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The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements

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I. BACKGROUND

The Organization of Petroleum Exporting Countries (OPEC) and the World Trade Organization (WTO) are two of the most visible international economic institutions. But, they are often associated with two diametrically opposed players in the global economy: the WTO with the sometimes savage rules of the market and OPEC with the often demonized intergovernmental manipulation of prices. Many believe that OPEC and the WTO do not have anything in common, arguing that OPEC's domain of oil[1] resource management does not have anything to do with the WTO. Indeed, every time oil succeeds in occupying the news headlines, often because of a price hike or collapse and consequent concerted governmental intervention in the name of correcting market failures, while OPEC comes in as the embodiment of that concerted governmental intervention against market forces, the WTO is nowhere to be seen in its professed role as the guardian of those same forces. This raises the important question of whether or not the WTO has any role in the petroleum sector.

Petroleum is the largest primary commodity of international trade in terms of both volume and value.[2] There is also the obvious national security element involved in it for both producing/exporting and consuming/importing countries. The political stability and economic survival of both groups of countries—and hence of the entire international community—depends to a large extent on the availability and affordability of oil in the international marketplace. It is widely believed that high oil prices were responsible for several global economic recessions

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[1] Although, technically, the term "petroleum" covers both oil and gas, in this article the terms "oil" and "petroleum" are used interchangeably.

[2] Data for 2000 show that fuel exports were worth $631 billion, accounting for 10.2 percent of world merchandise exports, while agricultural exports followed in second place with a value of $558 billion, and accounting for 9 percent of world merchandise exports. See WTO, *International Trade Statistics 2001* (Geneva: WTO, 2001), p. 95. A 1988 GATT study observed that petroleum was "the single most important commodity, both in value and volume terms, traded internationally, accounting for nearly a third of world seaborne trade". See GATT doc. MTN.GNG/NG3/W/16, para. 21.

in history.[3] Consequently, given OPEC's pivotal role as the forum for the negotiation and regulation of petroleum supplies—and ultimately of prices—and the role of the WTO as the foremost forum of negotiations and regulation of trade in virtually all tradable items at large, there is ample room for a series of complex issues of international law and policy to arise, such as: does the WTO have any role to play in the petroleum sector? can the WTO co-exist with OPEC? can one and the same country satisfy the membership requirements of both organizations at the same time? what is the reaction of oil-consuming developed countries to OPEC's behaviour?, etc. This article inquires into these questions and sheds some light on the issue of whether the multilateral trading system has any room to accommodate OPEC as an organization, and to analyse the interface between these two organizations in the existing international economic order and their respective roles over the petroleum industry.

To this end, section II starts with a general introduction into OPEC and the WTO as international economic organizations, including their philosophical foundations, goals, means, modes of operation, and historical relations. Section III addresses the question of whether—and how far—petroleum products are covered by the WTO and considers the various factors which contribute to the ineffectiveness of the multilateral trading system in this sector and highlights the recent trends towards the use of regional agreements as a solution for the problem of energy trade. Section IV briefly revisits the cartel question and surveys unilateral attempts made to challenge the legitimacy of OPEC particularly in the United States, the leading WTO Member and the biggest consumer of oil. Section V concludes with a few preliminary suggestions.

II. OPEC and the WTO: General

At first sight, it appears that no two institutions could be further apart from each other than OPEC and the WTO. To start with their very nature, while the WTO is a truly multilateral organization with a membership of about 145 countries (with about 30 negotiating their accession) and open to the accession of any country or customs territory, OPEC is an international organization of just 11 petroleum exporting countries and open to the accession of only those countries "with a substantial net export of crude petroleum, which has fundamentally similar interests to those of Member Countries".[4] From this also flows the fact that while OPEC remains a single-product organization, the WTO is progressively stretching itself into practically every

[3] According to ECOSOC, "… every sharp rise in oil prices since the early 1970s (such as in 1973–1974, 1979–1980 and 1990–1991) that was sustained for a period of 6 to 12 months has triggered a significant slowdown in growth, or even a recession, in many developed economies because of the sudden downward shift in consumer and business sentiment". ECOSOC, *World Economic and Social Survey, 2001*, p. 7. The IMF's "rule of thumb is a rise of $5 a barrel sustained over a year reduces world gross domestic product by 0.25 percent". See *Searching for Oil*, Financial Times, 26 August 2002, p. 14. See also The Economist, 25 November 1999, and 9 March 2000.

[4] Article 7.C of the OPEC Statute. The founding members were five: Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. The current membership includes, in addition to the founders: Algeria, Indonesia, Libya, Nigeria, Qatar, and the United Arab Emirates.

area of cross-border transactions. Having started from goods, the scope of WTO agreements has gone into such new areas as services, intellectual property, and most recently (although still largely at the preparatory stage) even environment, competition, investment, transfer of technology and trade and finance. From this perspective, while the WTO could well be described as a multi-sectoral organization, OPEC could be dubbed simply as a uni-sectoral grouping.

But, even at a deeper level, the similarities between them are largely limited to such relatively less important matters as organizational structure and decision-making procedures.[5] Otherwise, OPEC and the WTO appear to diverge in virtually every respect: the philosophical and policy rationale underlying their existence, the goals they pursue, as well as the means and enforcement mechanisms they adopt to reach them.

A. Philosophical foundations

While the WTO system is—or claims to be—founded on the theory of comparative advantage and the belief that free trade brings net mutual gains for all participating countries,[6] OPEC is the product of the belief that free trade in the petroleum sector only leads to unfettered and wasteful competition among its producers that is destructive to their mutual interests and government control is the only beneficial way of exploiting the sector. The trust placed in the market by the WTO and the mistrust of the same by OPEC thus constitute the most fundamental points of divergence. Indeed, both organizations owe their existence and present identity to this basic philosophy. If oil exporters had full trust in the market, no OPEC would be created from the outset. Likewise, if there had been no trust in the market, however grudging, there would be no need for a trade negotiating forum such as the WTO—or it could have taken a totally different shape.

B. Goals

The goals they pursue also diverge. Interestingly, the degree of divergence here, although certainly significant, appears wider than it actually is, in part due to the difference in the tone with which the two organizations present their goals. The WTO is more subtle in this respect. According to the preamble of the WTO Agreement, its

[5] Like most international organizations, OPEC and the WTO have several organizational features in common. To mention the major features: (1) they have fairly weak Secretariats with a (formal) mandate to give only administrative and analytical support to the decision-making inter-governmental bodies—the Conference in OPEC and the Ministerial Conference in the case of the WTO; and (2) in the area of voting, the one-country-one-vote principle applies in both cases. Moreover, they follow similar decision-making procedures—consensus in the case of the WTO and unanimity in the case of OPEC (see Article 11.C of the OPEC Statute; and Article IX.1 of the WTO Agreement). Note, however, that consensus is only a preferred line at the WTO—failing a consensus, there is a mechanism for decision-making by majority vote. In practice, the WTO, like its predecessor the GATT, still works largely by consensus.

[6] For a discussion of these theoretical foundations in a modern setting, see A. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J.I.E.L. 1 (1998), 57 ff.

goals include contributing to "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services ...".[7] However, OPEC is more blunt in its statement of goals. Article 2 of the OPEC Statute declares that the principal aim of the organization is to safeguard the collective and individual interests of its members and to ensure stabilization of international oil prices.[8]

C. Means

Needless to say, the means adopted by these organizations to reach their goals are also contrasting. The WTO generally promotes competition by discouraging governmental impediments to the free flow of trade across borders through, *inter alia*, the prohibition of trade-distorting subsidies, quantitative restrictions on both imports and exports and the encouragement of reciprocal reduction/elimination of import tariffs. OPEC, on the other hand, discourages competition between its members for market share and, instead, sets (target) prices which are implemented through, *inter alia*, co-ordinated supply control measures. In the pursuit of its price stabilization objectives, OPEC has adopted mainly two devices—direct price setting (between 1973 and 1985) and management of supplies (since 1985).[9] In April 2000, OPEC countries reached a "gentlemen's agreement" to keep oil prices within a target band of $22–28 a barrel.[10] This has resulted in OPEC being taken as a byword for a hydrocarbon "cartel"—a cliché in the field of international energy policy with "pejorative connotations" which led to several attempts, particularly in the United States, to use national legal processes to force OPEC and its Member Countries to abandon their oil price/supply management practices.[11]

D. Enforcement mechanisms

Different enforcement mechanisms are followed by OPEC and the WTO. In OPEC's rather undeveloped enforcement system, implementation of decisions is left to

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[7] See preamble of the WTO Agreement.

[8] See Article 2(b) of the OPEC Statute. In an effort to reconcile the conflicting interests of stakeholders in the industry (producers, consumers and intermediaries), the Statute provides that OPEC would give due regard to (i) the interests of the producing nations and to the necessity to secure a steady income for them; (ii) an efficient, economic and regular supply of petroleum to consuming nations; and (iii) a fair return on their capital to those investing in the petroleum industry. See Article 2(c) of the OPEC Statute. For current challenges and perspectives, see Ali Rodriguez, *The Future of OPEC: New Realities, New Challenges: An open letter*, XLV Middle East Economic Survey 26 (1 July 2002), at <http://www.mees.com/news/a45n26d01.htm>; and Bernard Mommer, *Global Oil and the Nation State* (Oxford: Oxford University Press, 2002).

[9] See Robert Mabro, *OPEC and the Price of Oil* (Oxford: Oxford Institute for Energy Studies, 1992), p. 16.

[10] According to this agreement, "… if the price of a basket of seven OPEC crudes stays below $22 for 20 trading days, … then the cartel will cut production by 500,000 barrels a day. If it stays above $28 for such a period, it will raise production by the same amount". See *The End of Opaque?*, The Economist, 20 April 2000. But this band has "never been implemented seriously". See Robert Mabro, quoted in Financial Times, 2 September 2002, p. 21.

