The World Trade Organization and Oil

Andrea Jiménez-Guerra

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Andrea Jimenez-Guerra was born in Venezuela in 1968. She studied International Affairs at Venezuela Central University. From 1994–98, she was the Director of the Committee of Energy and Mines at the Venezuela National Congress. One year later, she joined the Ministry of Energy and Mines as the Executive Assistant to the Minister. Today, she is the Ministry's Director of International Affairs.

For the academic year 2000-2001, she has been a Visiting Research Fellow at the Oxford Institute for Energy Studies, where she produced a paper about the relationship between oil and the World Trade Organisation. She also carried out research on oil fiscal regimes which will be submitted towards a Master's degree in International Economics in Caracas.

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GLOSSARY

ACP:	African, Caribbean and Pacific Group
ASEAN:	Association of South East Asian Nations
CPs:	Contracting Parties
CTE:	Committee on Trade and Environment
DSB:	Dispute Settlement Body
DSU:	Dispute Settlement Understanding
ECT:	Energy Charter Treaty
ESCWA:	Economic and Social Commission for Western Asia
GASCM:	General Agreement on Subsidies and Countervailing Measures
GATS:	Agreement on Trade in Services
GATT:	General Agreement on Trade and Tariffs
GCC:	Gulf Cooperation Council
IGOs:	International Governmental Organisations
ITO:	International Trade Organisation
MC:	Ministerial Conference
MEAs:	Multilateral Environment Agreements
MFN:	Most Favoured Nation
MTS:	Multilateral Trading System
NAFTA:	North America Free Trade Agreement
NT:	National Treatment
OPEC:	Organisation of Petroleum Exporter Countries
PADD:	Petroleum Administration for Defence Districts
PDO:	Petroleum Development Oman
PPA:	Protocol of Provisional Application
SDO:	Committee to Save Domestic Oil
SELA:	Latin American Economic System
SINOPEC:	China Petrochemical Corp
TBT:	Agreement on Technical Barriers to Trade
TRIMs:	Agreement on Trade-Related Investment Measures
UNCTAD:	United Nations Commission for Trade and Development
UR:	Uruguay Round
USA:	United States of America
WTO:	World Trade Organization

1. INTRODUCTION

The development of the international economy has created a system of interdependent nations, ultimately pointing at one world economy. This process of globalisation has strengthened the role of international economic organisations and treaties, creating new sets of rules, procedures, and principles.

It is in this context that the World Trade Organization (WTO) was created in January 1995, as a conclusion to the Uruguay Round, replacing GATT 1947. The scope of the new organisation has been broadened, and it tries to extend all main principles of GATT (most favoured nation, national treatment, and prohibition of quantitative restrictions) to services and intellectual property rights. Furthermore, WTO provides institutional/constitutional procedures (decision-making, disputes settlement) that will facilitate the effective implementation of its substantive rules.

Some people consider that WTO has a more carefully constructed architecture than its predecessor. This reflects the fact that much attention has been given to important questions of allocation of powers concerning delicate issues of governance and sovereignty.

As "the central international economic institution", as WTO has been described,[1] it seems reasonable to believe that it will have an effect on the oil sector, and more so as several oil-exporting countries have become members of the WTO, and others are already negotiating their membership. There is a common assumption that the oil trade is excluded from WTO, because oil was not included in GATT 1947. Crude oil has been exempted from or subjected to low tariff in most of the world's crude-importing countries, and even though customs duties on refined products and petrochemicals are higher than on crude oil, they are still considered to be relatively low and not to hamper trade in petroleum. However, there is no provision in the old GATT, or in any of the WTO agreements, that stipulates the non-application of its

[1] John Jackson: *The World Trade Organization*, 1998, p.1.

rules to the oil sector. In fact, the oil trade is governed by the general trade rules set by the WTO treaty and its annexes.

And even though oil was not directly addressed in GATT round negotiations, many rules that impact on the oil sector were settled in that forum, and many others will be negotiated at the WTO.

This paper centres on the effect of WTO on the oil sector. Its purpose is to analyse how the new organisation and its institutional/constitutional procedures may influence and constrain the national policies of oil-exporting countries. These countries will have to face the fact that their traditional developing policies might need to be revised and adapted to the new system, especially in matters related to subsidies, foreign investment, and energy services. Considering the importance of oil for fiscal revenues in oil-exporting countries, and the use of this resource in their development process, the trend towards trade liberalisation and economic de-regulation may have significant economic and political impacts.

Including oil in future negotiation rounds, however, could have a positive consequence for oil-exporting countries, as they could raise the issue of discrimination against this source of energy. Taxes and duties imposed on oil products by the consuming countries are very high, and they may be restricting demand and consequently free trade. We intend specifically to focus on the consequence of OPEC member countries being (e.g. Venezuela and Kuwait) or becoming (e.g. Saudi Arabia and Algeria) members of WTO. The paper consists of three chapters which discuss the following issues:

- The main institutional/constitutional elements of the WTO, and its difference from GATT.
- The role of oil and oil-exporting countries during the GATT trade negotiation rounds. The indirect impact of those rounds on the oil sector. The costs and benefits faced by oil-exporting countries in acceding to the WTO.
- Impact and opportunities of WTO agreements on the oil sector. How these texts can influence and constrain the national policies of oil-exporting countries, and how oil-exporting countries can balance the WTO provisions and the protection of their strategic oil sector.

2. THE WTO AND ITS PREDECESSOR, THE GATT 1947

One of the main features of the world economic system in recent years has been the strengthening of international economic organisations. This institutional framework has influenced economic development and performance, and may continue to do so. Regarding trade, a new international organisation – the World Trade Organization – came into being in 1995, as a consequence of the Uruguay Round (UR), the most important trade negotiation round. In order to assess the WTO, it is necessary to review its main antecedent: GATT.

2.1. Background

After the Second World War, the Allies agreed on the importance of establishing international institutions to regulate economic relationships and to contain the protectionist practices predominant at that time. By 1947, the United Nations had finalised a draft charter for an international trade organisation, ITO. In parallel with this process, a multilateral agreement for tariff reductions, designed to operate under the umbrella of the ITO, was negotiated. The General Agreement on Tariffs and Trade – GATT – imposed obligations on nations to refrain from a variety of trade-obstructing measures, necessary to protect the benefits of any tariff reduction.

The history of the preparation of GATT was influenced by the US performance. Indeed, the fact that the ITO did not come into being, and that GATT remained as the principal entity for international trade, is closely related to the US Constitution requirements for international treaties and agreements, as well as to the US political and economic interests at that time.[2]

The GATT treaty never came into force, although GATT obligations were binding under international law, due to the adoption of the Protocol of Provisional Application (PPA). By this protocol, the GATT signatories agreed to apply the treaty provisionally, based on the "grandfather rights" for any provision of its legislation that existed when they became parties, and that was inconsistent with GATT obligations. These "grandfather rights" or the "existing legislation" exception of the

[2] The US President and his negotiators recognised that an ITO Charter would have to be submitted to Congress for approval. But from the US point of view, the GATT was being negotiated under authority of the 1945 extension of the trade agreement authority. The congressional committees pointed out that this 1945 Act did not authorise the President to enter into an agreement for an organisation, it only authorised agreements to reduce tariffs and other restrictions on trade. For more detailed information, see John Jackson: *The World Trading System*, 1997, p.38.

PPA solved for most countries the problem of executive authority to agree to GATT. It allowed most governments, which would otherwise need to submit the GATT for legislative authorisation, to approve the PPA by executive authority, while the ITO Charter was submitted to legislatures. In the meantime, the contracting parties could deviate from those GATT obligations to which they could not adhere without legislative authority.[3]

Under a system of a provisional nature, characterised by selective application, GATT Contracting Parties (CPs) entered into eight rounds of negotiations, the first six being devoted to reducing tariffs. The seventh round, the Tokyo Round (1973–79), had as one of its goals the negotiation of non-tariff measure obligations. To reach that objective, separate instruments, called "codes" were negotiated, each of which was technically a stand-alone treaty. These codes addressed a number of non-tariff measures which were considered trade distorting, such as government procurement regulations, the use of standards to restrain imports, subsidies, antidumping duties, and so on. They did not have a mandatory legal status (they were considered as non-binding rules); the codes obligated only those nations that signed and ratified them. Nowadays, all of the codes (amended) are parts of the text of the Uruguay Round Agreements, as annexes to the WTO agreement.

The last GATT round of negotiation, the Uruguay Round, ended in 1994. Its results were formally signed and ratified by a sufficient number of nations to bring those results into force in January 1995. Therefore, the World Trade Organization was created to institutionalise the Uruguay Round Agreements. As the "central international economic institution", in its short life the WTO has become the chosen forum to continue negotiating many of the rules that sustain the economic order.

For nearly fifty years the GATT had proceeded with almost no constitution, but despite the lack of procedural structure for effective implementation of the substantive rules, the provisional agreement provided mechanisms to negotiate the main regulations applied to international economic relationships at the present moment.

[3] See Jackson, *The World Trading System.* pp 40–43.

2.2. The World Trade Organization

The Uruguay Round (1986–94) attempted to improve the institutional and constitutional defects of the GATT. The overall treaty is the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", and the first element is the WTO agreement. The latter deals with institutional and procedural matters that will facilitate the implementation of the substantive rules contained in its four annexes[4] (Annex 1).

The WTO agreement separates the institutional concepts from the substantive rules.[5] But, in order to become a member, contracting parties had to accept all the rules, the institutional as well as the substantive. The "single package"[6] concept essentially required all WTO Members to accept as binding international law obligation almost all of the pre GATT rules and text as amended.

2.2.1. Institutional and Constitutional Provisions

The structure

The WTO, as an international organisation, has a governing structure. The highest authority is the Ministerial Conference (MC), followed by four councils. The General Council has supervising authority, and can carry out many of the functions of the MC. Then, there is a Council for each of the Annex 1 agreements (Goods, Services and Intellectual Property Rights). There is also a "Dispute Settlement Body" (DSB) to supervise and implement the dispute settlement rules in Annex 2.[7] This structure reflects a vertical allocation of power, but in addition the WTO provides interaction between its governing bodies, councils and dispute settlement processes.

Decision-making procedures

[4] The agreements and associated legal instruments included in Annexes 1, 2 and 3, "Multilateral Trade Agreements" (MTA) are binding for all Members; those included in Annex 4 "Plurilateral Trade Agreements" (PTA) are binding only for those Members that have accepted them. The PTA do not create obligations or rights for Members that have not accepted them. See "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations".

[5] It has been said that one possible reason for this structure may be to suggest that the processes for changing the annexes might be more flexible and efficient than for changing the WTO agreement, so that the institution could keep abreast of fast developing changes of economic circumstances. In John Jackson: *The World Trade Organization*, p.38.

[6] John Jackson: *The WTO*, op. cit., 37.

[7] The WTO website provides complete information about the institutional structure and the main features and responsibilities of the governing bodies and councils.

The GATT stipulated that Contracting Parties should govern by majority vote in many matters. However, in practice, GATT generally avoided formal voting (except for waivers, membership and amendments). Most efforts were accomplished by consensus; most of the decisions were the product of a process of negotiation and compromise, with the understanding that agreement was necessary among countries with important economic influence.

The WTO agreement contains a matrix of decision-making procedures with important constraints around them. There are five techniques for making decisions or formulating new or amended rules for trade policy in the WTO. Basically, these procedures promote the consensus practised by GATT, but when no consensus is reached a voting system will be implemented with each member having one vote (ordinary decisions require a majority of votes cast and the interpretations and waivers require an affirmative vote from three-quarters of the overall WTO membership).

Unlike its predecessor, in the WTO agreement (Art. IX) consensus is defined as the situation when a decision is taken and no member, present at that meeting, formally objects to the proposed decision. In this case consensus is not the same as unanimity, since absences and abstentions do not prevent consensus. Some risks in the decision-making procedures have been highlighted, such as the consensus practice itself involving some deference to economic power, the difficulty of gathering three-quarters of the membership, and the development of block voting. Nevertheless, the new mechanism attempts to formalise and to balance the decisions taken by the WTO Members.

Dispute Settlement Understanding (DSU)

The Dispute Settlement mechanism has been described as the main achievement of the WTO system, and is an attempt to improve on its predecessor.[8] Thus, a unified dispute settlement system is established for all parts of the GATT/WTO and even if some agreements (the annexes) have clauses relating to dispute settlement, the rules and procedures of the Dispute Settlement Understanding will prevail over the former. Moreover, the DSU has been designed to avoid blocking the adoption of the final

[8] In the history of GATT, negotiation and compromise prevailed as mechanisms to resolve differences; dispute settlement procedures were complementary tools in this process. Despite this tendency, the GATT attempted to make dispute settlement procedures more rule-oriented.

report made by the panel and the appellate panel: the ultimate decision of the process will come into force as a matter of international law in virtually every case.

When a reasonable grievance[9] takes place against a Member, the Dispute Settlement Understanding provides the following stages:[10]

- Consultation: the aggrieved Member will request the aggrieving Member to have consultation. This request has to be made known to the Dispute Settlement Body (the DSB is the administering body of the DSU). If the controversy is not resolved, the Member initiating the process may ask for the formation of a panel.
- Panel: The DSB has to establish a panel[11] and it also has to prescribe the terms of reference. After considering the matter, the panel prepares its final report (decision).
- Appeal: If one of the parties decides to go for appeal, it will be considered by the Appellate Body, which will make the final decision.
- Implementation, compensation and suspension: if the recommendations contained in the final report have not been implemented within the time-frame set, the complaining party may either seek compensation or seek permission to withdraw or suspend concessions to the offending party. The suspension should be applied in the same sector in which the grievance has taken place. If this is not practical or effective, the complaining party may seek to apply suspension in other sectors under the same agreement.

It is important to highlight that the WTO does not initiate the case; the aggrieved Member has to bring it to the relevant body. Some Members can enter into non-allowed practices, but if no interested Member argues for the suspension of such practices, no action from the WTO will be triggered.

