

Are OPEC's Production Quotas Challengeable under GATT Article XI:1?

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Abbreviations

DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECT	Energy Charter Treaty
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade 1994
GATT 1947	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ITO	International Trade Organization
MFN	Most-Favoured Nation
NAFTA	North American Free Trade Agreement
OPEC	Organization of Oil Exporting Countries
PSNR	Permanent Sovereignty over Natural Resources
TPRM	Trade Policy Review Mechanism
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 Introduction

1.1 Background of the Research

Organization of Oil Exporting Countries (OPEC) regulates oil production by setting a production quota on the amount of oil a member country can produce within a certain period of time. OPEC has thus formed a very efficient cartel of producers where it regulates the amount of oil each member country can extract from the ground and this way controls oil prices and the profits made by oil exporters.¹ Since international rules on competition, which could be used to challenge OPEC's practices, do not exist, the question is could the rules of the World Trade Organization have any impact on the regulation of the production of oil.

This paper researches the applicability of the General Agreement on Tariffs and Trade 1994 (GATT) Article XI² to OPEC's production quotas, since it is the best and most probable cause for a challenge against OPEC member countries. OPEC is not a member of the WTO, but seven of its twelve member countries are: Kingdom of Saudi Arabia, Venezuela, Qatar, United Arab Emirates, Nigeria, Ecuador, and Angola. OPEC as an organization or its member countries who are not members of the WTO cannot be brought before the WTO Dispute Settlement Body (DSB). In this paper when referring to 'OPEC member countries' or simply 'OPEC' I only refer to those countries who are members of the WTO as well. If OPEC's measures were found to be inconsistent with GATT it could have serious implications on the price of oil, the exploitation of the oil resources and possibly retaliation from the oil exporting countries.

There is controversy whether production management is inconsistent with Article XI:1 of GATT. Article XI:1 regulates the general elimination of quantitative restrictions. The Article provides that prohibitions or restrictions whether made effective through quotas, import or export licenses or other measures on the exportation or sale for export of any product destined for the territory of any other contracting party are prohibited. In order for a measure to be in the purview of Article XI:1, it needs to be maintained *on the exportation of a*

¹ OPEC has stated this goal openly in its Statute, 15-20 January, Caracas, entry into force 1 October 1961, 4 ILM 1175 (1965 revision), Art. 2(c).

² General Agreement on Tariffs and Trade 1994, Agreement Establishing the World Trade Organization, Annex 1A, 15 April 1994, Marrakesh, entry into force 1 January 1995, Treaty Series 4/1995 (GATT), Art. XI. In this paper GATT 1994 will be referred to simply as the GATT and the agreement before the establishment of the WTO is referred to as GATT 1947.

product. It is unsure whether OPEC's measures are covered in Article XI:1, since the measures are maintained on the *production* of a *natural resource*.

If natural resources can be traded, they are covered by GATT.³ The GATT and the WTO dispute settlement systems have dealt with several disputes concerned with natural resources.⁴ WTO and GATT rules apply also to energy products including oil.⁵ Oil has thus never been excluded from the ambit of GATT 1947 or GATT but also never explicitly included in the coverage of the Agreements. The United States tried during the Tokyo Round to include oil in its natural form into the GATT 1947 system. The idea was most likely sparked by the oil embargo against the United States by some OPEC countries during the 1970s. The proposition faced opposition especially from developing countries and was never taken into serious consideration.⁶

It is unclear to what extent GATT can regulate government measures directed towards natural resources in their natural state, when they are yet to be 'produced' into tradable goods. There have been very few WTO cases which deal with oil, none of which oil in its natural

³ World Trade Organization, *World Trade Report 2010 Trade in Natural Resources* (2010), available at http://www.wto.org/english/res_e/publications_e/wtr10_e.htm (visited 9 April 2013), at 164.

⁴ See for instance *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body report circulated 12 October 1998, adopted 6 November 1998, WT/DS58/AB/R (*US – Shrimp*); *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Appellate Body report circulated 16 May 2012, adopted 13 June 2012, WT/DS381/AB/R (*US – Tuna II (Mexico)*); *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, Appellate Body report circulated 16 July 2008, adopted 1 August 2008, WT/DS345/AB/R (*US – Customs Bond Directive*); *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, panel report circulated 16 November 2007, adopted 8 January 2008, WT/DS337/R (*EC – Salmon (Norway)*); *Japan – Import Quotas on Dried Laver and Seasoned Laver*, panel report circulated 1 February 2006, not adopted, WT/DS323/R (*Japan – Quotas on Laver*); *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, panel report circulated 22 March 2004, adopted 24 April 2004, WT/DS277/R (*US – Softwood Lumber VI*); *United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body report circulated 11 August 2004, adopted 31 August 2004, WT/DS264/AB/R (*US – Softwood Lumber V*); *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, panel report circulated 29 August 2003, adopted 17 February 2004, WT/DS257/R, Appellate Body report circulated 19 January 2004, adopted 17 February 2004, WT/DS257/AB/R (*US – Softwood Lumber IV*); *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Appellate Body report circulated 7 April 2004, adopted 20 April 2004, WT/DS246/AB/R (*EC – Tariff Preferences*); *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, panel report circulated 27 September 2002, adopted 1 November 2002, WT/DS236/R (*US – Softwood Lumber III*); *European Communities – Trade Description of Sardines*, panel report circulated 26 September 2002, adopted 23 October 2002, WT/DS231/R (*EC – Sardines*).

⁵ Cases related to energy resources within the WTO dispute settlement system are *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, panel report circulated 19 December 2012, not adopted, WT/DS412/R (*Canada – Renewable Energy*); *China – Measures Concerning Wind Power Equipment*, request for consultations 22 December 2010, WT/DS419/R; *Canada – Measures Relating to the Feed-in Tariff Program*, panel report circulated 19 December 2012, not adopted, WT/DS426/R (*Canada – Feed-in Tariff Program*); *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, Appellate Body report circulated 11 March 2011, adopted 25 March 2011, WT/DS379/AB/R (*US – Anti-Dumping and Countervailing Duties (China)*).

⁶ Abdallah, Hussein, 'Oil Exports under GATT and the WTO' (2005) 29:4 *OPEC Review*, 267-294, at 273.

state. Cases dealing with oil in a processed form are *United States – Taxes on Petroleum and Certain Imported Substances*⁷ and *US – Gasoline*⁸. It is curious that despite the great volumes of international trade with oil, there have been only two cases dealing with oil within the GATT/WTO dispute settlement system. In addition it should be noted that in both cases the complainant was a country exporting oil and the restrictive measures of an oil importing country were under evaluation. The lack of cases may be proof of the special nature of oil in the world market and the reluctance of countries to pursue cases related to oil imports or exports.⁹

Perhaps because oil exporting countries were not signatories of the GATT 1947, the rules are inadequate when it comes to the regulation of trade in energy products.¹⁰ Selivanova identifies the following areas that the WTO rules have difficulties dealing with: security of supply, public service obligations, existence of quantitative restrictions, requirements of trade in energy services, and environmental implications of different forms of energy.¹¹ Even though the position of oil in its natural state within the WTO system is not clear since there is no case law or direct regulations on it, it is clear that WTO rules apply to energy products, including oil.¹² The problematic aspect of oil and the WTO system is the fact that oil in its natural state may not be regarded as a ‘product’ and also the principle of permanent sovereignty over natural resources may place some limitations as to how the WTO can regulate its use.

Thus far OPEC has maintained the production quotas without regard to the GATT regulation on the prohibition of quantitative restrictions. Also none of the members of the WTO have challenged OPEC’s measures within WTO system.¹³ The issue is however important

⁷ *United States – Taxes on Petroleum and Certain Imported Substances*, panel report adopted 17 June 1987, BISD 34S/136.

⁸ *United States – Standards for Reformulated and Conventional Gasoline*, panel report circulated 20 May 1996, adopted 20 May 1996, WT/DS2/R, Appellate Body report circulated 29 April 1996, adopted 20 May 1996, WT/DS2/AB/R (*US – Gasoline*).

⁹ UNCTAD, *Trade Agreements, Petroleum and Energy Policies* (New York and Geneva, 2000), at 1-2; Selivanova, Yulia, *The WTO and energy, WTO Rules and Agreements of Relevance to the Energy Sector* (Geneva: International Centre for Trade and Sustainable Development (ICTSD), 2007), at vii.

¹⁰ Sakmar, Susan, ‘Bringing Energy Trade into the WTO: The Historical Context, Current Status, and Potential Implications for the Middle East Region’ (2008) 18:1 *Indiana International & Comparative Law Review*, 89-112, at 90.

¹¹ Selivanova, *supra* note 9, at v.

¹² Selivanova, *supra* note 9, at vii.

¹³ Senator Frank R. Lautenberg introduced 1 May 2008 legislation in the U.S. Senate, OPEC Accountability Act, S. 752, 110th Cong., (2007-2009), to compel the President to challenge OPEC’s practice of setting production quotas within the WTO system. The bill was not enacted. Senator Lautenberg’s office also published a report *Busting Up The Cartel: The WTO Case Against OPEC* available at <http://www.lautenberg.senate.gov/documents/foreign/OPEC%20Memo.pdf> (visited 9 April 2013).

since it raises several questions such as the relationship between GATT and the regulation of production and natural resources. The question also directs attention to problems such as the lack of competition rules within the WTO, the sometimes problematic relationship between trade law and environmental law and politics within the WTO.

Researchers are split on the question whether Article XI:1 applies to production quotas and there seems to be no consensus on the matter. Different arguments have been presented for and against a breach of WTO obligations by OPEC member countries.¹⁴ In this paper I deal with the arguments presented by researchers in previous papers and conduct a more in depth analysis of the interpretation of the terms used in Article XI:1 and evaluate the significance of the principle of permanent sovereignty over natural resources (PSNR).

1.2 Research Questions, Scope and Structure

The main research question of this paper is whether GATT Article XI:1 is applicable to OPEC's production regulation measures. If OPEC's measures did fall within the purview of GATT Article XI:1, OPEC member countries that are also members of the WTO could be deemed to be in inconsistent with GATT Article XI:1, if such a case would be brought before a panel. In order to answer the research question, a number of issues about the interpretation of Article XI:1 needs to be clarified. One broad question is, does GATT regulate limitations set by its member countries on the production of a good, or are measures, such as production quotas, outside the coverage of GATT. Another question relating to the interpretation of the Article is the coverage of the term 'product' used in Article XI:1 and can it cover oil in its natural state.

My goals are to make an analysis of the conditions set in Article XI:1, and also research how the principle of permanent sovereignty over natural resources affects the question. In

¹⁴ Articles commented in this paper are Abdallah, *supra* note 6; Broome, Stephen A, 'Conflicting Obligations for Oil Exporting Nations: Satisfying Membership Requirements of Both OPEC and the WTO' (2006) 38:2 *George Washington International Law Review*, 409-436; Desta, Melaku, 'The Organization of Petroleum Exporting Countries, the World Trade Organization and Regional Trade Agreements' (2003) 37 *Journal of World Trade*, 523-552; Desta, Melaku, 'The GATT / WTO System and International Trade in Petroleum: An Overview' (2003) 21:4 *Journal of Energy and Natural Resources Law*, 384-398; Desta, Melaku, 'OPEC Production Management Practices under WTO Law and the Antitrust Law of Non-OPEC Countries' (2010) 28:4 *Journal of Energy and Natural Resources Law*, 439-464; Carey, Tim, 'Cartel Price Controls vs. Free Trade: A Study of Proposals to Challenge OPEC's influence in the oil market through WTO Dispute Settlement' (2009) 24:4 *American University International Law Review*, 783-810; Malkawi, Bashar H., 'Disciplining the Oil Cartel: Limits of the WTO in a Case against the Organization of Petroleum Exporting Countries' (2009) 20:6 *European Business Law Review*, 931-948; Worika, Ibibia L., 'Production, Management, OPEC and the WTO', in Pauwelyn, Joost (ed.): *Global Challenges at the Intersection of Trade, Energy and the Environment* (Geneva: Centre for Trade and Economic Integration, 2010), at 87-93, available at <http://www.cepr.org/press/CTEI-CEPR.pdf> (visited 9 April 2013).

the research I take into account the arguments that can be made to argue that production quotas *are* or *are not* covered in Article XI:1. The goal is to determine the purview of Article XI:1 and its applicability to OPEC's production quotas by defining what is meant in the in Article XI:1 by 'measures maintained on the exportation or sale for export of any product destined for the territory of any other contracting party'. The interpretation is divided into two sections: firstly what is meant in Article XI:1 by a restriction maintained on the exportation, and secondly what is a product in terms of Article XI:1.

In Chapters 2 and 3, I give an overview of the WTO and OPEC as organizations and present GATT, in particular Article XI:1. In chapter 4, I research the interpretation of Article XI:1 through the regulations of the Vienna Convention on the Law of Treaties (VCLT) and rules of interpretation applied within the WTO system and present previous research on the matter. Relevant case law is an integral part of the analysis. In chapter 4.4 I analyze the significance of the principle of PSNR on the interpretation of the Article. In chapter 5 I present the main challenges of the current WTO system, which relate to the research question: the politics in the organization and the dispute settlement system, the relationship between trade law and the environment, and the lack of competition rules in the WTO. In chapter 6 I present the final conclusions based on the research in the paper mainly focusing on the challenges of the WTO system and a potential case against OPEC.

2 WTO

2.1 Short History and the Organization

Most of the history of international trade regulation is equivalent to the history of the GATT 1947, since the WTO was established only in 1995¹⁵ and GATT originally in 1947¹⁶. Now GATT is, however, under the umbrella of the WTO Agreement. The establishment of WTO enabled the formation of an official organization regulating international trade and the WTO to have legal personality.

The idea about an organization regulating world trade came about long before the organization was eventually established. Negotiations about an International Trade Organization (ITO) and about the GATT 1947 are closely linked together. Negotiations about the organization started after the founding of the United Nations (UN) in 1945. The ITO was to be a specialized agency of the UN. Until 1948 the concentration was on GATT and it was brought to force provisionally after 1 January 1948 by adopting a protocol of provisional application and the final negotiations concerning the ITO were put off.¹⁷ Even though the United States had originally pushed forward the idea of an international organization regulating trade, eventually the ITO never came into being because the United States Congress would not approve the draft charter.¹⁸ According to Malanczuk, the United States was concerned that the ITO would limit American interests.¹⁹

The WTO eventually came into being in 1995 after the lengthy Uruguay Round negotiations. The Uruguay Round was launched in 1986 and was meant to address some of the pressing issues of the GATT 1947 and new areas to be included in international trade regu-

¹⁵ Agreement establishing the World Trade Organization, 15 April 1994, Marrakesh, entry into force 1 January 1995, Treaty Series 4/1995 (WTO Agreement).

¹⁶ General Agreement on Tariffs and Trade, 30 October 1947, Geneva, entry into force 1 January 1948 (GATT 1947).

¹⁷ Matsushita, Mitsuo; Shoenbaum Thomas J. & Mavroidis, Petros C., *The World Trade Organization: Law, Practice and Policy* (Oxford: Oxford University Press, 2006), at 1-2; Jackson, John H., *The World Trading System – Law and Policy of International Economic Relations* (London: MIT Press Cambridge, 2000), at 37; Jara, Alejandro, *A Brief History of the Multilateral Trading System*, at ETSG session, Thursday 9 September, available at http://www.wto.org/english/news_e/news10_e/rese_jara_09sep10.doc (visited 9 April 2013), at 2-3.

¹⁸ The ITO draft charter was agreed at the UN Conference on Trade and Employment in 1948 Havana, Cuba; Jackson, *supra* note 17, at 37.

¹⁹ Malanczuk, Peter, *Akehurst's Modern Introduction to International Law* (New York: Routledge, 1997), at 228.

lation such as services and intellectual property.²⁰ The negotiations ended up lasting over seven years. A settlement, which included a draft charter for the World Trade Organization, was concluded in 1993 and the draft was signed by 125 states in Marrakesh, Morocco on 15 April 1994.²¹

The WTO has established a common institutional framework for the conduct of trade relations. The organization is meant to facilitate the implementation, administration and operation of international trade relations. In addition to this main goal, the WTO has undertaken four tasks specified in the WTO Agreement Article III: (1) to provide a forum for multilateral trade negotiations; (2) to administer the Dispute Settlement Understanding; (3) to administer the Trade Policy Review Mechanism; (4) to cooperate with the International Monetary Fund and the International Bank for Reconstruction and Development.²²

The WTO consists of the Ministerial Conference and General Council, whose functions are described in Article IV of the WTO Agreement, and the Secretariat, dealt with more detail in Article VI of the WTO Agreement. In short, in the Ministerial Conference all members are represented. It meets at least once every two years and has the authority to take decisions on all matters relating to the WTO and its multilateral trade agreements. In the General Council also all members are represented, but compared to the Ministerial Conference, it meets only when it is appropriate. The Secretariat is headed by the Director-General²³ who appoints members of the staff of the Secretariat and determines their duties in accordance with regulations adopted by the Ministerial Conference.²⁴ The WTO has continued decision-making by consensus as under GATT 1947. When a consensus is not reached, a decision is made by voting. WTO decision-making within the Ministerial Conference and General Council is based on a one member – one vote principle. Unless otherwise provided, the decision is made by a majority vote.²⁵

²⁰ Jackson, *supra* note 17, at 44; Jackson, John H. & Sykes, Alan O., 'Introduction and Overview', in Jackson, John H. & Sykes, Alan O. (eds.): *Implementing the Uruguay Round* (Oxford: Clarendon Press, 1997), 1-22, at 4.

²¹ Malanczuk, *supra* note 19, at 231.

²² WTO Agreement Art. III; Jackson, *supra* note 17, at 4; Matsushita; Shoenbaum & Mavroidis, *supra* note 17, at 9.

²³ Pascal Lamy since 1 September 2005.

²⁴ More detailed descriptions of the WTO organs, see e.g. Loibl, Gerhard, 'International Economic Law', in Evans, Malcolm D. (ed.): *International Law* (Oxford: Oxford University Press, 2010), 722-751, at 733; Cottier, Thomas & Oesch, Matthias, *International Trade Regulation: Law and Policy in the WTO, and the European Union and Switzerland* (London: Cameron May Ltd., 2005), at 97-100; Jackson, *supra* note 17, at 65.

²⁵ WTO Agreement Art. IX; Literature on decision-making in the WTO see e.g. Loibl, *supra* note 24, at 733; Cottier & Oesch, *supra* note 24, at 100-108.

2.2 Agreements

The WTO Agreement is an umbrella agreement, which entails agreements under the WTO system in its annexes. The WTO Agreement has four annexed, which were negotiated during the Uruguay Round. Annex 1 is divided into three different sections. Annex 1A contains the multilateral agreements on trade in goods, including GATT 1994 and 1947 and the supplementary agreements; Annex 1B General Agreement on Trade in Services (GATS); and Annex 1C Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Annex 2 of the Agreement entails the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 3 the Trade Policy Review Mechanism (TPRM) and Annex 4 the Plurilateral Trade Agreements. The Plurilateral Trade Agreements are administered by the WTO Secretariat are not a part of the WTO as such.²⁶

GATS is meant to promote liberalization of trade in services. The Agreement was negotiated in the Uruguay Round since the importance of trade in services was growing and developing in the world economy. Its structure is similar to GATT and they share some of the fundamental principles such as the *Most-Favoured-Nation Treatment* (MFN)²⁷. GATS consists of a framework agreement with general obligations, specific commitments and institutional provisions; and annexes. The general obligations of GATS apply to all services.²⁸

The TRIPS Agreement includes the general provisions and basic principles of trade in intellectual property rights; standards concerning the availability, scope and use; enforcement; acquisition and maintenance; dispute prevention and settlement; transitional arrangements; and institutional arrangements. TRIPS includes also the principles of MFN and national treatment like GATT and GATS. The aim of the agreement is to reduce distortions to international trade and take into account the protection of intellectual property rights. The regulations of the agreement are linked to the Paris and Berne and Rome Con-

²⁶ WTO Agreement; Jackson, *supra* note 17, at 47; Björklund, Martin, 'Perustamissopimus, Organisaatio ja Päätöksenteko', in Björklund, Martin & Puustinen, Seppo (eds.): *Maailman kauppajärjestö WTO Sopimuskäytäntöä ja taustoja* (Helsinki: Taloustieto Oy, 2006), 53-62, at 55-56; Loibl, *supra* note 24, at 732; Cottier & Oesch, *supra* note 24, at 88-89.