[11] For more on this see section IV below.

the "collective self-interest", the good faith of individual members, and political peer pressure. There is no effective system of monitoring or surveillance; nor is there any system to settle disputes or to penalize offenders. Consequently, OPEC is constantly afflicted with problems common to most commodity-specific agreements: difficulty to determine quotas for individual member countries from the outset, and later the problem of quota cheating.[12] The WTO, on the other hand, is known for its effective enforcement mechanisms. While, like OPEC, good faith remains at the heart of the WTO system, policy surveillance through members' self-notification and the Trade Policy Review Mechanism (TPRM), a strong system of dispute settlement and fear of ultimate retaliation have made it the most effective and influential multilateral institution to date.

E. Historical relations

Finally, the history of relationships between these two institutions, discernible through the relations between their leading members, has been one of mutual distrust if not open hostility. Indeed, their respective proponents have been traditional opponents: OPEC was founded at a Baghdad meeting in 1960 at Iraq's invitation of Iran, Kuwait, Saudi Arabia and Venezuela,[13] while the creation of the GATT/WTO system is essentially credited to the single-handed effort of the US administration, supported by the UK, in the immediate post-war period.[14] Since the early 1970s, the economic and political well-being of the international community have suffered several times from the absence of co-operation between oil exporters (the OPEC countries) and its importers (the major GATT/WTO Members). On many occasions, while some producers have gone as far as using their oil resources as weapons of war,[15] oil-importing industrialized countries have also tried several options, ranging from the creation of consumer country cartels to attempts to destroy OPEC.[16] In short, for quite

[12] Quota cheating is a common problem of cartels, and OPEC is no exception. Virtually every OPEC member has, at one time or another, been found cheating on their quotas, though to different degrees. See, *inter alia*, The Economist, 12 March 1998, 2 July 1998, 25 March 1999, and 27 September 2001.

[13] See OPEC, *General Information*, at <http://www.opec.org>.

[14] The foundations of the stillborn International Trade Organization were laid by the *Suggested Charter* which was prepared and submitted by the United States in 1946. The GATT as well as the WTO still owe much of their content, and even their very existence, to the domestic politics of the US administration. The tortuous history of the GATT—its provisional life for nearly half a century—and its organizational defects, are all results of the choice of a Protocol of Provisional Application (PPA) as a means of bringing GATT into force bypassing Congressional scrutiny in the name of an executive order within presidential prerogatives under US constitutional law.

[15] Measures taken by the Organization of Arab Oil Exporting Countries (OAPEC) during the 1973 Arab–Israeli war are a prominent example here. For an extensive survey of this measure, see, Ibrahim Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 A.J.I.L. 4 (October 1974), 591–627.

[16] Former US Secretary of State Henry Kissinger wrote that "… both the Nixon and Ford Administrations had no higher priority than to bring about a reduction of oil prices by breaking the power of OPEC". Henry Kissinger, *Years of Renewal: Memoirs*, Vol. 3 (London: Simon & Schuster, 1999), pp. 668–669, quoted in "Foreword" by Alí Rodríguez Araque to Mommer, as note 8 above, p. XV. See also *United States: Excerpts from a Report Prepared for the Federal Energy Administration on an Evaluation of Options of US Government in its Relationship to US Firms in International Petroleum Affairs*, 14 Int'l Legal Materials 4 (July 1975), 1037 ff. For more recent policy debates in this area, see David L. Goldwyn, *The United States, Europe, and Russia: Toward a Global Energy Security Policy*, 1 EastWest Institute Policy Brief 5 (August 2002).

a long time, oil has fuelled animosity rather than co-operation between its producers and its consumers. As considered later, even today all three OPEC countries that are neither members of, nor negotiating accession to, the WTO (Iraq, Iran and Libya) are, by coincidence or otherwise, the three major countries that have long been labelled as rogue states responsible for several evil actions and intentions.

The OPEC countries have, over time and in an uncoordinated way, shown growing interest in the multilateral trading system. Of the 11 current members of OPEC, six (Indonesia, Kuwait, Nigeria, Qatar, the United Arab Emirates and Venezuela) have already become members of the WTO, and two (Algeria and Saudi Arabia) are negotiating their terms of accession. Indeed, the latest, and arguably the most important WTO Ministerial Conference since its birth in 1995, was hosted by Qatar—a member of both OPEC and the WTO—and the new round of trade negotiations launched at Doha has been named after the Conference host town—hence the Doha Development Agenda. The acute divergence between these two influential inter-governmental organizations has not made it impossible for one and the same country to enjoy the membership of both at one and the same time. Indeed, OPEC itself has recently applied for observership at various organs of the WTO, such as the Committee on Trade and the Environment (CTE),[17] and the Committee on Trade and Development (COMTD).[18] However, the relationship between these two organizations is still far from cordial. To begin with, Saudi Arabia, the most influential OPEC Member, and Algeria have yet to conclude their accession negotiations. Saudi Arabia even complains that its accession negotiation is being deliberately hampered by some WTO Members setting unreasonable demands.[19] Besides, three important OPEC Members (Iraq, Iran and Libya), accounting for about 22.2 percent of the world's proven oil reserves and 10.8 percent of the world's production in 2000[20]—despite all of them being under one or another form of sanctions[21]—still remain totally outside the WTO system.[22]

In sum, although OPEC and the WTO share a few things in common—as both are international economic organizations with a strong impact on the flow of international trade—their differences far outweigh their commonalities. This did not,

[17] See WTO Doc. WT/COMTD/33, 10 October 2001.

[18] See WTO Doc. WT/CTE/COM/6, 18 September 2000. But the WTO has yet to decide on OPEC's application for observership. When the application was considered by the pertinent WTO bodies, the positions taken mirrored the existing tensions in international relations—Egypt, Cuba, etc., supporting the request while the United States and Israel was leading the opposition. See, *inter alia*, WTO Doc. WT/COMTD/M/32, 17 May 2001.

[19] Saudi Minister of Commerce Osama Faqueh specifically noted that despite the voluntary nature of plurilateral agreements, "oddly, acceding countries are pressured into joining these agreements, otherwise their accession is hampered" (see WTO Doc. WT/MIN(99)/ST/107).

[20] See *BP Statistical Review of World Energy June 2001*, available at <http://www.bp.com/centres/energy>.

[21] See, e.g., Thomas Wälde, *Managing the Risk of Sanctions in the Global Oil & Gas Industry: Corporate Response Under Political, Legal and Commercial Pressures*, 36 Texas Int'l L.J. (2001), 183 ff.

[22] Iran applied for accession to the WTO in 1996 (see WTO Doc. WT/ACC/IRN/1) and Libya in 2001 (see WTO Doc. WT/ACC/LYB/1) but, thanks to the consensus tradition which the WTO has inherited from GATT, their applications remain blocked by the United States and others to this day. See also Financial Times, 14 February 2002, p. 9.

however, prevent the majority of OPEC countries from becoming also members of the WTO. The question to follow from this should thus be as to whether the GATT/WTO system has any role to play in the petroleum sector.

III. Petroleum Products and the GATT/WTO System

The role of the multilateral trading system on international trade in petroleum products has not always been clear.[23] A study by UNCTAD has observed that "… the strategic importance of petroleum trade to the world economy has been such that in the past it has been treated as a special case, in a largely political context and not within the GATT multilateral framework of trade rules".[24] However, as the same study emphasizes, strategic sensitivities notwithstanding, there is not any GATT provision which exempts petroleum trade from its coverage. In principle, trade in petroleum products among GATT/WTO Members is governed by the rules of the trading system just like other products.

However, although there was no explicit exclusion of petroleum products from the scope of the multilateral trade agreements, a combination of factors have, *de facto*, brought the virtual exclusion of international trade in petroleum products from the trading system. The most important ones in this respect are absence of petroleum export interests from GATT's origins and non-membership in the WTO of the major oil exporters even today, the consequent lack of specific trade/import liberalization commitments by GATT/WTO Members, the system's inherent market access bias, its ineffectiveness in the area of quantitative export restrictions, and the recent trend towards regionalism as a solution. These factors will be discussed in turn.

A. Non-membership of major petroleum exporters in the GATT/WTO

None of the major oil exporters of today was involved in the negotiations for the creation of the ITO, and its *de facto* substitute, the GATT, in the 1940s.[25] When OPEC was founded on 14 September 1960 in Baghdad, none of its five founding members (Kuwait, Iraq, Iran, Saudi Arabia, and Venezuela) was a contracting party to the GATT. This picture has of course changed with expansion in OPEC membership. But, one chief feature of OPEC has been the lack of co-ordination on broader policy issues impacting on the common interests of members. Most OPEC countries followed their own individual course in their relations with the multilateral trading system. Moreover, each country had to cater for its own needs which are not

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[23] See, *inter alia*, UNCTAD, *Trade Agreements, Petroleum and Energy Policies* (New York and Geneva: UNCTAD, 2000).

[24] Ibid., pp. 1–2, emphasis added.

[25] Saudi Arabia, Iran and Venezuela showed interest in the process for the creation of a multilateral trading system from quite early on. Indeed, Iran and Iraq even signed the Havana Charter for an International Trade Organization (see UNCTAD, as note 23 above, p. 149).

necessarily the same as those of others.[26] Diversification away from oil dependence has been the ambition of most of these countries, and membership of the trading system was perceived as a step forward in that direction. The development of such natural resource-dependent industries as petrochemicals in some OPEC countries also meant that export interests would be well served by GATT/WTO membership. WTO membership has also come to be recognized as a crucial element in countries' efforts to attract foreign investment. Such country-specific considerations, together with the absence of any effective OPEC-wide policy on the issue of GATT/WTO membership meant that individual countries had to take their own decisions regardless of what their implications would be for OPEC as an organization and its other members at large.

Following this course, of the six OPEC Member countries of the WTO today, two had been parties to the GATT before they became OPEC members (Indonesia joined GATT in 1950 and OPEC in 1962; Nigeria joined GATT in 1960 and OPEC in 1971);[27] four others followed the opposite route (OPEC founding members Kuwait and Venezuela joined GATT in 1963 and 1990 respectively and, in 1995, became original members of the WTO; Qatar and the United Arab Emirates joined OPEC in 1961 and 1967 respectively, and the GATT in 1994, and the WTO in 1996). Another former member of OPEC, Ecuador, followed a totally different route: it joined OPEC in 1973, suspended its OPEC membership in 1992, and acceded to the WTO in 1996. Yet, five important OPEC countries—Algeria, Iraq, Iran, Libya and Saudi Arabia—still remain outside the WTO system.

