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Revisiting the Debate on Trade in Energy Goods

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Abstract

The recent crude oil production and price wars have revived the debate on production restrictions as instruments for crude oil price stabilization. This debate is related to the broader attempt at crafting appropriate regulations for trade in energy goods. While the Organization of Petroleum Exporting Countries (OPEC) and OPEC+ countries rely on production restrictions to ensure favourable crude oil prices, this approach raises critical questions in terms of its compliance with World Trade Organization (WTO) Agreements. Answers to these questions are important in understanding the tradability of crude oil in situ, securing global crude oil supply, fine-tuning the legal framework for cross-border oil and gas pipelines, regulating oil consumption subsidies and keeping the environmental conservation discourse on track. This article explores answers to these questions.

Keywords: crude oil, energy, international trade, OPEC, WTO

1. Introduction

Recent disruptions in global crude oil markets have yet again provoked debate on the suitability of the Organization of Petroleum Exporting Countries (OPEC) and OPEC+² production quotas as instruments for crude oil price stabilization.³ The above

debate is part of the broader discussion on appropriate regulations for trade in energy goods.

Although it is acknowledged that there is a close relationship between trade in energy goods and trade in energy services, regulations on trade in energy services are beyond the scope of this article. Additionally, the article does not specifically discuss all relevant Energy Charter Treaty (ECT) provisions, as the ECT is generally consistent with provisions in the General Agreement on Tariffs and Trade (GATT).⁴

Energy goods are defined to include, on the one hand, finite energy sources such as crude oil and natural gas, and on the other, energy from renewable energy sources such as, hydroelectricity, solar, thermal, geothermal and wind. Leading authors on energy goods and the WTO have defined energy goods to include both renewable and non-renewable energy.⁵ This definition is primarily based on the physical attributes of these goods, especially crude oil and natural gas.⁶ The definition may be less persuasive when applied to electricity. However, electrical energy is defined as a good under the Harmonized System Code (HS Code) classification.⁷

This article is a modest contribution to the discussion on appropriate regulations for the energy sector. The article hopes to benefit policymakers, students, investors and all stakeholders interested in the regulation of trade in energy goods.

2. Oil and International Trade

2.1 The Organization of Petroleum Exporting Countries (OPEC)

OPEC's influence has fluctuated through the years due to various responses to crude oil supply and pricing. Today, although the organization is beset by member conflicts, a disagreeable geopolitical environment in the Middle East and the ever-rising influence of non-OPEC oil producing countries, it remains the world's foremost organization in crude oil trade.

Despite the creation of OPEC in the 1960s, it was not until the 1970s that the organization impacted on global oil trade.⁸ It is worth noting at this stage that OPEC's intervention and success might have curtailed the influence of the cartel type arrangement in the United States and contributed to the demise of market demand prorationing.⁹

Negotiations and subsequent agreements signed between 1971 and 1973 by OPEC members and the International Oil Companies (IOCs) successfully raised the posted prices.¹⁰ The above success is attributed to the alignment of several oil producing countries' interests in one organization.¹¹

The growing success of OPEC in raising prices and imposing its influence on global oil trade was adversely affected by declining oil prices and low demand in the 1980s.¹² OPEC responded by introducing a group production ceiling divided between the members and a reference basket for pricing.¹³ The above measures and the slight increase in oil prices towards the end of the decade, helped member countries to recover from the slump of the early 1980s.¹⁴

The 1990s didn't experience serious pricing problems such as those witnessed in the 1980s.¹⁵ However political instability in the Middle East led to price volatility.¹⁶ The attack on Kuwait by Iraq in 1990 precipitated a major price rise from US\$15.00 in May 1990 to over US\$40.00 at the end of 1990.¹⁷ The above attack, was finally quelled by the United States and the United Nations coalition forces, which invaded Iraq and forced Iraq out of Kuwait.¹⁸ This led to short term stabilization of prices.¹⁹

At the turn of the century, oil prices rose to US\$30.00 per barrel. In 2000, OPEC responded by introducing a price band mechanism to stabilize prices.²⁰ This new mechanism was only fairly effective in 2002.²¹ Although, OPEC has consistently struggled with volatile crude oil prices,²² it now faces ever growing pressure from major oil producing countries outside OPEC. Recently, crude oil production and price wars between Russia and Saudi Arabia and the COVID-19 pandemic have had a negative impact on global crude oil prices.²³

It is apparent from the foregoing discussion that OPEC has and continues to focus majorly on maintaining favourable crude oil prices. Restrictions on production of crude oil are central to maintaining favourable crude oil prices.

2.2 The World Trade Organization (WTO)

Articles II and III of the Marrakesh Agreement²⁴ provide the functions of the WTO. Article II (1) sums up the mandate of the organization as follows:

The WTO shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

The above provision renders the WTO the principal institution in the regulation of trade among its members. Relevant WTO Agreements include: The GATT, the Agreement on Trade Related Investment Measures (TRIMs) and the Agreement on Subsidies and Countervailing Measures (SCM).

The jury is still out on the suitability of the WTO to regulate crude oil production and trade. To some authors, such regulation is a preserve of domestic laws and policies and only extends to plurilateral and multilateral frameworks through the express consent of these sovereign territories. Although this argument is logical, it is not

supported by emerging academic opinion that appears to hold that crude oil trade (not production) may be subject to multilateral regulation under the WTO.²⁵

2.3 Classification of Crude Oil as a Good

Article XI of the GATT prohibits quantitative restrictions implemented through quotas and related measures. It follows that OPEC member states, majority of which are also WTO member states, are violating Article XI of the GATT.²⁶ This also applies to OPEC+ countries.

