

No. 09-20084

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SPECTRUM STORES INC; MAJOR OIL COMPANY INC;
WC RICE OIL COMPANY; FAST BREAK FOODS LLC,

Plaintiffs-Appellants,

v.

CITGO PETROLEUM CORPORATION; SAUDI ARABIAN OIL
COMPANY, doing business as Saudi Aramco; SAUDI
PETROLEUM INTERNATIONAL INC; ARAMCO SERVICES
COMPANY; SAUDI REFINING INC; MOTIVA ENTERPRISES
LLC; PETROLEOS DE VENEZUELA SA; PDV AMERICA INC;
PDV MIDWEST REFINING LLC; PDV HOLDING INC; OPEN
JOINT STOCK COMPANY, "Oil Company Lukoil", also
known as Lukoil Holdings, also known as Lukoil OAO,
also known as OAO Lukoil; LUKOIL AMERICAS
CORPORATION; GETTY PETROLEUM MARKETING; LUKOIL
INTERNATIONAL TRADING AND SUPPLY COMPANY; LUKOIL
PAN AMERICAS LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

**BRIEF OF THE UNITED STATES
AS AMICUS CURIAE SUPPORTING AFFIRMANCE**

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WC RICE OIL COMPANY INC.,

Plaintiffs-Appellants,

v.

CITGO PETROLEUM CORPORATION,

Defendant-Appellee.

FAST BREAK FOODS LLC, on behalf of itself and
all others similarly situated,

Plaintiff-Appellant,

v.

SAUDI ARABIAN OIL COMPANY, doing business as Saudi Aramco;
SAUDI PETROLEUM INTERNATIONAL INC; ARAMCO SERVICES
COMPANY; SAUDI REFINING INC; MOTIVA ENTERPRISES LLC;
PETROLEOS DE VENEZUELA SA; PDV AMERICA INC; CITGO
PETROLEUM CORPORATION; PDV MIDWEST REFINING LLC; PDV
HOLDING INC,

Defendants-Appellees.

GREEN OIL CO., on behalf of itself and all others similarly situated,

Plaintiff-Appellant,

v.

SAUDI ARABIAN OIL COMPANY, doing business as Saudi Aramco; SAUDI PETROLEUM INTERNATIONAL INC; ARAMCO SERVICES COMPANY; SAUDI REFINING INC; MOTIVA ENTERPRISES LLC; PETROLEOS DE VENEZUELA SA; PDV AMERICA INC; CITGO PETROLEUM CORPORATION; PDV HOLDING INC; PDV MIDWEST REFINING LLC; OPEN JOINT STOCK COMPANY, "Oil Company Lukoil" also known as Lukoil Holdings, also known as Lukoil OAO, also known as OAO Lukoil; LUKOIL AMERICAS CORPORATION; GETTY PETROLEUM MARKETING INC; LUKOIL PAN AMERICAS LLC,

Defendants-Appellees.

COUNTYWIDE PETROLEUM CO; FAST BREAK FOODS, LLC,

Plaintiffs-Appellants,

v.

PETROLEOS DE VENEZUELA SA; PDV AMERICA INC;
CITGO PETROLEUM CORPORATION; PDV HOLDING INC;
PDV MIDWEST REFINING LLC,

Defendants-Appellees.

FAST BREAK FOODS LLC,

Plaintiff-Appellant,

v.

CENTRAL OHIO ENERGY INC, on behalf of itself and
all others similarly situated; FAST BREAK FOODS LLC,

Plaintiffs-Appellants,

v.

SAUDI ARABIAN OIL COMPANY, doing business as Saudi Aramco;
SAUDI PETROLEUM INTERNATIONAL INC; ARAMCO SERVICES
COMPANY; SAUDI REFINING INC; MOTIVA ENTERPRISES LLC;
PETROLEOS DE VENEZUELA SA; PDV AMERICA INC; CITGO
PETROLEUM CORPORATION; PDV HOLDING INC; PDV MIDWEST
REFINING LLC; OPEN JOINT STOCK COMPANY, "Oil Company
Lukoil", also known as Lukoil Holdings, also known as Lukoil OAO, also
known as OAO Lukoil; LUKOIL AMERICAS CORPORATION; LUKOIL
PAN AMERICAS LLC; GETTY PETROLEUM MARKETING INC,

Defendants-Appellees.

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STATEMENT REGARDING ORAL ARGUMENT

Because the panel already heard oral argument from the parties on March 1, 2010, the United States does not request oral argument. Should the Court schedule a second oral argument in the case, the United States believes that its participation would be useful to the Court and would request fifteen minutes of argument time.

INTERESTS OF THE UNITED STATES

The district court dismissed plaintiffs' class-action antitrust suits both because the "act of state" doctrine precludes the federal courts from passing on the validity of the foreign sovereign acts that plaintiffs seek to challenge and because these cases present a nonjusticiable "political question." Plaintiffs appealed, and after oral argument this Court requested the views of the United States on whether these cases are barred by the act of state doctrine or present a political question. Pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States submits this amicus brief.

At the outset, we emphasize that the United States strongly opposes cartelization in the international oil markets and works to ensure a stable, affordable supply of energy. It has been a consistent priority of successive Presidential Administrations to reduce or eliminate United States dependence on foreign-produced oil, and the search for alternative renewable energy sources is now a particular priority. But these lawsuits are not an appropriate way to vindicate these policy objectives.

For the reasons set out below, this Court should affirm the district court's dismissal order. The heart of the plaintiffs' causes of action runs afoul

of the act of state doctrine, which forbids judicial inquiry into the validity of the public acts of a foreign sovereign committed within its own territory. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). These cases also present a nonjusticiable political question because it is for the Executive Branch, not the courts, to determine how best to protect United States foreign policy and national security interests in regard to foreign oil-producing states.

None of this is to condone any cartelization in oil markets; it is rather a recognition that federal courts are not a proper place for resolution of such disputes. *See Sabbatino*, 376 U.S. at 431-32 (act of state doctrine is to avoid “dangers of * * * adjudication” due to limitations of the judicial process); *U.S. Dep’t of Commerce v. Mont.*, 503 U.S. 442, 457-58 (1992) (conclusion that issue presents a political question is not decision on the merits, but “rather * * * the abstention from judicial review”); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir. 2006) (“A dismissal based upon the political question doctrine is not an adjudication on the merits”).

These lawsuits fail because plaintiffs cannot properly ask this Court to judge the legality of acts of state by foreign governments. The district court’s judgment of dismissal should accordingly be affirmed because adjudication of these cases would require the courts to pass on the legality of the sovereign

decisions of foreign states concerning the production of their core, but non-renewable domestic oil resources – in particular, whether the Saudi Arabian, Venezuelan, and Russian governments engaged in anti-competitive conduct when they decided to restrict the output of crude oil within their sovereign territory. The act of state doctrine precludes U.S. courts from probing, through private litigation, the legality of those acts. *See Sabbatino*, 376 U.S. at 401.

The policies animating the act of state doctrine, which has “constitutional underpinnings” (*Sabbatino*, 376 U.S. at 423), fully justify its application here. Adjudication of plaintiffs’ complaints would touch “sharply on national nerves” (*id.* at 428). The judicial action sought by plaintiffs to displace the processes and policies of the Executive Branch with regard to the oil-producing foreign states could give rise to significant foreign policy friction with potentially serious adverse consequences for the Nation’s energy needs, the U.S. economy, and national security. Judicial action on such a sensitive matter could result in oil embargoes, the divestiture of foreign state assets in the United States, retaliatory conduct against U.S. oil producers, and reduction in cooperation on unrelated but critically important issues.

For similar reasons, these cases also present a nonjusticiable political question. *See Baker v. Carr*, 369 U.S. 186, 211 & n.31 (1962). As the district court determined, these claims rest at bottom on allegations that sovereign states decided and agreed to limit production of crude oil from their territories. Adjudicating these claims would improperly interfere with the Executive Branch's management of our Nation's relations with those foreign states regarding their oil production, which is of such unique and fundamental importance to the security and economic well-being of the United States as well as those states.