The cumulative effect of all this is that, of the OPEC daily average crude oil production of 30.18 million barrels for 2001, over 15.97 million, or about 53 percent, is accounted for by the five OPEC countries that are not yet members of the WTO.[28] In terms of share of global crude oil exports, while OPEC itself accounts for about 55 percent, the five OPEC countries not members of the WTO account for about 60 percent of this OPEC share, or nearly 33 percent of the world's total.[29] In terms of proven oil reserves, while OPEC accounts for 77.8 percent of the world's total, the five countries account for over 61 percent of this OPEC share, or about 48.1 percent of the world's total.[30] Moreover, the second largest oil exporting country in the world, Russia, also still remains outside of the WTO. Although not a

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[26] To cite an obvious example, the degree of economic dependence of individual OPEC countries on the oil sector, although often similar, is not always the same. For instance, fuel exports as a percentage of total exports for 1997 for the ten OPEC countries, excluding Iraq, are as follows: Indonesia, 14 percent; Venezuela: 79 percent; UAE: 78 percent; Qatar: 80 percent; Kuwait 84.8 percent; Iran: 85 percent; Saudi Arabia: 89.6 percent; Nigeria: 90 percent; Libya: 95 percent; and Algeria: 97 percent. See A.F. Alhaji, *What have We Learned from the Experience of Low Oil Prices?*, XXV OPEC Review: Energy Economics and Related Issues 3 (September 2001), 198.

[27] The same was true with Gabon, which became party to the GATT in 1963 and a member of OPEC in 1975, but later withdrew from OPEC as of 1 January 1995; this date coincided with the entry into force of the WTO Agreement of which Gabon was an original member.

[28] Country-specific data taken from International Energy Agency: Monthly Oil Market Report, 13 May 2002, p. 47; available at <http://www.iea.org/omrep/index.htm>.

[29] Calculation based on data for 2000, taken from *OPEC Annual Statistical Bulletin* (Vienna: OPEC, 2001).

[30] As note 20 above.

member of OPEC, and often a free-riding beneficiary of OPEC production restriction decisions, Russia is also known to collude with OPEC quite often. It follows from all this that a substantial majority of petroleum production and trade takes place outside the reach of the multilateral trading system due to non-membership of several key producers.

B. LACK OF SPECIFIC IMPORT LIBERALIZATION COMMITMENTS BY GATT/WTO MEMBERS

The trading system works largely through the negotiation of reciprocal tariff (and at times non-tariff) reduction commitments which are annexed in schedules of concessions for every party.[31] As will be developed further later on, historically the driving force behind the GATT process has been countries' market access interests for their surplus products, which generally meant manufactures. None had such surplus in petroleum—indeed, virtually all of them were net petroleum importers even then. Coincidentally, the United States turned from a net petroleum exporter into a net importer in 1948[32]—the year in which the GATT entered into force on a provisional basis. It is also worth noting that although the now relatively petroleum-rich countries of Western Europe, such as Norway and the UK, were also founders of the GATT, their (North Sea) oil wealth was discovered only after 1969. The GATT was thus a market opening weapon for the products of its industrialized proponents—hence almost by definition predominantly concerned with the manufacturing sector.[33] Indeed, as one columnist put it, the GATT was created in 1947 "as a pure fruit of the industrial society",[34] with one overriding objective—to liberalize the flow of trade in industrial products among its largely industrialized Contracting Parties.[35] This means that while each contracting party had a vested interest in the opening of markets for its surplus products in other Contracting Parties, none had an interest in market access for petroleum products. Consequently, the tariff schedules of GATT Contracting Parties typically contained hardly any tariff reduction and binding commitments in the

[31] See GATT Articles II and XXVIII bis.

[32] See Daniel Yergin, *The Prize: The Epic Quest for Oil, Money and Power* (London: Simon & Schuster, 1991), p. 410; and *Forum*, XXXIII OPEC Bulletin 2 (February 2002), 5. US crude oil production peaked in 1970. See Mommer, as note 8 above, p. 152.

[33] See, e.g., how trade in agricultural products has been treated by the multilateral trading system in its course of evolution in Melaku Geboye Desta, *The Law of International Trade in Agricultural Products: from GATT 1947 to the WTO Agreement on Agriculture* (The Hague: Kluwer Law International, 2002), p. 58.

[34] Journal de Genève, quoted in GATT Focus Newsletter 41 (October 1986), p. 8.

[35] The 23 founding "members" of the GATT were Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, Republic of China, Cuba, Czechoslovakia, France, India, Lebanon, Luxemburg, Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia, Syria, the United Kingdom, and United States.

petroleum sector.[36] Thus, although applied tariffs on petroleum imports are generally low, countries are free to raise them to any desired levels—in as long as they remained unbound (which is the case to this day for such countries as Japan and the United States)—while they would not be allowed to erect quantitative restrictions against such imports.

C. GATT/WTO'S INHERENT MARKET ACCESS BIAS OVER ACCESS TO SUPPLIES

As noted earlier, the trading system came into being with market access as its primary objective. This is clearly discernible in the balance of obligations created between import restrictions (exporters' concerns), on the one hand, and export restrictions (importers' concerns), on the other. Trade measures which would restrict the quantity of allowable imports—generally called quantitative import restrictions—are subject to a flat prohibition under GATT Article XI. This provision covers all forms of trade barriers at the border that take a form other than customs duties and GATT case-law has identified a number of such practices.[37] Moreover, this principle against the use of quantitative import restrictions has also been supplemented by the unstated obligation to enter into periodic negotiations for the reduction and capping of non-quantitative restrictions, which take the form of tariff bindings.[38]

In principle, the same rule applies in respect of quantitative restrictions against access to supplies, i.e. quantitative export restrictions are also prohibited. But, unlike for example the symmetrical approach of the EC Treaty,[39] the GATT rules on export restrictions are different from those on import restrictions in two ways. First, as will be developed later, the prohibition of quantitative export restrictions is subject to a number of important exceptions that are, in the words of Jackson *et al.*, "so broad and vague as to almost render those obligations meaningless".[40] Second, the GATT prescribes no clear discipline on the use of non-quantitative export restrictions. The important GATT provision on customs duties, Article II, does not mention export

[36] Note that the absence of a binding on oil import tariffs has allowed governments to impose restrictive measures in response to low oil prices, which are not always welcomed even by net importers. For example, several US presidents—including Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter and Reagan—have invoked Section 232, the national security clause, to impose import-restrictive measures on oil. See Jeffrey P. Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 University of Pennsylvania J. Int'l Business L. (1989), 243 ff. More recently, during the oil price collapse of the late 1990s, US domestic oil producers petitioned—although unsuccessfully—the US International Trade Administration for the imposition of anti-dumping and countervailing duties on crude oil imports coming from such countries as Venezuela, Saudi Arabia, Iraq and Mexico. See William C. Smith, *Save Domestic Oil, Inc.'s Crude Oil Market Dumping Petition: Domestic and International Political Considerations*, Tulsa J. Comparative and Int'l L. (Fall 2000). However, given that US customs duties for petroleum imports remain unbound and many of the source countries are not members of the WTO, the US government would not need to undergo complex anti-dumping and/or countervailing duty investigations to raise its duties on petroleum imports.

[37] For more on this, see the following section on export restrictions.

[38] See GATT Articles II and XXVIII bis.

[39] See EC Treaty Article 28 (*ex* Article 30): "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States"; and Article 29 (*ex* Article 34): "Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States."

[40] See John Jackson, W. Davey and A. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text*, 3rd edn (St Paul, MN: West Publishing, 1995), p. 946.

duties at all. Although there is no consensus as to the implication of this under WTO law—e.g. whether export duties are subject to negotiations and binding commitments in the sense of Article II[41]—it is fairly settled that: (1) they are permitted;[42] (2) they are frequently used by countries for the purpose, *inter alia*, of protecting domestic processing industries by discouraging the export of essential raw materials, overcoming periodic supply shortages, improving terms of trade, and raising government revenue;[43] and (3) there is hardly any export duty reduction and/or binding commitment in members' schedules.[44] It is thus possible to conclude that while WTO Members are in principle not allowed to impose quantitative export restrictions, they are free to impose export duties at whatever level they may wish, which is unlike their market access obligations. Furthermore we shall see immediately that the exceptions to the prohibition of quantitative restrictions themselves are more lax in the case of export restrictions than in import restrictions.

D. Ineffective GATT/WTO discipline on quantitative export restrictions: a look at OPEC practices

1. *Quantitative Export Restrictions: the Principle*

Each time the oil price falls below OPEC's desirable level, the organization could pursue its objectives, in theory, through either export levies or supply cuts, or a combination of the two. In practice, however, OPEC generally favours supply restrictions over export levies. As noted earlier, OPEC has adopted the devices of direct price setting (between 1973 and 1985) and restriction of supplies (since 1985).[45]

[41] Several writers argue that export duties, although not explicitly mentioned under Article II, are still subject to periodic negotiations and that, if undertaken by a member and inserted in its schedules of concessions, their binding legal force is unquestionable. UNCTAD goes as far as arguing that Article II "maintains a symmetry between the treatment of export duties and import duties" (see UNCTAD, as note 23 above, p. 2). Frieder Roessler supports this view and argues that "export concessions can be bound in GATT schedules". See Frieder Roessler, *GATT and Access to Supplies*, 9 J. World Trade L. (1975), 27. However, equally as many, including Professor John Jackson, have argued that countries are free to do whatever they like in respect of export duties, and any commitments they may have undertaken on export levies can only be taken as extra-GATT commitments whose nature and enforcement fall outside the multilateral trading system. See John Jackson, *World Trade and the Law of GATT* (New York: Bobbs-Merrill, 1969), p. 499, footnote 12.

