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Cartel Price Controls vs. Free Trade: A Study of Proposals to Challenge OPEC's Influence in the Oil Market Through WTO Dispute Settlement

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COMMENT

CARTEL PRICE CONTROLS VS. FREE TRADE: A STUDY OF PROPOSALS TO CHALLENGE OPEC'S INFLUENCE IN THE OIL MARKET THROUGH WTO DISPUTE SETTLEMENT

TIM CAREY*

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INTRODUCTION

The price of oil worldwide soared to record new levels in 2008.¹ Fueled in large part by unprecedented demand in emerging market countries, the spectacular rise in prices led to a series of damaging aftershocks in other sectors.² The growing unease among consumers, policymakers, and energy producers resulted in a wide range of urgent proposals to review and reform the global oil trade.³

One consequence of the spike in prices was renewed calls by

1. See Catherine Boyle, *Fuel Woes Deepen As Oil Nears \$140 Record High*, TIMES ONLINE, June 16, 2008, http://business.timesonline.co.uk/tol/business/industry_sectors/natural_resources/article4149483.ece (reporting that the price of crude oil hit a record high point of \$139.89 a barrel, surpassing the previous high of \$139.12 set only twelve days earlier on June 6, 2008).

2. See June 2008 Release, SHORT-TERM ENERGY OUTLOOK (Energy Info. Admin., Washington, D.C.) June 10, 2008, at 2, available at <http://www.eia.doe.gov/emeu/steo/pub/jun08.pdf> (evaluating the overall state of the global oil market and forecasting developing trends, including rising consumption rates in China, India, and other countries experiencing rapid growth); see also Steven Mufson, *This Time, It's Different: Global Pressures Have Converged to Forge a New Oil Reality*, WASH. POST, July 27, 2008, at A1 (examining factors which today are contributing to oil demand levels outpacing supply, including a long period of low-to-moderate oil prices in recent years that contributed to the popularity of fuel-inefficient vehicles in the United States and the rapid growth of the Chinese economy); Adam Shell, *Could Cub Grow Into A Grizzly Bear Market?*, USA TODAY, July 6, 2008, at 1B (discussing the significant recent decline in stock prices, caused in part by rising oil prices, and the likelihood of a long-term downturn in stock prices). See generally *High oil prices hit global economies*, BBC NEWS, May 28, 2008, <http://news.bbc.co.uk/2/hi/business/7421778.stm> (reporting the effects of increased oil prices in different areas around the world, including rising food prices, greater emphasis on conservation and alternative energies, and an overall fear of economic fallout).

3. See generally Susan L. Sakmar, *Bringing Energy Trade into the WTO: The Historical Context, Current Status and Potential Implications for the Middle East Region*, 18 IND. INT'L & COMP. L. REV. 89 (2008) (discussing the current geopolitical environment surrounding the oil trade and recent demand by energy consumers for freer trade in energy services to alleviate price fluctuation and promote stability in energy markets).

members of Congress and the major 2008 Presidential campaigns in the United States to initiate dispute settlement proceedings against the Organization of Petroleum Exporting Countries (“OPEC”)⁴ at the World Trade Organization (“WTO”).⁵ Proponents of this notion capitalize on a popular perception within the United States of OPEC as a sinister cartel that never misses an opportunity to profit off economic calamity, and contend that OPEC’s activities are a major cause of skyrocketing gas prices.⁶ They argue that a decision from the WTO against OPEC’s actions would allow the imposition of trade remedies against oil exporting nations and ultimately reduce the price of oil for consumers.⁷

This Comment explores the viability of these proposals. Part I of this Comment describes the OPEC practices that form the basis of opponents’ complaints, including OPEC member countries’ efforts to influence the world oil market and help oil producers achieve certain rates of return, as well as the General Agreement on Tariffs and Trade⁸ (“GATT”) provisions under which such conduct is called into

4. Agreement Concerning the Creation of the Organization of Petroleum Exporting Countries, Sept. 14, 1960, 443 U.N.T.S. 247.

5. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154; *see* Press Release, Senator Frank R. Lautenberg, Lautenberg Introduces Bill To Take Action Against OPEC (May 5, 2008), <http://lautenberg.senate.gov/newsroom/record.cfm?id=297216> (announcing the introduction of Senator Lautenberg’s legislation requiring action against OPEC for “its anti-competitive practices and illegal export quotas on oil, which ultimately lead to higher gas prices here at home”).

6. *See* Andrew C. Udin, *Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC*, 50 AM. U. L. REV. 1321, 1324 (arguing that the consistent result of OPEC’s policies is to force American consumers to pay higher prices for gasoline in order to greatly increase OPEC’s profits); Spencer Weber Waller, *Suing OPEC*, 64 U. PITT. L. REV. 105, 106 (2002) (describing the public perception of OPEC within the United States as a “greedy, rapacious international cartel that preys on the American public”); *see also* OPEC Accountability Act, S. 2976, 110th Cong. § 2 (2008) (including in its findings that OPEC “has formed a cartel and engaged in anticompetitive practices to manipulate the price of oil, keeping it artificially high”).

7. *See* Press Release, Senator Frank R. Lautenberg, Senators Call on Bush to Take Action Against OPEC in the WTO (June 17, 2008), <http://lautenberg.senate.gov/newsroom/record.cfm?id=299257> (accusing OPEC of manipulating the oil market, thereby causing radically increased gas prices).

8. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 194 [hereinafter referred to collectively as GATT]. The 1994 and 1947 agreements

question.⁹ Part II.A finds OPEC's practices in violation of the GATT Article XI prohibition on quantitative export restrictions.¹⁰ Part II.B contemplates a justification for OPEC's tactics as a legitimate general exception under the GATT Article XX(g).¹¹ Part III counsels against challenging OPEC's practices at the WTO, and proposes the creation of a new multilateral energy trading framework that better serves the divergent goals of OPEC and the WTO.¹² This comment concludes that proposals to initiate WTO dispute settlement against OPEC member countries should be avoided not only because they are likely to be ineffective, but also because preferable alternatives exist for reforming the global energy trade.¹³

I. BACKGROUND

OPEC and the WTO are international organizations conceived with radically different goals and purposes.¹⁴ The WTO is primarily

are referred to collectively because the 1994 incorporates many aspects of the 1947 agreement and supersedes any conflicts.

9. See *infra* notes 34-37 and accompanying text (discussing the GATT Article XI, which prohibits WTO member countries from imposing quantitative export restrictions, including quotas).

10. GATT, *supra* note 8, art. XI (requiring the general elimination of qualitative restrictions); see *infra* notes 53-77 and accompanying text (arguing that while OPEC's methods are production quotas and not export restrictions, they nonetheless constitute a violation of the GATT Article XI).

11. GATT, *supra* note 8, art. XX(g) (providing general exceptions for measures relating to the conservation of exhaustible natural resources); see *infra* notes 78-109 and accompanying text (interpreting the language of Article XX(g) and existing precedent as permissive of the production quotas on oil set by OPEC member countries).

12. See *infra* notes 110-34 and accompanying text (recommending a new system for incorporating the energy trade within the WTO framework that seeks to achieve market stability, energy conservation, and economic development for oil exporting nations).

13. See *infra* notes 135-37 and accompanying text (concluding that WTO dispute resolution should not be initiated against OPEC because a WTO panel is likely to find OPEC's policies consistent with its obligations under the GATT, and therefore dispute resolution would not achieve the results sought by countries opposed to OPEC's activities in the global oil market).

14. See Melaku Geboye Desta, *The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements*, 37 J. WORLD TRADE 523, 523 (2003) (describing OPEC and the WTO as two "diametrically opposed" organizations: the WTO is focused heavily on market liberalization and access, while OPEC is focused equally closely on intergovernmental manipulation of prices).

a negotiating forum conceived to administer the GATT, which was negotiated in the immediate aftermath of World War II with the intention of reducing market access barriers and easing the flow of goods in international trade.¹⁵ Still reeling from the destruction of World War II, the creators of the GATT hoped that a far-reaching open markets policy would eliminate the economic tensions that at times led to armed conflict.¹⁶ OPEC, conversely, was created specifically to strengthen its member countries' control over the trade of their exports, and ultimately to influence the price of oil in the global market.¹⁷ As the two organizations grew and the economic landscape developed over the years, their power expanded while the economic interests of their respective member countries evolved.¹⁸ Today nine of the thirteen OPEC member countries have joined the WTO in the hope of maximizing their potential for economic growth through the WTO's framework of liberalized international trade.¹⁹ The dual membership these nine countries enjoy raises the question

15. See generally MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 25 (3d ed. 2005) (explaining the basic elements of the GATT/WTO structure, including the overall requirement for member countries to reduce trade barriers under the GATT, and methods of resolving disputes among WTO members).

