

The OPEC as a Cartel - an International Law Analysis^(*)

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Abstract:

The principle of free trade is not of absolute character and may enter into interactions and conflicts with other rules like the principle of permanent sovereignty over natural resources. Similarly, states may find themselves in a situation of conflicting obligations stemming out from their memberships in different international organizations. The present article evaluates the possible outcome of a claim against the OPEC and/or its members on the forum of the WTO.

Introduction

A statement declaring that the current industrialized world is energy and thus petroleum dependent is a truism. The 'hunger' for energy is rising which makes energy security and a search for the "black gold" a decisive factor in states' policies⁽¹⁾.

The accusations against the Organization of Petroleum Exporting Countries (OPEC) as world oil carter appear as political slogans as well

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(1) Demand for energy is expected to increase by almost 50% from 205 million barrels per day of oil equivalent to 335, and according to ExxonMobil this means that the world will need 60% more energy in 2030 than in 2000, cited in Luis E. Cuervo, *OPEC from Myth to Reality*, 30 Houston Journal of International Law, 433, 456.

as academic and legal analyses. The present article tries to critically resume them. It starts with the presentation of OPEC as an international organization capable to bear responsibility under international law. Afterwards the paper revises critically the idea of suing OPEC before the International Court of Justice (ICJ) which was proposed by certain American Senators. Further, it aims to demonstrate, that although the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) law is deprived of special rules regulating trade in petroleum, the WTO system served and still has a potential to serve as an adequate dispute settlement forum in the field of energy. In fact, it is the only international mechanism which has a capacity to resolve the controversy around the consistency with the international law of OPEC's activities. The article argues however, that the substantive regulations of the GATT/WTO law give little chance for the claimants to win the case.

1. OPEC's capacity to respond on the ground of international law

1.1. OPEC as an international organization

When OPEC was created it sought to establish its headquarters in Geneva. The Swiss authorities refused to grant the organization an international status with diplomatic immunity. They declared that OPEC was not an international organization serving any political end, but a group of commodity exporters that should be treated commercially⁽²⁾.

Nevertheless, on 30 June 1965 OPEC was given an official recognition as an international organization by United Nations Economic and Social Council. This was a result of an application addressed to the United Nations in 1964, that OPEC be granted consultative status since it was not possible to have relationship agreement directly with the UN⁽³⁾.

In 1965 OPEC was granted diplomatic recognition and privileges by the Austrian government and its headquarters were transferred to

(2) Fadhil J Chalabi, *Occupied Iraq And OPEC Conference Meetings*, available at <http://www.mees.com/postedarticles/energy/iraq/a46n37a02.htm>, last seen on 26 July 2009.

(3) Ian Skeet, *OPEC: Twenty-Five Years of Prices and Politics*, Oxford 1991, 36.

Vienna. The agreement signed between Austria and OPEC recognized the inviolability and extraterritoriality of the headquarters, Organization's capacity to contract and its legal personality⁽⁴⁾. The recognition of OPEC as an international organization was further confirmed by signing an agreement with another United Nations' organs: UNIDO⁽⁵⁾ and UNDP⁽⁶⁾.

According to OPEC's Statute⁽⁷⁾ it was created as a permanent intergovernmental organization (art. 1). It is equipped by several organs, of which the Conference is the supreme one (art. 9, 10). The Organization has a Secretary General as its legally-authorized representative, who has the authority to direct the affairs of the Organization in accordance with the instructions of the Board of Directors (art. 27). The Organization's staff is independent from any government or authority and shall carry their duties with the sole object of bearing the interests of the Organization in mind (art. 31).

Taking into consideration the above-mentioned arguments there shall be no important doubt about OPEC's capacity to act as an intergovernmental organization with all the consequences stemming out for this fact from the international law.

1.2. Responsibility of international organizations and the problem of attribution

In the year 2000, when the works on the Draft articles on Responsibility of States for Internationally Wrongful Acts were about to conclude, the International Law Commission decided to include the

(4) Austria and Organization of the Petroleum Exporting Countries: Agreement Regarding the Headquarters of the Organization of the Petroleum Exporting Countries, 24 June 1965, 1967 U.N.T.S. 136, art. 3, 4.

(5) Austria, Organization of the Petroleum Exporting Countries and United Nations (United Nations Industrial Development Organization): Agreement regarding the access of officials of the Organization of Petroleum Exporting Countries to the Commissary of the United Nations Industrial Development Organization, 28 October 1974, 1974 U.N.T.S. 151.

(6) Organization of the Petroleum Exporting Countries and United Nations (United Nations Development Programme): Agreement on technical co-operation (with letter of understanding), 30 September 1977, 1977 U.N.T.S. 343.

(7) <http://www.opec.org/library/Opec%20Statute/pdf/OS.pdf>, last seen on 1 September 2009.

topic “Responsibility of international organizations” to its programme of work. Professor Gaja was appointed as a Special Rapporteur of the topic⁽⁸⁾.