Traditionally, only nations have been subject to international law. Despite the importance given to business firms[12] and non-governmental organisations in

[9] In general, Agreements in goods, services and intellectual property follow these criteria to initiate a dispute settlement process: nullification and impairment of benefits accruing under these agreements; impediment of any objective of these agreements as a result of the failure of a Member to carry out its obligations under those agreements or the application of any measure conflicting the agreements.

[10] This section is based on Bhagirath Lal Das: *An Introduction to the WTO Agreements* (chapter 21), 1988.

[11] Usually, the panel consist of three members (sometimes five). Panel members are chosen from a list maintained for this purpose.

international fora in recent years, nations remain the principal subject of the Dispute Settlement mechanism (of the overall GATT/WTO system). Individuals' complaints against actions taken by foreign nations cannot be addressed directly to the WTO, but their own governments can bring up the matter. Usually, national law may provide the individuals with some resources and procedures to get their governments to intervene on their behalf.

Membership

As mentioned before, GATT did not become an organisation, and therefore it did not have members. Instead, the agreement had contracting parties. For nations or customs territories to be accepted by GATT, a two-third vote of approval was required by the existing Contracting Parties (CPs). Votes were motivated by the candidate's willingness to negotiate concessions which existing GATT CPs deemed to be adequate to fulfil their views of reciprocity to the various existing concessions. The new CPs had to commit themselves to equivalent trade concessions and obligations, which the existing membership had already accepted. Since codes regarding non-tariff measure obligations were optional, the concessions were based on tariff reductions.

All GATT CPs automatically became founder members of the WTO because they had signed the Uruguay Round Agreement. New accession processes have become longer and more complex because accession to the WTO requires acceptance of all of the multilateral agreements ("single package" idea), and involves an entire revision and adjustment of the national trade and economic policies. Likewise, the decision about a new member has to be taken by consensus, so any WTO Member's concerns have to be resolved during the bilateral and multilateral negotiations. Article XII[13] of the WTO Agreement states that accession to the WTO will be "on terms to be agreed"[14] between the acceding government and the WTO, thus, accession is essentially a process of negotiation.

The accession process for new members must follow several stages:[15]

[12] At present, many bilateral treaties and regional and sectorial agreements, such as the Energy Charter Treaty and NAFTA, provide for dispute settlement, not only between the contracting parties to the treaty, but also between investors and parties directly.
[13] For more information about Procedures for Negotiations under Article XII, see Accession to The World Trade Organization WTO website, (www.wto.org/thewto_e/acces_e.htm).
[14] WTO website, Accession and member (www.wto.org/thewto_e/acces_e.htm).
[15] WTO, ibid.

- Firstly, the government applying for membership has to submit a memorandum, describing all aspects of its trade and economic policies that have a bearing on WTO agreements, to the working party dealing with the country's application. After examining the existing trade and legal regimes of the acceding government, the working party enters into a substantive part of the multilateral negotiations involved in accessions. This determines the terms and conditions of entry for the applicant, which are related to WTO rules and disciplines upon accession, and transitional periods required to make any legislative or structural changes where necessary to implement these commitments.
- Secondly, parallel, bilateral talks begin between the prospective new member and individual countries. They are bilateral because different countries have different trading interests. The results of these negotiations are applied to all WTO Members under normal non-discrimination rules, even though they are negotiated bilaterally. The bilateral talks can be highly complicated, and they can delay, and even suspend the admission of a new member.
- Thirdly, once the working party has completed its examination of the applicant's trade regime, and bilateral market access negotiations are complete, the working party finalises the terms of accession ("protocol of accession" and list of commitments).
- Finally, the above mentioned documents are presented to the WTO General Council or the Ministerial Conference. If a two-thirds majority of WTO Members votes in favour, the applicant is free to sign the protocol and accede to the organisation.

Relations with other institutions

The language of the WTO agreement only calls for an appropriate relationship with international governmental organisations (IGOs). Except for the IMF and the World Bank, most questions about such a relationship seem to concern observer status. A number of IGOs were given observer status in the GATT, and now have the same status in various bodies or committees of the WTO.[16] Observer status usually brings access to

[16] IGO observers for General Council only (1998): United Nations, United Nations on Trade and Development, International Monetary Fund, World Bank, Food and Agricultural Organisation and Organisation for Economic Cooperation and Development.

documents, including restricted documents. Various subordinate bodies of the WTO determine such status, rather than a decision embracing all WTO activity.

Groups and alliances

Increasingly, countries are coming together to create groups and alliances in the WTO. In some cases they even speak with one voice using a single spokesman or negotiating team. The spread of customs unions, free trade areas and common markets has promoted this kind of participation, of which the largest and most important is the European Union.[17] Among other groups which occasionally present unified statements are the Association of South East Asian Nations (ASEAN), the Latin American Economic System (SELA) and the African, Caribbean and Pacific Group (ACP).

Smaller countries with many common trade interests can find in alliances and group strategies a way to increase their bargaining power in negotiations with their larger trading partners. A good example of diverse members sharing a common objective is the Cairns Group.[18] This group was set up just before the Uruguay Round, and became an important third force in the farm talks. They shared a common objective for agricultural trade liberalisation, since they could not compete with the larger countries in domestic and export subsidies.

2.2.2 Substantive Provisions

The substantive rules are contained in the agreements appended to the WTO Agreement. Annex 1A embodies the GATT 1994 (basically the GATT of 1947 as amended to the date of the UR completion), and a long list of agreements, understandings, decisions and other texts. The agreements are mostly the Tokyo Round side agreements as modified by the UR negotiation, but now no longer optional. Annexes 1B and 1C deal, respectively, with services and trade related intellectual property measures. Annex 2 contains the Dispute Settlement Understanding.

The main features of all the agreements mentioned above will be described later. In this section, we will focus on the central pillars of these texts. Two significant principles of non-discrimination are included throughout the WTO agreements: the

[17] The EU has a single external trade policy and tariff. While the member states coordinate their position in Brussels and Geneva, the European Commission alone speaks for the EU at almost all WTO meetings. (WTO website: www.wto.org.).

[18] From four continents, 15 members, ranging from OECD countries to the least developed, joined together to argue for agricultural trade liberalisation. (WTO website: www.wto.org.).

Most Favoured Nation (MFN) and National Treatment. The first implies that all benefit given to any member has to be extended to all members. This means non-discriminatory treatment among members. The second, the National Treatment, provides that imported products should have the same treatment as those accorded to domestic products. It tries to avoid discrimination between an exporting member and an importing one.

The key feature of the GATT/WTO system is non-discrimination. This obligation has been the basis for minimising distortion of trade and preventing national regulatory policies from being used as protectionist measures. It also has helped to reduce the cost of rules formulation, since general rules are applicable to all participating nations. The unconditional application of MFN has spread trade liberalisation faster, given that any concession by a particular country is generalised very broadly.[19] Likewise, non-discrimination avoids any rancour, misunderstanding, disputes or retaliation caused by discriminating practices. Thus, the substantive agreements deem certain trade measures as contrary to GATT/WTO, when they are implemented in a discriminatory fashion.

Developing countries[20]

It is important to mention that the GATT/WTO system provides preferential treatment for developing countries.[21] In other words, certain obligations of members have been laid down in respect of the level of development of those countries. Nevertheless, there is no WTO definition for "developing"; such status is given on the basis of self-selection, although this is not necessarily automatically accepted in all WTO bodies.

Some benefits of the "developing" status are:

- Flexibility in the use of economic and commercial policy instruments
- Longer transitional periods
- Technical assistance

[19] Exceptions from MFN have been given to developing countries (General System of Preferences), Customs Unions, Free Trade Areas, plurilateral agreements.
[20] Developing countries have a substantial majority of the WTO membership (107 of 140 in November 2000).
[21] During the Kennedy Round, a protocol to add Part IV to GATT dealing with problems of developing was approved in 1965, and came into force in 1966.

All OPEC Members who are presently Members of WTO, have developing status, and Saudi Arabia and Algeria, as acceding countries, are negotiating it. However, they have to prove that they qualify for such status, and this may not be easy because WTO members have shown resistance to granting the concessions that the developing status involves. The OPEC Secretariat[22] has highlighted some articles in GATT Part IV, which explicitly refer to developing countries who are dependent on a limited range of primary product exports:

> Article XXXVI recognises that "...there is need to provide in the largest possible measures more favourable and acceptable conditions of access to world markets for these products (primary products), and wherever appropriate to devise measures designed to stabilise and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices..."
>
> Article XXXVIII states "where appropriate, take action, including action through international arrangements, ... to devise measures designed to stabilise and improve conditions of world markets for these products (primary products), including measures designed to attain stable, equitable and remunerative prices for exports of such products."

[22] OPEC Secretariat: *OPEC and the WTO. Issues and Perspectives*, 1999, p.25.

3. GATT/WTO Oil and OPEC

3.1. Oil in the first seven GATT Trade Negotiation Rounds

There is a common belief that initially oil was excluded from GATT. In fact, oil and its products did not figure explicitly in the seven rounds of trade negotiations (except for the first one, held in Geneva in 1947). However, there are some political and trade reasons which support the assertion. It is well known that at the time of early GATT and until the beginning of the 1960s, most of the oil-exporting countries in Asia and Africa still had a colony status. The international oil companies (especially from Europe) controlled the whole chain of oil production in these countries. Additionally, Europe had no domestic oil production to protect at that time, thus no significant import duties were levied on crude oil and products.[23] In this context, the link between the oil-exporting countries from that part of the world and the GATT was very weak since the former had little control over their oil, and tariffs on oil were irrelevant.

Nevertheless, in the Western Hemisphere tariffs were an issue. The United States was among the first oil producers, but after the Second World War it became an oil importer. Prior to 1932, oil imports to the USA were duty free, but in that year the Revenue Act was passed imposing levies on imported oil: 21 cents per barrel on crude oil and fuel oil, $1.05 per barrel on gasoline and $1.68 per barrel on lubricating oil. At that time, Venezuela was one of the major oil producers, and the main supplier to the US market. Given that the average price that year reached 87 cents/barrel for US oil, and 81 cents for Venezuelan oil, these tariffs did have an impact on oil trade, specially for Venezuelan exports (the US tariff on Venezuelan crude oil represented 25 per cent of its price).

The Treaty of Trade Reciprocity, signed by the United States and Venezuela in 1939,[24] modified these tariffs. For quantities below 5 per cent of domestically refined supply in the preceding year, a 50 per cent tariff reduction (from $0.21 per cent to $0.105 per barrel) was allowed; for imports above this amount, the full $0.21 per barrel remained. Tariffs for gasoline and lube oil remained unchanged.

In 1943, Mexico and the USA celebrated a Trade Treaty which also reduced tariffs by 50 per cent, but without any limitation on volume (the quota tariff was

[23] Except for Germany which had local production, and for protection it applied an import duty on imported crude - DM 74.07 (£ 6 6s.) per tonne in 1950. See *Petroleum Press Service*, July 1950, p. 1984.
[24] Luis Vallenilla: *Auge, declinacion y porvenir del petróleo venezolano*, 1998, p.232.

abolished). Under a most favoured nation clause, the reductions applied to all other countries including Venezuela. Once again, levies on gasoline and lubricants were left intact.

After that, a third relaxation of petroleum trade barriers was enacted. On 30 October 1947, as a consequence of GATT, long-standing gasoline and lubricant tariffs were cut by half to $0.525 per barrel for gasoline and $0.84 per barrel for lubricants, with a proviso that "in no event shall the rate of imports tax...on topped crude petroleum, or fuel oil devised from petroleum be less than the rate of such tax applicable to crude petroleum".[25]

As oil prices increased, tariffs became insignificant or were abolished. Given that GATT negotiation rounds were predominantly focused on lowering tariffs, there was no relevant issue on crude and petroleum products to negotiate. Furthermore, during these rounds only Indonesia (1950), Nigeria (1960)[26] and Kuwait (1963) were contracting parties to the GATT. Regarding the political and strategic aspect of oil production, and in order to avoid tensions over the control of resources, it seems likely that consuming countries decided by "gentlemen's agreement" to exclude oil from GATT negotiations.

But, even if issues relating to crude oil were not directly addressed during GATT rounds, it has to be pointed out that there is no explicit provision in GATT and WTO agreements that excludes oil and petroleum products from their rules. On the contrary, according to GATT negotiating history, many matters concerning oil were discussed indirectly, and rules with an impact on oil policies from exporting-countries were negotiated. Many of these rules were originally conceived as "optional" regulation, but they have been developed and incorporated as binding rules of the WTO "single package".

Even though GATT concentrated on industrial products rather than primary ones, it is also true that practices relating to natural resources, such as "dual pricing" and export restrictions, were debated. Back in 1950, a GATT Working Party examined the use of export restrictions on raw materials "necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental

[25] Robert Bradley: *Oil, Gas, and Government*, Vol. I, 1996. p.724.
[26] Nigeria joined the OPEC in 1972.

stabilisation plan" (Article XX (I)).[27] The group concluded that the Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its material, or by reducing the supply of such materials available to foreign competitors.

During the 1960s, oil production was still under the control of multinational companies. In the USA, which was the main oil market, the administration imposed mandatory import controls in March 1959. After this date, no crude, unfinished oil or finished products were to be imported without licence from the Secretary of the Interior. All 50 states and Puerto Rico were covered and divided for regulation purposes into five Petroleum Administration for Defence Districts (PADD) plus Puerto Rico. The mandatory quota program was complemented by modest crude and fuel oil tariffs and higher gasoline and lubricant tariffs; effective protectionism was in place. These trade distortions were never discussed at the GATT forum.

In this period the oil-exporting countries' agenda had a markedly sovereign and investment issues slant; trade matters were not among their priorities. After independence and the creation of OPEC, oil-exporting countries concentrated on building investment and fiscal frameworks characterised by favoured provisions for the owners of the natural resource. They succeeded in coordinating their oil policies in order to protect their interests through OPEC,[28] and although oil prices decreased during the 1960s, oil-exporting countries maintained their revenues per barrel.

Subsequently, when oil–exporting countries nationalised their oil sector, and during the first oil crisis, there were some attempts on the part of the USA, within the framework of the Tokyo Round (1973–79), to raise the issue of restrictions on oil exports and oil export taxes. This happened when President Nixon abolished the mandatory quota program due in 1973 because of supply problems. The US initiative, however, failed as it faced strong opposition from other industrial countries (Japan, France and Canada) and from developing countries.