It has been argued that OPEC production quotas fall outside the scope of measures regulated under Article XI.²⁷ The above argument is mainly founded on the premise that OPEC and OPEC+ production quotas affect oil in situ. Additional support for the foregoing position is based on the principle of permanent sovereignty over natural resources. Nonetheless, there are strong grounds for a contrary position. Based on the reasons below, it can be argued that crude oil in situ is a good and should be regulated by the WTO. Compared to the former position, the latter position is supported by only a few authors.²⁸ An examination of the above positions is therefore necessary to establish the true character of crude oil and its tradability under the WTO legal framework.

The arguments below are divided into four thematic areas. These are; WTO jurisprudence on natural resources in the natural state, arguments on national sovereignty, thirdly, tradability of oil before extraction, and the HS Code nomenclature. To a large extent, the above themes suggest that crude oil in situ is a good.

The appellate body has pronounced itself on the issue of natural resources in their natural state. In the *United States Lumber dispute*, the appellate body addressed the issue of whether fungible goods such as unfelled trees can be treated as goods for purposes of the SCM Agreement.²⁹ The appellate body held that the term “goods” for purposes of the SCM Agreement, includes immovable goods, and, fungible goods.³⁰ However, the appellate body also distinguished the definition of goods in the GATT from that provided for the SCM.³¹

The author submits that the distinction between the definition of goods in the SCM and the GATT does not hold.³² Crude oil is a fungible good in its natural state and can be traded as such. Although WTO/GATT case law is not binding, this decision suggests that natural resources in their natural state may be regulated by the WTO. Similarly, it can be argued that crude oil in situ is a good and may be regulated by the WTO.

Secondly, in relation to the above argument, commentators have suggested that the principle of permanent sovereignty over natural resources does not permit the classification of crude oil in situ as a good.³³ Basically, the principle provides that states

should use their natural resources as they deem fit.³⁴ Scholars have posited that this principle has attained the character of customary international law.³⁵

A careful review of the principle reveals that the sovereignty of states over natural resources should be exercised with due regard to other international law obligations.³⁶ In light of the above, after 1995, countries voluntarily signed and ratified the WTO Agreement and its Annexures. By doing so and bound by the principle of *pacta sunt servanda*, WTO member states acknowledged a restriction to their sovereignty. Additionally, prior to the GATT 1947, some countries had proposed that export restrictions be permitted to protect scarce natural resources. However, this position was rejected as it would restrict access to raw materials.³⁷

In a related argument, some authors contend that tradability of goods and tradability of production licences should be distinguished.³⁸ Such authors argue that a state permit to exploit natural resources does not confer possession rights on the party exploiting the natural resource.³⁹ However, in most concession agreements, the party permitted to exploit the natural resource usually obtains a right of possession to a portion of the natural resource. This is especially true for modern concession agreements.⁴⁰

The above argument can be supported by the fact that crude oil has a HS Code classification. The ordinary meaning of the term “good” refers to a commodity that is tradable and usually refers to a tangible commodity.⁴¹ However, the definition of goods under WTO jurisprudence refers to such commodities listed under the HS Code nomenclature.⁴² The HS Code nomenclature is used for purposes of setting tariffs and indicating members’ traded goods that are subject to WTO regulation.⁴³

The above discussion strongly suggests that crude oil in situ is a tradable good and is subject to international trade regulation by the WTO/GATT. In light of the foregoing discussion, some provisions within the WTO legal framework are discussed as they are relevant to crude oil production and trade. These provisions are: Articles V, XI and XX of the GATT, Articles 2 and 4 of the TRIMs, Articles 3 and 5 of the SCM Agreement and relevant provisions in the Agreement on Technical Barriers to Trade (TBT).

2.4 Relevant WTO Agreements

Article V of GATT

Article V regulates traffic in transit, that is; goods, vessels and other means of transport, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport, originating and terminating beyond the frontiers of a contracting party. This provision is important for the regulation of transportation of crude oil across territories of member states.

Additionally, Article V guarantees freedom of transit through the territory of each contracting party via routes that are most convenient for international transit. Charges, regulations and formalities for traffic in transit, should apply equally to all contracting parties. In the *Colombia-Ports of Entry dispute*,⁴⁴ the panel found that Colombia's measures restricting ports of entry for certain goods contravened Article V (2) of the GATT, which provides for freedom of transit.

In its current form, Article V does not expressly provide for infrastructure such as cross-border oil and gas pipelines.⁴⁵ African countries have endured protracted negotiations for cross-border pipeline projects.⁴⁶ These negotiations should be guided by predictable international trade rules. The ECT, which is drafted in a WTO consistent manner, regulates cross-border oil and gas pipelines.⁴⁷

Article XI of GATT

As noted above, some authors argue that OPEC production quotas fall outside the scope of Article XI (1).⁴⁸ However in *Japan- Trade in Semiconductors*,⁴⁹ the panel stated as follows;

Article XI (1), unlike other provisions of the General Agreement, did not refer to laws or regulations, but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure.

It can be argued that OPEC and OPEC+ production quotas restrict sale for export, as only a certain amount of crude oil is available for sale and export.⁵⁰ The measures undertaken by OPEC member states and OPEC+ countries restrict oil production and supply and impair the benefits accruing to other WTO oil producing countries. The panel in *Japanese Measures on Imports of Leather* stated thus:

In any event, the Panel wished to stress that the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons e.g., it would lead to increased transaction costs and would create uncertainties which could affect investment plans.⁵¹

The measures instituted by OPEC member states and OPEC+ countries in their quest to comply with production restrictions, lead to uncertainties in the investment plans of other oil producing countries.