16. See John H. Jackson, *The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited*, 4 J. INT'L ECON. L. 67, 68 (2001) (identifying a primary objective of the GATT founders in the aftermath of World War II as avoiding another war by reducing the economic conditions that were seen as evocative of conflict).

17. See Desta, *supra* note 14, at 549 (describing OPEC as a rare example of a successful cartel that exists to control the total oil output of member countries).

18. See generally Sakmar, *supra* note 3 (exploring the current economic state of oil exporting nations and finding slow levels of growth that indicate a common need among these nations to increase trade capacity in the hopes of spurring development and offsetting possible economic losses as global demand for oil declines in the future).

19. Cf. WTO, *Understanding the WTO: The Organization – Members and Observers*, http://www.wto.org/English/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Jan. 10, 2009) [hereinafter *The Organization – Members and Observers*] (listing current members of the WTO — currently OPEC members that are also members of the WTO are Angola, Ecuador, Indonesia, Kuwait, Nigeria, Qatar, Saudi Arabia, UAE and Venezuela); *The Organization of the Petroleum Exporting Countries, Brief History*, <http://www.opec.org/aboutus/history/history.htm> (last visited Feb. 27, 2009) [hereinafter *OPEC Brief History*] (listing current OPEC countries).

of whether in fact countries can successfully fulfill their divergent obligations to each organization.²⁰

A. OPEC: ITS FOUNDING, GOALS AND METHODS

OPEC was created in 1960 by representatives of five of the world's leading oil producing nations at a conference in Baghdad.²¹ Its founding was devised, in part, as a counter to concurrent efforts by the United States to limit foreign competition for its own domestic oil producers.²² At its inception, the goal of OPEC's founding members was to protect the collective bargaining power of oil producing nations from protectionism and the coordinated operations of the world's largest oil corporations.²³ Today, with thirteen members, its goals remain much the same: to coordinate the oil production policies of member countries in order to guarantee

20. See Stephen A. Broome, Note, *Conflicting Obligations for Oil Exporting Nations?: Satisfying Membership Requirements of Both OPEC and the WTO*, 38 GEO. WASH. INT'L L. REV. 409, 411 (2006) (noting that "congressional efforts to challenge OPEC focus on OPEC's alleged inconsistency with the WTO"). See generally OFFICE OF SENATOR FRANK R. LAUTENBERG, BUSTING UP THE CARTEL: THE WTO CASE AGAINST OPEC (2004), available at <http://lautenberg.senate.gov/documents/foreign/OPEC%20Memo.pdf> (last visited Jan. 10, 2009) [hereinafter LAUTENBERG REPORT] (arguing that OPEC is violating its GATT/WTO obligations and that none of the exceptions apply).

21. See OPEC Brief History, *supra* note 19 (summarizing the history of OPEC from its inception by the five founding member countries of Iran, Iraq, Kuwait, Saudi Arabia and Venezuela, to its current roster of thirteen member countries, including the five founding parties and Qatar, Indonesia, Libya, United Arab Emirates ("UAE"), Algeria, Nigeria, Ecuador, and Angola (Gabon joined OPEC in 1975 and withdrew from membership in 1994)).

22. See Jeffrey P. Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 U. PA. J. INT'L BUS. L. 235, 245 (1989) (describing the establishment by President Eisenhower in 1959 of the Mandatory Oil Import Program, which imposed strict import restrictions on foreign oil into the United States, and theorizing that such restrictions, and their impact on oil prices worldwide, spurred the creation of OPEC as a counterweight to U.S. policies in the oil market).

23. See Edward Quill, *The Failure of International Commodity Agreements: Forms, Functions, and Implications*, 22 DENV. J. INT'L L. & POL'Y 503, 509 (1994) (describing the central factors leading to the creation of OPEC, including the weakened bargaining position of the world's leading oil corporations due to the introduction of several independent national oil companies, and the drastic price cuts resulting from increased international market competition and protectionist import restrictions in the United States).

their individual and collective best interests — the most important of which is maintaining an appropriately high price for oil.²⁴

OPEC achieves its goals by discouraging competition among its members for market share and by determining target oil prices, which are achieved through coordinated supply control measures, including quotas on oil production.²⁵ This coordination is at the root of the common conception of OPEC as a hydrocarbon “cartel,” a characterization that carries a range of pejorative connotations.²⁶ In the United States the negative public perception of OPEC has triggered a number of unsuccessful attempts to use the courts and U.S. antitrust laws to force OPEC to abandon its policies.²⁷

24. See OPEC, OPEC Statute, approved Jan. 1, 1961, art. 2(A), available at <http://www.opec.org/library/opec%20statute/pdf/os.pdf> [hereinafter OPEC Statute] (identifying the principle aim of the organization as the coordination and unification of petroleum policies of member countries and the determination of the best means for safeguarding their interests, individually and collectively); see also Broome, *supra* note 20, at 414 (studying OPEC member countries policies in relation to their WTO obligations, and concluding without a doubt that OPEC measures are designed to control the oil supply on the world market). But see Quill, *supra* note 23, at 512-13 (commenting on the difficulties OPEC faces in overcoming differences of opinions on policy objectives among its members).

25. See Energy Info. Admin., OPEC Brief (Nov. 26, 2004), <http://www.eia.doe.gov/emeu/cabs/opec.pdf> (describing how OPEC collects market price data on several varieties of crude oils produced around the world and then averages these prices to create an OPEC reference price representing world oil market conditions, which they in turn use to manipulate oil production levels to achieve a target price); see also OPEC, Why Does OPEC Set Oil Production Quotas?, <http://www.opec.org/library/FAQs/aboutOPEC/q12.htm> (last visited Jan. 13, 2009) (explaining that oil production regulations are one possible tactic employed by OPEC member countries to achieve “stability and harmony in the petroleum market for the benefit of both oil producers and consumers”). See generally Desta, *supra* note 14, at 536 (describing OPEC’s supply restriction measures as normally triggered when oil prices decline below certain levels).

26. See Desta, *supra* note 14, at 547-49 (describing OPEC as clearly an inter-governmental cartel and acknowledging the negative connotations such a term entails, but denying any impropriety in the functioning of OPEC as a cartel because there is no prevailing international law nor consistent principle or practice of major trading nations, where collusion to manage the pace of exploitation of natural resources is neither unusual nor discouraged).

27. See, e.g., *Prewitt Enter., Inc. v. OPEC*, 353 F.3d 916, 918-19 (11th Cir. 2003) (dismissing the suit for lack of jurisdiction—and thus an insufficient service of process—and holding that there were no means available for service upon OPEC in an action alleging violation of the Sherman Act and seeking equitable relief pursuant to the Clayton Act); *Int’l Ass’n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1355 (9th Cir. 1981) (holding that act of state doctrine barred federal court jurisdiction in an action by complainants seeking

Frustrated by the courts' failures, and eager to reap political gain from the public's distrust of OPEC, Congress has interjected itself with legislation aimed at facilitating future court challenges to OPEC's position.²⁸ However, in the absence of a new legal challenge against OPEC, some in Congress have looked to other means of sanctioning OPEC, including WTO dispute resolution.²⁹

B. THE GATT/WTO FRAMEWORK

The current multilateral trading system overseen by the WTO was established in 1947 with the enactment of the GATT.³⁰ The GATT seeks to improve worldwide economic growth by reducing domestic market access barriers and promoting free trade.³¹ Today the WTO includes 153 member countries that are bound by the terms of the GATT.³²

monetary and injunctive relief for alleged price fixing of crude oil prices in violation of Sherman Act).

