Trade in Oil and Export Restrictions

Taking the Organization of the Petroleum Exporting Countries to the WTO Court

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Abstract

The Organization of the Petroleum Exporting Countries (OPEC), as seen by observers, resembles a greedy international cartel that preys on the public in defiance of market competition. High oil prices are considered as a principal cause of the US economic woes. Some US congressmen pinpointed OPEC's alleged inconsistency with the World Trade Organization (WTO) rules and called upon the US administration to open dispute settlement proceedings against OPEC. This article discusses the legal issues arising from a US action at the WTO level against OPEC countries. The first sections of the article comprise an institutional review of the WTO and OPEC. The article addresses the interplay between the WTO and OPEC. It then illustrates the central provisions of the WTO that can be used for arguments and counter-arguments concerning such a WTO action. It culminates with a set of concluding thoughts.

Keywords: WTO , dispute settlement, US, OPEC, oil.

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A. Introduction

The Organization of the Petroleum Exporting Countries (OPEC) usually captures the headlines as oil prices skyrocket.[1] From public viewpoint, OPEC resembles a greedy international cartel that preys on the public in defiance of market competition.[2] At the global level, supply restrictions push up the prices of oil, given the inelasticity of supplies. Outside the country imposing the restriction, consumer welfare will decrease while producer welfare will increase. Hence, countries or consumers who are net buyers of that commodity will lose out while countries and producers who are net sellers would benefit from the measure. Issues of unfair competition and related welfare losses would be substantial if a country in a monopoly supplier position of a commodity with limited substitution resorts to restrictive measures.

US congressmen and other politicians continue to seize on high oil prices as a principal cause of the US economic woes. Oil prices are not fixed by OPEC. Rather, they are influenced by a variety of determinants. According to the general theory on prices, the economic law of supply and demand is the basic driver.[3]

1 *See* B. Bahree, 'Back in the Spotlight: After a Long Stretch off Center Stage, OPEC is Moving Oil Markets Again', *Wall St. J.*, 16 October 2006, p. R8 (OPEC can only grow stronger long-term as the world's need for the cartel's oil grows. The OPEC cartel has proved that it has enough discipline to prop up prices by restraining supply if need be, and also enough spare capacity to temper prices when they rise too high for its liking. In other words, OPEC is back in control of the oil price). *See also* G. Hitt, 'Elizabeth Holmes and Alex Frangos, Oil's Rise to $100: Foreign-Fuel Reliance Stirs Candidates, Political Discord', *Wall St. J.*, 3 January 2008, p. A6 (New York Sen. Hillary Clinton vowed to use her inaugural address as president to put the Organization of Petroleum Exporting Countries on notice that they cannot take advantage of us any longer). *See* 'Oil Pressure Rising; Oil and the Arab World's Unrest', *The Economist*, 26 February 2011. *See also* L. Denning, 'OPEC's Passive Aggressive Oil-Price Problem', *Wall St. J.*, 3 January 2011, p. C6 (OPEC's clout remains as the major supplier of crude and has its hands on the only spare oil). Fears of recession have seen prices falling in recent times. However, such a scenario could also prompt a challenge because certain OPEC members (*e.g.* Saudi Arabia, Venezuela, Iran) cannot accept prices below $80 because this would impact their ability to meet domestic spending obligations. As a consequence, the coming months could see OPEC struggling to balance the risk of long-term damage caused by pushing prices high – and thus precipitating or exacerbating recession in consumer nations – and allowing them to fall too low and thus risking internal problems, which must now be regarded with greater seriousness given the events of the so-called Arab spring. Although these socio-economic considerations may appear remote from the legal issues at stake in this article, they will also influence the decision-making of a country such as the United States in determining whether to bring a case to the WTO – there will be situations in which self-interest as a consumer will have to be weighed against the risks associated with destabilizing, *e.g.* OPEC's swing producer, Saudi Arabia.

2 *See* K.A. Lasater, 'A Survey of the Domestic Approaches to Antitrust Taken by the OPEC Member Nations: Do They Practice What They Preach?' 23 *Penn St. Int'l L. Rev.* 2004, pp. 413, 444.

3 When price goes up, quantity demanded goes down and when price goes down, quantity demanded goes up. *See* D.C. Colander, *Macroeconomics*, 5th edn., McGraw-Hill/Irwin, New York, 2004, pp. 84-92.

Other determinants include tariffs, exchange rates and refining capacity.[4] Also, oil price hikes is fuelled by market manipulation and weak regulatory oversight by the US government.[5] Thus, any suggestion that OPEC is solely responsible for the oil price hike is simplistic and misguided.

Previously, OPEC has been challenged under US antitrust laws; but they were unsuccessful.[6] In response, the US Congress enacted a number of laws abolishing certain defences that were standing in the way of a successful antitrust action against OPEC.[7] To date, no suits have been filed under these laws. It might be difficult to sue OPEC because courts feel uneasy about holding foreign oil-producing countries liable under domestic US antitrust laws.

Some in the United States suggested charging OPEC before the International Court of Justice. The argument would be that on the basis of the general principles of law recognized by civilized nations, OPEC is obligated to other countries not to manipulate oil prices.[8] In this context, international law principles include, for instance, the principle of sharing. If the International Court of Justice hears

4 For an overview of trade in oil *see* J.M. Day, 'Petroleum Prices', 1 *Am. U. Bus. L. Brief* 2004, pp. 52, 53 (discussing the petroleum industry and factors that affect the industry such as traders, weather reports, expectations of war, OPEC, currency value, taxes, lack of refining capacity, and refiners' profits). *See* M.A. Toman, 'International Oil Security: Problems and Policies', 20 *Brookings Rev.* 2002, pp. 20, 21 (For much of the 20th century, the United States maintained tariffs and quotas on oil imports to protect its petroleum industry against lower-priced competition from abroad). *See also* C.E. Lee, 'White House's Task Force to Probe Oil, Gas Markets', *Wall St. J.*, 22 April 2011, p. A5. (The Justice Department is putting together a team whose job it is to root out any cases of fraud or manipulation in the oil markets that might affect gas prices, and that includes the role of traders and speculators. Oil prices reflect rising global demand, a weak dollar and concerns about supply from Middle Eastern oil nations grappling with political unrest.)

5 *See* T. Slocum, 'Standard Oil Rises Again: How Eroding Legal Protections and Lax Regulatory Oversight Harm Consumers', 19 *Loy. Consumer L. Rev.* 2007, pp. 412, 415. (Prices are determined by the actions of investment banks, hedge funds and oil company energy traders in the energy markets.)

6 *See Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358-1362 (9th Cir. 1981) (seeking relief for alleged Sherman Act violation. The Court asserted that a US court will not adjudicate a politically sensitive dispute that would require the court to judge the legality of the sovereign act of a foreign state. The Court dismissed the case based on the principle of sovereign immunity). *See also Prewitt Enters., Inc. v. OPEC*, No. CV-00-W-0865-S, 2001 WL 624789 (N.D. Ala. Mar. 22, 2001) (seeking injunctive relief under federal antitrust laws. The district court judge declared that OPEC could be sued under the 'commercial activities' exception to the Act of State Doctrine. The term 'commercial activities' means either a regular course of commercial conduct or a particular transaction or act carried on in the United States by the foreign state. When OPEC failed to respond, the judge entered a default judgment. On appeal, the Eleventh Circuit affirmed, holding that absent OPEC's consent, it did not appear that there were any means available for service on OPEC, and that the court therefore could not establish jurisdiction over OPEC).

7 *See* K.S. Reinker, 'NOPEC: The No Oil Producing and Exporting Cartels Act of 2004', 42 *Harv. J. on Legis.* 2005, p. 285 (The Act abolished foreign sovereign immunity and state doctrine defences to antitrust actions). *See also* Foreign Trust Busting Act, H.R. 4731, 106th Cong. (2000) (prohibiting US courts from using the act of state doctrine to justify failures to make decisions on the merits in antitrust cases asserting energy supply or price manipulation).

8 Art. 38 of the Statute of the International Court of Justice provides the basis for bringing a case against OPEC. *See* J.B. Moore, 'The Natural Law Basis of Legal Obligation: International Antitrust and OPEC in Context', 36 *Vand. J. Transnat'l L.* 2003, pp. 243, 246, 254, 272.

such a case, it will be faced with a complicated task. The defendant nations would have to consent to International Court of Justice jurisdiction, which seems highly unlikely. Moreover, whether OPEC is responsible to other countries will depend upon the nature of obligation in the international realm. OPEC members attempt to preserve their own economic prosperity by agreeing to adjust production quotas, as they may have a target price or price range in view, for an economically critical export.

As a result of the experience under the US and international laws, congressional efforts have shifted to focus on OPEC's alleged inconsistency with the World Trade Organization (WTO). Some members of the Congress allege that OPEC supply restrictions are disguised restrictions on international trade, violating the prohibition on quantitative export restrictions found in Article XI of the General Agreement on Tariffs and Trade (GATT).[9] Moreover, members of Congress argue that the exceptions of Article XX in GATT 1994 allowing restrictions for the conservation of exhaustible natural resources are inapplicable since OPEC is not restricting oil production owing to conservation concerns or to preserve an exhaustible supply. A US case against OPEC members will set a precedent in WTO jurisprudence.

Those developments with regard to oil and OPEC could be treated as by-products of unusual and context-specific circumstances, such as a major price boom that has happened recently. Moreover, those developments could be viewed as a reflection of a more fundamental and systemic trend towards growing competition over strategic natural resources including oil. In any case, the question of whether or to what extent WTO law is equipped to address this issue is highly relevant.

