



# Busting Up The Cartel:

## The WTO Case Against OPEC

A REPORT FROM THE OFFICE OF  
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## **EXECUTIVE SUMMARY**

The Organization of Petroleum Exporting Countries (OPEC) consists of 11 of the world's largest oil producing nations,<sup>1</sup> producing slightly more than 1/3 of the world's oil, with 75% of the known reserves. By negotiating among themselves, OPEC sets export quotas for each of its member nations, and is able to exercise a great deal of control over the international price of oil.

Six of these countries,<sup>2</sup> representing half of OPEC's production, are members of the WTO, and two more<sup>3</sup> are seeking admission. Under the Uruguay Round Agreements, countries are not permitted to impose export quotas.

OPEC's price manipulation has been one of several major factors in the high gas prices of the last few years, which now average nearly \$2.20 per gallon.

### **The WTO Case against OPEC**

Article XI of GATT eliminates quantitative restrictions on exports by member countries. OPEC's agreement to limit oil production represents just such a quantitative restriction under the meaning of the WTO.

Article XI states: *"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."*

Indeed, this provision was interpreted in a 1988 report regarding Japan's anti-competitive semi-conductor practices:

*"This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure."*

Under the WTO rules, the President would consult with OPEC member nations, and if a satisfactory resolution is not reached in 60 days, we would then ask that a panel be convened to adjudicate the dispute.

### **Exceptions to Article XI Do Not Apply to This Case**

Under WTO rules, there are exceptions to Article XI for conservation of national resources and for international agreements in commodities. However, these exceptions

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<sup>1</sup> OPEC member nations are Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the UAE and Venezuela.

<sup>2</sup> WTO members are Indonesia, Kuwait, Nigeria, Qatar, the UAE and Venezuela.

<sup>3</sup> Saudi Arabia and Algeria.

do not apply when restrictions would “constitute a disguised restriction on international trade.” In this case, OPEC’s actions clearly constitute such a restriction. Indeed, OPEC’s stated goal is a price target, not conservation. Commodities agreements must be submitted and approved by WTO member nations. OPEC has not even attempted to submit the cartel agreement to such a process.

WTO rules also permit an exception for a nation’s national security interests as well. However, OPEC’s actions are not based on national security concerns. The Cartel has never made the claim that it manipulates prices for the national security of its member countries. Rather, it maintains that it sets prices to promote “economic development.” OPEC’s stated goal is price manipulation.

## ANALYSIS

### Background

The Organization of the Petroleum Exporting Countries (OPEC) is an intergovernmental organization that was founded in 1960, and has a current membership of eleven oil-producing and exporting countries. According to OPEC documents, the principal aim of the Organization is “the co-ordination and unification of petroleum policies of Member Countries and the determination of the best means for safeguarding their interests, individually and collectively.”<sup>4</sup> In addition, OPEC shall also “devise ways and means of ensuring the stabilization of prices in international oil markets with a view to eliminating harmful and unnecessary fluctuations.”<sup>5</sup> Further, “[d]ue regard shall be given at all times to the interests of the producing nations and to the necessity of securing a steady income for them; an efficient economic and regulatory supply of petroleum to consuming nations and a fair return on their capital to those investing in the petroleum industry.”<sup>6</sup>

Currently, OPEC’s membership consists of the following eleven countries: Iran, Iraq, Kuwait, Saudi Arabia, Venezuela, Qatar, Indonesia, Libya, United Arab Emirates (UAE), Algeria and Nigeria.<sup>7</sup> The first five countries are referred to as Founder Members, with the remaining known as Full Members, having joined the organization between 1961 and 1971. As recently as 1992, OPEC’s membership had thirteen countries, including both Ecuador<sup>8</sup> and Gabon.<sup>9</sup> Pursuant to the OPEC Statute, countries may become Full Members if they have “a substantial net export of crude petroleum” and “fundamentally similar interests to those of Member Countries.” To obtain membership, a country must be accepted by a majority of 3/4 of Full Members, including the concurrence of all five Founder Members.<sup>10</sup>

According to OPEC informational material, OPEC Member Countries meet at a biannual OPEC Conference “to co-ordinate and unify their petroleum policies in order to promote stability and harmony in the oil market.”<sup>11</sup> The Conference operates on the basis of “consensus and one Member, one vote.”<sup>12</sup> More specifically:

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<sup>4</sup> Organization of the Petroleum Exporting Countries (OPEC), OPEC Statute, Art. 2:A (2000), available at [<http://www.opec.org>][hereinafter cited as OPEC Statute].