28. *See, e.g.*, Gas Price Relief for Consumers Act of 2008, H.R. 6074, 110th Cong. (2008) (attempting to amend the Sherman Act to make it illegal for foreign states to act collectively to limit the production of oil, set the price for oil, or otherwise restrain the oil trade, and removing a court's ability to decide a case based on the act of state doctrine); No Oil Producing and Exporting Cartels (NOPEC) Act of 2007, H.R. 2264, 110th Cong. (2007) (proposing the elimination of protection of OPEC from provisions of the Foreign Sovereign Immunities Act); *see also* Broome, *supra* note 20, at 410 (finding that Congress perceived substantial difficulty in bringing an effective antitrust suit against OPEC, and thus sought to eliminate certain defenses and immunities thought to be a barrier to effective litigation).

29. *See, e.g.*, H.R. Con. Res. 276, 106th Cong. (2000) (urging the President of the United States to file a complaint in the WTO against oil-producing nations for violating their obligations under WTO rules).

30. *See* Jackson, *supra* note 16, at 68 (discussing the circumstances that led to the negotiation of the GATT and the negotiators' goals of eliminating the threat of future armed conflict, and increasing worldwide economic opportunity by reducing barriers to economic trade).

31. *See id.* at 68-69 (describing the history of the GATT/WTO multilateral trading system and its underlying policy goals, including the mutual economic betterment of all nations, and an effective system for peacefully resolving international economic disputes). *See generally* WTO, Understanding the WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm (last visited Jan. 13, 2009) (providing a general overview of the WTO, including its policy goals and objectives, and its methods of achieving results).

32. *See* The Organization – Members and Observers, *supra* note 19 (listing the members of the WTO as of July 23, 2008, and providing individual information on trade statistics, WTO commitments, disputes, trade policy reviews, and notifications); *see also* WTO, Understanding the WTO: The Organization –

The GATT commits its members to “reciprocal and mutually advantageous arrangements” designed to reduce trade barriers and discriminatory treatment in international commerce.³³ Originally, the GATT intended to curtail the most onerous border restrictions on trade, leaving any remaining restrictions in the form of tariffs to be negotiated down over time.³⁴ To that end, Article XI of the GATT provides for the elimination of restrictions on imports or exports, other than duties, taxes or other charges, regardless of whether such restrictions are effectuated through quotas, import or export licenses, or other measures.³⁵

The GATT includes a number of specific exceptions to Article XI, including exceptions for nations facing serious financial problems and exceptions for restrictions to support infant industries in developing nations.³⁶ In addition to these and other specific

Membership, alliances and bureaucracy, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (last visited Jan. 13, 2009) (describing the four general stages of accession to the WTO: disclosure of all aspects of a country’s trade and economic policies, determination of what mutually-beneficial terms the prospective member country has to offer, the drafting of a membership treaty, and the ultimate approval of agreement protocols).

33. See GATT, *supra* note 8, pmb1. (declaring mutual findings of the parties to the agreement, including the need to raise standards of living, ensure the optimal use of natural resources and promote the sustainable development, and resolving to develop an integrated, more viable and durable multilateral trading system); see also TREBILCOCK, *supra* note 15, at 25-39 (describing the basic elements of the GATT/WTO and providing a general roadmap to its rules and regulations, including the principle of non-discrimination among member countries, the Most Favoured Nation (MFN) principle, National Treatment principle, quantitative restrictions and certain remedies).

34. See TREBILCOCK, *supra* note 15, at 29-30 (explaining the goal of the GATT Article XI prohibition on the use of import or export quotas, and the underlying theory that restrictions on quantitative controls would increase transparency and commensurability of tariffs and help speed their reduction over time).

35. GATT, *supra* note 8, art. XI; see Broome, *supra* note 20, at 412-13 (analyzing the language of Article XI and considering whether OPEC’s measures restricting oil production are properly characterized as violating the GATT rules against quantitative restrictions on exports because OPEC’s measures consist of production quotas and not government-imposed export restrictions).

36. See GATT, *supra* note 8, art. XII (providing restrictions on the applicability of Article XI’s provisions in order to protect nations with serious balance of payments problems, as such measures are required to safeguard their financial position); see also *id.* art. XVIII (allowing states to violate Article XI if necessary to enact protective measures designed to raise the standard of living of their people, so long as those measures facilitate the attainment of the overall objectives of the GATT); see generally TREBILCOCK, *supra* note 15, at 30 (explaining briefly

exceptions to the provisions of Article XI, Article XX provides a number of general exceptions, or dispensations from the GATT obligations when necessary under certain conditions.³⁷ Included among them is the GATT Article XX(g), which explicitly provides a general exception for measures relating to the conservation of exhaustible natural resources.³⁸

If a nation challenges another country's actions, these disputes are resolved under the GATT/WTO framework by the Dispute Settlement Body ("DSB").³⁹ If a complaint cannot be resolved through obligatory consultations between parties, the complaint is referred to the DSB, which appoints a panel to investigate the complaint and make recommendations to the DSB for resolution of the dispute.⁴⁰ For this function, the DSB is comprised of representatives from all WTO member countries and issues decisions by consensus.⁴¹

several exceptions to Article XI, including those contained in Articles XII and XVIII, and the rise of so-called "New Protectionism," which entails the use of quantitative restrictions negotiated on a bilateral basis under threat of unilateral actions).

37. See GATT, *supra* note 8, art. XX (providing for a number of general exceptions to member states' obligations under the GATT, so long as such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade). Article XX includes a list of ten general exceptions for measures related to the protection of public morals, public health, the exploitation of prison labor, and the import and export of gold and silver. *Id.*

38. *Id.* art. XX(g) (allowing countries to take action to conserve exhaustible natural resources so long as similar measures are taken domestically as well); see also TREBILCOCK, *supra* note 15, at 334 (discussing the implications and intent of the GATT Article XX on the exploitation of natural resources and the environment, noting that the word "environment" does not appear in the text of Article XX, and speculating that the purpose of Article XX(g) might be to permit member countries to protect exhaustible natural resources such as petroleum).

39. See GATT, *supra* note 8, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 2(1) (establishing the Dispute Settlement Body ("DSB") and granting it authority to "monitor implementation of panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements").

40. See *id.* art. XXII (requiring consultation between parties should complaints arise regarding the operation of the GATT); *id.* Annex 2 art. 6 (authorizing the establishment of panels to investigate complaints between member countries).

41. See WTO, Dispute Settlement, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (last visited Jan. 13, 2008) (noting that since the member

C. THE WTO CASE AGAINST OPEC

Using WTO's dispute settlement framework as a forum to attack OPEC's interventionist policies in the oil market appeals to OPEC's opponents because of the seemingly obvious divergence between the stated goals of the two organizations.⁴² OPEC candidly seeks to limit membership to countries with substantial crude petroleum exports and "fundamentally similar interests" in order to ensure that its policies are closely aligned with the best interests of its membership.⁴³ The preamble of the WTO agreement, conversely, lists among its goals the reduction of tariffs, barriers to trade, and discriminatory treatment among members and trading partners.⁴⁴ Rather than restricting membership to meet specific criteria, the WTO agreement allows for membership (accession) by any State, provided only that the State's external commercial relations are autonomous.⁴⁵

In 2004 Senator Frank Lautenberg released a report entitled *Busting Up the Cartel: The WTO Case Against OPEC*, which proposed initiating dispute resolution against those OPEC member countries that are also members of the WTO and thus bound to the provisions of the GATT.⁴⁶ In addition to the report, Senator

states authored the agreements, they are the ones enforcing them through the DSB); *see also* TREBILCOCK, *supra* note 15, at 36-37 (explaining the WTO dispute resolution process, from members' initial obligation to consult with one another regarding complaints, to the possible involvement of the DSB and ultimate review by the General Council).

42. *See* Desta, *supra* note 14, at 524-25 (contrasting the general qualities of OPEC and WTO, two institutions that "at first sight" could not be further apart). The WTO is committed to market liberalization and open to the accession of any country or customs territory. *Id.* OPEC is strictly committed to ensuring a favorable market for oil exports, and its membership remains open only to countries that export substantial amounts of oil. *Id.*

43. *See* OPEC Statute, *supra* note 24, art. 7C (detailing the requirements for membership in OPEC, which are based on the fundamental premise that prospective members must meet narrow guidelines for crude oil exports and common interests).

44. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 2 (1999), 1867 U.N.T.S. 14, 33 I.L.M. 1143, 1144 (1994).

45. GATT, *supra* note 8, art. XII.

46. *See* LAUTENBERG REPORT, *supra* note 20, at 5-6, 12 (proposing that WTO dispute settlement proceedings be initiated against OPEC member countries for violating the GATT Article XI prohibition on quantitative export restrictions, and

Lautenberg introduced the OPEC Accountability Act of 2008, legislation that would require the U.S. government to pursue dispute resolution against OPEC member countries at the WTO.⁴⁷ Although this legislation was never enacted, Senator Lautenberg's efforts demonstrate his firm belief that WTO dispute settlement would eliminate OPEC's influence over oil markets.⁴⁸

II. ANALYSIS

OPEC's system of oil production and price controls among its member countries violates the GATT Article XI.⁴⁹ If challenged however, a DSB panel would probably find such practices justified under the GATT Article XX(g) General Exception for policies relating to the conservation of exhaustible natural resources.⁵⁰ Such a finding would preserve Article XI's effectiveness against market access barriers, while allowing member countries to determine their

finding no justification for OPEC's policies among the GATT specific exceptions to Article XI, general exceptions under Article XX, or separate protections for national security and developing nations).

47. See OPEC Accountability Act, S. 2976, 110th Cong. (2008) (requiring the United States Trade Representative ("USTR") to initiate consultations with countries that are members of both OPEC and the WTO with the aims of forcing a stop to OPEC's market manipulation, and if consultations fail, requiring the USTR to request a WTO dispute settlement panel to judge the case). The bill includes the finding that the agreement among OPEC member nations to limit oil exports violates the GATT Article XI prohibition on restrictions on the exportation or sale for export of a product. *Id.* The bill also finds that OPEC export quotas cause high prices that harm American families, "undermine the American economy, impede American and foreign commerce, and are contrary to the national interests of the United States." *Id.*

48. See Govtrack.us, S. 2976: OPEC Accountability Act, <http://www.govtrack.us/congress/bill.xpd?bill=s110-2976> (last visited Mar. 2, 2009); LAUTENBERG REPORT, *supra* note 20, at 12 (concluding that WTO dispute settlement against OPEC would increase oil supplies and, therefore, result in lower prices for consumers).

49. See *infra* notes 53-77 and accompanying text (arguing that OPEC member countries are in violation of Article XI because their coordinated limits on oil production amount to substantive export controls under the broad terms of Article XI and prior WTO panel precedent).

50. See *infra* notes 78-109 and accompanying text (suggesting that OPEC's policies likely fall under the GATT Article XX(g) General Exception for exhaustible natural resources because recent WTO actions have indicated a trend toward greater deference to measures aimed at environmental protection and because there is established precedent at the WTO of a panel considering petroleum an exhaustible natural resource covered under Article XX(g)).

own domestic policies for exploitation of exhaustible natural resources.⁵¹

A. OPEC'S PRACTICES VIOLATE GATT ARTICLE XI

The primary question in a challenge to OPEC's policies at the WTO is whether OPEC's activities are "prohibitions or restrictions" on exports barred under Article XI.⁵² OPEC is straightforward in its efforts to influence the global supply of oil through a system of production and pricing controls, but it does not directly restrict exports.⁵³ Because the GATT does not specifically identify production and pricing controls as prohibited means of limiting exports, whether OPEC's use of these controls violates Article XI remains an open question.⁵⁴

The *Lautenberg Report* and its companion legislation conclude that OPEC's agreement to limit oil production represents a quantitative restriction under Article XI.⁵⁵ The report considers the export-restrictive activities of OPEC member countries as fundamentally inconsistent with WTO obligations, which are deliberately broad under Article XI.⁵⁶ This conclusion is plausible,

51. See Desta, *supra* note 14, at 537-38.

52. See Broome, *supra* note 20, at 413 (referring to assertions made in the Lautenberg Report that OPEC's measures restricting oil production violate the GATT Article XI, and arguing that it is not clear that measures taken to restrict oil production "are properly characterized as export restrictions" under the GATT because they affect the production of the commodity itself, and not its export). *But see* Desta, *supra* note 14, at 533-34 (noting that the GATT case-law has established that the use of price setting techniques similar to those used by OPEC falls under the restrictions in Article XI, and arguing that it is possible a WTO panel would conclude OPEC's policies violate Article XI because they achieve the effect of quantitative restrictions effected through minimum export price requirements).

53. See Desta, *supra* note 14, at 526 (describing OPEC's system of discouraging competition between members and setting target prices for oil which are implemented through "coordinated supply control measures").

54. See Broome, *supra* note 20, at 413-14 (discussing the difference between "production" and "export restrictions" and those concepts' treatment under Article XI).

55. See OPEC Accountability Act, S. 2976, 110th Cong. § 2(6) (2008); LAUTENBERG REPORT, *supra* note 20, at 8 (finding OPEC's practices in violation of the GATT Article XI rules that prohibit quantitative export restrictions because OPEC's activities are export-restrictive and inconsistent with the terms of Article XI).

56. See LAUTENBERG REPORT, *supra* note 20, at 8 (suggesting that the broad

but not definitive, since the relevant GATT provisions do not mention production controls.⁵⁷

There is precedent for the *Lautenberg Report's* interpretation of Article XI as a comprehensive prohibition on all measures designed to limit exports, with the narrow exception of “duties, taxes, or other charges.”⁵⁸ In *Japan – Trade in Semi-Conductors*, a GATT panel considered whether administrative guidance alone by the Government of Japan over its semiconductor manufacturing sector was inconsistent with the provisions of Article XI.⁵⁹ In that case, Japan instituted a monitoring regime over its semiconductor industry in order to prevent dumping of semiconductor products at prices below manufacturing costs, in accordance with the 1986 Arrangement Concerning Trade in Semi-Conductor Products between Japan and the United States.⁶⁰ Under the regime’s guidelines, the Japanese government collected data from the nation’s semiconductor industry on costs and expenditures related to the manufacture and export of semiconductor products.⁶¹ The

wording of Article XI indicates that it covers any measure maintained by a WTO member that restricts exportation).

57. See GATT, *supra* note 8, art. XI (denouncing “prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures,” but making no specific reference to controls on the production of goods for export).

58. Report of the Panel, *Japan – Trade in Semi-Conductors*, ¶ 132, L/6309 (May 4, 1988), GATT B.I.S.D. (35th Supp.) at 116, 162 (1989) [hereinafter *Japan – Trade in Semi-Conductors*] (considering Japan’s implementation of a treaty provision entered into with the United States, in response to a complaint filed by the European Economic Community (“EEC”), and finding that Japan’s method of implementing the provision to monitor the manufacturing sector’s export practices constituted a “coherent system” that restricted Japanese exports and that this system violated article XI of the GATT).

59. *Id.* ¶ 49 (introducing the main arguments of the parties to the dispute, including the EEC’s contention that Japan’s monitoring regime had the effect of setting price controls on exports in violation of the GATT Article XI).

60. Arrangement between the Government of Japan and the Government of the United States of America Concerning Trade in Semiconductor Products, Nov. 6, 1986, *reprinted in* 25 I.L.M. 1408 (1986) (taking steps to address concerns among the U.S. semiconductor industry of Japanese manufacturers dumping semiconductor products on foreign markets at artificially low prices, including requiring the Japanese government to monitor exports by its semiconductor industry to ensure no anticompetitive dumping practices take place).

61. See *Japan – Trade in Semi-Conductors*, *supra* note 58, ¶¶ 19-27 (describing the scope and practice of the Japanese monitoring regime at the center of the dispute, which involved Japanese government officials reviewing the price

government then analyzed the data and, in cases in which “exports were made at prices ‘extremely lower’ than the [production] cost[s],” Japan would communicate the concerns about dumping to the manufacturer.⁶² The European Economic Community (“EEC”)⁶³ challenged the regime, alleging that the Japanese government’s monitoring and subsequent requests to industry to modify production schedules and rates constituted a violation of Article XI.⁶⁴ The EEC claimed the Japanese monitoring regime interfered with the market and consequently raised prices for semiconductor products.⁶⁵ Japan insisted that its “monitoring was mere watching,” and furthermore, that its communications to the industry were advisory only and not legally binding.⁶⁶ Ultimately, the Japanese argued that its efforts were only requests of manufacturers to align their production levels to reflect “real demand” and prevent dumping, not to restrict exports.⁶⁷

of semi-conductor exports and commenting when those prices were outside a certain range).

