

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

The World Trade Organisation (WTO) and the Organisation of Petroleum Exporting Countries (OPEC) Mandates: Regulating Production Quotas, Subsidies, and Corruption in Oil Producing Countries-an African Perspective.

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(Dissertation submitted in fulfillment of the requirements for the award of the LL.D degree)



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## **DEDICATION**

For HH, Dr. George Bagwana and Mrs. Idah Bagwana.

## DECLARATION

I, Timothy Kyepa, declare that 'The World Trade Organisation (WTO) and the Organisation of Petroleum Exporting Countries (OPEC) Mandates: Regulating Production Quotas, Subsidies, and Corruption in Oil Producing Countries-an African Perspective' is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: \_\_\_\_\_

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2<sup>nd</sup> March 2014

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Professor Riekie Wandrag

2<sup>nd</sup> March 2014

## LIST OF ACRONYMS

<b>AGOA</b>	<b>African Growth and Opportunity Act</b>
<b>DRC</b>	<b>Democratic Republic of Congo</b>
<b>DSB</b>	<b>Dispute Settlement Body</b>
<b>DSU</b>	<b>Understanding on Rules and Procedures Governing the Settlement of Disputes</b>
<b>ECT</b>	<b>Energy Charter Treaty</b>
<b>EITI</b>	<b>Extractive Industries Transparency Initiative</b>
<b>GATS</b>	<b>General Agreement on Trade in Services</b>
<b>GATT</b>	<b>General Agreement on Tariffs and Trade</b>
<b>GNPC</b>	<b>Ghana National Petroleum Corporation</b>
<b>GPA</b>	<b>Agreement on Government Procurement</b>
<b>HS Code</b>	<b>Harmonised System Code</b>
<b>IEA</b>	<b>International Energy Agency</b>
<b>IMF</b>	<b>International Monetary Fund</b>
<b>ITO</b>	<b>International Trade Organisation</b>

<b>MFN</b>	<b>Most Favoured Nation</b>
<b>NAFTA</b>	<b>North American Free Trade Area</b>
<b>OECD</b>	<b>Organisation for Economic Co-operation and Development</b>
<b>OFID</b>	<b>OPEC Fund for International Development</b>
<b>OPEC</b>	<b>Organisation of Petroleum Exporting Countries</b>
<b>PAIGH</b>	<b>Pan American Institute of Geography and History</b>
<b>PSA</b>	<b>Production Sharing Agreement</b>
<b>SCM</b>	<b>Agreement on Subsidies and Countervailing Measures</b>
<b>TPRB</b>	<b>Trade Policy Review Body</b>
<b>TPRM</b>	<b>Trade Policy Review Mechanism</b>
<b>UNCAC</b>	<b>United Nations Convention against Corruption</b>
<b>VAT</b>	<b>Value Added Tax</b>
<b>WTO</b>	<b>World Trade Organisation</b>

## **ABSTRACT**

African countries are faced with the daunting task of providing a comprehensive regulatory framework for their natural resources. This is at both the international and domestic level. The statement is particularly true for emerging African oil producing countries. Related to the above, it can be argued that production quotas, subsidies, and corruption continue to hinder the full liberalisation of the oil sector globally, and in Africa. Also, these three areas are the genesis of some of the prominent issues in the discussions of trade in energy goods. Although Africa is substantially endowed with natural resources like crude oil, it remains at the bottom of the development pecking order; accordingly, it has to get centrally involved in the debate on the regulation of international trade in oil to encourage development and to benefit from the resource.

The World Trade Organisation (WTO) and the Organisation of Petroleum Exporting Countries (OPEC) are the most relevant organisations in the collective regulation of production quotas, oil consumption subsidies and the control of corruption in the oil sector. Both organisations, directly for the former, and indirectly for the latter, deal with trade between nations. OPEC's mandate is established in the OPEC Statute, while the mandate of the WTO is found in various multilateral and plurilateral agreements. However, the General Agreement on Tariffs and Trade (1994) (GATT), the Agreement on Subsidies and Countervailing Measures (SCM), and the Agreement on Government Procurement (GPA) are the most relevant. The Energy Charter Treaty (ECT) is only discussed where relevant. This is because the treaty is based on the WTO framework. Also, several provisions in the WTO agreements are not fully discussed in the ECT.

OPEC which deals with regulation of oil production and to some extent oil prices in member countries has an effect on trade of the commodity. The role of the WTO however, is more direct as it regulates international trade of various

goods and services. Thus this thesis investigates how the above legal frameworks regulate production quotas, subsidies, and corruption in the oil sector. The results of the foregoing investigation are then applied to African countries, such as, Nigeria, Angola (members of both the WTO and OPEC) and Ghana, an emerging African oil producing country, to assess the impact of these international rules on the countries' legal regimes.

Ghana has recently developed its crude oil sector. The success of the nascent oil sector of this country may depend on the conception or improvement of a comprehensive legal framework, to regulate international trade in oil. It is apparent that without an effective legal framework to regulate international trade in oil, the discovery of oil in Ghana, may not make any long term positive impact on the current economic conditions. Ghana is a member of the WTO; however, it is yet to join OPEC, despite growing debate on its membership in the organisation.