²⁷ Principle of *Most Favoured Nation Treatment* is found in Art. II of the GATS and Art. I of the GATT. The Article concerning *Most-Favoured-Nation Treatment* in the GATS provides that 'each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country'.

²⁸ Loibl, *supra* note 24, at 735-736; Jackson, *supra* note 17, at 2.

ventions and the Treaty on Intellectual Property in Respect of Integrated Circuits²⁹ which include provisions on intellectual property rights.³⁰

The WTO evaluates the trade policies and practices of its Members through the periodic Trade Policy Review Mechanism (TPRM). The function of the system is to examine how a Member's trade policies and practices affect the multilateral trading system and improve the adherence to rules and commitments made under the WTO.³¹

A dispute settlement system was established with GATT 1947. Before the establishment of the WTO the disputes were resolved by panels consisting of three or five individuals and the decisions had to be taken by consensus by GATT contracting parties, which was at times problematic since the practice gave a party to the contract the ability to block a dispute decision. The Dispute Settlement Understanding (DSU)³² presented some important improvements to the system when the WTO was established. Decisions are now made through negative consensus, where the decision e.g. to adopt a panel report is made unless there is a consensus not to do so, and parties to the dispute can appeal the panel's decision to the Appellate Body.³³

2.2.1 GATT

2.2.1.1 History and Negotiations

The starting point of the GATT can be traced back to the Bretton Woods conference in 1944. As a result of the conference the International Monetary Fund, the World Bank and GATT 1947 were created. GATT 1947 was created to reduce tariffs and other barriers to international trade and to avoid economic conflicts between nations by providing rights and obligations to signatory countries. Simultaneously negotiations to establish an interna-

²⁹ *Paris Convention for the Protection of Industrial Property*, 20 March 1883, Paris, entry into force 20 September 1884, Treaty Series 5/1921; *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, Berne, entry into force 1 April 1928, Treaty Series 6/1928; *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 21 October 1961, Rome, entry into force 21 October 1983, Treaty Series 56/1983; *Treaty on Intellectual Property in Respect of Integrated Circuits*, 26 May 1989, Washington D.C., not in force.

³⁰ *Trade Related Aspects of Intellectual Property Rights*, Agreement Establishing the World Trade Organization, Annex 1C, 15 April 1994, Marrakesh, entry into force 1 January 1995, Treaty Series 4/1995 (TRIPS); Loibl, *supra* note 24, at 736; Jackson, *supra* note 17, at 2.

³¹ *Trade Trade Policy Review Mechanism*, Agreement Establishing the World Trade Organization, Annex 3, 15 April 1994, Marrakesh, entry into force 1 January 1995, Treaty Series 4/1995 (TPRM); Loibl, *supra* note 24, at 736; Matsushita; Shoenbaum & Mavroidis, *supra* note 17, at 258.

³² *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Agreement Establishing the World Trade Organization, Annex 2, 15 April 1994, Marrakesh, entry into force 1 January 1995, Treaty Series 4/1995 (DSU).

³³ Loibl, *supra* note 24, at 736-737.

tional organization regulating trade were also held. After it became clear that the ITO was not going to be established, GATT 1947 continued to function as the most important instrument to coordinate national trade policies and provide a forum for trade negotiations.³⁴ GATT was originally signed by twenty three states in 1947 and its signatories had grown to 128 by the end of 1994. Today³⁵ the WTO has 159 members. In practice GATT was like an international organization even though it continued to operate on the basis of a Protocol of Provisional Application until the WTO was established. GATT legal texts increased over the years even though the fundamental principles have not changed much.³⁶

Before the establishment of the WTO eight multilateral negotiation rounds were held to reduce tariffs and address other issues under the GATT.³⁷ The main focus was on governmental border measures, maintained on export or import, which distort international trade.³⁸ Round one refers to the negotiations held in Geneva in 1947 where the Agreement was established. The rounds following the negotiations in 1947 were Annecy (1949), Torquay (1951), Geneva (1956), the Dillon Round (1960-1962), the Kennedy Round (1964-1967), the Tokyo Round (1973-1979), and the Uruguay Round (1986-1994), which led to the establishment of the WTO.³⁹ The last five rounds were all held in Geneva but were named after the United States Undersecretary of State, C. Douglas Dillon; the United States President John F. Kennedy; and Tokyo and Uruguay Round after the places where they were launched.

The earlier rounds until the Kennedy Round centered on tariff reductions. During the GATT 1947 years, the signatory states started recognizing the significance of *non-tariff barriers*⁴⁰ to trade. The Kennedy Round achieved only partly its goals. In the Tokyo Round a number of multilateral agreements dealing with non-tariff barriers emerged. During the Tokyo Round also the tariffs had come down considerably from 40% in 1947 to 4.7% on manufactured products. New multilateral agreements were conducted during the Tokyo

³⁴ Jackson, *supra* note 24, at 37; Malanczuk, *supra* note 19, at 223, 228; Jackson & Sykes, *supra* note 20, at 3; Cottier & Oesch, *supra* note 24, at 68; Loibl, *supra* note 24, at 732; OECD, *Trade and competition policies for tomorrow* (Paris: OECD Publications, 1999), at 21.

³⁵ 18 March 2013.

³⁶ Cottier & Oesch, *supra* note 24, at 68; Malanczuk, *supra* note 19, at 228.

³⁷ Cottier & Oesch, *supra* note 24, at 72-77; A short history of the GATT until the founding of the WTO can be found on the World Trade Organization's webpage: The GATT years: from Havana to Marrakesh, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (visited April 9 2013).

³⁸ OECD, *supra* note 34, at 21.

³⁹ Loibl, *supra* note 24, at 732.

⁴⁰ Non-tariff barriers, in short NTBs, are barriers that have the same effect as a tariff but come in different forms, e.g. anti-dumping measures and countervailing duties.

Round but they were not made mandatory to signatory states until the establishment of the WTO, which made the GATT 1947 system somewhat confusing.⁴¹ Despite the achievements of the negotiation rounds the GATT 1947 remained incomplete as an instrument regulating international trade since it did not regulate trade in services or intellectual property rights and had many gaps in the area of agriculture and trade in foods. In addition the dispute settlement system of the GATT 1947 was not fully functional because of the consensus rule and the lack of an appellate body.⁴²

The Uruguay Round of Multilateral Trade Negotiations was launched on 20 September 1986 in Punta del Este and concluded at the final session of the Trade Negotiations Committee at Ministerial level held at Marrakesh, Morocco from 12-15 April 1994. GATT 1947 contracting parties created a Trade Negotiations Committee which was divided into three groups: the Surveillance Body, the Group of Negotiations on Goods, and the Group of Negotiations on Services. The groups on goods and services were to deal with the most pressing concerns for international trade; among other things non-tariff measures, natural resource-based products, market access, dispute settlement and functioning of the GATT 1947 system.⁴³

The Uruguay Round was an eight-year-long negotiation round, which resulted in the establishment of the WTO and new areas such as trade in goods and intellectual property rights to be included in the system.⁴⁴ The round resulted in the General Agreement on Tariffs and Trade 1994, which includes GATT 1947 as it was before the establishment of the WTO. The GATT 1947 is legally distinct from GATT but is included in the text of GATT.⁴⁵

2.2.1.2 Principles and Coverage

There is no general regulation on the coverage of the GATT. GATT ‘simply’ regulates trade in goods. Some of the goods regulated may be identified from the schedules of concession⁴⁶ but the schedules do not represent a comprehensive list of the coverage of GATT. Schedules of Concession include the specific commitments made by individual members, in comparison to the general principles such as national treatment and most-favoured na-

⁴¹ Loibl, *supra* note 24, at 732; Jackson, *supra* note 17, at 73-74.

⁴² Jackson & Sykes, *supra* note 20, at 3.

⁴³ Leebron, David W., ‘An Overview of the Uruguay Round Results’ (1996) 34:11 *Columbia Journal of Transnational Law*, at 11-36.

⁴⁴ Jackson, *supra* note 24, at 1.

⁴⁵ WTO Agreement Art. II:4; Loibl, *supra* note 24, at 733.

⁴⁶ GATT Art. II.

tion treatment which apply to all members. Usually the schedules consist of maximum tariff levels for different goods.⁴⁷ The purview of an Article is, therefore, defined by the content of the Article in question.⁴⁸

GATT is based on the following main principles: MFN Treatment in Article I:⁴⁹, National Treatment in Article III⁵⁰, Schedule of Concessions in Article II, Transparency in Article X, and Elimination of Quantitative Restrictions in Article XI:1, which will be the focus of this study. In addition GATT provides a number of exceptions to the general rule of liberalization in Articles XIX, XX, XXI, XXV and XXIV.⁵¹ MFN treatment is one of the central principles of GATT. The principle requires all members to treat other members of the Agreement the same way when granting any advantages, favours, privilege or immunity. Equal treatment applies to 'like products'.⁵² The second bedrock principle of GATT guaranteeing equal treatment between WTO members is the national treatment principle. The regulation is meant to ensure that foreign products are treated the same way as domestic products.⁵³

⁴⁷ More information on the Schedules of Concession can be found online on http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm (visited April 9 2013) and the schedules for each member on http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm (visited 9 April 2013); Jackson, *supra* note 24, at 51.

⁴⁸ Cottier & Oesch, *supra* note 24, at 83.

⁴⁹ With respect to specified measures, 'any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members'. For case law regarding the MFN principle see for example *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body report circulated 25 April 1997, adopted 23 May 1997, WT/DS33/AB/R (*US – Wool Shirts and Blouses*); *US – Gasoline*, *supra* note 8; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body report circulated 9 September 1997, adopted 25 September 1997, WT/DS27/AB/R (*EC – Bananas III*).

⁵⁰ GATT Art. III. For case law regarding the National Treatment principle see, for example, *Japan – Taxes on Alcoholic Beverages*, Appellate Body report circulated 4 October 1996, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (*Japan – Alcoholic Beverages II*); *EC – Bananas III*, *supra* note 49.

⁵¹ Matsushita; Schoenbaum & Mavriodis, *supra* note 17, at 3; Jackson, *supra* note 24, at 51.

⁵² Malanczuk, *supra* note 19, at 229; Cottier & Oesch, *supra* note 24, at 346-381. For WTO cases on the definition of a 'like product' see for example *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, Appellate Body report circulated 21 March 2001, adopted 5 April 2001, WT/DS135/AB/R (*EC – Asbestos*); *US – Gasoline*, *supra* note 8; *Indonesia – Certain Measures Affecting the Automobile Industry*, panel report circulated 23 July 1998, adopted 23 July 1998, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (*Indonesia – Autos*); *United States – Certain Country of Origin Labeling (COOL) Requirements*, Appellate Body report circulated 29 June 2012, adopted 23 July 2012, WT/DS384/AB/R, WT/DS386/AB/R (*US – COOL*); *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, Appellate Body report circulated 4 April 2012, adopted 24 April 2012, WT/DS406/AB/R (*US – Clove Cigarettes*).

⁵³ Björklund, Martin, 'Monenkeskisen järjestelmän taustat', in Björklund, Martin & Puustinen, Seppo (eds.): *Maaailman kauppajärjestö WTO Sopimuskäytäntöä ja taustoja* (Helsinki: Taloustieto Oy, 2006), 33-49, at 39; Cottier & Oesch, *supra* note 24, at 382-427.

2.2.1.3 GATT Article XI:1

GATT Article XI:1 sets a general ban on the use of quantitative restrictions. The Article provides that

'[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.'

Article XI:1 constitutes one of the fundamental principles of GATT.⁵⁴ The ambit of the Article is very broad as it covers all prohibitions and restrictions that are maintained on the importation or exportation of a product, not only quotas. Import quotas are however the most common type of restriction. WTO cases related to export restrictions are far more uncommon.⁵⁵ Quotas in general are numeral limitations on imports or exports within a certain period of time, usually within a year.⁵⁶ The wording of the Article is comprehensive as it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' The scope of the term 'restriction' is also broad, as a measure need not to be officially binding to be under the coverage of Article XI:1.⁵⁷ Evidence on the actual effects on trade of a measure is not necessary. Only the existence of a limitation is enough.⁵⁸

Article XI:1, like GATT in its entirety, applies only to governmental measures, not actions by private companies and entities. In most cases the issue of the legality of export re-

⁵⁴ *Turkey – Restrictions on Imports of Textile and Clothing Products*, panel report circulated 31 May 1999, adopted 19 November 1999, WT/DS34/R (*Turkey – Textiles*), para. 9.63.

⁵⁵ For cases related to export restrictions see: *China – Measures Related to the Exportation of Various Raw Materials*, Appellate Body report circulated 30 January 2012, adopted 22 February 2012, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (*China – Raw Materials*); *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, request for consultations 13 March 2012, WT/DS431/R, WT/DS432/R, WT/DS433/R (*China – Rare Earths*); *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, panel report circulated 19 December 2000, adopted 16 February 2001, WT/DS155/5 (*Argentina – Hides and Leather*); *Colombia – Indicative Prices and Restrictions on Ports of Entry*, panel report circulated 27 April 2009, adopted 20 May 2009, WT/DS366/R (*Colombia – Ports of Entry*).

⁵⁶ Matsushita; Schoenbaum & Mavroidis, *supra* note 17, at 296.

⁵⁷ *Japan – Trade in Semi-Conductors*, panel report adopted 4 May 1988, BISD 35S/116 (*Japan – Semi-Conductors*), paras. 104, 106-109, 117.

⁵⁸ Kulovesi, Kati & Puustinen, Seppo, 'GATT 1994, osa II, artiklat III – XXIII', in Björklund, Martin & Puustinen, Seppo (eds.): *Maailman kauppajärjestö WTO: Sopimuskäytäntöä ja taustoja* (Helsinki: Taloustieto Oy, 2006), 97-284, at 207; *India – Quantitative restrictions on Imports of Agricultural, Textile and Industrial Products*, Appellate Body report circulated 23 August 1999, adopted 22 September 1999, WT/DS90/AB/R (*India – Quantitative Restrictions*), para 5.128.

strictions will involve GATT Article XI:1, which was broadly interpreted in the *Japan – Semi-Conductors* case to cover all trade measures whether affecting exports or imports.⁵⁹ In *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* the Panel confirmed the broad scope of the term measure. Moreover it made again clear that Article XI:1 applies only to governmental measures.⁶⁰ In the WTO case *Colombia – Indicative Prices and Restrictions on Ports of Entry*, the Panel found that limiting the number of ports through which goods entered the market was inconsistent with Article XI:1 because the measure had a ‘limiting effect’ on imports, and therefore a numerical limitation was not necessary for the measure to be in the coverage of Article XI:1.⁶¹

Article XI:1 reaches not only quotas but also ‘other measures’ that restrict imports. Other measures can refer virtually to any requirement or regulation designed to inhibit imports or exports.⁶² The Panel in *Japan – Semi-Conductors* found that ‘Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to measures. This wording indicated clearly that any measure instituted or maintained by a contracting party, which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure.’⁶³ The Panel in *Brazil – Measures Affecting Imports of Retreaded Tyres* stated that the term ‘prohibition’ in Article XI:1 meant that ‘Members shall not forbid the importation of any products of any other Member into their markets.’⁶⁴ As for the term ‘restriction’, the Panel in the *Colombia – Ports of Entry* case, after reviewing several GATT and WTO cases, concluded that ‘restrictions’ in the sense of Article XI:1 includes measures that create uncertainty in investments, restrict market access, or makes importation very costly, and that the importance in an Article XI:1 analysis is to look at the design of the measure and its effects on importation.⁶⁵

⁵⁹ *Japan – Semi-Conductors*, *supra* note 57.

⁶⁰ *Argentina – Hides and Leather*, *supra* note 55, para. 11.314.

⁶¹ *Colombia – Ports of Entry*, *supra* note 55, para. 7.256.

⁶² *Ibid.*, paras. 7.226-7.227.

⁶³ *Japan – Semi-Conductors*, *supra* note 57, para. 106; same interpretation was also presented in cases *Argentina – Hides and Leather*, *supra* note 55, para. 11.17; and *United States – Certain Measures Affecting Imports of Poultry from China*, panel report circulated 29 September 2010, adopted 25 October 2010, WT/DS329/R (*US – Poultry (China)*), para. 7.450.

⁶⁴ *Brazil – Measures Affecting Imports of Retreaded Tyres*, panel report circulated 12 June 2007, adopted 17 December 2007, WT/DS332/R (*Brazil – Retreaded Tyres*), para. 7.11.

⁶⁵ *Colombia – Ports of Entry*, *supra* note 55, para. 7.240.

2.2.1.4 Exceptions to Article XI:1

Exceptions to Article XI:1 are in GATT Articles XX, XI:2 and XXI. Articles XX:2 and XXI bear no relevance to this study. In short, Article XI:2 provides that Article XI:1 does not apply to temporary export restrictions applied to prevent or relieve critical shortages of foodstuffs and other essential products, import and export restrictions necessary for the application of standards or regulations for the classification, grading or marketing of commodities, import restrictions on agricultural or fisheries products necessary to the enforcement of governmental measures which operate in specific circumstances stated in clauses i – iii. Article XXI provides the exceptions relating to a country's essential security interests or the maintenance of international peace and security.

The exception of importance to the question of Article XI:1's applicability to production regulation measures is Article XX⁶⁶. Article XX entails the 'General Exceptions' and permits actions in certain circumstances that otherwise would be inconsistent with GATT obligations. The most important exceptions to Article XI:1 are considered to be environmental exceptions stipulated in Article XX(b) and (g).⁶⁷ Sub-paragraphs (b) and (g) deal with the protection of human, animal or plant life or health and the conservation of exhaustible natural resources.⁶⁸

The WTO Appellate Body has found in *US - Shrimp* case⁶⁹ that a member must first show that the action is covered by one of the ten sub-paragraphs of Article XX, for example paragraph (g), which provides that

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

The sub-paragraphs must naturally be read together with the chapeau of the Article. However, as stated, according to WTO case law the action must be evaluated against the chapeau only if it is covered by one of the sub-paragraphs. The chapeau provides that

'[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this

⁶⁶ Cases related to Art. XX see e.g. *US – Gasoline*, *supra* note 8; *Brazil – Retreaded Tyres*, *supra* note 64; *US – Shrimp*, *supra* note 4; *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Appellate Body report circulated 6 March 2006, adopted 24 March 2006, WT/DS308/AB/R (*Mexico – Taxes on Soft Drinks*).

⁶⁷ Matsushita; Schoenbaum & Mavroidis, *supra* note 17, at 593.

⁶⁸ *World Trade Report 2010*, *supra* note 3, at 168.

⁶⁹ *US – Shrimp*, *supra* note 4, paras. 118-121.

Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.'

Article XX(g) of the GATT thus allows the application of measures otherwise inconsistent with GATT regulations if they are related to the conservation of exhaustible natural resources and if such measures are made effective in conjunction with restrictions on domestic production or consumption provided that they do not constitute arbitrary or unjustifiable discrimination between countries. The issue arises for example when a country bans or restricts exports of natural resource products on the grounds that it is necessary for conservation purposes. Natural resource export bans could qualify under GATT Article XX(g) as measures related to the conservation of exhaustible natural resources.⁷⁰

Article XX(g) has been invoked e.g. in dispute cases *US – Gasoline*⁷¹ and *US – Shrimp*⁷². In *US – Gasoline* the United States had adopted a 'Gasoline Rule' under the US Clean Air Act, which set out rules for establishing baseline figures for gasoline sold on the US market, with the purpose of regulating the composition and emission effects of gasoline to prevent air pollution. Venezuela and Brazil brought the case before a panel claiming that the United States' actions violated GATT Article III:4 on national treatment. The Panel and the Appellate Body agreed with the complainants. The United States attempted to justify its actions based on GATT Article XX(g) and the Appellate Body did find that the measures fell within the scope of Article XX(g) but constituted unjustifiable discrimination and a disguised restriction on international trade under the chapeau of Article XX. In *US – Shrimp* the United States had imposed an import prohibition of shrimp products from countries that had not used a certain net in catching shrimp. The Appellate Body again found that the measures fell within the scope of Article XX(g) but constituted arbitrary and unjustifiable discrimination under the chapeau, because it had a coercive effect on policy decisions made by foreign governments and was rigid and inflexible in its application.

