

NOTE

CONFLICTING OBLIGATIONS FOR OIL EXPORTING NATIONS?: SATISFYING MEMBERSHIP REQUIREMENTS OF BOTH OPEC AND THE WTO

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I. INTRODUCTION

On July 8, 2004 the Office of Senator Frank Lautenberg (D-NJ) released a report entitled *Busting Up the Cartel: The WTO Case Against OPEC* (Lautenberg Report).¹ The Lautenberg Report contends that countries that are members of both the World Trade Organization (WTO) and the Organization of Petroleum Exporting Countries (OPEC or the Organization),² and that abide by OPEC-mandated oil production quotas, are thereby in violation of the General Agreement on Tariffs and Trade (GATT) Article XI:1 prohibition on quantitative export restrictions.³ The Lautenberg Report concludes that the United States Trade Representative (USTR) should bring a claim against OPEC members at the WTO for their alleged violations.⁴

The Lautenberg Report is not the first challenge to OPEC's legitimacy emanating from the United States.⁵ OPEC has never been viewed favorably by the American public: "In the public's perception, [OPEC] epitomizes a greedy, rapacious international cartel that preys on the American public in defiance of our one hundred and ten year tradition of market competition embodied in the Sherman Act."⁶ U.S. citizens have twice challenged the cartel-like

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1. OFFICE OF SENATOR FRANK R. LAUTENBERG, *BUSTING UP THE CARTEL: THE WTO CASE AGAINST OPEC* (2004) [hereinafter LAUTENBERG REPORT], available at <http://lautenberg.senate.gov/documents/foreign/OPEC%20Memo.pdf>.

2. This list includes Indonesia, Kuwait, Qatar, the United Arab Emirates, Nigeria, and Venezuela. *Id.* at 2 n.2. Saudi Arabia and Algeria are also members of OPEC, and have observer status at the WTO. *Id.* at 2 n.3.

3. *Id.* at 2.

4. *Id.* at 12.

5. See *infra* notes 8, 9.

6. Spencer Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105, 106 (2002).

nature of OPEC under U.S. antitrust laws.⁷ Both cases were dismissed, however: the first under the doctrine of sovereign immunity and the Act of State Doctrine;⁸ the second on the theory that, absent consent, there were no acceptable means for serving an international organization like OPEC with process, and, therefore, the court could not establish jurisdiction.⁹

These cases left Congress with the impression that it is either impossible or extremely difficult to sue OPEC.¹⁰ In response, Congress introduced a number of bills abolishing certain defenses and immunities that it perceived were standing in the way of a successful antitrust action against the Organization.¹¹ Because no suit has since been brought, the question remains whether the judiciary will feel comfortable holding foreign oil-producing nations liable under U.S. antitrust laws.

While it is not clear that a U.S. court can legitimately order foreign oil-producing nations to comply with U.S. standards of competition, it is clear that the WTO Dispute Settlement Body can legitimately require WTO members to comply with WTO standards

7. See *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981) (seeking monetary and injunctive relief for alleged Sherman Act violations); *Prewitt Enters., Inc. v. OPEC*, No. CV-00-W-0865-S, 2001 WL 624789 (N.D. Ala. Mar. 22, 2001) (seeking injunctive relief under federal antitrust laws).

8. In *International Association of Machinists*, the Ninth Circuit relied on "elements" of the doctrine of sovereign immunity and the Act of State Doctrine. 649 F.2d at 1358. The court asserted that a U.S. 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" and concluded that the suit raised just this sort of dispute. *Id.* at 1358, 1362.

9. In *Prewitt Enterprises*, the district court judge declared that OPEC could be sued under the "commercial activities exception" to the Act of State Doctrine. 2001 WL 624789, at *8. When OPEC failed to respond, the judge entered a default judgment. *Id.* at *1. The litigation was transferred to the Chief Judge of the Northern District of Alabama, who vacated the default judgment with no opinion. *Prewitt Enters., Inc. v. OPEC*, No. CV-00-W-0865-S (N.D. Ala. May 3, 2001) (order vacating default judgment and injunction). On appeal, the Eleventh Circuit affirmed, holding that absent OPEC's consent, it did not appear that there were any means available for service on OPEC, and that the court therefore could not establish jurisdiction over the Organization. 353 F.3d 916, 928 (11th Cir. 2003).

10. Waller, *supra* note 6, at 107.

11. See, e.g., No Oil Producing and Exporting Cartels Act of 2001, S. 655, 107th Cong. (2001) (abolishing foreign sovereign immunity and Act of State Doctrine defenses to antitrust actions); International Energy Fair Pricing Act of 2000, H.R. 4732, 106th Cong. (2000) (requiring review of all U.S.-funded international energy development projects and programs to determine whether each is supporting OPEC, and eliminating financial aid if the review finds such support); Foreign Trust Busting Act, H.R. 4731, 106th Cong. (2000) (prohibiting U.S. courts from using the act of state doctrine to justify failures to make decisions on the merits in antitrust cases asserting energy supply or price manipulation).

of international trade.¹² Accordingly, recent congressional efforts to challenge OPEC focus on OPEC's alleged inconsistency with the WTO.¹³ Although they are two of the most visible international economic institutions, OPEC and the WTO are often "associated with 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."¹⁴

The first attempts to invoke WTO law to "bust up the cartel" were instigated by Representative Peter DeFazio (D-OR).¹⁵ DeFazio was largely unsuccessful, however, in achieving sufficient support for his ultimate objective: to pass a bill that would require the USTR to initiate dispute settlement proceedings against OPEC nations that are members of the WTO.¹⁶ But in light of the recent

12. Pursuant to the WTO Dispute Settlement Understanding, Article 17.14 rulings by the WTO Appellate Body "shall be adopted by the [Dispute Settlement Body (DSB)] and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members." Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17.14, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU]. By virtue of this so-called "reverse consensus" approach, which would require the winning party to the dispute to vote against adopting an Appellate Body ruling in its favor in order for the DSB to fail to adopt a decision, Appellate Body reports are always adopted by the DSB and thereby bind the parties. See Donald McRae, *What Is the Future of WTO Dispute Settlement?*, 7 J. INT'L ECON. L. 3, 13 (2004) ("The reverse consensus rule means that there is essentially no chance that a decision of the Appellate Body will be rejected.")

13. See *infra* notes 15, 18, and accompanying text.

14. Melaku Geboye Desta, *The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements*, 37 J. WORLD TRADE 523, 523 (2003).

15. On March 13, 2000, DeFazio introduced a resolution that urged President George W. Bush to "file a complaint at the World Trade Organization against oil-producing countries for violating trade rules that prohibit quantitative limitations on the import or export of resources or products across borders." H.R. Con. Res. 276, 106th Cong. (2000). On January 31, 2001, DeFazio wrote a letter to President George W. Bush urging his administration "to file a case at the [WTO] against OPEC countries . . . that have colluded to set production levels." Letter from Peter DeFazio, U.S. Representative, to George W. Bush, President (Jan. 31, 2001), available at <http://www.house.gov/defazio/013101EGLetter.shtml>. On October 17, 2003, the House of Representatives approved an amendment proposed by DeFazio that prohibited the use of federal funds to facilitate Iraq's participation in OPEC. Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, H.R. 3289, 108th Cong. § 3005 (2003) (amended 2003). In support of his amendment DeFazio stated, "U.S. taxpayers shouldn't be forced to subsidize Iraqi participation in an organization that violates WTO rules and manipulates production in order to influence world prices and gouge consumers." Press Release, Representative Peter DeFazio, DeFazio Amendment Approved (Oct. 17, 2003), available at <http://www.house.gov/defazio/101703GPRelease.shtml>.