### **KEY WORDS**

The Organisation of Petroleum Exporting Countries

The World Trade Organisation

Angola

Ghana

Nigeria

Africa

Oil producing countries

International Trade

Oil consumption subsidies



Agreement on Subsidies and Countervailing Measures

Production Quotas

General Agreement on Tariffs and Trade

Corruption

Agreement on Government Procurement

The Organisation of Petroleum Exporting Countries Statute



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## CHAPTER 1

### INTRODUCTION AND BACKGROUND

*'Nous entrons dans l'avenir à reculons.'*<sup>1</sup>

#### 1.1 Introduction

This chapter provides a background to the research, gives a statement of the research problem, sets out the scope of the research, and its objectives and methodology, and outlines the chapters of the thesis. The chapter also provides an introduction to the legal framework and mandate of the Organisation for Petroleum Exporting Countries (OPEC) as well as the mandate of the World Trade Organisation (WTO), in the regulation of production quotas, oil consumption subsidies and corruption in the oil sector.

The research is motivated by the need to harmonise trade rules and create equity in world trade. Furthermore, the need to encourage further liberalisation of the oil sector is also one of the objectives of this research. Generally, the WTO has actively encouraged the liberalisation of international trade.<sup>2</sup> It should be noted that OPEC is not part of the WTO framework; however, most of the OPEC members are members of the WTO.<sup>3</sup> Nonetheless, some of the provisions of OPEC's legal framework may

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<sup>1</sup> The above quotation is attributed to Paul Avery. Translated to English, the statement means that we enter the future walking backwards. This chapter provides a basis for the detailed analysis in the later chapters. It is impossible to discuss the regulation of production quotas, oil consumption subsidies, and corruption without understanding the history and conception of both the WTO and OPEC. See Guzzini S *Realism in International Relations and International Political Economy, the Continuing Story of a Death Foretold* (1998) 15 (hereafter Guzzini S 1998).

<sup>2</sup> Lowenfeld A F *International Economic Law* 2 ed (2008) 74-75 (hereafter Lowenfeld A F 2008). See also Bagwell K & Staiger R W 'Economic Theory and the Interpretation of GATT/WTO (2003) 16' available at <http://www.ssc.wisc.edu/~rstaiger/econ.theory.gatt.wto.pdf> (accessed 07 March 2013) (hereafter Bagwell K & Staiger R 2003). See also Schott J J 'Challenges Facing the World Trade Organisation' available at <http://www.piie.com/publications/chapterspreview/66/1ie2350.pdf> (accessed 07 March 2013).

<sup>3</sup> Angola, Ecuador, Kuwait, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and, Venezuela are members of both the WTO and OPEC. Additionally Algeria, Iran, Iraq, and, Libya are all observers at the WTO and are in the process of accession with the WTO. See Worika I L 'Production, Management, OPEC and the WTO' Pauwelyn J (ed) *Global Challenges at the Intersection of Trade, Energy and the Environment* (2010) 89 (hereafter Worika I L 2010).

not be compatible with the basic provisions of the WTO legal framework.<sup>4</sup> The core discussion of international trade measures affecting trade in oil is premised on the WTO legal framework which is more inclusive, and is then compared to the OPEC Statute. African countries, especially Nigeria and Angola which are members of both organisations are relied upon as examples.<sup>5</sup>

In addition, Ghana which joined the WTO on 1 January 1995 is used as an example of emerging African oil producing countries (WTO member countries) that may be considering OPEC membership.<sup>6</sup> Unlike most African countries, Ghana is a vigilant member of the WTO and has been involved in the dispute settlement process.<sup>7</sup> African oil producing countries need to deal with the duality of regulation and the challenges within the legal frameworks of both organisations. African oil producing countries will only benefit from the organisations if the scope and application of the organisations' legal frameworks are harmonised. Ghana is currently considering whether or not it should join OPEC.<sup>8</sup> However, that country's oil production is still low and it may not qualify.<sup>9</sup>

It should also be noted that non-OPEC oil producing countries have managed to perform exceptionally well in the management of their oil resources.<sup>10</sup> This may induce Ghana to refrain from joining OPEC. Commentators in Ghana argue that OPEC may not benefit oil production there due to production quotas and the fact

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<sup>4</sup> See chapter 1 sections 1.4.2 and 1.5. See also chapter 3 sections 3.4.1, 3.4.2 and 3.4.3 for a detailed discussion.

<sup>5</sup> See chapter 4 section 4.5.

<sup>6</sup> WTO 'Ghana and the WTO' available at [http://www.wto.org/english/thewto/countries\\_e/ghana\\_e.htm](http://www.wto.org/english/thewto/countries_e/ghana_e.htm) (accessed 08 June 2012). See also chapter 6 generally for a detailed discussion of Ghana.

<sup>7</sup> Ghana was a third party in the *Bananas* dispute. The other African countries that were involved include: Cameroon, Côte d'Ivoire, and Senegal. It should be noted that very many African countries were beneficiaries of preferential treatment under the European Communities and African, Caribbean and Pacific partnership; however, they chose to watch the progress of the dispute from the side-lines. See *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (Appellate Body Report) [1997] WT/DS27/AB/R 3.

<sup>8</sup> Ghana Oil and Gas 'Ghana Unlikely to Join OPEC on Commencement of Production' available at <http://ghanaoilonline.org/2011/01/ghana-unlikely-to-join-opec-on-commencement-of-production/> (accessed 21 May 2013).

<sup>9</sup> Ghana Oil and Gas 'Ghana Unlikely to Join OPEC on Commencement of Production' available at <http://ghanaoilonline.org/2011/01/ghana-unlikely-to-join-opec-on-commencement-of-production/> (accessed 21 May 2013).