Whether or not the measures of OPEC would fall within the purview of Article XX(g) is not assessed in this paper because it is a broad question and a multistep process. The connection between Article XX(g) and the principle of PSNR should be however noted. In case *China – Measures Related to the Exportation of Various Raw Materials*, where the Panel interpreted GATT Article XX(g), the Panel recognized that the principle of PSNR

⁷⁰ Matsushita; Schoenbaum & Mavroidis, *supra* note 17, at 797.

⁷¹ *US – Gasoline*, *supra* note 8.

⁷² *US – Shrimp*, *supra* note 4.

should be taken into consideration in the interpretation process and also noted that Article XX(g) has been interpreted and applied in a manner that respects WTO Members' sovereign rights over their own natural resources. Here the Panel referred to the Tokyo Round discussions on the adoption of the Understanding Regarding Export Restrictions and Charges, where GATT contracting parties discussed the importance of the sovereignty of states over their natural resources.⁷³ The Panel considered the ability to enter into agreements, such as the WTO, an important illustration of the exercise of sovereignty.⁷⁴

Treating Article XX(g) as an expression of a country's sovereignty over its natural resources, however, leads to some problems. Article XX(g) only justifies restrictive measures if their goal is to conserve natural resources, which might not always be the case when countries are regulating the use of natural resources. A country invoking Article XX(g) would have to be able to convince the DSB that its measures are related to the conservation of the resources because it has the burden of proof, which seems not to be consistent with the principle of PSNR because the principle in itself does not contain any conditions about the purpose of an action. Whether the controlling and managing of the resources in an economical purpose fulfills the condition, is unclear.

2.2.2 Dispute Settlement Understanding

When the WTO was established, also the dispute settlement process was changed and its major flaws corrected. Since 1995, the adoption of a panel or Appellate Body recommendation is made by negative consensus, not by consensus as was the case during GATT 1947. Also the Appellate Body and the chance to appeal a panel decision were implemented in 1995.⁷⁵ The dispute settlement process is regulated in the DSU. GATT provision, which are central to the dispute settlement process, are Article XXII which provides that each member shall afford opportunity for consultation, and Article XXIII which provides that a matter may be referred to the contracting parties if individual parties cannot achieve a satisfactory outcome.⁷⁶

⁷³ *China – Measures Related to the Exportation of Various Raw Materials*, panel report circulated 5 July 2011, adopted 22 February 2012, WT/DS394/R (*China – Raw Materials*), para. 7.381; GATT Multilateral Trade Negotiations, Group "Framework", MTN/FR/W/23.

⁷⁴ *China - Raw Materials*, *supra* note 73, para. 7.382.

⁷⁵ Jackson, *supra* note 24, at 3-4.

⁷⁶ Matsushita; Schoenbaum & Mavroidis, *supra* note 17, at 5.

The parties of a dispute must first attempt to solve the dispute by consultations.⁷⁷ Panel and Appellate Body proceedings should be the last resort. If the parties cannot find an amicable solution, a party may request the establishment of a panel.⁷⁸ The request is made to the DSB, which consists of representatives of all WTO members. No one except the members of the WTO may bring the case before a panel. The panel will consist of three individuals which the parties may choose themselves. If the parties cannot agree on panel members it is the duty of the Director-General to appoint the members.⁷⁹

A panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.⁸⁰ If a party is unsatisfied by the result of the panel's findings, it may bring the case to the Appellate Body, which the DSB establishes when needed. The Appellate Body consists of seven persons who serve in rotation. The persons are appointed for a four-year term. The appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.⁸¹

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it will recommend that the member in question bring the measure into conformity with the agreement by modifying its practices or terminating the measure completely.⁸² The reports of the panels and Appellate Body, approved by the DSB, must be implemented by the parties. If a party to the dispute does not implement the recommendations of appeal the report, the DSB may authorize other party or parties to take countermeasures, including compensation, suspension of concessions or other obligations temporarily.⁸³

⁷⁷ DSU Art. 4: Consultations; Jackson & Sykes, *supra* note 20, at 20; Björklund, Martin, 'Riitojenratkaisu', in Björklund, Martin & Puustinen, Seppo (eds.): *Maailman kauppajärjestö WTO: Sopimuskäytäntöä ja taustoja* (Helsinki: Taloustieto Oy, 2006), 489-528, at 492.

⁷⁸ DSU Art. 6: Establishment of Panels.

⁷⁹ DSU Art. 8: Composition of Panels; Björklund, *supra* note 77, at 501; Loibl, *supra* note 24, at 737.

⁸⁰ DSU Art. 11: Function of Panels; Loibl, *supra* note 24, at 737.

⁸¹ DSU Art. 17: Appellate Review.

⁸² DSU Art. 19: Panel and Appellate Body Recommendations.

⁸³ DSU Art. 22: Compensation and the Suspension of Concessions. Good examples of the dispute settlement process are *EC – Bananas III*, *supra* note 49; and *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report circulated 16 January 1998, adopted 13 February 1998, WT/DS26/AB/R (*EC – Hormones*) cases where all the dispute settlement procedures were used; Loibl, *supra*

2.3 Sources of WTO Law

Treaties and custom are the main sources of international law. A treaty is an agreement between states or international organizations, whereas custom is formed through an evolving process. The formation of customary law presumes a uniform practice by states and a general recognition that an obligation of international law is formed through the practice, *opinion juris*.⁸⁴ The existence of customary norms may be controversial and international economic law within itself has few established customary norms, thus treaties form the primary source of international economic law.⁸⁵

Article 38(1) of the Statute of the International Court of Justice (ICJ Statute) provides a list of sources in international law.⁸⁶ International law does not have a hierarchy of sources of law.⁸⁷ However, according to Malanczuk, in the case of conflict treaties prevail over custom and custom over general principles of international law.⁸⁸ The Vienna Convention on the Law of Treaties (VCLT), which has codified some of the customary norms of treaty interpretation, is also an important tool, when analyzing treaties.⁸⁹ Fundamental principles of treaty law are the principles of good faith and *pacta sunt servanda*. These principles are also codified in the VCLT.⁹⁰ According to Brownlie ‘the law of treaties concerns the question of the content of obligations between individual states: the incidence of obligations resulting from express agreement’.⁹¹

Before the establishment of WTO the relationship between international trade law and general public international law was unclear and the trading system seemed to be isolating itself from the general public international law. For instance the panels and Appellate Body

note 24, at 737. More on dispute resolution in the WTO see Cottier & Oesch, *supra* note 24, at 143-180; and Björklund, *supra* note 77, at 505-513.

⁸⁴ Shaw, Malcolm N., *International Law* (Cambridge: Cambridge University Press, 2003), at 68-88, 902; Jackson, *supra* note 24, at 26; Aust, Anthony, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2007), at 11; *Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. U.S.)*, Judgment, ICJ Reports 1986, 14, chapters 18, 284, 189 and 19, 311, 319-22; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, 4, chapter 20.

⁸⁵ Jackson, *supra* note 24, at 26-27.

⁸⁶ *Statute of the international Court of Justice*, 26 June 1945, San Francisco, entry into force 24 October 1945, Treaty Series 1/1956, Art 38(1); Malanczuk, *supra* note 19, at 36.

⁸⁷ Winham, Gilbert R., ‘The Evolution of the World Trading System – The Economic and Policy Context’, in Bethlehem, Daniel, [et al.] (eds.): *The Oxford Handbook of International Trade Law* (New York: Oxford University Press, 2009), 5-29, at 5.

⁸⁸ Malanczuk, *supra* note 19, at 57.

⁸⁹ *Vienna Convention on the Law of Treaties*, 23 May 1969, Vienna, entry into force 27 January 1980, Treaty Series 32/1980 (VCLT); Shaw, *supra* note 84, at 903.

⁹⁰ VCLT Art.26; Shaw, *supra* note 84, at 904-905.

⁹¹ Brownlie, Ian, *Principles of Public International Law*, (New York: Clarendon Press, 1990), at 2.

rarely referred to the rules of interpretation in the VCLT.⁹² Since 1995 the system has however become more ‘open’ and particularly in dispute settlement proceedings the relationship has been clarified and a more open attitude towards general principles and sources of international law has been presented. This has been the case especially with environmental cases within the WTO. Since the WTO itself does not adequately regulate environmental issues it has resorted to some customary law and general principles of public international law to settle disputes.⁹³ Cases where the rules of the VCLT have been applied are dealt in detail in chapter 4.

The fundamental sources of WTO law are naturally the WTO Agreement and its Annexes, including GATT, GATS, DSU, TRIMs and TRIPS. There are however additional sources that complement the WTO system.⁹⁴ According to Article 38 of the ICJ Statute a court whose function is to decide disputes in accordance with international law, it shall apply (a) international conventions; (b) international custom; (c) the general principles of law; (d) judicial decision and the teachings of the most highly qualified publicists.⁹⁵

The panel and Appellate Body reports constitute an important source of WTO even though they do not formally bind future panels or other members except parties to a certain dispute. Members often adjust their practices according to previous reports and panels and Appellate Bodies often refer to previous dispute reports and interpretations of WTO law made in the reports.⁹⁶ Panels and the Appellate Body have also shaped the relationship between sources of public international law and sources of WTO law by referring to scholarly publications, highly qualified publicists, general principles of law and custom. References to the teachings of qualified publicists are rare though. In the *US - Gasoline* case the Appellate Body stated that the General Agreement should not be read ‘in clinical isolation from public international law’ and the application of customary rules of interpretation.⁹⁷

⁹² Cottier, Thomas & Oesch, Matthias, ‘WTO Law, Precedents and Legal Change’ (2001) 3 *Turku Law Journal*, 27-41, at 36-38.

⁹³ *Ibid.*

⁹⁴ Cottier & Oesch, *supra* note 24, at 108; Palmetier, David & Mavroidis, Petros C., ‘The WTO Legal System: Sources of Law’ (1998) 92 *American Journal of International Law*, 398-413, at 398-399.

⁹⁵ Cottier & Oesch, *supra* note 24, at 109.

⁹⁶ *Ibid.*, at 110.

⁹⁷ *Ibid.*, at 112-113; Palmetier & Mavroidis, *supra* note 94, at 407-408; *US - Gasoline*, *supra* note 8, at 17.

3 OPEC

3.1 OPEC in General

Organization of Petroleum Exporting Countries is an intergovernmental organization of 12 oil-exporting nations founded in 1960 in Baghdad. OPEC is exclusively an organization of producing countries. The founding members of OPEC are Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. Later Qatar, Indonesia, Libya, United Arab Emirates, Algeria, Nigeria, Ecuador, Angola and Gabon joined the organization. Indonesia has since then suspended its membership and Gabon has terminated its membership.⁹⁸ The organization has three organs: the Conference, the Board of Governors and the Secretariat. The Conference formulates the general policy of the organization and determines the appropriate means and ways of its implementation, inter alia the raising or lowering of collective oil production. All decisions, except procedural matters, require unanimous agreement of all member countries.⁹⁹

OPEC's objectives are stated in the organization's Statute, which was originally approved by the Conference in January 1961. OPEC's aims are to coordinate and unify its member states' petroleum policies in order to secure fair and stable prices for petroleum producers; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return on capital to those investing in the industry.¹⁰⁰ Objectives have hence included minimizing oil price fluctuations and maximizing profits for oil producing countries. The formulation of more specific objections has proven to be difficult for OPEC because of the differing interests and positions of member countries, e.g. population and size of reserves.¹⁰¹ The objectives still stand as they are written in the Statute. They were however developed in a Declaratory Statement of Petroleum Policy in Member Countries in 1968 where OPEC member countries emphasized the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interests of their national development. OPEC member countries emphasized the importance that countries directly exploit their own natural resources and thus preserving freedom of choice when exploiting

⁹⁸ VerLoren van Themaat, Pieter, *The Changing Structure of International Economic Law* (Hague: Martinus Nijhoff Publishers 1981), at 89.

⁹⁹ OPEC Statute Chapter III, Art. 9, 11, 15.

¹⁰⁰ OPEC Statute Chapter I, Art. 2(c).

¹⁰¹ VerLoren, *supra* note 98, at 89-90.

natural resources.¹⁰² In the 1970 OPEC member countries exercised this right by controlling and cutting down the production of oil causing oil prices to rise steeply.

OPEC member countries hold, according to current estimates, 81% of world crude oil reserves. The biggest crude oil reserve holders of OPEC are Venezuela with 24.8% and Saudi Arabia with 22.1%.¹⁰³ OPEC countries hold 44% of the world's crude oil production capacity. In 2010 OPEC accounted for 42.4% of world crude oil production.¹⁰⁴ How reliable these percentages are can be debated since governments and oil companies may not publish accurate numbers of their mineral reserves for political or economic reasons.¹⁰⁵ Despite the possibly inexact percentages it can be stated that western developed nations do not hold enough oil reserves to affect OPEC's policies.¹⁰⁶

3.2 Production Quotas

OPEC pursues goals set in its Statute by setting production quotas in Conference meetings and that way affecting oil prices and the oil producer countries' revenues.¹⁰⁷ A production quota refers to the amount of oil a country can extract from the earth.¹⁰⁸ In 1986 OPEC determined the criteria that the quota system should be based on: reserves, production capacity, historical production share, domestic oil consumption, production costs, dependence on oil exports, population, and external debt.¹⁰⁹ The latest decision regarding the output quotas was made in June 2012, when OPEC decided to keep the quota of 30 million barrels per day unchanged. OPEC reports only the outcome of these meetings; how the quotas are established, is not certain.¹¹⁰ OPEC sets an overall production ceiling for all the member countries as well as a quota for each member country. The quota may be set annu-

¹⁰² 'Declaratory Statement of Petroleum Policy in Member Countries' incorporated in Resolution No. XVI.90 (1968); VerLoren, *supra* note 98, at 89.

¹⁰³ http://www.opec.org/opec_web/en/data_graphs/330.htm (visited 9 April 2013).

¹⁰⁴ Davis, Stacy C.; Diegel, Susan W. & Boundy, Robert G., *Transportation Energy Data Book* (2012), Table 1.2 World Crude Oil Production 1960-2010, at 1-3 available at http://cta.ornl.gov/data/tebd31/Edition31_Full_Doc.pdf (visited 9 April 2013).

¹⁰⁵ Schrijver, Nico, *Sovereignty over natural resources* (Cambridge: Cambridge University Press, 1997), at 14.

¹⁰⁶ VerLoren, *supra* note 98, at 89.

¹⁰⁷ Though there are many possible reasons for the fluctuation of oil prices and changes in supply might be relatively unimportant. *World Trade Report 2010*, *supra* note 12, at 53.

¹⁰⁸ OPEC uses crude oil for its reference for quotas and ceilings. Crude oil does not include condensates, natural gas liquids and oil from non-conventional sources.

¹⁰⁹ Sandrea, Rafael, 'OPEC's challenge – Rethinking its quota system' (2003) 101:29 *Oil & Gas Journal*, 31-37, at 33.

¹¹⁰ OPEC has published its member countries' crude oil production allocations from 1982 to 2008 in the OPEC Annual Statistical Bulletin 2012, available at http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2012.pdf (visited 9 April 2013).

ally or for just a few months depending on the objectives of the quota. The problem for OPEC has been that it has no way of enforcing member countries to comply with the quotas.¹¹¹ The original quota system was set up in 1982, but as member countries continually exceeded the assigned production amount, the system was changed in 1993 to match better the production capacity of member countries.¹¹²

There are different terms used to refer to OPEC's measures: production quotas, production management, production regulation and production allocation, which OPEC itself tends to use. In a report released by United States Senator Lautenberg's office, OPEC's production allocation measures are called 'export quotas'. Senator Lautenberg argues that OPEC's measures constitute a quantitative export restriction prohibited by GATT Article XI:1. Article XI:1 specifically prohibits export quotas and that is why Senator Lautenberg has probably chosen to use the term.¹¹³ This shows how the chosen term might be a direct expression of the writer's view on the matter. However, all the terms refer to OPEC's policy of allocating a numeric limitation on the production of oil, for OPEC countries as a whole and for each member country individually.

Trade in natural resources is very prone to cartels and production regulation since oil, and some other natural resources preserves are concentrated within few countries. The *World Trade Report 2010* has recognized a number of negative effects that imperfect competition and regulation of production have: a cartel, like the one OPEC is maintaining, could lead to an 'inefficient¹¹⁴ extraction path' of non-renewable natural resources; comparative advantage is no more relevant; it is more difficult for foreign suppliers to access the market.¹¹⁵ In the Report the effects trade restrictions have on global welfare are also pointed out. Since the regulation of trade in natural resources is inadequate, especially when dealing with production regulation power asymmetries and beggar-thy-neighbour¹¹⁶ policies may become more common than in other regulated fields of international trade.¹¹⁷

¹¹¹ In March 1982 OPEC set a production ceiling for a period of three months and continues to do so several times in the following years as a response to falling oil prices. The strategy did not, however, work because OPEC member countries exceeded quotas allocated to them; Sandra, *supra* note 109, at 32.

¹¹² Sandra, *supra* note 109, at 32; *World Trade Report 2010*, *supra* note 3, at 179.

¹¹³ *Busting up the Cartel: the WTO Case against OPEC*, *supra* note 13.

¹¹⁴ Slower than optimal.

¹¹⁵ *World Trade Report 2010*, *supra* note 3, at 193; Cottier & Oesch, *supra* note 24 also deal with cartels and the exploitation of dominant economic positions, at 59.

¹¹⁶ Beggar-thy-neighbour is term used to refer to an economic policy, which a country might use to better its economic position by worsening the economic problems of other countries.

¹¹⁷ *World Trade Report 2010*, *supra* note 3, at 42.

To some degree, trade in many goods is regulated by states. In the field of oil almost all countries have nationalized their oil industries. The setting of production quotas may have economic as well as political and national security objectives. Matsushita recognizes several reasons why export controls may be imposed: to ensure the continuing supply of commodities, natural resource conservation, maintain domestic price controls, maintain world prices.¹¹⁸

According to the *World Trade Report 2010*, GATT obligations apply to natural resources if the resource may be traded. Extracted oil is specifically named as a tradable resource.¹¹⁹ Unextracted oil would thus seem to be outside of the scope of GATT. However, it is also stated that WTO rules may also apply to products in their natural state in some circumstances. In the *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada* case the Appellate Body decided that unharvested wood could be considered a ‘good’ despite the fact that it could not be traded as such, and thus WTO Agreement on Subsidies and Countervailing Measures could be applied in the dispute.¹²⁰

It is not clear whether WTO rules apply to government measures related to the production of a good. This confusion brings out questions such as can oil as a natural resource constitute a product, what is a natural resource and what makes trade in natural resources different from trade in goods, can measures relating to production be seen to limit exports, what is the difference between an export quota and a production quota, and what is the significance of a country’s sovereignty over its natural resources.

¹¹⁸ Matsushita; Schoenbaum & Mavroidis, *supra* note 17, at 592.

¹¹⁹ *World Trade Report 2010*, *supra* note 3, at 162.

¹²⁰ *Ibid*; *US – Softwood Lumber IV*, *supra* note 4.

4 Interpretation of Article XI:1

According to GATT Article XI:1

'[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.' (emphases added)

Interpretation of Article XI:1 to define whether OPEC's production quotas are covered by it, is a multistep process. I have divided the question into two sections, firstly whether production regulation can constitute a *restriction on exportation* and secondly whether oil in its natural state constitutes a *product*. First I will present the rules of treaty interpretation, which apply in WTO law, concentrating on the VCLT and the panels' and Appellate Body's treaty interpretations. After that I will study the terms 'product' and 'restriction on exportation' in light of the treaty interpretation rules and WTO case law. In a separate section I will also present the principle of PSNR and analyze its relevance to the question.

4.1 Treaty Interpretation in WTO

Interpretation rules that are applicable to WTO agreements and instruments are VCLT Articles 31-33; DSU Article 3.2; WTO Agreement Article IX:2 and Article 17.6(II) of the Anti-Dumping Agreement on anti-dumping matters. The last two bear no relevance to the question at hand, so in the next chapters only the articles of the VCLT and the DSU will be presented.