<sup>5</sup> *Id.* at Art. 2:B.

<sup>6</sup> *Id.* at Art. 2:C.

<sup>7</sup> The content of this paragraph is based on information in Organization of the Petroleum Exporting Countries (OPEC) Secretariat, *OPEC General Information* 12-13 (2002), available at [<http://www.opec.org>][hereinafter cited as *OPEC General Information*].

<sup>8</sup> Ecuador became a Full Member in 1973, and requested that its membership be suspended effective December 31, 1992.

<sup>9</sup> Gabon became a Full Member in 1975, and terminated its OPEC membership effective January 1, 1995.

<sup>10</sup> OPEC Statute, *supra* note 4, at Art. 7:C.

<sup>11</sup> OPEC, “Answers to frequently asked questions about OPEC,” under “How does OPEC function?”, available at [<http://www.opec.org>][hereinafter cited as *OPEC FAQs*].

<sup>12</sup> *Id.* under “What is the OPEC Conference?” See also OPEC Statute, *supra* note 4, at Art. 11:C.

The Member Countries consider the current situation and forecasts of market fundamentals, such as economic growth rates and petroleum demand and supply scenarios. They consider what, if any, changes they might make in their petroleum policies. For example, in previous Conferences the Member Countries have decided variously to raise or lower their collective oil production in order to maintain stable prices and steady supplies to consumers in the short, medium and longer term.<sup>13</sup>

OPEC's ceiling on crude oil production and the output limits of individual OPEC Member Countries are set forth in the official OPEC quotas.<sup>14</sup>

Approximately two-thirds of the world's proven crude oil reserves is owned by OPEC members who control about one-third of current global oil production.<sup>15</sup> Currently, OPEC's crude oil production quotas attempt to maintain a world price between \$22 to \$28 per barrel.<sup>16</sup> The OPEC price band system reflected in this range of prices has been described by the U.S. Department of Energy as follows:

OPEC collects pricing data on a "basket": of seven crude oils, including Algeria's Saharan Blend, Indonesian Minas, Nigerian Bonny Light, Saudi Arabia Arab Dubai Fateh, Venezuela Tia Juana and Mexico Isthmus (a non-OPEC oil). The OPEC price – which was introduced on January 1, 1987 – is an arithmetic average of these oils. OPEC uses this price to monitor world oil market conditions. ...

## **WTO Agreements: Substantive Obligations and Dispute Settlement Procedures**

The WTO was established on January 1, 1995, upon the entry into force of the Agreement Establishing the World Trade Organization (WTO Agreement). The WTO Agreement conditions membership on the acceptance of the WTO multilateral trade agreements, including, but not limited to, the General Agreement on Tariffs and Trade 1994 and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). These agreements were approved and implemented by Congress in the Uruguay Round Agreements Act,<sup>17</sup> pursuant to the expedited legislative procedures for trade agreements contained in the Omnibus Trade and Competitiveness Act of 1988.<sup>18</sup>

### GATT/WTO Substantive Obligations

The GATT obligation relevant to a potential case against members of the OPEC cartel is located in Article XI, which contains a general obligation not to impose

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<sup>13</sup> *OPEC FAQs*, *supra* note 11, under "How does OPEC function?"

<sup>14</sup> *Id.* under "What is OPEC's current production ceiling?"

<sup>15</sup> CRS Report for Congress RL31676, *Middle East Oil Disruption: Potential Severity and Policy Options*, by Lawrence Kumins and Robert Bamberger, at 2 [hereinafter cited as *CRS Report*].

<sup>16</sup> *Id.* According to the U.S. Department of Energy, Iraqi oil production has not been a part of any OPEC quota agreements since 1998. U.S. Department of Energy, *OPEC Brief*, January 7, 2004, available at [<http://www.eia.doe.gov/emeu/cabs/opec.html>][hereinafter cited as *OPEC Brief*].

<sup>17</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4089 (Dec. 8, 1994) (codified as amended at 19 U.S.C. §§ 3501 *et seq.*).

<sup>18</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (Aug. 23, 1988) (codified as amended at 19 U.S.C. §§ 2901 *et seq.*).

quantitative restrictions on imports of goods from, or exports of goods to other WTO Member countries. Specifically, Article XI:1 states that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.<sup>19</sup>

Member countries are permitted to deviate from this general prohibition under Article XI:2 if the measures taken are necessary to provide relief from critical shortages and surpluses, or are designed to apply standards and regulations for the classification, grading, or marketing of internationally marketed commodities.<sup>20</sup> Additionally, Article XIII of the GATT 1994 requires that any quantitative restrictions that are imposed be instituted on a non-discriminatory basis.