Although in the 50 years since the founding of the Organization of Petroleum Exporting Countries (OPEC)¹ the various Presidential Administrations have taken diverse approaches to our Nation's foreign policy toward foreign oil-producing states, one constant reality across Administrations has been the Executive Branch's conclusion that this matter

¹ OPEC is an intergovernmental organization headquartered in Vienna, Austria. Founded by Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela, OPEC currently has twelve country members. The organization's professed aim is "to co-ordinate and unify petroleum policies among Member Countries, in order to secure fair and stable prices for petroleum producers; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return on capital to those investing in the industry." Brief History of OPEC (available at www.opec.org/opec_web/en/about_us/24.htm).

should not be managed through private litigation. Instead, the Executive Branch has pursued flexible and sustained engagement on a state-to-state basis. The Executive Branch has been and remains the proper and best suited branch of government to consider how to protect this Nation's vital energy and national security interests in this context, while working simultaneously to minimize anti-competitive conduct and its consequences in the global oil market, all in the broader context of this Nation's multi-faceted relations with the countries involved.

In retaining the ability to deploy all the tools at its disposal, including diplomacy, in dealing with OPEC nations, the Executive Branch has flexibility to respond to rapidly changing circumstances. By contrast, litigation pursued by private parties (and the final judgments such litigation would produce) comes at a particular moment in time and thus cannot be constantly adjusted to take account of new developments. Neither courts nor private parties have access to all relevant information or the broader foreign relations perspective. And the complex policy judgments on how most effectively to address the anti-competitive practices of oil-producing foreign states are so intertwined with questions touching on foreign affairs, national security, energy policies, and the global and domestic economies as to render such judgments an

inappropriate subject of a sweeping order by a court that would strike at the practices and decisions of several foreign governments regarding their oil production.

STATEMENT

I. The History of Executive Branch Calibration of, and Control Over, Relationships with Foreign Oil-Producing States

These cases arise against the backdrop of decades during which issues concerning oil production and related policies by OPEC members and other oil-producing states have been managed by the Executive Branch in the broader context of the United States' relations with those states.

In the 1970s, two oil supply disruptions resulting from tumult in the Middle East contributed to oil shortages in this country, leading to serious economic downturns. The first involved an oil embargo imposed by a consortium of Arab States (including Saudi Arabia) in retaliation for the United States' support of Israel in the 1973 Arab-Israeli War. As a result of that embargo, oil prices in the United States surged, focusing attention on the necessity of ensuring ready access to oil supplies at all times. In the wake of that crisis, President Nixon noted in his 1974 State of the Union address that “[i]n all of the 186 State of the Union messages delivered from this place, in

our history this is the first in which the one priority, the first priority, is energy.”² The President explained that cautious and sophisticated diplomacy was the best way forward at that time with regard to exporters of foreign oil. *Ibid.*

As a result of developments in the 1970s, Congress and the President undertook political and legislative steps to manage the Nation’s energy needs. Among other actions, Congress established the Strategic Petroleum Reserve (*see* Energy Policy and Conservation Act, Pub. L. No. 94-163, § 163, 89 Stat. 871 (1975)); made extensive investments in domestic energy production (*id.* § 102); and established the Department of Energy “to provide for a mechanism through which a coordinated national energy policy can be formulated and implemented to deal with the short-, mid- and long-term energy problems of the Nation” (Department of Energy Organization Act, Pub. L. No. 95-91, § 102(3), 91 Stat 565 (1977) (codified at 42 U.S.C. § 7112(3)). In 1974, the United States also worked with other major oil consumers to create the International Energy Agency, which affords consuming country members

² President Richard Nixon, Address on the State of the Union (Jan. 30, 1974) (available at www.presidency.ucsb.edu/ws/index.php?pid=4327).

states the ability in times of significant oil supply disruption to release strategic oil stocks.³

The United States in the 1970s thus pursued a flexible strategy of seeking cooperation and avoiding outright confrontation with oil-producing states; as then-Secretary of State Kissinger stated in 1974: “[C]ooperation *not* confrontation must mark our relationships with the producers. * * * We need each other.”⁴

President Reagan likewise had to manage the link between the world oil markets and the security interests of the United States. In 1987, the Reagan Administration issued an Energy Security Report encouraging a policy of finding common ground with and addressing security issues confronting oil-exporting states: “Many of the world’s suppliers have interests that coincide with those of the United States. It is in the national security interest to reinforce those commonalities and try to enhance the overall security and welfare of those producing countries — many of which are in unstable areas

³ See About the IEA (available at www.iea.org/about/index.asp).

⁴ Henry Kissinger, U.S. Secretary of State, Major Oil Consuming Countries Meet at Washington To Discuss the Energy Problem (Feb. 11, 1974), *in* Dep’t St. Bull., Mar. 1974, at 202.

of the world.”⁵ This was of a piece with “the overall goal of U.S. international policy,” articulated in the 1985 National Energy Policy Plan, of “maintain[ing] a stable and secure world energy environment, recognizing the interdependence as well as the independence of nations.”⁶

In 1990, the first President Bush stressed the importance of “maintaining access to energy resources that are key, not just to the functioning of this country but to the entire world.”⁷ The Clinton Administration’s 1998 Comprehensive National Energy Strategy also recognized the need for the Executive Branch to manage the United States’ relations with oil-producing states, reiterating that “more than half of U.S. petroleum imports come from sources within the Western Hemisphere.”⁸ Significantly, the report observed that the Secretary of Energy had “open[ed] an important avenue of dialog on energy with our hemispheric neighbors,” in particular Venezuela. *Id.* at 16-17.

⁵ Department of Energy, Energy Security: A Report to the President of the United States 223 (1987).

⁶ Department of Energy, The National Energy Policy Plan 29 (1985).

⁷ President George H.W. Bush, Remarks to Department of Defense Employees (Aug. 15, 1990) (available at http://bushlibrary.tamu.edu/research/public_papers.php?id=2165&year=1990&month=8).

⁸ Department of Energy, Comprehensive National Energy Strategy 16 (1998).

In 2000, then-Secretary of Energy Bill Richardson testified before Congress that the Clinton Administration's "policy with OPEC" was "to forcefully engage" it, "to explain our position, not to coerce and pressure."⁹ "I think our diplomatic efforts of quiet diplomacy, engaged diplomacy are working. * * * It is better to engage [OPEC] in a way that produces results."¹⁰ The Clinton Administration nevertheless publicly made clear its displeasure with OPEC: "[W]e are confronted today with the reality that OPEC and other major oil-producing nations are setting production levels * * * [that] threaten to encourage inflation and discourage world economic growth. This is unacceptable."¹¹

President George W. Bush adopted an approach of addressing such issues through diplomatic engagement with both foreign oil-producing states and OPEC. In 2001, the National Energy Policy Development Group issued a report laying out the framework for energy policy and the need for

⁹ OPEC's Policies: A Threat to the U.S. Economy: Hearing Before the H. Comm. on Int'l Relations, 106th Congress 30 (June 27, 2000) (testimony of Sec'y of Energy Bill Richardson).

¹⁰ *Id.* at 22.