16. See *supra* note 15. The last major action taken by the House with respect to Resolution 276 occurred on March 21, 2000, when it was referred to the Subcommittee on

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tumult over high gas prices, there has been a renewed interest in DeFazio's cause from other offices on Capitol Hill, most notably from Senator Lautenberg.¹⁷ The Lautenberg Report provides the first detailed legal argument that a basis for pursuing OPEC members at the WTO exists. On July 8, 2004, Senators Durbin, Levin, and Reid—all of whom were apparently persuaded by the Lautenberg Report—joined Senator Lautenberg in introducing legislation to the Senate virtually identical to the bill introduced by Representative DeFazio,¹⁸ which is still pending in the House.¹⁹

While it remains to be seen whether increasing gas prices will be enough of an impetus to rally the rest of Congress behind either of these bills, their allegations raise an issue that is important to WTO jurisprudence irrespective of whether the bills are passed; namely, whether a country can be a member of OPEC and the WTO while simultaneously fulfilling its obligations to both organizations.

This Note explores whether the obligations and practices of the WTO and OPEC are necessarily incompatible. The central focus is to refute the contention of the Lautenberg Report that OPEC-mandated production quotas operate as *de facto* export restraints and are thus prohibited by GATT Article XI:1.²⁰ The Note is divided into three Parts. Part I argues that there is an inherent difference between controlling the production of a nation's resources and imposing quantitative restrictions on the amount of those resources that can be exported abroad subsequent to production. It suggests that the WTO Appellate Body would likely find that Article XI:1 is not properly applied to quantitative production restrictions.²¹ In order to provide a complete analysis of the defenses

Trade of the House Ways and Means Committee. See Library of Congress, Summary & Status for the 107th Congress: House Concurrent Resolution 276, <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HC00276:@@X> (last visited Jan. 17, 2006). On January 31, 2001, DeFazio reintroduced the legislation. See H.R. Res. 27, 107th Cong. (2001). The last action taken on the resolution was its referral to the Subcommittee on Trade of the House Ways and Means Committee on February 9, 2001. See Library of Congress, Bill Summary & Status for the 107th Congress: House Resolution 27, <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HE00027:@@X> (last visited Jan. 17, 2006).

17. See *supra* notes 1–4 and accompanying text; see also *infra* note 18.

18. See S. 2624, 108th Cong. (2004) (“To require the United States Trade Representative to pursue a complaint of anti-competitive practices against certain oil exporting countries.”).

19. See *supra* note 16.

20. LAUTENBERG REPORT, *supra* note 1, at 2–3.

21. The Appellate Body is the highest tribunal in the WTO. See DSU, *supra* note 12, art. 17.1. The Appellate Body's interpretations of WTO law and other rulings are adopted by the DSB and binding on the parties unless all member governments, including the prevailing party in the dispute, agree not to adopt the Appellate Body's ruling. See *id.* art. 17.14. This procedure similarly applies to the decisions of WTO panels, which are the

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available to OPEC members if they were challenged at the WTO, however, Parts II and III assume, *arguendo*, that Article XI:1 is applicable to production quotas. Part II examines the viability of certain affirmative defenses contained in the GATT exceptions clauses. These defenses could bring OPEC members back into compliance with their WTO obligations if they were found to be in violation of Article XI:1. Part III examines the possibility that a defense might exist in the Article XXXVIII provision for intergovernmental agreements intended to promote the interests of developing countries.

II. OPEC PRODUCTION RESTRICTIONS AND THE SCOPE OF ARTICLE XI:1

GATT Article XI:1 provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.²²

The Lautenberg Report asserts that OPEC's measures restricting oil production violate Article XI:1's general elimination of quantitative restrictions on exports.²³ It is not clear, however, that measures taken by OPEC with respect to limiting the production of oil are properly characterized as export restrictions. To the extent that the actions of OPEC countries influence the supply of oil available on world markets, the effect derives not from government-imposed export restrictions, but rather from production quotas.²⁴

Still, there is no question that OPEC measures are designed to control the supply of oil on world markets in order to satisfy the collective and individual policy objectives of the Organization's

lower tribunal of WTO dispute settlement. *See id.* art. 16.4. However, because panel decisions are virtually always appealed, this Note will refer to the likely findings and interpretations of the Appellate Body, and will ignore the fact that any claim against OPEC countries would first be heard by a panel.

22. General Agreement on Tariffs and Trade art. 11.1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

23. LAUTENBERG REPORT, *supra* note 1, at 9.

24. *See* ROBERT MABRO, OPEC AND THE PRICE OF OIL 16 (1992) (noting that since 1987 OPEC's supply plans have attempted to steer oil prices towards a target level or zone); Desta, *supra* note 14, at 526; OPEC, How Does OPEC Function?, <http://www.opec.org/library/FAQs/aboutOPEC/q4.htm> (last visited Nov. 9, 2005).

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members.²⁵ Moreover, OPEC's activities clearly effectuate a quantitative limit on the amount of oil available on world markets. In this regard, OPEC measures generally have the same motivation and effect as quantitative export restrictions. Given a narrow, literal interpretation, it is unlikely that Article XI:1 could be applied to production restrictions, as the act of production is distinct from that of exportation, and nowhere in Article XI:1 is the word "production" ever mentioned. If the Appellate Body were to interpret Article XI:1 more broadly, however, such that it proscribes any measure that interferes with the free flow to the market of a given product, then OPEC production restrictions could conceivably be held to violate Article XI:1.

There is precedent for interpreting GATT articles as broadly protective of free trade.²⁶ In deciding whether the Article III national treatment obligation²⁷ was intended to apply only to goods that are the subject of tariff concessions under Article II, or, more broadly, to all imported goods, the WTO Appellate Body stated in *Japan—Taxes on Alcoholic Beverages* that the "broad and fundamental purpose of Article III is to avoid protectionism."²⁸ The Appellate Body acknowledged that "one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II,"²⁹ but emphasized that this was only "one purpose" of Article III.³⁰ The Appellate Body found that the national treatment obligation "is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production,"³¹ and that Article III "clearly extends to products not bound under Article II."³² The Appellate Body thus gave Article III a broad scope such that the substantive obligation of that Article extended beyond the protection of bound tariff concessions to the

25. See *Desta*, *supra* note 14, at 526 (noting that the OPEC statute is "blunt" in its statement of goals). R

26. See generally Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS11/AB/R, at 15 (Oct. 4, 1996) [hereinafter *Taxes on Alcoholic Beverages*]; Panel Report, *Japan—Trade in Semiconductors*, L/6309 (May 4, 1988), GATT B.I.S.D. (35th Supp.) at 152–53 (1989) [hereinafter *Trade in Semiconductors*].

27. Article 3 requires, with respect to internal taxation and regulation, that WTO Members treat imported products no less favorably than domestically-produced like products. GATT, *supra* note 22, art. 3(1)–(2). R

28. *Taxes on Alcoholic Beverages*, *supra* note 26, at 15. R

29. *Id.* (quoting Panel Report, *Japan—Taxes on Alcoholic Beverages*, ¶ 6.13, WT/DSS/R (July 11, 1996)).

30. *Id.*

31. *Id.* at 15–16.

32. *Id.* at 16.