Although oil has worldwide effects, the article will focus on the United States as it is the largest oil-consuming country in the world.[10] Whether a WTO action against OPEC countries is a serious likelihood or not, this article is designed to be a scholarly analysis of the arguments and counter-arguments that can be raised in such a case before the WTO court – a metaphor used to denote the judicial nature of the WTO dispute settlement process. Specifically, the article examines the claim that production quotas mandated by OPEC countries operate as export restraints and are thus prohibited by GATT Article XI. The article also examines the validity of certain defences contained in GATT Articles XX, XXI and XXXVIII.

9 *See* statement of Senator Arlen Specter, 147 Cong. Rec. S7942-01 (19 July 2001) (discussing the possibility of WTO action against OPEC for entering into agreements to restrict oil production, affecting the world market for oil by driving up its price. *See also* R. Brevetti, 'DeFazio Asks for WTO Case Against OPEC Production Cuts', 21 *Int'l Trade Rep.* (BNA) 2004 (1 April), p. 565. *See also* G.G. Yerkey, 'Senators Urge Bush Administration to Launch WTO Case against OPEC', *International Trade Daily*, 18 June 2008 (Eleven senators called on the US administration to open dispute-settlement proceedings at the WTO against the OPEC for participating in an oil cartel. The senators said in a letter that the 'very existence' of OPEC violates WTO rules, which, they argue, do not allow countries to maintain quotas or other quantitative restrictions on exports).

10 *See* 'Oil Consumption: Top Oil Consuming Countries in the World', available at <www.einfopedia.com/oil-consumption-top-oil-consuming-countries.php> (Daily oil consumption in the United States is 19.8 million bbl (billion barrel) per day. The United States is the number one oil consuming country followed by China, Japan and Russia), last accessed 22 August 2011.

The article finally offers some concluding thoughts by stating that chances of successfully advancing a WTO claim against OPEC countries are slim and that taking such a case forward is an ill-considered move with respect to international relations. Before indulging in analysing the core issues of this article, however, it is important to provide an introduction to the two international organizations involved in the case; OPEC, with allegedly intergovernmental manipulation of prices, and the WTO, which provides the rules of the free market.

B. Organization of the Petroleum Exporting Countries

OPEC originated in 1949 when Venezuela initiated discussions with Iran, Iraq, Kuwait and Saudi Arabia.[11] The purpose of those discussions was to develop closer and regular communications regarding the price of oil. In 1959, at the First Arab Petroleum Congress, further discussions were held where attending countries agreed to form an Oil Consultation Commission, establish national oil companies and consult with one another before taking unilateral action with regard to oil prices.[12] One year later, in response to disapproval of then existing oil prices and lack of sovereignty over their oil resources, Iraq invited representatives of the governments of Iran, Kuwait, Saudi Arabia and Venezuela to Baghdad for further discussions.[13] On 14 September 1960, OPEC was formed.[14]

OPEC is a permanent intergovernmental organization dedicated to maintaining the stability and prosperity of the oil market for its members.[15] Thus, OPEC is not a commercial entity as it does not itself conduct business transactions. OPEC is not a monopoly as it does not seek to drive other competitors out of the market. OPEC's objective is to coordinate and unify the oil policies of its member countries.[16] OPEC purports to secure fair and stable prices for oil producers, produce an efficient, economic and regular supply of oil to consuming countries, and provide a fair return on capital to those investing in the industry. OPEC can be seen as a model for raw materials producers in developing countries.

OPEC's member countries maintain absolute sovereignty over their respective oil production. Each member country undertakes the production of oil

11 *See* General Information Booklet, 5, available at <www.opec.org/library/General%20Information/pdf/geninfo.pdf>, last accessed 5 March 2011.

12 *Id*.

13 The five oil-exporting countries met to discuss the challenge posed by the multinational oil companies that arbitrarily and unilaterally reduced the posted prices of crude oil in 1950s and 1960s. *See* I. Seymour, *OPEC Instrument of Change*, Macmillan, London, 1980, pp. 80-95.

14 In August 1960, Esso reduced the price of Arabian light crude by 14 cents per barrel. The price of Arab Light Crude fell from $1.90 to $1.76. The members seized their chance to transform the Oil Consultation Commission into a more substantial organization. *See* J. Amuzegar, *Managing the Oil Wealth: OPEC's Windfalls and Pitfalls*, I.B. Tauris, London, 1999, pp. 17-27.

15 *See* OPEC Statute, approved January 1961, Chapter I, Art. 1, available at <www.opec.org/opec_web/static_files_project/media/downloads/publications/OS.pdf> (The 2008 Edition).

16 *Id*. Art. 2.

through its national oil company.[17] In 1983, OPEC formally introduced production quotas and has revised them periodically.[18] In some instances, OPEC set a price target for oil owing to problems stemming from quota cheating.[19] In brief, OPEC can set production quotas and price targets.

Countries can be either full members or associate members of OPEC.[20] Full members are the original founding members and any interested countries with a substantial net export of crude oil that also share fundamentally similar interests with the member countries.[21] Prospective full members can be admitted to OPEC by a three-fourths majority vote of the full members, as well as a unanimous vote by the founding members.[22] Associate members are those members that do not qualify as full members.[23] Associate members are admitted by a three-fourths majority vote of members, including a unanimous vote by the founding members.

OPEC consists of three major subdivisions: (1) the Conference, (2) the Board of Governors and (3) the Secretariat.[24] The Conference is the main power base of the organization. The Conference consists of a delegation from each of the member countries.[25] The Conference meets at least twice a year and each delegation has one vote.[26] The Conference is responsible for the setting of OPEC's policy goals and the means through which to achieve them. Outcomes of the Conference can have significant effects on future oil prices.

The Board of Governors consists of one governor for each member country, nominated by each member country, and who is confirmed by the Conference.[27] The Board of Governors meets twice a year.[28] As with the Conference, the gover-

17 *See* C. van der Linde, *The State and the International Oil Market: Competition and the Changing Ownership of Crude Oil Assets*, Kluwer Academic Publisher, Dordrecht, 2000, pp. 12-16 (each member country determines whether it maintains exclusive state ownership of its national oil companies). State-owned oil companies that exist under the OPEC umbrella are Sonatrach (Algeria), Sonangol (Angola), PetroEcuador (Ecuador), Pertamina (Indonesia), National Iranian Oil Company (Iran), Iraq National Oil Company (Iraq), Kuwait Petroleum Corporation (Kuwait), Libyan National Oil Corporation (Libya), Nigerian National Petroleum Corporation (Nigeria), Qatar Petroleum (Qatar), Saudi Aramco (Saudi Arabia), Abu Dhabi National Oil Company (United Arab Emirates) and Petroleos de Venezuela SA (Venezuela). *See* OPEC: Member Countries, available at <www.opec.org/aboutus/member%20countries>, last accessed 18 November 2011. *See* P. Stevens, 'National Oil Companies and International Oil Companies in the Middle East: Under the Shadow of Government and the Resource Nationalism Cycle', 1 *Journal of World Energy Law and Business* 2008, pp. 5, 6 (discussing limiting the operations of private international oil companies and asserting a greater national control over natural resource development).

18 H. Abdallah, 'Oil Exports Under GATT and the WTO', *OPEC Rev.*, Vol. 29, No. 4, 2005, pp. 267, 271.

19 *See* J.M. Griffin & W. Xiong, 'The Incentive to Cheat: An Empirical Analysis of OPEC', 40 *J. Law & Econ.* 1997, pp. 289, 299, 304 (In OPEC, there is a chance of cheating and cooperation).

20 *See* OPEC Statute, *supra* n. 15, at Chapter II, Art. 7.

21 *Id.* Art. 7(b) & (c).

22 *Id.*

23 *Id.* Art. 7(d).

24 *Id.* Chapter III, Art. 9.

25 *Id.* Art. 11(a).

26 *Id.* Art. 11(c) & 12.

27 *Id.* Art. 17(a)

28 *Id.* Art. 18.

nor from each member country is allowed one vote.[29] The Board is charged with managing the organization, implementing decisions of the Conference, preparing an annual budget and various other managerial functions.[30]

The Secretariat acts as the executive of the organization and is under the direction of the Board of Governors.[31] The Secretariat consists of a Secretary General and his or her staff, whose function is to act as the representative of the organization, directing its affairs.

OPEC produces about 40% of the world's oil and holds approximately 77% of the world's proven oil reserves.[32] It is common to think of OPEC as an Arab organization, but some of its larger producers are non-Arab countries such as Nigeria and Venezuela. Currently, twelve countries comprise OPEC and represent the world's major exporters of oil.[33] OPEC's costs of operation are divided equally among its members. Some countries in the Gulf region such as Kuwait and Saudi Arabia are top suppliers of oil. These countries have a comparative advantage in pumping oil.[34]

C. World Trade Organization

By the early 20th century, trade was pursued on a bilateral basis in the absence of international agreements or institutions. The United States, the biggest trade policymakers of that time, passed the Smoot-Hawley Act of 1930, which increased tariffs significantly and encouraged retaliation from other trade powers in Europe. Subsequently, many conferences were held to restore the world's confidence in the trading system, but with little success.[35]

29 *Id*. Art. 17(d).

30 *Id*. Art. 20.

31 *Id*. Art. 27.

32 *See* Bahree, *supra* n. 1.