In the 1970s, criticism of transnational companies was on the increase. The discussion centred on the obligations of transnational corporations and on the legitimacy of the regulation of their activities by sovereign states. The UN attempted

[27] This provision was proposed by New Zealand to justify its price stabilisation schemes in leather. See: John Jackson: *World Trade and the Law of GATT*, 1969.
[28] OPEC resolution XVI.90 is a good example that summarised oil-exporting countries' goals.

to create a global "UN Code of Conduct on Transnational Corporations". The focus was on state sovereignty, sometimes expressed in the reinforced formulation of "permanent sovereignty over natural resources and economic activities.[29] Oil-exporting countries nationalised their oil industries under this prevailing international order. Once they broke the link with international capital, oil-exporting countries undertook policies mainly focused on raising oil prices and controlling oil production. They succeeded in their goal, but parallel to this process was the increasing isolation of OPEC countries from other international forums, and even from the international governance of oil. They overestimated the power of their organisation, and they underestimated the strategic importance of oil to the importing countries who were members of GATT.

As already mentioned, the Tokyo Round results substantially broaden the scope of coverage of the GATT system. The special agreements (codes) included matters with a potential impact on oil and petroleum products, as subsidies, antidumping duties, technical barriers to trade and dispute settlement. During the negotiations no link to the oil sector or possible consequences to oil-exporting countries were discussed within the GATT or other international forum. One can argue that at that time codes' rules did not provide binding obligations, and that only three OPEC members were contracting parties to GATT. This might be true, but other natural resource-exporters, such as Canada and New Zealand, foreseeing the possible impact of these regulations on their economies, did face up to the negotiations and attempted to minimise their negative impact.

On the other hand, given that three OPEC members were contracting parties to GATT, the oil organisation could have been aware of the trend of trade negotiations in that forum, and it could have become involved in some ways. But as far as we know this did not happen. OPEC and its individual member countries were not aware of the development of a multilateral trade system; none of them had a long-term vision.

In 1982, the issue of "dual pricing" was formally raised at the GATT Ministerial Meeting because the Council was requested to make arrangements for the study of this practice. It is important to note that in this year OPEC set up its quotas production system.

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[29] See Thomas Wälde: 'International Investment under the 1944 Energy Charter Treaty', p.263, in *The Energy Charter Treaty*, 1996.

In 1986, the Canadian delegation stated that "natural-resource pricing policies, because they related to both matters of national sovereignty and to comparative advantage, were of fundamental importance to the contracting parties. All contracting parties, whether producers or consumers, had an interest in ensuring that the sovereign right to develop natural resources and to maintain the general comparative advantage of natural resource producing countries continued to be recognised".[30] Canada believed in particular that the unilateral right to countervail granted under Article VI and the Subsidies and Countervailing Measures Code was not intended to be used to negate a country's general comparative advantage. It should be recognised that the precedent set by a move unilaterally to broaden, and in the process make more ambiguous, the concept of subsidy would affect all contracting parties. A wide range of resources and resources infrastructure policies could be affected.

3.2. Oil in the Uruguay Round[31]

During the Uruguay Round and in the context of the Negotiating Group on Natural Resource-Based Products, some members insisted again on raising the question of "dual pricing" practices and export restrictions in the oil sector. It was argued that those policies distorted trade by maintaining price differentials to the advantage of domestic industry. Although "dual pricing" was not causing major trade problems at that time, it was also argued that such practices could lead to trade distortions in the future, particularly if petroleum prices were to rise again.

Those members who opposed these practices also contended that interpretations of GATT 1947 and provisions of the Tokyo Round did not address the problem effectively. Export taxes, "dual pricing" practices, as well as the high degree of government ownership and control in resource-based industries could contribute to trade distortions. The United States stated that the negotiations should explore the principles of governing trade in natural resource-based products, with the results expressed in a code or an elaboration of GATT Articles. Likewise, the US delegation suggested that issues of dual pricing and export restrictions should be reviewed in the context of the Negotiating Group on Subsidies and Countervailing Measures.

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[30] UNCTAD: *Trade Agreements, Petroleum and Energy Policies*, 1999, p.17, n. 6.

[31] Most of the information used in this section has been collected by UNCTAD. See *Trade Agreements, Petroleum...*, op.cit. pp 14–19.

There were many reactions opposing these suggestions. Most participants, including the EU, argued that "dual pricing" practices and export restrictions were issues of a general nature and should be addressed in a generic way. Then, many developing countries stressed that the Negotiating Group on Natural Resource-Based Products should adhere to its mandate: negotiations on market-access problems (such as tariffs and non-tariff measures) in the three identified sectors (forestry, fisheries, and non-ferrous minerals and metals). They also considered the issues under question were in conformity with GATT Articles, which provided for the use of export restrictions in the context of critical shortage, conservation measures, or development purposes. In this respect, the Negotiating Group on Subsidies and Countervailing Measures had to involve itself with certain pricing policies for natural resources (including petroleum and petroleum products) which could be subject to countervailing measures.

There are two provisions relevant to oil and petroleum products in the Chairman's draft text of the Agreement on Subsidies and Countervailing Measures of 7 November 1990:[32]

> Article 2.1:
>
> In order to determine whether a subsidy, as defined in Article 1.1, is specific to an enterprise or industry or group of enterprises or industries, and as such confers a benefit on certain enterprises over those available to other enterprises or industries *within the territory of a signatory,* the following shall apply...
>
> Article 14(e):
>
> When the government is the sole provider or purchaser of the goods and services in question, the provision or purchase of such goods or services shall not be considered as conferring a benefit, unless the government discriminates among users or providers of the good or services. Discrimination shall not include differences in treatment between users or providers of such goods or services due to normal commercial considerations.

Mexico disassociated itself from this draft text arguing that it dealt with matters outside the terms of reference of the Negotiating Group on Subsidies and Countervailing Measures. Domestic pricing policies of natural resources and requirements of non-discrimination should refer solely to "production facilities

[32] MTN.GNG/NG10/23 quoted in UNCTAD: *Trade Agreements, Petroleum*...op. cit. p. 18.

located in the national territory of the signatory country". It further argued that the Chairman's draft could lend itself to the interpretation that:

> countries endowed with natural resources renounce their comparative advantages, or otherwise that they be exposed to the application of countervailing measures in their export markets. This means that National Treatment is applied beyond the territory of contracting parties, which is fundamentally inconsistent with this basic GATT concept.

In view of that fact, Mexico proposed that Articles 2.1 and 14 (e)[33] of the Chairman's draft specify that the provisions in question were limited to the territory of a contracting party. These proposals were incorporated in the final version of the Agreement on Subsidies and Countervailing Measures:

> In order to determine whether a subsidy, as defined in Article 1.1, is specific to an enterprise or industry or group of enterprises or industries, and as such confers a benefit on certain enterprises over those available to other enterprises or industries *within the jurisdiction of the granting authorities*, the following shall apply...

Supply of oil at prices lower than world prices to refineries and petrochemical industries could be subject to countervailing duties if they were deemed to be an actionable subsidy causing material injury to domestic producers in importing markets. Considering the damage that the subsidy regulation could cause to them, one would have expected more active participation from the oil-exporting countries that were contracting parties to the GATT at that time: Indonesia, Kuwait, Nigeria and Venezuela (the latter which had accessed the agreement in 1990). In fact, personal inquiries revealed that OPEC never discussed issues of international subsidy regulation. Neither did those OPEC Members that were GATT contracting parties.

It is important to remember that, despite the strategic nature of oil, this sector is governed by the rules of the multilateral trading system. There were no negotiations under the Uruguay Round on tariffs applied on oil and petroleum products (with the exception of those involving the EU), due to the insignificance of those tariffs. Oil tariffs have never been very high (except in the USA before the 1940s) and in some cases, such as the EU, crude oil imports are duty free. The tariff rates range around

[33] Subparagraph (e) of Article 14 was deleted from the final version.

5.5 cents per barrel in the United States, and 215 yen per kilolitre in Japan (see Table 1). No commitments on tariff reductions or bindings appear in any WTO Member's schedule of commitments.

Table 1: Tariff Treatment for Crude Oil Pre- and Post-Uruguay Round MFN Tariffs in selected Development Country Markets

	Pre-Uruguay Round Tariff ranges	*Post-Uruguay Round Tariff ranges*
European Union	0%	0%
United States	5.5 cts/bbl (u)	5.5 cts/bbl (u)
Japan	350 yen/KL (u)	215 yen/KL (u)

Source: UNCTAD KL = kilolitre
Notes: u = unbound tariffs Cts/bbl = cents per barrel

Table 2: Tariff Treatment for Petroleum Products. Pre- and Post-Uruguay Round MFN Tariffs in selected Development Country Markets

	Pre-Uruguay Round Tariff ranges	*Post-Uruguay Round Tariff ranges*
European Union	5.0% - 7.0%	3.5% - 4.7%
United States	5.8% - 84 cts/bbl	5.8% - 84 cts/bbl
Japan	0% - 3033 yen/KL (p)	0% - 3033 yen/KL (p)

Source: UNCTAD KL = kilolitre
Notes: p = partially bound tariffs Cts/bbl = cents per barrel

With respect to petroleum products, MFN tariff levels after the Uruguay Round remain higher than those for crude oil, and some of them are still unbound. As we can see in Table 2, the USA and Japan kept their tariff on petroleum products at the pre-UR level (5.8 per cent and 84 cents per barrel for the USA and 0–3033 yen/KL for Japan). The EU reduced tariff levels from 5–7 per cent to 3.5–4.7 per cent.

Most MFN tariffs on petrochemicals in the developed markets were already bound before the Uruguay Round, but they experienced a significant reduction across the tariff line as a result of these negotiations (Tables 3 and 4).

Table 3: Tariff Treatment for Hydrocarbons.
Pre- and Post-Uruguay Round MFN Tariffs in selected Development Country Markets

	Pre-Uruguay Round Tariff ranges	*Post-Uruguay Round Tariff ranges*
European Union	0% - 14%	0% - 5.5%
United States	0% (18%)a	0% - 5.5%
Japan	0% (24%) b	0% - 5.5%

Source: UNCTAD
Notes: a Specific duties ranging from 2.7 to 3.7 cents/kg
b Specific duties ranging from 2.7 to 3.7 cents/kg

Table 4: Tariff Treatment for Plastics in Primary Forms.
Pre- and Post-Uruguay Round MFN Tariffs in selected Development Country Markets

	Pre-Uruguay Round Tariff ranges	*Post-Uruguay Round Tariff ranges*
European Union	8% - 13½%	5.7% - 6.5%
United States	0% (16%)a	0% - 6.5%
Japan	0% (7.2%) b	0% - 6.5%

Source: UNCTAD
Notes: a Specific duties up to 18.7 cents/kg
b In a few cases, specific duties up to 32 cents/kg

The impact of the Uruguay Round on tariff levels for crude oil and petroleum products has not been very significant, but there have been important consequences for petrochemical products. However the latter are not significant components in OPEC's total trade. The low tariffs for crude oil among the developed countries are consistent with their interests as consumers: they need and promote lower prices for crude since they do not produce it in sufficient quantities.

3.3. Membership and Accession Process of OPEC Member Countries

Three OPEC Members were Contracting Parties to GATT before the 1973 oil shock: Indonesia (1950), Nigeria (1960) and Kuwait (1963). The accession process of these countries took place a few years after their independence. There was no significant oil production in Nigeria until the early 1970s, and that is when the country decided to join OPEC.

When Mexico, a non-OPEC oil producer, negotiated its accession to GATT some aspects of crude oil export policies came to the fore. In 1986, Mexico included in paragraph 5 of its Protocol of Accession:

> Mexico will exercise its sovereignty over natural resources, in accordance with the Political Constitution of Mexico. Mexico may maintain certain export restrictions related to the conservation of natural resources, particularly in the energy sector, on the basis of its social and development needs if those export restrictions are made effective in conjunction with restriction on domestic production or consumption.[34]

Venezuela acceded to the GATT during the Uruguay Round in 1990. In its standard Protocol of Provisional Applications (PPA) no special consideration was made in respect of its oil sector; Venezuela relied on Article XX (g) which provides the adoption and enforcement of measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production and consumption.

Unlike Mexico, Venezuela did not consider that any special provision relating to its oil sector should be included in its Protocol of Accession. It found that the provision in the Mexican PPA was no different from the conditions expressed in Article XX (g) in relation to the conservation of exhaustible natural resources. Furthermore, it was concluded that such provision did not change Mexico's rights and obligations as a GATT contracting party, and did not have any particular advantage. In fact, given the current situation in which WTO finds itself unable to introduce changes, it seems reasonable to assume that Mexico's provision does not add any particular benefit over what has been already granted by Article XX (g). The issue is whether in the case of a modification of this Article or a toughening of export

restriction measures, Mexico will be exempted from those measures, due to the provision included in its Protocol of Accession.

All these oil-exporting countries who were GATT contracting parties became WTO members automatically on January 1995. The United Arab Emirates and Qatar joined the GATT after the Uruguay Round in 1994, and became WTO members in 1996.

At present, two OPEC Members, Algeria and Saudi Arabia, are negotiating accession, and in the meantime they have an observer status. Considering the several stages of the accession process, the terms for new entrants are considerably more stringent than they were in the past. WTO members are more demanding and are asking for more commitments than used to be required, raising the standard of accession. The last accession processes have shown that some acceding countries have been requested to accept plurilateral agreements.[35] This is the case of Oman, an oil-exporting country which is not a member of OPEC, and became a WTO Member in October 2000 (its accession process started in April 1996).

During the negotiation, Oman went through a process of privatisation, institutional changes and adjustment of its legal framework in order to promote a more liberal economy. The Sultanate agreed to consider the national oil company, Petroleum Development Oman (PDO), as a State Trading Enterprise according to GATT Article XVII.[36] Regarding the Multilateral Trade Agreement, Oman accepted to apply all the trade related aspects of intellectual property rights without taking advantage of the transition period. It opened the service sector relating to reservoir exploration and electricity distribution without attaching any conditions. Lastly, Oman agreed to sign the agreement on Government Procurement which is optional (plurilateral agreement).