GATT's fundamental objective and purpose of protecting free trade generally.³³

The Panel in *Japan—Trade in Semiconductors* gave Article XI:1 a similarly expansive reading.³⁴ In that case, the European Economic Community (EEC) alleged that the Japanese government's requests to industry to refrain from exporting semi-conductors covered by the 1986 Arrangement Concerning Trade in Semi-Conductor Products at prices below company-specific costs, and delays in issuing export licenses that resulted from the monitoring costs and export prices, were inconsistent with the provisions of Article XI.³⁵ Japan argued that Article XI:1 was inapplicable because the Arrangement did not constitute a "restriction" within the meaning of Article XI.³⁶ The Panel found that Article XI:1 applies to "all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges."³⁷ Moreover, in response to Japan's argument that the measures were not mandatory or legally binding, and therefore could not constitute "restrictions" within the meaning of Article XI:1, the Panel noted:

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.³⁸

The Panel concluded that an array of administrative actions and requirements "constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other than [sic] the United States," and, therefore, violated Article XI:1.³⁹ The Panel's analysis supports the position that Article XI, like Article III, is broadly protective of free

33. See Robert J. Girouard, *Water Export Restrictions: A Case Study of WTO Dispute Settlement Strategies and Outcomes*, 15 GEO. INT'L ENVTL. L. REV. 247, 257 (2003).

34. See *supra* note 26.

35. *Trade in Semiconductors*, *supra* note 26, at 152–53.

36. *Id.* at 153.

37. *Id.*

38. *Id.* at 153–54.

39. *Id.* at 158. In a more recent case brought under the WTO's Dispute Settlement Understanding, a panel noted that "[t]here can be no doubt, in our view, the disciplines of Article XI:1 extend to restrictions of a *de facto* nature." Panel Report, *Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶ 11.17, WT/DS155/R (Dec. 19, 2000) [hereinafter *Leather Exports*].

trade, and therefore precludes the use of any measures that threaten free trade.⁴⁰

In light of this precedent, it could be posited⁴¹ that Article XI:1—when broadly construed—applies to the types of measures that OPEC members implement in accordance with membership in that organization. Clearly, measures that restrict how much of something can be produced effect a quantitative limit on how much of that product will be traded on world markets.

Panels and the Appellate Body appear willing to give GATT articles in general, and Article XI:1 in particular, a broad scope.⁴² A material distinction remains, however, between export restrictions and production restrictions—a distinction that the Appellate Body would likely appreciate. The export restrictions and “measures” prohibited by Article XI:1 are those that restrict the ability of domestic producers to ship their inventories to consumers abroad.⁴³ Article XI:1 was designed to facilitate the ability of consumers in one country to access the inventories of producers in another, free from quantitative export (and primarily import) restrictions.⁴⁴ Foreign consumers, however, *do* have unfettered access to OPEC members’ inventories of oil free from quantitative restrictions once that oil is produced and becomes part of the producer’s inventory.⁴⁵

It is important to recognize the distinction between oil in commerce (i.e., oil extracted and stored in a manner suitable for transportation to the market) and oil in its natural state (i.e., oil still in the ground). Unlike the products in *Japan—Taxes on Alcoholic Beverages*, oil in its natural state has not gone through a production process, is not part of inventory, and so is not properly characterized as a “product” within the meaning of Article XI. It follows that

40. Girouard, *supra* note 33, at 257.

41. Some Members of Congress have, in fact, made such a conjecture. See LAUTENBERG REPORT, *supra* note 1, at 2–3; see also *supra* note 15.

42. See *supra* notes 26, 40, and accompanying text.

43. GATT, *supra* note 22, art. 11:1.

44. Cf. Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393, 414 n.112 (1994) (concluding that “managed trade,” a strategy that usually involves numerical targets for trade flows, violates Article XI:1).

45. Interview with Michael D. Sherman, Counsel for Petroleos de Venezuela, S.A. (PDVSA), in Washington, D.C. (Sept. 9, 2004). PDVSA is a corporation owned entirely by the Government of Venezuela which holds the rights to Venezuela’s oil resources. *Id.* Venezuela does not impose quantitative restrictions on oil exports, but it does comply with OPEC-mandated production quotas. *Id.* Calls made by the author to the trade desks of the embassies of Indonesia, Kuwait, Qatar, the United Arab Emirates, and Nigeria revealed that none currently apply quantitative restrictions to oil exports.

only *after* an OPEC member has produced oil for consumption could it violate Article XI:1 by restricting the quantity of that oil made available for export to foreign consumers. Under this view, prior to the time when oil is extracted from the ground and entered into commerce (i.e., before it becomes a tradable product), oil in its natural state is not covered by the GATT at all.

This view prevailed in an analogous issue that arose during the negotiations of the North American Free Trade Agreement (NAFTA)—which incorporates the principles of GATT Article XI:1 in NAFTA Article 309⁴⁶—with respect to Canada’s concerns about its freshwater resources.⁴⁷ In recent years, the United States has frequently expressed interest in increasing the production and export of Canadian freshwater to the United States to augment its inadequate domestic supply.⁴⁸ The Canadian government has made clear, however, that it is emphatically opposed to any efforts that would make Canadian freshwater accessible upon demand to foreign consumers.⁴⁹ Canada accordingly implemented a series of policy measures, including water pricing and licensing arrangements, which restrict how much Canadian water can be exploited for commercial purposes.⁵⁰ Although these measures necessarily limit how much water is available for export, this consequence does not clearly demonstrate the existence of an export restriction.

Indeed, in response to concerns about the effects NAFTA Article 309 might have on Canadian freshwater, the International Joint Commission, which is composed of members from both the United States and Canada, observed that “it is unlikely that water in its natural state (e.g., in a lake, river, or aquifer) is included within the

46. See North American Free Trade Agreement, U.S.-Can.-Mex., art. 309, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. NAFTA Article 309 uses almost identical language to GATT Article XI:1. See *id.*

47. See *infra* note 52 and accompanying text.

48. See Stephen Handelman, *Exporting Fresh Water*, TIME, Aug. 13, 2001, at B14 (noting comments by President Bush expressing eagerness to discuss water exporting issues with Canadian Prime Minister Jean Chretien).

49. See *id.* (quoting statement by Canadian Environment Minister that Canada has a policy of not exporting water); see also Tom McMillan, *Introduction to ENVIRONMENT CANADA, FEDERAL WATER POLICY (1987)* (noting that the Government of Canada “emphatically opposes” large-scale water exports), available at http://www.ec.gc.ca/water/en/info/pubs/fedpol/e_fedpol.pdf.

50. The stated goal of the measures contained in the Federal Water Policy is “to encourage the use of freshwater in an efficient and equitable manner consistent with the social, economic and environmental needs of present and future generations.” ENVIRONMENT CANADA, *supra* note 49, at 3.

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scope of [NAFTA or any of the WTO agreements, including GATT].”⁵¹ The Commission noted that:

[I]t should be recalled that following the signing of NAFTA, the three parties issued a joint declaration that NAFTA creates no rights to the natural water resources of any party; that unless water, in any form, has entered into commerce and has become a good or product, it is not covered by the provisions of any trade agreement, including NAFTA.⁵²

Clearly, then, NAFTA Article 309 does not provide a basis for the United States to force Canada to increase Canada’s production quotas on water. Similarly, Article XI:1 does not provide the basis for the United States—or any oil-consuming WTO member—to force OPEC countries to increase their production quotas on oil.