[42] Chapter 6 of the NAFTA confirms these views. NAFTA Article 603, para. 1, incorporates the GATT provisions on quantitative restrictions with its own explicit and rather stringent interpretation: "The Parties understand that the provisions of the GATT incorporated in paragraph 1 prohibit, in any circumstances in which any other form of quantitative restriction is prohibited, *minimum or maximum export-price requirements* and, except as permitted in enforcement of countervailing and antidumping orders and undertakings, minimum or maximum import-price requirements" (NAFTA Article 603, para. 2, emphasis added). Unlike the case of minimum export prices, of which NAFTA simply said that they are covered by the prohibition of GATT Article XI, and further confirming the view propounded earlier that export duties are permissible under the GATT, Article 604 of the NAFTA introduced a separate provision explicitly prohibiting the use of export duties as follows: "No Party may adopt or maintain any duty, tax or other charge on the export of any energy or basic petrochemical good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on: a) exports of any such good to the territory of all other Parties; and b) any such good when destined for domestic consumption."

[43] See Roessler, as note 41 above, pp. 30–31.

[44] See WTO, *Analytical Index: Guide to GATT Law and Practice*, updated 6th edn (Geneva: WTO, 1995), p. 73.

[45] See Mabro, as note 9 above, p. 16.

It is notable that non-OPEC WTO Member Countries such as Mexico[46] and Norway[47] also use supply restrictive measures to influence prices, at times even in open collaboration with OPEC. These are measures that could technically be termed as "quantitative restrictions" in the sense of GATT Article XI:1.[48] Under this provision, the WTO prohibits the imposition of quantitative restrictions on both imports and exports by its members, whether done individually or in concert with others. Interestingly, "GATT case-law" has established that the use of price setting techniques falls under this prohibition. In a 1978 GATT case on the legality of an EC system of minimum import prices as a condition for the importation of tomato concentrates, the Panel ruled that the practice was an import restriction in violation of Article XI:1.[49] Importantly for OPEC practice of restricting supplies in response to falling oil prices, the *Japan—Semi-Conductors* Panel applied the MIP reasoning to the case of export restrictions effected through minimum export prices and found that they were also a violation of GATT Article XI. The Panel specifically referred to the MIP Panel report and noted that "the CONTRACTING PARTIES had decided in a previous case that the import regulation allowing the import of a product in principle, but not below a minimum price level, constituted a restriction on importation within the meaning of Article XI. … The principle applied in that case to restrictions on imports of goods below certain prices was applicable to restrictions on exports below certain prices."[50] This same approach could arguably apply to OPEC-decision-based measures taken by OPEC-cum-WTO Members to restrict petroleum supplies. In as long as OPEC decisions to restrict supplies are caused by falling prices below the OPEC-approved price range or any other threshold, such measures could well qualify as quantitative restrictions effected through minimum export price requirements. As Professor

[46] Worried about the potential implication of its GATT membership for its oil supply management practices, Mexico inserted a purportedly special treatment provision for the sector in its protocol of accession to the GATT as follows: "Mexico will exercise its sovereignty over natural resources, in accordance with the Political Constitution of Mexico. Mexico may maintain certain export restrictions related to the conservation of natural resources, particularly in the energy sector, on the basis of its social and development needs if those export restrictions are made effective in conjunction with restrictions on domestic production or consumption." Paragraph 5 of Mexico's protocol of accession, as quoted in UNCTAD, as note 23 above, p. 23. However, the wording of this provision being nearly identical to GATT Article XX(g), the legal significance of its separate insertion by Mexico is doubtful at best. Indeed, Venezuela—an OPEC Member country which acceded to the GATT after Mexico—opted not to follow Mexico's line because such a provision "did not grant any particular advantage". See UNCTAD, as note 23 above. See also Reinier Lock, *Symposium: Mexico-United States Energy Relations and NAFTA*, 1 United States-Mexico L.J. (1993), 244.

[47] Norway—a GATT founding member who turned an important petroleum exporter only later—routinely uses legislation to reduce oil production to stabilize prices. The IEA has recently observed that since 1998 alone, Norway has "on two occasions reduced the level of oil production by government regulation with a view to stabilizing oil prices at a higher level". See IEA, *Energy Policies of IEA Countries: Norway 2001 Review,* Executive summary.

[48] Article XI:1 provides "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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 for export of any product destined for the territory of any other contracting party."

[49] See *European Communities—Programme of Minimum Import Prices, Licences, and Surety Deposits for Certain Processed Fruits and Vegetable*, Panel Report (L/4687 BISD 25S/68), adopted on 18 October 1978 (hereafter the *MIP* case), para. 4.1.

[50] See *Japan—Trade in Semi-Conductors*, Panel Report (L/6309 BISD 35S/116) adopted on 4 May 1988 (hereafter *Japan—Semi-Conductors*), para. 105.

Adelman noted in his testimony to a 1979 case against OPEC in California, output restriction is enough to achieve minimum price objectives.[51] This would thus amount to a violation of GATT Article XI:1. Interestingly, no formal GATT/WTO complaint has ever been lodged so far against oil exporting WTO Member Countries that resort to supply restrictions. Political considerations might have played a role behind this, but there are also potentially valid legal justifications for such measures within GATT/WTO system itself, to which I now turn.

2. *Export Restrictions for Conservation Purposes: the Exception*

The GATT exceptionally allows members to restrict exports on several specific grounds,[52] and OPEC countries as well as others in a similar situation could find their strongest defence from Article XX(g), which provides as follows:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: …
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

The introductory paragraph is concerned mainly with the manner of application of the specific measures—which vary from case to case—and our emphasis here will be on the requirements set by sub-article (g). This provision has been the subject of several GATT/WTO Panel and Appellate Body rulings. In general, since Article XX provides for limited and conditional exceptions from the substantive obligations, dispute settlement practice has determined that Article XX must be construed restrictively,[53] and that the party invoking Article XX bears the burden of proof. This means that, for OPEC-cum-WTO Member Countries to justify their actions on the basis of this provision, they should be able to prove that: (1) the supply restrictive measures relate to the conservation of an exhaustible natural resource; and (2) those measures are made effective in conjunction with restrictions on domestic production or consumption. These two conditions will be addressed in turn.

[51] Adelman noted that "Control of supply is the essence of monopoly; price fixing the result … The OPEC nations can raise or lower prices at will by controlling output. *Most of the (crude oil) price increases since 1970 have in fact resulted from output restriction*. Prices have also been raised by taxation and by direct price quotation. *These two methods are convenient, but not necessary*." Adelman, as quoted in *International Association of Machinists and Aerospace Workers v. OPEC and Member Countries*, 477 F. Supp. 553, (18 September 1979), p. 566 (emphasis added).

[52] See, generally, Articles XI(2), XX and XXI.

[53] See, e.g., *United States—Standards for Reformulated and Conventional Gasoline*, Panel Report (WT/DS2/R) issued on 26 January 1996, paras 6.20, 6.31, 6.35; and Appellate Body Report (WT/DS2/AB/R), adopted on 20 May 1996, (hereafter *Gasoline*), pp. 22–23.

In relation to conservation of an exhaustible natural resource, GATT/WTO case-law has already recognized petroleum as an exhaustible natural resource,[54] and the only question under this requirement will be whether or not the OPEC decision-based measures qualify as measures relating to conservation. That a measure which restricts the rate of exploitation of petroleum contributes towards its conservation is clear. The question here is thus not whether the overall policy of production cuts qualifies as a conservation measure, which it obviously does, but whether the specific measures taken by OPEC countries in response to falling prices qualify as measures relating to the conservation of petroleum. The concept of "relating to" got its first and most important interpretation in the *Salmon/Herring* case in 1988.[55] The Panel in that case observed that although Article XX(g) does not state how the trade measures are to be related to the conservation,[56] the context makes it clear that the provision covers measures of a wider import than those "necessary or essential for the conservation of exhaustible natural resources". It then concluded that "while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as 'relating to' conservation within the meaning of Article XX(g)".[57] This interpretation has been confirmed by subsequent GATT and WTO Panels and the Appellate Body.[58] The challenge for OPEC-cum-WTO Members would thus be to prove that their measures are related to the conservation of petroleum resources in the sense of being "primarily aimed at" that goal. Given that OPEC supply restriction decisions are normally triggered by falls in the market price of oil below a certain threshold rather than any concerns about reductions in the quantity of underground oil, this could not be an easy challenge. However, it is also plausible to argue that conservation of a mineral resource such as oil cannot be seen in isolation from the financial return of its exploitation for its owners and production restriction decisions caused by falling market prices should be construed as "relating to the conservation" of the resource.

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[54] In *Shrimp/Turtle*, the WTO Appellate Body indirectly recognized petroleum as an exhaustible natural resource. Rejecting complainants' arguments that the concept of "exhaustible natural resources" under Article XX(g) applied only to "finite resources such as minerals, rather than biological or renewable resources", the Appellate Body said: "Article XX(g) is not limited to the conservation of 'mineral' or 'non-living' natural resources ... Living resources are just as 'finite' as petroleum, iron ore and other non-living resources." See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report (WT/DS58/AB/R), issued on 12 October 1998 (hereafter *Shrimp/Turtle*), para. 128. See also *United States—Taxes on Automobiles*, Panel Report (DS31/R, issued on 11 October 1994, not adopted), para. 5.57.

[55] *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, Panel Report adopted on 22 March 1988, BISD 35S/98 (hereafter *Salmon/Herring*).

[56] Ibid., para. 4.5.

[57] Ibid., para. 4.6 (italics added).

[58] In *Gasoline*, the Appellate Body said: "All the participants and the third participants in this appeal accept the propriety and applicability of the view of the *Herring and Salmon* report and the Panel Report that a measure must be 'primarily aimed at' the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g). Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)." *Gasoline*, as note 53 above, p. 19.