The 1950 Report of the Working Party on "The Use of Quantitative Restrictions for Protective and Commercial Purposes" addresses key aspects of this discussion.⁵² Some of the export restrictions that are inconsistent with GATT and not covered under the

exceptions include export restrictions applied by a contracting party to avoid price competition among exporters.⁵³ Production quotas are used to enforce OPEC objectives. The main objective of the organization, as discussed above, is to impact the price of oil on the world market. This affects competition among exporters especially those that are not members of OPEC.

Article XX of GATT

Article XX of the GATT, provides some justification for OPEC and OPEC+ production quotas. However, this is subject to debate as the chapeau of the Article prohibits measures which constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.⁵⁴

Articles 2 and 4 of TRIMs

Without prejudice to the rights and obligations under the GATT, the TRIMs prohibits WTO members from applying trade related investment measures that are inconsistent with Article XI of the GATT. An illustrative list of such measures is provided in the Annex to the TRIMs.

TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:...

the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.⁵⁵

The TRIMs provide additional text to the obligation to eliminate quantitative restrictions highlighted in Article XI (1) of the GATT. Compliance with crude oil production restrictions often provides advantages of favourable crude oil prices. These measures also indirectly restrict the volume of crude oil available for export. Accordingly, it can be argued that OPEC and OPEC+ production quotas are inconsistent with Article 2 of TRIMs.

In *India – Certain Measures Relating to Solar Cells and Solar Modules*,⁵⁶ the appellate body found that India's domestic content measures were not supported by the derogation in Article III (8) of GATT and therefore inconsistent with Article 2(1) of

TRIMS. It can be argued that OPEC and OPEC+ production quotas cannot be supported by Articles XI and XX of GATT and are therefore inconsistent with Article 2 of TRIMs.

The reprieve provided to developing countries in Article 4 of TRIMs is only temporary and therefore is of limited benefit. Moreover, in *Canada-Renewable Energy-Feed in Tariff Program*,⁵⁷ the appellate body noted thus:

[T]here is little, if any, indication that the provisions of the TRIMs Agreement were intended to override rights recognized in the GATT, such as the right provided in Article III:8(a). On the contrary, several provisions of the TRIMs Agreement – particularly the initial clause of Article 2.1, and Articles 3 and 4 – would seem to reflect reiterative attempts to safeguard rights recognized in the GATT, rather than to override them.⁵⁸

Articles 3 and 5 of the SCM Agreement

In 2018, the International Energy Agency (IEA) reported that fossil fuel subsidies to consumers amounted to about US\$400 billion.⁵⁹ Research indicates that oil consumption subsidies are prevalent in many oil producing countries including OPEC and OPEC+ countries.⁶⁰ Oil consumption subsidies are part of the broader category of fossil fuel consumption subsidies.⁶¹ These subsidies are implemented through price control regulations.⁶²

The G-20 leaders recognized that inefficient fossil fuel subsidies encourage wasteful consumption, distort markets, impede investment in clean energy sources and undermine efforts to deal with climate change.⁶³

These subsidies are inconsistent with Articles 3 of the SCM Agreement. Article 3 of the SCM agreement states thus:

3(1) Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

... (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

The appellate body interpreted the term “contingent” to refer to subsidies contingent in both law and fact. Oil consumption subsidies violate Article 3 (1) (b) of the SCM. This is so, irrespective of the fact that the subsidies are provided in the law or are offered as a matter of practice. In *Canada-Autos*⁶⁴ the appellate body held thus:

Finally, we believe that a finding that Article 3.1(b) extends only to contingency ‘in law’ upon the use of domestic over imported goods would be contrary to the object and purpose of the SCM Agreement because it would make circumvention of obligations by Members too easy. ...For all these reasons, we believe that the Panel erred in finding that Article 3.1(b) does not extend to subsidies contingent ‘in fact’ upon the use of domestic

over imported goods. We, therefore, reverse the Panel's broad conclusion that 'Article 3.1(b) extends only to contingency in law.'⁶⁵

As noted above, OPEC and OPEC+ countries subsidize petroleum consumption. Such subsidies may encourage consumers to buy and use locally produced oil as opposed to imported oil. This affects the markets of other oil producing countries. The subsidies discussed above are prohibited under the SCM Agreement.⁶⁶ Although oil consumption subsidies are granted to consumers and not the producers directly, it can be argued that they benefit oil producing companies as they increase demand for oil. Pursuant to Article 4 (7) of the SCM Agreement, prohibited subsidies should be withdrawn without delay.⁶⁷ The SCM Agreement provides additional procedures for the resolution of disputes involving subsidies.⁶⁸

It should also be noted that these subsidies can only be regarded inconsistent with the SCM Agreement where they are specific to a particular industry.⁶⁹ The WTO dispute settlement body has clarified this position.

As with any analysis under the SCM Agreement, the first issue to be resolved is whether the measures in question are subsidies within the meaning of Article 1 that are specific to an enterprise or industry or group of enterprises or industries within the meaning of Article 2.⁷⁰

Article 5 of the SCM regulates actionable subsidies.⁷¹ These can only be challenged where they occasion adverse effects to the domestic industry of another member. That is, the subsidized imports have to affect the domestic industry of another WTO member. It can be argued that oil consumption subsidies affect the domestic oil sectors of other WTO oil producing countries.

Environmental Conservation

The preamble to the Marrakesh Agreement provides for among other objectives, the following environmental conservation consideration:

...the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...⁷²

Environmental conservation was a major consideration in the establishment of the WTO. To this end, it may be argued that international trade should be conducted in an ecosystem that protects and preserves the environment.

Similarly, the TBT recognises that WTO members may enact regulations and adopt measures to protect the environment.