The concept of a wrongful act committed by an international organization is similar to the one under the principles of states’ responsibility⁽⁹⁾. According to the art. 3 of the Special Rapporteur’s draft (“General Principles”):

- “1 - Every internationally wrongful act of an international organization entails the international responsibility of the international organization.
- 2 - There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:
 - (a) Is attributed to the international organization under international law; and
 - (b) Constitutes a breach of an international obligation of that international organization.”⁽¹⁰⁾

The above rules prejudge the capacity of international organizations to bear responsibility independently from their member states, but it does not solve the problem of relation between those two kinds of responsibility. The question of attribution was already an object of deliberation within the International Law Commission. In the Second Report by professor Gaja it was stated, that a “conduct does not necessarily have to be attributed exclusively to one subject only [...] one could envisage cases in which conduct should be simultaneously attributed to an international organization and one or more of its members.”⁽¹¹⁾

(8) United Nations, Report of the International Law Commission, Fifty-fourth session, 2002, General Assembly Official Records, Fifty-seventh session, Supplement No. 10 (A/57/10), 228.

(9) *Draft Articles on State Responsibility for Internationally Wrongful Acts, with commentaries*, Report of the International Law Commission on the work of its Fifty-third session, adopted in the Resolution of the General Assembly, A/RES/56/83, art. 2.

(10) Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10 (A/58/10), para. 53.

(11) *Id.*, para. 6, International Law Commission, Fifty-fifth session, Second report on responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur, A/CN. 4/541.

In OPEC's case, the member states limit the production of petroleum, and in consequence its export, as a result of resolutions taken by the OPEC's Conference. This organ is composed of member states' ministers and is the supreme authority in the organization. Decisions on production cuts are fulfilled by the states themselves. The Gaja's Second Report further explains that "[t]he fact that a member State may be bound towards an international organization to conduct itself in a certain manner does not imply that under international law conduct should be attributed to the organization and not to the State"⁽¹²⁾. On the ground of the above statements of the ILC's Report it seems to be correct to conclude, that a possible breach of international law as a result of production quotas could be attributed to the OPEC's member states, which directly limit the extraction of petroleum, but simultaneously to OPEC as such, which through its "decisions and resolutions"⁽¹³⁾ directs a State in breaching of international law⁽¹⁴⁾. Such a dual attribution leads to joint, or joint and several responsibility⁽¹⁵⁾.

The above findings resolve the question of substantive law but leaves open the issue of a forum before which a claim could be made. When states have in principle their *ius standi* before the International Court of Justice or the Dispute Settlement Body of the WTO, the international organizations do not have such a legal capacity⁽¹⁶⁾. For that practical reason the potential claims based on international law could be directed only against the OPEC's member states and not the organization itself.

This conclusion is not necessarily accurate under domestic law, which has its own substantive regulations and rules of attribution. In

(12) *Id.*, para. 13.

(13) *Id.*, para. 24.

(14) See, *id.* para. 9.

(15) *Id.*, para. 8.

(16) With the exception of the European Communities before the WTO, which has a status recognized by the Marrakech Agreement establishing the World Trade Organization, e.g. art. XI:1.

cases which took place before American courts, the defendant was the OPEC and its member states⁽¹⁷⁾ or only the OPEC itself⁽¹⁸⁾.

1.3. Principle of permanent sovereignty over natural resources

The analysis of substantive legal grounds of OPEC's and/or OPEC member states' responsibility under international law requires a reference to the principle of permanent sovereignty over natural resources. The content of this principle was evolving during decades after the establishment of United Nations and was a function of two opposite factors: on the one hand - an aspiration of certain states to regain their supremacy over their natural resources, what was often menaced in the colonial and post-colonial era and - on the other hand - an investors' need of access to raw materials in exchange of right of entry to western markets, know-how and capital.

The most important document in that matter remains the General Assembly Resolution on Permanent Sovereignty over Natural Resources of Developing Countries of 1966⁽¹⁹⁾. The legal character of General Assembly resolutions is a disputable subject, but there is a consent that according to the provisions of United Nations Charter it lacks a formally binding character. Nevertheless, as a result of the General Assembly's position its resolution have a far going capacity to influence the international practice and law.

(17) United States District Court, C. D. California, *International Association Of Machinists And Aerospace Workers, ("IAM"), an association, Plaintiff, v. The Organization of the Petroleum Exporting Countries ("OPEC"), the Democratic and Popular Republic of Algeria, ("Algeria"), the Republic of Ecuador, ("Ecuador"), the Gabonese Republic, ("Gabon"), Republic of Indonesia, ("Indonesia"), Imperial Government of Iran, ("Iran"), Republic of Iraq, ("Iraq"), State of Kuwait, ("Kuwait"), Libyan Arab Republic, ("Libya"), Federal Republic of Nigeria, ("Nigeria"), State of Qatar, ("Qatar"), Kingdom of Saudi Arabia, ("Saudi Arabia"), State of United Arab Emirates, ("United Arab Emirates"), and the Republic of Venezuela, ("Venezuela"), Defendants*; 477 F. Supp. 563 (1979); similarly on appeal, 649 F.2d 1354.

(18) United States District Court, N.D. Alabama, Southern Division, *Prewitt Enterprises, Inc., On Its Own Behalf And On Behalf Of All Others Similarly Situated, Plaintiffs, v. Organization Of The Petroleum Exporting Countries, Defendant*; 2001 WL 624789.

(19) *Permanent Sovereignty over Natural Resources*, G.A. res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) 15, U.N. Doc. A/5217 (1962).