¹¹ U.S. Policy Toward OPEC: Hearing Before the H. Comm. on Int'l Relations, 106th Cong. (Mar. 1, 2000) (testimony of Sec'y of Energy Bill Richardson).

continued engagement, both diplomatic and economic, with OPEC member states:

Periodic efforts by OPEC to maintain oil prices above levels dictated by market forces have increased price volatility and prices paid by consumers, and have worked against the shared interests of both producers and consumers in greater oil market stability. This remains a policy challenge, which we will meet over the longer term through * * * increased engagement with all our major suppliers.¹²

This policy grew out of the recognition that “the global economy will almost certainly continue to depend on the supply of oil from [OPEC] members, particularly in the Gulf.” *Id.* at 8-4. “Saudi Arabia, the world’s largest oil exporter, has been a linchpin of supply reliability to world oil markets.” *Ibid.*

Notably, the Bush Administration later made clear that private antitrust litigation – which would seek judicial imposition of a policy choice on the Executive in its relationships with OPEC member states based on information submitted by private litigants – was wholly inconsistent with the Federal Government’s longstanding process for managing the often-delicate relationships with foreign oil-producing states, taking account of the

¹² Nat’l Energy Policy Development Group, Nat’l Energy Policy 8-6 (2001) (available at www.pppl.gov/common_pages/national_energy_policy.html).

multifaceted nature of these relationships and contemplating use of the many tools at its disposal, ranging from confrontation to carefully calibrated diplomacy. In May 2007, the House of Representatives had passed a bill that would have subjected OPEC member states to antitrust suits. On the same day, the Bush Administration issued a veto threat: “the appropriate means for achieving [U.S. policy objectives in the international energy markets] lie[] in diplomatic efforts by the United States with the countries involved in that trade, rather than lawsuits against those countries in U.S. courts.”¹³

Significantly, the Administration explained that exposing OPEC member states to such suits and liability

would result in a targeting of foreign direct investment in the United States as a source of damage awards and would likely spur retaliatory action against American interests in those countries and lead to a reduction in oil available to U.S. refiners. Such a result would do little to achieve a free market in international trade in petroleum, would substantially harm other U.S. interests abroad, and would strongly discourage investment in the United States economy.

¹³ Executive Office of the President, Statement of Administration Policy: H.R. 2264, No Oil Producing and Exporting Cartels Act of 2007 (NOPEC) (May 22, 2007) (available at <http://georgewbush-whitehouse.archives.gov/omb/legislative/sap/110-1/hr2264sap-h.pdf>).

Ibid. The Bush Administration issued a second veto threat just a few weeks later in connection with similar legislation.¹⁴

Thus, the consistent thread of Executive Branch policy has been to pursue flexible state-to-state processes to deal with the oil-producing states, reacting to constantly changing international and domestic environments. The Executive has at no point looked to the courts through litigation of antitrust actions to confront OPEC.

The Obama Administration of course is not bound to pursue any particular policies or any specific type or level of engagement with OPEC. But it is the position of the Obama Administration that the Nation's appropriate policy toward OPEC and associated oil-producing states should not be dictated through private antitrust litigation in Article III courts.

II. Procedural History of this Litigation

In December 2007, the United States Judicial Panel on Multidistrict Litigation consolidated five pending civil actions brought by private plaintiffs, all of which involved antitrust allegations challenging decision by OPEC

¹⁴ Executive Office of the President, Statement of Administration Policy: H.R. 6, Creating Long-Term Energy Alternatives for the Nation (CLEAN) Act (June 12, 2007) (available at <http://georgewbush-whitehouse.archives.gov/omb/legislative/sap/110-1/hr6sap-s.pdf>).

member states. The panel transferred the cases to the Southern District of Texas, and the various plaintiffs ultimately combined their claims into two complaints.

In the first, a group of plaintiffs led by Spectrum Stores, Inc. names as the sole defendant CITGO Petroleum Corporation, a wholly owned subsidiary of Venezuela's national oil company. Spectrum Stores Compl. ¶2. CITGO purchases Venezuelan oil, refines it into gasoline and other oil-based products, and sells those products in the United States. *Id.* On behalf of a class of "persons and business entities in the United States that have been direct purchasers of gasoline and other oil-based products from CITGO" (*id.* ¶10), the Spectrum Stores plaintiffs allege that CITGO violated U.S. antitrust laws when it "joined with the members of OPEC as a willing participant in the price-fixing conspiracy" and "served as the subservient instrument by and through which Venezuela and [OPEC] have extended their anticompetitive predations directly onto United States sovereign territory" (*id.* ¶¶3, 5).

The second complaint – known as the Consolidated Complaint – is more expansive. It names as defendants the national oil companies of Saudi Arabia and Venezuela, along with their various holding companies and

subsidiaries, as well as Lukoil, a publicly traded Russian business conglomerate, and its related subsidiaries.¹⁵

The Consolidated Complaint alleges that the defendants colluded to control output of crude oil and to set prices for crude oil and refined petroleum products. *Id.* ¶52. The defendants allegedly did so by, among other actions, “falsely announcing planned reductions in crude oil pumping in order to affect the futures market for crude oil and [refined petroleum products],” and “pumping crude oil but withholding it from the [refined petroleum product] market so as to impact the prices of [refined petroleum products].” *Id.* ¶53.

The district court granted defendants’ motion to dismiss. With respect to the act of state doctrine, the district court applied the Supreme Court’s decision in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int’l*, 493 U.S. 400, 406 (1990), holding that “the act of state doctrine provides that ‘the act within its own boundaries of one sovereign State * * * becomes * * * a rule of decision for the courts of this country.’” *In re Refined Petroleum Products*, 649 F. Supp. 2d 572, 581 (S.D. Tex. 2009). Examining the Spectrum

¹⁵ Russia is not an OPEC member, but has attended OPEC meetings as an observer.

complaint, the district court concluded that “the antitrust conspiracy for which the plaintiffs seek redress is a conspiracy between sovereign states to limit the production of crude oil from their territories, and that CITGO’s role in the alleged conspiracy is a supporting one.” *Id.* at 585. The court also found that “the allegations in the Consolidated Complaint show that the price-fixing with respect to [refined petroleum products] sold in the United States of which plaintiffs complain is, in fact, caused by the production decisions of the conspiracy’s sovereign members.” *Id.* at 586. The court therefore concluded that “plaintiffs’ claims cannot be resolved unless the court rules on the legality of the decisions and agreements reached by the foreign sovereigns regarding the production of crude oil within their own territories,” and that the requirements of *Kirkpatrick* for application of the act of state doctrine were met. *Id.* at 589, 596.

With regard to the political question doctrine, the district court noted that plaintiffs’ claims could only be assessed in light of the allegations in their complaints, and looked to the Supreme Court’s *Baker v. Carr* decision for guidance. *Id.* at 597. The district court concluded that adjudication of these cases would express a lack of respect for the Executive’s handling of foreign

relations in the context of its state-to-state engagement with foreign oil-producing nations. *Ibid.*

ARGUMENT

The district court correctly dismissed these cases. It held first that they are barred by the act of state doctrine, and, second, that they present a nonjusticiable political question. As noted above, we agree with the district court that the act of state doctrine applies because decisions in favor of plaintiffs would require the courts to hold unlawful sovereign acts of foreign states taken within their territory. In these cases, the policies underlying the act of state doctrine support its application, as adjudication of these cases would seriously hamper the Executive's conduct of foreign relations.

For similar reasons, and without addressing the various applications of the political question doctrine in other settings, in these cases the political question doctrine also governs and renders them nonjusticiable. Adjudication of these suits would intrude upon the Executive's prerogative and consistent practice to address the actions taken by OPEC members and other oil-producing states with the various tools at its disposal, including diplomacy, in order to protect U.S. national interests with respect to oil, a uniquely vital and limited natural resource. The doctrine here focuses, in other words, on

the impact of the litigation on the ability of the Executive Branch to perform its assigned role in this area of singular concern to the economy and national security of the Nation, and the inability of the Judiciary to do so.

We respond to the questions in the order in which this Court posed them and in which the district court addressed them, turning first to the act of state question.¹⁶

I. The Act of State Doctrine Precludes Judicial Resolution of Plaintiffs' Lawsuits.

The district court's judgment should be affirmed because the act of state doctrine requires dismissal of plaintiffs' claims.

As this Court has explained, "[t]he act of state doctrine serves to enhance the ability of the Executive Branch to engage in the conduct of foreign relations." *Walter Fuller Aircraft Sales, Inc. v. Rep. of Philippines*, 965

¹⁶ Ordinarily, the political question doctrine would be addressed before the substantive question of whether the act of state doctrine requires dismissal on the merits. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-101 (1988). However, addressing the act of state question first highlights the manner in which adjudication of these cases would require the courts to evaluate the legality of foreign sovereigns' decisions concerning the production of their nations' crude oil. That discussion not only demonstrates why these cases are barred by the act of state doctrine, but also informs the analysis of why adjudication of these cases would interfere with the Executive Branch's management of the United States' relations with oil-producing foreign sovereigns, and so helps demonstrate why these cases present a nonjusticiable political question.