62. *Id.* ¶ 36.

63. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (calling for a closer union among the nations of Europe to encourage greater economic growth, accomplished through the establishment of a customs union with a common external tariff and common policies for agriculture, transport and trade).

64. *See Japan – Trade in Semi-Conductors*, *supra* note 58, ¶ 49 (alleging that Japan’s efforts to monitor semi-conductor exports and advise manufacturers of apparently anti-competitive policies were effectively export controls in violation of the GATT Article XI).

65. *See id.* ¶¶ 34-35 (claiming that communications between government officials and the semi-conductor industry were effectively interpreted as orders to curtail exports at a certain price).

66. *See id.* ¶¶ 37-42 (detailing Japan’s argument that its practice was only to monitor the semi-conductor trade, and when exports were made at prices “extremely lower” than the costs, the Japanese government “might present the facts and communicate its concern to the manufacturer”); *id.* ¶ 14 (describing the framework of the Japan/U.S. arrangement in semi-conductor trade, the second section of which required Japan to monitor, as appropriate, cost and export prices on the products exported by Japanese semi-conductor firms to certain markets “in order to prevent dumping”); *see also* Broome, *supra* note 20, at 415 (characterizing the Japanese argument as based on the belief that the monitoring regime did not constitute a “restriction” under Article XI).

67. *See Japan – Trade in Semi-Conductors*, *supra* note 58, ¶ 27 (explaining the Japanese government’s objective was to emphasize to manufacturers the importance of not producing more than buyers demanded and not to regulate or encourage companies to conspire to allocate production volume, which would be a violation of Japanese anti-trust laws).

The GATT panel began its analysis by declaring unequivocally that Article XI, unlike other GATT provisions, does not refer to laws or regulations but to a broader class of measures, and further that the article's expansive wording was a clear indication that it covered any measure restricting exports, or sales for export.⁶⁸ Furthermore, the panel noted a previous decision that held that an import regulation allowing the import of a product in principle, but not below a minimum price level, constituted a restriction on imports within the meaning of Article XI.⁶⁹ The central question for the panel in *Japan – Trade in Semi-Conductors* was thus whether the same principle applied to export restrictions based on market prices.⁷⁰ The panel held that it did, and concluded that the Government of Japan had created an administrative structure to effectively restrict the sale for export of semiconductor products below a target price.⁷¹ The Japanese monitoring regime thus constituted a restriction on exports inconsistent with Article XI.⁷²

Based on the *Japan – Trade in Semi-Conductors* precedent, a DSB panel would likely find OPEC's methods inconsistent with Article

68. *Id.* ¶ 106 (finding that Article XI unequivocally forbids any measures instituted or maintained by a party to the GATT which restricts the exportation or sale for export of products, regardless of whether the measures are legally binding on those affected).

69. See Report of the Panel, *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, ¶ 4.9, L/4687 (Oct. 4, 1978), GATT B.I.S.D. (25th Supp.) at 68, 107 (1979) (examining a United States complaint concerning the minimum import price for tomato concentrates and the systems of licensing and surety deposits applied by the European Community with respect to imports of certain processed fruits and vegetables and finding such import restrictions inconsistent with the GATT Article XI prohibition on export restrictions).

70. See *Japan – Trade in Semi-Conductors*, *supra* note 58, ¶ 96 (considering the central question in the case as whether the administrative guidance of the Japanese Government was, at its base, designed to constrain exports). The panel found that the question of how such constraints were effected, either through measures to restrict production for exports, or through measures restrict exports themselves, were immaterial because it is the ultimate effect of the measures that is considered critical under the GATT. *Id.* ¶¶ 114-17.

71. See *id.* ¶ 117 (concluding that the administrative structure created by the Japanese government “operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs”).

72. See *id.* (finding that the Japanese government's monitoring measures violated Article XI because they “constituted a coherent system restricting the sale for export of monitored semi-conductors”).

XI.⁷³ OPEC influences the oil market using tactics that are clear for the general public to observe and, in many ways, more restrictive and controlling than those employed by Japan in *Japan – Trade in Semi-Conductors*.⁷⁴ OPEC's widely recognized and acknowledged tactic of curtailing production levels in direct response to declining prices is precisely the type of activity prohibited by the holding of *Japan – Trade in Semi-Conductors*.⁷⁵ Finding OPEC member countries in violation of Article XI would, therefore, be entirely consistent with previous panel decisions.⁷⁶

B. OPEC'S PRACTICES ARE PERMISSIBLE UNDER THE GATT ARTICLE XX(G)

Article XX of the GATT lists General Exceptions to its provisions that may be invoked in specific circumstances.⁷⁷ In general, it allows nations to take legitimate measures necessary to guarantee a member country's best interests, so long as such measures are not disguised attempts to circumvent the GATT rules.⁷⁸ Subsection (g) specifically

73. *Cf. id. But see* Broome, *supra* note 20, at 414 (arguing that the panel is likely to interpret Article XI narrowly and therefore refuse to apply it to production restrictions because production and exportation are different concepts).

74. *Cf. Desta, supra* note 14, at 533 (explaining that when the oil price falls below a certain level, OPEC can seek a more desirable price through either export levies or reductions in supply, and in practice it has used both, although it typically prefers supply restrictions).

75. *See id.* at 534 (declaring that the GATT case law has found the type of price-setting techniques used by OPEC to be in violation of Article XI).

76. *But see* Broome, *supra* note 20, at 418 (considering it likely that the WTO 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" of preventing the oil from becoming a tradable product). Prior to the production of the oil (i.e. extraction from its natural state and further refinement), the author contends it cannot be characterized as a "product" subject to the GATT. *Id.* at 418-19. To conclude otherwise may lead to a host of other designs to circumvent Article XI's prohibition on export controls. *Id.* at 418. Similar restrictions on the development of raw materials and limitations on production levels would practically eviscerate Article XI's effectiveness. *Id.*

77. GATT, *supra* note 8, art. XX. *See generally* TREBILCOCK, *supra* note 15, at 30-35 (explaining briefly the general exceptions to the GATT obligations, and other means by which WTO members can legitimately waive their obligations under the GATT).

78. *See* GATT, *supra* note 8, art. XX (allowing members countries to adopt certain measures otherwise contrary to provisions of the agreement, so long as such measures are not used as "a means of arbitrary or unjustifiable discrimination," or as "a disguised restriction on international trade").

addresses the exploitation of exhaustible natural resources, although it does not specifically enumerate oil.⁷⁹

The *Lautenberg Report* dismisses Article XX(g) as an unviable source of protection for OPEC's policies for two reasons.⁸⁰ First, the *Lautenberg Report* claims that an attempt by OPEC to invoke Article XX(g) would amount to "a disguised restriction on international trade" that is prohibited under the statute.⁸¹ Second, it argues that OPEC has never cited or relied upon the "conservation of natural resources" as justification for its policies.⁸²

Prior GATT/WTO Panels have established that Article XX enumerates limited and conditional exceptions from obligations under other provisions of the GATT, and does not otherwise create additional obligations for member countries to follow.⁸³ Parties invoking Article XX as an affirmative defense bear the burden of proof in justifying their exception under its provisions.⁸⁴ Parties may invoke Article XX at their own discretion because its use as an argument in the alternative is not construed as a *de facto* admission

79. *Id.* art. XX(g) (exempting measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"); *see infra* notes 91-94 and accompanying text (discussing case which referred to petroleum as an example of an exhaustible natural resource).

80. *See* LAUTENBERG REPORT, *supra* note 20, at 6 (claiming OPEC cannot invoke Article XX(g) because its exceptions are not intended for the type of restrictive trade policies employed by OPEC).

81. *See id.* at 2-3 (insisting that exceptions to Article XI do not apply because "OPEC's stated goal is a price target, not conservation").