The document was a result of compromise between capital exporting countries, led by United States and United Kingdom, developing countries and the former “Eastern Block”⁽²⁰⁾. In consequence, the Resolution linked expressly the principle of permanent sovereignty over natural wealth and resources with the right to self-determination as its “basic constituent”. It confirmed and reconfirmed the existence of the principle, which was fully supported also by United States. The Americans several times opposed certain proposals brought by the developing countries, mainly to assure the protection of foreign property abroad and a right to compensation in the case of expropriation, but were favorable to the principle as such. The United States Delegation expressly stated, that it “wholly supports every country, including [their] own, enjoying the full benefit of its natural resources”⁽²¹⁾. The standards of foreign investor’s protection evolved in time, but the status of principle as such remains beyond doubt. The analysis in the following chapters does not aim to undermine its character but to evaluate the possible legal consequences of states’ actions which influence the world oil prices.

2. Responsibility before the International Court of Justice

According to the 2006 data, OPEC controls 902 billion barrels of oil or 78% of the world’s proved reserves⁽²²⁾. It gives to the organization an overwhelming influence over the international petroleum market. The main controversy is its influence on the petroleum prices as a result of common regulation of petroleum extraction. This activity is a result of OPEC’s goals, which stem out from art. 2 of its statute:

- a - Stabilization of prices in international oil markets.
- b - Securing steady income for producing countries.

(20) For a brief history of negotiations see Stephen M. Schwebel, *The Story of U.N.’s Declaration on Permanent Sovereignty over Natural Resources*, 49 American Bar Association Journal, 463.

(21) United Nations General Assembly, Seventeenth Session, Provisional Verbatim Record of the 1193d Meeting, A/PV.1193, 31.

(22) OPEC Share of World Crude Oil Reserves (2007), <http://www.opec.org/home/PowerPoint/Reserves/OPEC%20share.htm>, last seen on 26 July 2009.

- c - Securing an “efficient, economic and regular supply of petroleum to consuming nations.”
- d - Securing a fair return on capital investments in the petroleum industry.⁽²³⁾

For that reason OPEC was accused of ‘cartel’ practices and ‘price fixing’. The above mentioned practices were an object of claims before the U.S. courts in 1978 and 2000 (see pt. 1.2). In 2001 the U.S. Senator Arlen Specter joined by four other Senators made a statement on next possible law suits against OPEC before federal courts, but what was a novelty, he also proposed to use the international dispute settlement forum by bringing a case to the ICJ. The claim was to be based on “the general principles of law recognized by civilized nations”⁽²⁴⁾. Senator Arlen Specter did not provide any specific general principle which could be applicable in suit against OPEC. He based his argumentation on a Recommendation of Organization for Economic Cooperation and Development which aim to “halt and deter hard core cartels” and instructs countries “to co-operate with each other in enforcing their laws against such cartels”⁽²⁵⁾ and a communiqué of 1988 antitrust Summit of Americas⁽²⁶⁾. In Senator’s opinion the above mentioned documents could serve as an inspiration for the ICJ, which would face a “cutting-edge lawsuit” and could make “new law on the international level”, but taking under consideration the evolution of international law, the ICJ “could go into the suggested direction”⁽²⁷⁾.

The idea of bringing the OPEC case into the ICJ never took place. Apart from political concerns, the legal argumentation seemed to be erroneous. The direct claim could not be directed against the OPEC as

(23) OPEC Statue, available at www.opec.org/home/PowerPoint/Reserves/OPEC%20share.htm, last seen on 26 July 2009.

(24) Congressional Record - Senate, July 19, 2001, S7943.

(25) Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, adopted by the Council at its 921st Session on 25 March 1998 [C/M(98)7/PROV]), <http://www.oecd.org/dataoecd/39/4/2350130.pdf>, para. I.A.1, I.B.1.

(26) Communiqué, Antitrust Summit of the Americas, <http://www.ftc.gov/opa/1998/10/communique.shtm>, last seen on 26 July 2009.

(27) Congressional Record, fn. 21.

such as it had no standing before the Court. The only subjects which may be parties to the dispute before the ICJ are the states (art. 34.1. of the ICJ Statue), but its jurisdiction is compulsory only in the case of a previous special states' declaration. The only OPEC member which deposited such a declaration of compulsory jurisdiction is Nigeria⁽²⁸⁾. However even in this case, the declaration contains a reservation excluding the ICJ's jurisdiction, when an another method of dispute settlement is provided⁽²⁹⁾. This subsidiary clause would be applicable in case of the WTO law, which has its own dispute settlement mechanism.

It should be also kept in mind, that the "general principles of international law" never served the ICJ as an independent source of law⁽³⁰⁾. It played a subsidiary function in the interpretation of obligations stemming out from another sources, mainly treaties.

What could be more effective and also suggested by Senator Specter was a request for an advisory opinion⁽³¹⁾. Even if states do not have a capacity to file a motion for such an opinion, it could be obtained through a request of the Security Council. Advisory opinions are not legally binding, but may have an important meaning in political negotiations.

The later political declarations of American Senators contained the call for bringing a suit against OPEC into the WTO. In the document⁽³²⁾ issued by Senator Frank Lautenberg several legal arguments based on GATT were provided in a much more detailed form than the proposal of bringing the case to the ICJ. The report called for suing those OPEC members which are at the same time parties to the WTO agreements⁽³³⁾

(28) <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=NG>, last seen on 26 July 2009.