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they 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, and are otherwise in accordance with the provisions of this Agreement,⁷³

This is further supported by Article 2 of the TBT that stresses protection of the environment as one of the legitimate objectives of technical measures that may be permitted within the WTO legal framework.⁷⁴ However, such measures should not unnecessarily restrict international trade.⁷⁵

Some of the environmental conservation concerns that attend production and trade in energy goods, especially non-renewable energy goods, include, greenhouse gas emission through flaring, pollution of soil and water sources and destruction of natural flora and fauna. Sustained criticism of the negative impact of production and trade in energy goods on the environment has inspired industry players to develop environment friendly technology and practices to minimize environmental degradation. Such practices include, 3D and 4D seismic technology and mobile and slimhole drilling technology.⁷⁶

That said, OPEC and OPEC+ countries can argue that that their production quotas are meant to conserve an exhaustible natural resource and to protect the environment. In both cases, if such measures are to be maintained within the WTO framework, they have to meet the strict requirements provided in Article XX of the GATT.

Article XX of the GATT provides for the conservation of exhaustible natural resources. This provision has been interpreted to permit measures meant to conserve the environment. This provision is particularly helpful in crafting of measures that may be permissible as exceptions to various obligations under the GATT.

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;

Article XX has a peculiar method of interpretation. The measure at issue has to fit within one of the exceptions in the subparagraphs and thereafter conform to the

requirements in the chapeau. This position was confirmed by the appellate body in *US-Gasoline*.⁷⁷

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions — paragraphs (a) to (j) — listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX (g); second, further appraisal of the same measure under the introductory clauses of Article XX.

Article XX (g) provides for an exception to GATT obligations, where a member state invokes measures relating to the conservation of an exhaustible natural resource if such measures are made effective in conjunction with restrictions on domestic production. The wording of this subparagraph is important.⁷⁸ This subparagraph has three major elements.⁷⁹ These are; relating to, conservation of exhaustible natural resources, and made effective in conjunction with restrictions on domestic production.⁸⁰

The first element “related to” was discussed in *Canada-Herring and Salmon*.⁸¹ The panel held that the measure had to be primarily aimed at conservation of exhaustible natural resources. For purposes of environmental conservation, the measure should be dedicated to conserving an exhaustible natural resource such as fauna and flora etc. The second and third elements of the three-tier test do not require further elaboration. OPEC and OPEC+ production quotas do not meet the first requirement as they are not primarily meant to conserve the environment, but rather to ensure price stability.

In the event that a measure meant to conserve an exhaustible natural resource passes the three tier test in the subparagraph, the measure is further subjected to a compliance test of the chapeau. In *US-Gasoline*,⁸² the appellate body held thus:

The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of ‘abuse of the exceptions of [what was later to become] Article [XX].’ This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.

The appellate body in the *US-Gasoline* dispute interpreted ‘disguised restrictions to international trade’ to mean anything that has the effect of creating arbitrary or unjustifiable discrimination in international trade, taken under the guise of an exception under Article XX.⁸³ Accordingly, conservation measures implemented by member states engaged in trade of energy goods should not be disguised measures intended to create arbitrary and unjustifiable discrimination in international trade.

OPEC and OPEC+ production quotas may be said to create arbitrary and unjustifiable discrimination in international trade of crude oil. In *US-Shrimp*,⁸⁴ the appellate body found that although the import ban maintained by the Respondent was related to conserving an exhaustible natural resource, it constituted arbitrary and unjustified discrimination and hence was inconsistent with the chapeau of Article XX.

The discussion of environmental conservation, is incomplete without examining the position of the WTO vis-à-vis international treaties on environmental conservation, especially the United Nations Framework Convention on Climate Change (UNFCCC). OPEC and OPEC+ countries may be constrained in making the argument that their domestic environmental conservation measures are enacted in accordance with their obligations under the UNFCCC and the Kyoto Protocol.⁸⁵ Such an argument has a limited scope of application. In *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*,⁸⁶ the panel found that Article 31(3) (c) of the Vienna Convention on Law of Treaties (VCLT)⁸⁷ would only apply in cases where the parties to the dispute have common membership in the WTO Agreement and the external treaty. The panel’s interpretation is absurd and adversely affects the international obligations of WTO members.⁸⁸

3. Conclusions

Crude oil in situ is tradeable and should not be excluded from the WTO legal regime. WTO members can contribute to the important discussion on energy security through embracing the definition of crude oil in situ as a good.

The scope of Article V of the GATT is insufficient to regulate trade in energy goods. This is particularly true for regulation of cross-border crude oil pipelines. This regulatory weakness may be cured by borrowing from the energy transit provisions in the ECT. Predictable regulations on cross-border pipelines will support investment in energy infrastructure in developing countries.

It may be argued that OPEC and OPEC+ production restrictions are inconsistent with the provisions on quantitative restrictions in Article XI of GATT and Article 2 of the TRIMs. These production restrictions cannot be justified by Article XX (g) of GATT

and Article 4 of the TRIMs. OPEC, OPEC+ countries and the WTO should work towards measures that are consistent with the GATT and TRIMs.

It can also be argued that oil consumption subsidies provided in many OPEC and OPEC+ countries are inconsistent with Articles 3 and 5 of the SCM. It is recommended that prohibited subsidies are immediately withdrawn while actionable subsidies that cause adverse effects to markets of other crude oil producing countries are challenged through the WTO dispute settlement process.

OPEC and OPEC+ countries may be constrained in making the argument that their production restrictions are meant to conserve an exhaustible natural resource or to protect the environment. The primary objective of these production restrictions is price stability. On a related note, the WTO dispute resolution bodies should interpret WTO Agreements in a manner that supports environmental conservation obligations in relevant international treaties.