Oman's accession process has been much tougher and costlier than previous ones. By signing the agreement on Government Procurement the country has limited its

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[34] Protocol for the Accession of Mexico to the GATT, quoted by UNCTAD: *Trade Agreements' Petroleum*, op. cit. p. 20.

[35] Plurilateral Agreements are optional agreements. They can be applicable to only those members that accept them. There are four plurilateral agreements: Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy, and International Bovine Meat Agreement.

[36] Such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders (GATT Art. XVII). Considering this statement, State Trading Enterprises' purchases or sales cannot be used as an instrument to develop local capacities and companies. This is not the case for government institution procurements.

ability to use of development policy tools to boost domestic enterprises through public purchase or contracting. This experience reflects the difficulty that Saudi Arabia, Algeria and other oil-exporting countries will have to face in their own accession process. The current status of accession for the OPEC member countries mentioned above is as follows:

- **Saudi Arabia**

Saudi Arabia's Working Party was established in July 1993. In parallel, bilateral market access negotiations on goods and services started on the basis of revised offers. The main subjects under discussion in the Working Party are agriculture, preshipment inspection, sanitary and phytosanitary measures, technical barriers to trade, intellectual property rights and services. The Saudis are hoping to ascertain their status as a developing country, in order to have a longer transition period, special industry safeguard measures and application of offset arrangements. Nevertheless, WTO Members have shown increasing reluctance to automatically grant such concessions, since they consider that in many respects this status bestows more WTO rights and fewer obligations.

The accession of Saudi Arabia to the WTO will really entail a shift in economic policies towards a more open, market-based system. The Kingdom has been subject to many requirements to make commitments beyond those made by countries with a similar or higher level of economic development. Along with Oman, it is expected to sign the Government Procurement Agreement. The existing Saudi rules regarding procurement will then have to be reversed and a large number of local firms will find it difficult to compete with foreign firms under the harmonised procurement regulation. Likewise, Saudi Arabia may be asked for notification of enterprises engaging in state trading practices, such as Aramco.

Negotiations on the petrochemical industry tend to consider energy inputs for downstream products at prices lower than world prices as export subsidy, because a very large portion of the Saudi petrochemical production goes to export. This is an issue of relevance for oil-exporting countries. Natural resource product exporters have made several efforts to clarify that those "inputs are available through the whole economy, and they are not specific to some industries". They cannot, therefore, be deemed as an actionable subsidy. The trend of the negotiation in this matter could mean a loss of abilities to promote local industry.

WTO Members submitted schedules of specific commitments on market access and national treatment in the services sector. Under the General Agreement on Trade in Services, a member can negotiate with other members about the sectors in which it wants to give commitments. A member can also prescribe terms, limitations and conditions on market access in respect of the services mentioned in its schedule. During bilateral negotiations Saudi Arabia might be under pressure to submit schedules of commitments. One can expect those commitments to be in specific sectors like financial services (banking and insurance), movement of personnel, telecom services, and perhaps in the few energy services already classified.

Although oil and hydrocarbons were not included in the product list of the GATT negotiations, the oil sector of Saudi Arabia will benefit indirectly from a reduction of tariffs on industrial trade. The petrochemical sector would have better access to the world's major markets. Many of these, particularly the USA and EU, impose heavy customs duties on Saudi products. The second advantage of joining the WTO would be recognition of the Gulf Cooperation Council as a trading region (the Kingdom is the last Council member negotiating its accession to the WTO) allowing the trading block to coordinate a common strategy for future WTO negotiations. A third advantage would be the opportunity to exploit the instruments provided by the organisation to defend national interest (e.g. dispute settlement), and to participate in further negotiations and influence the outcome.

- **Algeria**

The Algeria Working Party was established in June 1987. Almost nine years later (1996) the memorandum on the Foreign Trade Regime was circulated. Topics under discussion in the Working Party include agriculture, the customs system, state trading, transparency, legal reforms, trade related aspects of intellectual property rights and services (banking, insurance and telecommunications).

- **China**

The importance of the assimilation of China into the WTO and the fact that it produces 3.21 MM b/d, makes it necessary to point out some of the possible consequences for its oil sector.[37] The China negotiation for WTO membership is

[37] The information in this section comes from *Platt's Oilgram Price Report*, 78 (98), 23 May, 2000.

important not only for what the country represents, but also because the rules for accommodation that are worked out in the China context will set an important precedent for future similar activities of the WTO, including the possible accession of Russia (an important oil-producing country) and other former Soviet Union states.

China has for years adopted non-tariff trade barriers to maintain its state-owned upstream and downstream monopoly. For instance, Beijing has largely suspended imports of gasoline and gasoil since September 1998 in order to refine more overseas crude oil and import fewer products. Domestic production of fuel oil and naphtha is complemented by tightly regulated imports of those products using quotas. The central government sets the volume of crude imports annually after reviewing production and demand forecasts submitted by China Petrochemical Corp (Sinopec) and PetroChina. It also charges 9 per cent on gasoline and kerosene imports, 6 per cent on gasoil, naphtha and fuel oil imports, and Yuan 16 ($ 1.90)/mt for crude oil imports.

Entry to the WTO will bar quotas and other quantitative restrictions. Experts are expecting the following changes in the oil sector:

- Non-tariff barriers will be phased out no later than 2005. Based on the 1996–97 period, there has been talk that product imports could reach 19.8 million mt in the first year of WTO entry, rising by 15–18 per cent annually over the following five years in order to ensure that market access increases progressively.
- Crude oil import tariffs might be removed entirely, while a 9 per cent import tax on gasoline might be reduced.
- The retail sector in the mainland is expected to be opened to foreign companies three years after entry. The wholesale oil sector would be opened five years after the country's WTO accession.

China embarked on a massive industry revamp two years ago to prepare the state oil company for challenges from foreign firms. The project is to increase product yields, improve product quality to match that of imported grade, drastically lower production cost to make prices competitive with overseas products, and improve servicing.

3.4. OPEC, as an Organisation and the WTO

OPEC was created as a permanent intergovernmental organisation. Its principal aims are to ensure the stabilisation of prices in international markets (eliminate unnecessary

fluctuations), and to secure a steady income for the producing countries, a regular supply of petroleum to consuming nations, and a fair return to the petroleum industry.[38]

Some OPEC features coincide with those of the Commodity Agreements[39] incorporated into the draft charter of the proposed ITO. Articles 54 and 58 of that Charter stated that commodity agreements were concerned with the regulation of production or the quantitative control of exports or imports of a primary commodity in order to moderate pronounced fluctuations in the price of that commodity, with a view to achieving a reasonable degree of stability on the basis of fair prices to consumers and fair remuneration to producers. But, OPEC does not conform in all aspects to a commodity agreement; it does not fulfil the many requirements of being open to all potentially relevant members (oil producers and consumers) or of being temporary in nature.

Commodity agreement provisions were incorporated in GATT Article XX (h),[40] as permissible exceptions to GATT rules; nevertheless no commodity agreement has ever been formally submitted to the contracting parties. From OPEC's point of view, these provisions for commodity agreements are important because they indicate that the multilateral trade system does have room for organisations of a similar nature to OPEC.[41]

In March 2000, OPEC applied for observer status in various bodies or committees of the WTO, particularly the General Council, the Committee on Trade and Development, and the Committee on Trade and Environment. These bodies have several times postponed discussion about granting the observer status.

Conclusions

In the past, OPEC members were not able to influence the outcome of GATT negotiations because they were not involved in them from the beginning (most of them were not contracting parties and they believed that the strategic status of oil was enough to exempt the oil sector from the multilateral trading rules). As a result, hydrocarbons were excluded from GATT negotiations. In contrast, trade in agricultural products, textiles and services has a central role in the agreement, reflecting the

[38] See Articles 1 and 2 of OPEC Status (1998)
[39] International commodity agreements were established for wheat, sugar, coffee, cocoa, rubber and tin.
[40] "Measures undertaken in pursuance of obligations under an intergovernmental commodity agreement which conforms to criteria submitted to the Contracting Parties and not disapproved by them or which is itself so submitted and so disapproved."
[41] OPEC: *OPEC and the WTO,* op. cit. 1999, p.7.

concerns of the countries which led the discussion. Although oil was not directly addressed in GATT round negotiations, many rules that impact the oil sector were settled in that forum and many others will be negotiated at the WTO.

The fact that more OPEC countries are becoming WTO Members and that OPEC itself is negotiating for observer status, will help these countries to coordinate their views and interests (perhaps create groups and alliances in WTO) in order to increase their bargaining power in negotiations. Nevertheless, accession has become a tough process. Today, these countries are paying the cost of remaining isolated from nearly fifty years of negotiation in the GATT/WTO system. As we can see, new memberships have a higher cost: accession process demands deeper economic, political and legal changes than before. The question here is whether to take in the cost of joining the WTO, trying to avail itself of the benefits that come with membership, or staying outside "the club" and bearing the costs.

Considering the widening of the scope of the WTO in terms of new subjects and mandatory levels, it is reasonable to believe that its legal framework has an increasing capacity to influence international economic relationships between members and non-members.

4. THE WTO AGREEMENTS AND THE IMPLICATIONS FOR OIL

4.1. The General Agreement on Tariffs and Trade 1994 (GATT'94)[42]

The GATT'94 is a multilateral agreement between countries providing a framework for the conduct of the international trade of goods. It contains rules for governments, and even for enterprises, in matters related to imports and exports. The main objective of this agreement is to create an international trading system for the free flow of goods and it is based on the basic principles of GATT: the most favoured nation and national treatment, and the prohibition of quantitative restrictions:

- The Most Favoured Nation (MFN). Coverage of this principle goes beyond the tariff concession; it also applies to charges of any kind related to imports and exports, the methods of levying tariff and such charges, and all rules, formalities and requirements affecting sale, purchase, transportation, distribution or use of the product.
- The National Treatment of Internal Taxation and Regulation provides that with respect to internal taxation and domestic regulation, the imported products should be treated in the same ways as domestic products.
- The General Elimination of Quantitative Restrictions. Unlike tariffs, which are generally allowed, non-tariff measures are disallowed except in special circumstances. Article XI[43] states that members cannot generally prohibit or restrict the import of goods into its territory or export of goods from its territory. There are specific pre-conditions for such non-tariff measures, and these can be taken only through prescribed procedures.[44]

Under the agreement, both industrial and developing countries have made significant commitments to open up their markets by reducing import tariffs and removing quantitative restrictions. For some products, members decided to "bind" tariffs at a

[42] GATT'94 consists of: the provisions of GATT 1947 (ratified by the WTO agreement), the provisions of GATT legal instruments predating the WTO Agreement, certain Understandings negotiated in the Uruguay Round, and the Marrakesh Protocol to GATT 1994.

[43] Article XI: "No prohibitions other than duties, taxes or 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 or exportation…or on the exportation or sale for export of any product."

[44] Article XIII provides for non-discrimination in the application of restrictions or prohibitions (Non-discriminatory Administration of Quantitative Restrictions).

particular level, which means that they undertook not to raise the tariffs on these products beyond this level.

Tariffs

Tariff negotiations do not present a particular challenge for oil-exporting countries since tariffs on crude oil, petroleum products and petrochemicals are very low, and in some cases these imports are duty free. The fact that more OPEC member countries are becoming WTO members will allow them to negotiate tariff bindings,[45] providing greater security of access to markets.

Tariffs have never represented an impediment to international trade in oil, and it is difficult to believe that additional duties will be imposed on crude oil and products, given that industrialised countries often request low prices for these commodities. Energy policies, rather than custom duties have influenced the dynamics of international trade in oil. Moreover, the importance of tariffs in trade policy has been quite reduced, and countries tend to replace them with other instruments.

Export restrictions

The OPEC policy of setting production quotas for oil can be considered as a quantitative restriction on exports, and as mentioned before, such measures are contrary to the spirit of the GATT/WTO. It is important to emphasise that OPEC's quotas limit the level of production, and not the level of exports. Nevertheless, Article XX (g) provides an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption". In other words, the oil exporting-countries can use this exception if the scope and coverage of restrictions on domestic production are consistent with the export restrictions.

Another exception relevant to OPEC Members is Article XX (h), which provides for 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".

[45] A bound level is the top limit for a tariff.

Finally, the national security exception (Article XXI)[46] could have some applicability to the petroleum sector, especially to justify import or export restrictions in a range of circumstances. In the past, the United States, for political and national security reasons, has imposed export controls under the Export Control Act, and import restrictions through compulsory quotas on crude oil, petroleum products and derivates, as was already mentioned.

Being conscious of the relevant role of the USA in the preparation of the GATT text in 1947, and considering the importance of oil in its economy, as well as the political influence of US domestic producers, one could speculate that the previous provisions (Art. XX) were related to some US energy interest.[47]

Taxes

Trade in petroleum products involves the issue of high domestic taxes in the big consuming countries. Their level is often very high and they have become important sources of government revenues.[48] The oil-exporting countries have considered these excise taxes as an instrument for controlling consumption and a way to undermine their ability to derive income from their own natural resources. According to GATT'94 rules, a country can impose any domestic tax as long as it fulfils the non-discrimination obligation stipulated in the main articles. As these taxes are applied in a non-discriminatory fashion to imports and domestic production, they do not conflict with the principle of National Treatment. However, national sovereignty in this respect is restricted by paragraph 4 of Article III, which states that imports must be treated not only no less favourably than the "same" but also "like" products of domestic origin. The present structure of energy taxes in the industrialised countries taxes oil more than other "like" fuels. Where a coal industry exists, the disparity in the taxation violates the national treatment principle. In countries with no fuel production, the tax on petroleum products may displace oil imports for coal imports, which is contrary to the most favoured nation treatment.

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[46] "Nothing in this agreement shall be construed...to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests..."

[47] USA Total petroleum imports steadily grew after the war to overtake declining exports and make the USA in 1948 a net importer for the first time since 1922. In 1947, the USA imported 437,000 b/d of crude oil and refined products, and exported 451,000 b/d. In 1948, the imports reached 514,000 b/d and exports fell to 367,000 b/d. Bradley: *Oil, Gas and Government,* op.cit. p.725.