F.2d 1375, 1387 (5th Cir. 1992). The district court correctly concluded that this doctrine is applicable where, as here, private litigants have called upon the courts to decide whether foreign sovereign acts relating to the exploitation of crude oil within a foreign state's territory are unlawful and should give rise to antitrust liability. Rendering such a decision would adjudicate foreign states' sovereign conduct and thus seriously jeopardize the Executive Branch's ability to manage its relationships with those states — and would emphatically not “enhance” the Executive Branch's “conduct of foreign relations.” *Ibid.* In applying the Act of State Doctrine, the court would in no sense be condoning the acts of the foreign sovereigns in question; instead, the court would merely be applying a rule of decision that bars U.S. judicial examination of whether the acts at issue were unlawful.

A. The Antitrust Conspiracy Alleged by Plaintiffs Arises from the Sovereign Acts of Foreign States.

“[I]n its traditional formulation,” the act of state doctrine “precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.” *Sabbatino*, 376 U.S. at 401. Although the doctrine was “once viewed * * * as an expression of international law, resting upon the ‘highest considerations of

international comity and expediency’” (*Kirkpatrick*, 493 U.S. at 404), it has “more recently [been] described * * * as a consequence of domestic separation of powers, reflecting ‘the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder’ the conduct of foreign affairs” (*ibid.* (quoting *Sabbatino*, 376 U.S. at 423)).

In their complaints, both sets of plaintiffs allege that the central features of the purported antitrust conspiracy are sovereign decisions regarding output of crude oil, made in concert among OPEC members and with other oil-producing states. *See, e.g.*, Spectrum Stores Compl. ¶1 (“The primary elements of OPEC’s international conspiracy are agreed-upon limits on the production of oil by OPEC’s eleven member nations.”); Consolidated Compl. ¶52 (“Defendants and their co-conspirators agreed to restrain the output and thereby fix the price of crude oil with the knowledge and intent that doing so would fix and increase the price of [refined petroleum products], thereby producing supra-competitive profits from the sale of [such products] in the United States.”).

Further, as the district court appropriately recognized, the two complaints allege that foreign sovereigns – and not the actual corporate

defendants – are responsible for making the alleged decisions to cut oil production in an effort to bolster profits. Indeed, the tape of the oral argument before this Court reveals that plaintiffs’ counsel conceded that an important part of the conspiracy they allege revolves around control of the amount of oil to be withdrawn from the foreign sovereigns’ territories.

The Spectrum Stores complaint is explicit about this point. It acknowledges that the alleged conspiracy to restrain trade depends on oil quotas set through OPEC, and identifies OPEC, its member states, and “privately-owned oil companies that have coordinated production levels with the sovereign members of the conspiracy” as unnamed co-conspirators. Spectrum Stores Compl. ¶16.

The Consolidated Complaint likewise directly challenges the decisions of foreign governments to cut oil production. Although the complaint attempts at times to paint a picture of corporate, non-sovereign responsibility (*see* Consolidated Br. 23), its specific allegations pertain to oil-extraction decisions made by foreign sovereign states. Most significantly, the complaint is premised on the fact that foreign states work through OPEC to limit crude oil production:

Soon after some of the largest oil exporting nations, including Saudi Arabia and Venezuela, began to “acquire” profit and ownership interests in private oil production companies, they decided that it was desirable to coordinate their commercial activities to prevent price disputes between themselves. They simultaneously needed to shield the fact that they had begun the transition from sovereign activities to coordinated commercial operations violative of the antitrust laws of the United States, their biggest market. To that end, they formed [OPEC].

Consolidated Compl. ¶59.

This allegation stands as a recognition that *foreign states* formed an organization that would institute coordinated limits on oil production. *Id.*

¶59. Against the backdrop of this allegation, plaintiffs cannot plausibly argue that they “do not * * * challenge the ability of sovereign nations to manage their natural resources.” Consolidated Br. 20 (quoting Consolidated Complaint ¶7).

Additional allegations in the Consolidated Complaint underscore that foreign governments, and not corporate entities, allegedly play the decisive role in making oil production decisions. Plaintiffs claim, for example, that in March 1998, PdVSA and Saudi Aramco “agreed with representatives of other co-conspirators to cut production of crude oil,” and plaintiffs support this allegation with an official OPEC communique stating “that *member countries* have agreed to voluntary cuts” in oil production. Consolidated Compl.

¶54(G) (emphasis added). Plaintiffs note that “Citgo executives * * * have participated in the operations of OPEC, the forum created by the cartel to provide a sheltered forum for conspiratorial discussion” (*id.* ¶54(L)), but OPEC is an international body with *governmental*, and not corporate, members.

Similarly, plaintiffs assert that in June 1998, “Saudi Aramco, PdVSA, and Lukoil agreed with representatives of other co-conspirators to cut production of crude oil,” but support that allegation with a quote from an unidentified document that, “[t]ogether with promises from non-OPEC nations Russia, Oman and Mexico, world oil producers have pledged to cut world wide production by approximately 3.1 million bpd.” *Id.* ¶54(H). Plaintiffs moreover allege that Venezuela’s Oil Minister is also the President of PdVSA, and attribute to him several statements suggesting that it is the Venezuelan government, and not PdVSA, that makes decisions relating to oil production. *See, e.g., id.* ¶¶55(I); *id.* 55(N); *id.* 55(P)-(R)); *see also* ¶54(Q) (noting that “[a]ll *countries* have reaffirmed their commitment to the quotas”).

Foreign sovereigns — not corporate actors — are thus alleged by plaintiffs to be responsible for the decisions to restrict oil production that form the heart of plaintiffs’ complaint. And these oil-production decisions are

sovereign acts. In *MOL, Inc. v. Peoples Republic of Bangladesh*, the Ninth Circuit held that a country acts in a “uniquely sovereign” capacity when it “regulate[s] its natural resources.” 736 F.2d 1326, 1329 (9th Cir. 1984). The D.C. Circuit confirmed that principle in *World Wide Minerals, Ltd. v. Kazakhstan*, in which the court held that the act of state doctrine barred a suit in part because “issuance of a license permitting the removal of uranium from Kazakhstan is a sovereign act.” 296 F.3d 1154, 1165 (D.C. Cir. 2002).

Plaintiffs have moreover failed to adequately allege any independent collusive activity extending beyond their allegations concerning foreign sovereign decisions to restrict oil production. The Spectrum Stores complaint, for example, alleges that Venezuela sought to acquire CITGO, an American corporation, in order to “ensure a stable outlet for its heavy crude oil,” thereby allowing CITGO to “materially assist Venezuela by removing the threat of buyers exercising downward pressure on the price of Venezuelan oil.” Spectrum Stores Compl. ¶¶24, 27.

In the same vein, the Consolidated Complaint alleges that the private defendants took steps to expand their businesses in order to carry out the conspiracy. *See, e.g.*, Consolidated Compl. ¶¶2-4, 6, 54, 57 (alleging that defendants have vertically integrated and acquired refineries, pipelines,

shipping tankers, port facilities, and storage facilities, in order to exert control over, and capture the profits from, the world's largest market). But plaintiffs do not support that allegation. And standing alone, allegations that corporations seeking to vertically integrate so as to minimize the threat of a disruption in their distribution chains do not provide "plausible grounds" that an antitrust conspiracy exists. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

In the Consolidated Complaint, plaintiffs also allege that the private defendants "participate as members of the conspiracy by implementing common formulas with other conspirators for [refined petroleum product] pricing and passing on profits from [refined petroleum products] to their national oil company parents." Consolidated Compl. ¶58; *see also id.* ¶¶ 52, 63. But plaintiffs allege no facts that would support the inference that defendants colluded to fix prices in the domestic market for refined petroleum products. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (holding that "[t]o survive a motion to dismiss, [a plaintiff must] plea[d] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

Indeed, apart from the accusation of conspiracy, the only factual support plaintiffs provide is an unexplained reference to a Wall Street Journal article, *id.* ¶52. That article, however, simply states that “Saudi Arabia prices its oil according to a [particular] formula” and that “[m]any other exporting countries follow the kingdom’s lead.” Bhushan Bahree, *Saudis Cite Market Forces For Lower Crude Output*, Wall St. J., A3 (June 5, 2006).