33 Currently, OPEC's member countries include Algeria, Angola, Ecuador, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates and Venezuela. *See* OPEC: About OPEC, available at <www.opec.org/aboutus/functions/functions.htm>, last accessed 26 April 2011. OPEC lost Gabon as it pulled out of the organization. *See* J. Tanner, 'Gabon Is Seeking Incentives to Keep OPEC Membership', *Wall St. J.*, 8 May 1995, p. A9H (Gabon pulled out over a dispute for a cut in its OPEC fees). Also, Indonesia withdrew from OPEC in 2009. *See* 'Indonesia Plans to Quit OPEC', *Wall St. J.*, 29 May 2008, p. A9 (Due to its ageing oil fields and lack of fresh investment in exploration, Indonesia has become an oil-consuming country. Currently, Indonesia is producing just short of one million barrels of crude oil daily).

34 The cost of oil production in the Gulf region is one of the lowest in the world: less than $1.50 per barrel, compared with the global average of about $5 per barrel. *See* G. Bahgat, 'Redefining Energy Security in the Persian Gulf', 31 *Fletcher F. World Aff.* 2007, pp. 215, 218.

35 Some of the conferences were the International Financial Conference in 1920, the Genoa Conference in 1922 and the World Monetary Conference in 1933. *See* R. Cameron, *A Concise Economic History of the World: From Paleolithic Times to the Present*, 3rd edn., Oxford University Press, New York, 1997, pp. 358-359.

Recognizing the devastation created by protectionist trade policies, the Allies held the Bretton Woods conference.[36] The Bretton Woods institutions initially envisioned the inclusion of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (the World Bank) and the International Trade Organization (ITO). The ultimate goal of the Bretton Woods institutions was to abandon protectionist trade policies, rebuild the deteriorating world economy and regulate the economic relationship, especially among the major economic powers at that time.[37] In 1947, representatives of 57 countries met in Havana, Cuba, to negotiate the Havana Charter, which was intended to create the ITO.[38] The Havana Charter would have complemented the road map of

36 From 1 to 22 July 1944, the Bretton Woods Conference was held in the resort town of Bretton Woods, New Hampshire. Some 700 delegates from 44 states participated in the Conference. The participants held a preparatory process for the Bretton Woods Conference in the United States in cities such as Atlantic City, New Jersey. *See* R.F. Mikesell, *The Bretton Woods Debates: A Memoir. Essays in International Finance Series: No. 192*, Princeton University, Princeton, NJ, 1994, p. 30.

37 H.D. White, a leading US economist of that era, envisioned the IMF as an institution designed chiefly to prevent the disruption of foreign exchange, strengthen monetary and credit systems, and help in the restoration of foreign trade, whereas the World Bank was designed chiefly to supply huge volumes of capital to the United Nations and associated nations needed for reconstruction, relief and economic recovery. *Id*. at p. 30.

38 The process of drafting a charter for the ITO passed through four stages: (1) the original American draft of September 1946, (2) draft charter revised at the London meeting of the preparatory committee of the international conference for trade and employment between October and November 1946 (the London Draft), (3) further revised draft in Geneva in April-August 1947 (the Geneva Draft) and (4) the charter revised in Havana in November 1947-March 1948 (the Havana Charter). *See* J. Reuvid, *A Handbook of World Trade: A Strategic Guide to Trading Internationally*, Kogan Page Limited, London, 2001, p. 5.

the international economic order.[39] However, the US Congress never ratified the Havana Charter.[40] The ITO was pronounced dead in 1951.

In 1947, the GATT was concluded in Geneva as an interim agreement until the creation of the ITO.[41] GATT 1947 was a code under which countries agreed to conduct their mutual commercial relations. The purpose of GATT was to establish an open system of world trade between the contracting parties. The non-discriminatory provisions of Article I (MFN Treatment) and Article III (National Treatment on Internal Taxation and Regulation), Article II (Schedule of Concessions)

39 *See* US Department of State, Havana Charter for an International Trade Organization, Arts. 73, 74 (1948). The Havana Charter provided commitments on Tariffs, Preferences, Internal Taxation and Regulation (Arts. 16-19), Quantitative Restrictions and Related Exchange Matters (Arts. 20-24), Subsidies (Arts. 25-28), State Trading and Related Matters (Arts. 29-32), General Commercial Provisions on Freedom of Transit, Anti-Dumping and Countervailing Duties (Arts. 33-39), Special Provisions for Free Trade Areas and Customs Unions and Consultation (Arts. 40-45), Restrictive Business Practices (Arts. 46-54) and Inter-Governmental Commodity Agreements (Arts. 55-70).

40 The President submitted the ITO draft charter to Congress in 1948, but it did not move beyond a vote in the Senate. In 1951, the President announced that he would no longer seek approval. The death of the ITO was attributed to the domestic political situation in the United States. The Truman administration confronted a new protectionist and isolationist Republican Congress. The United States refused to join the ITO because of perceived threats to national sovereignty and the danger of too much ITO intervention in markets. Congress feared that the ITO would be too supranational. It was feared that there would be double delegation of power from Congress to the US President and from the President to an international organization, and that thereby the functions of Congress would be usurped. In other words, an international organization would establish a World Government. Also, the US Congressional support for the ITO was conditioned on dismantling of the British Imperial Preference system (Commonwealth system) devised at the Ottawa Conference in 1932, a system that was enacted partly in response to the US Smoot-Hawley Act, because, as the United States contended, it contravened the most-favoured-nation rule. Because of the British Commonwealth system, US economic interests were excluded from the British market and its satellite countries or dominions such as South Africa, Canada and India. The British refused to yield unless they received assurances from Congress that American tariffs would be lowered. However, the US administration did not lower its tariffs and stood for its pledge to Congress by dismantling the British Commonwealth system. Moreover, the US Constitution authorizes Congress to regulate commerce with foreign nations. *See* US Const. Art. 1, § 2. Therefore, the US Congress considered the Executive had exceeded its mandate under the constitution. In 1950s, there had been an agreement for the establishment of the Organization for Trade Co-operation (OTC) that would take over GATT and police world trade. *See* G. Bronz, 'An International Trade Organization: The Second Attempt', 69 *Harv. L. Rev.* 1956, pp. 440, 447-449, 473-476.

41 *See* General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 61 Stat. pts. 5,6, T.I.A.S. No. 1700, 55 UNTS 187.

and Article XI (General Elimination of Quantitative Restrictions) in GATT 1947 are the 'key' provisions that express its basic structure.[42]

GATT 1947 was the beginning of a series of negotiations that ended with the establishment of the WTO in 1994. In the intervening years, countries held eight rounds of negotiations that led ultimately to the birth of the WTO with the successful conclusion of the Uruguay Round negotiations.[43] Despite the obvious achievements of GATT rounds, there were loopholes in the trading system.[44] The GATT operated as an agreement and a pragmatic institution. For example, although Article XXV(3) & (4) calls for one vote per nation and decisions to be taken by majority vote, in practice, consensus was developed among parties. Consensus means that any party can block the adoption of a decision or an agreement.

Against this background, the GATT parties decided, at their 1986 Punta del Este Ministerial meeting, to launch the Uruguay Round. The agenda covered traditional GATT subjects such as tariffs, non-tariff barriers, subsidies and safeguards. It also added intellectual property, services and trade-related investment measures. It also specifically provided that the results of the Uruguay Round 'shall be treated as parts of a single undertaking'.[45]

Almost seven years later, the Uruguay Round came to an end. It brought with it the legalization of world trade politics after GATT was considered a geopolitical

42 Art. I of GATT requires each contracting party to extend, immediately and unconditionally, any advantage, favor, privilege and immunity given to a product of a contracting party to the 'like product' of all other contracting parties. GATT includes 17 provisions using the words 'like product', 'like commodity' and 'like merchandise'. Decisions on what constitutes like product are made on a case-by-case basis after applying a variety of criteria that GATT Panels have found to be relevant, including product characteristics, consumer tastes and habits, and product end-uses in a particular market. In general, like product has broader interpretation when it is used in GATT 1947 basic obligations such as the MFN treatment and narrower interpretation in GATT 1947 exceptions such as Art. VI regarding anti-dumping and countervailing duties. *See* R.J. Zedalis, 'A Theory of the GATT "Like Product" Common Language Cases', 27 *Vand. J. Transnat'l L.* 1994, pp. 33, 45-51, 78-83. Art. II requires each contracting party to apply to products of other contracting parties tariff concessions stated in its schedule. Tariff concessions could be easily nullified if a contracting party was allowed to impose internal taxes, regulations or laws on imported products different from those imposed on domestic products once imported products pass the borders of the importing country. Art. III protects the 'competitive opportunities' enjoyed by imports *vis-à-vis* like domestic products in the importing country. For illustrative cases under Art. III of GATT 1947, *see* K.C. Kennedy, 'The GATT-WTO System at Fifty', 16 *Wis. Int'l L. J.* 1998, pp. 421, 432, 433. Art. XI of GATT 1947 provides for tariffication of non-tariff trade barriers, except under specific conditions.

43 *See* M. Moore (Ed.), *Doha and Beyond: The Future of the Multilateral Trading System*, Cambridge University Press, Cambridge, UK, 2004, pp. 68, 115.

44 The first Secretary-General of the GATT, E.W. White, referred to the GATT as "It is anything but neat and orderly". *See* G. Patterson & E. Patterson, 'The Road From GATT to the MTO', 3 *Minn. J. Global Trade* 1994, pp. 35, 37. As the acronym of the GATT indicates, GATT scope was limited only to tariffs and trade in goods. It did not contain rules aimed at the liberalization of trade in services and other sectors.