With regard to restrictions on domestic production or consumption, taken literally, this requirement is fairly straightforward to apply. The required domestic restrictions are set out as alternatives with the disjunctive "or": "if such measures are made effective in conjunction with restrictions on domestic production or consumption". Decision-based supply restrictions taken by OPEC Member Countries are necessarily implemented via domestic production cuts. But, in situations such as this—where a substantial proportion of domestic production is exported—whatever production restrictions are taken at the domestic level will affect only the export market, and there is no reason for domestic consumption to be affected. Accordingly, the requirement of "restrictions on domestic production or consumption" is necessarily satisfied by any OPEC country measure to restrict petroleum supplies. As such, this requirement plays hardly any role here, and the interest of the other WTO Members remains vulnerable. Indeed, this provision provides further proof to the market access bias of the rules of the trading system. The provision makes perfect sense when it is seen from the perspective of market access. By prescribing concomitant "restrictions on domestic production or consumption" as a condition for the imposition of import restrictions for conservation purposes, the system is effectively saying that such exceptions should not be used for protectionist aims—i.e. to increase the market share of competing domestic products at the expense of imports. As the Appellate Body rightly said in *Gasoline*, "the clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources … if no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals."[59] It is difficult to find such a rationale for making export restrictions dependent on "restrictions on domestic production or consumption" in a situation where nearly all of domestic production is intended for export. Such a requirement will protect the interests of nobody and the test of even-handedness would have no relevance.[60]

In sum, if OPEC countries can pass the hurdle set by the conservation requirement, they should find it fairly straightforward to prove that their supply restrictive measures are made effective in conjunction with domestic production. It is this lax nature of the conditions set by the treaty which led writers to conclude that "with these exceptions, a GATT Member can almost apply export restrictions at will".[61] Accordingly, OPEC decision-based measures to restrict supplies, although a

[59] *Gasoline*, as note 53 above, pp. 20–21.

[60] The only case so far where an export restriction was found to violate this condition was *Salmon/Herring*. But, in that case, unlike OPEC measures, there was competition between domestic and foreign processors of herring and salmon, and the restriction on the exportation of unprocessed herring and salmon was designed to protect domestic processors by giving them exclusive access to fresh fish (since no corresponding restrictions were imposed on domestic processors and consumers) while denying such raw material to foreign processors. This was thus a case where the requirement of even-handedness would make sense. See *Salmon/Herring*, as note 55 above, para. 5.2.

[61] See Jackson *et al.*, as note 40 above, p. 946.

violation of GATT Article XI, could arguably be justified under the exceptions provision of Article XX(g). For such measures to be justified under this provision, satisfying the requirements of paragraph (g) discussed above is not enough; they also have to be implemented in accordance with the terms of the chapeau of Article XX: that they should not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

E. The trend towards regional remedies

The other side of the conclusion in the preceding paragraph is that the trading system does not give adequate protection for the energy security interest of its creators. The control of energy resources by Western companies—which prevailed during the formative days of the trading system[62]—ended with the "wave of nationalizations" of the 1970s[63] and the success of OPEC in effectively forcing concessionaire international oil companies to accept what was called "the principle of government participation in producing oilfields" leading to majority control by those countries.[64] These developments destroyed the foundational assumption on which GATT rested—that as long as energy resources were in Western hands, GATT did not have to bother about guaranteeing a right of access to such resources. Moreover, the success of OPEC in using supply restriction measures as means of raising oil prices—and the use of oil as a war weapon by the Arab members of OPEC during the 1973 Arab–Israeli war (which was much more successful than similar attempts during the six-day Arab–Israeli war of June 1967[65])—made it clear to the industrial world that the multilateral trading system was not properly equipped to deal with problems of access to crucial supplies such as oil. Petroleum importing developed countries realized that they were the victims of their own making. A consensus thus developed that measures had to be taken at the national, regional and international levels. The International Energy Agency (IEA) was set up in 1974 as an immediate response to the oil crisis of the time,[66] and intended to "serve as a demonstration of industrial country unity" and to result in "a concerted

[62] As Rueda put it, until 1950, "the United States, Britain, and the Netherlands effectively controlled the production and distribution of world oil through their influence over the 'Seven Sisters' …". See Andres Rueda, *Price-Fixing at the Pump—Is the OPEC Oil Conspiracy Beyond the Reach of the Sherman Act?*, 24 Houston J. Int'l L. 1 (2001), 9.

[63] See, *inter alia*, Alí Rodríguez Araque, *Geopolitics of the International Oil and Gas Industry and OPEC*, opening address delivered on 30 April 2001 at the Dundee International Oil and Gas Conference, University of Dundee, Scotland, available at <http://www.opec.org/>.

[64] For further information, see Gavin Brown (ed.), *OPEC and the World Energy Market: A Comprehensive Reference Guide*, 2nd edn (London: Longman, 1990), pp. 411–433.

[65] See ibid., pp. 81–91.

[66] Agreement on an International Energy Program (signed in Paris on 18 November 1974). At the core of the IEP is the obligation created under Article 2 of the Agreement by which participating countries undertook to establish "a common emergency self-sufficiency in oil supplies" requiring them to "maintain emergency reserves sufficient to sustain consumption for at least 60 days with no net oil imports". For more on this, see Richard Scott, *IEA: The First Twenty Years*, Vol. I (Paris: OECD/IEA, 1994).

program for reducing dependence on OPEC oil".[67] Policies to raise energy efficiency and to diversify its sources were pursued at the national level, including the introduction of subsidies to promote non-oil energy sources.

More importantly, a plethora of regional initiatives were launched with a strong energy content. For example, already since the 1950s, "two of the three treaties establishing the European Communities are about energy";[68] the 1988 Free Trade Agreement between the United States and Canada (Canada–US FTA) and, to a certain extent, its larger successor NAFTA (including Mexico) were both driven, at least in part, by a US effort to assure more secure energy sources.[69] The same could be said about the ongoing process for the establishment of the Free Trade Area of the Americas (FTAA) for which hemispheric "energy cooperation and integration" feature among the major driving forces.[70] The European Energy Charter of 1991 and its broader and more legalistic successor the Energy Charter Treaty (ECT) are also based on the same strategy and objective.[71] An important feature of the energy-specific aspect of most of the regional initiatives is their identical approach in trying to reverse the traditional GATT emphasis on access to markets in favour of access to supplies. A closer look at the energy-trade provisions of the ECT and NAFTA demonstrates this more vividly.

1. *The ECT Trade Regime*

The ECT is an EU-driven international agreement which aims to create a freer and more competitive energy market among its Contracting Parties through the establishment of a negotiated discipline on the regulation of investment, transit and trade in the energy sector.[72] The ECT process originally had the dual mission, on the one hand, of facilitating the transition of former Soviet republics into market economies, and on the other, of boosting the energy security of western Europe.

Investment protection and facilitation of transit are the predominant features of the Treaty. With respect to trade, the ECT simply assumes that all its Contracting Parties will eventually become members of the WTO and any reference to trade issues in the Treaty is aimed only at filling the gap in the interim period pending accession of

[67] Mason Willrich and Melvin Conant, *The International Energy Agency: an Interpretation and Assessment*, 71 A.J.I.L 2 (1977), 202.

[68] The European Coal and Steel Community (ECSC) Treaty and the Euratom Treaty "were adopted primarily to ensure regular and equitable supplies of coal and nuclear energy in the Community". See European Commission, *Green Paper: Towards a European Strategy for the Security of Energy Supply* (2001, hereafter *EC Green Paper*), p. 10.

[69] An important aspect of the new US energy policy is also to further strengthen NAFTA's energy element: "to develop closer energy integration among Canada, Mexico, and the United States and identify areas of co-operation, fully consistent with the countries' respective sovereignties". See US *National Energy Policy: Report of the National Energy Policy Development Group*, May 2001, pp. 8-4, available at <http://www.fe.doe.gov/general/energypolicy.shtml> (hereafter US *National Energy Policy 2001*). See also Lock, as note 46 above, pp. 235 ff.

[70] See US *National Energy Policy* 2001, ibid., pp. 8–10.

[71] For more on this, see section III:E.2, below.

[72] For more on the ECT, see Thomas Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (London, The Hague and Boston, MA: Kluwer Law International, 1996).

the few remaining countries that are parties to the ECT but not yet WTO Members.[73] Thus, with regard to the relationship between WTO Members *inter se*, the ECT trade regime is simply the WTO trade regime. Likewise, the trade relationship between ECT Contracting Parties one or more of which are not members of the WTO is also governed by WTO rules—but, this time, "subject to some exceptions and modifications".[74] Among these exceptions and modifications, the Treaty's balance between export and import restrictions is pertinent here.

As pointed out earlier, the WTO does not prohibit the use of export duties as a means of discouraging exports; nor does it require the setting of export duty bindings. The trade provisions of the ECT go a long way further in the direction of imposing an obligation, although still of a soft-law type, on the use of export duties. In a radical departure from GATT/WTO rules, Article 29(4) of the ECT provides that "each Contracting Party shall endeavour not to increase any customs duty or charge of any kind imposed on or in connection with importation or exportation: ... (b) in the case of the exportation of Energy Materials and Products listed ..., and that of their importation if the Contracting Party is not a member of the WTO, *above the level most recently notified to the Secretariat...*".[75] Paragraph (6) further provides that "no such Contracting Party shall increase any customs duty or charge of any kind imposed on or in connection with importation *or* exportation of Energy Materials and Products listed ... above the lowest of the levels applied on the date of the decision by the Charter Conference to list the particular item in the relevant Annex. ..." There is no such requirement under the GATT—Article II (which is the only relevant provision for the purpose) deals only with import duties. This is therefore an important improvement over the GATT. Perhaps surprisingly, but in a way that clearly demonstrates its focus on supply access, ECT Article 29 also prescribes the same soft-law obligation regarding import restrictions—which is a weakening of the stringent GATT obligation of Article II.

This reversal of disciplines appears to reflect the power balance behind these rules. It further strengthens the argument that, under the GATT, the primary object of its sponsors was getting access to foreign markets for their surplus products—hence the emphasis on market access and almost a disregard of issues of export restrictions; while in the energy sector, the concern of the more powerful parties to the ECT is access to supplies—hence a strengthening of the discipline on export restrictions and a concomitant weakening of the market access aspect of it.

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[73] At the time of writing (January 2003), the ECT has 51 signatories and 46 Contracting Parties. Of the 46 Contracting Parties, 37 are already members of the WTO; eight (Armenia, Azerbaijan, Bosnia and Herzegovina, Kazakhstan, Tajikistan, F. Y. Macedonia, Ukraine, and Uzbekistan) are observers negotiating their accession; and only one (Turkmenistan) remains totally outside of the WTO. See <http://www.wto.org> and <http://www.encharter.org>.

[74] See ECT Article 29; see also *ECT Transparency Document: Applicable Trade Provisions of the Energy Charter Treaty* (1998), p. v.