(29) *Id.*

(30) Remigiusz Bierzanek, Janusz Symonides, *Prawo Międzynarodowe Publiczne*, Warsaw 2004, 109. Judge Arnold McNair in his separate opinion In South-West Africa case warned about direct transplanting of private law to international public law, *International Court of Justice*, 1950 Reports of Judgments, Advisory Opinions and Orders, 128, 148.

(31) *Congressional Record*, fn. 21.

(32) *Busting up the Cartel: The WTO Case against OPEC*, <http://lautenberg.senate.gov/documents/foreign/OPEC%20Memo.pdf>, last seen on 26 July 2009.

(33) *Id.*, 2.

and not the OPEC itself. Angola, Ecuador, Kuwait, Saudi Arabia, Qatar, Venezuela, United Arab Emirates are currently WTO members and Algeria, Iran, Iraq and Libya are observers and are negotiating the terms of accession⁽³⁴⁾. The WTO claim does not provoke similar jurisdictional doubts as in the case of a suit before the ICJ. However the specificity of trade in petroleum is poorly reflected in the substantive obligations of GATT/WTO.

3. The GATT/WTO and petroleum disputes

3.1. Lack of direct norms concerning petroleum in the law of GATT/WTO

The initial GATT liberalizations rounds gathered mainly petroleum importing countries. The exporters - mostly OPEC members - joined later the GATT/WTO system: Indonesia (1950), Nigeria (1960), Kuwait (1963), Venezuela (1990), Qatar (1994), United Arab Emirates (1994) and Saudi Arabia (2005)⁽³⁵⁾. Russia remains still outside, but may join the club in a near future⁽³⁶⁾.

The tariffs applied on petroleum are generally very low and in many cases not bound. The importing states prefer not to create import barriers on unprocessed goods, but rather impose an excise paid by consumers. Such a solution allows importing the deficit products on lower prices and does not preclude higher later costs imposed on consumers. It is consistent with WTO regulations, if the tax rate does not lead to discrimination of imported goods. In consequence, tariffs in the energy sector typically reflect more the dictates of energy policy securing adequate supplies than a trade policy in the classic sense⁽³⁷⁾.

GATT is lacking any special provisions concerning directly the trade in petroleum and according to UNCTAD document titled “Trade Agreements, Petroleum and Energy Policies” there was a “gentlemen’s

(34) http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, last seen on 26 July 2009.

(35) http://www.wto.org/english/thewto_e/gattmem_e.htm, last seen on 26 July 2009.

(36) http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm, last seen on 26 July 2009.

(37) See generally U.N. Conference on Trade & Dev., *Trade Agreements, Petroleum and Energy Policies* (2000), available at www.unctad.org/en/docs/poitcdtsbd9.en.pdf, 26, last seen on 23 June 2009.

agreement” not to bring petroleum issues in GATT context⁽³⁸⁾. Nevertheless, the general rules of this multilateral agreement, such as most favored nation treatment (art. I) and national treatment (art. III) apply to trade in energy products. The analysis of The GATT/WTO case law shows that the dispute settlement mechanism served as a legal tool in resolving petroleum disputes.

3.2. The role of WTO in resolving petroleum disputes

The GATT/WTO dispute settlement mechanism played a noticeable role in solving cases concerning petroleum even though this problematics remained on the margin of the multilateral trading system. All three cases, two of which were settled under GATT 1947 and one already after the entry into force of the Marrakech Agreement, concerned similar problems. The legal ground of the claims was the national treatment rule, which was allegedly violated as a result of the entry into force of regulations motivated by environmental protection. In all three cases the respondent was the United States, which seems to be ironic when taking under consideration the American skepticism towards the Kyoto Protocol. The following points discuss the GATT/WTO case law concerning petroleum issues.

3.2.1. US - Taxes on Automobiles

In order to promote more fuel efficient cars, the United States imposed “gas guzzler” tax which varied according to the car’s gas consumption. The European Communities were complaining before the panel and suggested that the tax discriminated the cars of European origin and in consequence violated the national treatment standard incorporated in the art. III:2 of GATT⁽³⁹⁾.

(38) Id., 15, an opinion also shared in Susan L. Sakmar, *Bringing Energy Trade into the WTO: the Historical Context, Current Status, and Potential Implications for the Middle East Region*, 18 *Indiana International and Comparative Law Review*, 89, 98.

(39) United States - Taxes on Automobiles, Report of the Panel, DS 31/R, the report was not formally presented for adoption by the GATT Council but circulated on 11 October 1994, para. 19

The panel decided to analyze the “aim and effect” of the tax and concluded, that the sole fact that it affected mainly the cars imported from the EC was not enough to demonstrate the GATT inconsistency. The tax had no effect of affording protection to domestic production and did not change the conditions of competition⁽⁴⁰⁾.