4.1.1 Article 3.2 of the DSU

According to DSU Article 3.2

'[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.'

The WTO dispute settlement system comprises of the consultations process, examination of facts and law by panels, appeal on issues of law, and disciplines on the implementation of DSB recommendations and rulings following a dispute, including recourse to propor-

tioned retaliation. These elements operate together to provide security and predictability to the multilateral trading system.¹²¹ The DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system within the WTO. Therefore, DSU provisions must be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it.¹²² The importance of security and predictability as an object and purpose of the WTO has been recognized as well in many panel and Appellate Body reports.¹²³

The requirement of security and predictability also implies that the DSB will resolve a dispute the same way in a subsequent case, unless there is a particular reason to do otherwise. The creation of the Appellate Body during the Uruguay Round and the possibility for Members to appeal a panel decision also ensures the security and predictability of the system.¹²⁴ Prior adopted reports form part of the GATT/WTO system, and, as stated by the Appellate Body, create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant.¹²⁵

Article 31 and 32 of the VCLT contain customary rules of interpretation of public international law within the meaning of Article 3.2 of the DSU and comprise the legal framework within which treaty interpretation must take place.¹²⁶ Articles 31 and 32 set out fundamental rules of treaty interpretation and impose certain common disciplines upon treaty inter-

¹²¹ On the dispute settlement proceedings see DSU Art. 4-22.

¹²² *United States – Sections 301 310 of the Trade Act of 1974*, panel report circulated 22 December 1999, adopted 27 January 2000, WT/DS152/R (*US – Section 301 Trade Act*), para. 7.75.

¹²³ See *Japan – Alcoholic Beverages II*, *supra* note 50, at 31; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body report circulated 19 December 1997, adopted 16 January 1998, WT/DS50/AB/R (*India – Patents (US)*), para. 58; *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, panel report circulated 25 November 1997, adopted 25 November 1997, WT/DS56/R (*Argentina – Textiles and Apparel*), para. 6.29; *The United States Manufacturing Clause*, panel report adopted 15/16 May 1984, BISD 31S/74, para. 39; *Japan – Measures on Imports of Leather*, panel report adopted 15/16 May 1984, BISD 31S/94, para. 55; *EEC – Imports of Newsprint*, panel report adopted 20 November 1984, BISD 31S/114, para. 52; *Norway – Restrictions on Imports of Apples and Pears*, panel report adopted 22 June 1989, BISD 36S/306, para. 5.6.

¹²⁴ *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, Appellate Body report circulated 30 April 2008, adopted 20 May 2008, WT/DS344/AB/R (*US – Stainless Steel (Mexico)*), para. 160.

¹²⁵ *Japan – Alcoholic Beverages II*, *supra* note 50, at 14.

¹²⁶ *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, Appellate report circulated 12 September 2005, adopted 27 September 2005, WT/DS269/AB/R, WT/DS286/AB/R (*EC – Chicken Cuts*), para 7.8; *US – Gasoline*, *supra* note 8, at 16-17; *Japan – Alcoholic Beverages II*, *supra* note 50, at 104; *European Communities – Customs Classification of Certain Computer Equipment*, Appellate Body report circulated 5 June 1998, adopted 22 June 1998, WT/DS62/AB/R (*EC – Compute Equipment*), para. 84; *US – Shrimp*, *supra* note 4, para. 114; *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Appellate Body report circulated 14 December 1999, adopted 12 January 2000, WT/DS98/AB/R (*Korea – Dairy*), para. 81.

preters.¹²⁷ The two Articles have been respected and applied in the WTO when interpreting a covered agreement.¹²⁸

From the above it can be seen that the function of Article 3.2 of the DSU is mainly to emphasize the importance of the security and predictability of the trading system and to refer to the VCLT rules of interpretation as a part of the WTO system. The WTO Agreements hence have no written rules of interpretation similar to the VCLT Articles 31 and 32 and the WTO functions mostly within the rules of the VCLT.

4.1.2 Vienna Convention on the Law of Treaties

Articles 31-33 of the VCLT codify the basic principles of treaty interpretation. The principles cover the general rule of interpretation, supplementary rules of interpretation and interpretation of treaties authenticated in two or more languages. The principles are recognized as a part of customary international law. The articles are not meant to provide a comprehensive list of the principles of treaty interpretation.¹²⁹ The most important Article of the VCLT in terms of this research is Article 31 on the General rule of Interpretation, which provides that:

- 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
- 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.**
- 3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) any relevant rules of international law applicable in the relations between the parties.**

¹²⁷ *Canada – Certain Measures Affecting the Automotive Industry*, Appellate Body report circulated 31 May 2000, adopted 19 June 2000, WT/DS139/AB/R, WT/DS142/AB/R (*Canada – Autos*), para. 10.10; *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Appellate Body report circulated 24 July 2001, adopted 23 August 2001, WT/DS184/AB/R (*US – Hot-Rolled Steel*), para. 60.

¹²⁸ In *India – Patents (US)*, *supra* note 123, para. 46, where the Appellate Body stated that the Panel had created its own interpretative principle which was not consistent with the customary rules of interpretation of public international law or established GATT/WTO practice.

¹²⁹ Van Damme, Isabelle, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21:3 *European Journal of International Law*, 605-648, at 619; *Draft Articles on the Law of Treaties with commentaries*, adopted by the International Law Commission at its eighteenth session, 1966, Yearbook of the International Law Commission, 1966, vol. II.

4. A special meaning shall be given to a term if it is established that the parties so intended.’

The purpose of treaty interpretation under Article 31 of the VCLT is to ascertain the common intentions of the parties. According to the Appellate Body ‘[t]hese common intentions cannot be ascertained on the basis of the subjective and unilaterally determined expectations of one of the parties to a treaty’.¹³⁰ In the drafting of a multilateral treaty there is always need for compromise, which sometimes leads to ambiguity and disputes when Members later apply the regulation and have different interpretations of its meaning.¹³¹ Especially in the complex system of the WTO interpretation is meant to clarify the covered agreements and provide codified principles on which a panel or the Appellate Body can rely upon.¹³²

There are different ways to categorize the interpretative rules set out in VCLT. Fitzmaurice has for example drawn up the following principles of interpretation based on the jurisprudence of the International Court of Justice (ICJ): actuality, natural meaning, integration, effectiveness, and subsequent practice.¹³³ Most commonly the interpretation rules are categorized into the text, context, and object and purpose of a treaty, which constitute the three schools of interpretation: the objective approach, also called the textual approach; the subjective approach, which concentrates on the context and intention of the parties; and the teleological approach emphasizing the object and purpose of a treaty and giving more power to the judge or arbitrator.¹³⁴ The VCLT clearly incorporates all these elements. In this paper the three principles of textuality, object and purpose, and context will be used together with the principles of interpretation which have been developed in WTO case law, taking into account the hierarchy of the sources, to conclude whether GATT Article XI:1 is applicable to the situation.

¹³⁰ *EC – Computer Equipment*, *supra* note 126, para. 84; Fitzmaurice, Malgosia, ‘The Practical Working of the Law of Treaties’, in Evans, Malcolm D. (ed.): *International Law* (Oxford: Oxford University Press, 2010), 172-200, at 183.

¹³¹ Aust, *supra* note 96, at 230-231.

¹³² Van Damme, *supra* note 129, at 640.

¹³³ Fitzmaurice, *supra* note 130, at 183-185. Fitzmaurice, Gerald, ‘Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points’ (1951) 28 *British Yearbook of International Law*, 1-28, at 9; Shaw, *supra* note 84, at 932-933.

¹³⁴ Shaw, *supra* note 84, at 932-933.

The ILC has stated that none of the elements has priority over the others but that they must be used together to interpret a treaty as a whole.¹³⁵ In addition the interpretative rules of the VCLT should be used together with other principles of treaty interpretation, which are not codified. The statement of the Appellate Body in *EC - Computer Equipment* is contrary to this point since the Appellate Body stated that ‘the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention’.¹³⁶ The Appellate Body has however in other cases shown this is not the case by using e.g. elements of interpretation such as effectiveness¹³⁷, *in dubio mitius*¹³⁸, and *prohibition of abus de droit*¹³⁹ when interpreting a treaty.¹⁴⁰ In addition, one of the principles, which is not mentioned in the VCLT but applied by panels and the Appellate Body is *lex specialis*¹⁴¹. The principle of *lex specialis* may be seen as a part of effective treaty interpretation.¹⁴² Panels and the Appellate Body have also referred to relevant case law of other courts, most often the ICJ.¹⁴³

The purpose of the interpretative exercise is to narrow the range of possible meanings of the treaty term to be interpreted, not to generate multiple meanings or to confirm the ambiguity and inconclusiveness of treaty obligations; a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term; this logical progression provides a framework for proper interpretative analysis, bearing in mind that treaty interpretation is an integrated operation, where interpretative rules

¹³⁵ *Draft Articles on the Law of Treaties with commentaries*, *supra* note 129, at 218-223; Fitzmaurice, *supra* note 130, at 184 also notes that there is no hierarchy between the methods of interpretation in VCLT Article 31.

¹³⁶ *EC – Computer Equipment*, *supra* note 126, para. 84.

¹³⁷ The effective approach gives emphasis to the object and purpose of a treaty. See Lauterpacht, Hersch, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’, (1949) 26 *British Yearbook of International Law*, 48-85, at 59.

¹³⁸ The principle of *In Dubio Mitius* is based on the sovereignty of states and according to the principle a term must be interpreted in a way that least interferes with personal and territorial sovereignty or imposes fewer general restrictions. The principle is also dealt in Cameron, James & Gray, Kevin R., ‘Principles of International Law in the WTO Dispute Settlement Body’ (2001) 50 *International and Comparative Law Quarterly*, 248-298, at 258-260.

¹³⁹ *Abus de droit* means the abuse of rights and is based on the principles of good faith and equity.

¹⁴⁰ Cottier & Oesch, *supra* note 24, at 120-121; Aust, *supra* note 84, at 230-231, 234; Van Damme, Isabelle, ‘Jurisdiction, Applicable Law, and Interpretation’, in Betlehem, Daniel, [et al.] (eds.): *The Oxford Handbook of International Trade Law* (New York: Oxford University Press, 2009), 298-343, at 323-324.

¹⁴¹ According to *lex specialis* a regulation of specific subject matter (*lex specialis*) overrides a regulation of a general matter (*lex generalis*).

¹⁴² Matsushita; Schoenbaum & Mavroidis, *supra* note 17, at 27-28.

¹⁴³ Van Damme, *supra* note 140, at 331.

and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.¹⁴⁴

Even though there is no formal authority of a textual approach over other approaches, in WTO case law a literal interpretation has priority over other methods and the panels and Appellate Body have emphasized the wording of a provision and in several cases referred to dictionaries, particularly the Shorter Oxford Dictionary, to define the ordinary meaning of the terms of a treaty. Seeking reference from preparatory work is one of the supplementary means of interpretation. The Appellate Body has however not relied upon preparatory work of a treaty much, because of the lack of reliable records and conflicting statements of the negotiating parties.¹⁴⁵ It is difficult to make estimates about the hierarchy of the principles and how often they have been used because with the textual interpretation other methods are often utilized to confirm the textual analysis.¹⁴⁶

4.1.3 Tools of Interpretation

4.1.3.1 Text

Focusing on the text of the treaty means mainly to analyze the terms used in the treaty. The terms used in a treaty are presumed to show the intent of the parties.¹⁴⁷ The jurisprudence of the WTO and also of the ICJ support the textual approach where the common intention of the parties is defined based on the expressions in the text of the treaty. A number of reports address the application of the VCLT provisions on treaty interpretation in dispute settlement in the WTO and according to WTO case law an interpretation must be based above all to the text of the treaty. It has been recognized though that also the context plays a role in the interpretation of a treaty.¹⁴⁸

¹⁴⁴ *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products*, Appellate Body report circulated 21 December 2009, adopted 19 January 2010, WT/DS363/AB/R (*China – Publications and Audiovisual Products*), para. 399; *United States – Continued Existence and Application of Zeroing Methodology*, Appellate Body report circulated 4 February 2009, adopted 19 February 2009, WT/DS350/AB/R (*US – Continued Zeroing*), para. 268; *EC – Chicken Cuts*, *supra* note 126, para. 176.

¹⁴⁵ Cottier & Oesch, *supra* note 24, at 119; Matsushita; Schoenbaum & Mavroidis, *supra* note 17, at 31-32; Aust, *supra* note 84, at 245; *US – Shrimp*, *supra* note 4, para. 114; Compare to Van Damme, *supra* note 129, at 618 where Van Damme points out that the importance of the textual approach should not be over-emphasized because the text, context and object and purpose often interact with each other.

¹⁴⁶ Van Damme, *supra* note 129, at 617-618.

¹⁴⁷ *Ibid.*, at 622.

¹⁴⁸ *European Union – Anti-Dumping Measures on Certain Footwear from China*, panel report circulated 28 October 2011, adopted 22 February 2012, WT/DS405/R (*EU – Footwear (China)*), para.7.8; *Japan – Alcoholic Beverages II*, *supra* note 50, at 11.

It has been established that a term must be interpreted in its ordinary meaning unless there is reason to assume otherwise. The ordinary meaning of a term is connected to the principles of *good faith* and *pacta sunt servanda* enshrined in Article 26 of the VCLT.¹⁴⁹ The ordinary meaning of a term ascertained only in their context and in the light of the object and purpose of the treaty.¹⁵⁰

Despite the emphasis on textual interpretation, the Appellate Body has applied a broad idea of contextualism instead of a literal interpretation.¹⁵¹ Dictionary definitions are often used as one tool to determine the ordinary meaning of a term but the Appellate Body has held that dictionaries alone are not necessarily capable of resolving complex questions of interpretation.¹⁵² The interpreter thus should not equate the ordinary meaning of a term with a definition provided by dictionaries even though they can act as important guides.¹⁵³ The meaning of a term must be interpreted as a part of a treaty as a whole and also in the wider context of general international law.¹⁵⁴ This means for example that interpreting Article XI:1 but not taking into consideration the significance of the principle of PSNR might lead to an incorrect interpretation.

There has also been some controversy as to the time at which the common intentions of the parties should be assessed. The Panel in *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* stated that various sources of international law support the view that the ordinary meaning of a term should be evaluated according the time when the treaty was concluded.¹⁵⁵ The WTO jurisprudence has however also recognized an evolutionary interpretation of terms which was conducted in the *US – Shrimp* case where the

¹⁴⁹ Brownlie, *supra* note 91, at 631; Aust, *supra* note 84, at 234-235.

¹⁵⁰ *China – Publications and Audiovisual Products*, *supra* note 144, para. 348; Aust, *supra* note 84, at 235.

¹⁵¹ Van Damme, *supra* note 140, at 326.

¹⁵² *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, panel report circulated 10 November 2004, adopted 7 April 2005, WT/DS285/AB/R (*US – Gambling*), para. 164; *US – Softwood Lumber IV*, *supra* note 4, para. 59; *Canada – Measures Affecting the Export of Civilian Aircraft*, Appellate Body report circulated 2 August 1999, adopted 4 August 2000, WT/DS70/AB/R (*Canada – Aircraft*), para. 153-154; *EC – Asbestos*, *supra* note 52, para. 92; *United States – Continued Dumping and Subsidy Offset Act of 2000*, Appellate Body report circulated 16 January 2003, adopted 27 January 2003, WT/DS217/AB/R (*US – Offset Act (Byrd Amendment)*), para. 248; *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Appellate Body report circulated 22 December 2000, adopted 19 January 2001, WT/DS166/AB/R (*US – Wheat Gluten*), para. 67.

¹⁵³ *US – Offset Act (Byrd Amendment)*, *supra* note 152, para. 248.

¹⁵⁴ Brownlie, *supra* note 91, at 633; Aust, *supra* note 84, at 235, 243-244; VCLT Art 31(1).

¹⁵⁵ *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, panel report circulated 30 May 2005, adopted 27 September 2005, WT/DS286/R (*EC – Chicken Cuts*), para.7.99. In the case the Panel also referred to Sinclair, Ian, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), at 124.

Appellate Body found that the term natural resources is not static but evolutionary and interpreted living creatures, turtles, as being exhaustible natural resources.¹⁵⁶

Even though the Articles of the VCLT on interpretation have been followed faithfully by panels and the Appellate Body, they should act only as guidance and not diminish the rights and obligations provided in the WTO Agreement.¹⁵⁷ It is well established that a panel or Appellate Body interpreting a treaty cannot import words into a treaty that are not there or concepts which were not intended by the parties of the treaty.¹⁵⁸ In the *India – Patents (US)* case the Appellate Body noted that the panel had misunderstood the concept of legitimate expectations in the context of the customary rules of interpretation of public international law. The legitimate expectations are reflected in the language of the treaty itself and an interpreter is supposed to examine the words of a treaty to determine the intentions of the parties.¹⁵⁹

During the case *United States – Final Countervailing Duty Determination with Respect to Certain Soft-wood Lumber from Canada*, the United States raised some economic concerns, that would result if the panel would interpreted the term ‘good’ to encompass also standing, unharvested timber. The Panel concluded however that it would not be appropriate to substitute its economic judgment for that of the drafters of the treaty. The Panel emphasized the practice in WTO law to rely on the text of the treaty in the interpretation of a term. In the Panel’s view taking into account the economic issues over the textual interpretation would have been on the contrary to the rules of the VCLT.¹⁶⁰ The Panel further noted that if members of the treaty feel like the treaty does not address certain issues they should bring this up during negotiations and not through dispute settlement. The Panel’s duty is not to explain what the text should mean but what it means.¹⁶¹

As mentioned earlier the interpretation should not be divided into rigid sections. However, in the WTO case law a certain hierarchy emphasizing the importance of the text of a treaty has been established. The text has such a prominent position in the WTO interpretative practice that the following principles of contextualism, object and purpose and effectiveness can be seen as principles complementing the textual approach.

¹⁵⁶ Van Damme, *supra* note 140, at 334; *US – Shrimp*, *supra* note 4, para. 130.

¹⁵⁷ *India – Patents (US)*, *supra* note 123, para. 46.

¹⁵⁸ *EU – Footwear (China)*, *supra* note 148, para. 7.8.

¹⁵⁹ *India – Patents (US)*, *supra* note 123, para. 45.

¹⁶⁰ *US – Softwood Lumber IV*, *supra* note 4, para. 7.59.

¹⁶¹ *Ibid.*, para. 7.53, 7.60.

4.1.3.2 Contextualism

As will be seen when defining the relevant terms of Article XI:1, the panels and the Appellate Body have always contextualized the term even if they have first resorted to a dictionary definition.¹⁶² This is however different than what is meant in Article 31(1) as context. Context in the VCLT refers to the preamble and annexes of the treaty and also any agreement or instrument that is connected to the treaty in question.¹⁶³ The approach emphasizes the intent of the parties which may be found in the negotiating history of a treaty.¹⁶⁴ This chapter deals with a broader concept of context which includes e.g. the context of a particular case and the context of the treaty.

The Panel in *EC –Chicken Cuts* took into consideration the ‘factual context’ when determining the ordinary meaning of the terms contained in a concession. The factual context is the context where the concession exists and is being applied. This view is also supported in literature by a statement that ‘[t]he true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonably flow from that text.’¹⁶⁵ The factual context is distinct from the context referred to in Article 31(2) of the VCLT. Despite the notion of factual context, the starting point of the interpretation for the Panel was still the ordinary meaning of the term. The factual context was a way to test the ordinary meaning and make sure it corresponds to the factual circumstances.¹⁶⁶

Article 31(3)(b) of the Vienna Convention refers to ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. The Appellate Body in *Japan – Alcoholic Beverages II* defined the term ‘subsequent practice’ as common and consistent acts or pronouncements, which form a distinct pattern.¹⁶⁷ The Appellate Body also referred to a writing in which Ian Sinclair stated that the term subsequent practice refers specifically to a harmonious practice common to all parties.¹⁶⁸ In *EC - Chicken Cuts* the Panel also pointed out Aust’s statement that ‘[h]owever precise a text appears to be, the way in which it is actually applied by the parties is usually

¹⁶² Van Damme, *supra* note 129, at 621.

¹⁶³ Shaw, *supra* note 84, at 933-934.