B. To Rule for Plaintiffs on Their Antitrust Claims Would Require a Court to Rule on the Legality of the Foreign Sovereign Acts of Saudi Arabia, Venezuela, and Russia.

In short, the antitrust conspiracy that plaintiffs allege caused them injury arises as a result of decisions of foreign sovereigns to limit oil production within their territories based on agreements among them. Plaintiffs therefore have a cause of action under the antitrust laws only if those foreign sovereigns have violated the Sherman Act. *See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961) (requiring a private antitrust plaintiff to demonstrate that defendant’s anti-competitive conduct caused it injury). And absent a specific statutory directive to the contrary, the act of state doctrine prohibits the federal courts from measuring the validity of these alleged foreign sovereign acts against the benchmark of U.S. domestic law. *Cf.* 22 U.S.C. § 2370(e)(2) (abrogating the act of state doctrine in cases

involving foreign state confiscation of property in violation of international law).

“Act of state issues only arise when a court *must decide* — that is, when the outcome of the case turns upon — the effect of official action by a foreign sovereign.” *Kirkpatrick*, 493 U.S. at 406. Thus, in *Kirkpatrick*, the Supreme Court held that the act of state doctrine did not bar a suit in which adjudication could result in the suggestion that a government official had committed an illegal act, because the suit itself did not require the court to pass on the validity of any foreign government conduct. *Ibid.* But to resolve the cases at bar, a court would of necessity have to determine that the decisions of foreign states to set particular production quotas were illegal because they were based on agreements to restrict oil output with the purpose of restraining trade in refined petroleum products — and that Saudi Arabia, Venezuela, and Russia (a non-OPEC country) were the knowing instigators of an antitrust conspiracy that violated the Sherman Act. Thus, to adjudicate these cases, a court “must decide” the legality of foreign state action, as the district court recognized. *See* 649 F. Supp. 2d at 583; *see also Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918) (“[T]he act within its own boundaries of one

sovereign state * * * becomes * * * a rule of decision for the courts of this country.”).

Significantly, this is not a case in which private defendants have influenced a foreign government to aid them in carrying out an independent antitrust conspiracy. The act of state doctrine generally poses no impediment to the adjudication of such cases. *See, e.g., United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927) (declining to apply the act of state doctrine to an antitrust conspiracy in which private defendants engaged in anti-competitive conduct that included, but was not limited to, securing discriminatory Mexican legislation); *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990) (holding the doctrine inapplicable to an antitrust suit against tobacco companies in which the companies, among other actions, were alleged to have bribed the wife of the Venezuelan president in order to secure discriminatory legislation).

In *Industrial Investment Development Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), for example, this Court held that the act of state doctrine did not preclude an antitrust suit against private logging and lumber corporations that allegedly influenced the Indonesian government to refuse to grant a logging concession to the plaintiff. Notably, defendants’ antitrust liability in

Mitsui & Co. did not depend on a determination that the Indonesian government violated the antitrust laws in refusing the logging concession. Indeed, this Court found it significant that plaintiffs did “not limit their allegation of injury from the antitrust cause of action to the inability to harvest Indonesian timber.” *Id.* at 54. The federal courts could therefore find that the defendants acted unlawfully without ever passing on the validity of the logging concession itself.

These cases, in stark contrast, allege an antitrust conspiracy developed, coordinated, and implemented by foreign states themselves and involving the extraction of oil within their borders. Assessing the legality of that alleged conspiracy would require a court to determine the legality of the sovereign acts of those foreign states. The act of state doctrine puts that inquiry out of judicial bounds.¹⁷ Indeed, in *International Association of Machinists*, the Ninth

¹⁷ A different analysis would apply if the United States itself decided to pursue a suit that would ask a court to declare unlawful or invalidate a sovereign act of a foreign state. As discussed earlier, the act of state doctrine stems from the separation of powers under the Constitution, reflecting the sense that the Judicial Branch should not interfere with the conduct of foreign affairs and foreign commerce, which are the exclusive domain of the political Branches of the United States government. See *Kirkpatrick*, 493 U.S. at 404. But if the Executive Branch has already decided to confront a foreign state by invoking the exercise of U.S. judicial power, the federal courts would not be interfering with foreign relations in granting the requested relief.

Circuit held that similar price-fixing claims against OPEC should be dismissed pursuant to the act of state doctrine. The court concluded that to adjudicate the plaintiffs' claims effectively would be to "instruct[] a foreign sovereign to alter its chosen means of allocating and profiting" from its oil production decisions. *Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981). Judicial intervention of that nature would, the court observed, unduly impose a domestic court's judgment as to the legality of OPEC's actions and intrude on the United States' state-to-state engagement with OPEC nations. *Ibid.*

C. These Cases Do Not Trigger the Territorial Limitation nor a Possible Commercial Activity Exception of the Act of State Doctrine.

Plaintiffs object to application of the act of state doctrine on two grounds, neither of which is persuasive.

First, plaintiffs maintain that their antitrust suits do not challenge "the public acts a recognized foreign sovereign power committed *within its own territory*" (*Sabbatino*, 376 U.S. at 401 (emphasis added)), but rather only those acts "that are taken, and that are intended to have effect, *in the United States*" (Consolidated Br. 26.) In plaintiffs' view, "[t]he multinational cartel in which Venezuela and other member nations participate, by definition, transcends

the territorial boundaries of any one nation and implicates each sovereign conspirator in matters beyond its own territorial jurisdiction.” *Spectrum Stores Br.* 10.

Plaintiffs, however, misperceive the relevant inquiry. As explained above, the act of state doctrine applies here because resolving these lawsuits would force a court to question the validity of foreign states’ sovereign decisions to restrict oil production within their sovereign territory. The appropriate inquiry is whether *those* decisions relating to oil extraction were “performed within [the foreign state’s] own territory.” *Kirkpatrick*, 493 U.S. at 405. And they clearly were. Decisions concerning the extent to which non-renewable natural resources like oil may be extracted from sovereign territories and exploited are fundamental aspects of sovereignty. *See, e.g.,* G.A. Res. 1803, 17 U.N. GAOR, 2d Comm. 327, U.N. Doc. A/850 (1962).

Even taking plaintiffs’ argument on its own terms, a foreign sovereign’s decision to enter into an agreement under the auspices of an international organization regarding the extraction of oil in the sovereign’s own territory is not “extraterritorial” in the relevant sense. The act of state doctrine arose originally in cases involving seizures of property or repudiation of debts (*see, e.g., Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303-04 (1918)), and the doctrine’s

territorial limitation rests on the common-sense principle that a foreign state lacks a substantial sovereign interest over property outside its jurisdiction. That diminished interest in turn suggests that a judicial determination concerning the legality or validity of the sovereign act beyond its territory would not risk creating significant friction in foreign relations.¹⁸ In seizure and repudiation cases, courts interpreting the territorial limitation to the act of state doctrine have therefore focused on the legal *situs* of the property or debt that foreign governments are alleged to have seized or repudiated. *See, e.g., Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1121-25 (5th Cir. 1985); *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 (2d Cir. 1985).

This analysis does not hold in a case involving a challenge to an international agreement of the kind at issue here. When a foreign state enters into a compact with another state, the sovereign nature of such an agreement does not depend on the fortuity of where the agreement happens to be struck.

¹⁸ Although the act of state doctrine may be subject to a territorial limitation, the reach of the antitrust laws is not limited to conduct that occurs within the boundaries of the United State. Anticompetitive conduct — including cartels — that affects United States domestic or foreign commerce may violate the antitrust laws regardless of where such conduct occurs or the nationality of the parties involved. *See Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 (1993) (“[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”).