### Exceptions to GATT/WTO Obligations

There are two exceptions that could potentially be invoked by OPEC members if faced with a WTO challenge under Article XI:1. GATT Article XXI contains a national security exception, which provides that nothing in the GATT shall be construed to “prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests,” in certain defined circumstances, including actions “taken in time of war or other emergencies in international relations.”<sup>21</sup> Given the fact that crude oil is arguably considered essential to the economic security of many of the OPEC countries, and in light of recent events in the Middle East, it is possible that if challenged OPEC members would respond that the latest production restrictions and quotas are a response to either the war in Iraq, or other “emergencies in international relations” that justify the national security exception. However, OPEC has not made this argument in the past, and it is a tenuous one at best.

Second, OPEC countries may attempt to invoke the Article XX general exceptions, which allow Members to impose otherwise GATT-inconsistent measures that fulfill enumerated public policy measures. Specifically, OPEC countries may attempt to invoke either Article XX(h), which allows for GATT inconsistent measures where there is a intergovernmental commodities agreement, or Article XX(g), which allows inconsistent measures with respect to “exhaustible natural resources.” However, these measures cannot be invoked if they are “applied in a manner which would constitute a measure of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or [are] a disguised restriction on international trade.”<sup>22</sup>

### Dispute Settlement Procedures

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<sup>19</sup> GATT 1994 Art. XI:1.

<sup>20</sup> *Id.* at Art. XI:2.

<sup>21</sup> *Id.* at Art. XXI(b).

<sup>22</sup> *Id.* at Art. XX.

Were a WTO complaint to be filed by the United States, the disputing parties would first enter into consultations, ordinarily for 60 days.<sup>23</sup> If these fail to resolve the issue, the United States could request a panel, which would be established no later than at the second meeting of the WTO Dispute Settlement Body (DSB) at which the request appears as an agenda item, unless all DSB members vote against doing so.<sup>24</sup> It should be noted that where an action is found to violate a GATT/WTO obligation, there is a presumption of nullification or impairment of benefits owed the complaining country, but the defending country would have an opportunity to rebut this charge.<sup>25</sup>

### **Current WTO Relations of OPEC and OPEC Members**

Six of the current OPEC member countries – Kuwait, Venezuela, Qatar, Indonesia, UAE and Nigeria – are WTO Members.<sup>26</sup> Both Saudi Arabia and Algeria have WTO observer status and their accessions are currently in progress. Iraq and Iran have requested status as WTO observer governments, Iran in 1995 and Iraq in January 2004.<sup>27</sup> Iran has also applied for accession to the WTO,<sup>28</sup> however, the United States has blocked WTO consideration of Iran's requests in the past.<sup>29</sup> In addition, Libya had reportedly requested WTO membership, though we have been unable to locate specific WTO documentation regarding Libya's request.<sup>30</sup>

At this time, OPEC is not listed as having WTO observer status to the WTO General Council,<sup>31</sup> however, the organization was an observer at the recent WTO Ministerial Meeting at Cancún, and has a pending request for observer status in the WTO Committee on Trade and Environment.<sup>32</sup> According to OPEC documentation, the OPEC Secretariat “has become a regular participant in meetings of various organizations, bodies and specialized agencies of the United Nations, particularly the United Nations Conference on Trade and Development (UNCTAD), the World Bank and the

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<sup>23</sup> WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Art. 4.3.

<sup>24</sup> DSU, Art. 4.7, 6.1.

<sup>25</sup> DSU, Art. 3.8.

<sup>26</sup> The information in this paragraph is taken from World Trade Organization, “Members and Observers,” and “Accessions” available at [<http://www.wto.org>](search under: The WTO, Membership), unless otherwise noted.

<sup>27</sup> Iran – Request for Observer Status; Communication from Iran, WT/L/78 (July 25, 1995); Iraq – Request for Observer Status; Communication from Iraq, WT/L/560 (January 23, 2004).

<sup>28</sup> Accession of Iran – Request for accession pursuant to Article XII, WT/ACC/IRN/1 (September 26, 1996).