Were the Appellate Body to reach a contrary conclusion, absurd and unintended results could arise from Article XI:1. Conceivably, every time a WTO member took some measure that reduced domestic production in a particular industry, whether it is a natural resource industry or otherwise, another WTO member could complain that the country was violating Article XI:1. Any measure that prevented an industry from operating at maximum capacity might constitute an export restriction. In the words of then-USTR Robert Zoellick, “[i]t would be like someone coming to the United States and saying we must dig up more of this metal or that metal or produce more of this or that product.”⁵³

It is true that the WTO judiciary has a history of interpreting GATT Articles—and specifically Article XI:1—as broadly protective of free trade in goods.⁵⁴ It is also true that the production quotas implemented by OPEC members inhibit the free flow of oil from oil-producing countries to oil-consuming countries. However, it is not clear that the Appellate Body would find that production quotas fall within the scope of Article XI:1. It is likely the Appellate Body would find that production quotas are a step removed from export restrictions because the export effect of a production restriction is only incidental to the actual and intended effect that the oil is not yet a tradable product. Only after a commodity is extracted from its natural state, refined, infused with those quali-

51. INT’L JOINT COMM’N, PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES 67 (2000), available at <http://www.ijc.org/php/publications/html/finalreport.html>.

52. *Id.*

53. Gary G. Yerkey, *USTR Opposes Opening WTO Trade Case Against OPEC for Restricting Oil Supplies*, 21 INT’L TRADE. REV. 954 (2004) [hereinafter *USTR*].

54. *Cf.* Girouard, *supra* note 33, at 257.

ties which the market finds desirable, divested of those qualities deemed undesirable, and stored in a manner suitable for transportation to the market, could that commodity properly be characterized as a “product” subject to an export restriction. Prior to that stage, oil, or any other commodity, is beyond the reach of the GATT.

III. THE AFFIRMATIVE DEFENSES OF THE GATT EXCEPTIONS CLAUSES

While it is argued in Part I that the scope of Article XI:1 is not so broad as to include OPEC-style production quotas, the foregoing discussion suggests that it is at least possible that the Appellate Body might find to the contrary. Were that to be the case, the likely course of action for OPEC countries would be to invoke one of the limited GATT exceptions enumerated in Articles XX or XXI and assert an affirmative defense.⁵⁵ If a country is found to maintain measures that are contrary to WTO law, that country can fulfill its WTO obligations by demonstrating that the measures in question qualify for one of the Article XX or XXI exceptions.⁵⁶

This Part assumes, *arguendo*, that a panel would find OPEC measures violate Article XI:1. It then explores the exceptions that have occasionally been cited by scholars to justify OPEC’s consistency with the WTO, as well as other exceptions that might potentially be invoked. For certain exceptions, the text of the clause might appear to clearly extend to OPEC measures. The proposition that OPEC measures could be justified by one of the exception clauses, however, becomes more dubious in light of past panel and Appellate Body interpretation and, in some cases, the negotiating history of the relevant clauses.

A. *Article XX(h): The Commodity Agreements Exception*

Article XX(h) is an obscure and rarely invoked provision of the GATT. Indeed, it has been invoked only once, and then unsuccessfully.⁵⁷ Nevertheless, some scholars interpret Article XX(h) to provide an exception to GATT obligations that encompasses the

55. See Desta, *supra* note 14, at 535–37; Girouard, *supra* note 33, at 263–64.

56. See GATT, *supra* note 22, arts. 20, 21 (listing measures that the treaty should not be construed to prohibit).

57. See Panel Report, *EEC–Import Regime for Bananas*, ¶¶ 165–66, DS38/R (Feb. 11, 1994) [hereinafter *Import Regime for Bananas*] (finding that Article XX(h) could not justify the inconsistency of the European Economic Community’s preferences for bananas imported from only certain sources because of the principle of most-favored-nation treatment in GATT Article 1:1).

OPEC Agreement.⁵⁸ While the Article seems on its face to support such an interpretation, close scrutiny of the text and its history leads to the conclusion that Article XX(h) could not be invoked by OPEC Members.

GATT Article XX(h) provides:

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: . . . (h) undertaken in pursuance of obligations under intergovernmental commodity agreements which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

**Sub-paragraph* (h): The exception provided for in this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30(IV) of 28 March 1947.⁵⁹

In order for an intergovernmental commodity agreement to fall within this exception, a number of elements must be met in both the chapeau and sub-article (h) itself. Article XX's chapeau is primarily concerned with the manner of application of the specific measures (as opposed to the measures themselves), which vary from case to case.⁶⁰ It is unlikely that a panel would find that OPEC's actions constitute a means of "arbitrary or unjustifiable discrimination among countries where the same conditions prevail."⁶¹ OPEC's decisions on how much oil to produce are not intended to

58. See, e.g., Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth?*, 44 VA. J. INT'L L. 285, 326 & n.99 (2003) (citing GATT art. XX(h) to note that "[s]tates can . . . use quantitative restrictions to implement multilateral commodity agreements, like OPEC"); cf. Raj Bhala, *Saudi Arabia, the WTO, and American Trade Law and Policy*, 38 INT'L LAW. 741, 801-02 (2004). Discussing Saudi Arabia's application for WTO membership and how the Kingdom might justify OPEC-mandated production quotas, Bhala wrote:

GATT Article XX(h) contains a limited exception for international commodity agreements (that satisfy a review by the WTO Members). True, it may seem better suited for products like coffee or cocoa from countries like Colombia or Ghana than for petroleum from well-off Gulf states. However, the Kingdom could still offer a plausible argument that many people within OPEC countries are poor, and without the careful management of the world's oil markets through supply-side constraints, those people would be considerably worse off.

Bhala, *supra*, at 801-02.

59. GATT, *supra* note 22, art. 20(h) (as amended).

60. See Desta, *supra* note 14, at 535.

61. GATT, *supra* note 22, art. 20.

treat consuming WTO Member States disparately.⁶² Nor is disparate availability of oil among oil-consuming countries a consequence of OPEC's actions.⁶³ Whatever oil is produced is equally available to all purchasers at prevailing market prices.⁶⁴

OPEC countries would likely also satisfy the requirement that the measures do not constitute a "disguised restriction on international trade."⁶⁵ OPEC is candid about the fact that it controls the production of oil in response to market fluctuations in order to maintain a degree of price stability.⁶⁶

Problems arise, however, under sub-article (h)'s prerequisites for an acceptable intergovernmental commodity agreement. Article XX(h) enumerates three ways in which an intergovernmental commodity agreement can qualify for the exception: (1) conformance to criteria submitted to the WTO's Member States and not disapproved by them; (2) submission of the particular intergovernmental commodity agreement itself followed by no disapproval; and (3) conformance to the principles approved by the United Nations Economic and Social Council (ECOSOC) in its resolution 30(IV) of March 28, 1947.⁶⁷

None of these approaches, however, would be available to qualify OPEC's statute and measures under Article XX(h)'s exception. With respect to option (1), neither the GATT's Contracting Parties nor the WTO's Member States have ever agreed on the criteria necessary for intergovernmental commodity agreements to be in compliance with Article XX(h).⁶⁸ Consequently, there is currently

62. Interview with Michael D. Sherman, *supra* note 45.

63. *Id.*

64. *Id.*

65. GATT, *supra* note 22, art. 20.

66. See Organization of Petroleum Exporting Countries, OPEC Statute, art. 2(C) (2001) [hereinafter OPEC Statute] (stating that OPEC shall strike a balance between achieving "a steady income to the producing countries; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return on their capital to those investing in the petroleum industry"), available at <http://www.opec.org/library/opec%20statute/pdf/os.pdf>; see also Rilwanu Lukman, Secretary General, OPEC, Address to the 16th World Petroleum Congress (June 13, 2000) (discussing OPEC's commitment to stable oil prices), <http://www.world-petroleum.org/docs/opec.doc>.