<sup>10</sup> Sankey P et al 'The End of the Oil Age 2011 and Beyond: A Reality Check' available at <http://bioage.typepad.com/files/1223fm-05.pdf> (accessed 21 May 2013).

that Ghana, like Nigeria and Angola, is less developed than many of the OPEC states and needs to maximise revenue from its oil sector.<sup>11</sup>

OPEC greatly affects the quantity of oil produced in member countries and to this end influences international oil prices.<sup>12</sup> Prior to the formation of OPEC, oil trade outside the United States, China, present-day Russia, and Canada was dominated by international oil companies.<sup>13</sup> The host governments in the oil producing countries merely acted as vendors of licences and concessions to the international oil companies.<sup>14</sup> The host governments only benefitted in terms of royalties and taxes.<sup>15</sup> These governments were not involved in production or setting of crude oil prices.<sup>16</sup> OPEC changed this trend and empowered the host governments of its member states to get involved in production and the setting of oil prices. It is argued in this thesis that some OPEC practices, such as production quotas and oil consumption subsidies, may violate WTO rules.<sup>17</sup> It is also argued that OPEC has failed to control corruption in the member states.

Production quotas that are made to protect oil prices, affect the stability of global oil prices. OPEC production quotas encourage volatility of oil prices.<sup>18</sup> This volatility is exacerbated by the fact that production limits that are set are often violated by the members.<sup>19</sup> Related to production quotas and protection of prices, oil consumption subsidies are provided for some petroleum products.<sup>20</sup> These subsidies usually

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<sup>11</sup> Ethe O 'Is OPEC Good for Ghana' available at [http://www.africanews.com/site/Is\\_OPEC\\_good\\_for\\_Ghana/list\\_messages/28599](http://www.africanews.com/site/Is_OPEC_good_for_Ghana/list_messages/28599) (accessed 21 May 2013). It is worth noting that Ghana has recently borrowed money from the OPEC Fund for International Development (OFID). However this relationship is unlikely to affect or encourage Ghana's membership to OPEC. OPEC and the OFID have distinct mandates. Suffice it to note that OPEC's strict membership requirements restrict membership. See also Republic of Ghana, Ministry of Finance and Economic Development 'Minister Leads Delegation to IMF/World Bank Meeting' available at <http://www.mofep.gov.gh/?q=news/220911> (accessed 07 March 2013).

<sup>12</sup> See chapter 1 sections 1.2.1 and 1.2.2.

<sup>13</sup> Fattouh B *An Anatomy of the Crude Oil Pricing System* (2011) Oxford Institute for Energy Studies 14 (hereafter Fattouh B 2011).

<sup>14</sup> Fattouh B (2011) 14.

<sup>15</sup> Fattouh B (2011) 14.

<sup>16</sup> Fattouh B (2011) 14.

<sup>17</sup> Cottier T et al 'Energy in WTO law and policy' Cottier T & Delimatsis P (eds) *The Prospects of International Trade Regulation from Fragmentation to Coherence* (2011) 220 (hereafter Cottier T et al 2011).

<sup>18</sup> Parra F *Oil Politics A Modern History of Petroleum* (2010) 336-337 (hereafter Parra F 2010).

<sup>19</sup> Parra F (2010) 337.

<sup>20</sup> See chapter 1 section 1.5 and chapter 4 section 4.4.2.



target the poor.<sup>21</sup> It can be argued that the revenue received as a result of production restriction, may be used to support oil consumption subsidy programs.<sup>22</sup> This is especially true for the oil producing countries. This creates a direct link between the two practices. Similarly, it can also be argued that production quotas maintained to protect appropriate oil prices, also have a direct link to corruption in oil producing countries whose major source of revenue is oil exports.<sup>23</sup> To this end, OPEC production restrictions are related to oil consumption subsidy programs and corruption. In sum, it is argued that the collective regulation of these three areas will encourage further liberalisation of the trade in oil. This is also one of the major reasons why these three areas are the focus of this study. The next section explains the title of the thesis as well as the common concepts used in the thesis and also sets out limitations. The section below does not attempt to define all terms used and only focuses on those that are relevant to delineate the scope of the thesis.

### 1.1.1 Explanation of the Title and Limitations of the Thesis

OPEC and the WTO are the major international organisations that are potentially involved in the regulation of oil trade.<sup>24</sup> It suffices, therefore, that a study on

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<sup>21</sup> It has been estimated that in practice only about 8 % of fossil fuel subsidies reach the poor for whom they are intended. See IEA et al 'Joint report by IEA, OPEC, OECD and World Bank on fossil-fuel and other energy subsidies: An update of the G20 Pittsburgh and Toronto Commitments 6' available at <http://www.oecd.org/site/tadffss/49006998.pdf> (accessed 24 May 2013).

<sup>22</sup> Empirical studies reveal that oil consumption subsidies are made to cater to the demands of consumers. This position is self-explanatory even in the absence of empirical studies. On the other hand, it has also been suggested that production quotas are made to cater for both producers and consumers. Accordingly, it can be argued that oil consumption subsidies are used by OPEC members to protect their consumers from the high global oil prices. Thus it can be argued that revenue received from the high crude oil prices is used to subsidise oil consumption in the OPEC countries. See Hochman G & Zilberman D *The Political Economy of OPEC* (2011) Energy Bioscience Institute University of California Berkeley 2-3 (hereafter Hochman G & Zilberman D 2011a). See also See Hochman G & Zilberman D *OPEC and Cheap Fuel Policies* (2011) Energy Biosciences Institute and the USDA Economic Research Services 2 (hereafter Hochman G & Zilberman D 2011b).

<sup>23</sup> See chapter 4 sections 4.4.3 and 4.5.