Cf. Wolf v. Fed. Rep. of Germany, 95 F.3d 536, 543 (7th Cir. 1996) (holding that a promise “to enter into an international agreement with another sovereign state” is a sovereign, and not a commercial, act). Indeed, the radical step of finding unlawful under U.S. law an international agreement between foreign states governing the production of oil within the territories of the states involved would “touch * * * sharply on national nerves” (*Sabbatino*, 376 U.S. at 428), and could seriously complicate the ability of the President to carry out his foreign-relations duties. Just as the act of state doctrine prevents a court from probing the validity of a seizure on foreign soil, so too does it foreclose inquiry into the validity of OPEC-related agreements governing exploitation of oil reserves.

Plaintiffs also err in contending that, even if a court would have to pass on the validity of the acts of foreign states to resolve their claims, those acts are purely commercial and therefore do not come within the act of state doctrine. Any commercial activity exception to the act of state doctrine would not be applicable here.¹⁹ The Supreme Court held in *Republic of Argentina v.*

¹⁹ The Supreme Court has not decided whether there is such an exception to the act of state doctrine. See *Alfred Dunhill of London, Inc. v. Rep. of Cuba*, 425 U.S. 682 (1976). The Ninth and Eleventh Circuits have held that there is not. See *Honduras Aircraft Registry, Ltd. v. Honduras*, 129 F.3d 543, 550 (11th Cir. 1997); *Int’l Ass’n of Machinists*, 649 F.2d at 1360. This Court has not

Weltover, Inc. that, in deciding whether activity is commercial in nature for purposes of the Foreign Sovereign Immunities Act, “the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce.” 504 U.S. 607, 614 (1992).

The decisions of foreign states relating to the extraction of crude oil within their own territories are plainly not decisions that a private party could make on its own. Such decisions are guided by policies of the sovereign concerning such matters as the uses to which the oil, as a natural resource, may be applied, the degree of regulation the sovereign wishes to attach, and the availability of other natural resources. These decisions are quintessentially governmental and cannot be made by private parties. As such, they are not commercial activity.

This is not a controversial proposition. *Weltover* itself cited with approval *Rush-Presbyterian–St. Luke’s Medical Center v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989), in which the Seventh Circuit reasoned that “a contract whereby a foreign state grants a private party a license to exploit the state’s natural resources is not a commercial activity, since natural resources,

yet taken a position on the question. *See Callejo*, 764 F.2d at 1115 & n.17.

to the extent they are 'affected with a public interest,' are goods in which only the sovereign may deal." Similarly, in *MOL, Inc.*, the Ninth Circuit held that Bangladesh's renegeing on a contract to export rhesus monkeys was a sovereign, and not a commercial, act because Bangladesh "was terminating an agreement that only a sovereign could have made." 736 F.2d at 1329. Indeed, in another decision, the Ninth Circuit expressed doubts that imposing limits on oil production through OPEC constitutes purely commercial activity, noting that "OPEC's 'price-fixing' activity has a significant sovereign component." *Int'l Ass'n of Machinists*, 649 F.2d at 1360.

D. Application of the Act of State Doctrine Here Would Further its Purposes.

Finally, application of the act of state doctrine to these cases would further the doctrine's purposes. The doctrine was "fashioned because of fear that adjudication would interfere with the conduct of foreign relations." *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769 (1972) (plurality op.). As already explained, in its dealings with foreign oil-producing states over the last 35 years, the United States has had to determine how best to maintain a stable source of energy at an affordable cost. In particular, the Executive Branch works to balance the competing objectives of sustaining the

flow of oil to the United States and minimizing anti-competitive conduct in the oil markets. Thus, President Obama has stated that although the United States is committed to reducing dependence on fossil fuels and to seeking alternative energy sources, “we’re not going to be eliminating our need for oil imports in the immediate future; that’s not our goal.”²⁰

Moreover, imposing treble damages on private defendants for their parent-states’ participation in agreements concerning the amount of oil to be drawn from their territories would seriously complicate relations with those foreign states that control most of the world’s proven oil reserves and that supply the United States with a substantial fraction of the oil critical to our energy needs, our national security, and our domestic economy. The possible consequences of judicial action in this sensitive arena include oil embargoes, divestiture by certain foreign states of assets in the United States, retaliatory conduct by foreign states against American oil producers, and reduction in cooperation on unrelated issues of immense public importance to the United States.

²⁰ Remarks by President Obama and President Abbas of the Palestinian Authority (May 28, 2009) (available at www.whitehouse.gov/the_press_office/Remarks-by-President-Obama-and-President-Abbas-of-the-Palestinian-Authority-in-press-availability/).

Without a doubt, resolution of these cases would thus hamper the conduct of foreign relations and “touch * * * sharply on national nerves.” *Sabbatino*, 376 U.S. at 428. Application of the act of state doctrine therefore serves essentially the same underlying principles that demonstrate why this case presents a political question, as we explain below. *See Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1029 (5th Cir. 1972) (noting the kinship between the political question and act of state doctrines).

Plaintiffs nevertheless maintain that this argument is “absurd” because application of the act of state doctrine would immunize corporate defendants for conspiring to artificially inflate the price of refined petroleum products. Consolidated Br. 40; Spectrum Stores Br. 52-53. Plaintiffs’ concern is unfounded. As explained above, the act of state doctrine does not bar inquiry into antitrust actions simply because a foreign state has some involvement in an antitrust conspiracy. But it does apply here, where the courts have been asked to issue a judgment in private litigation where the action turns on the validity of sovereign decisions regarding crude oil extraction, as the Ninth Circuit has held. *See Int’l Ass’n of Machinists*, 649 F.2d at 1360.

II. This Case Presents a Nonjusticiable Political Question.

The district court decision to dismiss was also correct because the same central features of these cases that support application of the act of state doctrine also establishes that they present a nonjusticiable political question. The political question doctrine marks the line between those “Cases” and “Controversies” that are the proper subject of adjudication in the federal courts under Article III of the Constitution, and those disputes involving questions entrusted to the political branches, which the judiciary has no power to review. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (noting that the political question doctrine “originate[s] in Article III’s ‘case’ or ‘controversy’ language”). As Chief Justice Marshall observed in *United States v. Palmer*, such questions concerning the conduct of relations with foreign nations “belong more properly to those * * * who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.” 16 U.S. (3 Wheat.) 610, 634 (1818).

This Circuit has explained that, “[o]ut of due respect for our coordinate branches and recognizing that a court is incompetent to make final resolution

of certain matters, * * * political questions are deemed 'nonjusticiable.'" *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

In *Baker v. Carr*, the Supreme Court provided six guideposts for helping to identify whether a case is nonjusticiable under the political question doctrine, the presence of any of which calls for dismissal:

(1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department" (369 U.S. at 217);

(2) "a lack of judicially discoverable and manageable standards for resolving it" (*ibid.*);

(3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" (*ibid.*);

(4) "the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government" (*ibid.*);

(5) "an unusual need for unquestioning adherence to a political decision already made" (*ibid.*); or

(6) "the potentiality of embarrassment of multifarious pronouncements by various departments on one question" (*ibid.*).

Of particular relevance here, the political question doctrine removes from judicial oversight cases requiring assessment of and intrusion into the political branches' decision making with respect to questions in the area of foreign affairs that quintessentially must be resolved state-to-state. That indeed is a principle reflected in all of the guideposts articulated in *Baker*. Thus, as the Supreme Court reaffirmed in *Baker*, "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative — 'the political' — departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Id.* at 211 n.31 (quoting *Oetjen*, 246 U.S. at 302).

This Court has likewise recognized that foreign relations that are properly within the sphere of the Executive Branch to address or that require an assessment of discretionary Executive foreign policy decisions are beyond the authority or competency of a court. See *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978). "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed

to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211.

In quite pertinent language, the Supreme Court was emphatic in *Baker* that deciding whether a case impermissibly infringes on the foreign affairs powers of the political branches requires "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211-12.

As described above, the district court here concluded that plaintiffs' claims present a political question under *Baker*. The court determined that the claims, at heart, rested on allegations that foreign states had made decisions and agreements concerning the production of oil within their territories, that these were sovereign decisions, and that plaintiffs' claims could not be adjudicated without a lack of respect for the Executive Branch's handling of foreign relations with the foreign states concerned with respect to these issues.