<sup>29</sup> See “After Some Debate, EU to Support Iraq Observer Status at WTO,” *Inside U.S. Trade*, January 30, 2004, at 8; see also EU Ministers Agree to Support U.S. Plan to Grant Observer Status to Iraq at WTO,” *BNA Daily Report for Executives*, January 27, 2004, at A-5; “General Council Keeps Iran's Application to WTO on Ice, OK's Macedonia's Accession,” 19 *Int'l Trade Rep.* 1805 (BNA 2002); “U.S. Blocks Iranian WTO Application; Syria Prevented from Placement on Agenda,” 19 *Int'l Trade Rep.* 36 (BNA 2002); “WTO Accepts Membership Applications From Bahamas, Tajikistan; Delays on Iran,” 18 *Int'l Trade Rep.* 1200 (BNA 2001).

<sup>30</sup> See “U.S. Blocks Iranian WTO Application; Syria Prevented from Placement on Agenda,” 19 *Int'l Trade Rep.* 36 (2002).

<sup>31</sup> See WTO, “Members and Observers,” *supra* note 26.

<sup>32</sup> WT/MIN(03)/INF/5/Rev.1 (August 29, 2003); WT/CTE/INF/6 (February 4, 2003).

International Monetary Fund” and “OPEC also attends meetings of other important international organizations.”<sup>33</sup>

## **Are OPEC’s Production Setting Procedures and Quotas in Violation of GATT/WTO Obligations?**

### GATT Article XI: Quantitative Restrictions

Restrictive commodity agreements, such as OPEC’s quotas and production limits, implicate Article XI:1 of the GATT 1994. 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.<sup>34</sup> Given the aim of the Article, the export-restrictive actions of those OPEC Members that are also WTO Members is inconsistent with this obligation.

There is GATT/WTO precedent for invoking Article XI:1 with respect to restrictions on exports. In 1988, the European Economic Community (EEC) challenged actions taken by Japan after it entered into the 1986 Arrangement Concerning Trade in Semi-Conductor Products with the United States. The EEC argued that certain export-related measures, including government requests to industry not to export semi-conductors covered by the Arrangement at prices below company-specific costs, were inconsistent with the provisions of Article XI:1.<sup>35</sup> The EEC also alleged that delays in issuing export licenses resulting from the monitoring of costs and export prices constituted an Article XI:1 violation.<sup>36</sup>

The GATT panel found that Article XI:1 applies to “all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes or other charges.”<sup>37</sup> Furthermore, in response to the argument that non-legally binding or mandatory measures were not restrictions within the scope of Article XI:1, the panel noted that:

Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations, but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measures.<sup>38</sup>

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<sup>33</sup> *OPEC General Information*, *supra* note 7, at 13.

<sup>34</sup> See Note H. Van Houtte, *The Law of International Trade* 111 (1999) [hereinafter cited as Van Houtte].

<sup>35</sup> Japan – Trade in Semi-Conductors; Report of the Panel adopted May 4, 1988, GATT, 35th Supp. Basic Instruments and Selected Documents (BISD) 116, 152-53 (1989)[hereinafter cited as *Japan Semiconductor Case*].

<sup>36</sup> *Id.* at 153.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 153-154.



A more recent WTO panel has added that “[t]here can be no doubt, in our view, that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature.”<sup>39</sup>

The GATT panel in the Japan semi-conductor case ultimately found that an array of Japanese administrative actions and requirements “constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other than the United States” and thus, was inconsistent with Article XI:1.<sup>40</sup> The panel also concluded that “[t]he delays of up to three months in the issuing of export licenses that resulted from the monitoring of costs and export prices of semi-conductors destined for contracting parties other than the United States constituted restrictions on exportation inconsistent with Article XI:1.”<sup>41</sup>

With respect to OPEC practices, a challenge by the United States would likely have to focus specifically on the issues of crude oil production cutbacks and the observance of quotas by countries that are both OPEC and WTO Members. These actions constitute a restriction on the sale for export of crude oil for purposes of Article XI:1.

#### GATT Article XXI: National Security Exception

As stated earlier, in response to a complaint alleging violations of Article XI:1, an OPEC /WTO Member may invoke the Article XXI national security exception as a defense. Specifically OPEC Members could claim that they consider the restrictions to be “necessary for the protection of its essential security interests ... taken in time of war or emergency in international relations” pursuant to Article XXI(b)(iii).

However, the national security exemption has never been used in this way. The security exemption has nearly always been used in the context of a trade sanction with the aim of accomplishing a specific political objective or bringing pressure to bear on a rival nation.