<sup>24</sup> See chapter 1 sections 1.2 and 1.3, chapter 3 sections 3.2 and 3.4 and chapter 4 section 4.4. It can also be argued that the Energy Charter Treaty (ECT) which is based on WTO rules and deals exclusively with energy trade is an appropriate treaty. However, under Annex W of the ECT certain provisions in the WTO agreements are excluded from trade in energy goods. This includes provisions on application of dispute settlement procedures in Art 4 of the Agreement on Subsidies and Countervailing Measures (SCM) and Art 6 on serious prejudice which affects the effectiveness of Art 5 on actionable subsidies. Further the Agreement on Government Procurement (GPA) is also excluded. Also, Art 29 (2) (as amended) of the ECT refers to applying WTO rules as they are applied to trade in energy goods by the WTO. This is vague as the WTO has not applied these rules such as Art XI of the GATT to certain energy goods for example crude oil.

production quotas, oil consumption subsidies and corruption in African oil producing countries should examine the laws and institutions of these two organisations.<sup>25</sup> Other organisations, such as the International Energy Agency (IEA) also exist.<sup>26</sup> However, these have not been very active in influencing oil policy and trade in the oil producing countries.<sup>27</sup> Additionally, the author acknowledges the fact that production quotas, oil consumption subsidies, and corruption affect the upstream and downstream oil sectors. However, these are some of the issues that arise out of both organisations potentially regulating international trade in oil. Thus the thesis is not restricted to either the upstream oil sector or the downstream oil sector.

Production quotas are the main instrument used by OPEC to stabilise oil prices.<sup>28</sup> These quotas affect the amount of oil that is produced and exported and also influence global oil prices. As such, the discussion of production restriction or production quotas focuses on crude oil as opposed to refined oil. It is argued in the thesis that production quotas are inconsistent with the General Agreement on Tariffs and Trade (GATT) provisions on export restrictions. The focus on crude oil as opposed to refined oil requires a detailed discussion of whether crude oil is a good for purposes of the GATT.<sup>29</sup>

‘Oil consumption subsidies’ refer to financial contributions made by the various countries (oil producing and non-oil producing) towards reducing the price of oil

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<sup>25</sup> The above reason also forms the basis for the classification of the research as a comparative study. See generally chapter 3, chapter 4 and chapter 5.

<sup>26</sup> The organisation was formed to respond to the 1973/4 oil crisis. It is mainly composed of oil consuming states that seek to guarantee oil supply among other objectives. See IEA ‘History’ available at <http://www.iea.org/aboutus/history/> (accessed 07 November 2012).

<sup>27</sup> Although the IEA has a working relationship with OPEC, the problem of rent allocation between producing countries and consuming countries as well as the difference in the interests of the two organisations is a major challenge to harmonisation of the policies of the organisations. This affects the ability of the IEA to influence policy in OPEC member states. See generally Mabro R A Dialogue Between Oil Producers and Consumers: The Why and the How (1991) Oxford Institute for Energy Studies (hereafter Mabro R 1991). See also Luciani G ‘Oil and Political Economy in the International Relations of the Middle East’ available at <http://www.princeton.edu/~gluciani/pdfs/Chapter%20in%20Fawcett.pdf> (accessed 21 May 2013). It can be argued that the above problems may be overcome at the WTO as the organisation deals with various commodities and is not limited to oil. Accordingly, it is an appropriate forum for making concessions and compromises.

<sup>28</sup> See chapter 4 section 4.4.1.

<sup>29</sup> See chapter 1 section 1.4.1 for a detailed discussion.

products for domestic consumption.<sup>30</sup> These subsidies sometimes create adverse effects for the oil sectors of other oil producing countries.<sup>31</sup> In this regard it can be argued that oil consumption subsidies may be in contravention of provisions in the Agreement on Subsidies and Countervailing Measures (SCM).<sup>32</sup> Oil Consumption Subsidies in this thesis are based on the difference between average end-user prices paid by consumers and the full supply price.<sup>33</sup> This may denote a financial contribution made by a particular country. The definition of subsidies under the SCM Agreement is relied upon in this thesis.<sup>34</sup>

Corruption in the OPEC member states has been identified as a major challenge.<sup>35</sup> Corruption in the oil dependent states has been attributed to a high level of government involvement in the sector.<sup>36</sup> OPEC does not have specific rules on corruption. The WTO, on the other hand, has an Agreement on Government Procurement (GPA), which can be used to control corruption. However, the GPA has not been very effective.<sup>37</sup>

For purposes of this thesis, production quotas, oil consumption subsidies, and control of corruption are identified as the key areas. Therefore, reference to 'international trade in oil' refers to the regulation of the above areas. It should be noted that other areas such as internal taxes and transit of energy and energy related services also have an effect on global trade in oil. However, these are beyond the scope of this thesis.<sup>38</sup>

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<sup>30</sup> See chapter 3 section 3.4.3 and chapter 4 section 4.4.2. The discussion of oil consumption subsidies in this thesis focuses on such subsidies in oil producing countries.

<sup>31</sup> See chapter 3 section 3.4.3 and chapter 4 section 4.4.2.

<sup>32</sup> See chapter 3 section 3.4.3 and chapter 4 section 4.4.2.

<sup>33</sup> See IEA 'Fossil-fuel subsidies – Methodology and Assumptions' available at <http://www.iea.org/publications/worldenergyoutlook/resources/energysubsidies/methodologyforcalculatingsubsidies/> (accessed 12 April 2013). It should be noted that OPEC is not comfortable with this definition and prefers that the benchmark price should be the cost of oil production. See IEA et al Analysis of the Scope of Energy Subsidies and Suggestions for the G-20 Initiative (2010) 13-14 (hereafter IEA et al 2010a).

<sup>34</sup> See Art 1 of the SCM Agreement. See also chapter 3 section 3.4.3.

<sup>35</sup> See chapter 3 section 3.4.4 and chapter 4 sections 4.4.3 and 4.5.