45 Single undertaking is also known as the principle of globality or single roof policy. *See, generally*, T.J. Dillon, 'The World Trade Organization: A New Legal Order for World Trade?' 16 *Mich. J. Int'l L.* 1995, p. 349.

document created to contain the spread of non-market ideology to other countries. In addition to all areas covered in the negotiations, the WTO institution as an international organization was established. The functions of the WTO, as set out in Article III of the WTO Charter, are to provide the framework for the implementation of all the agreements that had been or might be negotiated, provide the forum for future trade negotiations and administer the dispute settlement system and the trade policy review mechanism.[46] The function of the WTO as a forum for future trade negotiations allows for further evolution of the international trading system to include new multilateral agreements between its members.

The Uruguay Round results both clarified and extended existing GATT obligations in virtually every facet. Many of the WTO Agreements establish special and differential treatment for developing and least developing countries. Special treatment for developing and least developing countries takes the form of a prolonged transitional period accompanied with lesser obligations normally imposed on countries participating in these agreements.[47] In addition, as one of its most impressive successes, the WTO provides a unified dispute resolution regime represented in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[48]

46 The covered agreements of the Final Act of the Uruguay Round include, in addition to the WTO Charter, the Multilateral Trade Agreements. The Multilateral Trade Agreements are as follows: the GATT 1994, which includes, with certain exceptions, GATT 1947, its subsequent agreements and many of its decisions and waivers, GATS Agreement, TRIPs Agreement, Dispute Settlement Understanding and Trade Policy Review Mechanism (hereinafter the Multilateral Agreements). *See* General Agreement on Tariffs and Trade, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Ann. 1A, 1B, 1C, 2 & 3, 33 ILM 1125 at 1133-1240 (1994). Countries in the Uruguay Round concluded Plurilateral Trade Agreements. These were Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement (hereinafter Plurilateral Trade Agreements). *Id*. Ann. 4. The Plurilateral Trade Agreements create neither rights nor obligations for those countries that have not accepted them.

47 For example, under the Agreement on Subsidies and Countervailing Measures (SCM), export subsidy prohibition, as mentioned in Art. 3:1(a) of the Agreement, does not apply to least developing countries designated by the United Nations as such and some developing countries having GNP per capita less than $1,000 annually such as Bolivia, Egypt and Morocco at the time the WTO came into effect. According to Art. 27:4, other developing countries have to phase out their export subsidies progressively within 8 years from the date the WTO enters into force upon fulfilling certain conditions.

48 The Tokyo Round established separate dispute resolution procedures in some of the separate codes negotiated during the Tokyo Round such as the code on subsidy and anti-dumping. As such, the GATT has been described as the centrepiece of a solar system of independent agreements with their own dispute settlement mechanism. *See* M.M. Mora, 'A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes', 31 *Colum. J. Transnat'l L.* 1993, pp. 103, 107, 123-128, 129-136. *See also* J.H. Jackson, 'The Birth of the GATT-MTN System: A Constitutional Appraisal', 12 *Law & Pol'y Int'l Bus.* 1980, p. 21. The DSU of the WTO applies to all the covered agreements.

D. The Interplay of OPEC and WTO

Currently, nine of the OPEC countries – Angola, Ecuador, Indonesia, Kuwait, Nigeria, Qatar, Saudi Arabia, United Arab Emirates and Venezuela – are members of the WTO.[49] Some of the key Arab members of OPEC, such as Saudi Arabia, acceded to the WTO recently. According to Saudi Arabia's accession protocol, all oil-based and natural gas-based products are made available to all users regardless of whether the users are Saudi or foreign owned.[50] Hence, Saudi Arabia treats foreign enterprises and products no less favourably than Saudi enterprises and products. The accession report did not make a specific reference to OPEC or export restrictions on oil. With the exception of dual pricing of energy – which received extensive attention from WTO members when examining the accession of Saudi Arabia – OPEC and its relevance to oil exports did not receive such a priority.[51]

Other OPEC countries are in the process of acceding to the WTO.[52] The fact that some OPEC countries are not WTO members means only those OPEC members that are also WTO members might be subject to legal challenges from another WTO Member, *e.g.* the United States, in the WTO dispute settlement procedures. As for OPEC itself as an organization, it is listed neither as a WTO member nor as a WTO observer.[53] So it would be the individual members of OPEC, not OPEC itself, that would be subject to trade action.

49 *See* List of WTO Members, the World Trade Organization, available at <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, last accessed 24 February 2012.

50 *See* Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, adopted 1 November 2005, WTO Doc. No. WT/ACC/SAU/61, para. 28.

51 *See* D. Pruzin, 'WTO Completes Saudi Accession Talks; EU Conceded on Energy Pricing Issue', 22 *Int'l Trade Rep.* (BNA) 2005 (3 November), p. 1777 (The EU held up approval of the final Saudi accession deal, complaining that the kingdom had failed to respect the terms of an August 2003 bilateral trade deal regarding the domestic pricing of energy. The EU claimed it secured a deal from the Saudis that natural gas liquids (NGLs) – a by-product of crude oil production – would be sold for the same price on the domestic market as they are on the international market. The EU argues that the pricing policy provides an unfair advantage to Saudi-based producers using NGL as an input in the production of petrochemical products such as polyethylene).

52 These countries include Algeria, Iran, Iraq and Libya. *See* D. Pruzin, 'Developing Countries Call for Greater Voice for Acceding Nations in WTO Accession Talks', 26 *Int'l Trade Rep.* (BNA) 2009 (22 October), p. 1416. (Some countries began negotiations even before the WTO was created, applying for membership in what was then the GATT. The longest accession still in the pipeline is Algeria, which first submitted its application in June 1987.) *See* D. Pruzin & G.G. Yerkey, 'Iran Minister Says WTO Accession Talks Advancing, Despite Absence of Chairman', 27 *Int'l Trade Rep.* (BNA) 2010 (4 March), p. 317. *See also* D. Pruzin, 'Iraq Outlines Legislation, Begins Steps to Launch WTO Membership Negotiations', 25 *Int'l Trade Rep.* (BNA) 2008 (10 April), p. 537. *See* D. Pruzin, 'WTO Members Agree to Begin Work on Libya Accession Request', *21 Int'l Trade Rep.* (BNA) 2004 (29 July), p. 1295.

53 Several international organizations such as Organization for Economic Cooperation and Development and United Nations Conference on Trade and Development have been granted observer status. The purpose of observer status for international intergovernmental organizations in the WTO is to enable these organizations to follow discussions therein on matters of direct interest to them. *See International Intergovernmental Organizations Granted Observer Status to WTO Bodies*, World Trade Organization, available at <www.wto.org/english/thewto_e/Igo_obs_e.htm>, last accessed 24 November 2011.

Oil trade, whether crude oil or oil derivatives, is not totally excluded from the coverage of WTO agreements. When analysing the ordinary meaning of a term, reference can be made to dictionaries, agreements and past rulings. On the basis of dictionary definitions, the term 'oil', as a natural resource, is defined as goods or products.[54] Furthermore, when oil is traded, it is treated as goods, and as a result, measures regulating oil are subject to the various WTO agreements on trade in goods.[55] This can also be confirmed by the GATT Article XX(g) exception (*i.e.* measures relating to the conservation of exhaustible natural resources), which suggests that oil is generally covered by the WTO.

WTO issues relating to the role of OPEC also relate to services, although this article only focuses on goods.[56] For trade in energy services, the most relevant regulations under the WTO are the General Agreement on Trade in Services (GATS) and its Annexes. The production of primary and secondary energy is subject to the GATT 1994 because the production service is incorporated in the value of the good produced. Transportation and distribution of energy, if provided independently, might constitute services under the GATS. Construction, engineering and consulting services could also be used in the energy value-added chain.[57] Thus, a production quota may qualify as a restriction on production services under the GATS. The service issues are not addressed here because the United States has not been citing this as the basis for its challenge. However, service issues have been raised in relation to Venezuela and other OPEC members' nationalizations of the oil fields, which is a different aspect of the concerns regarding OPEC.[58]

Over the years, developed and developing countries increased the number of goods governed by the disciplines of the multilateral trading system. As a matter of fact, a GATT decision of 1987 was concerned with oil trade in which Kuwait

54 *See* B.A. Garner, *Black's Law Dictionary*, 7th edn., West Group, St. Paul, MN, 1999, p. 1049.

55 Through extraction and processing, oil can be turned into goods, and can be sold as commercial products. Oil may be defined as goods within the meaning of the GATT when it is listed as goods in the WTO member states' schedules of concessions on goods, tradable, and has reached a level of processing specified by the HS Nomenclature in relation to specific natural-resource-based goods. In some circumstances, WTO rules may have implications for products in their natural state. *See* Appellate Body Report, United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, adopted 19 January 2004, WTO Doc. No. WT/DS257/AB/R, para. 67 (there is no basis to exclude tangible items – such as standing, unfelled trees – that are not both tradable as such and subject to tariff classification from the scope of the term 'goods' in Art. 1:1 of SCM).

56 *See* W.-C. Shih, 'Energy Security, GATT/WTO, and Regional Agreements', 49 *Nat. Resources J.* 2009, pp. 433, 437, 444 (Energy trade is also a multi-faceted issue that covers a wide range of issues from trade in goods to trade in services relating to energy).

57 *Id.*

58 *See* S. McNew, '"Full Sovereignty Over Oil": A Discussion of Venezuelan Oil Policy and Possible Consequences of Recent Changes', 14 *Law & Bus. Rev. Am.* 2008, pp. 149, 151.

associated itself with the case.[59] If oil trade is not governed by GATT, then the GATT Panel would not exercise jurisdiction on the matter. However, that case was limited to the consumer/importer side. There is no case yet on the producer/exporter country's side for reasons such as setting prices or production targets.