[48] According to some estimates provided by OPEC, in 1999 the average tax on composite barrels in the EU was $65/b, or 68% of the retail price. See *OPEC and Environmental Policy,* 2000.

In the view of the OPEC Secretariat, the present structure of energy taxes in EU countries and the USA is a case of discrimination. It has been suggested that oil-exporting countries could bring the issue of excessively high consumption and excise taxes imposed by importing countries on oil products into the framework of negotiation in the next round of trade talks. Nevertheless, to levy taxes is a sovereignty issue, and it cannot be easy for governments to prove that there is hidden protection for domestic production behind those taxes.

Both domestic taxes on petroleum products and the restriction of exports can be considered sovereignty issues, and in one way "the oil exporting countries' ability to influence the international oil price through OPEC and other means is counterbalanced by the consumer countries' ability to influence the final price of petroleum products in their local markets, through energy, fiscal and environmental policies".[49]

The excessive taxation on oil products and the determination of production levels represent the major issues affecting oil trade. Since they are applied in non-discriminatory fashion, they do not conflict with the WTO framework. Considering the sovereign nature of taxation and conservation of natural resources, it will not be easy to tackle those issues within the WTO. But this does not mean that negotiation on this matter may not happen some day, since precedent exists in the Tokyo Round on tropical products.

4.2. The General Agreement on Subsidies and Countervailing Measures (GASCM)

Before the Uruguay Round, the provisions relating to subsidies were in Article XVI of GATT 1947 and those relating to countervailing duties in Article VI of GATT 1947, and in the Subsidies Countervailing Duty Code of 1979. Now the Agreement on Subsidies and Countervailing Measures, which forms an integral part of the WTO Agreements, provides a comprehensive frame of rules in these areas. The provisions of Articles XVI and VI of GATT 1994 also remain valid insofar as they are not in conflict with the new Agreement. Article 1 of this Agreement defines a subsidy as a financial contribution by a government, whether in the form of a direct transfer of funds, government revenue that is otherwise due but is foregone or not collected, or

[49] Majid Al-Moneef: 'Petroleum Trade and its Relation to the World Trade Organization', 2000 p. 9.

the provision by the government of goods and services other than general infrastructure.

Under this Agreement, subsidies are classified as:

- **Non-actionable**: these are permissible subsidies, applied across the board to all industries and not limited to a specific industry or enterprise or group of enterprises/industries.
- **Prohibited subsidies**: there are two types of such subsidies: those contingent upon export performance[50] and those contingent upon the use of domestic products over imported products.
- **Actionable Subsidies**: these subsidies are specifically limited to a certain number of firms or industries. They can be applied within certain limitations: (a) they should not cause material injury[51] or threat of material injury to the domestic industry of any other member; (b) they should not cause nullification or impairment of benefits under GATT 1994; and (c) they should not cause serious prejudice or threat of serious prejudice to the interests of another member.

In case of the existence of prohibited subsidies or actionable subsidies, a member can take recourse to the Dispute Settlement Body or initiate the process of investigation for countervailing duty,[52] but for both processes there is only one solution: countervailing duty. The latter option can be adopted only in cases where injury is involved. In other cases (serious prejudice), members can approach the dispute settlement process. For example, a prohibited subsidy or an actionable subsidy causing injury can be subject to action through the countervailing duty process as well as the dispute settlement process; but if it doesn't cause injury, it can be subject only to the dispute settlement.

The General Agreement on Subsidies and Countervailing Measures has special clauses for developing countries. Prohibition of export subsidy does not apply

[50] After Annex I to The General Agreement on Subsidies and Countervailing Measures, these subsidies can be: currency retention schemes which involve a bonus on export, exemption of direct taxes specifically related to export, international transport and freight charges on terms more favourable than those for domestic shipment, etc.

[51] The term "injury" means material injury to the existing domestic industry or material retardation of the establishment of domestic industry. It also includes threat of such injury. The examination of the existence of injury includes evaluation of: decline in output, sales, market share, profit, productivity, etc; factors affecting domestic prices; and negative effects on cashflow, inventories, employment, wages, capital or investment (Bhagirath Lal Das: "An Introduction to the WTO Agreements", op.cit. p.53).

to least developed country members. However, if such a country attains the share of exports of a particular product up to 3.25 per cent of the world export of that product for two consecutive years, it will have to phase out the export subsidy on that product in eight years. It also does not apply to other developing countries for a period of eight years from the entry into force of the WTO Agreements.

With regard to crude oil, petroleum products and petrochemicals, the Agreement has some implications. The Negotiating Group on Subsidies and Countervailing Measures during the Uruguay Round was concerned with certain pricing policies in oil-exporting countries that could be subject to countervailing duties. It was argued that:

> Differential export taxes on raw materials and processed products resulted in the supply of raw materials to local industries at prices lower than those prevailing on the world market. Dual price practices distorted trade by maintaining price differentials to the advantage of domestic industry through export restrictions (or taxes) on raw materials.[53]

One example of this is the threat against petrochemical exports from the oil-exporting countries to be subject to countervailing duties (they assumed that goods for domestic consumption received favourable treatment) if they were deemed to cause material injury to domestic producers in importing markets.

Dual pricing is not inconsistent with the principles of the WTO, as long as mechanism and policy options do not contravene the specific provisions of the GATT 1994 and the Multilateral Trade Agreements. After the GASCM only specific subsidies are actionable, that is, subsidies specifically limited to a certain number of firms or industries, those "generally available" throughout the economy which are considered non-actionable. Within the oil-exporting countries, all domestic industries are provided with low energy prices, below world prices, thus this does not constitute a specific subsidy and, therefore, is not actionable.

The domestic pricing policies of natural resources and the requirements of non-discrimination raise the question of what constitutes a comparative advantage within GATT. The Canadian point of view was that natural resources pricing policies are related to issues of national sovereignty as well as comparative advantage. It was

[52] Whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, is a decision to be made by the authorities of the importing Member (Article 19 of GASC).

essential that natural resource-producing countries ensure the sovereign right to develop natural resources and maintain the general comparative advantage they possess.[54]

According to Annex I (List of Export Subsidies), government provisions on favourable terms of products or services used as inputs in the production of exported goods can be subject to countervailing duty. Moreover, Annex II (Guidelines on Consumption of Inputs in the Production Process, note 61) considered energy, fuels, and oil used in the production process of an exported product as physically incorporated inputs. These two assertions have an impact on the production of energy-intensive goods or downstream products, because the exploitation of a natural resource, with a competitive advantage for industrial development, can attract countermeasures.

The GASCM also deals with environmental subsidies. Article 8.2 allows environmentally related non-actionable subsidies for the adaptation of existing facilities to meet new environmental regulation and standards. The conceptualisation of subsidy within the agreement has been criticised among members. As environmental subsidies are deemed non-actionable, the agreement can, in a certain way, help to strengthen environmental measures that could affect oil-exporting countries.

Most of the subsidies allowed are related to areas that are of interest to developed countries (such as the adoption of environmentally friendly technologies, and research and development); whereas subsidies applied to the process of development and industrialisation tend to be prohibited.[55] From the point of view of UNCTAD, oil-exporting countries may themselves be able to take advantage of the improved rule in the ASCM on "actionable" subsidies in the appropriate circumstances. For example, the GASCM facilitates action against a member's subsidisation of a product if the impact of the subsidy is to displace or impede another member's exports of a like product into the importing or third country market. This could conceivably provide the basis for challenging subsidies for other energy products competing with petroleum or petroleum products.[56]

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[53] In Reinaldo Figueredo: *Petroleum, Derivatives and WTO Agreements*, 1998, p. 5

[54] UNCTAD/UNDP: "Implications of the Post Uruguay Round International Trading System for Petroleum Exporting Countries and for International Trade in Petroleum and Petroleum Products", November 1996, p.10.

[55] Bhagirah Lal Das, "WTO Agreements: Implications and Imbalances", in *Third World Economics Issues*, 150/51, December, 1996.

[56] UNCTAD: Trade Agreements, Petroleum..., op. cit. p.35

As a conclusion, one could say that the GASCM prohibits or limits those subsidies aimed at improving the performance of domestic companies in a development process. For oil-exporting countries, it is clear that the ability of using their energy advantage to foster industrialisation will be reduced.

4.3. The Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping).

The first Anti-dumping Code was negotiated during the Kennedy Round (1962–67). Then a second attempt to clarify and improve multilateral rules on anti-dumping was made during the Tokyo Round (1973–79). This agreement, as an integral part of the WTO agreements, provides a specific frame for anti-dumping measures.[57] According to this legal text (paragraph 1 of Article 2), a product is to be considered as being dumped if it is introduced into the commerce of another country at less than its normal value, and the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

In order to take action against dumping, a WTO Member has to determine first that dumping exists. Then, it is necessary to confirm that there is a material injury or threat of material injury to its domestic industry or material retardation of the establishment of a domestic industry, and, finally, that a causal link exists between dumping and the injury.

There is a great similarity between the provisions on subsidies and countervailing measures under the GASCM and the provisions of the Anti-dumping Agreement. After UNCTAD, the basic distinction between them is that subsidisation is an unfair trade practice of states, whereas dumping is an unfair trade practice of private sector entities.[58] Nevertheless, a government or a public enterprise can behave like a private enterprise in the international market.

The definition of injury and the process of investigation are the same for both agreements. But there are some differences in order to confront the case of dumping, as follows: there is no obligation for consultation before starting the investigation; the

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[57] The first anti-dumping measures were prescribed in Art. VI of GATT 1947, which states "the contracting parties recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry...".
[58] UNCTAD, *Trade Agreements, Petroleum...*op.cit. p.35

importance of the magnitude of the margin of dumping; the individual margin of dumping in the case of each known exporter under investigation will normally have to be determined; and the de minimis limit for the margin of dumping is 2 per cent of the export price, and in terms of volume of the dumped import is 3 per cent of the like product in the importing country.[59]

Within WTO, action for anti-dumping can be taken only by the government and not by individuals; if the former makes that decision it has to approach the Council for Trade in Goods to seek approval for such action. The Member can also approach the Dispute Settlement Body for formation of a panel. In matters relating to anti-dumping, the panel cannot determine if a measure is inconsistent with WTO rules, it can only decide whether the importing country has established the facts properly and evaluated them in an unbiased and objective manner.

This agreement can have an impact on the petroleum products and petrochemical industries. The supply of cheap inputs to these industries has been deemed as a cause of dumping in the markets of other countries. According to Article 2, the provision of those inputs is only considered to fall under dumping if it is strictly directed at production for exports. Among oil-exporting countries, the cheap raw materials are for exports as well as for the domestic market. However, sales to the domestic markets represent less than 5 per cent in exports of the countries concerned. This disproportion influences the perception that the product is initially produced for export.

From the point of view of the Economic and Social Commission for Western Asia (ESCWA), this problem can be solved, at least in the Gulf Cooperation Council (GCC) countries, if domestic consumption is increased by enlarging the domestic market through some form of economic integration.[60] But this condition can only be reached in the long term. In the meantime, the threat of anti-dumping measures against petroleum products and petrochemicals, especially with higher added value, is a real one and should be a matter of concern to oil-exporting countries.

The OPEC Secretariat[61] sees the abuse of anti-dumping provisions as an example of the problems faced in interpreting and implementing trade rules. Since other barriers have been progressively weakened or eliminated, the use of anti-

[59] Lal Das, *An Introduction to the WTO...*, op.cit. p.65.
[60] T.M Al-Khalidi: 'Multilateral Trading System and Energy Related Issues: Implications for Petroleum Trade', p. 32
[61] OPEC Secretariat: *OPEC and the WTO*. op.cit. 1999, p.7

dumping tariffs has increased.[62] Indeed, as tariffs have been reduced for petroleum products and petrochemicals, especially during the Uruguay Round, one can see increasing attempts by industrialised countries to impose anti-dumping duties on the mentioned goods. As an example, we can cite the attempt of the Committee to Save Domestic Oil (SDO), a regional United States group of independent oil producers, to file anti-dumping and countervailing duties complaints against Venezuela, Mexico, Iraq, and Saudi Arabia, claiming that these countries had a policy of undercutting prices in the USA to put American producers out of business.

The SDO based its claim on the US law regarding anti-dumping. Unlike the WTO rules, this law allows the accumulation of margins. Accumulation is the proposition that when dumping and/or subsidisation has occurred in a number of countries that export to the United States, then these various cases can be lumped together for the purpose of evaluating the presence of material injury. It might be that a single country's dumping could not be taken as the cause of material injury to the competing US industry. However, when the dumping of several countries is combined, the dumped product takes a higher percentage of the US market, and it will be much easier to make an affirmative injury determination. As well as subsidies, anti-dumping duties restrict the ability of oil-exporting countries to boost a developing process based on comparative advantages from natural endowment.

4.4. The Agreement on Technical Barriers to Trade (TBT)

Technical regulations for products are taken for reasons of security, health and environment. The wide acceptance of these regulations and standards (non-mandatory) helps to facilitate the utilisation of the products. But these measures can sometimes be used as unreasonable barriers to trade if their levels are higher than necessary, or if they favour products of domestic origin or from a specific foreign origin.

The new Agreement on Technical Barriers to Trade has enlightened and strengthened the provisions of the previous agreement (the first TBT was negotiated during the Tokyo Round). Its goals are the avoidance of unnecessary obstacles to

[62] A report from the WTO shows that for approximately one year (1994–95), nineteen countries initiated 160 anti-dumping actions and had in force accumulated 805 anti-dumping measures. The largest number of initiations (37) was in the EC (treated as one country) and the second largest (30) in the United States. Jackson: *The World Trading System*, op. cit. p.261.

trade, harmonisation, equivalence of technical regulation, mutual recognition of conformity assessment, and transparency.

The Agreement provides mechanisms for mutual recognition of conformity assessment procedures[63] (Art.6) as well as mechanisms for the equivalence of technical regulations (Art.7) to reduce transaction costs and avoid delays. Members should try to accept the technical regulation of other members as equivalent to their own (even if they are different), as long as they fulfil the same objective.