<sup>36</sup> See chapter 4 sections 4.4.3 and 4.5.

<sup>37</sup> See chapter 3 section 3.4.4.

<sup>38</sup> Yanovich A 'WTO Rules and the Energy Sector' Selivanova Y (ed) *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (2012) 11 and 29 (hereafter Yanovich A 2012).

Regulation is broadly understood as a system that facilitates or restricts certain behaviour.<sup>39</sup> In some cases, commentators have categorised regulation as red tape, which only creates obstacles to economic activity.<sup>40</sup> This may be true, especially for the oil sector. It has been noted that the oil sector in Africa will in the near future be greatly supported by indigenous private oil companies.<sup>41</sup> These, like all other private companies will essentially be driven by profit motives and they may consider regulation to be bureaucratic red tape. This in most cases does not advance the interests of the citizens<sup>42</sup> of the countries where oil resources are located.<sup>43</sup> On a positive note, some authors have defined regulation as economic regulation.<sup>44</sup> That is, legislative and administrative controls that govern economic activity.<sup>45</sup> This definition is more balanced and takes into account the needs of both private oil companies and the citizens. The regulation of economic activity can benefit both the private entities and the citizens of an oil producing country.

The research endeavours to keep the focus of the study on Africa, and, in addition to providing African examples, a specific African case study is undertaken in chapter six. Although the challenges experienced by oil producing countries in the regulation of production quotas, oil consumption subsidies and control of corruption

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<sup>39</sup> Baldwin R et al *Understanding Regulation Theory, Strategy, and Practice* 2 ed (2012) 3 (hereafter Baldwin R et al 2012).

<sup>40</sup> Baldwin R et al (2012) 1.

<sup>41</sup> Nigeria and Angola have indicated that they will increase local participation in the oil sector. Local participation may include the participation of local private oil companies. See Global Witness *Rigged? The Scramble for Africa's Oil, Gas and Minerals* (2012) 8 (hereafter Global Witness 2012).

<sup>42</sup> Citizens in this context refer solely to natural persons and not juristic persons.

<sup>43</sup> Private oil companies may favour limited regulation to exploit oil resources at the lowest costs. Thus the citizens may lose revenue and also face externalities such as environmental degradation.

<sup>44</sup> It is argued that economic regulation is meant to benefit politically effective groups. The theory of economic regulation is premised on the broad theory of demand and supply. Thus the state will use regulation to provide benefits to particular groups. For the citizens, these benefits may include regulations to enhance taxes from the private oil companies. On the other hand, regulation may be used to limit entry of private oil companies to protect the existing companies. Thus regulation in this case can achieve both objectives. See Posner R A *Theories of Economic Regulation* (1974) National Bureau of Economic Research Working Paper Series No. 41 1, 14-15 and 19 (hereafter Posner R A 1974). See also generally Stigler G 'The theory of economic regulation' (1971) 2 *Bell J. Econ & Management Sci* 2.1 (hereafter Stigler G 1971). The economic theory of regulation has been criticised by some authors. It has been argued that the theory has limitations and is related to the public interest theory of regulation. Further, it has been argued that regulations are not always made in the public interest. Commentators also argue that the private interest ambit of the economic theory of regulation presupposes that regulators always regulate for private interests, which is not entirely true. For a detailed discussion see generally Ogus A 'W(h)ither the Economic Theory of Regulation? What Economic Theory of Regulation?' Jordana J & Levi-Faur D (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004) (hereafter Ogus A 2004).

<sup>45</sup> Posner R A (1974) 1.

are not limited to Africa, an analysis of these key areas without delineating the scope of the study would be too ambitious.

## 1.2 The Organisation of Petroleum Exporting Countries (OPEC)

### 1.2.1 A Brief History

The birth of OPEC is attributed to a conference held in Baghdad, Iraq, between 10 and 14 September 1960.<sup>46</sup> The conference revolutionised oil trade and introduced a new organisation. OPEC officially<sup>47</sup> came into existence, with Saudi Arabia, Iran, Kuwait, Iraq and Venezuela as the founding members.<sup>48</sup> OPEC was formed in retaliation against the domination of international oil companies and a cartel-type arrangement created by some state governments in the United States of America.<sup>49</sup>

‘Since its birth in 1960, our Organisation has been characterized by a clarity of objectives. It envisaged a central objective to which it diligently stuck for more than ten years. That objective revolved around the concept that oil prices are an integral part of the basic national interests of member countries and that their decisions to

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<sup>46</sup> Danielsen A L *The Evolution of OPEC* (1982) 4 (hereafter Danielsen A L 1982). The OPEC statute differs from the foregoing text on the dates of formation, the text indicates 9 -14 September 1960 as the dates when OPEC was formed. See also Wälde T W ‘Organisation of Petroleum Exporting Countries’ Istituto Della Enciclopedia Italiana and Fondata Da Giovanni Treccani S.p.A. *Encyclopaedia of Hydrocarbons International Law* (2007) 560 (hereafter Wälde T W 2007). The text indicates 10 -14 September 1960 as the correct dates for the formation of OPEC. The date indicated in the Statute and affirmed by Wälde T W (2007) is the most appropriate date. See also Behr P ‘Energy Nationalism Do Petrostates Threaten Global Energy Security?’ Kassie G et al (eds) *International Issues in Social Work and Social Welfare Selections from CQ Researcher* (2010) 242 (hereafter Behr P 2010).

<sup>47</sup> The term ‘officially’ is used with regard to 1960, as OPEC’s formation is said to go back to several meetings held between the major oil producing countries at the time. In 1947, exploratory meetings were held between the Venezuelans and the Iranians. Venezuelan officials also toured the Middle East in 1949 and an Arab Petroleum Congress was held in Cairo in 1959. See Hallwood P & Sinclair S *Oil, Debt and Development – OPEC in the Third World* (1981) 42 (hereafter Hallwood P & Sinclair S 1981).