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Agreements and Resolutions

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Endnotes

¹ For Henriette and Reuben

² OPEC + refers to OPEC and a group of allies. See Energy Intelligence Group OPEC-Plus Demands Could Slam Russian Production at http://www.energymintel.com/pages/eig_article.aspx?DocID=1073068 (accessed on 21 May 2020). The OPEC + alliance is underpinned by the Declaration of Cooperation agreed in 2016 and the Charter of Cooperation endorsed in 2019.

³ Bradshaw, M., Van de Graaf, T. and Connolly, R., 'Preparing for the new oil order? Saudi Arabia and Russia' *Energy Strategy Reviews* 26 (2019) 100374 2

⁴ Article 4 of the Energy Charter Treaty. The ECT expressly provides for non-derogation from the WTO Agreement between contracting parties that are members of the WTO. Nonetheless, concerns persist on the interpretation of Article 4 with regard to trade in energy products and materials. Energy Charter Treaty Article 4 Non-Derogation from WTO Agreement General Comments and Notes at

https://www.energychartertreaty.org/fileadmin/ImagesMedia/ECT/Evolution_of_the_Article/Article_4_-_Non_derogation.pdf (accessed on 21 May 2020)

⁵ Cottier T., Malumfashi, G., Matteotti-Berkutova, S., Nartova, O., de Sepibus, J. and Bigdeli, S.Z., Individual Project No. 6^[SEP] Energy in WTO Law and Policy at https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_7may10_e.pdf (accessed on 21 May 2020)

⁶ Cottier T., Malumfashi, G., Matteotti-Berkutova, S., Nartova, O., de Sepibus, J. and Bigdeli, S.Z., Individual Project No. 6^[SEP] Energy in WTO Law and Policy at https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_7may10_e.pdf (accessed on 21 May 2020)

⁷ Cottier T., Malumfashi, G., Matteotti-Berkutova, S., Nartova, O., de Sepibus, J. and Bigdeli, S.Z., Individual Project No. 6^[SEP] Energy in WTO Law and Policy at https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_7may10_e.pdf (accessed on 21 May 2020). The HS Code for electrical energy is 271600.

⁸ Hallwood, P. and Sinclair, S. *Oil, Debt and Development – OPEC in the Third World* (1981) 42 (Hereafter cited as Hallwood, P. and Sinclair, S. 1981).

⁹ Hallwood, P. and Sinclair, S. (1981) 6-7. For differences between Maximum Efficiency Rate (MER) and market demand prorationing, see United States Senate, State Regulation of Natural Gas Production: Hearing Before the Committee on Energy and Natural Resources, United States Senate, One Hundred Second Congress, Second Session, on the Issues Concerning State Regulation of Natural Gas Production, June 18, 1992, Volume 4 255-256. Also see Macfadyen, A., & Watkins, G. (2014) Government Controls on the Petroleum Industry: Oil Prorationing. In *Petropolitics: Petroleum Development, Markets and Regulations, Alberta as an Illustrative History* 274

¹⁰ The increase in posted prices is credited to the Tehran Agreement, the Tripoli Agreement and the Geneva Accords. See Hallwood, P. and Sinclair, S. (1981) 43 Posted prices are the announced price of oil reflecting the market development of crude oil and crude oil products. Prior to the 1970s posted prices were manipulated and administered by the IOCs and did not truly reflect the market development of crude oil. Also see Fattouh, B., An Anatomy of the Crude Oil Pricing System (2011) 15 available at

<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2011/03/WPM40-AnAnatomyoftheCrudeOilPricingSystem-BassamFattouh-2011.pdf> (Hereafter cited as Fattouh, B., 2011) Despite the failure of the negotiations in September 1973, six Gulf member states of OPEC increased the posted prices. Also see Yergin, D. (1991) *The Prize. The Quest for Oil, Money and Power* and Fattouh, B., *The Origins and Evolution of the Current International Oil Pricing System: A Critical Assessment in: Mabro, R. (ed.) Oil in the Twenty-First Century: Issues, Challenges, and Opportunities* (2006) all cited in Brémond, V., Hache, E. and Mignon,

V. 'Does OPEC Still Exist as a Cartel? An Empirical Investigation' (2011) *Journal of Energy Economics* (03) 10 1-2 (Hereafter cited as Brémond, V. et al., 2011) The posted price period is said to have originated with the IOCs, which sought to have a stable low price to limit the income tax paid to the oil exporting countries irrespective of the prevailing market conditions.

¹¹ Hallwood, P. and Sinclair, S. (1981) 43.

¹² See OPEC Brief History available at http://www.opec.org/opec_web/en/about_us/24.htm (accessed on 21 May 2020) See also Sammi, M.V., OPEC: Past, Present, and Future, in Shojai, S. (ed.) *The New Global Oil Market: Understanding Energy Issues in the World Economy* (1995) 86 (Hereafter cited as Sammi, M.V., 1995) The text cites sharp price fluctuations and excess oil supplies as some of the issues that affected OPEC in the 1980s.

¹³ See OPEC Brief History available at http://www.opec.org/opec_web/en/about_us/24.htm (accessed on 21 May 2020). Also see Brémond, V. et al (2011) 1 The author indicates that a new price mechanism was established in the mid 1980s this was a market related price as opposed to an administered price. There were different pricing systems in the 1970s and the 1980s, that is the posted price, official price, buyback price, the administered price by OPEC and the market-related price, which prevails today. Also see Fattouh, B., (2011) 11-16.

¹⁴ See OPEC Brief History available at http://www.opec.org/opec_web/en/about_us/24.htm (accessed on 21 May 2020).

¹⁵ See OPEC Brief History available at http://www.opec.org/opec_web/en/about_us/24.htm (accessed on 21 May 2020) It should be noted that weak prices still persisted in the decade; prices at some point went as low as the prices of the mid 1980s. However, the decade was much more stable than the 1980s.