¹⁶⁴ Van Damme, *supra* note 129, at 618.

¹⁶⁵ Sinclair, *supra* note 155, at 121.

¹⁶⁶ *EC – Chicken Cuts*, *supra* note 155, para. 7.105.

¹⁶⁷ *Japan – Alcoholic Beverages II*, *supra* note 50, at 13.

¹⁶⁸ Sinclair, *supra* note 155, at 138.

a good indication of what they understand it to mean, provided the practice is consistent, and is common to, or accepted by all the parties'.¹⁶⁹

The context also includes taking into consideration the rules of general international law. The interpretation should result in a harmonious and coherent result. This means the principles of interpretation in the VCLT should be followed in a holistic fashion, so that the interpretation is in harmony with customary and conventional international law.¹⁷⁰ Even though a term may have many possible interpretations that does not mean that every interpretation is correct or that an interpreter may choose one without recourse to the context and object and purpose of the treaty to clarify the possible meanings.¹⁷¹ The interpretation should fit harmoniously with the terms, context, and object and purpose of the treaty and the different tools of interpretation should not be applied in isolation from one another.¹⁷² When an interpreter resorts to rule outside of the WTO Agreements, a careful balance must be maintained between taking into account a WTO Member's international obligations and at the same time ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.¹⁷³

4.1.3.3 Object and Purpose

The object and purpose of a treaty can be interpreted with the help of the title, preamble, provisions and negotiation history of the treaty.¹⁷⁴ The object and purpose can be defined in terms of the treaty or a specific provision.¹⁷⁵ The object of a particular provision should however be used only when the object and purpose of a treaty is unclear.¹⁷⁶ In this case the

¹⁶⁹ Aust, *supra* note 84, at 194, referred to in *EC – Chicken Cuts*, *supra* note 155, para. 7.250.

¹⁷⁰ Van Damme, *supra* note 140, at 330-331.

¹⁷¹ *US - Continued Zeroing*, *supra* note 144, para. 268; *United States – Countervailing and Anti-dumping Measures on Certain Products from China*, Appellate Body report circulated 11 March 2011, adopted 25 March 2011, WT/DS379/AB/R (*US – Anti-Dumping and Countervailing Duties (China)*), para. 570; *Argentina – Safeguard Measures on Imports of Footwear*, Appellate Body report circulated 14 December 1999, adopted 12 January 2000, WT/DS121/AB/R (*Argentina – Footwear (EC)*), para. 81, footnote 72.

¹⁷² *US – Continued Zeroing*, *supra* note 144, para. 273.

¹⁷³ *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft*, Appellate Body report circulated 18 May 2011, adopted 1 June 2011, WT/DS316/AB/R (*EC and certain member States – Large Civil Aircraft*), para. 845.

¹⁷⁴ Van Damme, *supra* note 129, at 631.

¹⁷⁵ *US – Gasoline*, *supra* note 8, para. 88.

¹⁷⁶ *EC – Chicken Cuts*, *supra* note 126, para. 238.

terms to be defined are in GATT Article XI:1. So the treaty whose object and purpose should be analyzed is the GATT.¹⁷⁷

The Appellate Body often assumes that a treaty and its provisions have a particular object and purpose.¹⁷⁸ The Appellate Body has stated in *Japan – Alcoholic Beverages II* that the method of object and purpose should be used only as a confirmation for an interpretation, not as an independent basis for interpretation.¹⁷⁹ Therefore the object and purpose approach cannot overrule the text of the treaty because it is assumed that the object and purpose will be expressed in the text of the treaty.¹⁸⁰ The panels and the Appellate Body have on many occasions used the object and purpose of a treaty to help analyze a certain term. In *EC – Asbestos* for example the Appellate Body clearly deviated from the dictionary definition of ‘like’, in the context of like product and concluded that the term had to ‘be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears’.¹⁸¹

4.1.3.4 Effectiveness

The principle of effectiveness can be applied in different ways. One way is to consider all interpretations which results in the text being ineffective and meaningless incorrect. This view presumes that all rules have significance. Another way to utilize the principle of effectiveness is to combine it with the object and purpose view: a rule must have an object and purpose to achieve some goal. If an interpretation does not enable the rule to achieve this goal, the interpretation is incorrect.¹⁸² In general the principle is applied together with other interpretative principles.¹⁸³

The ICJ as well as the WTO Appellate Body have recognized the importance of the principle of effectiveness. In *US – Gasoline*, the Appellate Body explained that ‘[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility’, which can be seen as an expression of the principle of

¹⁷⁷ Specifically the GATT 1994. As stated earlier, GATT 1994 is legally distinct from GATT 1947 even though the rules of the GATT 1947 have hardly been changed and Article XI:1 was originally drafted for GATT 1947.

¹⁷⁸ Van Damme, *supra* note 140, at 327-328.

¹⁷⁹ *Japan – Alcoholic Beverages II*, *supra* note 50.

¹⁸⁰ Van Damme, *supra* note 129, at 631.

¹⁸¹ Van Damme, *supra* note 129, at 624; *EC - Asbestos*, *supra* note 52, para. 88. On the application of the purpose and object method see also *EC – Tariff Preferences*, *supra* note 4, para. 90; *US – Shrimp*, *supra* note 4, para. 153;

¹⁸² Fitzmaurice, *supra* note 130, at 188.

¹⁸³ Van Damme, *supra* note 129, at 637.

effectiveness.¹⁸⁴ In *US – Offset Act (Byrd Amendment)*, the Appellate Body stressed that the principle of effectiveness was an ‘internationally recognized interpretative principle’.¹⁸⁵ In *EC – Chicken Cuts* the Appellate Body stated that ‘pursuant to the principle of effective treaty interpretation, it is the task of the treaty interpreter to give meaning to all the terms of the treaty’.¹⁸⁶ The ICJ has recognized the principles of effectiveness by stating that when several interpretations are an option the one that enables the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that that interpretation should be adopted.¹⁸⁷

Effectiveness is not easy to define. Effectiveness is connected to the context of the treaty and the object and purpose of a treaty often define what is regarded as effective. The object and purpose of the GATT is to promote free trade in goods and hence articles, such as Article XI:1, would be effective when they support the goals of GATT. Also the political context and in general the system of the WTO may influence what is regarded to be as effective. According to Van Damme, the principle’s relative character is one of the reasons why it was not codified in the VCLT.¹⁸⁸

Often it can be concluded that a panel or the Appellate Body has applied the principle without expressly mentioning the word ‘effectiveness’. This can be done by interpreting provisions in a way that is coherent with the underlying values and objectives of the WTO system. A panel and the Appellate Body might not identify the interpretative principles which it applies because the principle complete and support each other and in the report the conclusions are not divided by theoretical principles. The principle is applied together with

¹⁸⁴ *US – Gasoline*, *supra* note 8, at 23.

¹⁸⁵ *US – Offset Act (Byrd Amendment)*, *supra* note 152, para. 271; see also *Japan – Alcoholic Beverages II*, *supra* note 50, at 106, 111; *Korea – Dairy*, *supra* note 126, para. 80; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Appellate Body report circulated 13 October 1999, adopted 27 October 1999, WT/DS103/AB/R (*Canada – Dairy*), para. 133; *Argentina – Footwear (EC)*, *supra* note 171, para. 81; *United States – Restrictions on Imports of Cotton and Manmade Fibre*, Appellate Body report circulated 10 February 1997, adopted 25 February 1997, WT/DS24/AB/R, at 16 footnote 24; *United States – Section 211 Omnibus Appropriations Act of 1998*, Appellate Body report circulated 2 January 2002, adopted 2 January 2002, WT/DS176/AB/R (*US – Section 211 Appropriations Act*), paras. 161, 338; *United States – Subsidies on Upland Cotton*, Appellate Body report circulated 3 March 2005, adopted 21 March 2005, WT/DS267/AB/R (*US – Upland Cotton*), para. 549.

¹⁸⁶ *EC – Chicken Cuts*, *supra* note 126, para. 214.

¹⁸⁷ Fitzmaurice, *supra* note 130, at 187; The principle has been applied also in *German Settlers in Poland*, ICJ Advisory Opinion of 10 September 1923, Series B, No 6 at 26 where the Court did not adopt a literal interpretation of the treaty in question because it would have undermined the value of the treaty and not guaranteed effective protection; in *Acquisition of Polish Nationality*, ICJ Advisory Opinion of 15 September 1923, Series B, No 7 at 17 where the Court similarly concluded that a literal interpretation would have undermined the value of the interpreted treaty.

¹⁸⁸ Van Damme, *supra* note 129, at 636, 637.

the other interpretative principles and it cannot override the intentions of the parties but can be used as an indication of the intentions.¹⁸⁹

4.2 Previous Research

The researchers who have come to the conclusion that OPEC member countries are acting contrary to Article XI:1 by setting oil production quotas, have based their view on WTO case law¹⁹⁰ or have not justified their view at all but taken it as a given that Article XI:1 is applicable to production quotas.¹⁹¹ Interestingly, Desta argued in two papers published in 2003¹⁹² that OPEC's measures are inconsistent with Article XI:1 but presented his changed view in a paper published in 2010¹⁹³.

The cases referred to when argued that production quotas are covered in Article XI:1 are *Japan – Alcoholic Beverages II*¹⁹⁴ and *Japan – Semi-Conductors*¹⁹⁵. Both cases support a broad interpretation of GATT Articles. In *Japan – Alcoholic Beverages II* the Appellate Body stated that the fundamental purpose of Article III is to avoid protectionism and interpreted the Article broadly and applied the Article to all imported goods.¹⁹⁶ In *Japan - Semi-Conductors* case the Japanese government had requested the producers of semi-conductors not to export semi-conductors to other countries, apart from the United States, *below a certain price*. The Panel interpreted Article XI:1 broadly and found the system to be inconsistent with Article XI:1, because the measures constituted a quantitative export restriction through a minimum export price requirement.¹⁹⁷ Based on the *Japan – Semi-Conductors* case Desta has also argued that OPEC's production quotas constitute a similar prohibited price setting technique than in the *Japan – Semi-Conductors* case because OPEC's measures are often a response to declining oil prices, and a minimum export price is executed through the production quotas.¹⁹⁸

¹⁸⁹ Lauterpacht, *supra* note 137, at 82-84.

¹⁹⁰ Carey, *supra* note 14; Desta, *Journal of World Trade*; and Desta *Journal of Energy and Natural Resources Law*, which is based on Desta's article in *Journal of World Trade*.

¹⁹¹ This approach has been chosen by Abdallah, *supra* note 6.

¹⁹² Desta, *Journal of World Trade*, *supra* note 14; Desta, *Journal of Energy and Natural Resources Law*, *supra* note 14.

¹⁹³ Desta, 2010, *supra* note 14.

¹⁹⁴ *Japan – Alcoholic Beverages II*, *supra* note 50. Japan had implemented a tax law that taxed Japanese alcohol at a lower rate than other alcohols.

¹⁹⁵ *Japan – Semi-Conductors*, *supra* note 57. Japan restricted the sale for export of semi-conductors at prices below company-specific costs to markets other than the United States, which was inconsistent with Article XI:1.

¹⁹⁶ *Japan – Alcoholic Beverages II*, *supra* note 50, at 15; Broome, *supra* note 14, at 414-415.

¹⁹⁷ *Japan – Semi-Conductors*, *supra* note 57, paras. 105, 132.

¹⁹⁸ Desta, *Journal of World Trade*, *supra* note 14.

The researchers admit that if given a literal interpretation, a panel most likely would not consider production quotas to be in the ambit of Article XI:1. However, based on the cases the writers argue that Article XI:1 is a comprehensive prohibition and should be interpreted broadly to include OPEC's measures, even though the term 'production' is not mentioned in Article XI:1.¹⁹⁹ Researchers who claim that Article XI:1 does not cover OPEC's production quotas on the other hand emphasize the difference between an export quota, which naturally is in the ambit of Article XI:1, and a production quota, which OPEC member countries are maintaining.²⁰⁰

Researchers who argue that production quotas are not covered in Article XI:1 base their view on the wording of Article XI:1, the difference between an export quota and a production quota, the principle of permanent sovereignty over natural resources, and case law.²⁰¹ Desta's paper in 2010 will be used as an example of these arguments since all of them appear in his paper.

In his article published in 2010, Desta presents a threefold evaluation process which a measure must pass in order to be considered in the purview of Article XI:1. According to Desta 'Article XI:1 presupposes that (1) there is a product, (2) product is ready for exportation and (3) product is already destined for another contracting party'. In Desta's opinion, Article XI:1 is not applicable to OPEC's measures because production quotas do not fill these three conditions set in the Article.²⁰² Broome has a very similar view, and he states that despite the fact that WTO case law suggests a broad interpretation of Article XI:1, oil in its natural state is not a product, and production restriction is not an equivalent to an export restriction.²⁰³ Also Malkawi in his paper deems the violation unlikely on the basis of the difference between the terms production quota and export quota.²⁰⁴

To support his view that Article XI:1 does not apply to production quotas, Desta refers to the *Final Report of the International Joint Commission, GATT dispute Canada –*

¹⁹⁹ Carey, *supra* note 14, at 796-799.

²⁰⁰ Desta 2010, *supra* note 14, at 450-454; Malkawi, *supra* note 14, at 941-942; Broome, *supra* note 14, at 414-416.

²⁰¹ Desta 2010, *supra* note 14; Malkawi, *supra* note 14; Broome, *supra* note 14.

²⁰² Desta 2010, *supra* note 14, at 450.

²⁰³ Broome, *supra* note 190, at 413-416.

²⁰⁴ Malkawi, *supra* note 14, at 940.

Measures Affecting Exports of Unprocessed Herring and Salmon and Energy Charter Treaty's (ECT) Article 18.²⁰⁵

The governments of the United States and Canada had requested a report from the International Joint Commission on the effects of bulk water removal from the Great Lakes. In its final report The Commission also researched if the regulations of GATT can affect water management in the Great Lakes. The Commission concluded that 'it is unlikely that water in its natural state (e.g., in a lake, river, or aquifer) is included within the scope of any of these trade agreements since it is not a product or good'. One of the bases for this argument was a declaration by the NAFTA parties, which declared that 'NAFTA creates no rights to the natural water resources of any party; that unless water, in any form, has entered into commerce and has become a good or product, it is not covered by the provisions of any trade agreement, including NAFTA'.²⁰⁶ Desta points out that water in its natural state is not a tradable good and needs to be in some way produced in order to be covered by international trade rules and makes a direct comparison between oil in its natural state and oil in a processed state.²⁰⁷

In the dispute *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, Canada maintained regulations prohibiting the exportation or sale for export of unprocessed herring and salmon. The United States complained that Canada's measures were inconsistent with GATT Article XI:1. Canada argued that the measures were justified under Article XX(g) because their goal was to preserve fish stocks. The Panel found that the measures were contrary to Article XI:1 and could not be justified by Article XX(g). The dispute itself is not essential to the question of whether GATT regulates resources in their natural state. The measures in the case restricted the exports of fish after they had been caught; catching of the fish was not limited. Desta refers to the fact that during the process the United States stated that if Canada's measures had limited the catching of fish, GATT rules would not apply to the measures.²⁰⁸ However, the Panel did not make such a statement.

²⁰⁵ Desta 2010, *supra* note 14, at 452-454.

²⁰⁶ International Joint Commission 'Protection of the Waters of the Great Lakes', *Final Report to the Governments of Canada and the United States* (2000), available at <http://www.ijc.org/php/publications/html/finalreport.html> (visited 9 April 2013), in Section 8 - Legal and Policy Considerations, The International Legal Context.

²⁰⁷ Desta 2010, *supra* note 14, at 452.

²⁰⁸ *Ibid.*, at 452-453; *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, panel report adopted 22 March 1988, BISD 35S/98 (*Canada – Herring and Salmon*).

Desta also brings out the issue of sovereignty by referring to Article 18 of the ECT, which may imply that OPEC member countries can regulate the production of oil as they please. In Article 18 the contracting parties recognize state sovereignty and sovereign rights over energy resources. Furthermore it is recognized that each state holds the rights to decide the rate at which its energy resources may be depleted or otherwise exploited. These rights must be however exercised in accordance with the rules of international law.²⁰⁹

The issue of sovereignty is not dealt in depth in the articles. In GATT there is no mention of state sovereignty, unlike in the ECT. In an article published in the *OPEC Energy Review*, Abdallah states first that production quotas are contrary to Article XI:1 but can be justified under Article XX(g). He then goes on to say that the application of Article XX might not be needed at all since national sovereignty is an internationally recognized right and setting of production ceilings falls under this right.²¹⁰ In Abdallah's view the principle of permanent sovereignty over natural resources would thus exempt OPEC member countries from the evaluation of their measures with regard to GATT regulations.

A number of researchers have come to the conclusion that OPEC's measures are in fact inconsistent with Article XI:1 but can be justified under GATT Article XX(g).²¹¹ GATT Article XX provides general exceptions to Article XI:1. According to Article XX(g) nothing in the Agreement may be construed to prevent the adoption or enforcement of measures relating to the conservation of exhaustible natural resources. According to Carey and Broome, the purpose of Article XX(g) is to give a country freedom to decide on the use of its natural resources.²¹² As stated earlier, regarding Article XX(g) as an expression of the principle of PSNR however leads to some problems.²¹³

4.3 What is a Restriction on Exportation?

Article XI:1 prohibits both prohibitions and restrictions maintained on the importation or exportation of products. It is clear that the term 'prohibition' means that Members cannot forbid the exportation of a product to another Member. OPEC is not maintaining a prohibition since exportation is allowed to other Members. Exportation is limited by maintaining

²⁰⁹ Desta, 2010, *supra* note 14, at 43-454; *Energy Charter Treaty*, 17 December 1994, Lisbon, entry into force 16 April 1998, Treaty Series 35/1998, Art. 18.

²¹⁰ Abdallah, *supra* note 6, at 276.

²¹¹ Desta, *Journal of World Trade*, *supra* note 14; Desta, *Journal of Energy and Natural Resources Law*, *supra* note 14; Carey, *supra* note 14; Broome, *supra* note 14.

²¹² Carey, *supra* note 14, at 804-805; Broome, *supra* note 14, at 242.

²¹³ See p. 18-19 of this paper.

production quotas, therefore the term to be defined is ‘restriction’. Most WTO cases have dealt with import restrictions but the interpretations in these cases can also be applied to export restrictions. I will refer only to exportation since OPEC’s measures do not concern importation. I will first deal with the term ‘restriction’ and after that the further requirement of maintaining the measure ‘on exportation’.

4.2.1 Restrictive Measure

Article XI:1 provides that restrictions are restrictive measures in the form of ‘quotas, import or export licenses or other measures’.

What form a measure takes, is not important because of the broad coverage of the Article. Referring to the interpretation of the Panel in *India - Quantitative Restrictions*, the Panel in Panel Report *India – Measures Affecting the Automotive Sector* concluded that the prohibition provided by Article XI:1 is broad in scope and any form of limitation imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1. Especially the term ‘other measures’ makes the coverage of the Article very broad, because the form of the measure is not limited to for example only quotas or licenses.²¹⁴ Concentrating on the form of the measure would be contrary to the object and purpose of the GATT, which is to promote free trade and eliminate restrictions to international trade.

This means that the restriction need not take a form of a numerical limitation. What is important is the nature of the measure. In *EEC – Minimum Import Prices* a GATT panel found that a minimum import price and security system for tomato concentrate resulted in a restriction under Article XI:1 even though it did not impose a per se quantitative limit on the amount of imports.²¹⁵ In *Colombia – Ports of Entry* the Panel examined whether the measure in question had a limiting effect on importation of certain products. The Panel concluded that restrictions on ports of entry limited competitive opportunities and limited imports arriving from another Member of the WTO and thus constituted a restriction on importation within the meaning of Article XI:1.²¹⁶ The Panel In *India – Autos* also resorted to a purposive interpretation and suggested that the nature of the measure as a restriction in

²¹⁴ *India – Measures Affecting the Automotive Sector*, panel report circulated 21 December 2001, adopted 6 April 2002, WT/DS146/R, WT/DS175/R (*India – Autos*), para. 7.261.

²¹⁵ *European Community Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, panel report adopted 18 October 1978, BISD 25S/68, para. 4.9.