<sup>48</sup> It should be noted that other members were subsequently admitted as full members. These included; Qatar, Libya, Indonesia, UAE, Algeria, Nigeria, Ecuador, and Gabon. See Danielsen A L (1982) 4.

<sup>49</sup> The domination of international oil companies, commonly known as the seven sisters has been described as an international corporate cartel. The following companies dominated oil trade in the Middle East prior to the formation of OPEC; Exxon, Mobil, Texaco, Socal, Gulf, Shell, and BP. The cartel type arrangement in the United States was known as market demand prorationing. This was a quota and allocation system used to limit production in the United States and maintain prices from 1935 to 1970. See Hallwood P & Sinclair S (1981) 6-7.

## Chapter1: Introduction and Background

change them are their legitimate right and one which ought not to be left in the hands of foreign oil companies alone.<sup>50</sup>

Despite the creation of OPEC in the 1960s, it was not until the 1970s that the effect of OPEC was felt in oil trade.<sup>51</sup> It is worth noting at this stage that OPEC's intervention and success might have affected the cartel-type arrangement in the USA and contributed to the demise of market demand prorating in 1970.<sup>52</sup> At the same time, production cuts by some OPEC members and the oil embargo on the USA led to an oil shortage and increased global oil prices.<sup>53</sup> Similarly, these actions also affected the cartel-type arrangement that was maintained by the international oil companies.

'By the early 1970s the OPEC members could show a united front against the, by then disunited, international oil companies, reversing the situation of only a few years earlier.'<sup>54</sup>

Negotiations and the resulting agreements signed between 1971 and 1973, between OPEC members and the international oil companies successfully raised the posted prices.<sup>55</sup> The success of OPEC members can be explained by the uniform voice, developed from having organised themselves under one organisation.<sup>56</sup> However,

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<sup>50</sup> Jaidah A M *An Appraisal of OPEC Oil Policies – Energy Resources and Policies of the Middle East and North Africa* (1983) 48 (hereafter Jaidah A M 1983).

<sup>51</sup> Hallwood P & Sinclair S (1981) 42.

<sup>52</sup> As a result of oil price suppression by the United States and its support of Israel in the Yom Kippur War, some Arab OPEC members imposed an oil embargo on the United States. Some OPEC member states also instituted a production cut. See Hallwood P & Sinclair S (1981) 6-7. See also Behr P (2010) 242.

<sup>53</sup> See Behr P (2010) 242 for a detailed discussion of OPEC policies in the 1970s.

<sup>54</sup> Hallwood P & Sinclair S (1981) 42.

<sup>55</sup> The increase in posted prices is credited to the Tehran Agreement, the Tripoli Agreement and the Geneva Accords. See Hallwood P & Sinclair S (1981) 43. Posted prices are the announced price of oil reflecting the market development of crude oil and crude oil products. Prior to the 1970s posted prices were manipulated and administered by the international oil companies and did not truly reflect the market development of crude oil. See OPEC 'Definitions' available at <http://www.opec.org/library/Annual%20Statistical%20Bulletin/interactive/2009/FileZ/definition.htm> (accessed 4 July 2011). See also Fattouh B (2011) 15. Despite the failure of the negotiations in September 1973, the posted prices were increased by the six Gulf member states of OPEC. See also Yergin D (1991) *The Prize. The Quest for Oil, Money and Power* and Fattouh B *The Origins and Evolution of the Current International Oil Pricing System: A Critical Assessment in: Mabro R. (ed.) Oil in the Twenty-First Century: Issues, Challenges, and Opportunities* (2006) all cited in Brémond V et al 'Does OPEC still exist as a cartel? An empirical investigation' (2011) *Journal of Energy Economics* (03) 10 1-2 (hereafter Brémond V et al 2011). The posted price period is said to have originated with the international oil companies, which sought to have a stable low price to limit the income tax paid to the oil exporting countries irrespective of the prevailing market conditions.

<sup>56</sup> Hallwood P & Sinclair S (1981) 43.

this success was curtailed by the Iranian oil-workers strike, which halted oil production in Iran in 1978.<sup>57</sup> The foregoing state of affairs was compounded by the refusal of OPEC members to sell oil on the spot market; this increased oil prices on the spot market.<sup>58</sup> Thus the 1970s although initially successful, ended on a low note.

Further, the growing success of OPEC in raising prices and imposing its influence on oil trade was adversely affected by the declining prices and low demand that characterised the oil trade in the 1980s.<sup>59</sup> The low prices at the time have been imputed to increased oil production in the non-OPEC countries, and low demand due to energy conservation efforts in the USA, Europe, and Japan.<sup>60</sup> OPEC responded by introducing a group production ceiling divided between the members and also by providing a reference basket for pricing.<sup>61</sup> The above measures and the slight increase in oil prices, towards the end of the decade, helped member countries to recover from the effects of the early 1980s.<sup>62</sup>

The 1990s did not experience pricing problems as serious as those witnessed in the 1980s.<sup>63</sup> However, political instability in the Middle East caused some price volatility in the early 1990s.<sup>64</sup> The attack on Kuwait by Iraq in 1990 precipitated a major price rise from US \$ 15 per barrel in May 1990 to over US \$ 40 per barrel at the end of

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<sup>57</sup> Parra F (2010) 220.

<sup>58</sup> Parra F (2010) 229.