For standards, the TBT has a Code of Good Practice for the Preparation, Adoption and Application of Standards (Annex 3 to the Agreement). The new mechanism requires standardisation bodies to follow principles and rules very similar to those specified for mandatory regulations, as well as to avoid standards causing unnecessary detrimental effects on international trade. The Code is opened for acceptance by the standardising bodies of the members.

The TBT Agreement is very important to petroleum countries due to the complexity of technical regulation and standards in the sector. These rules can affect their competitive position and their access to the main trading partners' markets. A good example is the case of reformulated and conventional gasoline between Venezuela, Brazil and the United States.[64]

The harmonisation of standards and regulation is based on the development of international standards at the multilateral level, and the restriction of unilateral imposition and extraterritorial application of domestic law. However, harmonisation may not always be optimal, especially on environmental and political grounds. The key issue here is the level at which the regulation should be harmonised; a low or a high level could produce different social and economic costs. It has been suggested that harmonisation should take place where differences in technical regulation and standards may cause trade distortion.[65]

Under the TBT Agreement, some technical regulations and standards have to fulfil environmental objectives. In this sense, the Agreement is environment related, and it could be used to apply measures that discriminate against crude oil and petroleum products exports. Additionally, the environmental measures do not have to pass very restrictive tests; these rules do not have to prove that they are effective in

[63] To verify that a product conforms to the technical regulation.
[64] See For details check p. 57-58.
[65] UNCTAD, *Trade Agreements, petroleum...*, op. cit. p.37.

achieving the claimed environmental objective. The agreement does not require the scientific justification for technical regulations. In this case, UNCTAD has pointed out the convenience of environmental measures to be based on the principle of necessity, effectiveness, non-discrimination, transparency and least trade distortion.[66]

4.5. The Agreement on Rules of Origin

The rules of origin determine the country in which a product will be deemed to have originated. Nowadays, the manufacturing process can take place in different countries, making it difficult to determine the origin of a product. This data is very important since some rules of GATT 1994 are applied selectively to the product of a particular country (for example, an anti-dumping duty or the Generalised System of Preferences). Usually, three alternative criteria have been used to determine the origin of a product, namely:

> Change of tariff classification: the criterion of change of classification for determining the origin of a product involves finding out whether the manufacturing or processing done in a particular country changed the tariff classification of the product.
>
> Ad valorem percentage: where the determining factor is whether a certain minimum percentage of value addition was done in a particular country.
>
> Manufacturing or processing criterion: this criterion prescribes the particular operation in the manufacturing processes which will determine the origin.[67]

The final objective of the Agreement on the Rules of Origin is to have a harmonised set of rules to be applied uniformly by all members. These rules should not create restrictive, distorting, or disruptive effects on international trade, should be based on the principle of non- discrimination as between one member and another and on the principle of national treatment. To reach that goal a work programme has been established. The Technical Committee of rules of origin will be the appropriate body to conduct this work.

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[66] T.M.Al-Khalidi, *Multilateral Trading System...*, op. cit. p.28.

Article 9 states that the country to be determined as the origin of particular goods is the country where the good has been wholly obtained, and when more than one country is concerned in the production of the goods, the country where the last substantial transformation has been carried out. The Agreement also states that in those cases where the criterion of Substantial Transformation is not sufficient for the determination of the origin of a product or a group of products, complementary criteria could be used, such as the ad valorem percentages and/or manufacturing or processing operation.[68] For the oil-exporting countries, the criterion of Substantial Transformation can represent a threat to some of their refining products, because some of those countries use refinery located outside the national territory for manufacturing some products, primarily oil and lubricants.

Considering that contracted out refining services (processing contracts) is a common commercial practice of the oil industry, the Venezuelan Delegation to WTO has submitted ideas for discussion[69] based on the combination of two criteria. The substantial transformation defines origin of the products that are the result of a manufacturing process, except when the processor is not the owner of the raw material, but realises the process at the request of the owner. The nationality of the owner must coincide with the national origin of at least 75 per cent of the raw material. In this case, the transformation process is a contracted service (manufacturing by commission or contract), and such a service should not determine or modify the origin of the raw materials, and the manufactured products arise from that same origin.

In general, the services given by the processor, hired in the international market, should have the processor's origin, but in this case, the owner has not sold the inputs to the processor, giving them the right over the manufactured products. The change of origin of some petroleum products will reduce the number of products included in bilateral agreements and regional agreements signed by the oil-exporting countries.

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[67] Lal Das, *An Introduction to...*, op.cit. p.96.

[68] In this criterion, the particular operation in the manufacturing processes, which will determine the origin, is prescribed. See: Lal Das, An Introduction to..., op. cit. p 96.

[69] Document prepared by the Venezuelan Permanent Mission to the UN Organisation and other international organisations accredited in Geneva, October 2000.

4.6. The Agreement on Trade-Related Investment Measures (TRIMs)

The scope of the Agreement on Trade Related Investment Measures is limited to measures applied to the trade of goods.[70] It does not deal with investment policy per se, but only with those measures that are inconsistent with GATT Articles III (National Treatment) and XI (General Elimination of Quantitative Restrictions), and in this way restrict and distort trade. Those TRIMs that have direct trade implications are explicitly mentioned in the Agreement, and they are:

> Related to the National Treatment, such as "local content requirements" or "minimum export requirements": requirement levels for local procurement or restriction in volume or value of import enterprises can purchase or use to an amount related to the level of products it exports.
>
> Related to the Prohibition of quantitative restrictions, such as "trade balancing requirements and export control": restrictions of imports for local production, or tying export requirements to that import level; restrictions on access by companies to foreign exchange.

Besides these restrictions, the Agreement does not forbid the use of other important performance requirements or selective investment incentives, like: transfer of technology, I&D activities, national shareholding participation, or joint ventures. These policy instruments are fundamental for the trade and industrial development in developing countries, and this classification includes the major oil-exporting countries.

The agreement establishing the WTO is itself, in general terms, related to competition since its principal objective is to promote an international competitive environment, but so far there is no set of rules in the WTO for anti-competitive practices. Since anti-competitive provisions are left to national policy and law, no provision has been stipulated against state monopolies or industries reserved to the state in the GATT/WTO system.

The TRIMs Agreement can be considered as an "in built agenda". Article 9 states that no later than five years after the date of entry into force of the WTO Agreement, the Council for Trade in Goods shall review the operation of the TRIMs

[70] Some investment provisions are to be found within other WTO agreements: GATS, TRIPS, Subsidy and Countervailing Duty and the plurilateral agreement on Government Procurement.

Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text.

Even though the WTO is not the natural forum for discussing a Multilateral Agreement on Investment (MAI), there has been pressure to do so, especially with the failed experience of the OECD to negotiate an agreement in this area.[71] The MAI proposal aimed at establishing national treatment and right of establishment as a basic obligation, and it provided rules for movement of key personnel. The proposal also prohibited mandatory performance requirements and sought to limit investment incentives.

So far, only the EU has presented a preliminary proposal for reviewing the TRIMs Agreement. There seem to be two ways of interpretating Article 9. One is related to the improvements of the agreement, the second with the possibility of complementing it with new investment and competition[72] rules.

The United States has shown less interest in this issue because the terms of the Agreement on TRIMs fell far short of what it had hoped. The perception is that the USA has found an alternative mechanism to ensure access to the market through Bilateral Investment Treaties (BIT). While investment regulation at the multilateral level will require a long time for negotiations and enforcement, BITs have been a more effective and shorter way of creating an investment framework. Since the early 1980s, the USA has concluded 45 Bilateral Agreements with developing countries and economies in transition, including oil-exporting countries such as Ecuador, Kazakhstan, and Trinidad and Tobago. The negotiations with Venezuela were suspended because the proposal attempts to limit the policy instruments of the state which receives the foreign investment by reducing the performance requirements. The USA also has experience in investment provision through the North America Free Trade Agreement (NAFTA).[73]

In any case, the developed countries may press for revision of the TRIMs agreement. This review could be aimed at clarifing and developing the rules of the

[71] One of the key problems among OECD members was the reform of the national-security clause. Canada and the EU wanted to establish a "closed list" of circumstances in which a country might justifiably invoke the national-security clause. UNCTAD, *Trade Agreements, Petroleum...*, op.cit. p. 58.

[72] Competition policy was proposed to be included on the agenda of the next round of multilateral negotiations, but it will be very difficult to reach a single multilateral antitrust agreement for developing and developed countries. See Isabella Falautano and Paolo Guerrieri "New Trade Issues, Developing Countries and the future of the WTO", *The International Spectator*, 35, (2), April–June 2000, p.78.

[73] The North America Free Trade Agreement was signed between Canada, Mexico and the United States in 1992, and came in force in 1994.

agreement and strengthening and creating new mechanisms for the implementation and supervision of the agreement (to evaluate the measures adopted by the Members in order to eliminate the inconsistent TRIMs). It could also attempt to widen the scope of the agreement (they will try to increase the list of TRIMs, specially those related to the investment requirements, the transfer of technology and R &D.

Since the TRIMs Agreement covers the supply of goods for local production, it does not allow oil-exporting countries to impose any legal restriction on domestic refineries and petrochemical industries importing crude oil rather than using local crude. It also prohibits restricting by law the purchases of oil companies to the domestic market.

As mentioned before, since the agreement does not provide any regulation for Foreign Direct Investment, consequently it is unlikely to have a direct impact on the oil upstream sector. Nevertheless, the possibility that the Council for Trade might review and widen the agreement could lead to the prohibition of investment incentives and performance requirements, usually used by oil-exporting countries as investment policy instruments in the achievement of trade and industrial development, and the inclusion of some competitive rules.

The OPEC Secretariat considers that the implications of TRIMS are limited. At present, there is no obligation to open up the oil industry to foreign oil companies, giving them access to oil reserves, refineries, or retail markets. If in the coming years developments lead to an extension of the agreements to areas regulating Foreign Direct Investment more directly, then the situation may be different.[74] If future negotiations continue to reduce or eliminate investment incentives and performance requirements, national development policies will be very limited.

While the possibilities of a Multilateral Agreement on Investment within the WTO are cleared up, some investment elements could emerge from other agreements in the WTO system. The General Agreement on Trade in Services contains the national treatment principle for provision of services; since the offer of a service often requires establishment, investment provisions are to some extent covered by the GATS. This agreement also makes some references to monopolies and business practices.

[74] OPEC Secretariat, *OPEC and the WTO...*, op. cit. p.26.

International references for investment regulation

Nowadays, there are two important agreements involving investment measures in oil-producing countries (not OPEC members) that could shape a future Multilateral Agreement on Investment within the WTO. These are the NAFTA and the Energy Charter Treaty (ECT).[75] These agreements are important attempts to create an international investment and trade regime, and they are linked to a chain of previous experiences, such as: a huge number of Bilateral Investment Treaties, the aborted Havana Charter, the stillborn Code of Conduct on Transnational Corporations, the defunct Andean Pact Decision 24 of 1974, the Convention on the Multilateral Investment Guarantee Agency (MIGA) and, more recently the investment and trade provisions in the Uruguay Round agreements.[76]

Both should be in the interest of oil-exporting countries due to the fact that they include the major importing countries (the USA and the EU) and important oil producers (Mexico, Russia and the former Soviet provinces). Besides, NAFTA and the ECT are GATT oriented. GATT provisions are incorporated into these agreements, where they are interpreted sometimes more strictly than under the GATT system.[77]

NAFTA

The Canada-United States Free Trade Agreement (FTA) and then NAFTA were the first example of treaties covering trade as well as investment. Furthermore, NAFTA contains a separate chapter on energy, which introduced certain GATT provisions. This energy chapter narrows in some significant way certain GATT exceptions that have high relevance for oil-exporting countries.[78] Considering the strategic role of its oil sector, Mexico has exempted itself from these stipulations.

The NAFTA investment provisions are based on the four following principles:

- National treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment (Art. 1102).

[75] The Energy Charter Treaty was signed in December 1994 by 41 States and the European Union. Among the signatories were most of the OECD States, including all the EU-Member States, and most countries of eastern and central Europe, including most CIS-States.
[76] For more details see Thomas Wälde, 'International Investment under the 1994 Energy Charter Treaty', op.cit.
[77] UNCTAD: *Trade Agreements, Petroleum...*, op. cit. p. 63.
[78] NAFTA restricts the use of GATT exemptions on Articles XX and XXI.

- Most-favoured-nation treatment for foreign investors. When there is a conflict between the national treatment standard and the MFN standard the better treatment has always to be accorded to NAFTA parties (Art.1103).
- Minimum international standards of fair and equitable treatment to investment (Art. 1105).
- Prohibitions on attaching to investments a broad range of performance requirements[79] and of putting conditions on the receipt of an advantage relating to an investment on certain such requirements (Art. 1106).

This last principle has special importance for oil-exporting countries since performance requirements are instruments for development policies. In most OPEC countries, the oil sector, especially upstream, is reserved to the states. Governments may keep the right to set conditions on private investment to further national developing goals as compensation for opening a crucial sector of their economies.

NAFTA also includes provisions relating to expropriation and compensation and provisions concerning settlement of disputes. The latter allows private companies to sue governments that are NAFTA parties. Conscious of the impact of the NAFTA investment provisions, Mexico decided to exempt its oil sector from those provisions.

Energy Charter Treaty (ECT)

The ECT applies GATT provisions to non-WTO members. In the trade area the aim was to introduce a common GATT-type standard of international trade rules in the energy sector. This was done when most of the countries in transition in eastern and central Europe were (and some still are) outside the GATT and related instruments. The focus of the treaty is energy investment. The ECT established investment regimes for the two phases of investment: the pre-investment regime or "soft law" in the access phase, and the post-investment regime or "hard law" for investments made.

Countries are keen to retain sovereign rights on the terms on which investors are allowed to enter and on the conditions for access. The treaty attempts to regulate this access phase softly. In that sense, parties made a general commitment to "encourage and create stable, equitable, favourable, and transparent conditions for investors of other parties", including a commitment to accord their investment "fair

and equitable treatment".[80] Parties also agreed to "endeavour" to accord treatment no less favourable than for nationals to other countries' investors, and to limit exceptions in order to progressively remove existing restrictions. Despite these provisions, the pre-investment phase could be subject to the possibility of discrimination.