¹⁶ See OPEC Brief History available at http://www.opec.org/opec_web/en/about_us/24.htm (accessed on 21 May 2020).

¹⁷ Euclid, A. 'OPEC's Dominance of the Global Oil Market: The Rise of the World's Dependence on Oil' *Middle East Journal* (2004) (58) 3 424 (Hereafter cited as Euclid, A., 2004).

¹⁸ Euclid, A., (2004) 425.

¹⁹ Euclid, A., (2004) 425.

²⁰ Horn, M. 'OPEC's Optimal Crude Oil Price' *Energy Policy* (2004) (32) 12 269 (Hereafter cited as Horn, M., 2004) The price band mechanism involves setting of a price range between US\$22:00 to US\$28:00 per barrel and using that price range to regulate production. Also see Ebghaei, F. OPEC and Its Role in Regulating Price of Petroleum (2007) MPRA Paper No. 80156 18 (Hereafter cited as Ebghaei, F., 2007)

²¹ Horn, M., (2004) 269.

²² See The Guardian, Oil prices volatile as OPEC talks down shortage fears at <https://www.theguardian.com/business/2011/mar/08/oil-prices-volatile-iran-opec-production> (accessed on 21 May 2020).

²³ See The Guardian, Oil prices fall again despite OPEC+ deal to cut production at <https://www.theguardian.com/business/2020/apr/10/opec-russia-reduce-oil-production-prop-up-prices> (accessed on 21 May 2020). Also see OPEC, Statement by HE Mohammad Sanusi Barkindo, OPEC Secretary General, to the Intergovernmental Group of Twenty Four (G-24) - Meeting of Ministers and Governors, 16 April 2020, virtual meeting at https://www.opec.org/opec_web/en/5897.htm (accessed on 29 May 2020)

²⁴ Marrakesh Agreement Establishing the World Trade Organization.

²⁵ Farah, P.D. and Cima, E. 'Energy Trade and the WTO: Implications for Renewable Energy and the OPEC Cartel' *Journal of International Economic Law* 2013 16(3) 707-740 (Hereafter cited as Farah P.D. and Cima, E., 2013)

²⁶ Angola, Ecuador, Kuwait, Nigeria, Qatar, Saudi Arabia, United Arab Emirate, and, Venezuela are members of both the WTO and OPEC. Additionally, Algeria, Iran, Iraq, and, Libya are all observers at the WTO and are in the process of accession with the WTO. See Worika, I. L. Production, Management, OPEC and the WTO, in Pauwelyn, J. (ed.) *Global*

Challenges at the Intersection of Trade, Energy and the Environment (2010) The Graduate Institute, Geneva Centre for Trade and Economic Integration 89 (Hereafter cited as Worika, I.L., 2010).

²⁷ See World Trade Organisation World Trade Report 2010 Trade in Natural Resources (2010) WTO Secretariat 166 (Hereafter cited as World Trade Organisation 2010). In this report it is argued that the language of Article XI regulates export restrictions and not production limitations. Also see Desta, M.G., Legal Issues of OPEC Production Management Practices: An Overview published in Werner, J. and Ali, A.H. (eds.) *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought* (2009) 19-20 (Hereafter cited as Desta, M.G., 2009). The learned author rescinding his earlier position discussed below, states that by its nature, Article XI (1) of the GATT requires that the following factors are met, that is, there is a product, the product is ready for exportation, and, the product is already destined for another contracting party. Accordingly, OPEC production quotas which target crude oil before production do not qualify as export quotas. Also see Cossy, M., Energy Trade and WTO Rules: [Reflections] on Sovereignty over Natural Resources, Export Restrictions and Freedom of Transit published in C. Herrmann, C. and Terhechte, J.P. (eds.) *European Yearbook of International Economic Law (EYIEL)*, Vol. 3 (2012) 290-291. (Hereafter cited as Cossy, M., 2012). The author argues that the principles of state sovereignty over natural resources do not permit the regulation of OPEC production quotas by the WTO. See also Desta, M.G., Legal Issues of OPEC Production Management Practices under WTO Law and the Antitrust Law of non-OPEC Countries (2010) *Journal of Energy & Natural Resources Law* Vol 28 No 4 450-451. (Hereafter cited as Desta, M.G., 2010). Also see Broome, S.A. Conflicting Obligations for Oil Exporting Nations?: Satisfying Membership Requirements of Both OPEC and the WTO (2006) *The George Washington International Law Review*, 38 (2): 418-417. (Hereafter cited as Broome, S.A., 2006). Also see Worika, I.L., (2010) 90. The author argues that OPEC production management policies should be distinguished from production quotas, and export restrictions.

²⁸ See Desta, M.G., 'The GATT/WTO System and International Trade in Petroleum: an Overview' (2003) *Journal of Energy & Natural Resources Law*, 21 (4): 394-397 (Hereafter cited as Desta, M.G., 2003) However, the learned author has since argued against this position. Also see Botha, L., How do the Current WTO Disciplines Apply to the Trade of Energy Goods and Services? (2009) A Discussion Paper Commissioned by USAID Southern Africa Global Competitiveness Hub 11 (Hereafter referred to as Botha, L., 2009) The author argues that *de facto* OPEC production quotas are GATT inconsistent as they amount to export restrictions. See also Lautenberg, F.R., Busting Up The Cartel: The WTO Case against OPEC (2004) A Report from the Office of Senator Frank R. Lautenberg 1-2 (Hereafter referred to as Lautenberg, F.R., 2004). Also see Marceau, G., The WTO in the Emerging Energy Governance Debate published in Pauwelyn, J. (ed.) *Global Challenges at the Intersection of Trade, Energy and the Environment* (2010) The Graduate Institute Geneva Centre for Trade and Economic Integration 27 (Hereafter cited as Marceau, G. 2010a). The learned author opines that challenges in accessing oil supplies due to licensing restrictions may be inconsistent with Article XI of the GATT. Also see United Nations Conference on Trade and Development, *Trade Agreements, Petroleum and Energy Policies* (2000) Executive Summary UNCTAD/ITCD/TSB/9 2. (Hereafter referred to as United Nations Conference on Trade and Development, 2000). Selivanova, Y. The WTO and Energy - WTO Rules and Agreements of Relevance to the Energy Sector (2007) ICTSD Programme on Trade and Environment 15-16. (Hereafter referred to as Selivanova, Y., 2007). The author observes that restrictions on the export of energy goods may contravene Article XI of GATT. However, the argument is not made on the basis of oil production quotas.