67. GATT, GUIDE TO GATT LAW AND PRACTICE: ANALYTICAL INDEX 543 (6th ed. 1994) [hereinafter ANALYTICAL INDEX].

68. When Article XX(h) was first drafted, the GATT Contracting Parties could not agree on a set of principles and criteria to which commodity agreements should conform. See *id.* at 546. The Review Working Party on Organizational and Functional Arrangements was given the task of establishing acceptable criteria. *Id.* at 545. Because of heightened sensitivity to commodity trade issues, however, none was established and the Working Party was held over from one session to another. *Id.* The final word on the matter was issued in 1956:

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no way to judge whether OPEC's arrangement qualifies for the exception. The provision suggests that OPEC members that are also WTO members could submit to the WTO Member States for consideration and approval a set of criteria—encompassing OPEC's agreement—against which the acceptability of commodity agreements could then be judged. Such a submitted set of criteria, however, would have to be approved unanimously by all of the other WTO members, including the United States.⁶⁹ Given congressional disdain for the OPEC arrangement,⁷⁰ it is unlikely the United States would ever be amenable to a submission of criteria that validated OPEC's activities under the GATT. It follows from this argument that option (2) is off the table as well. If the United States would oppose general commodity agreement criteria that would permit the OPEC arrangement, it would certainly oppose an express validation of the OPEC Agreement itself, if submitted in accordance with option (2).

Option (3), “conformance to the principles approved by the United Nations Economic and Social Council in its Resolution 30(IV) of March 28, 1947,” is particularly obscure. Resolution 30(IV) refers in turn to the principles laid down in Chapter VII of the London Draft of the International Trade Organization's Charter.⁷¹ In the principles articulated for governing intergovernmental commodity agreements, such agreements must include both net

The Working Party gave consideration to the question whether [Article XX(h)] should include a statement of objectives to be sought and principles to be applied in inter-governmental commodity arrangements. The view was widely held in the Working Party that such objectives and principles would need to take into account the circumstances of the particular commodity agreement under negotiation and should, therefore, be left to each negotiating subject, so far as the contracting parties are concerned, to any review by the [Contracting Parties] in accordance with the relevant provisions of the General Agreement.

Id. at 546 (citing *Report of the Working Party on Particular Difficulties Associated with Trade in Primary Commodities*, L/592/Rev.1 (Nov. 17, 1956)). To date, no commodity agreement has been formally submitted to the Contracting Parties under Article XX(h). *Id.* at 547.

69. See WTO Agreement, *supra* note 12, art. 9. Article 9 states that the WTO shall continue the practice of decision making by consensus. *Id.* It provides for majority and super-majority voting for certain types of decisions if consensus cannot be achieved. *Id.* Given the extreme sovereignty concerns of WTO Members, however, these voting provisions have never been used and all ministerial decisions have been made by consensus. Interview with Steve Charnovitz, Professor of International Trade Law, The George Washington University Law School, in Washington, D.C. (Feb. 15, 2005) (“Aside from a few waivers by some countries, all WTO decisions to date have been made by consensus.”).

70. See *supra* notes 1, 15–19, and accompanying text.

71. See U.N. Econ. & Soc. Council [ECOSOC] Res. 30 (IV), U.N. Doc. E/403 (Mar. 28, 1947) (citing ITO draft charter).

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exporters and importers of a commodity.⁷² Article 51(3) of the Charter specifies that “such arrangements shall include provision for adequate participation of countries substantially interested in the importation or consumption of the commodity as well as those substantially interested in its exportation or production.”⁷³ Moreover, in the only GATT precedent relating to Article XX(h), *EEC—Import Regime for Bananas*, it was found that the EEC’s Lomé Convention was inconsistent with Article XX(h) because it was not open to all interested parties, and thus did not satisfy the criteria of ECOSOC’s Resolution 30(IV):⁷⁴

Turning to the principles in the ECOSOC Resolution 30(IV), the Panel noted that this Resolution required, *inter alia*, that the negotiation of, and participation in, an international commodity agreement must be open to all interested countries The Panel, noting the limited membership of the Lomé Convention found that the criteria of the ECOSOC Resolution 30(IV) had not been met.⁷⁵

Article 7 of OPEC’s statute stipulates that only countries with net exports of petroleum may be full members or associate members of OPEC and therefore precludes membership for importing and consuming countries.⁷⁶ On this fundamental ground, OPEC’s Statute and measures almost certainly would be viewed as inconsistent with the principles in ECOSOC’s Resolution 30(IV), and the measures would therefore not qualify for Article XX(h)’s exception.

B. *Article XX(g): The Natural Resources Exception*

Another exception occasionally cited as meeting the needs of OPEC members is the Article XX(g) exception for measures relating to the conservation of natural resources.⁷⁷ Indeed, assuming

72. London Draft Charter of the International Trade Organization of the United Nations art. 51(3), in U.N. Conference on Trade and Employment, 1st Sess., *Report of the First Session of the Preparatory Committee*, U.N. Doc. E/PC/T/33 (1946) (on file with publisher).

73. *Id.*

74. *Import Regime for Bananas*, *supra* note 57, ¶ 166.

75. *Id.*

76. See OPEC Statute, *supra* note 66, art. 7 (requiring “Full Member” candidates to have “substantial net exports” of petroleum; “Associate Members” to have net exports of petroleum; and excluding from membership countries which do not “fundamentally have interests and aims similar to those of Member Countries”).

77. See, e.g., U.N. Conference on Trade & Development, *Trade Agreements, Petroleum and Energy Policies*, at 28, U.N. Doc. TAD/INF/PR/069 (2000) (noting that it “might seem” that Article XX(g) would meet the needs of petroleum-producing and -exporting countries); Bhala, *supra* note 58, at 801 (noting that, “arguably, a country-specific export restraint allocated by an international commodity organization ought to fit within . . . article XX[(g)]”); Desta, *supra* note 14, at 535–36.

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that a panel determined that production controls *are* contrary to the principles of GATT Article XI, then Article XX(g) is an exception that OPEC members could persuasively invoke.

Recognition of a nation's permanent sovereignty over its own natural resources is "a fundamental principle of contemporary international law."⁷⁸ Articulation of this concept gathered momentum in the 1950s during the process of decolonization as a "basic constituent of the right to self-determination and an essential and inherent element of state sovereignty."⁷⁹ Perhaps the most significant statement regarding permanent sovereignty over natural resources was recorded in 1972, in United Nations General Assembly Resolution 1803. That Resolution declares:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.⁸⁰

The doctrine of permanent sovereignty thus reflects the "inherent and overriding right" of a state to control the exploration and

78. Franz Xaver Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage*, 26 ENVTL. L. 1187, 1192 (1996) (citing DJURA NINCIC, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS* 268-69 (1970)).

79. *Id.* at 1190 (quoting MILAN BULAJIC, *PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW* 284 (2d ed. 1992)).

80. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (Dec. 14, 1962). U.N. Resolution 3201 of 1974, entitled "Declaration on the Establishment of a New International Economic Order," further recognized the principle of permanent sovereignty over natural resources:

The new international economic order should be founded on full respect for the following principles: . . . (e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploration with means suitable to its own situation No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.