[75] Italics added.

2. *The NAFTA Energy Chapter*

A situation similar to the ECT's emphasis on access to supplies could be observed in the evolution of the US-driven free trade agreements in North America. The NAFTA has a special chapter devoted to energy products. Chapter Six of NAFTA closely approximates the spirit of the ECT. Driven by the US need to secure access to the energy supplies of its energy-resource-rich neighbours, this Chapter goes beyond GATT and introduces a separate provision explicitly prohibiting the use of export duties as follows:

> "No Party may adopt or maintain any duty, tax or other charge on the export of any energy or basic petrochemical good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on: a) exports of any such good to the territory of all other Parties; and b) any such good when destined for domestic consumption."[76]

On other non-duty export restrictive measures, too, NAFTA further tightens the requirements for invoking exceptions similar to those in GATT Articles XI:2(a) (relating to critical shortages of essential products), Article XX(g) (conservation of exhaustible natural resources), Article XX(i) (availability of essential supplies to a domestic processing industry), and Article XX(j) (acquisition or distribution of products in general or local short supply).[77] Mexico—the NAFTA Member Country which often co-operates with OPEC in the use of supply restrictive measures to force a rise in prices—has successfully negotiated a reservation excluding application of these NAFTA obligations.[78] This shows that regional agreements rather than multilateral agreements are being increasingly pursued to secure access to supplies.

IV. Unilateral Challenges to OPEC in the United States

A. Judicial and legislative challenges

Two forms of challenges have been attempted against OPEC in the United States—judicial and legislative. At the judicial level, two cases have been brought so far before the US courts. The first one was brought in late 1978 by a US labour union, called the International Association of Machinists and Aerospace Workers, before the US District Court for the Central District of California, alleging violation of US antitrust laws and claiming damages and injunctive relief.[79] OPEC itself is an organization and each of its then 13 members were joint defendants. The court

[76] NAFTA Article 604.

[77] See NAFTA Article 605.

[78] See NAFTA Annex 603.6. As a result, some Canadian critics contend that these NAFTA provisions reaffirm "Canada's flawed United States-Canada Free Trade Agreement (CFTA) commitment to supply US energy needs with only limited exception, thus restricting Canada's sovereignty over its own resources". Robert F. Housman and Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: a Look Back and a Look Ahead*, 8 American University J. Int'l L. & Policy (Summer 1993), 719.

[79] See *International Association of Machinists and Aerospace Workers v. OPEC and Member Countries*, 477 F. Supp. 553 (18 September 1979).

dismissed OPEC (the organization) from the lawsuit as a preliminary matter on the ground that it "could not be and had not been legally served" as both the Foreign Sovereign Immunities Act (FSIA) and the International Organizations Immunities Act (IOIA) were not applicable to OPEC.[80] The court further dismissed the claim for damages on the ground that plaintiff was at best only an indirect purchaser of oil from OPEC countries—a condition that precludes damages under US law. Finally, the court also dismissed the claim for injunctive relief for lack of jurisdiction under the FSIA, arguing that defendants' practice of setting conditions for the exploitation of their valuable natural resources was a sovereign function for which they enjoyed full immunity and that it could not qualify for the commercial activity exception.[81] On appeal, the US Court of Appeals affirmed the judgment of the lower court, but on the alternative ground of the "act of state" doctrine.[82] The court recognized the "sovereign component" of OPEC countries' price-fixing practices[83] and stressed that "while the case is formulated as an antitrust action, the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources".[84]

The second court case in the United States was brought before the District Court for the Northern District of Alabama in April 2000 against OPEC as an organization—and not its members—in the form of a class suit by Prewitt Enterprises, a company which operated a lone gas station in the city of Birmingham, Alabama.[85] Just like the previous case, Prewitt also sought injunctive relief under US antitrust law.[86] The court ruled that OPEC was an "unincorporated association" under US law and that it had both subject matter and *in personam* jurisdiction over it.[87] On the important questions of sovereign immunity and the act of state doctrine—which were used previously at district and appellate levels to dismiss challenges against OPEC countries—the court concluded that "OPEC is not itself a foreign state or an agency or instrumentality ... of a foreign state; rather, by its own description, OPEC is a 'voluntary intergovernmental organization'... Therefore, neither the Foreign Sovereign Immunities Act ... nor the

[80] The court noted that this was because "FSIA applies only to foreign sovereignties, which OPEC is not; and, IOIA applies only to those international organizations 'in which the United States participates'". Ibid., p. 560.

[81] Ibid., p. 567.

[82] According to this doctrine, "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory" and that "a United States court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state". See *International Association of Machinists and Aerospace Workers v. OPEC and Member Countries*, 649 F.2d 1354, (9th Cir. 1981), p. 1358.

[83] See ibid., p. 1360

[84] Ibid., p. 1361. For a comment, see Monroe Leigh, *Judicial decisions*, 76 A.J.I.L. (1982), 160 ff. This ruling has since served as an important authority on what the US courts call "the principle of supreme state sovereignty over natural resources." See *World Wide Minerals, Ltd., et al.* (appellants) *v. Republic of Kazakhstan, et al.* (appellees), United States Court of Appeals for the District of Columbia Circuit, 296 F.3d 1154 (2 August 2002).

[85] See James Norman, *"Gas" Station Owner Wins OPEC Injunction*, 29 Platt's Oilgram News 62 (30 March 2001), 4, and at <http://www.platts.com>.

[86] See *Prewitt Enterprises, Inc. v. Organization of the Petroleum Exporting Countries*, United States District Court for the Northern District of Alabama, Southern Division, Civil Action Number Cv-00-W-0865-S (21 March 2001), pp. 4–5.

[87] See ibid., pp. 18–19.

act of state doctrine ... is implicated in this action".[88] In a complete reversal of the 1978 precedent, the court went further and ruled that OPEC member countries, although not directly involved as defendants, were co-conspirators with OPEC itself and other non-OPEC oil exporting countries (specifically Mexico, Russia, Norway and Oman), and the supply restriction agreements they entered into were "plainly commercial in nature" for which "there can be no sovereign immunity".[89] According to the court, the commercial activities exception also applied to the act of state doctrine, thus bringing the case "entirely within the Court's judicial competency, regardless of the identity of the actor".[90] After finding that these OPEC practices were "illegal *per se* under the Sherman and Clayton Acts", the court granted an order, valid for 12 months (until 21 March 2002), enjoining

> "… defendant Organization of the Petroleum Exporting Countries, its officers, agents, servants, employees and attorneys, and those persons and entities in active concert and participation with them ... from entering into any agreements amongst themselves or with third parties to raise, lower, or otherwise determine the volumes of production and export of crude oil ... and/or enforcing the performance of any such agreements."[91]

Within days of this judicial decision, a legislative effort was launched in the US Congress by two US senators who introduced a bill seeking to enable the government "to bring action against foreign states, such as OPEC countries, for collusive practices in setting the price or production of petroleum products".[92] OPEC condemned these developments as "an absurdity that violates the most basic legal principles"[93] and filed an appeal on 20 April 2001 against the district court decision—a move which froze the injunction. At the end of this appeal, on 2 August 2002, the appeals court overturned the initial ruling on the ground that summons (sent by registered mail) had not been properly served on the Organization—a reason also used for dismissal of OPEC from the suit by the California District Court in 1978—as the headquarters agreement between OPEC and Austria apparently required such processes to pass only through diplomatic channels.[94] While this court ruling put an end to the judicial challenge for the moment, the fate of the legislative initiative has yet to be known.

88 See ibid., pp. 19–20.
89 See ibid., pp. 20–21.
90 See ibid., p. 22.
91 See ibid., pp. 28–29. For a supportive argument, see Rueda, as note 62 above, p. 56.
92 Cathy Landry, *Senators Seek Anti-Trust Move Against OPEC*, 79 Platt's Oilgram News 64 (3 April 2001), 2, and at <http://www.platts.com>.
93 See statement by Alí Rodríguez-Araque, Secretary General of OPEC, "US Congress bill against OPEC violates most basic legal principles", OPEC Press Release No. 6/2001 (Vienna: OPEC, 5 April 2001).
94 See XLV Middle East Economic Survey 32 (12 August 2002), at <http://www.mees.com/news/a45n26d01.htm>. The judge further wrote: "The notion of wholly insulating from service of process an entity such as Opec—whose decisions surely affect the daily lives of most Americans—is, for many, a bitter pill to swallow. But the court must apply the rules as they are written." Quoted in Oil Daily (8 August 2002).

B. OPEC AND ITS US ROOTS

Whatever the final outcome of these unilateral initiatives in the United States, the important question is whether unilateralism is the right approach to resolve the problem. This is a normative question with no single answer. But, in examining the question, it is worth bearing in mind that this unilateral challenge comes from a country whose domestic petroleum resource management system served as both an inspiration as well as operational model for OPEC itself. The United States is an important producer of crude oil to this day[95]—a net exporter until 1947. Owing to the US system of private property rights over land and the migratory nature of crude oil within a reservoir regardless of surface boundaries, the problem of unfettered and wastefully competitive drilling plagued its oil industry for a long time, reaching its apex in the early 1930s with the discovery of the wealthy East Texas oilfield. The leading producer states at that time—mainly Texas, Oklahoma, Kansas and Louisiana—introduced legislation imposing production quotas for every reservoir and individual well through a system known as prorationing.[96] However, as the commerce clause excluded any restrictions on interstate commerce, any production restriction imposed by any one state was often rendered ineffective by a production expansion in another state; hence the need for some form of interstate cooperation. This led to the conclusion, in 1935, of an interstate arrangement for a coordinated management of supplies, called the Interstate Oil Compact. This was an inter-state machinery of producer states whose governors and regulators met quarterly to assess the condition of the market and determine the allowable production levels for each producer state.[97] It would then be up to each state authority to proration the state-level quotas among individual wells and/or reservoirs. This therefore is the first inter-state—although not international—co-ordination of oil production and trade policies among producers. OPEC is an international version of these US domestic approaches to the regulation of the oil and gas industry. Daniel Yergin has observed that the creation of OPEC was a realization of its founders' "dream of a world-wide Texas Railroad Commission"[98]—the powerful Texas state authority charged with the task of setting and enforcing oil production quota in order to resolve the twin problems of excessive production and low prices.