²¹⁶ *Colombia – Ports of Entry*, *supra* note 55, para. 7.257.

relation to importation is a deciding factor when determining whether a measure falls within the scope of Article XI:1.²¹⁷

The decisive factor has often been the potential, not actual, trade effects of a measure. Even though panels have evaluated the effects a measure might have on trade flows, the Panel in *Colombia – Ports of Entry* points out that a number of panels have also evaluated the measure based on the design of the measure and its potential to adversely effect on importation as opposed to the actual resulting impact on international trade.²¹⁸ In *Colombia – Ports of Entry* the Panel noted that due to the complexity of trade statistics it would be unnecessary to try to interpret them and make some kind of conclusions as to the trade effects of the measure. Instead the Panel noted the fact whether the ports of entry measure is a restriction on importation within the meaning of Article X:1, should be based on whether the measure has a limiting effect on importation by negatively affecting the competitive opportunities available to the products in question. This meant that neither party could solely rely on evidence on either increase or decline in imports.²¹⁹ Also the Panel in *Turkey – Textiles* declined to make a determination based on the alleged trade effects of the measure. The respondent stated that the level of imports had actually increased for the products in question during the time when the measure had been maintained. The Panel noted that based on this fact it could not reject the claims for a violation because multiple factors impact trade flows.²²⁰ Even though the actual trade affects do not have to be proven, they can of course be used to strengthen the argument for the restrictive nature of the measure.

From the earlier interpretations in WTO jurisprudence we can see that the definition of a restriction that the WTO is maintaining is broad. WTO has not required that the restriction has to be binding, enforced by the government, to be based on numerical limitations or even have any proven limiting effects on trade. The WTO has emphasized the nature of the restriction and this way broadened the purely textual interpretation of the term ‘restriction’. Emphasizing the nature of the restriction and its potential effects and not fixating on purely numerical quotas, border measures or official government regulations goes together with the object and purpose of GATT which is to prohibit restrictions on trade and is a good example of taking into consideration contextuality and the principle of effectiveness.

²¹⁷ *Ibid.*; Van Houtte, Hans, *The Law of International Trade* (London: Sweet and Maxwell, 2002), at 91.

²¹⁸ *Colombia – Ports of Entry*, *supra* note 55, para. 7.253.

²¹⁹ *Ibid.* para. 7.256.

²²⁰ *Turkey – Textiles*, *supra* note 54, paras. 9.202-9.204.

OPEC is restricting the production of oil by setting limits to its production and this way controlling exports. OPEC's measures most likely have limiting effects on exports. What kind of a connection is required between the measure and process of exports is dealt in the next chapter. How the restrictions specifically affect exports is not examined in this paper. However, as stated earlier the actual trade impacts of a measure are not decisive when determining the restrictive nature of a measure. The measure OPEC is maintaining is restrictive in its nature and the fact that the restriction may not be considered as 'officially binding' because OPEC members have sometimes exceeded the assigned limits is not relevant because of the broad interpretation of the term 'restriction'. Because of the previous WTO jurisprudence taking into account the context of the situation and the object and purpose of the GATT, it is clear that OPEC is maintaining a restrictive measure in the meaning of Article XI:1.

4.2.2 Restriction on Exportation

The problem faced in the case of OPEC is, can production regulation measures constitute a restriction *on exportation*. Article XI:1 of the GATT does not cover just any restriction, but only those restrictions that are instituted or maintained by a Member on the exportation of products.²²¹ OPEC's measures clearly regulate the amount of oil that can be produced and hence the amount that will be released into the world market, so the production restriction seem to have exactly the same impact as normal export restrictions. However the measures do not directly regulate the exportation of oil. The question is what kind of connection is required between the measure and the process of exportation.

The measure does not need to take place in the border, which would imply that the measure does not need to relate *directly* to the imports or exports of a product. In the case *Brazil – Retreaded Tyres* the Panel concluded that the fines imposed by Brazil on importation, marketing, transportation, storage, keeping or warehousing of retreaded tyres were inconsistent with Article XI:1 even though they did not impose any kind of border restriction but rather a 'disincentive to importation'. The Panel based this ruling on the emphasis in WTO

²²¹ *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, panel report circulated 26 November 2004, adopted 19 May 2005, WT/DS302/R (*Dominican Republic – Import and Sale of Cigarettes*), para. 7.258.

jurisprudence on the nature of the measure as a restriction and in general the broad interpretation of the Article.²²²

According to the *Webster's New Encyclopedic Dictionary* the term 'on' includes 'with respect to', 'in connection, association or activity with or with regard to'.²²³ According to a panel interpretation the term, in the context of Article XI:1, would be 'with regard to' or 'in connection with'. The Panel points to the possibility that a measure may not have to directly relate to the process of importation and it might include a measure which otherwise relate to other aspects of the importation of the product.²²⁴ This interpretation of the Panel would support the view that a production restriction may be termed as a restriction on the exportation even though it does not directly regulate exports. The interpretation gives way to the view that a measure can relate to exports in different ways and enables a broader interpretation of the term than just border measures or measures directly relating to the process of importation or exportation.

The Panel in *India – Autos* also points out that the application of a measure at the point of importation is not a decisive criterion in determining whether it can be said to be maintained on the importation.²²⁵ This also supports the view that that an 'upstream measure' such as the one OPEC is maintaining on the production of oil could be in the coverage of Article XI:1. Based on the Panel's interpretations it seems that the fact that the measure is not a border measure or does not directly relate to the exportation process does not exclude it from the purview of Article XI:1.

I argue that production restrictions can be covered by GATT Article XI:1 and the concept 'maintained on exportation', because it is not required that the restrictive measure takes place at the border and because the measure does not have to directly regulate exports. Thus a production restriction that limits the exports from one WTO Member to another, like OPEC's restriction does, can be in the purview of Article XI. If the production of oil is limited by the government and most of the oil produced is being exported to other WTO Members, the limitation on production also limits the amount of exports. The term production is not specifically mentioned in Article XI:1, which is why some researchers argue that based on the textual interpretation of the Article production quotas cannot be included

²²² *Brazil – Retreaded Tyres*, *supra* note 64, para. 7.370.

²²³ *Webster's New Encyclopedic Dictionary* (New York: Black Dog & Leventhal Pub, 1994).

²²⁴ *India – Autos*, *supra* note 217, para. 7.257; the same interpretation is presented in *Dominican Republic – Import and Sale of Cigarettes*, *supra* note 221, para. 7.258.

²²⁵ *India – Autos*, *supra* note 217, para. 7.260.

in the purview of the Article.²²⁶ The concept ‘maintained on exportation’ however leaves room for interpretation and the panels and the Appellate Body have applied an interpretation, where again the context and the object and purpose of the treaty and Article are taken into consideration. The fact that the measure does not need to be maintained on the border and it does not have to directly relate to exports is crucial. Because of that also production restrictions can be termed restrictions on exportation

4.4 What is a Product?

If a measure is maintained on the exportation of a ‘product’ in terms of Article XI:1, it is possible that the measures are in the coverage of the Article. In this case if oil cannot be termed as a ‘product’ OPEC’s measures will not fall within the purview of Article XI:1.

There is no definition of a product in the text of the GATT. There is also no case law within the WTO, where a panel would have had to determine whether a natural resource in its natural, unprocessed state constitutes a product. There are also very few cases which have contemplated on the definition of a product in general. It should also be noted that a ‘product’ is a legal term in the field of WTO and GATT and has a special meaning where the object and purpose of the GATT and the practice of Members needs to be taken into consideration.²²⁷ Therefore even though dictionary definitions will be consulted they may not define the term accurately.

When it comes to dictionary definitions of the term product, the *Shorter Oxford English Dictionary* does not define product as an object; it defines ‘product’ as a ‘thing produced by an action, operation’²²⁸ *Merriam Webster’s Collegiate Dictionary* indicates that a product may be a ‘good’ or a ‘service’ that is marketed or sold as a commodity.²²⁹ The Panel in *China – Audiovisual Products* referred to the *Oxford English Dictionary*, which defines product as ‘[a]n article or substance that is manufactured or refined for sale’.²³⁰ The term

²²⁶ Broome, *supra* note 14, at 413, 414-416; Desta 2010, *supra* note 14, at 450-451.

²²⁷ Weksman, Jacob, ‘Greenhouse Gas Emissions Trading and the WTO’ (1999) 8:3 *Review of European community & International Environmental Law*, 251-264, at 255.

²²⁸ *Shorter Oxford English Dictionary* (Oxford: Oxford University Press, 2007), at 2359 and 3239.

²²⁹ *Merriam Webster’s Collegiate Dictionary* (New York: Merriam-Webster, 2003), at 991.

²³⁰ *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, panel report circulated 12 August 2009, adopted 19 January 2010, WT/DS363/R (*China – Publications and Audiovisual Products*), para. 7.1188; *Oxford English Dictionary* (Oxford: Oxford University Press, 2004), available at <http://www.oed.com>.

‘product’ generally refers to a thing produced in dictionaries.²³¹ The dictionaries also seem to be referring to a definition of a product where a thing is a product if it is tradable.

Since the terms ‘good’ and ‘product’ are used at times interchangeably, definitions of the term ‘good’ may be useful in defining a ‘product’. In *US – Softwood Lumber IV* one of the issues the Panel faced was the definition of the term ‘good’. The question was, whether standing timber²³² could be a ‘good’ in the context of Article 1.1(a)(1)(iii) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Panel concluded that the SCM Agreement does not place limitations on the broad ordinary meaning of the term in its context and in light of the object and purpose of the Agreement. Canada had suggested that goods were tradable products with a potential or actual tariff line. The Panel pointed to the fact that although the term ‘good’ is often used as an equivalent to the term ‘product’ that may not always be the case. The Panel noted also that the Agreement does not address whether the goods have to be able to be imported or traded. The Panel thus concluded that standing timber was a good even though it could not be traded as such.²³³ The Panel in *US – Softwood Lumber III* case also came to the conclusion that there is no reason to limit the term ‘goods’ to tradable goods and that standing timber are goods in the sense of Article 1.1(a)(1)(iii) SCM Agreement.²³⁴

It should be however noted that the Panel in *US – Softwood Lumber IV* specifically made a distinction between the terms ‘good and a ‘product’ and seemed to imply that the term product entails the ability to trade or import/export a product and that standing timber would not have filled the definition of a product. This means that the case cannot be used as a precedent for including a natural resource in its natural state within the coverage of the term ‘product’. Most researchers also argue that oil, since it cannot be traded as such, does not constitute a product. Broome has argued that oil is not a product in the sense of Article XI:1 since it has not gone through a production process.²³⁵ Worika has similarly stated that GATT does not regulate oil in its natural state since it does not qualify as a product or a good. Therefore OPEC’s measures cannot, according to Worika, be inconsistent with Article XI:1 since oil still on the ground is not covered by GATT.²³⁶

²³¹ *China – Publications and Audiovisual Products*, *supra* note 230, para. 7.1340.

²³² Standing timber is an input for logs which are processed into softwood lumber by sawmills.

²³³ *US – Softwood Lumber IV*, *supra* note 4, para. 7.28.

²³⁴ *US – Softwood Lumber III*, *supra* note 4, para. 7.29.

²³⁵ Broome, *supra* note 14, at 416.

²³⁶ Worika, *supra* note 14, at 91.

Considering the object and purpose of the treaty may provide some basis for the inclusion of oil in its natural state as a product. The object and purpose of GATT is to liberalize markets in trade in goods and reduce tariff levels and other barriers to trade. As noted earlier, OPEC's production quotas can be seen as restrictions on the exportation in terms of Article XI:1. By placing restrictions on the production levels of oil, OPEC is creating the same effect that an export restriction would have: influencing the amount exported from one WTO Member country to another. It could be argued that since the measure has an equivalent effect to an export restriction it should be in the coverage of Article XI:1, despite the literal interpretation of the term 'product'.

Another fact that might support the inclusion of OPEC's measures into the coverage of Article XI:1 is the practice in WTO jurisprudence to interpret Article XI:1 broadly. The researchers who have argued that oil production quotas are covered in Article XI:1 rely mostly on this argument. They have not analyzed the term 'product' and justified why oil in its natural state should be considered a product. The broad interpretation argument is based on two cases *Japan – Semi-Conductors*²³⁷ and *Japan – Alcoholic Beverages II*²³⁸. In *Japan – Semi-Conductors* the broad interpretation concerned the measure itself, not the object of the measure at hand. This is why the case cannot be used to argue for a broad interpretation of the term 'product'. In *Japan – Alcoholic Beverages II* the interpretation problem concerned the definition of a like product in terms of Article III of the GATT, and cannot be used either to justify a broad application of the term product.

As stated in the general section of textual interpretation, the interpretation of the text of the treaty takes prevalence over other forms of interpretation and the interpreters cannot make a decision based on what the interpretation of an article *should* include but what it actually does include. The object and purpose of a treaty cannot be used to broaden the coverage of a treaty, if there is no textual basis for it, because it is not what the parties of the agreement are committed to. Therefore the term 'product' cannot cover natural resources in their natural state unless states wish to agree to it.

It can be concluded that there is no basis in the text of GATT or a precedent from WTO/GATT practice that oil in its natural state may be termed a 'product'. The previous practice of the Members of excluding, i.e. not challenging OPEC practices, oil in its natural

²³⁷ *Japan – Semi-Conductors*, *supra* note 57.

²³⁸ *Japan – Alcoholic Beverages II*, *supra* note 50.

state from the rules of WTO also serves as an indication that the Members do not consider oil in its natural state to be a product. Natural resources are definitely not outside the scope of WTO and GATT but purely textual approach will not offer indication that oil in its natural state could be termed as a product.

4.5 Permanent Sovereignty over Natural Resources

The aspect of permanent sovereignty over natural resources needs to be addressed to determine what kind of role general international customary law plays in the interpretation process of the WTO and how the WTO covered Agreements may limit the coverage of the principle.

4.4.1 Foundation of the Principle

Permanent sovereignty over natural resources has developed after World War Two when new independent states formed through the decolonization process. When the new states emerged some of their resources, for example oil, were in the hands of foreign investors. The independent states wanted to stimulate their social and economic development and pushed for rules and principles that would give them more control over their position and in particular over their natural resources. The history of the principle takes place in the UN where debates over the principle of permanent sovereignty over natural resources took place. The General Assembly resolutions are the most important documents constituting the status of the principle in international law.²³⁹ General Assembly resolution are not formally binding but can be an indication of an *opinion juris* and some countries have been willing to see Resolution 1803 as a declaration of existing law.²⁴⁰

Schrijver recognizes the following reasons for the development of the principle: ‘the scarcity and optimum utilization of natural resources, deteriorating terms of trade of develop-

²³⁹Birnie, Patricia & Boyle, Alan, *International Law & The Environment* (New York: Oxford University Press, 2002), at 138; Schrijver, *supra* note 105, at 1; UNGA Resolution Right to exploit freely natural wealth and resources, 21 December 1952, UN Doc. A/RES/626(VII) (Resolution 626), at 18; UNGA Resolution ‘Concerted action for economic development of economically less developed countries’, 15 December 1960, UN Doc. A/RES/1515(XV) (Resolution 1515); UNGA Resolution ‘Permanent sovereignty over natural resources’, 14 December 1962, UN Doc. A/RES/1803(XVII) (Resolution 1803), at 15; UNGA Resolution ‘Permanent sovereignty over natural resources of developing countries’, 18 December 1972, UN Doc. A/RES/3016(XXVII) (Resolution 3016).

²⁴⁰ Birnie & Boyle, *supra* note 239, at 138; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, at 254 para. 70; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, at 45 para. 89; *Nicaragua v. U.S.*, *supra* note 84, at 44 para. 72, at 106-107 paras. 202-203; *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, Ad Hoc Award of 19 January 1977, 17 ILM (1997), paras. 83-86.

ing countries, promotion and protection of foreign investment, state succession, nationalization, cold war rivalry, the demand for economic independence and strengthening of sovereignty and the formulation of human rights.’²⁴¹ The adoption of General Assembly resolutions on sovereignty over natural resources were preceded by debates about the nature and legal status of the principle, the duty of states to take into consideration the interests of other states in their natural resource policies and the conflict between on the one hand respecting acquired rights over natural resources and on the other hand allowing states to use their natural resources when necessary.²⁴²

The nationalization of oil is one of the processes intertwined with the development and emergence of the principle of permanent sovereignty over natural resources. In 1933 a British-owned Anglo-Persian oil company and the government of Iran concluded an agreement according to which the oil company could utilize certain areas of Iran for oil extraction and processing. This enabled oil flow to the United Kingdom. In 1951 Iran announced its plans to nationalize the oil company and annul the agreement. Iran did not agree to submit the dispute to arbitration which led the United Kingdom to bring the case before the ICJ.²⁴³ United Kingdom argued for the bindingness of the agreement concluded in 1933. The ICJ however stated that it was not within its jurisdiction to review the case since the Agreement did not constitute an international convention.²⁴⁴

Before Resolution 1308, which is considered to be the most important documentation affirming the status of the principle of PSNR, there were three important resolutions about the control of natural resources in the 1950s. In Resolution 1515 in 1950 the General Assembly recommended that ‘the sovereign right of every State to dispose of its wealth and its natural resources should be respected in conformity with the rights and duties of States under international law’.²⁴⁵ In Resolution 523 in January 1952 the General Assembly considered ‘that the under-developed countries have the right to determine freely the use of their resources in order to be in a better position to further the realization of their plans of economic development in accordance with their national interest, and to further the expansion of the world economy’. The resolution in general concerned the integrated develop-

²⁴¹ Schrijver, *supra* note 105, at 4-5.

²⁴² *Ibid.*, at 164-165.

²⁴³ *Anglo-Iranian Oil Co. Case (Preliminary Objection)*, Judgment, ICJ Reports 1952, 93.

²⁴⁴ Schrijver, *supra* note 105, at 41-42.

²⁴⁵ Resolution 1515, *supra* note 239.

ment and commercial agreements.²⁴⁶ In Resolution 626 in December 1952 the General Assembly noted that ‘the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty’ and recommended that member states ‘refrain from acts, direct or indirect, designed to impede the exercise of the sovereignty of any State over its natural resources’.²⁴⁷

The General Assembly adopted Resolution 1803 (XVII) on PSNR on 14 December 1962. The Resolution refers to the ‘recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States’.²⁴⁸ The Resolution was the result of the work done in the UN Commission on Permanent Sovereignty over Natural Resources and the Economic and Social Council. The Commission on Permanent Sovereignty over Natural Resources was established in 1958 by the General Council based on the recommendation of the Commission on Human Rights to conduct a survey of the status of permanent sovereignty over natural wealth and resources, with recommendations, where necessary, for its strengthening.²⁴⁹ Even though the Resolution is one of the key developments for the principle, it was not a clear victory for the countries claiming rights to their natural resources since the observance of agreements was given a prominent position in the Resolution.²⁵⁰

Debates continued after 1962 and focused on elaborating the Resolution and connecting it to development, human rights and the environment.²⁵¹ A divide between developing countries and Western developed countries continued as the developing countries tried to broaden the scope of permanent sovereignty by including in it not only natural resources but also any kind of economic activities and wealth in general.²⁵²

4.4.2 Status of Customary International Law

According to the Schrijver PSNR has become an accepted principle of international law through international treaty law and state practice.²⁵³ The status of the principle is based

²⁴⁶ UNGA Resolution ‘Integrated economic development and commercial agreements’, 12 January 1952, UN Doc. A/RES/523(VI).

²⁴⁷ Resolution 626, *supra* note 239.

²⁴⁸ Resolution 1803, *supra* note 239.

²⁴⁹ Brownlie, *supra* note 91, at 539-540.

²⁵⁰ Schrijver, *supra* note 105, at 165.

²⁵¹ *Ibid.*, at 166.

²⁵² *Ibid.*, at 166-167.