The panel did, however, perceive a less favorable treatment of imported cars on the grounds of art. III:4 GATT as a result of CAFE (Corporate Average Fuel Economy) Regulation. It required that the average fuel economy of car fleet provided by any manufacturer (which meant also an importer) does not exceed certain level. The calculation method required a separate computation for a domestic fleet, i.e. wholly produced in United States or Canada and a separate one for a foreign fleet. As a result a manufacturer who sold large inefficient domestic cars could not offset them by importing foreign small efficient cars. At the same time large imported cars could not be offset by domestic small cars. In such a case CAFE measures placed small foreign cars and foreign parts in a less favorable competitive position with respect to small domestic cars and domestic parts⁽⁴¹⁾. Similarly the separate foreign fleet accounting did not further the objective of “conservation of exhaustible resources” and therefore precluded the possibility of justifying the CAFE regulation on the ground of art. XX (g) GATT⁽⁴²⁾.

In consequence the panel concluded that because of the separate and less favorable fleet calculation, the CAFE regulation violated the art. III:4 of GATT. Nevertheless the panel’s report was not adopted by the GATT Council and therefore has a limited potential to influence the GATT/WTO jurisprudence⁽⁴³⁾.

3.2.2. *US - Superfund*

In order to reauthorize the program of cleaning up the hazardous waste sites, the American Congress passed a regulation called in short the

(40) StateId., para. 5.25, 5.31.

(41) Id., paras. 5.47, 5.48.

(42) Id., paras. 5.60, 5.61.

(43) See, Trade Agreements, Petroleum and Energy Policies, fn., 44.

“Superfund Act”⁽⁴⁴⁾. The program would be financed from the higher excise tax imposed on petroleum and certain chemicals. The main legal issue was the differentiation of the tax on domestic petroleum (8.2 cent per barrel) and the imported petroleum (11.7 cent per barrel)⁽⁴⁵⁾. The United States tried to argue that the difference between the taxes was insignificant amounting to 0,0002 \$ per liter and should not affect the buyers decisions because of the much more important petroleum price fluctuations on the market⁽⁴⁶⁾. Third countries (Australia, Kuwait, Nigeria, Indonesia, Malaysia and Norway among them⁽⁴⁷⁾) mostly shared the view of the claiming states (Mexico, Canada and EEC).

According to the panel’s findings the tax differential does not require demonstration of trade effects of such solution. “[T]he tax on petroleum was inconsistent with Article III:2, first sentence and consequently constituted a *prima facie* case of nullification and impairment and [...] an evaluation of the trade impact of the tax was not relevant for this finding.”⁽⁴⁸⁾

3.2.3. *US Gasoline*

The case was once again a result of American policy aiming to limit the air pollution caused by automobile combustion. In especially polluted areas of the country, only the ‘reformulated’ gasoline was allowed for sale. Its parameters could not depart from the indications of 1990 which served as the ‘baselines’. While the domestic producers could opt for an individual baseline, the importers in fact had to apply the statutory baseline which was derived from general characteristics of gasoline consumed in the United States in the 1990, which included a much higher quality gasoline sold in California. The domestic refiners could import a

(44) United States Superfund Amendments and Reauthorization Act of 1986 (SARA, P.L. 99-499).

(45) United States - Taxed on Petroleum and Certain Imported Substances, Report of the panel adopted on 17 June 1987 (L/6175 - 34S/136), para. 2.2.

(46) *Id.*, para. 3.1.2.

(47) *Id.*, para. 4.1 et seq.

(48) *Id.*, para. 5.1.12.

gasoline of inappropriate parameters and blend it already in the United States, when the importer had to fulfill the criteria in all instances⁽⁴⁹⁾.

According to the submissions of Venezuela and Brazil the above mentioned approach breached the national treatment rule (art. III GATT) and the obligations stemming out from the Technical Barriers Regulation⁽⁵⁰⁾.

The panel found, that the American regulation resulted in a less favorable treatment of imported gasoline, which amounted to a breach of art. III:4 of GATT. The panel acknowledged that the 'clean air' could be treated as an exhaustible resource in the sense of art. XX (g), but there was no connection with that goal and a less favorable treatment of import⁽⁵¹⁾. Similarly arguments grounded on other exception provisions (art. XX (b), (d)) could serve as a justification⁽⁵²⁾.

The gasoline case was the first in which the WTO Appellate Body had an occasion to issue a report. It modified the panels interpretation of art. XX (g). The WTO members enjoy an autonomy in determining their environmental policies, but they must do it with respect of GATT standards. The applicability of the 'exhaustible resources' exception does not require an identical treatment of domestic and imported goods but may not amount to 'naked discrimination'⁽⁵³⁾.

4. The potential role of WTO in resolving the "OPEC dispute"

The above point demonstrated the ability of GATT/WTO dispute settlement mechanism to solve disputes involving petroleum in spite of lack of direct norms related to trade of this product. The main legal argument against the OPEC/WTO members based on substantial law concerns the prohibition of export restrictions stemming out of art. XI

(49) United States - Standards of Reformulated and Conventional Gasoline, Report of the Panel, 19 January 1996, WT/DS2/R, para. 3.15.

(50) *Id.*, para. 3.73 et. seq.

(51) *Id.*, paras. 6.36, 6.40.

(52) *Id.*, para. 8.1.

(53) United States - Standards of Reformulated and Conventional Gasoline, Report of the Appellate Body, 29 April 1996, WT/DS2/AB/R, 20, 21.

GATT. The following points analyze the applicability of GATT provision as legal bases of claims and counterarguments in the potential OPEC dispute.

4.1. Quantitative export restrictions

The art. XI of GATT 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”.