It is interesting to note that there was always strong opposition to the practice of prorationing as well as the compact from, *inter alia*, the consuming states within the

[95] Mommer has noted that the US share of global oil production stood at two-thirds in 1940, one-third in 1960, one-sixth in 1973 and one-tenth today. See Mommer, as note 8 above, p. 63.

[96] By proration, "the oil-producing states, acting through administrative commissions, have set production quotas for each pool as a whole and allocated these quotas among the variously owned wells within the pools". See J. Howard Marshall and Norman L. Meyers, *Legal Planning of Petroleum Production: Two Years of Operation*, 42 Yale L.J. (1933), 702–703; see also J. Howard Marshall and Norman L. Meyers, *Legal Planning of Petroleum Production*, 41 Yale L.J. (1931).

[97] See Gary D. Libecap, *The Political Economy of Crude Oil Cartelization in the United States, 1933–1972*, 49 J. Economic History 4 (December 1989), 840.

[98] Yergin, as note 32 above, p. 523.

Federation who, since the birth of OPEC in 1960, often equated the interstate compact to an internal OPEC—a complaint they continued to make even after 1974 against the system of gas production quotas.[99] However, the courts, including the US Supreme Court, were willing to endorse prorationing and even outright price-fixing by the state as legitimate practices.[100] The Supreme Court's approval of state price-fixing measures was rather hesitant and circumlocutory in the early days. In a 1932 case brought before the US Supreme Court on appeal by Champlin Refining Company seeking injunction against enforcement of certain provisions of the Oklahoma "Curtailment Act"—which, *inter alia*, claimed that Section 2 of the Act "is a price-fixing law and void under the Fourteenth Amendment"[101]—the Court ruled as follows:

> "We put aside plaintiff's contentions resting upon the claim that §2 or §3 authorizes or contemplates directly or indirectly regulation of prices of crude oil. The commission has never made an order under §2. The court found that none of the proration orders here involved were made for the purpose of fixing prices. The fact that the commission never limited production below market demand, and the great and long continued downward trend of prices contemporaneously with the enforcement of proration, strongly support the finding that the orders assailed have not had that effect."[102]

But, of course, "there is demand only at a price"[103] and the effect of this decision was to legitimize price-fixing without saying so expressly. The Court was more explicit on this in a later case that involved a decision by the Oklahoma state regulator—known as the Oklahoma Corporation Commission.[104] The issue arose from a decision given by the Commission in a dispute between two companies—Cities Service Gas Co. (a gas producer in the Guymon-Hugoton Field, Oklahoma, also operating a pipe line connected with the field) and Peerless Oil & Gas Co. (also a gas producer in the same field but without its own pipeline outlet). Court records show that, the Guymon-Hugoton Field had three principal production horizons, but they were so interconnected as to make in effect one large reservoir of gas. More

[99] See, e.g., *Big US Gas Producing States Fan Prorationing Controversy*, Oil & Gas J. (4 May 1992), where consuming state congressmen have been cited as saying that "prorationing smacks of a producing state cartel like the Organization of Petroleum Exporting Countries with the goal of restricting production to increase prices".

[100] Williams has observed that "Price-fixing, a new movement marching under the banner of 'conservation', was recently given the imprimatur of the Supreme Court". Howard R. Williams, *Conservation of Oil and Gas*, 65 Harvard L. Rev. (1952), 1180.

[101] Section 2 of the challenged Act provides as follows: "That the taking of crude oil or petroleum from any oil-bearing sand or sands in the State of Oklahoma at a time when there is not a market demand therefor at the well at a price equivalent to the actual value of such crude oil or petroleum is hereby prohibited, and the actual value of such crude oil or petroleum at any time shall be the average value as near as may be ascertained in the United States at retail of the by-products of such crude oil or petroleum when refined less the cost and a reasonable profit in the business of transporting, refining and marketing the same, and the Corporation Commission of this State is hereby invested with the authority and power to investigate and determine from time to time the actual value of such crude oil or petroleum by the standard herein provided, and when so determined said Commission shall promulgate its findings by its orders duly made and recorded, and publish the same in some newspaper of general circulation in the State." *Champlin Refining Co. v. Corporation Commission of Oklahoma et al.*, 286 U.S. 210 (1932).

[102] See ibid.

[103] Marshall and Meyers (1933), as note 96 above, at 729.

[104] *Cities Service Gas Co. v. Peerless Oil & Gas Co. et al.*, 340 U.S. 179 (1950).

importantly, Cities' wells were located in an area in which the gas pressure was considerably lower than that found beneath the wells of Peerless. As a result, production from Cities' wells was causing drainage from the Peerless section of the field, and Peerless was losing gas even though its wells were not producing. Having no pipe-line outlet of its own, Peerless offered to sell the potential output of its wells to Cities Service. Cities refused by setting unacceptably low prices and other conditions. Peerless then requested the Oklahoma Corporation Commission: (a) to order Cities to make a connection with a Peerless well and purchase the output of that well ratably at a price fixed by the Commission, and (b) to fix the price to be paid by all purchasers of natural gas in the Guymon-Hugoton Field. After gathering relevant evidence, the Commission concluded, *inter alia*, that the integrated well and pipe-line owners were dictating the prices paid to producers without pipeline outlets, and that as a result gas was being taken from the field at a price below its economic value. On that basis, the Commission agreed with Peerless and issued two orders—the first setting minimum prices for natural gas, and the second directing Cities Service to take natural gas ratably from Peerless' well in accordance with a formula for ratable taking prescribed by an earlier Order of the same Commission. Challenging the validity of the state decision to fix prices at the wellhead on natural gas produced within its borders and sold inter-state, Cities appealed to the Oklahoma Supreme Court; the Court rejected the claims. Cities then appealed to the US Supreme Court.

The US Supreme Court agreed with the state court and explicitly recognized price-fixing as lawful in the following words: "a price-fixing order [by a state] is lawful if substantially related to a legitimate end sought to be attained. … In the proceedings before the Commission in this case, there was ample evidence to sustain its finding that existing low field prices were resulting in economic waste and conducive to physical waste. That is a sufficient basis for the orders issued."[105] This ruling showed that principles of competition embodied in Federal antitrust law were subservient to the more important objective of oil and gas conservation—"two of our most important natural resources", as the same Supreme Court observed in the context of another case.[106] Indeed, as recently as 1992, the Justice Department itself has said that "a state's prorationing laws are sovereign acts outside the scope of federal antitrust laws".[107] From all this one may fairly conclude that the practices of price and/or supply management that are currently being carried out by OPEC at an international level had their deep-rooted precedent in US domestic law since the early days of the previous century.

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[105] See ibid.
[106] See *Burford et al. v. Sun Oil Co. et al.*, 319 U.S. 315 (1943).
[107] See *Big US Gas Producing States Fan Prorationing Controversy*, Oil & Gas J. (4 May 1992).

C. OPEC AND THE CARTEL QUESTION

A cartel is generally defined as "a combination of producers or sellers that join together to control a product's production or price".[108] Despite the common assumption, a cartel can thus be composed of any producers or sellers, whether they are governments or private companies or a combination of them. Looked at from this perspective, that OPEC is a cartel appears clear enough.[109] The "founding fathers" of OPEC have also reportedly admitted this to have been their intention.[110] Yet, today, OPEC itself dislikes the term cartel. OPEC argues that it is not a cartel, *inter alia*, because (a) OPEC controls only less than one-half of the petroleum market, and (b) OPEC responds to both low and high oil prices.[111] However, these may not be sufficient to conclude that OPEC is not a cartel. To start with, from a legal perspective, there is no minimum market share requirement as such for a collusive practice to qualify as cartel. But, more importantly, the fact that OPEC controls more than three-quarters of proven oil reserves[112] and Saudi Arabia's role as a swing producer and sure winner of any price competition—thanks to its high quality crude oil and low cost of production—suffices to refute this argument. As to OPEC's action in response to both high and low prices, not only are the reactions to high prices less frequent and less significant, they are often designed to serve the long-term interest of OPEC itself.[113]

It is noteworthy, however, that getting together for countries to protect their common economic interests is neither wrong in itself, nor unique to OPEC. Whatever the prejudices against the term "cartel", it takes only a cursory look at the web of international economic agreements to realize how cartels and cartel-like arrangements

[108] See *Black's Law Dictionary*, 7th edn (St Paul, MN: West Publishing, 1999).

[109] Note, however, that this is a matter of controversy for economists. See Anas Alhajji and David Huettner, *OPEC and Other Commodity Cartels: A Comparison*, 28 Energy Policy 15 (2000), 1151–1164.

[110] Zuhayr Mikdashi wrote "Perez Alfonzo, the Venezuelan minister who is credited with conceiving the OPEC idea, told this author that his model for OPEC was that of a governmental cartel. Its aim is to protect the public interest of the countries concerned, as opposed to a private cartel which promotes the commercial interest of stockholders of the constituent firms". Zuhayr Mikdashi, *Cooperation among Oil Exporting Countries with Special Reference to Arab Countries: A Political Economy Analysis*, 28 Int'l Organization 1 (1974), 1–30, at 6.

[111] See Luncheon Address by former OPEC Secretary General Rilwanu Lukman to the 16th World Petroleum Congress, Calgary, Canada, 13 June 2000, at <www.opec.org>.

[112] According to a BP data for 2000, OPEC countries accounted for 77.8 percent of the world's proved oil reserves. *BP Statistical Review of World Energy June 2001*, available at <http://www.bp.com/centres/energy>. Proven reserves are "quantities that geological and engineering information indicates with reasonable certainty can be recovered in the future from known reservoirs under existing economic and operating conditions". See ibid.