²⁵³ *Ibid.*, at 33-34.

mostly on the UN Resolution 1308. In addition to the UN Resolution the principle has also been included in the International Covenant on Civil and Political Rights as well as in the International Covenant on Economic, Social and Cultural Rights.²⁵⁴ In the *Case Concerning Armed Activities on the Territory of the Congo* even though the principle of permanent sovereignty did not apply to the situation at hand the Court recognized the importance of the principle and stated that is a principle of customary international law and includes the right to use, control and dispose natural resources freely.²⁵⁵ The significance and customary law nature of the Resolution 1803 has also been recognized in the Texaco Overseas Petroleum arbitration case where the consensus on the principle among countries in different parts of the world and different economic systems was pointed out.²⁵⁶

4.4.3 Coverage of the Principle

There is no official, binding definition on the principle of PSNR. The coverage of the principle depends on what kind of activities are included within sovereignty and what kind of resources are included within the term ‘natural resources’.

The activities included within sovereignty can be determined from resolutions and treaties referring to the principle. According to different sources states are free to use, control and dispose their natural resources as they wish.²⁵⁷ This freedom is however limited by the duty to take into consideration the well-being of their peoples and their international obligations to for instance not to cause harm to other states and observe contractual and treaty

²⁵⁴ *International Covenant on Civil and Political Rights*, 19 December 1966, New York, 23 March 1976, Treaty Series 7/1976, Art. 1(2); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, New York, 3 January 1976, Treaty Series 6/1976, Art. 1(2).

²⁵⁵ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Judgment of 19 December 2005, ICJ Reports 168, para. 244; *Max Planck Encyclopedia of Public International Law on Customary International Law* para. 20, available at http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1393& (visited 9 April 2013).

²⁵⁶ *Texaco vs Libya*, *supra* note 240. See also *Nicaragua v. U.S.*, *supra* note 240, paras. 188, 191; *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 240, para. 70.

²⁵⁷ *Declaration of the United Nations Conference on the Human Environment*, concluded 16 June 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973), Principle 21; *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, United Nations publication, Sales No. E.93.I.8 and corrigenda, vol. I: Resolutions adopted by the Conference, resolution 1, annex I, Principle 2; *Convention on Biological Diversity*, 5 June 1992, Rio de Janeiro, 29 December 1993, Treaty Series 78/1994, Art. 3; UNGA Resolutions 626, 1803 *supra* note 240; Human Rights Covenants, *supra* note 254; *African Charter on Human and Peoples' Rights*, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM. 58 (1982), Art. 21; ECT, *supra* note 209, Art. 18.

obligations.²⁵⁸ *Absolute* sovereignty over natural resources does not therefore exist but there is a balancing act between the different principles and rules of international law.

It should be noted that the drafters of The ECT have included in the treaty an article dealing with sovereignty over energy resources.²⁵⁹ In the Article it is provided that states have sovereignty over their energy resources ‘in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises.’²⁶⁰ The treaty therefore provides quite an exact definition on the sovereignty over *energy* resources.²⁶¹ The Article also provides that the rights must be exercised in accordance with and subject to the rules of international law. This means that *inter alia* concluded contracts and other treaties, like the Agreements of the WTO, must be respected.

The coverage of the principle of course depends on the definition of natural resources, which has been defined in many different ways depending on the interpreter. Many of the interpretations derive from non-legal literature and no general definition exists in international law. Natural resources are often divided into non-renewable and renewable resources.²⁶² The key characteristic of non-renewable resources is that their consumption changes the possibilities of future generations.²⁶³ Even though there is no debate about the nature of oil as a non-renewable natural resource it can be noted that the Appellate Body has indirectly recognized oil as an exhaustible natural resource in *US - Shrimp* case.²⁶⁴ The further dilemmas of the definition of natural resources need not concern us here.²⁶⁵ The question of whether natural resources can be termed as goods or products on the other hand

²⁵⁸ Schrijver, *supra* note 105, at 244, 251.

²⁵⁹ ECT, *supra* note 209, Art. 18.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² Schrijver, *supra* note 105, at 13-15.

²⁶³ *World Trade Report 2010*, *supra* note 3, at 75.

²⁶⁴ *US - Shrimp*, *supra* note 4, para. 128.

²⁶⁵ More on the definition on natural resources see Schrijver, *supra* note 105, at 15; *World Trade Report 2010*, *supra* note 3, at 46.

is of great relevance to this research, an issue which was dealt in chapter 4.3 on the definition of a product.

There have also been estimates that the globalization and western capitalist world market may be undermining and narrowing the coverage of sovereignty because especially the rules of the WTO regulate an area, which used to belong under the economic sovereignty of each state.²⁶⁶ In addition to the founding of the WTO and adding different fields to the international trade regulation system, Schrijver recognizes the process of privatization as something undermining permanent sovereignty.²⁶⁷

It can be concluded that oil is in the category of natural resources and oil production is within the principle of PSNR. The problem is how treaties such as the GATT can limit the sovereign powers of a state and what kind of relevance the principle should be given when interpreting Article XI:1 .

4.4.4 Pacta Sunt Servanda v. Sovereignty over Natural Resources

The principle of PSNR has often clashed with the principle of *pacta sunt servanda*. As stated before, the principle of PSNR was born out of conflict between developing and developed western nations after decolonization when developing countries wanted to gain control over their own natural resources, which were in the hands of foreign investors. Developing countries therefore wanted to terminate or change the agreements on foreign control.

When talking about the principle PSNR and its coverage one must take into consideration that countries may enter into agreements which limit their sovereignty. The rights of sovereignty are thus not unlimited. The sovereignty may be limited by agreements or customary international law. Part of the sovereignty over natural resources is also the ability to organize the way they are developed through contracts and a country is obligated by international law to abide the treaties it concludes.²⁶⁸

²⁶⁶ Jeffery, Ramon J., *The Impact of State Sovereignty on Global Trade and International Taxation*, Series on International Taxation: No 23 (London: Kluwer Law International Ltd, 1999), at 15-16; Schrijver, *supra* note 105, at 378.

²⁶⁷ Schrijver, *supra* note 105, at 378-379.

²⁶⁸ Jeffery, *supra* note 266, at 25; Schrijver, *supra* note 105, at 23, 262-263; *The Government of the State of Kuwait v The American Independent Oil Company ('Kuwait v Aminoil')*, Ad Hoc Award of 24 March 1982, 21 ILM (1982), at 1,021 para. 90(2).

The principle of *pacta sunt servanda*, agreements must be kept, is the basis of all treaties. The parties need to trust that the rights and obligations expressed in a treaty will hold.²⁶⁹ *Pacta sunt servanda* is only one expression of the principle of good faith, which governs all reciprocal actions of states.²⁷⁰ Treaties constitute a formal source of law and are the expression of the parties of binding rules they wish to implement. The principle of *pacta sunt servanda* is written in the VCLT in Article 26 which states that ‘[e]very treaty is binding upon the parties to it and must be performed by them in good faith’.²⁷¹ The principle of *pacta sunt servanda* is mentioned in WTO case law for example in case Panel Report, *Korea – Government Procurement*, where the Panel referred to Article 26 of the VCLT.²⁷²

There is debate about which principle, *pacta sunt servanda* or PSNR, is the main rule and which is the exception. A writer’s opinion may depend on his/her position for example as a third world researcher or as a researcher from a western developed country.²⁷³ The ILA has concluded that even though permanent sovereignty is inalienable, a state may accept obligations regarding the exercise of its sovereignty by entering into a contract.²⁷⁴ According to Schrijver, a state cannot derogate ‘from the essence of the exercise of its sovereign rights over its natural resources’. But limit its sovereignty only partially so that the external power would have control only in a limited area, limited resources or within a set time frame.²⁷⁵

As stated earlier the principle of PSNR has the status of customary international law. It is however possible for parties to deviate from general international law by concluding a trea-

²⁶⁹ Fitzmaurice, *supra* note 130, at 181; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, 7, para. 114; *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, panel report circulated 28 February 2001, adopted 23 August 2001, WT/DS184/R (*US – Hot-Rolled Steel*), para. 286 footnote 277; *Korea – Measures Affecting Government Procurement*, panel report circulated 1 May 2000, adopted 19 June 2000, WT/DS163/R (*Korea – Procurement*), para. 7.93 recognized the implicit development of Vienna Convention Article 26 *pacta sunt servanda* in respect of the GATT 1947 and the WTO Agreements; *EC – Sardines*, *supra* note 4, para. 278; *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, panel report circulated 6 April 1999, adopted 22 September 1999, WT/DS90/R (*India – Quantitative Restrictions*), para. 3.95.

²⁷⁰ *Charter of the United Nations*, 26 June 1945, San Francisco, entry into force 24 October 1945, Treaty Series 1/1956, Art. 2.2; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, ICJ Reports 1949, 244, at 119; Shaw, *supra* note 84, at 811-812.

²⁷¹ Thirlway, Hugh, ‘The Sources of International Law’, in Evans, Malcolm D. (ed.): *International Law* (Oxford: Oxford University Press, 2010), 95-121, at 99.

²⁷² *Korea – Procurement*, *supra* note 269, para. 7.93.

²⁷³ Schrijver, *supra* note 105, at 23.

²⁷⁴ *Declaration on the Progressive Development of Principles Public International Law relating to a New International Economic Order*, Approved by the International Law Association at its 62nd Conference in Seoul, 29-30 August 1986, at 1-11.

²⁷⁵ Schrijver, *supra* note 105, at 264.

ty. In principle only *jus cogens*²⁷⁶ limits the ability to diverge from general international law.²⁷⁷ From the positions of different writers it seems clear that the treaties limiting a country's sovereignty over its natural resources are valid. There seems to be however another limiting factor to the contracts concluded by states other than *jus cogens* which is the 'essence' of a country's sovereignty. It seems that a country cannot give away by contract its sovereignty to some other country or a foreign enterprise. Whether GATT regulations would constitute as giving away the essence of the sovereignty is unclear. Many natural resources are however under GATT regulations and governments have accepted this. So concluding from the practice of states, GATT regulations, even though deviating from the principle of PSNR, do not result in derogation of the essence of sovereignty over natural resources.

4.4.5 PSNR as an Interpretative Tool in the WTO/GATT System

There is no mention of the principle of permanent sovereignty over natural resources in any of the WTO Agreements, if one does not consider Article XX(g) as epitomizing the principle. However, WTO applies the rules of the VCTL in its interpretation process and thus a panel or the Appellate Body has to take into consideration general public international law even if a certain rule is not specifically mentioned in the WTO Agreements. In principle there is no hierarchical order between the sources of international law provided in Article 38 of the ICJ Statute.²⁷⁸ When a treaty provision is not clear it may be assumed that the parties intended the treaty to be consistent with the customary rules of international law. This way the customary rules come into play in the interpretation of a treaty.²⁷⁹

A principle of customary international law cannot in any way make the actions of a state immune even if the measures are within the coverage of the principle. The actions will be evaluated under GATT provisions and the principle will act as one of the factors influencing the interpretation of a provision. The principle of PSNR is thus not absolute. This has been recognized in WTO jurisprudence in *Mexico – Tax Measures on Soft Drinks and Other Beverages* where the Panel referred to a report in *EC – Hormones* where the Appellate

²⁷⁶ *Jus cogens* refers to norms that cannot be contracted out of. The term is mentioned in the VCLT Article 64. Even though Worika, *supra* note 14, at 90, has stated that the principle PSNR may be a principle of *jus cogens* no support is found for this claim.

²⁷⁷ Thirlway, *supra* note 271, at 99-100.

²⁷⁸ Brownlie, *supra* note 91, at 3.

²⁷⁹ *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, panel report circulated 31 March 2008, adopted 14 November 2008, WT/DS321/R (*Canada – Continued Suspension*), para. 227 footnote 64/65.

Body stated that a customary rule of international law cannot relieve a panel from applying the normal principles of treaty interpretation.²⁸⁰

The principle of PSNR is one tool of interpretation in the process. The Appellate Body made it clear in *US – Shrimp* that general principles of international law have to be taken into account when interpreting WTO provisions.²⁸¹ The Panel on *Korea – Procurement* noted that customary international law does not apply only in the interpretation of agreements but also in the economic relations between WTO Members. Customary international rules apply to the WTO treaties and the process of treaty formation as long as WTO Members do not contract out of it.²⁸²

On several occasions, a panel or the Appellate Body has recognized the relevance of customary international law, but stated that the WTO agreements take precedence over customary law. The Panel in *Mexico – Tax Measures on Soft Drinks and Other Beverages* stated that ‘General principles of international law cannot be used to override the text of the WTO Agreement, to create new exceptions to WTO obligations, or otherwise to abridge the rights and obligations of WTO Members’. This is the case even if the principle was widely recognized as customary international law. Only a ‘textual directive’ in a WTO Agreement would make the principle ‘relevant’. This does not however mean that a principle not recognized in the WTO Agreements is wholly without relevance in a WTO dispute case. The fact that treaty provisions prevail over norms of customary international law has also been recognized in WTO case Panel Report, *United States – Anti Dumping Act of 1916*²⁸³ and in ICJ judgment *Military and Paramilitary Activities in and against Nicaragua*²⁸⁴. Therefore treaties, if in conflict with customary international law, are given precedence over customary rules.

Based on the above, the principle should act as a guiding tool when interpreting the terms of the Article. The principle’s effect is not however so great that it could override the text of the Article. Concluding that OPEC’s restrictions are covered by the term ‘restriction on exportation’ is in conflict with the principle because the interpretation would imply that

²⁸⁰ *Mexico – Tax Measures on Soft Drinks and Other Beverages*, panel report circulated 7 October 2005, adopted 24 March 2006, WT/DS308/R (*Mexico – Taxes on Soft Drinks*), para. 78; *EC – Hormones*, *supra* note 83, paras. 120-125.

²⁸¹ *US – Shrimp*, *supra* note 4, para. 158 footnote 157.

²⁸² *Korea – Procurement*, *supra* note 269, para. 7.96.

²⁸³ *United States – Anti-Dumping Act of 1916*, panel report circulated 29 May 2000, adopted 26 September 2000, WT/DS162/R (*US – 1916 Act (EC)*), para. 6.189.

²⁸⁴ *Nicaragua v. U.S.*, *supra* note 84, para. 274.

OPEC member countries cannot restrict the production of oil as they please. The principle cannot however overturn this interpretation because the text of the treaties takes precedence over customary law. On the other hand the principle can be used to support the interpretation that oil in its natural state cannot be regarded as a 'product'. This interpretation is coherent with the principle of PSNR and gives OPEC member countries the ability to decide at how their natural resources are being exploited. In general environmental concerns and customary international law, such as PSNR, are secondary to the text of the Agreement and the WTO has received criticism about interpreting the covered agreements placing more emphasis on trade aspects than environmental aspects of a dispute.

4.6 Conclusions

The question whether oil production quotas are covered by GATT Article XI is a complex interplay between different methods and principles of interpretation. The textual interpretation holds much weight in the interpretation process but the manner in which the textual approach is applied is always contextual. Every term must be interpreted taking into account the context of the treaty, the article, the situation at hand, and the object and purpose of a treaty. The object and purpose of a treaty is a useful tool of interpretation but its use cannot result in an interpretation that is not consistent with the text of the treaty. In WTO practice it is sometimes difficult to differentiate the different interpretation methods and their use, because the bodies apply a holistic interpretation and do not separate different methods in the reports.

It seems that the strict interpretation of the term 'product' is why oil production quotas are not covered by Article XI:1. The strictness does not derive from earlier interpretations in GATT/WTO practice, but from the lack of interpretations, the practice of WTO Members and the textual interpretation of the term 'product'. A method emphasizing the object, purpose and effectiveness of the GATT might favour an interpretation where oil in its natural state was included in the coverage of the term 'product' because a production quota has the practically the same effects as an export quota. This purposive interpretation combined with cases supporting a broad interpretation of GATT articles has led some researchers to the conclusion that oil production quotas are in the coverage of Article XI:1. In my view these factors do not sufficiently justify why oil in its natural state should be regarded as a product because the cases do not concern specifically the term product. As mentioned, an interpretation emphasizing the object and purpose of a treaty cannot override the textual

interpretation, which in this case refers to the requirement that a product is actually produced, which oil in its natural state is not.

The interpretation that production regulation measures are restrictions maintained on exportation in the meaning of Article XI:1 may be a controversial interpretation since it does not appear in any of the previous research papers. In previous research the writers have only applied a strict textual interpretation where they have commented on the difference between a production restriction and an export restriction and the fact that the term 'production' does not appear in the text of Article XI:1. In my opinion the text of the Article and the previous practice in WTO open a possibility for a broader interpretation of Article XI:1, where production regulation measures are included in the Article's coverage. This view can naturally be challenged but it has reasonable arguments supporting it.

The principle of PSNR has all in all quite a weak affect to the problem at hand. This reflects the problems of interpreting treaties in an environmentally friendly manner. Because environmental principles are not incorporated in GATT and have not been taken into consideration in the drafting of the articles, apart from Article XX on general exceptions, they are not equal with the principle of free trade. Promotion of free trade is the objective of GATT and the Articles have been drafted and interpreted by panels and the Appellate Body accordingly. Some of the claims made in previous research in relation to the principle of PSNR and the role of Article XX(g) have been challenged in this paper. The principle most definitely cannot exclude OPEC member countries from the regulations of GATT, even if they are contrary to the principle of PSNR.²⁸⁵ This does not mean that GATT regulations result in the weakening of a country's sovereignty. A part of a country's right to decide and conclude agreements e.g. on the exploitation of its natural resources is one dimension of sovereignty. Also the claim that Article XX(g) is a representation of the principle of PSNR is questionable. The Article is undisputedly important since it is one of the few articles where environmental aspects of trade restrictions are incorporated in the article. However, the Article places such limitations and requirements which the measures must fulfill and enables free trade centered interpretations that it would be a very poor expression of a country's freedom to decide on the use and control of its natural resources.

Natural resources when they have not yet been produced have an unclear status in the WTO system. Even though it was concluded that oil in its natural state does not constitute

²⁸⁵ This claim was made by Abdallah, *supra* note 6, at 276.

a product, the significance of *US – Softwood Lumber IV*²⁸⁶ should be noted. The case does not offer any insight to the definition of a product but the Appellate Body did conclude that standing timber was a good in terms of the SCM Agreement and thus under the coverage of the WTO system. Resources in their natural state when they have not been produced yet do not thus fall outside of the WTO Agreements in all situations.

²⁸⁶ *US – Softwood Lumber IV*, *supra* note 4.

5 Challenges

5.1 Politics in WTO

The evaluation in chapter 4 of the purview of Article XI:1 is presented using the analytical tools, which the panels and Appellate Body often utilize. The analysis is made from within the WTO system as a panel might conduct the research. What a panel does not write out in its report of a case are the politics involved in decision making. It cannot be denied that the panels and the Appellate Body function in a political context.²⁸⁷ The formation of the Appellate Body in the Uruguay Round negotiations and the possibility of parties to appeal a panel report have added to the judicial part of the dispute settlement system. Despite this, diplomacy is still a part of the dispute settlement system of the WTO.²⁸⁸

Law should be distinguished from politics in the DSB. If it is not, providing security and predictability is impossible.²⁸⁹ Cottier and Oesch recognize that the rule of law may not be as developed in the international trading system as in domestic law but argue that the WTO system, at least the dispute settlement system, is still based on the rule of law, because of its substantive law, transparency and procedural fairness.²⁹⁰ Achim Helmedach and Bernhard Zangl have pointed out the importance of the establishment of the Appellate Body with its legal experts for a term of four years who, unlike the panel members, are not chosen by the dispute parties. According to them the political independence of the WTO judicial system has improved considerably after the establishment of the Appellate Body.²⁹¹

In addition to the actual dispute settlement process and the decisions being under scrutiny also the fact that not all Members have the opportunity to use the dispute settlement system has been pointed out.²⁹² Guzman and Simmons have examined whether small Members and powerful Members of the WTO are really equal within the WTO dispute settlement system and concluded that states with power act differently than states that do not financial resources or adequate knowledge at their disposal.²⁹³ According to Guzman and Simmons

²⁸⁷ Van Damme, *supra* note 140, at 325.

²⁸⁸ Björklund, *supra* note 77, at 492.

²⁸⁹ Van Damme, *supra* note 140, at 325.

²⁹⁰ Cottier & Oesch, *supra* note 24, at 543. Cottier has served as a member or chair of several GATT and WTO panels.

²⁹¹ Helmedach, Achim & Zangl, Bernhard, 'Dispute Settlement under GATT and WTO: An Empirical Enquiry into Regime Change', in Joerges, Christian & Petersmann, Ernst-Ulrich (eds.): *Constitutionalism, multilevel trade governance and international economic law* (Oxford: Hart Publishing, 2011), 85-110, at 88-90.