²⁹ *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber From Canada* WT/DS257/AB/R AB-2003-6 Para 68.

³⁰ *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber From Canada* Paras 58-60, 62-63, and, 66.

³¹ *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber From Canada* Para 63.

³² The author respectfully disagrees with the reasoning of the appellate body. Firstly, the preamble of the GATT 1947 clearly indicates the intention of the parties. The Agreement was made to develop the full use of the resources of the world and to expand the production and exchange of goods. Although the appellate body did not expressly indicate the particular annex of the WTO Agreement, the context and the previous paragraphs of the decision indicate that they were referring to the GATT. The GATT is not limited to imported and exported goods. As indicated in the preamble, it also extends to production; production is related to exchange. Secondly, the appellate body relied on the distinction between the terms “goods” in the SCM Agreement and “products” in some provisions of the GATT. However, these terms are used interchangeably in the GATT. The Preamble and other provisions such as Article V refer to goods while Articles, I, II, III, and XI among others refer to products. The Agreement does not explain the distinction. See GATT 1947. Further, the preparatory notes of the GATT 1947 also use both terms. See United Nations Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (1946) generally. See also United Nations Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment (1947) generally. For a contrary opinion, see Cossy, M., (2012) 285 and Desta, M.G., To What Extent are WTO Rules Relevant to Trade in Natural Resources? http://www.wto.org/french/res_f/publications_f/wtr10_forum_f/wtr10_destaf.htm (accessed on 21 May 2020).

³³ See Worika, I.L. (2010) 291. Also see Marceau, G., (2010 b) 88.

³⁴ See Desta, G.M. (2010) 454 citing Schrijver, N. *Sovereignty Over Natural Resources: Balancing Rights and Duties* (1997) for a detailed discussion.

³⁵ See Desta, G.M., (2010) 454. Also see Hofbauer, J.A. *The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications* (2009) unpublished LL.M thesis Faculty of Law University of Iceland 3-4. (Hereafter referred to as Hofbauer, J.A., 2009). The author provides a detailed history of the numerous United Nations resolutions that led to Resolution 1803, which forms the basis of the principle. The author also highlights international cases where the principle has been applied.

³⁶ Preamble, Art. 1, Paras 5-7, United Nations General Assembly – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217. Also see Schrijver, N., *Sovereignty over Natural Resources Balancing Rights and Duties* (1997) 2. (Hereafter referred to as Schrijver, N., 1997). Also see Article 18 of the Energy Charter Treaty.

³⁷ See United Nations Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (1946) Section C Article 1 (k) 12. It had been proposed by some members that export restrictions should be permitted for the preservation of scarce natural resources even if there were no restrictions on domestic consumption. This position was heavily criticized on the ground that it could unduly restrict access to raw materials.

³⁸ See Desta, M., To what extent are WTO rules relevant to trade in natural resources? at https://www.wto.org/english/res_e/publications_e/wtr10_destae.htm (accessed on 21 May 2020).

³⁹ See Desta, M., To what extent are WTO rules relevant to trade in natural resources? at https://www.wto.org/english/res_e/publications_e/wtr10_destae.htm (accessed on 21 May 2020).

⁴⁰ Brinsmead, S., *Oil Concession Contracts and the Problem of Hold-Up* (2007) 19 (Hereafter cited as Brinsmead, S., 2007) at SSRN: <https://ssrn.com/abstract=1002755> (accessed on 21 May 2020).