The ECT imposes "hard law" obligation enforceable by international arbitration. Like NAFTA, arbitration is not only between the contracting parties to the treaty, but also between investors and parties directly. Investors are accorded full national treatment and most-favoured-nation treatment. Additionally, expropriation or nationalisation must be for a public purpose, non-discriminatory, subject to due process, and be accompanied by prompt, adequate and effective compensation.

4.7. The Agreement on Trade in Services (GATS)

The objective of the Agreement on Trade in Services is the expansion of trade in services "as a means of promoting the economic growth of all trading partners and the development of developing countries".[81] The GATS has four main bases:

1. A definition of trade in services based on the mode of supply;
2. general obligations and rules, applicable to all service sectors;
3. specific commitments, to be negotiated and included in national schedules of commitments;
4. the concept of progressive liberalisation, to be implemented through negotiation.

According to Article 1, trade in services is defined as the supply of a service: a. from the territory of one member into the territory of any other member (cross border supply); b. in the territory of one member to the service consumer of any other member (movement of the consumer); c. by a service supplier of one member, through commercial presence in the territory of any other member (commercial presence), and, d. by a service supplier of one member, through the presence of natural persons in the territory of any other member (movement of natural persons suppliers).

This agreement provides general obligations to all members in respect of all sectors of services, irrespective of whether or not a Member has undertaken specific

[79] The prohibition includes export and import requirements, levels domestic content, use of domestic goods, transfer of technology other than where required as a remedy for a violation of competition laws, etc.
[80] ECT, Article 10
[81] GATT Secretariat, "The Result of the Uruguay Round of Multilateral Trade Negotiations", p. 327

commitments in that sector. The general obligations are in the areas of: the Most-Favoured-Nation Treatment,[82] transparency, notification, flexibility for developing countries, regional integration, implementation of obligation through domestic legislation, monopolies[83] and business practices,[84] balance of payment provisions, payments and transfers, exceptions, so on.

The specific commitments are negotiated between members about the sectors in which they want to make commitments. The latter have to be included in national schedules of commitments,[85] and they relate to three areas, viz., market access, national treatment and other additional commitments that might be achieved in specific services sectors. A member can prescribe terms, limitations, qualifications and conditions on market access and national treatment in respect of the services mentioned in its schedule (conditioning the access).

If a member has not mentioned a particular sector in its schedule of specific commitments, it will be presumed that it has undertaken no obligation in respect of that sector, thus there is no obligation regarding market access and national treatment, just the general obligations. However, there is a provision for future rounds of negotiation for additional specific commitments.[86] For these negotiations, it has agreed that there must be appropriate flexibility for the individual developing country to open fewer sectors, to liberalise fewer types of transactions and to progressively extend market access in line with its developing situation.

The WTO Members have met some difficulties in looking for an appropriate definition of energy services.[87] There are two major problems: First, the industry has traditionally not distinguished between energy goods and services; second, many relevant services could be used both for energy-related and other purposes. Despite uncertainty about the concept of energy services, it seems to be a common thought

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[82] The agreement provides exemptions for the obligation of Most-Favoured-Nation treatment (paragraph 2 of the Article 2).

[83] Article VIII: Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II (MFN) and specific commitments.

[84] Article IX: Members recognise that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.

[85] Members have generally given their schedules of specific commitments in two parts: commitments extending to all sectors, called horizontal commitments, and commitments in specific sectors, Lal Das, *An Introduction to...*, op.cit. p.108.

[86] Negotiations on Commitments in four areas have taken place after the UR: basic telecommunications (1997); financial services (1997), movement of natural persons (1995); and maritime transport (suspended).

[87] The following services can be regarded as "core" energy services: exploration, drilling, processing and refining, transport, transmission, distribution, etc. Other services include consulting, design and engineering, construction, storage, maintenance of the network, etc., in UNCTAD, *Trade, Agreements, Petroleum* ..., op.cit. p.38.

that the production of energy does not constitute a service subject to GATS, but a product governed by GATT. The transportation and distribution of energy are considered services after the GATS.

The WTO "Services Sectoral Classification List" (Doc. MTN.GNS/W120) does not list energy services as a separate category. A number of specific energy services are covered by the list, but under the respective horizontal categories, such as: transport, distribution, consulting, construction, engineering. Others are listed as a subsector, which is the case of the pipeline transportation of fuels (subsector of Transportation Services), and services incidental to energy distribution and incidental to mining (subsector of Other Business Services).

Thus, WTO Members have been negotiating a specific classification for the energy services.[88] In this regard, the USA[89] and the EU[90] have presented some proposals. Both initiatives attempt to develop a classification of energy services that will, from their point of view, reflect current market realities for the energy sector by including the many different activities that constitute the entire chain of energy services. The US proposal is based on the assumption that governments have privatised and deregulated many of the state-owned enterprises, creating special opportunities for an energy broker or trader, and for the "customer services related to energy".[91]

During the last formal meeting of the Committee for Specific Commitments, the Venezuelan delegation to the WTO presented some preliminary comments about the EU and US proposals.[92] First, they noted that both proposals are divided only into activities and not by sources of energy. The energy sector includes different subsectors with specific technical requirements, environmental impact and product valuation. From a strategic point of view, all subsectors do not have the same

[88] At this moment, the discussion on energy services is focused on their classification; no new commitments on market access or national treatment have been considered.

[89] The energy activities may be divided into the five categories: activities related to the development and redevelopment of the energy resources; activities related to the operation of energy facilities; activities related to energy networks; activities related to wholesale markets in energy; activities related to the retail supply of energy, in WTO, "Committee on Specific Commitments: Communication from the United States, Classification of Energy Services", pp.1, 2

[90] The EU presented the following list: services related to prospecting and drilling; services related to energy storage; services related to refining; services related to networks; services related to contract drilling, services related to energy supply; services related to final use; and services related to deactivation, in WTO, "Committee on Specific Commitments: Communication from the EU, List of Energy Services", p 2.

[91] WTO, "Committee on Specific Commitments: Communication from the United States, Classification of Energy Services", p.4.

[92] Statement of the Venezuelan Delegation to the formal meeting of the WTO Specific Commitments Committee, 4/10/00.

relevance for an oil-exporting country. A classification by type of energy source will give more flexibility to the Members (oil-exporting countries), in the sense that they will be able to get a specific commitment in those subsectors that are not considered highly relevant for their economy. Moreover, it was mentioned that the proposals could not include any considerations relating to energy goods (oil, oil products, gas and electricity) because those are governed by GATT's rules.

Finally, the delegation stressed that in most oil-exporting countries, the state still acts as the regulating entity as well as an operator with a vertically integrated company, performing all the activities of the production and distribution chain. In these countries the oil sector has a strategic role within the national economy.

There is a consensus between the WTO Members about the relevance of a multilateral classification for energy services. This is a pre-condition to the launch of a new round of negotiations for new specific commitments in the energy sector. The present commitments among oil-exporting countries are very limited, with Venezuela[93] and Kuwait having a relatively high level of commitment.

The impact of the liberalisation of energy services on the oil-exporting countries that have acquired an expertise in this field and have developed an export capacity depends on how their respective governments address this matter. If the sector is liberalised with no conditioning, international competition could destroy domestic companies. But, if in the process of liberalisation certain preconditions are required, the benefits of trade liberalisation may be realised. Effective regulatory framework and the setting of performance requirements[94] to access the domestic market, as a mechanism to boost joint ventures, technology transfer and I&D activities, might reinforce the international competitiveness of domestic companies.

In the previous section we commented on investment elements emerging from the General Agreement on Trade in Services. It was argued that the offer of a service often requires establishment in the country where such service is to be provided; thus, investment provisions are to some extent covered by the GATS. Following attempts to define and to classify energy services including activities from the entire chain of the oil sector, it seems reasonable to think that some investment activities in the oil sector, especially upstream, could take place disguised as a service. An example of

[93] Venezuela has guaranteed market access and national treatment to a range of services related to engineering, architecture, consultancy, etc., under certain conditions and limitations established by the national regulations.
[94] These measures are contained in articles IV (increasing participation of developing countries) and XIX (negotiation of specific commitments)

this can be found in Venezuela under the *apertura*, where some service contracts were in reality about real investment, but avoided investment requirements under the national investment law.

4.8. The WTO Committee on Trade and Environment (CTE)

There was no direct reference to the environment in GATT 1947 since there were no concerns about it at that time. Nevertheless, some special measures established by Article XX (paragraphs b and g) for the protection of human, animal, or plant life or health, and the conservation of exhaustible resources were reinterpreted to fill that gap. Likewise, the Agreement allows members to implement policies to protect the environment, as long as those measures (taxes, standards or other regulations) do not discriminate between domestic and imported goods, and they are applied equally to all contracting partners.

Given the relevance of environmental issues in recent times, and the impact on trade, the Marrakesh Agreement on the WTO includes a Ministerial Decision on Trade and Environment. The main purpose of this decision is to ensure that environmental policies and measures do not become protectionist devices. With this in mind, the WTO General Council established a special Committee on Trade and Environment, which is given two specific functions: to identify the relationship between trade and environmental measures in order to promote sustainable development and, to make recommendations on whether any modifications to the multilateral trading system are required.[95]

In addition, to examine and report, with recommendations, on the relationship between trade services and the environment, including the issue of sustainable development.[96] Some subjects of the CTE's work[97] were identified as relevant for the oil-exporting countries:[98]

- The relationship between the Multilateral Trading System (MTS) and Multilateral Environment Agreements (MEAs): the CTE suggests that disputes between WTO Members which are parties to the MEAs may be resolved under these latter agreements. It makes a distinction between trade

[95] GATT Secretariat, '*The Results of the Uruguay Round...*', op.cit. pp. 470.
[96] Ministerial Decision on Trade in Services and the Environment.
[97] The report of the Committee on Trade and Environment was presented and adopted at the Ministerial Conference held in Singapore in 1996.
[98] UNCTAD, *Trade Agreements, Petroleum...*, op.cit.,p 51.

measures specifically mandated by an MEA and those that are not, but it also notes that the WTO has some provisions that permit the use of trade-related measures in pursuit of environmental targets.

- Eco-labelling: the energy criteria for eco-labelling usually refers to the energy inputs required to manufacture a product, the amount of energy needed to use a product and to energy consumption during the production process. The use of such criteria may result in discrimination against some sources of energy, such as fossil fuels.
- Market access: it has been discussed that the removal of trade restrictions and distortion (high tariffs, export restrictions, subsidies and non-tariff measures) could benefit the trading system and the environment. Such assumptions could have an impact on petroleum exports.
- The relationship between the MTS, taxes and charges for environmental purposes: WTO allows border tax adjustment, since it is levied on imported products at the same rate as on like domestic products. However, the concepts of "like" and "competing" products are not clear, and a higher tax level can be applied to the latter. Regarding taxes on inputs, WTO rules allow the adjustment of a specific tax if the taxed input is physically incorporated in the product in question (e.g. carbon content of fuels). But taxes on non-incorporated inputs (e.g. carbon-dioxide emissions during production), as well as taxes on production processes, are not generally accepted.

The OPEC Secretariat[99] also agrees that some points of the Agenda of the CTE are of direct interest to oil producers. Regarding the relationship between the MTS and trade measures for environmental purposes, including those pursuant to MEAs, the Organisation is concerned with the hierarchy of MEAs and WTO law, and the precedence of trade rules over environmental rules or vice versa. In the first case, it would be necessary to amend Article XX (b) to cover measures to protect the environment. But that would be an admission that the WTO is an environmental organisation, and could open the door for protectionist measures in the name of the

[99] OPEC Secretariat, *OPEC & the WTO*..., op. cit. pp.20–22

environment. The second alternative implies the possibility of resorting to WTO waivers on a case-by-case basis.

The relationship between environmental policies with significant trade effects and the provision of the multilateral trading system is a point of attention for OPEC. It is helpful to know the consequences of the Kyoto Protocol with respect to trade in emission permits, and how this could affect oil demand. Questions remain about the regulation of trade in emissions (would it be considered as a product or as a service trade?), and the treatment of non-participants in terms of reconciling market access obligations.

On the issue of border tax adjustment (BTA), it appears that present regulation considers energy as physically incorporated into a product, "energy, fuels and oil to be treated as inputs in the production of exported products",[100] therefore it can be liable for BTA. This makes it easier for a country to impose energy taxes without losing competitiveness, since these taxes can be removed from exports. In the opinion of OPEC this will reduce the concerns of consuming countries about loss of international competitiveness, thus encouraging them to proceed unilaterally to impose environmental taxes.

At the meeting of the CTE on 13–14 February 2001,[101] participation was particularly active with several proposals and papers submitted by members and the Secretariat on a broad range of issues. The focal point was on market access issues, specifically market access implications of environmental measures and the "win-win-win" potential for trade, environment and development arising from trade liberalisation in the fisheries, energy, agriculture, and non-ferrous metals sectors.

The EU submitted a new paper on environmentally harmful and trade distorting measures and policies in the energy sector (WT/CTE/W/185). It noted that the market failures in the energy area affect the use of best available and environmentally sound technology. Removing energy subsidies had the potential to result in "win-win-win" outcomes. Following the EU's request, it was agreed that the Secretariat would prepare a background paper on this sector.

Several members made reference to the increasing tendency for environmental measures to be based on life-cycle analysis and production and processing methods

[100] Annex II of the Agreement on Subsidies and Countervailing Measures.
[101] Environment: Trade and Environment News Bulletins Te/035 — 20 February 2001 at WTO website (www.wto.org).

that were not necessarily degradation and poverty. Norway, the EU and others recognised that certain measures may have a negative impact on the exports of developing countries, even if these measures were taken to address genuine environmental concerns.

There is no doubt that the relation between trade and the environment is one of the most controversial and important challenges that the MTS has to face. Despite the prevailing consensus about the protection of the environment, it is well known that environmental measures have been used for protectionist ends, with negative consequences for developing countries, particularly oil-exporting countries.