Oil trade is also subject to domestic trade remedy laws.[60] For example, in 1999, a consortium of independent US crude oil producers alleged that companies in Saudi Arabia and Iraq, among other countries, were dumping subsidized crude oil in the US market.[61] Thus, oil trade is covered in the multilateral trading system as well as OPEC.

E. Grounds for WTO Action Against OPEC

The United States, in its case against OPEC countries, could cite a violation of Article XI of GATT that eliminates quantitative restrictions on exports.[62] If the WTO dispute settlement panel adopts a literal or textual interpretation of Article XI of GATT, it is unlikely that this article could be applied to production quotas

59 The Superfund case was brought by EC, Canada and Mexico. A 1987 GATT Panel found that tariffs mandated by the US Comprehensive Environmental Response, Compensation, and Liability Act, known as Superfund legislation, was in violation of Art. III:2 of GATT (the non-discriminatory article). The United States charged imported oil at a rate of 11.7% per barrel. On the other hand, it charged domestic oil at a rate of 8.2%. The case is cited briefly in K.K. Sim, 'Rethinking the Mandatory/Discretionary Legislation Distinction in WTO Jurisprudence', 2 *World Trade Rev*. 2003, pp. 33, 49-50. The other oil-related case is *US-Reformulated Gasoline* case of 1996. However, the *Reformulated Gasoline* case was primarily concerned with an environmental measure. For more on this 'environmental' case *see* E.B. Weiss & J.H. Jackson (Eds.), *Reconciling Environment and Trade*, Transnational Publishers, New York, 2001, pp. 163-292.

60 Oil trade includes here crude oil, oil derivatives and oil country tubular goods, such as tubes and drill pipes, that are used in the oil and gas industry.

61 The US Department of Commerce denied the petition on the ground that there was no sufficient support from the domestic industry to initiate an investigation since opposition from US producers exceeded support. On appeal, the CIT and Court of Appeals for the Federal Circuit affirmed the decision of the Commerce Department. *See Save Domestic Oil, Inc. v. United States*, 240 F. Supp. 2d 1342 (Ct. Int'l Trade 2002) (stating that this was the first case in which the Commerce Department had rejected a petition at the filing petition level). *See also Save Domestic Oil v. Commerce Department*, 357 F.3d 1278, 1284 (C. A Fed. 2004). (The Commerce Department does not have a standard practice applicable to all industries of disregarding the opposition of domestic importer-producers with import levels beyond a certain percentage. There is an industry-specific analysis.) One may speculate that the Commerce Department rejected the dumping petition because imposing an anti-dumping order would lead to political backlash from oil-producing countries as well as to an increase in the price that US consumers would pay at the pump.

62 Art. XI of GATT states that no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale. *See* General Agreement on Tariffs and Trade, *supra* n. 41, at Art. IX for export of any product destined for the territory of any other contracting party.

since there is no mention of the word 'production'.[63] Moreover, the term 'production' is distinct from 'exportation'.[64] On the other hand, if a WTO Panel would interpret the language of Article XI broadly, OPEC production quotas could be prohibited.

Few cases relating to export restrictions were brought before the GATT. There were two major disputes concerning export restrictions within the framework of GATT, namely the *Japan – Semiconductors and the Canada – Salmon* cases.[65] In those two cases, the defendants were found to be violating GATT XI.

The GATT Panel in Japan-Trade in Semiconductors gave Article XI a broad interpretation.[66] In that case, the European Economic Community (EEC) claimed that the Japanese government's requests to industry to refrain from exporting semiconductors covered by the 1986 United States–Japan Arrangement Concerning Trade in Semi-Conductor Products at prices below company-specific costs, and delays in issuing export licenses that resulted from the monitoring of costs and export prices, were inconsistent with the provisions of GATT Article XI as they implied price controls with quantitative effects on exports.[67] On the other hand, Japan maintained that it was merely monitoring costs and export prices, and its 'administrative guidance' was not legally binding – as it was just a voluntary guideline for the manufacturers and traders of semiconductors.[68] Thus, the Arrangement did not constitute a 'restriction' within the meaning of Article XI, and thus Article XI was inapplicable. Third parties to the case, such as Australia, Hong Kong and Singapore, complained that the measures in question had led to an increase in the prices of semiconductors and caused difficulties in sourcing for their domestic downstream industries relying on imports from Japan.

The Panel in that case concluded that the administration structure that the Japanese government had created was such that without being legally binding in form, it exerted various forms of pressure on the private sector to eliminate the sale of selected semiconductors below company-specific prices, which substantially restricted their exports, hence violating Article XI.[69]

The Panel found that Article XI applies to 'all measures' instituted or maintained by a contracting party prohibiting or restricting the importation, exporta-

63 In general, WTO Panels and the Appellate Body use the Vienna Convention approach in interpreting agreements. Art. 31 of the Vienna Convention provides that an agreement must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the agreement. *See* 1969 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679.

64 An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. *See* Japan-Taxes on Alcoholic Beverages, adopted 4 October 1996, WTO Doc. No. WT/DS8/AB/R, at 12.

65 *See* A. Porges *et al.*, *GATT Analytical Index: Guide to GATT Law and Practice*, 6th ed., World Trade Organization, Geneva, 1995, pp. 315-318 (citing the GATT Panel report on Japan – Trade in Semiconductors). *See* GATT Dispute Settlement Report, Canada – Measures Affecting Exports of Unprocessed Herring and Salmon (Canada – Salmon), adopted 22 March 1988, L/6268 – 35S/98.

66 *See* GATT Analytical Index, *supra* n. 65.

67 *Id*. at 316.

68 *Id*. at 317.

69 *Id*. at 318.

tion or sale for export of products.[70] Thus, the Panel in Japan-Trade in Semiconductors protected free trade, the fundamental objective of GATT.[71]

The second major case was *Canada – Salmon*. In that case, the disputed regulation was part of Canada's fishery legislation stating, "No person shall export from Canada any sockeye or pink salmon unless it is canned, salted, smoked, dried, pickled or frozen".[72] The complainant, the United States, claimed that this was a clear violation of Article XI. The United States alleged that the disguised objective of the measure in question was to promote the downstream processor sectors in Canada, at the expense of the processors in neighbouring areas in the US territory. However, Canada claimed that the measures under dispute were part of its fisheries conservation and management regime and hence justified under Article XX(g), which allows for restrictive measures if they are 'relating to' the conservation of exhaustible natural resources. In addition, Canada argued that its regulation was also consistent with Article XI:2(b), permitting export prohibitions "necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade".[73] It claimed that these measures had been necessary to maintain Canada's reputation for safe, high-quality fish products.

In that case, the GATT Panel first examined whether the Canadian regulation under review could be considered as an exception as defined by Article XI:2(b), given Canada's defence that it aimed at preserving certain quality standards. The Panel found that Canada prohibited the exports of these particular fish varieties in unprocessed form even if they could meet the standards generally applied to fish exported from Canada.[74] Thus, the Panel came to the conclusion that these export prohibitions could not be considered as an exception 'necessary' for the classification, grading or marketing of commodities as defined by Article XI:2(b). Then, the Panel turned to an assessment of whether these measures could be justified by Article XX(g). It first examined the meaning of the terms 'relating to' and 'in conjunction with' as stated in Article XX(g). Its interpretation was that for a trade measure to be considered as 'relating to', it had to be primarily aimed at

70 *Id*. The Panel ruled that Art. XI, unlike other provisions of the GATT, did not refer to laws or regulations, but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party that restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure. Moreover, the Panel stated that an array of administrative actions and requirements, which constituted a coherent system restricting the sale for export of monitored semiconductors at prices below company-specific costs, violated Art. XI.

71 Similar to the GATT Panel in Japan-Trade in Semiconductors, the EC Court of Justice analyses international treaties in light of 'the object and purpose' and 'its context' with its precise and unconditional nature. *See Case 104/81, Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.*, [1982] ECR I-3641, 3665, para. 23 (this case involves a German company which alleged that the charge relating to the rate of alcohol for imported port wine from Portugal was higher than that applicable to domestic wine, in violation of the non-discrimination provision of the EC-Portugal FTA).

72 *See* GATT Dispute Settlement Report, Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, *supra* n. 65, at para. 3.9.

73 *Id*. para. 3.4.

74 *Id*. para 4.2.

conservation of exhaustible resources.[75] It also stated that a trade measure could only be considered to be 'in conjunction with' production or consumption restrictions if it was primarily aimed at rendering these restrictions effective.

The Panel then examined whether the Canadian regulation could satisfy these criteria. It found that, affirming the US argument, the Canadian fishery regulation, which restricted domestic production (*i.e.* harvesting), covered other fish varieties that were not subject to export prohibitions. In addition, the export prohibitions applied only to supplies in unprocessed form and did not cover exports of the same varieties in general. The Panel also found that these measures restricted purchases of these commodities only by foreign processors and consumers and not those made by domestic processors and consumers. Hence, the Panel concluded, "these prohibitions could not be deemed to be primarily aimed at the conservation of salmon and herring stocks and at rendering effective the restrictions on the harvesting of these fish". In summation, the Panel determined that the export prohibitions imposed by Canada violated Article XI and could not be justified under Article XX(g).

A parallel between Canada–Salmon and OPEC production control measures can be drawn. OPEC countries appear to be in an analogous position to Canada or the United States in the GATT case. The moment OPEC countries produce the crude oil and ban its exportation, or make exportation conditional on any further processing within the countries, they would be in breach of their WTO obligations. To the extent OPEC countries restrict production, their acts remain outside the scope of the WTO system. In other words, WTO law comes into play only after oil has passed through a production process and has been converted into a product ready for exchange and trade.