The main goal of article XI was to eliminate protectionism through import restrictions. They became prohibited and alternatively replaced by tariff measures. The provision covers also the export restrictions, which means that the member states are not allowed to regulate through quotas the trade flowing out of their custom territories. Art. XI contains exceptions which allow to deviate from the principle of non-imposition of quantitative restrictions but only in the case of “critical shortages of foodstuff or other products essential to the exporting contracting party” (art. XI:2 a) or in case of “application of standards or regulations for the classification, grading or marketing of commodities in international trade” (art. XI:2 b), and in case of “restrictions on any agricultural or fisheries product [...] necessary to the enforcement of governmental measures”. None of these exceptions are relevant in the OPEC case.

The applicability of art. XI to the restrictions of petroleum refinement is problematic. The wording of this provision refers uniquely to ‘export’, when as OPEC imposes ‘production’ quotas⁽⁵⁴⁾. Even so, the export flow and prices depend on the amount of certain good on the market. The statement of breach will depend on the inclusion of production quotas as falling under the art. XI.

(54) <http://www.opec.org/library/faqs/aboutopec/q12.htm>, last seen on 26 July 2009.

According to Lautenberg's Report⁽⁵⁵⁾, such a broad interpretation of art. XI is required. The document qualifies "production limits" as "measures which stop trade in or restrict tradable quantities" which breach the provision. The above conclusion is reinforced by the report of the panel in the Japan - Semi-Conductor case in which the restriction on exports in the context of art. XI took place. The panel stated that art. XI concerns "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"⁽⁵⁶⁾. This broad and functional interpretation goes in a line with the report of the Appellate Body in the Japan-Taxes on Alcoholic Beverages case. It was stated that: "the broad and fundamental purpose of Article III is to avoid protectionism"⁽⁵⁷⁾. The conclusion extended beyond the protection of bound tariff concession to the GATT's fundamental objective and purpose of protecting free trade generally⁽⁵⁸⁾. The functional and broad interpretation of GATT is not uncommon in the practice of panels and the Appellate Body. According to Lautenberg's Report "the aim of Article XI:1 is to eliminate quantitative restrictions, in other words, restrictions implemented through measures which stop trade in or restrict tradable quantities of a product, as opposed to measures that allow trade in a product to flow even with a fee. Given the aim of the Article, the export-restrictive actions of those OPEC Members that are also WTO Members is inconsistent with this obligation."⁽⁵⁹⁾

(55) Busting up the Cartel, fn., 8.

(56) Japan - Trade In Semi Conductors, Report of the Panel adopted on 4 May 1988, para. 106.

(57) Japan - Taxes on Alcoholic Beverages, Report of the Appellate Body, adopted on 4 May 1988, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, 15.

(58) Stephen A. Broome, *Conflicting Obligations for Oil Exporting Nations?: Satisfying Membership Requirements of Both OPEC and the WTO*, 38 *George Washington International Law Review*, 409, 414-415; similarly Robert J. Girouard, *Water Export Restrictions: A Case Study of WTO Dispute Settlement Strategies and Outcomes*, 15 *Georgetown International Environmental Law Review*, 247, 257.

(59) Busting up the Cartel, fn., 8.

However one must recognize the difference between 'semiconductors' and 'alcoholic beverages' on the one hand, and 'oil' on the other hand. The former goods went already through production process and are clearly 'products' in the meaning of art. XI:1. In that context 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 ground). It follows that only after an OPEC member has produced oil for consumption could it violate art. XI:1, oil in its natural state is not covered by the GATT at all⁽⁶⁰⁾. Art. XI:1 does not force WTO members to extract oil or any other good as coal or water, to increase their production and make all their natural resources freely available on international market.

The fact which is also problematic in the OPEC case, apart from the product distinction, is the influence of quotas on the price fixing, which is, according to Lautenberg's Report, the principal goal of restrictions. Melaku Geboye Desta remarked that, according to the GATT case-law such price setting techniques fall under art. XI:1⁽⁶¹⁾. His conclusion is based *inter alia* on 1978 report on EC-Minimum Import Prices [...] on Fruits and Vegetable. The panel concluded that the price fixing practice was an import restriction and therefore constituted a breach of art. XI:1⁽⁶²⁾.

In a potential OPEC case, the establishment of a breach of art. XI:1 would be a result of a strongly functional interpretation. Having in mind the above-mentioned distinctions on the natural/extracted oil and its production/exportation, which in the opinion of the author of the present article form a very strong argument against the applicability of art. XI:1, it is however thinkable that a panel and/or the Appellate Body would declare the violation of the present article on the base of functions of

(60) Stephen A. Broome, *Conflicting Obligations*, fn., 416, 417.

(61) Melaku Geboye Desta, *The Organization of Petroleum Exporting Countries, the World Trade Organization, and the Regional Trade Agreements*, 37 *Journal of World Trade*, 523, 534.

(62) *European Community Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits And Vegetable, Report of the Panel adopted on 18 October 1978*, (L/4687 - 25S/68), para. 4.9.

production quotas. It is plausible that the claiming states will argue, that the principal function of restriction of production is price fixing, which as demonstrated above, may be declared a breach of art. XI:1. In such a case the OPEC states would have no choice but to build their defense on the exception clauses of GATT, especially on the 'natural resources' exception (art. XX (g), see pt. 4.2).