The ability of the WTO to make its structure either more flexible or rigid in response to pressures from the MEAs will, in a certain way, depend on how developing countries define their interests and build up a negotiating capacity. We believe that environmental policies do not fall within the WTO's competence and they should be discussed in another forum. WTO should only deal with environmental issues when they represent an obstacle to trade, staying uninvolved in any promotion or confrontation relating to this matter. Nevertheless, the WTO is wrestling with a high level of pressure from governments and from organised groups, which attempt to raise the organisation's awareness of the environment problem, and its connection with economic activities. This scenario could lead the WTO to more environmental related activities.

4.9. Dispute Settlement Understanding (DSU)

In the context of GATT-WTO, three cases involving petroleum products were raised at the Dispute Settlement Body. All involved environmental components and national treatment obligation. The European Community-United States automobile taxation case[102] and the Mexican-United States Superfund case[103] were brought under GATT 1947, and the Venezuelan-United States standards for reformulated and conventional gasoline was brought under the WTO.

The case of standards and reformulated gasoline has been considered one of the first challenges to the Dispute Settlement Body to show that it can be operated as a neutral mechanism to settle commercial disputes. In January 1995, Venezuela

[102] The report of the Panel for this case was not formally presented to the GATT Council for adoption (Document DS31/R, 11/10/94).
[103] Report of the Panel adopted on 17 June 1987. (Documents L/6175 - 34S/136).

complained to the Dispute Settlement Body that the United States was applying rules that discriminated against gasoline imports, and formally requested consultation with the United States. In fact, the USA Environmental Protection Agency (EPA), in an attempt to implement certain provisions of the Clear Air Act, adopted a final rule entitled "Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline". It stated that, from 1995 to 1998, only gasoline of a specified cleanliness be sold in areas of high air pollution, and that gasoline sold in the rest of the USA must cause no greater air pollution than gasoline sold in 1990.

The regulation stipulated stricter rules on the chemical characteristics of imported gasoline than it did for domestically refined gasoline. Those chemical characteristics had to be in conformity, on an annual average basis, with defined levels, fixed by the gasoline rule, or by "non-degradation requirements". Under the latter, a domestic refiner could use, as an annual average basis, its individual baseline, which was the annual average achieved by the refiner in 1990. Three methods[104] were provided for the establishment of the baseline, and all of them allowed the refiner to use its own references.

Importers could only use Method 1 for their individual baseline. If they were not able to have that data, they had to use a statutory baseline derived from the average characteristics of all gasoline consumed in the USA in 1990, including the highest quality reformulated gasoline sold in California. The complaints of Venezuela (and later Brazil) were based on the violation of Article III (National Treatment), Articles 2.1, 2.2[105] of the Agreement on Technical Barriers, and on the nullification of GATT benefits under Article XXIII:1(b).[106]

The Dispute panel agreed with Venezuela and Brazil. The Panel decided that imported and domestic gasoline were like products, and under the differing baseline methods, imported gasoline was accorded less favourable treatment than domestic

[104] Method 1: Refiners had to show evidence of the qualities of gasoline produced in 1990; Method 2: They had to use data on the quality of blendstock produced in 1990; and Method 3: The data on quality of post 1990 gasoline blendstock or gasoline.

[105] Art. 2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country. Art. 2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

[106] If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of... (*b*) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement (...)

gasoline, in violation of Article III. Regarding the exceptions on Article XX, appealed by the USA, the Panel observed that WTO Members were autonomous in determining their own environmental objectives (including the protection of human health and the conservation of exhaustible natural resources), but they had to respect the rules of GATT, specially with respect to the relative treatment of domestic and imported products. In February 1996 the USA submitted an appeal to the Appellate Body of the WTO. The appeal report upheld the panel's conclusions, making some changes to the panel's legal interpretation. The USA agreed and amended its regulation.

In the opinion of UNCTAD, the interpretation of Article XX (g) by the Report of the Panel is very important to oil-exporting countries. In order to apply Article XX (g), restrictions on imported products had to be consistent with restrictions on domestic ones, but they did not require identical treatment to domestic and imported products. Verification that the "protective" measures had effectively contributed to the conservation of exhaustible natural resources was not requested.

5. CONCLUSIONS

The WTO has arguably become one of the most important multilateral organisations in the world economy. The improvement of a structure of governing rules that establishes rights and duties allows the WTO to boost economic performance. The new organisation has a broader and more complex mandate than its predecessor, although this structure evolved out of the GATT. Despite its provisional nature and a meagre treaty text, the GATT was capable of creating, by its accumulated experience, a Multilateral Trade System. This evolutionary process is likely to continue within the WTO. Indeed, many Uruguay Round agreements have provisions for further negotiation of rules concerning subsidies, services, investment and competition policies.

GATT/WTO System and the Oil-exporting Countries

OPEC members were not involved in the development of the Multilateral Trade System. For a long time it was believed that oil was excluded from the GATT system, but there is no explicit provision in either GATT and/or WTO agreements that excludes oil and petroleum products from their rules. Indeed, even if oil was not directly addressed during GATT rounds, many matters concerning it were discussed and negotiated indirectly. They were related to natural resource performances, specifically, "dual pricing" practices, export restrictions, subsidies, anti-dumping measures, and so on. OPEC Members were not involved in these negotiations, thus they were not able to influence the outcome. These countries remained isolated for nearly fifty years from negotiations in the GATT/WTO system.

Nevertheless, other oil-exporting countries such as Mexico joined GATT and took part in the negotiations. Indeed, that country became a GATT contracting party in 1986. When it negotiated its accession some aspects of crude oil export policy came to the fore; Mexico included in its Protocol of Accession a special provision related to its oil sector (conservation of natural resources). Furthermore, Mexico had an important role in the negotiations on pricing policies for natural resources during the Uruguay Round. It succeeded in influencing the outcome of that process by modifying the Chairman's final draft.

For future negotiations, OPEC Members have the opportunity to actively participate. The fact that more OPEC countries are becoming WTO Members and that OPEC itself is negotiating observer status will help these countries to coordinate their

views and interests in future negotiations. Nevertheless, accession has become tough: the accession process requires more far-reaching economic, political and legal changes than before.

With the widening of the scope of the WTO in terms of new subjects and mandatory levels, it is reasonable to expect that its legal framework would have an increasing capacity to influence international economic relationships between members and non-members.

Implications

Considering that oil-exporting countries are developing economies based on one natural resource, the main impact of the WTO on these countries is focused on the sovereign right over natural resources and comparative advantages. These countries may be limited in the use of general comparative advantage of natural resources for their development, and they must face the fact that their traditional policies may have to be revised and adapted to the new system. From this perspective, oil-exporting countries might have to reconcile the pressure and promotion of open and deregulated markets at the multilateral level with their development goal.

Since oil is the main source of fiscal revenues for oil-exporting countries, any attempt to reduce the value of their natural resources may have a significant negative impact on their economy and political system. The OPEC policy of setting production quotas has been considered by many as a quantitative restriction on trade, and thus contrary to a GATT principle. It is important to stress that OPEC quotas limit the level of production of its members, and not the level of exports. Additionally, GATT provides exceptions to this rule; the most important is the one found in Article XX (g), relating to the conservation of exhaustible natural resources.

Nevertheless, the ability of oil-exporting countries to use their natural resources to promote industrialisation has several limitations in WTO agreements. Regulations on subsidies and anti-dumping have constrained the policies aimed at the development process. These agreements still have provisions that allow energy inputs to be supplied at lower prices than in the international market, but they are subject to conditions related to features of the economy that have become harder to establish. Subsidies granted in the process of development and industrialisation tend to be prohibited by the GATT/WTO system.

On this particular issue, there are two different approaches. On one side, oil-exporting countries consider that energy inputs supplied at lower prices than in the international market are a non-actionable subsidy (permissible subsidy), since those inputs are available through the economy, and they are not specific to export production. They believe that comparative advantage may be used to foster the development process. On the other hand, most of the developed countries argue that cheap energy is a subsidy that distorts trade, and affects the conditions of normal competition. This is the approach prevailing among WTO members. Acceding countries would have to deal with the requirement to eliminate feedstock discount, and enhance competition for the domestic products in both domestic and international markets, or be faced by the threats of countervailing duties and anti-dumping measures.

GATT/WTO system has special provisions for developing countries that grant a transitory period of eight years for export subsidies to take effect. It has been argued that these countries may have sufficient time to keep these subsidies and give a chance to their industries to establish themselves in international markets.

Industrialisation policies also have to face the agreement on Trade-Related Investment Measures. This text deals with those investment measures that are inconsistent with GATT Articles III (National Treatment) and XI (General Elimination of Quantitative Restrictions). This means that oil-exporting countries cannot condition, by law, oil companies' purchases to the domestic market in order to promote the development of local suppliers to the oil industry.

Future Negotiations

For future WTO negotiations, there are two types of issues over which OPEC countries need to coordinate their views and interests in order to increase their bargaining power. These issues relate, firstly to oil trade distortions, such as taxation and environmental measures among consuming countries, and secondly, to provisions for further negotiation of rules concerning services, investment and competition policy.

Up to now, neither customs duties on crude oil nor trade policy per se have represented a barrier to international oil trade. The attempts to reduce the flow of oil have emerged from fiscal, environmental and energy policies. The trade of petroleum products is facing the issue of high domestic taxes in the big consuming countries.

Oil-exporting countries have regarded these excise taxes as an instrument for controlling consumption and for undermining their ability to derive income from their own natural resources. As these taxes are applied in a non-discriminatory fashion to imports and domestic production, they are not inconsistent with GATT obligations. This does not mean that negotiations may not happen. The key element here is that both taxation and the conservation of exhaustible natural resources are considered to be a sovereign issue.

One of the big challenges for oil-exporting countries is to ascertain that environmental policies and measures do not become protectionist devices. There is no doubt that the relation between trade and the environment is one of the most controversial and important challenges that the Multilateral Trade System has to face. Despite the prevailing consensus about protection of the environment, it is well known that environmental measures have been used to protectionist ends, with negative consequences for developing countries, particularly oil-exporting (fossil fuel) countries.

In this area, oil-exporting countries have to face the issue of environmental measures at both national and multilateral level. Probably, the most serious environmental measures for oil-exporting countries come from the UN Framework Convention on Climate Change. Given the importance of the environment today, one can assume that this issue will continue to be a sensitive one for oil trade. Oil-exporting countries, therefore, will need a forum in which to tackle the issue of protectionist devices. The ability of the WTO to make its structure more flexible or rigid in response to the pressures from the environment lobbies will, in a certain way, depend on how developing countries manage to get together and build up a negotiating capacity.

Regarding items on the WTO future agenda, oil-exporting countries should be particularly concerned about new investment provisions. The upstream is the segment of the oil chain that deals directly with extraction of the natural resource, and it is the sector that produces the big revenues. Throughout OPEC history the sovereignty of oil-exporting countries over natural resources, particularly over investment, has been a major issue. So far, the agreement on TRIMs does not have any provision on investment policy per se, but the agreement, as well as several WTO agreements, stipulates further negotiations on this subject.

Recent international agreements that cover trade as well as investment –

such as NAFTA and ECT – have interpreted GATT provisions sometimes more strictly than under the GATT system. Thus one can expect that future negotiations at the WTO might strengthen the investment provisions. One possible consequence would be the prohibition of investment incentives and performance requirements, commonly used by oil-exporting countries as investment policy instruments for trade and industrial development. Moreover, these agreements have incorporated international arbitration between contracting parties but also between investors and parties directly.

Negotiations on services will also need special attention from oil-exporting countries. The close interconnection between services and investment could allow for some investment elements to pass as a service. The General Agreement on Trade in Services contains the national treatment principle for provision of services; since the offer of a service often requires establishment, investment provisions are to some extent covered by the GATS.

Advantages and Disadvantages

To join the WTO has a cost. As we have seen throughout this paper, accession has become a tough process in terms of the required institutional and economic changes and adjustments.

WTO agreements do have an impact on oil. Up to now, it is clear that those agreements can limit the capacity of the developing countries to boost industrialisation by using their comparative advantage. States can find that the use of the following instruments may be reduced:

- Cheap energy inputs
- Conditioning of oil companies' purchases to the domestic market
- Conditioning of government's purchases to the domestic market (for those who voluntarily decided to sign the plurilateral agreement on government procurements)

The disadvantages of joining the WTO may have to be weighed against the cost of isolation. We consider that the cost of remaining outside the GATT/WTO Multilateral System is important, since decisions taken in that framework will in any case affect non-members. The manoeuvring ability of outsiders has been strongly reduced in our interconnected and globalised world. The question here is whether one should incur the

costs of joining the WTO, trying to avail ourselves of the benefits that come with membership, or stay outside "the club" and bear different costs. In that case oil countries would have no input in WTO decisions, but the decisions would be applied to them.

Possible advantages of membership could be:

- To influence the outcome of new rounds of negotiations. Considering that new negotiations may involve investment provisions, it is extremely important for these countries to be in.
- To tackle oil trade distortions, such as taxation and environmental measures. Some have suggested the case of other mechanisms to negotiate and to dialogue on these issues, such as the producer-consumer forum.[107] This might be the case, but an effective producer-consumer forum does not really exist and it is too early to evaluate its future potential.
- Access to Dispute Resolving Mechanisms. This can be an option for use when there is discrimination against oil. In the past, the Dispute Settlement Mechanism has been used by Venezuela and Brazil (reformulated gasoline) with satisfactory results.
- WTO does not act by itself. The aggrieved Member has to bring the case to the relevant body. This procedure gives more flexibility to members.
- The multilateral level provides the best forum for negotiations to less powerful countries. The terms obtained through bilateral agreements can be harder than those in multilateral agreements.

It is important to emphasise that these advantages can only be achieved if oil-exporting countries coordinate their approach to negotiations, perhaps by creating groups and alliances within the WTO, in order to increase their bargaining power.

[107] Al-Moneef, op.cit. p.9.

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OXFORD INSTITUTE FOR ENERGY STUDIES
57 WOODSTOCK ROAD, OXFORD OX2 6FA ENGLAND
TELEPHONE (01865) 311377
FAX (01865) 310527
E-mail: publications@oxfordenergy.org
http://www.oxfordenergy.org