82. *See id.* at 11 (acknowledging that crude oil is probably the kind of exhaustible natural resource covered by Article XX(g), but arguing that because OPEC has never claimed conservation as a justification, it has lost the ability to successfully invoke Article XX(g) as an affirmative defense); *see also* GATT, *supra* note 8, art. XX(g) (requiring that in order to invoke the exception, the policies in question must be legitimate efforts to conserve natural resources, and must be made "in conjunction with restrictions on domestic production or consumption").

83. *See United States – Restrictions on Imports of Tuna*, ¶¶ 2.1-3.9, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) (1993) (considering a dispute brought by Mexico over import restrictions on tuna imposed by the United States in accordance with the enactment of the Marine Mammal Protection Act of 1972, which sought to protect the dolphin population from the dangers of tuna fishing operations, and therefore, per the United States, qualified as a measure aimed at protecting a nonrenewable natural resource under the GATT Article XX(g)).

84. *See id.* ¶ 5.22 (adding that panels will not consider Article XX unless specifically invoked by a party to a dispute).

of guilt.⁸⁵ Therefore, despite the *Lautenberg Report*'s conclusion that Article XX(g) does not excuse OPEC's activities, there is no reason to expect that OPEC member countries would refrain from asserting Article XX(g) as an affirmative defense.⁸⁶

Assuming that OPEC would seek an Article XX general exception if it were found in violation of Article XI, a WTO panel would apply a multifaceted analysis to determine whether OPEC's policies merit a general exception.⁸⁷ The WTO Appellate Body Report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (“*Shrimp Products Prohibition*”) stated that measures seeking a general exception under Article XX must first satisfy one of the particular exceptions of sub-paragraphs (a) through (j).⁸⁸ Once a State establishes provisional justification under one of the particular exceptions, the panel evaluates the measure for compliance with the introductory clause of Article XX which prohibits the invocation of Article XX exceptions as a means of circumventing the GATT's overall purpose.⁸⁹

85. *Id.*

86. See Broome, *supra* note 20, at 419-34 (considering what defenses could potentially be invoked if OPEC were found in violation of Article XI, including Article XX(g), the Article XX(h) Commodity Agreements Exception, the Article XXI National Security Exception, and Article XXXVIII, which permits cooperative, intergovernmental arrangements intended to promote the interests of developing countries).

87. See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 116-122, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp Products Prohibition*] (declaring that for a measure to warrant a general exception, it must both fall under one of the particular exceptions contained in paragraphs (a) to (j), and must satisfy the requirements of the introductory clause of Article XX, which forbids arbitrary or discriminatory measures, as well as disguised barriers to trade). The panel in *Shrimp Products Prohibition* also noted that Article XX terms should be interpreted in light of its context and purpose. *Id.* ¶ 116.

88. *Id.* ¶ 69; see ¶¶ 164-65 (evaluating the legitimacy of U.S. import restrictions on shrimp caught without the use of turtle excluder devices, which protect endangered sea turtles from capture in shrimpers' nets, and finding that while the shrimp export ban is legitimately aimed at the conservation of exhaustible natural resources, and therefore covered under Article XX(g), the ban constitutes “arbitrary” and “unjustifiable” discrimination under the terms of Article XX and thus the policy is not covered under the Article XX General Exceptions).

89. See GATT, *supra* note 8, art. XX (emphasizing in the opening section of the article that the intention of the article is to preserve a proper level of national sovereignty, but not at the risk of allowing surreptitious avoidance of the GATT obligations); *Shrimp Products Prohibition*, *supra* note 88, ¶ 156 (expressing the

OPEC's methods are justified under the Article XX(g) exception for exhaustible natural resources because the WTO Appellate Body ruled in *Shrimp Products Prohibition* that petroleum is an exhaustible natural resource under the terms of Article XX(g).⁹⁰ In that case, the WTO Appellate Body considered whether a U.S. law designed to protect sea turtles was justified as relating to an exhaustible natural resource.⁹¹ The panel found that the language of Article XX(g) does not limit itself to non-living materials, since living resources are just as finite as petroleum, minerals, and other inanimate materials.⁹² By highlighting petroleum as a definitively finite, and thus exhaustible natural resource, the body explicitly underscored the applicability of Article XX(g) to petroleum and policies affecting trade in petroleum.⁹³

After finding OPEC's measures covered by Article XX(g), a WTO panel will next assess the measures' justifiability under the introductory language of Article XX, which is concerned mainly with the manner in which policies are implemented and seeks to prevent abuses of Article XX's general exceptions.⁹⁴ Prior GATT/WTO Panel and Appellate Body rulings on Article XX have established that its exceptions must be construed narrowly to keep parties from seeking a broader range of exceptions than originally intended under the statute.⁹⁵ For example, in the 1996 *United States*

fundamental principle that the introductory language of Article XX exists both to guarantee a level of domestic sovereignty for member countries, and prevent the abuse of Article XX's exceptions).

90. See *Shrimp Products Prohibition*, *supra* note 87, ¶ 128 (reaching a conclusion on whether natural resources were limited to non-living resources and, in concluding that they are not, implicitly holding that petroleum is a classic example of an exhaustible natural resource under Article XX).

91. *Id.* ¶ 127.

92. See *id.* ¶ 128 (finding that "[t]extually, Article XX(g) is *not* limited to the conservation of 'mineral' or 'non-living' natural resources Living resources are just as 'finite' as petroleum, iron ore and other non-living resources") (emphasis in original).

93. See *id.* ¶ 129 (asserting that one must interpret the language of Article XX(g) in consideration of the "contemporary concerns" of the international community for environmental protection measures).

94. Cf. *id.* ¶ 37 (noting that the object and purpose of the introductory language of Article XX is to prevent abuses of the article's general exceptions, and thus preserve the parties' overall commitments to the GATT).

95. See, e.g., Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶¶ 6.1-6.10, WT/DS2/AB/R, (Jan. 29, 1996) [hereinafter *Standards for Reformulated and Conventional Gasoline*] (considering a dispute

– *Standards for Reformulated and Conventional Gasoline* (“*Standards for Reformulated and Conventional Gasoline*”) case, a WTO Panel set a high standard for exceptions, finding that policies inconsistent with the GATT must be “necessary” to achieving the member country’s stated policy goals in order to justify an Article XX exception.⁹⁶ Under that holding, the term “necessary” was interpreted as covering policies enacted as a last resort, in situations where no other reasonably available policies existed that were either consistent with the GATT, or less inconsistent than the policy in question.⁹⁷

OPEC’s policies meet this standard because production quotas are less inconsistent with the GATT Article XI prohibitions than direct export controls.⁹⁸ The goal of OPEC’s production quotas is to control the exploitation of petroleum, an exhaustible natural resource.⁹⁹ By controlling oil exploitation through production and not directly through export control, OPEC’s tactics are less inconsistent with Article XI than other reasonably available policies, and thus meet the threshold established in *Standards for Reformulated and Conventional Gasoline* of a necessary policy that merits a general exception under Article XX.¹⁰⁰

related to the implementation of the Clean Air Act of 1990 by the United States Environmental Protection Agency and efforts to control pollution caused by the combustion of gasoline manufactured in or imported into the United States, the panel concluded that the United States’ policies treated imported gasoline less favorably than domestic gasoline).

96. *See id.* ¶ 6.20 (underscoring that a party asserting Article XX as an affirmative defense must prove three factors to merit a general exception: (1) the policy in question aims toward achieving an objective allowed under Article XX, (2) the policy is necessary to achieving that goal, and (3) the policy conforms with the introductory clause of Article XX, which prohibits measures implemented as “disguised” restrictions on trade and arbitrary or discriminatory measures).

97. *See id.* ¶ 6.24 (highlighting that past panels examining questionable measures under Article XX considered the availability of alternate measures that were either fully consistent or “less inconsistent” with the GATT, in order to judge the necessity of the policies in question).

98. *Cf.* GATT, *supra* note 8, art. XI (prohibiting export controls but making no explicit mention of a prohibition on production quotas).