[113] Noting OPEC's price band of between \$22 and \$28 per barrel, the US District Court for the Northern District of Alabama which decided the latest judicial challenge to OPEC at first instance level observed that OPEC's implementation of the price band "must be interpreted as a balancing of the cartel's short-term and long-term interests. By setting the lower limit of the band at \$22 per barrel, prices are kept consistently above competitive levels, thus securing monopoly profits. In the longer term, the price band discourages development of more expensive supply sources in at least two ways. First it eliminates the prospect of constant escalation in prices. It was not only high prices that drew out expensive supplies in the past, but also the then-current forecasts of constantly escalating future prices. Second, a formal (but ambiguously defined) \$28 upper limit to the band makes development and exploration of high cost reserves more risky. The openly stated threat of supply increases to drive down prices in the event they exceed \$28 would make it chancey to rely upon prices anywhere near this level in making development decisions. In fact, confusion over if and when such a supply increase might occur or with regard to dissention within OPEC over the cap itself only serves to increase the uncertainty about prices and to discourage development investments in more costly reserves." *Prewitt Enterprises, Inc. v. OPEC Countries*, as note 86 above, pp. 10–11.

are pervasively employed to promote the interests of those who frequently denigrate the very concept. Several leading WTO Members have, at one time or another, been members of international agreements setting up cartels of the same nature as OPEC. The International Uranium Cartel is perhaps a good example not just because it was created by several developed-countries parties to the GATT, but also because it got its inspiration partly from the perceived successes of OPEC. Formed in 1972 by an agreement between Australia, France, South Africa, Canada and Rio Tinto Zinc of Britain, this arrangement operated "to control the world price and supply of uranium through a complex scheme of price-fixing, bid-rigging, and the allocation of markets".[114] The United States has, on several occasions, concluded agreements with several countries restricting trade through, *inter alia*, direct export quotas or minimum export prices which had the same purpose and effect as OPEC price-manipulative measures—often in blatant violation of their GATT obligations.[115] The recent unsuccessful steel negotiations between several leading WTO Members for the restriction of production outside the framework of the WTO[116] would only have created the latest OPEC parallel for the steel industry composed almost entirely of developed-country steel producers.[117] Indeed, the US Court of Appeals which decided the 1981 case against OPEC made it clear that "… while conspiracies in restraint of trade are clearly illegal under domestic law, the record reveals no international consensus condemning cartels, royalties, and production agreements".[118] Nor is there any clear proof from recent practice that such a consensus has developed since.

Finally, in as long as the WTO does not have any way of counteracting concerted practices among cross-border private operators, such as market-sharing or price-fixing arrangements between companies, the WTO does not necessarily exclude OPEC-like results. Indeed, neither do most developed countries discourage private cartels in every case even at the national level[119]—not to mention the ubiquity of those operating illegally.[120] We have also seen that, in the very area of petroleum itself "for 40 years, from 1933 through 1972, crude oil production in the United States was controlled by government-enforced prorationing of output among the states to fix prices".[121] The

[114] Larry R. Stewart, *Canada's Role in the International Uranium Cartel*, 35 Int'l Organization 4 (Autumn 1981), 658. Interestingly, the cartel operated in secrecy for about four years until it was exposed by the Australian Friends of the Earth in the summer of 1976. Id.

[115] See *Japan—Semi-Conductors*, as note 50 above.

[116] See *Washington steels itself for big push to cut output*, Financial Times (26 November 2001).

[117] Back in history as well, when industrialized countries were hit by the first oil crisis in 1974, among the alternatives they considered against OPEC were "the imposition of an oil import quota, the withholding of bushels [of wheat] for barrels [of oil], and the creation of *an industrial country buyers' cartel* to negotiate guaranteed long-term prices for OPEC oil". See Edward John Ray, *The Political Economy of International Trade Law and Policy: Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariff Barriers*, 8 J. Int'l L. & Business (Fall 1987), 285 (emphasis added).

[118] See *International Association of Machinists and Aerospace Workers v. OPEC and Member Countries*, 649 F.2d 1354 (9th Cir. 1981) 1354.

[119] Shipping cartels are a good example here as they are exempt from the purview of competition law in the United States, the European Union, etc.

[120] On illegal cartels in the European Union, see <http://europa.eu.int/comm/competition/antitrust/cases/2001>; and for the United States, see <http://www.usdoj.gov/atr/cases.html>.

[121] Libecap, as note 97 above, p. 834.

difference ultimately appears to be that OPEC is about the only successful inter-governmental cartel, not to mention the fact that it is composed exclusively of developing countries.[122] In sum, while OPEC is clearly an inter-governmental cartel, any value judgment against its activities and the very terminology is supported neither by prevailing international law nor by any consistent principle or practice of the major trading nations which point their fingers at OPEC.[123] Collusion between companies to manipulate prices is a condemned practice in many cases and in many countries; collusion between sovereign states to manage the pace of exploitation of their most important natural resources is neither unique to OPEC nor illegal under the law of any particular country; nor can it be. Indeed, nothing short of an international legal norm can be applied to measure the legality or otherwise of the acts of sovereign states. Such a norm has yet to be created.

V. Conclusion: Rethinking the Relationships

This article has shown that the multilateral trading system was designed from the beginning to serve a market access agenda. By the time energy security became an issue after the creation of OPEC, the trading system was ill-suited to address it properly. In an effort to overcome the problem, leading GATT/WTO Members opted for the non-multilateral path, and particularly the path of regional trading arrangements, which are inherently based on the philosophy of discrimination.[124] This approach cannot provide a lasting solution to the problem of energy trade.

In one of his latest writings, Professor John Jackson recalled that, of the two main objectives of the trading system at the time of its creation, "… the first, and the more important at that time, sometimes overlooked, was the prevention of another war".[125] The role of the multilateral trading system as a vital instrument of international peace and stability could be hardly complete in the absence of so many countries controlling so much of such a vital commodity. If there is such a thing as a single product of international trade prone to causing "another war", oil could probably come on top. Regionalism cannot be the solution in such a sensitive sector; leading WTO Members should rather look for solution within the multilateral framework. This needs positive

[122] As Robert Mabro said, "By its very nature OPEC arouses emotions, and brings to the surface deep-seated, sometimes subconscious value judgements and prejudices. We are all human and in scientific endeavours our objectivity is a function of our emotional distance from the object of inquiry. OPEC is an organization of developing countries which seemed to be wielding power. Whether they admit it or not many cannot help but feel a bit suspicious. Like Nathanael the disciple who, according to St John, did ask rather bluntly: 'Can there any good thing come out of Nazareth?', some quietly wonder: 'Can there any good thing come out of the third world?' Perhaps yes, or maybe not. But one should at least wait and heed first the advice of Philip, the other disciple, 'Come and see'." Mabro, as note 9 above, p. 7.

[123] For a contrary view, see *Note: The Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments*, 91 Yale L.J. (1982), 780–782.

[124] On the vices of regional trading arrangements in general, see Jagdish Bhagwati, *Free Trade Today* (Princeton, NJ: Princeton University Press, 2002), pp. 106–120.

[125] John H. Jackson, *The WTO "Constitution" and Proposed Reforms: Seven "Mantras Revisited"*, 4 J.I.E.L. (2001), 67, 68.

efforts from both sides to look for some common ground, of which there is plenty. At the rhetorical level, both groups of countries accept this approach as the only way forward;[126] but it needs to be supplemented by actions that accommodate each other's primary concerns. At the risk of oversimplification, these primary concerns may be simply stated as follows: consumers want regular and adequate supplies of oil at reasonable prices, and producers want reassurance of their sovereign right to their natural resources, secure access to export markets, and reasonable returns from those exports to support their overall development. The WTO, if allowed, has the potential to adequately address both groups of concerns in the interest of the common good.

To this end, WTO Members should actively facilitate rather than hinder—the accession of non-WTO OPEC countries. This does not just bring more oil producers into a system of rules, however ineffective; it also allows the acceding countries enormous benefits in terms of attraction of investment; closer integration with the global economic system; better terms of market access for their competitive petrochemical products that will benefit consumers everywhere; gaining much-needed influence in the development of environmental and other rules within the WTO; and use of WTO regulations for domestic regulatory clean-up. At the same time, OPEC countries, without in any way questioning their full sovereignty over their natural resources, might consider relaxing the extent of their intervention in price regulation and even undertake minimum supply commitments at pre-negotiated price levels. This approach goes in line with the objectives of both institutions. By undertaking minimum supply commitments, OPEC furthers one of its principal aims—that of "ensuring the stabilization of prices in international oil markets with a view to eliminating harmful and unnecessary fluctuations".[127] Moreover, by undertaking minimum supply commitments or providing other acceptable assurances to consumer countries, OPEC countries will help stabilize the world, of which they are also a direct, though not sole, beneficiary. At the same time, a credible undertaking on the part of suppliers provides much-needed confidence and predictability to the market, and a favourable international political environment for the smooth operation of business—two of the most fundamental objectives of the WTO. The WTO on its part might consider taking several measures to assuage OPEC countries' not unfounded fears. First, the WTO could introduce an explicit understanding providing immunity to OPEC's price/supply management practices whose WTO-legality could not be

[126] OPEC has repeatedly expressed its willingness to enter into what it calls "a fair agreement" that recognizes, on the one hand, owners' rights to a just price for their exhaustible and non-renewable resources, and, on the other, consumers' rights to a guaranteed oil supply at reasonable prices. See OPEC, *Forum*, XXXIII OPEC Bulletin 2 (February 2002), 6. See also the two "Solemn Declarations" of OPEC Countries' Heads of States and Governments, made on 4–6 March 1975 in Algiers, and on 27–28 September 2000 in Caracas, Venezuela. Likewise, leading powers on the consumer end, including the United States and the European Union, often talk in identical terminology about their determination to strengthen trade alliances and establish dialogue with oil producers. The US government talks in terms of the "need to strengthen our trade alliances, [and] to deepen our dialogue with major oil producers". See US *National Energy Policy 2001*, as note 69 above, pp. 8-4. The EC Commission Green Paper also declared that the European Union must "establish an ongoing dialogue with producer countries". See *EC Green Paper* (2001), as note 68 above, p.73.

[127] Article 2.B of the OPEC Statute.

taken for granted. Second, a restatement of the already established international law principle of national sovereignty over natural resources might help in confidence-building with no cost to anyone. Needless to say, this is only a preliminary proposal, and a more meaningful approach has yet to be devised. But one thing is clear in all this: any approach in this direction has the potential to transform the role of petroleum in international relations from fuelling conflict to oiling co-operation. And, as the saying goes, if there is the will, there is always the way.