<sup>59</sup> See OPEC 'Brief History' available at [http://www.opec.org/opecweb/en/about\\_us/24.htm](http://www.opec.org/opecweb/en/about_us/24.htm) (accessed 4 July 2011). See also Sammi M V 'OPEC: Past, Present, and Future' Shojai S (ed) *The New Global Oil Market: Understanding Energy Issues in the World Economy* (1995) 86 (hereafter Sammi M V 1995). The text cites sharp price fluctuations and excess oil supplies as some of the issues that affected OPEC in the 1980s.

<sup>60</sup> Behr P (2010) 242.

<sup>61</sup> See OPEC 'Brief History' available at [http://www.opec.org/opec\\_web/en/about\\_us/24.htm](http://www.opec.org/opec_web/en/about_us/24.htm) (accessed 4 July 2011). See also Brémond V et al (2011) 1. The foregoing text indicates that a new price mechanism was established in the mid-1980s; this was a market related price as opposed to an administered price. Thus there were various pricing systems between the 1970s and the 1980s, that is, the posted price, official price, buyback price, the administered price by OPEC and the market-related price, which prevails today. See Fattouh B (2011) 11-16. See also Parra F (2010) 289 for a detailed discussion of the quota allocation in the 1980s and the price mechanism. See also Skeet I *OPEC: Twenty-Five Years of Prices and Politics* (1989) 217 (hereafter Skeet I 1989).

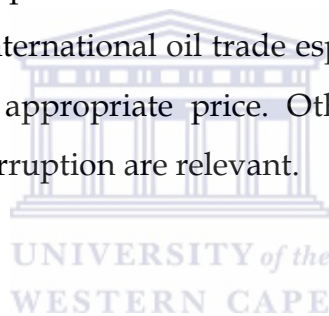
<sup>62</sup> See OPEC 'Brief History' available at [http://www.opec.org/opec\\_web/en/about\\_us/24.htm](http://www.opec.org/opec_web/en/about_us/24.htm) (accessed 4 July 2011).

<sup>63</sup> See OPEC 'Brief History' available at [http://www.opec.org/opec\\_web/en/about\\_us/24.htm](http://www.opec.org/opec_web/en/about_us/24.htm) (accessed 4 July 2011). It should be noted that weak prices still persisted in the decade; prices at some point went as low as the prices of the mid 1980s. However, the decade was much more stable than the 1980s.

<sup>64</sup> See OPEC 'Brief History' available at [http://www.opec.org/opec\\_web/en/about\\_us/24.htm](http://www.opec.org/opec_web/en/about_us/24.htm) (accessed 4 July 2011).

1990.<sup>65</sup> It should be noted that the above attack was finally quelled by the USA and the United Nations coalition forces, which forced Iraq out of Kuwait.<sup>66</sup> This allowed the prices to settle but only for a while.<sup>67</sup> Ecuador also suspended its membership of the organisation in 1992.<sup>68</sup>

At the turn of the century, oil prices rose from US \$ 10 to US \$ 30 per barrel, OPEC responded by introducing a price band mechanism to stabilise prices.<sup>69</sup> This new mechanism took long to improve the situation and was only fairly efficient in 2002.<sup>70</sup> On 14 September 2000, OPEC celebrated its 40<sup>th</sup> anniversary.<sup>71</sup> Currently, OPEC is struggling with volatile crude oil prices.<sup>72</sup> It is apparent from the foregoing discussion that OPEC has focused and continues to focus on maintaining the best possible price for crude oil. This is mainly achieved through production regulation. OPEC's mandate is largely responsible for the trend discussed above. While this is important, the regulation of international oil trade especially for Africa goes beyond the struggle to maintain an appropriate price. Other related issues such as oil consumption subsidies and corruption are relevant.



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<sup>65</sup> Euclid A 'OPEC's Dominance of the Global Oil Market: The Rise of the World's Dependence on Oil' *Middle East Journal* (2004) (58) 3 424 (hereafter Euclid A 2004). See also Parra F (2010) 305.

<sup>66</sup> Euclid A (2004) 425

<sup>67</sup> Euclid A (2004) 425.

<sup>68</sup> See OPEC 'Ecuador Facts and Figures' available at [http://www.opec.org/opecweb/en/about\\_us/148.htm](http://www.opec.org/opecweb/en/about_us/148.htm) (accessed 24 May 2013). Ecuador returned to the organisation in 2007. See also The New York Times 'Ecuador Set to Leave OPEC' available at <http://www.nytimes.com/1992/09/18/business/ecuador-set-to-leave-opec.html> (accessed 24 May 2013). Ecuador suspended its membership because of the annual United States \$ 2 million membership fee and the Organisation's refusal to raise the country's production quota from 320,000 barrels a day. Mr. Andres Barreiro Vivas, the country's energy minister at the time, stated that the above conditions were affecting the country's economy.

<sup>69</sup> Horn M 'OPEC's optimal crude oil price' *Energy Policy* (2004) (32) 12 269 (hereafter Horn M 2004). The price band mechanism involves setting of a price range between US \$ 22 to US \$ 28 per barrel and using that price range to regulate production.

<sup>70</sup> Horn M (2004) 269.

<sup>71</sup> OPEC 'Annual Statistical Bulletin (2000)' available at [http://www.opec.org/opec\\_web/static\\_files/project/media/downloads/publications/ASB2000.pdf](http://www.opec.org/opec_web/static_files/project/media/downloads/publications/ASB2000.pdf) (accessed 24 May 2013).

<sup>72</sup> Wearden G 'Oil Prices Volatile as OPEC Talks Down Shortage Fears' available at <http://www.guardian.co.uk/business/2011/mar/08/oil-prices-volatile-iran-opec-production> (accessed 24 May 2013).