99. *See* OPEC Statute, *supra* note 25, art. 2 (declaring that the principal aim of the organization is the coordination of petroleum policies of member countries to ensure, among other things, “an efficient, economic and regular supply of petroleum”); *Shrimp Products Prohibition*, *supra* note 88, ¶ 128 (indicating that petroleum, as a finite, non-living natural resource, qualifies as an exhaustible natural resource under the terms of the GATT Article XX(g)).

100. *See Standards for Reformulated and Conventional Gasoline*, *supra* note 96,

The question remains whether OPEC's policies qualify as measures relating to conservation.¹⁰¹ *The Lautenberg Report* finds without elaboration that because OPEC member countries have never cited conservation as a motivating factor in their decisions, the exception is not available to them.¹⁰² The main issue is whether OPEC's decisions to adjust production levels, which are made strictly in relation to price fluctuations, are considered "relating to" conservation under the meaning of Article XX(g).¹⁰³

Self-determination over a country's own natural resources is a bedrock principle of international law that will factor into a panel's analysis of OPEC's oil production controls.¹⁰⁴ A shift is already well underway in the WTO toward greater deference for environmental concerns.¹⁰⁵ A panel would thus likely find that the contracting

¶ 6.22 (asserting that the WTO does not examine the necessity of the policy goal, but rather determines whether the policies in question are necessary to achieve the goal sought, assuming that aim is allowable under Article XX paragraphs (b) – (j)). In the *Standards for Reformulated and Conventional Gasoline* case, the WTO addressed whether or not the policy goal in question was for the protection and promotion of clean air, which the panel found to be an exhaustible natural resource within the meaning of Article XX(g), and allowable as protecting human, animal, or plant life or health under Article XX(b). *Id.* ¶¶ 6.21, 6.36.

101. See GATT, *supra* note 8, art. XX(g) (excepting measures relating to conservation "if such measures are made effective in conjunction with restrictions on domestic production or consumption"); see also *Desta*, *supra* note 15, at 536 (recognizing petroleum to be an exhaustible natural resource but questioning if OPEC's production restrictions qualify as conservation measures since it instituted them largely in response to price fluctuations).

102. LAUTENBERG REPORT, *supra* note 20, at 11.

103. See *Desta*, *supra* note 14, at 536 (noting the important distinction between finding an overall policy of manipulating production levels as a legitimate conservation measure, versus OPEC's specific policy of manipulating production levels based on changing prices).

104. See Franz Xaver Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage*, 26 ENVTL. L. 1187, 1191 (1996) (interpreting United Nations General Assembly Resolution 1803 (XVII) as granting an "inherent and overriding right" of a state to control the exploitation and the use of its natural resources," so long as its use reflects the best interests of its people).

105. See generally Steve Charnowitz, *The WTO's Environmental Progress*, 10 J. INT'L ECON. L. 685 (2007) (studying developments in the interaction between environment and trade at the WTO and concluding that WTO actions will continue a trend toward greater attention to issues of environmental protection). Not only will the WTO sustain recent panel decisions sympathetic to the environment, the next round of WTO amendments will also likely include a number of strengthened environmental provisions. *Id.* at 705-06.

parties intended specifically for Article XX(g) to protect sovereignty over natural resources, regardless of whether OPEC member countries advertise their policies as relating to conservation.¹⁰⁶ Furthermore, the language of Article XX(g) specifically tolerates conservation measures taken in conjunction with restrictions on domestic production, which is precisely what OPEC's policies accomplish.¹⁰⁷ Because its oil production policies aimed at the export market are equivalent to those for domestic consumption, a panel could not find them arbitrary or discriminatory, nor could they find them unrelated to domestic conservation or production policies.¹⁰⁸

III. RECOMMENDATIONS

The United States should not pursue a WTO dispute settlement against OPEC member countries because such a strategy would not yield positive results.¹⁰⁹ Those concerned with rising energy prices and who seek to liberalize the energy trade are better served by bringing OPEC member countries into greater harmony with the GATT/WTO framework, not driving them away.¹¹⁰ Instead of dispute resolution a new round of negotiations should be initiated to better incorporate energy trade within the WTO.¹¹¹

106. See Broome, *supra* note 20, at 424-25 (discussing the likelihood of a successful Article XX(g) defense by OPEC and finding strong support for that defense in the notion of permanent sovereignty).

107. Cf. GATT, *supra* note 8, art. XX(g).

108. See Desta, *supra* note 14, at 537 (finding that OPEC's policies are covered by Article XX(g)'s requirement that measures be taken in conjunction with domestic efforts even though most of OPEC members' oil is exported). Ultimately, if challenged and found to be legitimately related to conservation, OPEC and its policies would not fail under Article XX(g)'s domestic production or consumption requirement. *Id.*

109. See *supra* notes 78-109 and accompanying text (arguing that a WTO dispute settlement against OPEC member countries would not result in the elimination of OPEC's influence over global oil markets because, as an exhaustible natural resource, the general exception under the GATT Article XX(g) allows controls on the export of petroleum).

110. See *infra* notes 121-34 and accompanying text (discussing the benefits to be gained from closer collaboration between OPEC member countries and the WTO, including more effective regulation, improved market access, and better economic growth).

111. See generally Sakmar, *supra* note 3 (evaluating proposals to effectively bring the energy trade into the WTO and concluding that continued uncertainty and volatility in energy markets will encourage the United States and the European Union to push for more comprehensive rules to govern the trade of energy).

A. THE UNITED STATES SHOULD NOT PURSUE WTO DISPUTE SETTLEMENT AGAINST OPEC

WTO dispute resolution against OPEC is not a legitimate solution for escalating energy prices because there is a substantial likelihood such a challenge would fail due to Article XX's general exceptions.¹¹² On a more practical note, current reports indicate that the world's oil producers are already operating at or very near maximum capacity, and that supply is actually growing faster than demand.¹¹³ Going forward with an attack on these nations' sovereignty over their main source of revenue and primary mechanism for achieving greater economic opportunity would degrade regional stability among oil producing nations and produce negative long-term national security implications for many of the world's developed nations.¹¹⁴ Even a successful challenge could have negative repercussions, such as a precedent allowing trading partners to force one another to eliminate any measure that prevented an industry from operating at maximum capacity.¹¹⁵

There is also a legitimate issue as to how much a WTO challenge would antagonize and further marginalize OPEC member countries.¹¹⁶ Virtually all of the thirteen countries that comprise

112. See *supra* notes 91-94 and accompanying text (arguing that the GATT Article XX(g) exception, for measures aimed at exhaustible natural resources, covers OPEC's policies aimed at regulating oil exports among its member countries, in part because a WTO panel asserted in the *Shrimp Products Prohibition* case that petroleum is a "finite" resource covered under the definition of exhaustible natural resources used in Article XX(g)).

113. See *Saudis May Be Strapped for Oil, Close to Full Capacity*, CNBC.COM, June 16, 2008, <http://www.cnbc.com/id/25179997> (reporting that Saudi Arabia's ability to boost output past 9.45 million barrels per day, as promised in June 2008, may not be possible); *World has enough oil supplies for 'many decades': Nuaimi*, AFP, June 22, 2008, <http://afp.google.com/article/ALeqM5i2J6Q6UEMfsPHEDB-P4VacV9mGEg> (quoting Saudi Arabian Oil Minister Ali al-Nuaimi as saying that oil demand is at approximately 1.2 billion barrels per day, while global oil supplies have risen to 1.4 to 1.6 billion barrels per day).

114. See generally *Desta*, *supra* note 14 (finding that challenging OPEC member countries under the market-access framework of the WTO cannot provide a lasting solution to the problem of energy trade).

115. See *Broome*, *supra* note 20, at 418 (quoting former USTR Robert Zoellick as saying that measures aimed at preventing an industry from operating at full capacity "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").