The United States agrees that the political question doctrine bars adjudication in the unique context of these cases.

A. The Executive Branch Has Followed a Considered Policy of Calibrated United States Relations with Foreign Oil-Producing States.

As we detailed earlier, the United States, for more than the last 35 years and through decisions made at the highest levels of the Executive Branch — the Branch constitutionally responsible and politically accountable for the conduct of foreign affairs — has charted a consistent course of managing the complex U.S. relationships with foreign oil-producing states upon which this country still depends for its domestic energy needs, rather than resorting to the far blunter instrument of antitrust litigation against them. It is for the Executive Branch, in the exercise of its considered judgment, to decide how to manage overall relations with foreign oil-producing states. Thus, it can: best protect American consumers and industry from spikes in oil prices that increase the costs of, among many other goods, heating oil and gasoline; protect against the risk that disruption in oil supplies will provoke an economic recession; ensure that the absence of oil does not impair the Nation's defense infrastructure; provide channels through which this Nation's interests may be forcefully presented directly to the leadership of the foreign states involved; and secure bilateral cooperation on unrelated issues of great

importance, including, for example, counter-terrorism, nuclear non-proliferation, and illegal drug trafficking.

In the context of international relations relating to the supply of oil, the Executive Branch has consistently found that recalibration of economic and diplomatic measures, as necessary and prudent in the broader context of relations with these and other nations, provides the necessary flexibility to most effectively deal with anti-competitive practices of foreign oil-producing states – including the member states of OPEC and their affiliates. By contrast, notwithstanding OPEC's notoriety, the Federal Government has itself never filed an antitrust action against OPEC's member states or their subsidiaries. International agreements concerning the extraction of oil within other states' sovereign territory are not matters of ordinary commercial concern familiar to the antitrust laws.

Rather, issues concerning oil production by OPEC member states and other nations have been brought within the channels of diplomatic negotiations and related measures for resolution (*cf. Dames & Moore v. Regan*, 453 U.S. 654 (1981)), reflecting in part the significant sovereign interests of oil-producing states in the production and depletion of their basic natural

resources, and as a critical source of these states' economic and political foundation.

Although the United States fully appreciates that not all cases affecting foreign relations pose nonjusticiable political questions, the doctrine prohibits the pursuit of judicial channels rather than management by the Executive Branch of issues that are properly and most effectively addressed by the Executive in the exercise of its authority to direct the most vital international relations interests of the Nation, and prohibits as well entry of judicial judgments that would formally assign responsibility and liability, and freeze relationships that must be open to dialogue. The nature of the matter at issue, its immense importance to the foundations of our modern state, and its utter unsuitability for judicial resolution set it apart from other cases that merely affect foreign relations in more attenuated or isolated ways.

B. Courts Cannot Properly Second-Guess the Executive Branch's Determination to Protect the Nation's Vital Interests Through Its Particular Policies and Approaches to Foreign Oil-Producing States.

Plaintiffs' suits present a direct challenge to the three-decade history of the management by the Executive Branch of U.S. policy toward oil-producing states, particularly OPEC member states. In urging this Court to supplant the

delicate process of managing relations over oil production with these states pursued by Presidential Administrations for the past 35 years, plaintiffs invite direct confrontation with these foreign states over their sovereign decisions regarding extraction of petroleum resources within their own territory. Indeed, plaintiffs request nothing less than a determination by a U.S. court that such sovereign decisions of foreign states relating to the extraction of crude oil are unlawful; the imposition of treble damages on the defendants for their cooperation with what, in most cases, are their foreign sovereign parents; the disgorgement of all unlawful profits connected with the defendants' participation in OPEC; and punitive damages. *See Consolidated Compl. 28-29; Spectrum Stores Compl. 27-28.* Plaintiffs even ask this Court to compel the oil companies owned by the Saudi Arabian and Venezuelan governments, as well as a major Russian oil company, to divest their domestic subsidiaries. *Id.*

Granting plaintiffs even a portion of the relief they seek would have an unprecedented impact in the foreign affairs and national security arenas. Such a formal and public contradiction by the Judicial Branch of the United States' chosen approach to the formation of policy would severely undermine the Executive Branch's ability to speak for the Nation with one voice and to

balance the competing objectives of sustaining the flow of oil to the United States and working at the same time to lessen anti-competitive conduct in the global oil market. It could also have effects more broadly in relation with oil-producing states and other nations on a variety of other critical issues.

The damage that could ensue from such litigation includes an immediate disruption of oil imports into the United States, with potentially devastating consequences. Oil is a critical commodity in the United States, and protecting a reliable supply is of paramount importance to both our national security and domestic economy. *See, e.g., Int'l Ass'n of Machinists*, 649 F.2d at 1360 (“There is no question that the availability of oil has become a significant factor in international relations.”). The United States imports considerably more than half of the oil that it uses (57% in 2008),²¹ and, of those foreign imports, nearly half (46.3% in 2008) come from OPEC states.²²

While we struggle as a nation to secure alternative sources of energy, the Executive Branch must in the meantime continue to make a range of

²¹ U.S. Energy Information Administration, *How Dependent Are We on Foreign Oil?* (available at http://tonto.eia.doe.gov/energy_in_brief/foreign_oil_dependence.cfm).

²² *See* U.S. Energy Information Administration, *U.S. Imports by Country of Origin* (available at www.eia.doe.gov/aer/txt/ptb0504.html).

difficult and complicated judgments about how best to deal with foreign states with large oil reserves, including Saudi Arabia, Russia, and Venezuela – which together supplied nearly a quarter (24.7%) of the United States' foreign oil needs in 2008. *Ibid.* These judgments are themselves inextricably linked to wider questions of national security, military strategy, foreign relations, and economic stability.

For example, the United States' position toward the oil policies of Saudi Arabia must take into account the value of having a stable ally in the Middle East, other economic considerations including Saudi Arabia's substantial investments in the United States, and political and security objectives on which the United States works closely with Saudi Arabia, including counter-terrorism and regional security issues. Judgments about Russia must be made considering its cooperation on many global security issues – including Iran, Afghanistan, North Korea, and nuclear non-proliferation – and other matters of vital interest to the United States' national security. In addition, consideration must be given to Russia's role as an important supplier of natural gas to global markets. And the United States seeks to develop a positive relationship with Venezuela on a full range of issues, particularly counter-narcotics, counter-terrorism, and commerce, including oil.

None of this is to say that these or any particular country's actions are or should be immune from criticism. To the contrary, the best (and indeed only appropriate) way to express any such disapproval officially and on behalf of the United States Government in this particularly sensitive context is through Executive Branch communication with a foreign state, not through divisive and piecemeal litigation and formal judgments entered by the judicial branch.

Pursuing such litigation and enforcing the judgment that plaintiffs seek here would also undermine the United States' relationships with other oil-producing states that have a large stake in the questions presented in plaintiffs' complaints. Mexico takes the view in its amicus brief, for example, that "restrict[ing] and sanction[ing] sovereign activities" relating to oil extraction "would constitute a dangerous infringement of the sovereignty of all nations whose laws provide for public control over petroleum exploitation." Amicus Curiae Brief of the United Mexican States in Support of Appellees and Affirmance 2. Such an affront to Mexican sovereignty would strain an important and complex relationship.

These are just some of the highly complex issues with which the Executive Branch wrestles on an almost-daily basis in developing its foreign

policy with respect to oil-producing states. Furthermore, to accommodate shifting circumstances and priorities, the Executive Branch must of necessity constantly re-calibrate and re-assess how most effectively to engage with these states, which themselves have varying interests. The one-time judicial consideration of private antitrust suits aimed at bringing OPEC to heel would break sharply from the Executive Branch's considered foreign policy judgments about the proper course to pursue, and would frustrate these diplomatic endeavors by disrupting relations with various foreign states with which the U.S. interacts on a daily basis.