The one exception to this is a 1975 case in which Sweden instituted import quotas as a protectionist measure for its footwear industry. Although many GATT members expressed doubt about the rationale, Sweden argued that “the maintenance of a minimum domestic production capacity in vital industries” was “an integral part of the country’s security policy.”<sup>42</sup>

A decision by OPEC to attempt to invoke the national security exemption would break new ground. Indeed, OPEC has maintained that stable oil prices are essential for economic development interests, rather than security interests or attaining a political

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<sup>39</sup> Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather; Report of the Panel ¶ 11.17 (WT/DS155/R)(adopted February 16, 2001).

<sup>40</sup> *Japan Semi-Conductor Case*, *supra* note 35, at 162.

<sup>41</sup> *Id.*

<sup>42</sup> World Trade Organization, *Guide to GATT Law and Practice* 602-603 (updated 6<sup>th</sup> ed. 1995)[hereinafter cited as *GATT Analytical Index*].

objective. While Sweden's argument that economic interests can rise to the level of security interests might be one that OPEC could make, there are several reasons why it does not apply.

First, Sweden was instituting a protectionist measure designed to ensure the availability of a specific good to its citizens in the event that world events cut off the flow of trade. OPEC's action is based not on accomplishing such a specific security objective, but rather on a vague notion of economic development interests.

Second, Sweden's reasoning in the 1975 case has never been adjudicated. Indeed, at the time, many GATT parties expressed doubts about Sweden's rationale, and reserved their rights under GATT, and Sweden offered to consult with other GATT parties on the matter. Sweden's reasoning has therefore never been established as precedent and cannot be cited as such.

Third, the institution of the Dispute Settlement Understanding in 1995 created a new adjudication system that was based more on rules than negotiations between members. This change means that reasoning like Sweden's has never been examined by a panel with the ability to make authoritative rulings.

#### GATT Article XX: General Exceptions

The GATT, in its Article XX General Exceptions, contains at Article XX(h) a general exception for commodity agreements. The provision exempts from GATT obligations "measures undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved." To benefit from this exception, the measure must also meet the conditions of the Article XX proviso, which require that the measure be applied in a nondiscriminatory manner with respect to countries where the same conditions prevail and that it not constitute a disguised restriction on international trade.<sup>43</sup> Currently, OPEC has not attempted to submit its agreement to the WTO for approval.<sup>44</sup> It appears that OPEC could, if challenged, seek recognition of its agreement. It has been suggested, however, that because OPEC does not include importing countries, it may not qualify as a commodity agreement for WTO purposes, and thus, may not be a candidate for submission and justification under the Article.<sup>45</sup>

In addition, there is also the possibility that OPEC members would invoke Article XX(g), which states that GATT inconsistent measures are permissible if they apply to the

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<sup>43</sup> An interpretative note to Article XX(h) states that the exception extends to any commodity agreement which conforms to the principles approved by the U.N. Economic and Social Council in its Resolution 30(IV) of March 28, 1947.

<sup>44</sup> To date, no commodity agreement has ever been formally submitted to the GATT Contracting Parties under Article XX(h). See *GATT Analytical Index*, *supra* note 42, at 591.

<sup>45</sup> Van Houtte, *supra* note 34, at 111-12 (1995).

“conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” While the commodity crude oil appears to be the type of exhaustible natural resource covered by Article XX(g), this fact has never been cited or relied upon as OPEC’s justification for its production limits or quotas.<sup>46</sup> Therefore, it appears that this provision would not apply.

Article XXXVIII:2(a): Obligations as to Developing Countries

In addition to the national security and general exceptions, OPEC countries may attempt to cite GATT obligations with respect to trade in basic commodities for developing countries.

Thus far, it appears that only Brazil has filed a complaint in the GATT citing this provision. In 1980, Brazil challenged the European Communities’ sugar subsidy system, arguing in part that European Communities had acted inconsistently with this Article in refusing to participate in the International Sugar Agreement (ISA), a commodity agreement consisting of both exporting and importing members.<sup>47</sup> The panel held that Brazil could expect to receive benefits from Part IV, and seemingly approved of the existence of the ISA, stating as follows:

The Panel noted the principles and objectives stipulated in Article XXXVI and the guidelines for joint action given in Article XXXVIII to further the objectives set forth in Article XXXVI, and that Brazil being a developing country could expect to enjoy benefits in accordance with these provisions. In this connection the Panel also noted that the European Communities had made considerable efforts in favor of a number of developing countries and had pursued an active and constructive policy towards the setting-up of international agreements.