116. See *Desta*, *supra* note 14, at 550 (recommending more engagement, not less, between the WTO and OPEC member countries); cf. LAUTENBERG REPORT,

OPEC have some history of serious instability or conflict, and virtually all remain developing countries, where economic growth has tended to lag.¹¹⁷ For many, their GATT/WTO membership marks a robust effort to expand international relations while improving conditions for economic growth and future development.¹¹⁸ Using this platform as a means to attack their prime source of economic capacity would seriously discourage these countries from further integration into the global economic system.¹¹⁹

B. OIL EXPORTING NATIONS AND ENERGY CONSUMERS SHOULD
JOINTLY DEVELOP A NEW MULTILATERAL FRAMEWORK FOR
MANAGING THE GLOBAL ENERGY TRADE

Rather than pursuing reactionary policies aimed at short-term consumer satisfaction, policymakers' efforts are better directed at conceiving a more workable framework under well-known and successful multilateral trading principles.¹²⁰ At its inception at the close of World War II, the dual goals of the GATT were to foster conditions for new levels of economic growth and prosperity among its member countries and to prevent another world war by creating

supra note 21, at 12 (making no mention of the security and development implications that WTO dispute settlement against OPEC could bring).

117. See, e.g., CIA, The World Factbook – Angola, <https://www.cia.gov/library/publications/the-world-factbook/geos/ao.html> (last visited Feb. 8, 2009) (considering Angola a “rebuilding” nation after 27 years of civil war ended in 2002); CIA, The World Factbook – Libya, <https://www.cia.gov/library/publications/the-world-factbook/geos/ly.html> (last visited Feb. 8, 2009) (explaining that Libya’s designation as a state sponsor of terrorism was removed in June 2006).

118. See Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT’L L.J. 484, 487 (2007) (noting that developing countries who joined the GATT in the 1970s were significantly motivated by the promotion of economic development on a broader scale than offered by the typical East-West alliances arising from the Cold War political dynamic).

119. See Desta, *supra* note 14, at 550 (recommending that OPEC countries should be encouraged to join the WTO because it would promote their integration into a structured system of rules, as well as allow them to reap the benefits of global investment, increase their access to foreign markets, and facilitate their ability to influence global environmental rules).

120. See Sakmar, *supra* note 3, at 111 (suggesting that “while the [Energy Charter Treaty] and the WTO have laid the foundation for countries to address the trade-related aspects of energy, the rules need to evolve to address energy trade more comprehensively”).

conditions of mutual accommodation and respect that would reduce the likelihood of wide-scale armed conflict.¹²¹ Recent history indicates that the GATT has been largely successful on both fronts.¹²² However, if there is a single commodity prone to creating conflict, it is oil.¹²³ Not only would an improved trading framework alleviate the risk of conflict by bringing more oil producers under a system of rules, it would allow acceding countries the benefits they seek in terms of new investment and better market access.¹²⁴

There is widespread support for developments aimed at freer trade in energy services and major energy importers and exporters have already requested that the WTO make liberalized energy trade a priority in future negotiations.¹²⁵ Such negotiations should specifically acknowledge that the need for policies designed to control the rate of oil production are necessary to ensure a nation's sovereignty over environmental protection and natural resources.¹²⁶ The WTO has explicitly declared that requiring a showing of "necessity" for oil production controls would achieve that purpose and also maintain the safeguards against Article XX abuses.¹²⁷

121. See *supra* notes 16-17 and accompanying text (discussing the history and purpose of the GATT); see also Jackson, *supra* note 17, at 67-68 (exploring the current state of the world trading system with emphasis on proposed developments and reforms); Broome, *supra* note 20, at 435 (finding that a reading of Article XI that allows one WTO member "to force another to produce more of its natural resources to satisfy world demand" probably goes further than the intended limits of Article XI).

122. See Jackson, *supra* note 16, at 68 (noting that by one measure—avoidance of another world war—the GATT has been successful); *supra* Part I.B.

123. Desta, *supra* note 14, at 549.

124. See *id.* at 550 (presenting advantages to the accession of OPEC members to the WTO).

125. See Sakmar, *supra* note 3, at 104-05 (citing a collective request to the WTO from several major energy importers and exporters seeking freer energy trade among a "target group" of developing nations).

126. See *supra* note 90 (inferring the intent to preserve members' sovereignty over natural resources from the introductory language to Article XX). *But see* LAUTENBERG REPORT, *supra* note 20, at 2 (making no mention of environmental utility of OPEC's oil production controls, and viewing them only as a method to control prices).

127. See *Standards for Reformulated and Conventional Gasoline*, *supra* note 95, ¶¶ 6.20-6.24 (considering the necessity of inconsistent measures, and finding that measures deemed unnecessary do not warrant general exceptions under Article XX).

C. THE FOCUS SHOULD BE ON STABILIZING ENERGY MARKETS,
INCENTIVIZING CONSERVATION, AND IMPROVING ECONOMIC
DEVELOPMENT IN OIL EXPORTING NATIONS

Critical to the success of a new framework for managing the global energy trade is recognizing the unique nature of the commodities involved and the rapidly changing nature of the marketplace.¹²⁸ At the forefront of global energy concern is the need for stable sources of energy at stable prices.¹²⁹ Thus far, the WTO system has proven ineffective at providing consistency and predictability in global energy markets.¹³⁰

A new multilateral energy trading policy at the WTO should embody the goals of improving development opportunities for oil exporting countries, encouraging multilateral conservation, developing new technologies, and ultimately limiting the market forces that lead to drastic and detrimental price fluctuations in energy markets.¹³¹ A successful strategy would focus on building the capacity for investment and trade in other sectors within oil exporting nations.¹³² Such a policy would both reduce oil exporting

128. See generally Saint Petersburg Summit 2006, Global Energy Security, ¶¶ 2, 7, 10, June 3, 2006, available at http://peopleandplanet.org/dl/climate/g8_energy_security.pdf [hereinafter Global Energy Summit] (identifying current global energy challenges, including potential political instability in some major oil producing nations and the vulnerability of the global energy infrastructure to man-made calamity and natural disasters and highlighting the need to pursue comprehensive energy security policies that embody the goals of preventing climate change, while promoting clean energy and sustainable development).

129. See *id.* ¶ 1 (considering an affordable supply of environmentally-sound constant, plentiful, reliable, and secure energy resources as a key factor in continued development worldwide).

130. See Sakmar, *supra* note 3, at 95-96 (noting that during the early GATT negotiations, participating states seemed to have a “gentlemen’s agreement” whereby they avoided discussion of petroleum trade issues).

131. See Global Energy Summit, *supra* note 128, ¶ 1 (highlighting the critical components of a successful and progressive energy policy). See generally Sakmar, *supra* note 3 (forecasting the likelihood of new rules governing the energy trade at the WTO and suggesting that the possibility of a new regime will continue to increase as market forces continue to elevate the importance of issues of energy security).

132. See Broome, *supra* note 20, at 435-36 (identifying the benefits of the WTO membership to OPEC countries and stressing the importance of the diversification of their economies).

nations' reliance on high oil prices, and alleviate their growing concerns over diminishing consumer demand for oil worldwide.¹³³

CONCLUSION

The solution to 2008's dramatic and unprecedented escalation in oil prices is not WTO dispute settlement against OPEC member countries.¹³⁴ While OPEC's policies likely violate the GATT Article XI prohibition on quantitative export restrictions, there is ample precedent for finding them permissible under the GATT Article XX(g) General Exception for measures affecting exhaustible natural resources, such as oil.¹³⁵ Therefore, a preferred strategy for improving and liberalizing the flow of oil in international markets is to develop a new framework for managing the energy trade within the WTO that better acknowledges and accommodates the needs of oil producers and consumers.¹³⁶

133. See generally Adam Schreck, *Oil off \$3; Regulators Blame Demand for Run-Up*, USATODAY.COM, July 22, 2008, http://www.usatoday.com/money/industries/energy/2008-07-22-oil-tuesday_N.htm (reporting new evidence that high oil prices are eliminating consumer demand, especially in the United States, where gasoline demand dropped for thirteen weeks in a row).

134. See Broome, *supra* note 20, at 435-36 (explaining that a WTO suit brought against OPEC by the United States could ultimately create a conflict of interest for countries that are both party to OPEC and the WTO and that given that the two organizations provide differing advantages for countries that are members to both, forcing them to choose is not ideal).

135. See *supra* notes 77-108 and accompanying text (exploring past WTO panel decisions and the extent to which precedent informs how a panel would interpret OPEC's activities).

136. See generally Sakmar, *supra* note 3 (examining the driving factors behind the development of a new energy trading framework at the WTO, the most prominent of which is a heightened need for energy security).