These profound foreign policy concerns have contributed to the Executive Branch's consideration in the past of whether to bring its own antitrust action against OPEC, its member states, or their corporate subsidiaries. As the Assistant Attorney General in charge of the Department of Justice's Antitrust Division testified in 2006 to the Antitrust Modernization Commission, "trying to pursue [an antitrust suit against OPEC] where you have sovereign states involved raises foreign policy issues. It can raise national and homeland security issues. All of those things need to be taken

into account * * * ."²³ In lodging their complaints with the district court, plaintiffs have not and cannot claim that they have "taken into account" these far-ranging concerns of vital importance to the United States. Nor could the courts in adjudicating the merits of these suits.

Under these circumstances, plaintiffs' requests for treble damages and broad equitable relief concerning matters going to this Nation's state-to-state relations with foreign states present a nonjusticiable political question: "[Foreign policy] decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). As the Supreme Court has explained, questions involving the Executive's authority over foreign policy

are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

²³ Tr. of the Public Hearing Before the Antitrust Modernization Commission, at 79-80 (Mar. 21, 2006) (testimony of Assistant Attorney General Thomas O. Barnett) (available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/060321_FTC_DoJ_Transcript_reform.pdf).

Ibid.; see also *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (holding that there is “no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government”).

Plaintiffs’ suits thus fall within the first of the categories identified in *Baker* – which this Court has emphasized is “[t]he dominant consideration in any political question inquiry” (*Saldano v. O’Connell*, 322 F.3d 365, 369 (5th Cir. 2003)) – because there is “a textually demonstrable constitutional commitment *** to a coordinate political department” of the sensitive foreign policy judgments implicated by plaintiffs’ lawsuits (*Baker*, 369 U.S. at 217).

For much the same reasons, plaintiffs’ complaints also implicate the fourth and sixth considerations identified in *Baker* – “[t]he impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,” and the “potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Ibid.*

As the Ninth Circuit has held in a related challenge to OPEC, an “[i]ll-timed judicial decision[] challenging the acts of foreign states could nullify [the political branches’ diplomatic] tools and embarrass the United

States in the eyes of the world.” *Int’l Ass’n of Machinists*, 649 F.2d at 1358; see also Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 274b2 (2010) (approving of a “deferential approach in an area as volatile and fraught with international repercussions as this one”).

The courts of appeals have consistently concluded that cases that would displace or intrude upon the processes and determinations of the Executive Branch in the area of foreign policy, which must be carefully calibrated over time, present political questions. The D.C. Circuit, for example, has held that the political question doctrine barred a suit that questioned the determination by officials of the Executive Branch “that it was in the best interest of the United States to take [certain] steps” with respect to Western Hemisphere foreign relations. See *Schneider*, 412 F.3d 195.

Indeed, the D.C. Circuit has dismissed on political question grounds a range of sensitive cases intruding upon the fashioning of the Nation’s foreign policy. See *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006) (claims arising out of the forced relocation of the local inhabitants of Diego Garcia during the Cold War); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006) (allegations that Secretary of State Kissinger unlawfully supported the regime of a Chilean dictator); *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008) (claims

against CIA employees for their alleged involvement in the torture and killing of plaintiff's husband in Guatemala).

In a similar vein, the Second Circuit has found that a class-action suit against Austria in connection with the Nazi-era looting of Austrian Jews presented a political question because "'a court's undertaking independent resolution' of *this* claim is impossible 'without expressing lack of the respect due' the Executive Branch." *Whiteman v. Dorotheum*, 431 F.3d 57, 72 (2d Cir. 2005). Significantly, the Second Circuit observed that, "[i]n applying this fourth *Baker* test, courts have been particularly attentive to the views of the United States Government about the consequences of proceeding with litigation." *Id.* at 72 n.17.

In addition, the Ninth Circuit has invoked the political question doctrine to dismiss a tort suit against Caterpillar, Inc. for supplying U.S.-financed bulldozers to Israel, concluding that it could not address the case against Caterpillar without questioning the United States' decision to provide military assistance to Israel. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007). And the Eleventh Circuit dismissed on political question grounds a tort claim against the United States for accidentally firing live missiles at a Turkish vessel during a NATO training exercise. *See Aktepe v. United States*, 105 F.3d

1400 (11th Cir. 1997). As the Eleventh Circuit explained, “[t]he relationship between the United States and its allies, like the broader question of which nations we number among our allies, is a matter of foreign policy.” *Id.* at 1403. *See also El-Shifa Pharmaceutical Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004) (dismissing as presenting political question just compensation claim arising out of destruction by U.S. cruise missiles of Sudanese facility).

The precedent thus confirms that the political question doctrine precludes judicial intrusion into the sensitive and politically fraught domain of foreign affairs and national security policy-making, in which the oil production practices and agreements of the foreign states involved lie.

That is so whether or not Congress has enacted legislation creating a generic cause of action – like the Sherman Act – that addresses conduct of a similar sort among private parties in a commercial setting. While the Supreme Court pointed out in *Japan Whaling Association v. American Cetacean Society* that “interpreting congressional legislation is a recurring and accepted task for the federal courts,” and that courts may not decline that task merely because a decision “may have significant political overtones” (478 U.S. 221, 330 (1986)), it coupled that cautionary note with the observation that the “political question doctrine excludes from judicial review those controversies

which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch” (*id.* at 230). Moreover, the Court nowhere suggested that suits relying on federal statutes can never present political questions. As we have demonstrated, some such cases do, indeed, impermissibly interfere with the Executive Branch’s policy choice to address foreign states’ oil production decisions on a state-to-state basis.

Indeed, the en banc D.C. Circuit recently held that neither the Federal Tort Claims Act nor other generic causes of action could be the basis for judicial review of the President’s stated reasons for taking military action in the war on terror and in response to al Qaida’s 1998 bombing of the U.S. Embassies in Kenya and Tanzania. *El Shifa Pharmaceutical Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (*en banc*). As the full D.C. Circuit explained, “[n]either a common law nor statutory claim may require the court to reassess ‘policy choices and value determinations’ the Constitution entrusts to the political branches alone.” *Id.* at 843 (quoting *Japan Whaling*, 478 U.S. at 230); *see also Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1232 (D.C. Cir. 2009) (“We are aware of no court that has held we cannot or need not conduct the jurisdictional analysis called for by the political question doctrine simply

because the claim asserted involves a statutory right.”); *Gonzalez-Vera*, 449 F.3d at 1264 (holding that cause of action arising from Torture Victim Protection Act (TVPA) – “like any other, may not be heard if it presents a political question”); *Bancoult*, 445 F.3d at 431 (holding that claims under the Federal Tort Claims Act and Alien Tort Statute presented a political question); *Harbury*, 522 F.3d at 423 & n.5 (same for FTCA and TVPA); *Aktepe*, 105 F.3d at 1402 (same for Public Vessels Act and Death on the High Seas Act); *Corrie*, 503 F.3d at 979 (same for TVPA and RICO); *cf. Zivotofsky v. Sec’y of State*, 2010 WL 2572934 (D.C. Cir. June 29, 2010) (order denying rehearing en banc (statement by Edwards, J.) (noting that case could not proceed if it infringed authority committed constitutionally to the Executive)).

As applied here, the political question doctrine bars plaintiffs from relying on the Sherman Act to enlist this Court to override the United States’ longstanding policy of pursuing channels of diplomacy and engagement rather than litigation to manage the difficult, complex, and vitally important relationships with OPEC-affiliated states. A statutory claim that a contract or combination in restraint of trade violates the Sherman Act cannot be adjudicated when the acts that allegedly make up the contract and combination constitute sovereign acts fully executed within foreign sovereign

territory that must be addressed through flexible diplomacy, not private litigation and inflexible court judgments. Given the impact that this litigation would otherwise have on the foreign, national security, economic, and energy policies of the United States, the district court's judgment should be affirmed.

CONCLUSION

For the foregoing reasons, the United States urges that the district court's judgment of dismissal be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 11,763 words. Concurrent with the filing of this brief, the United States has filed a motion seeking the Court's permission to file a brief exceeding the word limit specified by Federal Rule of Appellate Procedure 29.

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CERTIFICATE OF SERVICE

I certify that on August 16, 2010 the foregoing document, Brief of the United States as Amicus Curiae Supporting Affirmance, was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a copy by first class mail to the addresses listed below:

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