G.A. Res. 3201, ¶ 4, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974). In addition, U.N. Resolution 3281 of 1974, entitled the "Charter of Economic Rights and Duties of States," provides in Article 2: "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities." G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. Nos. 31, 31A, U.N. Doc. A/9631 (Dec. 12, 1974).

the use of its own natural resources.⁸¹ Although the doctrine of permanent sovereignty was not nearly as established in 1947 (when the GATT was signed) as it is today, the text of Article XX(g) suggests that the contracting parties were concerned with their ability to retain full sovereignty over the exploitation of their natural resources. It further suggests that the contracting parties intended Article XX(g) to protect that sovereignty.

Article XX(g) 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.⁸²

As discussed in reference to Article XX(h), OPEC Members would likely satisfy the requirements of the Article XX chapeau.⁸³ The possibility of OPEC Members invoking Article XX(g) successfully further depends on the two issues presented in sub-article (g) itself: (1) whether the supply-restrictive measures “relate to” the conservation of an exhaustible natural resource; and (2) whether those measures are made effective in conjunction with restrictions on domestic production or consumption.

1. The “Relating To” Provision

Canada—Measures Affecting Exports of Unprocessed Herring and Salmon was the first case brought under the GATT to interpret the term “relating to” in Article XX(g).⁸⁴ In that case, the United States argued that export restrictions maintained by Canada on unprocessed salmon and herring were inconsistent with Canada’s obligations under Article XI:1 and were not justified by any of the exceptions in that Article or Article XX.⁸⁵ The United States claimed that the reason Canada was placing restrictions on the export of raw salmon and herring was to ensure a stable supply of

81. Perrez, *supra* note 78, at 1191 (quoting Kamal Hossain, *Introduction to PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW*, at xiii (Kamal Hossain & Subrata Roy Chowdhury eds., 1984)).

82. GATT, *supra* note 22, art. 20(g).

83. See *supra* notes 62–66 and accompanying text.

84. See Panel Report, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, 35/S/98 (Nov. 20, 1987).

85. *Id.* ¶ 3.29.

inputs to domestic processors by curtailing supply to foreign processors.⁸⁶ The United States argued that the purpose and effect of Canada's export restrictions was not to conserve resources, but rather to protect Canadian fish processors and maintain employment in British Columbia.⁸⁷ Canada argued that "relating to" could not be read to mean "essential" or "necessary to," and that its measures were indeed "relating to" the conservation of salmon and herring.⁸⁸

The Panel explained that "some of the sub-paragraphs of Article XX state that the measure must be 'necessary' or 'essential' to the achievement of the policy purpose set out in the provision (cf. subparagraphs (a), (b), (d) and (j)) while subparagraph (g) refers only to measures 'relating to' the conservation of exhaustible natural resources."⁸⁹

The Panel found that this language suggested that Article XX(g) "does not only cover measures that are necessary or essential for the conservation of exhaustible natural resources but a wider range of measures."⁹⁰ It added that while this interpretation broadens the scope of the exception, in order to qualify under Article XX(g), a country still must show that the measures implemented are "primarily aimed at" the conservation of an exhaustible natural resource.⁹¹ This showing must be made before the measures will be seen as "relating to" conservation within the meaning of Article XX(g).⁹² This approach was validated by the Appellate Body in a subsequent case.⁹³

Senator Lautenberg charges that OPEC members have never explicitly cited the *conservation* of oil as a motivation for their supply management practices.⁹⁴ Lautenberg points to Chapter I, Article 2(C) of the OPEC Statute, which summarizes the overarching purpose of the Organization.⁹⁵ This provision declares:

Due regard shall be given at all times to the interests of the producing nations and to the necessity of securing a steady income to the producing countries; an efficient, economic and regular

86. *Id.* ¶ 3.33.

87. *Id.* ¶ 3.11.

88. *Id.* ¶ 3.26.

89. *Id.* ¶ 4.6.

90. *Id.*

91. *Id.*

92. *Id.*

93. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, at 18 (Apr. 29, 1996).

94. See LAUTENBERG REPORT, *supra* note 1, at 11.

95. See *id.* (citing OPEC Statute, *supra* note 66, art. 2(C)).

supply of petroleum to consuming nations; and a fair return on their capital to those investing in the petroleum industry.⁹⁶

From the text of the Statute, OPEC production measures do not appear to be “primarily aimed at” the conservation of a natural resource. It appears, rather, that they are aimed at achieving a degree of stability in international markets for oil. According to Senator Lautenberg, then, because OPEC has never cited conservation as a justification for its production restrictions, these measures do not qualify under Article XX(g).⁹⁷

Market stability and conservation, however, are not necessarily mutually exclusive objectives. OPEC members could argue that market stability is an essential element in their efforts to manage and ensure conservation of their oil resources, permitting them to remain a viable and dependable source of income for current and future generations.⁹⁸ Were OPEC countries to discard their quota system and take no action in response to price fluctuations (i.e., make oil available on demand and let the market alone determine price), they would conceivably see their oil resources more rapidly depleted. Managing their supplies in response to market fluctuations facilitates OPEC members’ ability to conserve their oil resources for the use of future generations.⁹⁹ Viewed from this perspective, the Appellate Body might be persuaded that OPEC’s measures are “primarily aimed at” conservation.

Reference to the doctrine of permanent sovereignty over natural resources would enhance the ability of OPEC members to make this argument successfully.¹⁰⁰ The position of OPEC members is further strengthened by the Appellate Body’s cognizance of the great degree to which OPEC economies are dependent upon oil. It is unlikely that the Appellate Body would deny OPEC Members their sovereign right to full control over a natural resource so essential to their economic development merely because they have

96. OPEC Statute, *supra* note 66, art. 2(C).

97. See LAUTENBERG REPORT, *supra* note 1, at 10–11.

98. An article in the *Economist* suggests that oil producing nations need to manage their oil resources in a way that recognizes that “oil is a non-renewable source of income that should not be consumed by one generation alone.” *Tackling the Oil Curse*, *ECONOMIST*, Sept. 25, 2004, at 16.

99. In an address delivered to the 22d Oxford Energy Seminar, Rilwanu Lukman, then the Secretary General of OPEC, stated: “To . . . traders, oil prices amount to winning or losing, dollars and cents, but for OPEC, oil revenues remain critical to the destiny of the millions of nationals who reside within its Member Countries.” Rilwanu Lukman, Secretary General, OPEC, Address at the 22d Oxford Energy Seminar (Aug. 29, 2000) (on file with publisher).

100. See *supra* notes 78–82.

never stated explicitly that their primary goal is “conservation.” Such an approach would amount to little more than semantic pettiness and would be uncharacteristic of the Appellate Body. The Appellate Body would likely grant OPEC enough flexibility in applying the “primarily aimed at” standard that they would be able to satisfy the “relating to” requirement of Article XX(g).

2. Measures Made in Conjunction with Reductions in Domestic Production

The requirement that measures relating to the conservation of an exhaustible natural resource be applied in conjunction with restrictions on domestic production or consumption is fairly straightforward to apply to OPEC measures. The required domestic restrictions under Article XX(g) are set out as alternatives with the disjunctive “or,” the relevant language stating: “[I]f such measures are made effective in conjunction with restrictions on domestic production *or* consumption.”¹⁰¹ Clearly, supply restrictions undertaken by OPEC members are necessarily implemented via domestic production cuts and, thus, this prong of Article XX(g) is satisfied.

In sum, by satisfying the requirements of the Article 20 chapeau and both of the requirements of sub-article (g), OPEC members would likely be able to assert Article XX(g) as an affirmative defense if their measures were found to violate Article XI:1.