However, the Panel also noted that in the particular situation in the sugar markets in 1978 and 1979, when Brazil and other developing countries took action through the ISA to improve the market situation, the European Communities increased its subsidized sugar exports to an extent that inevitably reduced significantly the effects of the measures taken by Brazil and other sugar exporters. The Panel felt that even though the European Communities was not a party to the ISA and not bound by the same obligations as members to the Agreement, it would nevertheless be appropriate to collaborate with other contracting parties in conformity with the guidelines given in Article XXVIII and thus further the principles and objectives of Article XXXVI.”<sup>48</sup>

The panel continued:

The Panel recognized the efforts made by the European Communities in complying with the provisions of Articles XXXVI and XXXVIII. It nevertheless felt that increased Community exports of sugar through the use of subsidies in the particular market situation in 1978 and 1979, and where developing contracting parties had taken steps within the framework of the

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<sup>46</sup> See OPEC Statute, *supra* note 4, at Art. 2:C.

<sup>47</sup> European Communities – Refunds on Exports of Sugar – Complaint by Brazil; Report of the Panel, adopted on November 10, 1980, GATT, BISD, 27<sup>th</sup> Supp. 69 (1981)[hereinafter cited as EC Sugar Case]; see also *GATT Analytical Index*, *supra* note 42, at 1070

<sup>48</sup> See EC Sugar Case, *supra* note 47, at 80.

ISA to improve the conditions in the world sugar market, inevitably reduced the effects of the efforts made by these countries. For this time-period and for this particular field, the European Communities had therefore not collaborated jointly with other contracting parties to further the principles and objectives set forth in Article XXXVI, in conformity with the guidelines given in Article XXXVIII.<sup>49</sup>

While this panel language speaks favorably of developing country actions under commodity agreements, the status of this provision as an exception to the GATT with respect to such actions is unclear. Because Member practices under the ISA were not at issue in the case, it was not determined whether Article XXXVIII:2(a) would serve as an exception to other GATT obligations or whether it instead places an obligation on developed country parties to act in a manner that facilitates the actions of developing countries under goods arrangements in aid of the development purposes set out in Part IV of the GATT.

### **WTO Members of OPEC**

With respect to WTO Members that are also OPEC members, membership in OPEC has been noted but not addressed by the WTO.<sup>50</sup> For example, in the 1990 GATT Working Party report on Venezuela's accession to the GATT, the working party members raised questions regarding the fact that Venezuela set the level of domestic and export prices of a number of products exported by state enterprises, including petrochemicals, but did not directly address Venezuela's OPEC membership.<sup>51</sup> Venezuela responded to the questions by stating that "[t]he aim of the price control policy was to equalize the internal prices of such goods with export prices, the latter obviously being determined by conditions in international markets, and not by decisions of Venezuelan enterprises."<sup>52</sup> In addition, the WTO's fourth Trade Policy Review of Indonesia, completed in May 2003, raises questions about deregulation of the domestic petroleum industry, related mining and environmental taxes that have been introduced, and merely makes mention of Indonesia's OPEC membership.<sup>53</sup> The report, however, does not question Indonesia's involvement in the organization.<sup>54</sup>

### **Conclusion**

OPEC's practices are in violation of WTO rules prohibiting quantitative restrictions on exports. Although there are exceptions that OPEC could attempt to cite, the applicability of these exceptions is tenuous. A WTO case against the six WTO members of OPEC could have immediate, large and lasting benefits to the US consumer and economy by driving down oil and gas prices.

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<sup>49</sup> *Id.* at 95.

<sup>50</sup> *See* WTO, Trade Policy Review: Indonesia; Report by the Secretariat (May 28, 2003) (WT/TPR/S/117); *see also* Venezuela's OPEC membership. Accession of Venezuela; Report of the Working Party adopted on 11 July 1990, GATT, 37<sup>th</sup> Supp. BISD 43, 66 (1991).

<sup>51</sup> Venezuela's OPEC membership. Accession of Venezuela; Report of the Working Party adopted on 11 July 1990, GATT, 37<sup>th</sup> Supp. BISD 43, 66 (1991).

<sup>52</sup> *Id.*

<sup>53</sup> WTO, Trade Policy Review: Indonesia; Report by the Secretariat, 81 (May 28, 2003) (WT/TPR/S/117)

<sup>54</sup> *Id.* at 81-82.