4.2. Exceptions

The World Trade Organization is an institution primarily predestinated at the liberalization of world's economy and at keeping the competition between the member states. It is however not indifferent at other values, which are in correlation with the principle of free trade. The exception clauses of GATT (art. XX and XXI) and GATS (art. XIV and XIVbis) open the WTO law at values which do not always have a strictly economical character, but which are often relevant for states' economies. In the OPEC case they may play a significant role.

4.2.1. *Conservation purposes*

Among the exception clauses, the one which seems to have the most of significance in the OPEC case is the 'natural resources' exception. According to art. XX (g) of GATT: "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: [...]"

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

The applicability of the above mentioned prescription will depend on the answer of several partial questions. First of them is the qualification of petroleum as an 'exhaustible natural resource'. The answer was already given by the panel in the formerly analyzed US-Taxes

on Automobiles case (see pt. 3.2.1): “The Panel, noting that gasoline was produced from petroleum, an exhaustible natural resource, found that a policy to conserve gasoline was within the range of policies mentioned in Article XX(g).”⁽⁶³⁾ Appellate Body confirmed this conclusion in the US-Shrimp case: “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.”⁽⁶⁴⁾

The next question concerned the nature of “relation” between the measure and the “conservation of natural resources”. This problem was already an object of controversy in the Canada-Salmon/Herring case. The responding state argued that: ““relating to” could not be read to mean “essential” or “necessary to”, terms used elsewhere in Article XX, and General Agreement” and only what was required “under Article XX(g) was that the measures applied should bear a relationship to conservation programmes.” However, on the other hand, “while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be primarily aimed at the conservation of an exhaustible natural resource to be considered as “relating to” conservation within the meaning of Article XX(g).”⁽⁶⁵⁾ The above-mentioned conclusions were confirmed by the Appellate Body in the US-Gasoline case (see pt. 3.2.3)⁽⁶⁶⁾.

According to Lautenberg’s Report, conservation of natural resources “has never been cited or relied upon as OPEC’s justification for its production limits or quotas” and such goal does not stem out from its statute (see pt. 4 *infra*), what results in non-applicability of art. XX (g) in the present case.⁽⁶⁷⁾

(63) United States - Taxes on Automobiles, fn. 39.

(64) United States - Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, para. 128.

(65) *Canada - Measures Affecting Exports Of Unprocessed Herring And Salmon*, Report of the Panel adopted on 22 March 1988, (L/6268-35S/98), paras. 3.26, 4.6.

(66) US-Gasoline, fn. 53, paras. 15-18.

(67) Busting up the Cartel, fn. 32, 11.

Lautenberg's conclusion seems to be poorly justified. According to the art. 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts the only two factors which determine such an act are "a breach of an international obligation of the State" which is "attributable to the State under international law". In the Commentary it was further explained that "it is only the act of a State that matters, independently of any intention"⁽⁶⁸⁾. Therefore the fact that OPEC states restrict their production with the intention of "conservation of natural resources" or "price fixing" is irrelevant in determining the state responsibility. The only relevant factor is the breach of the obligation, but according to an objective interpretation of state's conduct.

The above conclusion was also shared by Melaku Desta but based on different arguments. He correctly stated that "conservation of a mineral resource such as oil cannot be seen in isolation from the financial return of the exploitation for its owners and production restriction decisions caused by falling market prices should be construed as 'relating to the conservation' of the resource"⁽⁶⁹⁾. Stephen Broome added that "[m]arket 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 be a viable and dependable source of income for current and future generations. [...] Viewed from this perspective, the Appellate Body might be persuaded that OPEC's measures are 'primarily aimed at conservation'"⁽⁷⁰⁾.

It should be also stated that the restriction of oil production take place through domestic production cuts, therefore the condition of art. XX (g) that "measures are effective in conjunction with restrictions on domestic production or consumption" is fulfilled.

(68) Fn., 36.

(69) Melaku Gebeye Desta, *The Organization of Petroleum Exporting Countries*, fn.61, 536.

(70) Stephen A. Broome, *Conflicting Obligations*, fn. 58, 427.

The above mentioned arguments let conclude that art. XX (g) would provide a sufficient ground for the OPEC states against a claim based on art. XI:1 GATT.

4.2.2. Another exceptions

Even if the 'natural resources exception' seems to be sufficient and suited against the art. XI:1 claim, GATT provides also another exception clauses which might be relevant in the discussed case.

OPEC is a result of an agreement which could be categorized as "international commodity agreement". According to art. XX (h) GATT it should "conform to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or [...] itself so submitted and not so disapproved". The criteria were never enacted by the GATT/WTO members nor the OPEC agreement was submitted for approval. The ad to art. XX (h) provides a third possibility of legalization of a commodity agreement which "conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947". As the panel in EEC-Import Regime for Bananas stated, this "criterion was impossible [to fulfill] since the principles approved by the Economic and Social Council were, in the opinion of the Caribbean banana producers, no longer pertinent, because this resolution referred to the London draft of the ITO Charter, which never came into effect"⁽⁷¹⁾. Furthermore the Charter in art. 60 (d) provided that "[s]uch agreements 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"⁽⁷²⁾. The panel noted that the limited membership of the Lomé Convention resulted in a non-fulfillment of criteria stemming out from art. XX (h) GATT. This statement is equally true in the case of OPEC, since in order to qualify as a member of the organization, a state has to be "a substantial net export[er] of crude petroleum, which has fundamentally similar interests

(71) EEC-Import Regime for Bananas, Report of the Panel, 11 February 1994,

(72) The Havana Charter which was signed on 24 March 1948 is available on <http://www.worldtradelaw.net/misc/havana.pdf>.

to those of Member Countries [...] if accepted by a majority of three-fourths of Full Members.⁽⁷³⁾”.