As for the WTO dispute settlement, the case law on export restrictions is rather limited. In 1999, the EC complained about measures taken by Argentina on the export of bovine hides.[76] The EC alleged that Argentina had imposed a *de facto* export prohibition on raw and semi-tanned bovine hides that allegedly violated GATT Article XI:1. The EC argued that Argentina had a long track record of export restrictions on these commodities, going back to the early 1970s, aiming at supporting the downstream processing industries. In fact, Argentina had consistently imposed export duties of up to 30% on raw bovine hides, which were then being slowly phased out. However, the EC did not challenge the existence of export restrictions in the form of export duties as such. But it disputed other measures such as the Argentinean regulation allowing for the representatives of the processing industry to be part of customs control on raw material – which, the EC alleged, constituted a *de facto* restriction. It claimed that this practice might discourage exporters of raw material by delaying customs procedures. The Panel investigated whether these 'extra' measures were in breach of Article XI:1.[77]

75 *Id*. para. 4.6.

76 *See* WTO Panel Report, Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Argentina – Hides and Leather), adopted 19 December 2000, WT/DS155/R.

77 *Id*. para. 11.50.

It concluded that the EC had not been able to offer satisfactory evidence to illustrate how the Argentinean regulation in question would violate Article XI.[78] It decided that the mere presence of the representatives of the downstream sector in customs control, by itself, would not constitute an export restriction within the meaning of Article XI:1.

The most recent case of export restrictions is *China – Raw Materials*, a highly relevant case in the context of OPEC restrictions. In 2009, the WTO Dispute Settlement Body established a panel to examine complaints by the United States, the European Union (EU) and Mexico concerning China's export restrictions on selected minerals widely used as key inputs in the steel, aluminium and chemicals industries.[79] The complainants alleged that China's policies regarding the quantitative restrictions on exportation of these commodities were inconsistent with its obligations under GATT Article XI. China, for its part, said the restrictions were justified because they were necessary to protect the environment. In particular, China argued that the export restrictions were justified under Article XX(b) and (g) of GATT as an exemption from global trade rules on the grounds that the restrictions were needed to protect human health and preserve exhaustible natural resources.[80] The WTO Panel – which made its ruling public on 5 July 2011 – found that China violated global trade rules by imposing export restrictions on these minerals.[81] The Panel's ruling in the *China – Raw Materials* case has potential significance beyond the raw materials at issue in that dispute, possibly setting the legal basis for a future challenge against restrictions on many other products, including oil.

78 *Id*. para. 11.55.

79 The minerals in question were bauxite, coke, fluorspar, magnesium, manganese, phosphate, silicon and zinc. *See* WTO Dispute Settlement, *China – Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)*, adopted 2009, DS394, 395, 398.

80 The WTO Appellate Body explicitly clarified during the recent *China – Publications and Audiovisual Products* case, there is no doubt that China may invoke GATT Art. XX to excuse itself from its commitments under its Accession Protocol. The Panel, in this case, did look at whether China's measures in question could be justified under GATT Art. XX(b). Since it concluded that the measures did not qualify for an exception satisfying the requirements of GATT Art. XX, the Panel decided that it was not necessary for it to determine whether China has the right to invoke GATT Art. XX in cases of inconsistency with its Accession Protocol. However the Appellate Body decided to clarify this ambiguity and concluded that China's right to invoke GATT Art. XX also covers its commitments under its Accession Protocol. *See* WTO Appellate Body Report, China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products), adopted 21 December 2009, para. 415.

81 *See* D. Pruzin, 'WTO Final Ruling Rejects China Limits on Exports of Variety of Raw Materials', 28 *Int'l Trade Rep.* (BNA) 2011 (7 July), p. 1133 (the Panel backed key claims made by the United States, the EU and Mexico against the Chinese restrictions in the form of export duties, export quotas and other restrictions. The Panel also rejected Chinese claims that restrictions on some of the raw materials at issue could be justified as exceptions from WTO rules on the grounds that they are necessary to protect human health and conserve exhaustible natural resources as China failed to provide sufficient evidence to show that the restrictions served these policy purposes. According to the Panel, export restrictions are not an efficient policy to address environmental externalities when these derive from domestic production rather than exports or imports).

Through production quotas, OPEC countries steer and limit the supply of oil on world markets. These production quotas have the same effects as export restrictions. However, the export effect of a production restriction is only incidental to the actual and intended effect that the oil is not yet produced. OPEC countries do not use government-mandated export restrictions, but rather production quotas. There is a substantive distinction between export restrictions, which are prohibited in GATT Article XI, and production restrictions implemented by OPEC.

F. Available Defences for OPEC Against WTO Action

A WTO Panel may find, on an *arguendo* basis, that OPEC production quotas violate GATT Article XI. At the outset, OPEC can claim that restrictions on production are not inconsistent with the WTO because oil does not become subject to the disciplines of the WTO until it has been extracted and produced. In other words, oil in its natural state may not be covered by the GATT.[82] Oil not yet extracted from its natural state, refined and traded does not qualify as a product or good.[83] However, for the reasons seen earlier, the term 'goods' applies to oil in its natural state and as traded oil. Therefore, oil is covered by the obligations contained in the GATT and the other WTO agreements relating to trade in goods. Even assuming that oil falls under the ambit of GATT, Article XI does not provide the basis for any WTO member to force OPEC countries to increase their oil production quotas.[84] Finding by the WTO to the contrary means that any measure taken by a country that prevents an industry from producing at maximum capacity may constitute an export restriction.

OPEC countries may counter-argue that they export oil to the international market in which the sales transactions occur, which is then are delivered to 'other contracting parties'. In essence, OPEC countries do not know for sure who is buying the oil. Literally speaking, OPEC countries export oil to 'any other contracting party' as defined in the context of the WTO. Furthermore, there are three excep-

82 Since the GATT came into existence in 1947, there has been an informal understanding among contracting parties not to subject oil to multilateral tariff concessions negotiations. Some of the theoretical reasons for the apparent ambivalent attitude of the contemporary international trade regime to oil trade include the definition of energy as a good or service, which in itself is not without controversy, location of energy at the heart of government economic thinking and oil as a vital national asset not to be left to free international trade trajectories. *See* F.N. Botchway, 'International Trade Regime and Energy Trade', 28 *Syracuse J. Int'l. L. & Com.*, 2001, pp. 1, 11, 12.

83 Similar to the case of oil in its natural state, the International Joint Commission observed that Canadian freshwater in its natural state is not included within the scope of any trade agreement including GATT/WTO. Trade agreements do not create rights to natural water resources and that unless water, in any form, has entered into commerce and has become a product, it is not covered by any trade agreement. *See* Int'l Joint Comm'n, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States*, 2000, p. 67, available at <www.ijc.org/php/publications/html/finalreport.html>, last accessed 3 July 2011.

84 *See* G.G. Yerkey, 'USTR Opposes Opening WTO Trade Case against OPEC for Restricting Oil Supplies', 21 *Int'l Trade Rep.* (BNA) 2004 (3 June), p. 954 (citing then-US Trade Representative R.B. Zoellick as having said that WTO rules do not compel people to sell things).

tions that could potentially be invoked by OPEC countries if faced with such a scenario. More specifically, OPEC members may invoke GATT Article XX (general exceptions), Article XXI (national security) and Article XXXVIII (cooperative and intergovernmental arrangements). The following subsections will examine these exceptions that may allow OPEC's quantitative restrictions.

I. Article XX Defence

Article XX general exceptions allow countries to impose otherwise WTO-inconsistent measures that fulfil enumerated public policy measures.[85] OPEC countries may attempt to invoke either Article XX(g), which allows inconsistent measures with respect to exhaustible natural resources, or Article XX(h), which allows for WTO-inconsistent measures where there is an intergovernmental commodities agreement. In several cases, the WTO Appellate Body adopted an analytical procedure under Article XX that first examines whether a measure can be provisionally justified under paragraph XX(g) or XX(h) and then considers whether it satisfies Article XX introductory proviso, known as the chapeau.[86]

The exception of Article XX(g) allows a member to adopt a trade measure relating to the conservation of exhaustible natural resources if such a measure is made effective in conjunction with restrictions on domestic production or consumption. Under Article XX(g), the measure must 'relate to' the conservation of exhaustible natural resources. The phrase 'relating to' was interpreted as exempting a broader range of measures.[87] The WTO Appellate Body's interpretation of the 'relating to' facet of Article XX(g) is less strict than the GATT jurisprudence requiring the measures in question to be 'primarily aimed at' rendering effective the restrictions on domestic production or consumption.[88] This interpretation broadens the scope of Article XX(g) exception. Nevertheless, OPEC countries still have to establish that their production restrictions are reasonably related to the policy goal of conservation of exhaustible natural resources.

85 Art. XX is divided into a general introductory clause (preamble) and subsequent provisions that constitute the circumstances under which exceptions to GATT obligations are justified. *See* B.L. Bowen, 'World Trade Organization and Its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade', 29 *Ga. J. Int'l & Comp. L.* 2000, p. 181.

86 Art. XX introductory proviso provides that a trade measure must not be applied in an arbitrary and discriminatory manner with respect to countries where the same conditions prevail and that it does not constitute a disguised restriction on international trade. *See* Appellate Body, United States – Standards for Reformulated and Conventional Gasoline, Appellate Body Report, adopted 29 April 1996, WT/DS2/AB/R. *See also* Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, adopted 12 October 1998, WT/DS58/AB/R.