²⁹² *Ibid.*, at 92.

²⁹³ Guzman, Andrew T. & Simmons, Beth A., 'Power Plays & Capacity Constraints: The Selection of Defendants in WTO Disputes' (2005) Paper 52 American Law & Economic Association Annual Meetings.

Members weigh the benefits against the *resource* and *political costs* when deciding whether to pursue a case or not.²⁹⁴ Horn, Mavroidis and Nordström in their research conducted in 1999 about the early years of the WTO system pointed out that US, EC, Japan and Canada had made over 40% of the complaints between 1995 and 1999. The writers concluded that the differences in activity between the developed and developing countries ‘reflect differences in the diversity and value of trade’. The writers could not, based on their statistical analysis, make any assumptions about how the power aspect and legal capacities might the participation of Members in the dispute settlement system.²⁹⁵

How could the politics aspect influence the question analyzed in this paper? It affects the fact whether the case will be brought before a panel and who will act as complainant(s). The political aspect might lead to the situation that because of fear of retaliation from the oil exporting nations no Member will pursue the case and the WTO never has to analyze the applicability of WTO regulations to measures limiting production and measures regarding natural resources or to think how far can the coverage of Article XI:1 be stretched especially taking into account the principle of PSNR. Also developing countries might not have the opportunity to act as complainants because of the lack of resources and knowledge about the WTO law. It is however impossible to say for certain what factors influence a country’s decision to pursue a case or not.

WTO will at the end of the day be an organization promoting free trade, even though environmental aspects have gained some more ground in the WTO. A liberal free trade policy that the WTO promotes will always influence a panel’s and the Appellate Body’s interpretations. As noted in the previous section, the argument for a broad interpretation of Article XI:1 and emphasis on the elimination of trade barriers, will probably not justify the application of Article XI:1 to oil production quotas, but the actual trade effects of the production quota are the most compelling argument for the inclusion of the quotas within the general prohibition of quantitative limitations and most likely the reason why researchers are split on the question.

²⁹⁴ *Ibid.*, at 4.

²⁹⁵ Horn, Henrik; Mavroidis, Petros C. & Nordström, Håkan, ‘Is the Use of the WTO Dispute Settlement System Biased?’ (1999) Discussion Paper No. 2340. Centre for Economic Policy Research, London, UK, at 1, 26.

5.2 Trade Law and the Environment

When analyzing if the production measures of a natural resource are covered by GATT regulations, very few environmental aspects are taken into consideration. Customary international law, like the principle of PSNR, can act as an interpretative tool but it does not hold much weight if the text of the agreements enables an interpretation which is consistent with the free trade principles of the WTO. If the text of the agreement implies an interpretation which is not consistent with environmental principles, it will be adopted despite the conflict. Also what is not taken into serious consideration is how the ruling affects the environment and the exploitation of natural resources.

In the WTO Agreement the Members have recognized that

'their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development'.²⁹⁶

This recognition from the Members to take into consideration the environmental perspectives reflected a change towards a more environmental centered organization regulating world trade.²⁹⁷ Two great examples of the change in attitude within the WTO/GATT system about measures taken to protect the environment protection are *United States – Restrictions on Imports of Tuna*²⁹⁸ in the GATT 1947 period and *US – Shrimp*²⁹⁹ after the establishment of the WTO. The cases are also good examples of the possible conflicts that may arise between environmental law and trade law. It is clear that conflicts have and will arise since the WTO dispute settlement system deals with environmental disputes between states more frequently than any other international dispute settlement mechanism but has hardly any environmental regulations.³⁰⁰

²⁹⁶ WTO Agreement preamble, *supra* note 15.

²⁹⁷ Ahn, Dukgeun, 'Environmental Disputes in the GATT/WTO: Before and After *US – Shrimp* Case' (1998-1999) 20 *Michigan Journal of International Law*, 819-870, at 820.

²⁹⁸ *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, panel report adopted 22 February 1982, BISD 29S/91.

²⁹⁹ *US – Shrimp*, *supra* note 4.

³⁰⁰ Ahn, *supra* note 297, at 825. In GATT the only article directing attention to environmental concerns is Art. XX on the general exceptions. Cases where Art. XX has been invoked on environmental issues are *EC – Asbestos*, *supra* note 52; *US – Shrimp*, *supra* note 4; *US – Gasoline*, *supra* note 8; *United States – Taxes on Automobiles*, panel report circulated 11 October 1994, not adopted, WT/DS31/R; *US – Tuna*, *supra* note 298;

One of the most infamous cases related to the conflict between environmental protection and elimination of trade barriers is the *US – Tuna* case in 1991 despite the fact that the panel report was never adopted. In the case the United States had adopted the US Marine Mammal Protection Act, which provided dolphin protection standards for fishing tuna for the domestic fishing fleets as well as foreign boats catching tuna in that area. If the exporting country could not prove to the United States authorities that it meets the dolphin protection standards set out in United States law, the United States government would embargo all imports of the fish from that country. Mexico's exports of tuna to the United States were banned based on the Act and Mexico brought the case before a GATT panel in 1991. The Panel concluded that a country could not ban the imports of a product *from another Member country* based on how the product was produced and that way enforcing its own domestic laws in another country. Therefore the measures were inconsistent with GATT Article XI:1 and not justified under XX(g).³⁰¹

The *US – Shrimp* case was similar in that the US required under the US Endangered Species Act of 1973 that US shrimp trawlers use 'turtle excluder devices' in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles to protect the endangered turtles. Section 609 of US Public Law 101–102, enacted in 1989 said that shrimp which was caught with technology that could adversely affect certain sea turtles may not be imported into the US. India, Malaysia, Pakistan and Thailand, who were affected by the import ban, brought the case to the WTO. The case differs from the *US – Tuna* ruling because the Appellate Body stated that the protection of sea turtles was allowed under GATT XX. The United States lost the case however because it has discriminated between WTO Members when implementing the import bans but later corrected its procedures and was allowed to maintain the bans.³⁰²

If production regulation of oil was deemed to be in to coverage of Article XI:1 the respondent could of course invoke GATT Article XX(g). Some researchers have argued that Article XX(g) is meant to preserve the ability of a state to a certain extent to practice its sovereignty over its natural resources. Support for this claim may also be found in WTO case law such as *China – Raw Materials* where the Panel noted that China may pursue its

Thailand - Restrictions on the Importation of and Internal Taxes on Cigarettes, adopted 7 November 1990, BISD 37S/200; *Canada – Herring and Salmon*, *supra* note 208; *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted 22 February 1982, BISD 29S/91.

³⁰¹ *US – Tuna*, *supra* note 298.

³⁰² *US – Shrimp*, *supra* note 4.

economic and social development by '[e]xercising its sovereignty over its own natural resources while respecting the requirements of Article XX(g) that China committed to respect'.³⁰³ According to Carey the purpose of Article XX(g) is to protect the right to sovereignty over natural resources, especially because of the taking into consideration of environmental concerns in recent times by panels and the Appellate Body.³⁰⁴ Broome also claims that Article XX(g) is an indication of a country's permanent sovereignty over its natural resources.³⁰⁵

Article XX(g) however imposes some requirements, which the restrictive measures must fulfill in order to be exempted from e.g. Article XI:1. The measure must fulfill three requirements: (1) the measure cannot be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, (2) the measure must relate to the conservation of exhaustible natural resources and (3) the measure must be made effective in conjunction with restrictions on domestic production or consumption. These requirements enable different kinds of interpretations and when environmental concerns and the elimination of trade restrictive barriers are pitted against each other, the free trade aspect often wins.

A comparison between *US – Tuna* and *US – Shrimp* cases shows, however, that the Appellate Body does not think about the purely economic and free trade aspects of case. Both cases dealt with trade restrictions to protect the environment: in *US – Tuna* dolphins and in *US – Shrimp* turtles. The *US – Tuna* decision has been criticized by claiming that the Panel ignored the text of GATT and made the decision to prohibit the trade restriction in order to avoid 'green protectionism' gaining ground in international trade.³⁰⁶ In *US – Shrimp* the Appellate Body diverged from the earlier panel ruling in *US – Tuna* and concluded that the trade restrictions taken against other Members to protect the environment was within the coverage of Article XX exceptions. Cooperation would be of course the best way to solve environmental problems compared to unilateral trade restriction measures, but cases like

³⁰³ *China – Raw Materials*, *supra* note 73, para. 7.383.

³⁰⁴ Carey, *supra* note 211, at 804-805.

³⁰⁵ Broome, *supra* note 190, at 424.

³⁰⁶ Howse, Robert, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate' (2002) 27 *Columbia Journal of Environmental Law*, 491-522, at 493.

the *US Shrimp* might offer a base for negotiations and a common ground for cooperation between environmental law and trade law.³⁰⁷

5.3 Lack of Competition Rules in WTO

There is no agreement on competition policy within the WTO.³⁰⁸ Especially the problem of access to market raised the issue of competition policy regulation to the discussion in the 1980s and 1990s. In 1996 as a result of the first Ministerial Conference of the WTO trade and competition were included in the WTO Work Programme.³⁰⁹ The absence of consensus on competition matters has, however, hindered the regulations' development and inclusion in the WTO system. Defining legal and illegal limits on competition is challenging. The United States has expressed concern and discontent about the competition circumstances especially in the Far East but instead of a binding international regulation on competition, it has favoured a soft collaboration approach between states. The EU, Canada and Japan have supported a competition agreement as a part of the WTO.³¹⁰

Competition policy deals with barriers to competition set by governments and anti-competitive conduct by private actors in the form of production quotas, dividing markets within enterprises and fixing prices of products. Arrangements such as these are international cartels, which affect international trade and may interfere with trade liberation goals of the WTO. Even though competition law focuses of private actors the elimination of competition barriers set by governments is also an important part of competition policy.³¹¹ Competition laws are, apart from the EU, national and the contracting parties of GATT view that GATT cannot be used to control competition practices since regulation of competition has not been included in the GATT. Several regulations of the WTO mainly in the

³⁰⁷ Howse, *supra* note 306, at 491-492.

³⁰⁸ For case law touching on competition policy see Matsushita, Mitsuo, 'Trade and Competition Policy', in Betlehem, Daniel, [et al.] (eds.): *The Oxford Handbook of International Trade Law*, 646-670, at 655-659; *Japan – Measures Affecting Consumer Photographic Film and Paper*, panel report circulated 31 March 1998, adopted 22 April 1998, WT/DS44/R (*Japan – Film*); *United States – Anti-Dumping Act of 1916*, Appellate Body report circulated 28 August 2000, adopted 26 September 2000, WT/DS136/AB/R (*US – 1916 Act (EC)*); *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Appellate Body report circulated 13 October 1999, adopted 27 October 1999, WT/DS103/AB/R (*Canada – Dairy*); *Mexico – Measures Affecting Telecommunications Services*, panel report circulated 2 April 2004, adopted 1 June 2004, WT/DS204/R (*Mexico – Telecoms*).

³⁰⁹ Björklund, *supra* note 26, at 56; Matsushita, *supra* note 308, at 665; WT/MIN(96)/DEC Singapore Ministerial Declaration, adopted on 13 December 1996, on competition see para. 20.

³¹⁰ Tapio, Tuomas, 'WTO ja monenkeskisen kauppajärjestelmän haasteet', in Björklund, Martin & Puustinen, Seppo (eds.): *Maailman kauppajärjestö WTO: Sopimuskäytäntöä ja taustoja* (Helsinki: Taloustieto Oy, 2006), 555-574, at 562.

³¹¹ Matsushita; Schoenbaum & Mavroidis, *supra* note 17, at 853; Loibl, *supra* note 24, at 739; OECD, *supra* note 34, at. 7, 22, 23; Matsushita, *supra* note 308, at 647.

field of GATS and TRIPS, however, touch upon and intersect with the subject of competition.³¹²

Even though the WTO does not regulate competition policy, it is closely connected to it since the WTO and competition share the same principles of free trade, non-discrimination and competition. Even though the fields of competition law and international trade regulation are different in nature in that competition laws regulate often conduct of private enterprises and WTO law the conduct of states; and competition laws are often national and WTO law international, the fields are complementary since competition is a prerequisite to free world trade and anti-competitive conduct hinders the objectives of the WTO.³¹³

The question of production management, e.g. in the case of OPEC, is a good example of a question which could be better regulated by competition rules than the current GATT system. OPEC countries get together to decide how much each country should produce oil within a certain period of time, mainly to regulate oil prices and secure a steady income for the producing countries.³¹⁴ Therefore in terms of competition, OPEC countries have formed a cartel. Article XI:1 seems to be just strict enough not to encompass production quotas of a natural resource even though the measure has equivalent effects to an export quota.³¹⁵ OPEC's measures could on the other hand be challenged more easily under competition rules, whether as a part of the WTO system or as an independent set of rules. A new set of rules which could take into account the competition and possibly also environmental aspects of the question would be the optimal solution.

³¹² Jackson, *supra* note 24, at 57; Betlehem, Daniel, [et al.], *supra* note 87, at 649; In OECD, *supra* note 34, at 60-70 are listed some GATT provisions that appear to influence directly or indirectly business practices, instead of just governmental measures.

³¹³ Matsushita, *supra* note 308, at 647; OECD, *supra* note 34, at 7.

³¹⁴ OPEC Statute, Art. 2(c).

³¹⁵ Comparison between GATT Article XI and Article 29 of *Treaty Establishing the European Community*, 13 December 2007, Lisbon, entry into force 1 December 2009 (EC Treaty), should be noted: in Article 29 of the EC Treaty quantitative restrictions on exports, and all measures having equivalent effect, are prohibited between EC Member States. The coverage of the Article is thus broader than the coverage of GATT Article XI, since the EC Treaty also prohibits measures having equivalent effect to a quantitative restriction. GATT on the other hand places some limitations on the applicability of the Article, and based on this research an equivalent effect to a quantitative restriction, which OPEC's measures clearly have, is not enough for the measure to be prohibited under GATT Article XI.

6 Final Conclusions

Based on this paper it is possible to present assumptions about what a potential case against OPEC would look like: who would be the complainant(s), what arguments the parties would present, what would be the Panel's conclusion, and what kind of consequences could result from the decision.

The complainant would most likely be the United States. Firstly, because trade statistics show that the United States, EU and Japan have made approximately 40% of the complaints in the WTO dispute settlement system.³¹⁶ Secondly, because United States is the only country where there have been some 'official' initiatives to challenge OPEC's production management measures. The challenge has come mainly from Senator Frank R. Lautenberg.³¹⁷ Also OPEC's cartel-like behavior has been attempted to challenge based on the US Antitrust laws twice in US district courts with civil action.³¹⁸ Both cases were dismissed. United States also naturally has the knowledge and economic resources to pursue such a case.

The complainant would claim that OPEC member countries' production regulation measures are inconsistent with Article XI:1 of the GATT. The complainant's strongest argument would most likely be the effects of the production regulation measures, which are equivalent to the effects of an export quota and the broad interpretation of GATT articles practiced previously by panels and the Appellate Body. The complainant would argue that OPEC's measures are covered by the article because the measure is maintained on the exportation of a product destined for the territory of another Member. The biggest challenge, based on this paper, would be to argue successfully that oil in its natural state is a product in terms of Article XI:1.

The respondents would claim that production regulation of oil is not in the coverage of Article XI:1 because production regulation is not maintained on the exports and oil in its natural state is not a product. A strict literal interpretation of the Article supports the respondents' claims more than the complainant's argument. However as concluded in chapter 4, production quotas can be successfully argued to be in the purview of Article XI:1. In

³¹⁶ Horn; Mavroidis & Nordström, *supra* note 295, at 26.

³¹⁷ See, *supra* note 13.

³¹⁸ *International Association of Machinists and Aerospace Workers v. OPEC and Member Countries*, 477 F.Supp. 553 (18 September 1979); *Prewill Enterprises, Inc. v. Organization of the Petroleum Exporting Countries*, United States District Court of the Northern District of Alabama, Southern Division, Civil Action Number Cv-00-W-0865-S (21 March 2001).

case a panel would come to the conclusion that the countries' measures do fall under Article XI:1, the respondents could invoke Article XX(g) on the general exceptions, specifically for measures related to the conservation of exhaustible natural resources.

The Panel would most likely not find the respondents' production regulation measures to be in violation of GATT, because oil in its natural state cannot be regarded as a product and thus Article XI:1 does not apply to oil production quotas, even if they result in a restriction of international trade. This conclusion would not result in changes in the current oil production policies of OPEC, but perhaps to some political tension between the complainant and the respondents.

More interesting and daunting are the consequences of a decision which would include oil production quotas under Article XI:1 and not accept the justification under Article XX(g). It is difficult to predict the implications of this kind of decision. Would oil production increase or decrease? Would OPEC countries begin competing with each other? Would oil prices rise or fall? What would be the environmental effects of the decision? Would OPEC countries comply with the decision but perhaps try to circumvent the decision by regulating the production more conspicuously? Or would OPEC refuse to abide the decision? What would be the influence of this kind of decision on future dispute settlement proceedings? Would countries see this as a chance to challenge all natural resource regulation measures maintained by governments?

The fact that the consequences of such a decision is difficult to predict might be one of the reasons why there has not been a case against OPEC member countries. Also forcing OPEC countries to abide a decision might prove to be problematic. The complainant has the right to compensation and to retaliate by suspending concessions under Article 22 of the DSU, if the ruling is not implemented by the respondent. But who would want to start an economic battle with the main exporters of oil. This is why the questions about the relationship between GATT regulations and production regulation of a natural resource might never be answered in the WTO dispute settlement system. Maybe this is best since the current GATT rules do not take into consideration sufficiently the consequences, especially environmental implications, of the decision.

WTO rules are ambiguous in many parts and as in the case of Article XI:1 leave a broad range for interpretation. Sometimes the panels and the Appellate Body have interpreted the

articles broadly, like in the cases of *Japan – Alcoholic Beverages II*³¹⁹ and *Japan – Semi-Conductors*³²⁰, which have sparked broad interpretations of Article XI also in research dealing with the Article's applicability on OPEC's production regulation measures. At other times there is no case law directly dealing with the question as is the case with the definition of a product. In this paper the approach has been taken that if there is no case law supporting a broad interpretation of a specific term, the adopted interpretation should be quite strict and based first and foremost on the text of the Article to ensure that the common intention of the parties will be fulfilled.

The contradiction between the object and purpose of the GATT and a strictly textual interpretation seems to be the main reason why there are differing opinions on the applicability of Article XI to oil production quotas. On the one hand a production quota has an equivalent effect to an export quota and a limiting effect to international trade. Because the object and purpose of GATT is to reduce barriers to trade and support free trade, the purposive interpretation would imply that production quotas are within the coverage of the Article. On the other hand a textual interpretation, which emphasizes the facts that the word production is not mentioned in the Article and a natural resource in its natural state is not a product, supports the claim that production quotas fall outside of the purview of the Article.

In this research both methods are applied, but the textual approach is always the starting point. The biggest difference between the previous research and this paper is the interpretation of the requirement that the restriction must be *maintained on exportation*. It was concluded that production regulation measures can be maintained on exportation, but not based on a purely purposive interpretation where only the effects of a production quota are taken into consideration. The language of the text also enables a broad interpretation of the requirement, which the panels and the Appellate Body have also applied. In previous research it was either concluded that production restriction is different from an export restriction and since Article XI does not mention production, production quotas are not in the purview of the Article; or that the Article should be interpreted broadly because of the actual trade effects of the production quotas. The relevant case law, however, implies that the textual interpretation and an interpretation emphasizing the object and purpose of a treaty can be applied together to support one another.

³¹⁹ *Japan – Alcoholic Beverages II*, *supra* note 50.

³²⁰ *Japan – Semi-Conductors*, *supra* note 57.

Based on this research it can be concluded that a balance should be established between free trade, the right of states to exercise sovereignty over their natural resources, energy security, fair competition, and climate change concerns. Ideally this would be achieved in the form of cooperation between countries. Without cooperation and new regulations, the WTO and its Dispute Settlement Body are tied by the content of the Agreements, which promote free trade. Evolutionary and environmental interpretations in disputes are possible but should not be relied upon to achieve the balance.