C. *Article XXI: The National Security Exception*

Article XXI provides:

Nothing in this agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the

101. GATT, *supra* note 22, art. 20(g).

United Nations Charter for the maintenance of international peace and security.¹⁰²

Article XXI(b)(iii) provides the language most germane to OPEC's activities. That provision, in relevant part, states: "[n]othing in this agreement shall be construed . . . to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations."¹⁰³ Given that OPEC members are countries whose economies are heavily dependent on their oil resources,¹⁰⁴ it could be argued that OPEC's supply management practices are necessary to the *economic* security of each of its members. It could further be argued that falling oil prices, at least as far as OPEC members are concerned, rise to the status of an "emergency in international relations."¹⁰⁵

The economic security argument was advanced once before, in 1975, when Sweden introduced global import quotas for footwear.¹⁰⁶ The Swedish government considered the measure to be in conformity with the spirit of Article XXI and stated, *inter alia*, that:

[The] decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.¹⁰⁷

This argument was not received favorably by other GATT contracting parties,¹⁰⁸ and after a series of consultations with GATT members adversely affected by the quotas, Sweden terminated the measures only two years after they were first implemented.¹⁰⁹

Aside from the Swedish case, Article XXI has only ever been invoked to justify a trade sanction targeted at a specific political objective or to put pressure on a rival nation.¹¹⁰ The following is a brief history of the cases involving Article XXI:

102. *Id.* art. 21.

103. *Id.* art. 21(b)(iii).

104. *See* Lukman, *supra* note 99.

105. *See* GATT, *supra* note 22, art. 21(b)(iii).

106. ANALYTICAL INDEX, *supra* note 67, at 557.

107. *Id.* (quoting L/4250).

108. *See id.*

109. *Id.*

110. LAUTENBERG REPORT, *supra* note 1, at 9; *see also infra* notes 112–117.

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In 1970 the United Arab Republic (UAR) declared that upon accession to the GATT it would invoke Article XXI to justify its boycott against companies that maintained relations with Israel.¹¹¹ Several members of the Working Party supported the view of the UAR representative that the background of the boycott measures was political and not commercial.¹¹²

In 1982 the EEC and its member states, Canada, and Australia indefinitely suspended Argentinean imports into their territories.¹¹³ The countries invoked Article XXI, stating that their measures were acceptable in "light of the situation addressed in the [U.N.] Security Council Resolution 502 [the Falkland/Malvinas issue]."¹¹⁴

In May 1985, while the United States was embroiled in a political conflict with Nicaragua, the United States invoked Article XXI to justify the embargo it placed on exports of goods from the United States to Nicaragua (except those goods destined for the organized Nicaraguan democratic resistance).¹¹⁵

In November 1991 the EEC adopted trade measures against Yugoslavia "on the grounds that the situation prevailing in Yugoslavia no longer permits the preferential treatment of this country to be upheld."¹¹⁶ The EEC invoked Article XXI to justify the cessation of Yugoslavia's most-favored-nation treatment in the European Community on the ground that measures were necessary to the "essential security interests" of member states.¹¹⁷

Case precedent then appears to confirm that Article XXI was designed to leave open to the Member States the option of using trade sanctions to accomplish political or military security objectives. This history undermines the contention that economic security interests provide a basis upon which to invoke Article XXI.

Moreover, the negotiating history of Article XXI does not seem to support the economic security argument either. In response to an inquiry as to the meaning of "essential security interests," the following comments were made by one of the drafters of the original charter:

111. See GATT Working Party, *Accession of the United Arab Republic*, ¶ 22, L/3362 (Feb. 27, 1970) (claiming justification on the ground of the then-existing state of war).

112. *Id.* ¶ 23.

113. ANALYTICAL INDEX, *supra* note 67, at 557.

114. *Id.* (citing L/5319/Rev.1.)

115. *Id.* (citing L/5803).

116. *Id.* at 558 (quoting L/6948).

117. *Id.* (quoting L/6948).

We gave a good deal of thought to the question of the security exception which we thought should be included in the Charter. We recognized that there was a great danger of having too wide an exception and we could not put it into the Charter, simply by saying: 'by any Member of measures relating to a Member's security interests,' because that would permit anything under the sun. Therefore we thought it well to draft provisions which could take care of real security interests, and at the same time, so far as we could, to limit the exception so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance [T]here must be some latitude here for security measures. We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose.¹¹⁸

It appears, then, that the drafters intended Article XXI to provide a narrow exception, only permitting Member States to use trade measures for temporary, emergency situations pertaining to political or military conflict. It is likely that OPEC production restrictions—given that they are intended as a response to fluctuating market prices—would be viewed by the Appellate Body as designed for “commercial purposes.” Equating economic security with national security in the context of Article XXI would likely constitute an unacceptably broad interpretation of Article XXI in the eyes of the Appellate Body.

IV. ARTICLE XXXVIII: JOINT ACTION

Article XXXVIII permits cooperative, intergovernmental arrangements intended to promote the interests of developing countries.¹¹⁹ Given that OPEC consists solely of developing countries,¹²⁰ and that the arrangement is designed to promote the members' economic development,¹²¹ it is worth exploring whether OPEC/WTO Members might be able to invoke Article XXXVIII.

118. *Id.* at 554 (quoting EPCT/A/PV/33, at 20–21).

119. GATT, *supra* note 22, art. 38 (as amended).

120. There is no definition for the term “developing country.” World Trade Organization, Who are the Developing Countries in the WTO?, http://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm (last visited Nov. 16, 2005). Members make their own determinations of when they are “developed” or “developing” countries. *Id.* WTO Members would likely concede that OPEC Members—all countries with low per capita income, relatively undeveloped infrastructure, and poor human development indices—are “developing” countries if OPEC Members so declared.

121. *See supra* notes 66, 99.

Article XXXVIII:1 and 2(a) provide:

1. The contracting parties shall collaborate jointly, within the framework of this Agreement and elsewhere, to further the objectives set forth in Article XXXVI.
2. In particular, the Contracting Parties shall: (a) where appropriate, take action, including through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products.¹²²

Article XXXVIII has been cited only once in a GATT/WTO case.¹²³ In that case, Brazil successfully challenged the EEC's sugar subsidy system, arguing that the EEC acted inconsistently with Article XXXVIII when it refused to participate in the International Sugar Agreement (ISA).¹²⁴ The ISA was a commodity agreement consisting of both importing and exporting members, and was designed to improve the world's sugar market for developing countries.¹²⁵ Brazil also argued that, contrary to the provisions of Article XXXVI, the EEC's system for granting subsidies for sugar exports severely depressed world market prices, displaced Brazilian exports, and led to reduced sales opportunities and export earnings for Brazil.¹²⁶ In ruling for Brazil, the Panel:

[R]ecognized the efforts made by the European Communities in complying with the provisions of Articles XXXVI and XXXVIII. It nevertheless felt that increased Community exports of sugar through the use of subsidies in the particular market situation in 1978 and 1979, and where developing contracting parties had taken steps within the framework of the ISA to improve the conditions in the world sugar market, inevitably reduced the effects of the efforts made by these [developing] countries.¹²⁷

122. GATT, *supra* note 22, art. 38.

123. See Panel Report, *European Communities—Refunds on Exports of Sugar—Complaint by Brazil*, ¶ 2.25, L/5011 (Nov. 10, 1980) [hereinafter *Sugar Refunds*].

124. *Id.*

125. See International Sugar Agreement art. 1(a), Oct. 7, 1977, 31 U.S.T. 5135, 1064 U.N.T.S. 219 (stating that an objective of the Agreement is to “raise the level of international trade in sugar, particularly in order to increase the export earnings of developing exporting countries”).