87 *See* US – Standards for Reformulated and Conventional Gasoline, *supra* n. 86. *See also* Panel Report, Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, adopted 20 November 1987, 35/S/98, para. 4.6 (some of the sub-paragraphs of Art. XX such as (a), (b) and (d) state that the measure must be 'necessary' or 'essential' to the achievement of the policy purpose set out in the provision while subparagraph (g) refers only to measures 'relating to' the conservation of exhaustible natural resources. Art. XX(g) covers not only measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures).

88 *See* GATT Dispute Settlement Report, Canada – Measures Affecting Exports of Unprocessed Herring and Salmon, *supra* n. 65.

The phrase 'exhaustible natural resources' has been consistently interpreted as applying to both living and non-living resources.[89] For example, measures aimed at saving clean air, the life of sea turtles or oil fit within Article XX(g). Also, the way Article XX(g) has been drafted may indicate that it applies to the conservation of internal exhaustible natural resources that are situated inside the territory of the country applying the trade measure.[90] A country can control the production of a resource to the extent that it falls under its jurisdiction. Production quotas by OPEC countries are designed, in part, to prevent shortages of oil essential to the exporting country.[91] Therefore, OPEC's production quotas on oil, an exhaustible natural resource, can be justified under Article XX(g).

Production quotas by OPEC countries must satisfy the remaining requirement of GATT Article XX(g) – the even-handedness requirement – that such measures are made effective in conjunction with restrictions on domestic production or consumption. OPEC may have difficulty in demonstrating that its restrictions applied 'in conjunction' with restrictions on domestic production or consumption. However, OPEC countries seem to impose restrictions, not in respect of the exports of oil and consumption, but in respect of domestic production. Article XX(g) refers to production 'or' consumption restrictions. Thus, OPEC countries meet the requirement of Article XX(g) when it applies production restriction, rather than consumption restriction, because this restriction is one of the two choices available.

GATT Article XX(h) exempts measures undertaken in pursuance of obligations under any intergovernmental commodity agreement.[92] To benefit from this exception, the intergovernmental commodity agreement must conform to the criteria submitted to WTO members and not disapproved by them or which is itself so submitted and not so disapproved. Until now, OPEC agreement has not been submitted to the WTO for approval.[93] If challenged, OPEC can request approval by WTO members. However, for an intergovernmental commodity agreement to qualify for Article XX(h) exception, such an agreement must include all interested countries.[94] In other words, an intergovernmental commodity agreement must be

89 *See* Appellate Body, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, adopted 12 March 2001, WT/DS135/AB/R.

90 The negotiating history of Art. XX(g) appears to confirm the view that national and international issues can be addressed under this article. The US Draft Charter version of XX(g) included reference to measures taken pursuant to international agreements. The absence of this reference in the current version of Art. XX(g) may indicate the intention that Art. XX(g) would cover not only measures taken pursuant to international problems but also internal measures. *See* Reuvid, *supra* n. 38.

91 *See* 'Tackling the Oil Curse', *The Economist*, 25 September 2004, p. 16 (oil-producing nations by managing their oil resources recognizes that oil is a non-renewable source of income that should not be consumed by one generation alone).

92 *See* General Agreement on Tariffs and Trade, *supra* n. 41, at Art. XX(h).

93 No intergovernmental commodity agreement has ever been formally submitted to the GATT/WTO for approval under Art. XX(h). *See* GATT Analytical Index, *supra* n. 65, at p. 591.

94 *See* Panel Report, EEC – Import Regime for Bananas, adopted 11 February 1994, DS38/R, at 165-166 (finding that Art. XX(h) could not justify the inconsistency of the European Economic Community's preferences system for bananas).

open to both exporters and importers of a commodity. In the case of OPEC, it does not include importing countries.[95] OPEC may not qualify as an intergovernmental commodity agreement. However, the Doha Draft Modalities for Agriculture states that the general exceptions provisions of Article XX(h) of GATT 1994 shall also apply to agreements to which only commodity-dependent producing countries are parties.[96] Thus, OPEC could fall under the ambit of Article XX(h) exception.

For the next step of examination whether restrictions by OPEC countries would satisfy the chapeau of Article XX (*i.e.* that they are not a disguised restriction on international trade), the measures have to pass the first tier of the analysis (*i.e.* 'relating to' and the 'even-handedness requirement').[97] The chapeau provides that the measure must not be 'applied' in an arbitrary and discriminatory manner with respect to countries where the same conditions prevail and that it does not constitute a disguised restriction on international trade. The WTO Appellate Body in Brazil-Tyres recently explained that applying the chapeau requires an application of the principle of *abus de droit*. This principle prohibits the abusive exercise of a member's rights and dictates that whenever the assertion of a right impinges on the field covered by a treaty obligation, it must be exercised bona fide, that is to say, reasonably.[98] The task before the Panel or Appellate Body reviewing an Article XX exception is to balance the costs and benefits of a measure in equilibrium between the member acting under an exception and the members to whom an obligation has been impaired.

Substantively, the Appellate Body performs such balancing via application of a two-pronged test. First, the invocation of an exception should not result in arbitrary or unjustifiable discrimination between countries where the same conditions prevail.[99] Second, the measure enacted to achieve the end of the country, as justified by an Article XX exception, should not constitute "a disguised restriction

95 Only countries with net exports of petroleum may be full members or associate members of OPEC. *See* OPEC Statute, *supra* n. 15, at Chapter II, Art. 7.

96 *See* WTO Committee on Agriculture, Revised Draft Modalities for Agriculture, adopted 6 December 2008, WTO Doc. No. TN/AG/W/4/Rev.4, paras. 95, 100.

97 *See* Appellate Body, United States – Standards for Reformulated and Conventional Gasoline and Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, *supra* n. 86.

98 *See* Appellate Body Report, Brazil – Measures Affecting Imports of Retreaded Tyres, adopted 3 December 2007, 224, WT/DS332/AB/R.

99 The difficulty in applying this prong of the chapeau is in determining the sort of discrimination upon which to focus. If the Panel or Appellate Body is evaluating chapeau compliance, there must have already been a GATT obligation that was breached. A difficulty also emerges almost immediately when applying the first prong. What is the difference between arbitrary and unjustifiable? If there is a difference, is that difference meaningful? The Appellate Body, when applying the first prong, does not always diligently separate instances of discrimination that are arbitrary from those that are unjustifiable and vice versa. *See* B. Sharp, 'Responding Internationally to a Resource Crisis: Interpreting the GATT Article XX(J) Short Supply Exception', 15 *Drake J. Agric. L.* 2010, pp. 259, 282.

on international trade".[100] An affirmative response to either of these fails to satisfy the chapeau.

Article XX chapeau is concerned with the manner of application of the specific measure, as opposed to the measure itself which varies depending on the facts of the case. The effect of Article XX chapeau to be prevented is the abuse of the exceptions enumerated in the subsequent paragraphs. Article XX chapeau is also a more general standard since the basis for determining whether discrimination exists under Article XX is the same 'conditions' prevailing in the countries involved, a term that can cover not only products, but potentially any other factor that can affect the production of goods.[101]

With regard to the discrimination reference in Article XX, decisions of OPEC concerning oil production are not intended to treat consuming WTO members differently. Once produced, oil is equally available to all consuming countries at the prevailing market price. Also, OPEC countries could satisfy the requirement that the measures do not constitute a 'disguised' restriction on international trade. Hence, OPEC's measures do not constitute means of arbitrary or unjustifiable discrimination among countries where the same conditions prevail and do not form a disguised restriction on international trade.

II. Article XXI Defence

Article XXI of GATT contains security clauses that allow exceptions to its rules in those circumstances that present a threat to important interests of a certain country.[102] In particular, OPEC countries can rely, in making their case, on Article XXI(b) of GATT, which concerns protection of a country's essential security interests that it considers so in times of war or emergency in international relations. OPEC countries are heavily dependent on oil revenues, and falling oil prices

100 The key analysis in this step of the scrutiny focuses on whether a restriction is disguised. The Appellate Body notes that the offending member must have intended to conceal a trade-restrictive objective with what appears to be a reasonably exceptional measure. In order to determine the intent behind the measure's enactment, the design, architecture and revealing structure of a measure is considered. *Id*. *See also* Panel Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, adopted 18 September 2000, para. 8.236, WT/DS135/R.

101 In its decisions, the Appellate Body has not focused on the meaning of 'the same conditions'. *See* Appellate Body, United States – Standards for Reformulated and Conventional Gasoline and Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, *supra* n. 86.

102 Art. XXI recognizes that no contracting party is
(a) required to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(b) prevented from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; or
(iii) taken in time of war or other emergency in international relations. *See* General Agreement on Tariffs and Trade, *supra* n. 41, Art. XXI.

threaten their economic development interests. OPEC countries may restrict the exports of exhaustible natural resources, such as oil, which may help prevent or slow down resource depletion if this product is intensively produced. Countries may want to prevent or slow down the depletion of their natural resources, or may simply choose to keep them for the benefit of future generations.

In a 1975 GATT case, Sweden introduced the import quota system to protect its footwear industry, arguing that the maintenance of a minimum domestic production capability in vital industries was an integral part of the country's security policy.[103] Thus, economic interests could amount to the level of security interests and emergency in international relations. OPEC countries can employ the same argument advanced by Sweden.

The OPEC line of argument is viable because the national security exception is self-judging in nature. The use of the word 'it' in Article XXI(b) clearly states that it is for every country to judge what is related to its own essential security interests.[104] The self-judging language means that OPEC countries acting to promote their national interests determine what measures are necessary to achieve those ends.[105] As a result, OPEC countries are entitled to make the determination of whether production quotas are necessary for the promotion of their national interests.