In consequence, art. XX (h) does not provide a sufficient defense against a potential claim based on art. XI:1 GATT.

Another provision which should be considered is the art. XXI, which is applicable in case of security exceptional situations. It could be argued that OPEC's supply management practices are necessary to the economic security of each of its members and are taken “in time of [...] emergency in international relations” (art. XXI (b) (iii) GATT). The doctrine tends rather to interpret this provision as permitting to trade and production restrictions for political or military but not commercial reasons. Equating economic security with national security in the context of article XXI would likely constitute an unacceptably broad interpretation of this provision⁽⁷⁴⁾.

Similarly the art. XXXVIII 2 (a) was taken under consideration as a possible exception clause⁽⁷⁵⁾. The provision encourages establishment of agreements, which would serve to facilitate the access of commodities from developing to developed countries. The OPEC agreement provides as one of the goals “[s]ecuring an “efficient, economic and regular supply of petroleum to consuming nations”. The International Sugar Agreement (ISA), which aimed to secure a more favorable access for a particular commodity was positively seen by the EEC-Sugar case⁽⁷⁶⁾. However the OPEC agreement serves also to stabilize oil prices on international markets and secure a steady income for petroleum producing countries. What is more, as opposed to ISA, OPEC is composed uniquely of petroleum exporting countries. For that reason ISA/OPEC analogy is

(73) Art. 7. C. of OPEC Statute available at <http://www.opec.org/library/Opec%20Statute/pdf/OS.pdf>, last seen on 16 July 2009.

(74) Stephen A. Broome, *Conflicting Obligations*, fn. 58, 431.

(75) *Id.*, 432-434.

(76) European Communities - Refunds On Exports Of Sugar Complaint By Brazil, Report of the Panel adopted on 10 November 1980 (L/5011- 27S/69), para. 2.25.

not applicable, and art. XXXVIII would hardly serve as an exception clause for the breach of art. XI:1 GATT⁽⁷⁷⁾.

Conclusions

OPEC is an international organization capable to bear responsibility on the ground of international law. None of the relevant international courts or tribunals provide standing to international organizations. Nonetheless, the remarks of the International Law Commission allow to conclude, that the alleged breach of international obligations in the form of production quotas are attributable cumulatively to OPEC and its member states. The present state of international law does not allow to bring the case before the International Court of Justice on the ground of the breach of general principles of international law. The more suitable forum is the dispute settlement system of the World Trade Organization, which in spite of the lack of norms related directly to the trade in petroleum, served as a dispute settlement forum in oil matters. The WTO dispute settlement system still has a potency of playing this role even much more actively (see pt. 3.2). Its capacity may raise when Russia will enter the WTO.

The possible claim against OPEC could refer to its influence on export through production restrictions, which might be interpreted as a breach of art. XI:1 of the GATT. The author of the present article opts rather for a non-applicability of this provision to unprocessed goods which were not yet extracted. The opposite conclusion could lead to an imprecise state's obligation to supply its natural resources to the international market. Such a conclusion will be also contrary to the principle of states' permanent sovereignty over its natural resources, which attained a legal character⁽⁷⁸⁾. Even if art. XI:1 of GATT would be recognized as applicable, the same agreement provides one important

(77) Stephen A. Broome, *Conflicting Obligations*, fn. 58, 433- 434.

(78) Dissenting opinion of judges Weeramantry and Skubiszewski, East Timor case (Portugal v. Australia), 30 June 1995, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 204, 264.

exception clause which allows to take measures “relating to the conservation of exhaustible natural resources” (art. XX (g)). The limitation of petroleum production by OPEC members may be interpreted as an action taken in order to satisfy the above goal and is taken in the line with the principle of permanent sovereignty.

According to some economic analyses, even if the OPEC and other exporting countries produced oil with their full capacity, the growing demand on petroleum would not stop the raising prices⁽⁷⁹⁾. This conclusion which recently seemed to be very probable, could be partially undermined as a result of events of the ongoing financial crisis, which have demonstrated, that oil prices may fall dramatically⁽⁸⁰⁾. Nevertheless, the tendency of growing need for petroleum, provoked mainly by a very intensive economic growth of East-Asian countries, which leads to a rather constant increase of prices is easily predictable and the OPEC’s policy may only hamper or increase the results of this process.

(79) See Melaku Desta’s opinion to the article *OPEC, WTO and the Hotelling’s Rule*, http://worldtradelaw.typepad.com/ielpblog/2006/11/opec_and_wto.html, last seen on 26 July 2009.

(80) In July 2008 the oil prices topped at almost 140 \$/b. and in only four months felled to 40\$/b., <http://oil-price.net/dashboard.php?lang=en>, last seen on 26 July 2009.