126. *Sugar Refunds*, *supra* note 123, ¶¶ 2.1–2.2. Note that GATT Article XXXVI stipulates the Member States' commitment and obligation to pursue policies that will have the effect of, *inter alia*, enhancing the economic development of less-developed countries. See GATT, *supra* note 22, art. 36.

127. *Id.* Part V(h).

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By implication, the Panel seemed to suggest that the actions of the ISA were not inconsistent with the GATT and, indeed, that the EEC should have taken steps to bolster the ISA in accordance with the principles articulated in Article XXXVIII. Noting the similarities between OPEC and the ISA—both are intergovernmental commodity agreements designed to ensure more favorable markets for a particular commodity—one might postulate that the implicit approval of the ISA by the GATT Panel in *European Communities—Refunds on Exports of Sugar (EC—Sugar)* warrants a conclusion that the OPEC arrangement would, in the context of Article XXXVIII, be viewed favorably by the Appellate Body.

There are some significant differences between the two agreements, however, which undermine this argument. First, the ISA was open to both producer and consumer nations alike,¹²⁸ whereas the OPEC statute explicitly precludes OPEC membership for those countries that are not net oil exporters.¹²⁹ Second, although the ISA was admittedly designed with the purpose of improving the world market for sugar, “improvement” entailed securing greater access to developed country markets for developing country sugar producers rather than merely stabilizing world sugar prices.¹³⁰ By contrast, the attainment of market access for oil producers is not a problem that OPEC is designed to address.¹³¹

In addition, the practices of the ISA were not at issue in *EC—Sugar*, and thus the Panel did not determine whether Article XXXVIII:2(a) might serve as an exception to other GATT obligations regarding the ISA itself. Rather, it appears from the Panel report in *EC—Sugar* that Articles XXXVI and XXXVIII are designed to encourage participation by developed countries in international trade arrangements that facilitate the development objectives laid out in Part IV of the GATT.¹³²

Although Article XXXVIII’s original purpose was to foster international arrangements that create more favorable terms of trade

128. International Sugar Agreement, *supra* note 125, art. 1.

129. See OPEC Statute, *supra* note 66, art. 7(C)–(D) (providing that OPEC is open only to those states with net exports of crude petroleum).

130. See International Sugar Agreement, *supra* note 125, art. 1(g) (stating that an objective of the Agreement is to “provide for adequate participation in, and growing access to, the markets of the developed countries for sugar from developing countries”).

131. Nowhere in the OPEC Statute is the term or concept of market access discussed.

132. See *Sugar Refunds*, *supra* note 123, ¶ 4.30 (noting that it would be “appropriate [for the EEC] to collaborate with other contracting parties in conformity with the guidelines given in Article XXXVIII and thus further the principles and objectives of Article XXXVI”).

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for developing country producers of primary products,¹³³ the Appellate Body would probably not view this provision as permitting a quantitative restriction on exports contrary to Article XI:1. Insofar as it has been applied, Article XXXVIII appears to encompass only cooperative arrangements between developed and developing countries designed to secure market access for exports of primary products on which the economies of the developing countries particularly depend. Were a WTO panel to focus on OPEC's exclusive arrangement among producer nations that is primarily aimed at maintaining price stability,¹³⁴ OPEC would not qualify for Article XXXVIII.

V. CONCLUSION

Historically, the rules governing the international economy were simple and informal.¹³⁵ As national economies became more closely integrated, however, there emerged an increasing need for a solid legal foundation for international economic transactions.¹³⁶ A distinct phenomenon of the twentieth century is the dramatic increase in international institutions and agreements designed to provide the stability and predictability necessary for economic growth.¹³⁷ Countries bound themselves to these institutions and agreements, exchanging sovereignty for predictability and a share of the gains from coordinated policy-making.¹³⁸ The purpose and nature of these commitments vary dramatically, and countries typically subscribe to a plethora of bilateral, regional, and/or multilateral institutions or agreements, each with its own set of obligations and requirements. It seems only a matter of time before obligations begin to conflict.

Senator Lautenberg and Representative DeFazio believe they have identified such a conflict between GATT Article XI:1 and OPEC-mandated production quotas.¹³⁹ Their interpretation of

133. See GATT, *supra* note 22, art. 38.

134. See OPEC Statute, *supra* note 66, arts. 2(C), 7(C).

135. ROBERT GILPIN, *GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER* 83 (2001).

136. See Miles Kahler, *Legalization as Strategy: The Asia-Pacific Case*, 54 INT'L ORG. 549, 552 (2000) (describing growth of ASEAN legal institutions).

137. See generally Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000) (exploring reasons for widespread legalization of international governance and the multiple varieties of degrees and forms of legalization encountered).

138. See John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT'L ECON. L. 1, 1-3 (1998).

139. See LAUTENBERG REPORT, *supra* note 1, at 1-2; see also *supra* note 15.

Article XI:1, however, would likely be considered as unacceptably broad by the WTO Appellate Body should OPEC's legitimacy ever be challenged in that forum. It is most likely that the Appellate Body would distinguish production quotas from the export restrictions prohibited by Article XI:1. While there is precedent for giving Article XI:1 a broad reading,¹⁴⁰ Article XI:1 still has limits. A reading that implies that one WTO member could use Article XI:1 to force another member to produce more of its natural resources to satisfy world demand likely exceeds those limits.

Still, this Note concedes the possibility that the Appellate Body could find that OPEC production quotas violate Article XI:1. In such circumstances, the only plausible affirmative defense that OPEC members could raise would be that their measures relate to the conservation of a natural resource, and thus qualify for an exception under Article XX(g). The Article XX(h) commodity agreements exception is simply too undeveloped to provide a reliable defense, and the Article XXI national security exception is so established as a military/political tool that it is unlikely it could be invoked for economic purposes. Finally, although as a group of developing countries OPEC members are appealing candidates for the Article XXVIII joint action clause, the exclusive producer-only membership requirements of OPEC would prevent them from successfully invoking that Article.

It is unclear whether Senator Lautenberg or Representative DeFazio's efforts in the U.S. Congress will ever succeed. Much will likely turn on developments in the U.S. economy, whether politicians and the media continue to seize on high oil prices as a major cause of the United States' economic woes, and whether OPEC decides to increase quotas to satisfy burgeoning world demand. It is even less clear that the executive branch of government would follow through with Congress' demands even if Congress were to pass a bill, as USTR Robert Zoellick, the Bush administration official formerly responsible for trade policy, has already expressed his opposition to using the WTO as a forum to challenge OPEC's legitimacy.¹⁴¹

Whether the United States brings a case against OPEC countries or not, the alleged inconsistency is certainly worthy of consideration. To those countries that are members of both organizations, their ability to fulfill their obligations to, and benefit from, both organizations is fundamental to their economic development.

140. See *Leather Exports*, *supra* note 39; *Trade in Semiconductors*, *supra* note 26.

141. See *USTR*, *supra* note 53 and accompanying text.

OPEC provides these countries a forum in which to coordinate their production of oil in order to achieve a stable, consistent stream of income that current and future generations can invest in development and infrastructure. At the same time, the WTO secures these countries access to markets for their fledgling goods and services industries that are essential as they attempt to diversify their economies. It is hard to say, if OPEC/WTO members were faced with an ultimatum, which organization offers the greatest economic reward in the near or long-term. But, as this Note concludes, it is unlikely that such an ultimatum will ever be presented.