The national security exception has rarely been used in arguing for economic interests. The security exception has mainly been used in the context of trade sanctions with the aim of accomplishing specific political goals or bringing pres-

103 Sweden claimed that maintaining minimum domestic production capacity is indispensable in order to secure the provision of essential products to meet basic needs in case of war or other emergency in international relations. *See* GATT Analytical Index, *supra* n. 65, at p. 603.

104 All legal analysis in the WTO begins with the text of the WTO agreements. The WTO Appellate Body stated, "The proper interpretation of WTO rules is, first of all, a textual interpretation". In other words, the WTO Appellate Body adopts the textual approach. *See* Appellate Body, Japan – Taxes on Alcoholic Beverages, adopted 1 November 1996, AB-1996-2, WT/DS1/AB/R, WT/DS10/AB/R/, WT/DS22/AB/4, at 19. Other international tribunals have considered the interpretation of the 'it considers' clause. The International Court of Justice interpreted this clause when it examined treaty language that allowed a national security exception to certain treaty obligations. In 1986, the International Court of Justice considered claims brought by Nicaragua against the United States for violations of a 1956 treaty. The treaty permitted either signatory to take action 'necessary to protect its essential security interests'. The International Court of Justice decided that this clause did not preclude it from evaluating United States' attempts to invoke the national security exception to the treaty. It noted that, unlike GATT Art. XXI, the 1956 treaty mandated an objective standard of review (the national security measure must be 'necessary'), instead of the subjective standard implied by the GATT (the country may take measures 'it considers necessary'). *See Military and Paramilitary Activities (Nicaragua v. United States)*, 27 June 1986, 1986 ICJ 14, at 116-117 (considering alleged violations of the Treaty of Friendship, Commerce and Navigation of 1956).

105 One precedent exists involving Nicaragua's complaint against the US embargo where by the GATT Panel decided that the Panel is not permitted to consider or decide the validity of the assertion of a national security defence. *See* GATT Panel Report, United States – Trade Measures Affecting Nicaragua, unadopted 13 October 1986, GATT Doc. L/6053.

sure to bear on a rival nation.[106] Therefore, the success of OPEC's argument regarding Article XXI(b) of GATT will depend upon the interpretation of the terms 'it considers', 'emergency in international relations', and 'essential security interests' within that article. The WTO does not define these critical terms. Because the WTO dispute settlement bodies have a more adjudicative role than the previous dispute settlement system, they have more power to interpret substantive law, including these critical terms. Since Article XXI seemingly reinforces its apparent permissiveness, a WTO Panel could interpret the question of 'essential interests' as one of balance: to use a provision for security exceptions in a manner that is neither too tight nor too broad.

III. Article XXXVIII Defence

In addition to Articles XX and XXI defences, OPEC countries can use Article XXXVIII with respect to trade in basic commodities for developing countries. Article XXXVIII can serve as an exception to other GATT obligations regarding OPEC's production quotas.[107] A WTO precedent exists whereby a member country cited Article XXXVIII. The Panel in that precedent allowed measures of developing countries according to commodity agreement.[108] Accordingly, developing countries can act in a manner that facilitates their economic development purposes.

The goal of GATT Article XXXVIII is to foster international arrangements that create more favourable trade terms for developing countries that are producers of primary products. OPEC is an intergovernmental commodity agreement designed to ensure more favourable markets for oil through stabilizing world oil prices. Therefore, given that OPEC consists solely of developing countries and that OPEC is designed to promote its members' economic development, OPEC could invoke Article XXXVIII defence.

106 *See* GATT Analytical Index, *supra* n. 65, at 603-606 (citing Ghana's boycott of Portuguese products, trade restrictions by the EEC and Canada on imports from Argentina, the US embargo against Nicaragua, the Arab League's boycott of Israel, the US prohibition on imports of Nicaraguan products, the EC trade measures against Yugoslavia, and the US embargo on trade with Cuba). There is a lot of literature on the use of national security exception in the context of trade sanctions. *See* D. Akande & S. Williams, 'International Adjudication on National Security Issues: What Role for the WTO?' 43 *Va. J. Int'l L.* 2003, pp. 365, 379-381. *See also* E.J. Lobsinger, 'Diminishing Borders in Trade and Terrorism: An Examination of Regional Applicability of GATT Article XXI National Security Trade Sanctions', 13 *ILSA J. Int'l & Comp. L.* 2006, pp. 99, 104-111.

107 Art. XXXVIII provides that WTO members can take action, including through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures to stabilize and improve conditions of world markets in these products, including measures designed to attain stable, equitable and remunerative prices for exports of such products. *See* General Agreement on Tariffs and Trade, *supra* n. 41, Art. XXXVIII.

108 In 1980, Brazil challenged the European Communities' sugar subsidy system arguing that by maintaining sugar subsidies and refusing to participate in the International Sugar Agreement of 1977, the European Communities acted inconsistently with Art. XXXVIII. In that case, the Panel noted that Brazil being a developing country could expect to enjoy benefits according with Art. XXXVIII. *See* GATT Analytical Index, *supra* n. 65, at p. 1070.

G. Conclusion

Efforts to bring OPEC before courts in the United States have failed because OPEC is made up of sovereign nations. Alternatively, the United States could challenge OPEC countries under the WTO. Until now, OPEC has escaped the scrutiny of the multilateral trading system. However, there has been a renewed interest in the United States to challenge the actions of OPEC countries through the WTO dispute settlement mechanism.

The United States may charge OPEC countries by relying on Article XI of GATT, which eliminates quantitative restrictions on exports. However, Article XI has its own limitations. For example, Article XI does not refer to 'production' quotas anywhere in its text. Rather, Article XI refers to 'export' quotas. Even assuming that a WTO Panel finds that OPEC production quotas violate GATT Article XI, OPEC countries can resort to several exceptions.

Article XX(g) of GATT allows a member to adopt a trade measure relating to the conservation of exhaustible natural resources if such a measure is made effective in conjunction with restrictions on domestic production or consumption. Production quotas by OPEC countries are designed, in part, to prevent shortages of oil essential to the exporting country. OPEC's production quotas are also coupled with domestic production restrictions. Moreover, OPEC may rely on GATT Article XX(h), which exempts measures undertaken in pursuance of obligations under any intergovernmental commodity agreement. However, reliance on Article XX(h) can be weak because an intergovernmental commodity agreement must be open to both exporters and importers of a commodity. In the case of OPEC, it does not include importing countries. To satisfy Article XX chapeau, OPEC production quotas are not discriminatory or 'disguised' restriction on international trade.

OPEC countries can rely also on Article XXI(b), which concerns protection of a country's essential security interests that it considers so in times of war or emergency in international relations. OPEC countries are heavily dependent on oil revenues, and falling oil prices threaten their economic development interests. It is for every country to judge what is related to its own essential security interests. The text of GATT Article XXI can be characterized as broadly and vaguely worded. There is no consensus as to the authoritative legal interpretation of some terms in Article XXI.

In addition to Articles XX and XXI defences, OPEC countries can resort to Article XXXVIII with respect to trade in basic commodities for developing countries. OPEC is an intergovernmental commodity agreement designed to ensure more favorable markets for oil through stabilizing world oil prices. Given that OPEC consists solely of developing countries and that it is designed to promote its members' economic development, OPEC could invoke the Article XXXVIII defence.

The review of the GATT/WTO cases on export restrictions shows that the majority of the disputes involved alleged unfair advantages that the measures created for domestic producers and processors of the country instituting them, at the expense of the complainant countries. For the defendants, economic and

political objectives seem to have been the primary motivation. For the complainants, the primary motivation was the objective of obtaining greater access to natural resources, *e.g.* oil. As such, the dispute between the United States and OPEC countries could be seen as another example of competition over resources. As the world economy recovers from the current slowdown and when the international competition over natural resources picks up again, it is highly likely that there will be more disputes over quantitative restrictions coming before the WTO.

Oil revenue represents the primary source of income for OPEC countries, and thus it is crucial to the economies of these countries. Because the market prices do not reflect the social cost of scarcity, simply exposing oil – an exhaustible resource – to the growing demand of global markets in the face of increasing population, intensifying demand from developed and developing countries, and rising disposable incomes resulting in changes in consumption patterns might irreversibly damage the sustainable use of this resource and limit the ability of future generations to benefit from it.

Looking beyond the pure economics of the matter, however, the relevance of restrictions in the context of environmental protection is crucial. In the *Canada – Salmon* case, environment-related exceptions under GATT Article XX were not found to be applicable. Such an outcome is highly likely for the *United States – OPEC* case too. This is mainly because the environmental component or objective of the measures in question was relatively weak compared with their economic objective with a restrictive impact on trade. However, this does not refute the fact that such measures could have substantially contributed if the genuine objective was environmental protection. A carefully measured quantitative restriction policy in conjunction with other domestic measures limiting production and consumption could well help protect the environment and slow down the depletion of exhaustible resources, such as oil.

If a WTO case is filed, it would be the first WTO case on the producer/supplier side. The use of the WTO dispute settlement against OPEC countries could have significant ramifications on international relations, especially in the relationship between the United States and Saudi Arabia. Issues of sovereignty and foreign policy will be impacted by a WTO case. The legality of OPEC in international trade law should not be examined by an international *quasi*-judicial body. WTO law and jurisprudence may have little to offer to import-dependent countries. Thus, consultation and cooperation between producing and consuming countries would better serve their interests and enhance global economic prosperity.