- ⁴¹ Goods are defined as merchandise or possessions See Good at <https://www.oxfordlearnersdictionaries.com/definition/english/goods> (accessed on 21 May 2020).
- ⁴² See Chapter 27 of the Harmonised Commodity Description and Coding System (HS Code) which classifies natural mineral fuels and other energy goods. The code has been relied upon in various WTO cases in the interpretation of like products under Article I and III of GATT. This presence of natural mineral fuels in the classification, as one of the commodities is an indicator that crude oil is covered under the WTO disciplines. See Botha, L. (2009) 3 and 4 See also Van Den Bossche, P. *The Law and Policy of the World Trade Organisation Texts, Cases and Materials* (2008) 78 (Hereafter cited as Van Den Bossche, P., 2008) 351-356 on WTO cases that have applied the HS Code.
- ⁴³ See Harmonized Commodity Description and Coding Systems (HS) <https://unstats.un.org/unsd/tradekb/Knowledgebase/50018/Harmonized-Commodity-Description-and-Coding-Systems-HS> (accessed on 21 May 2020).
- ⁴⁴ *Colombia-Ports of Entry DS 366*.
- ⁴⁵ Azaria, D., Energy Transit under the Energy Charter Treaty and the General Agreement on Tariffs and Trade (2009) *Journal of Energy and Natural Resources Law* 27 (4): 559-596 (Hereafter cited as Azaria, D., 2009).
- ⁴⁶ See EACOP Uganda and Tanzania Sign Inter-Governmental Agreement for Crude Oil Pipeline at <https://eacop.com/publication/view/uganda-and-tanzania-sign-inter-governmental-agreement-for-crude-oil-pipeline/> (accessed on 21 May 2020).
- ⁴⁷ See Article 7 (10) of the Energy Charter Treaty.
- ⁴⁸ Broome, S.A., (2006) 415.
- ⁴⁹ L/6309 (May 4, 1988), GATT B.I.S.D. (35th Supp.) at 152–53 (1989).
- ⁵⁰ Desta, G.M., 2010 499. The restriction on exportation is also a measure that is covered by Article XI of GATT.
- ⁵¹ See Report of the “Panel on *Japanese Measures on Imports of Leather*” (L/5623 - 31S/94).
- ⁵² GATT/CP.4/33, republished as “The Use of Quantitative Restrictions for Protective and Commercial Purposes,” Sales No. GATT/1950-3.
- ⁵³ GATT/CP.4/33, republished as “The Use of Quantitative Restrictions for Protective and Commercial Purposes,” Sales No. GATT/1950-3.
- ⁵⁴ Article XX (g) of the GATT allows countries to implement measures that relate to the conservation of exhaustible natural resources. It can be argued that crude oil is an exhaustible natural resource. However, the productions quotas result in discrimination against other oil producing countries that are not OPEC+ countries, thus this is inconsistent with the chapeau of Article XX. See also Desta, G.M., (2003) 397, it is argued that the OPEC production quotas are justified by Article XX (g), the author respectfully disagrees with this line of argument as the chapeau of Article XX as indicated above, places certain limitations on this argument. The argument is further developed in the section on environmental conservation concerns.
- ⁵⁵ Annex to the TRIMs.
- ⁵⁶ *India – Certain Measures Relating to Solar Cells and Solar Modules* WT/DS456/AB/R.
- ⁵⁷ *Canada-Measures Relating to the Feed in Tariff Program* WT/DS426/AB/R.
- ⁵⁸ *Canada-Measures Relating to the Feed in Tariff Program* WT/DS426/AB/R Para 5:32.
- ⁵⁹ See IEA Fossil Fuel Subsidies available at <https://www.iea.org/topics/energy-subsidies> (accessed 21 May 2020).
- ⁶⁰ See IEA Fossil Fuel Subsidies available at <https://www.iea.org/topics/energy-subsidies> (accessed 21 May 2020).
- ⁶¹ See IEA World Energy Outlook 2010 http://www.energy.eu/publications/weo_2010-China.pdf (accessed on 21 May 2020).
- ⁶² IEA, OECD and World Bank (2010) *The Scope of Fossil-Fuel Subsidies in 2009 and a Roadmap for Phasing out Fossil-Fuel Subsidies* 7.
- ⁶³ G-20 Leaders’ statement: The Pittsburgh Summit. (2009) Pittsburgh, PA, 24–25.

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- ⁶⁴ WT/DS139/AB/R WT/DS142/AB/R.
- ⁶⁵ *Canada-Autos* WT/DS139/AB/R WT/DS142/AB/R.
- ⁶⁶ Article 3 of the SCM Agreement.
- ⁶⁷ Article 4 (7) of the SCM Agreement.
- ⁶⁸ Article 4 of the SCM Agreement.
- ⁶⁹ Article 1 and 2 of the SCM Agreement.
- ⁷⁰ *Indonesia-Autos* WT/DS54/R WT/DS55/R WT/DS59/R WT/DS64/R.
- ⁷¹ Article 5 of the SCM Agreement.
- ⁷² Preamble to the Marrakesh Agreement Establishing the World Trade Organization
- ⁷³ Preamble to the Agreement on Technical Barriers to Trade.
- ⁷⁴ Agreement on Technical Barriers to Trade.
- ⁷⁵ Agreement on Technical Barriers to Trade.
- ⁷⁶ US Energy and Information Administration, Oil: Crude and Petroleum Products Explained Oil and the Environment, at https://www.eia.gov/energyexplained/index.php?page=oil_environment (accessed on 21 May 2020).
- ⁷⁷ WT/DS2/AB/R.
- ⁷⁸ In *US-Gasoline* WT/DS2/AB/R, the Appellate Body held that applying the basic principle of interpretation, words of a treaty, like the General Agreement, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose.
- ⁷⁹ Van Den Bossche, P., (2008) 634 The author of the foregoing text notes that Article XX (g) has a three-tier structure.
- ⁸⁰ Van Den Bossche, P., (2008) 634.
- ⁸¹ BISD 35S/98.
- ⁸² WT/DS2/AB/R.
- ⁸³ WT/DS2/AB/R.
- ⁸⁴ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/23.
- ⁸⁵ Irish, M., 'Renewable Energy and Trade: Interpreting against Fragmentation' 2013, *Canadian Year Book of International Law*. 51, 241 (Hereafter cited as Irish, M., 2013).
- ⁸⁶ *European Communities - Measures Affecting the Approval and Marketing of Biotech Products* WT/DS291, WT/DS292, WT/DS293.
- ⁸⁷ Article 31(3) (c) of the VCLT on general rules of interpretation provides that relevant rules of international law applicable in the relations between the parties should be considered when interpreting treaties.
- ⁸⁸ See Irish, M., (2013) 246-247. Also see Kyepa, T. The World Trade Organization (WTO) and the Organization of Petroleum Exporting Countries (OPEC) mandates; Regulating Production Quotas, Subsidies and Corruption in Oil Producing Countries, An African Perspective (2014) unpublished LLD Thesis University of the Western Cape 79.