## 1.2.2 The OPEC Mandate

As indicated in section 1.2.1, OPEC's mandate has always focused on ensuring that its members get a satisfactory price for their oil.<sup>73</sup> Art 2 (A)-(C) of the OPEC Statute provides the mandate of the organisation.

'The principal aim of the Organi[s]ation shall be the coordination and unification of the petroleum policies of Member Countries and the determination of the best means for safeguarding their interests, individually and collectively.

The Organi[s]ation shall devise ways and means of ensuring the stabili[s]ation of prices in international oil markets with a view to eliminating harmful and unnecessary fluctuations.

Due regard shall be given at all times to the interests of the producing nations and to the necessity of securing a steady income to the producing countries; an efficient, economic and regular supply of petroleum to consuming nations; and a fair return on their capital to those investing in the petroleum industry.'<sup>74</sup>

The economies of the OPEC members are diverse: some countries, like Saudi Arabia and the United Arab Emirates, have flourishing economies, while other economies, especially those of the African members for example, Nigeria and Angola are still growing.<sup>75</sup> This makes it very difficult to harmonise the petroleum policies of the members. OPEC members depend on oil trade to run their economies and thus their petroleum policies have to be in accord with their broad economic policies. The above challenge is highlighted by among other examples, the 1990 dispute between Iraq and Kuwait which was largely driven by OPEC's failure to accommodate the

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<sup>73</sup> This does not mean that OPEC directly fixes the prices for oil; this was the position in the past. Currently OPEC members can only limit oil production. This in turn indirectly affects the price of oil. The prices are now set by movements on the different petroleum exchanges. These include: the New York Mercantile Exchange, the International Petroleum Exchange and the Singapore International Monetary Exchange. The New York Mercantile Exchange (Nymex) orchestrated the plan to put OPEC out of the price setting arena. See Wälde T W (2007) 563 for a detailed discussion. See also Goodman L M *The Asylum The Renegades who Hijacked the World's Oil Market* (2011) 71-72 and 92-93 (hereafter Goodman L M 2011).

<sup>74</sup> The OPEC Statute Art 2.

<sup>75</sup> See The World Bank 'Data-Saudi Arabia' available at <http://data.worldbank.org/country/saudi-arabia> (accessed 24 May 2013). See also The World Bank 'Data- United Arab Emirates' available at <http://data.worldbank.org/country/ united-arab-emirates> (accessed 24 May 2013). See also The World Bank 'Data-Nigeria' available at <http://data.worldbank.org/country/nigeria> (accessed 24 May 2013). See also The World Bank 'Data-Angola' available at <http://data.worldbank.org/country/angola> (accessed 24 May 2013).

individual oil production policies of the two countries.<sup>76</sup> Be that as it may, OPEC has existed since the 1960s and has managed to overcome the various challenges that have threatened its existence. This indicates that the organisation has been successful in maintaining relative harmony in the petroleum policies of its members.

The stabilisation of oil prices on the international oil markets is by no means a simple endeavor. Currently the control of crude oil prices has been wrestled from the firm grip of OPEC.<sup>77</sup> The movement of oil prices is controlled to a very large extent by the major petroleum exchanges.<sup>78</sup> OPEC can only indirectly influence prices by setting a production ceiling for its members.<sup>79</sup> Thus to date OPEC has not been very successful in controlling the volatility of crude oil prices.<sup>80</sup> The apparent failure to effectively stabilise prices on international oil markets does not imply that OPEC does not affect the price of oil. It still does so through controlling supply by its member countries.

OPEC exercises its mandate through resolutions.<sup>81</sup> The choice of resolutions as a tool for creating obligations is to protect and emphasise the sovereignty of the member states.<sup>82</sup> It has been noted that these resolutions have the force of law, as they are made in terms of provisions in the OPEC Statute.<sup>83</sup> It can also be argued that these resolutions can be characterised as soft law.<sup>84</sup> An issue that requires further investigation is the strength of the obligations created thereunder.<sup>85</sup>

The OPEC mandate shows that its main interest is price stabilisation. The need to control prices is tied to ensuring a steady income for member states. It is doubtful whether OPEC is really interested in ensuring a steady supply of petroleum to

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<sup>76</sup> Parra F (2010) 295-297.

<sup>77</sup> Goodman L M (2011) 92-93.

<sup>78</sup> Wälde T W (2007) 563.

<sup>79</sup> See OPEC 'Brief History' available at [http://www.opec.org/opec\\_web/en/about\\_us/24.htm](http://www.opec.org/opec_web/en/about_us/24.htm) (accessed 4 July 2011).

<sup>80</sup> Wearden G 'Oil Prices Volatile as OPEC Talks Down Shortage Fears' available at <http://www.guardian.co.uk/business/2011/mar/08/oil-prices-volatile-iran-opec-production> (accessed 24 May 2013).

<sup>81</sup> See OPEC Statute Art 11 (C).

<sup>82</sup> Stoehr L 'OPEC as a Legal Entity' (1979) *Fordham International Law Journal* Vol 3 Issue 1 95 (hereafter Stoehr L 1979).

<sup>83</sup> Stoehr L (1979) 95. See also chapter 4 section 4.4.1 on resolutions creating legitimate expectations and soft law.

<sup>84</sup> See chapter 4 section 4.4.1.

<sup>85</sup> This issue is discussed in chapter 4 section 4.4.1.

consuming countries. This can only be done where the organisation is assured of an appropriate price for its members' crude oil. Recently relations between the IEA and OPEC have been strained due to the IEA releasing its emergency oil stocks onto the market without the approval of OPEC.<sup>86</sup> This indicates that the interests of the consuming states are not the major focus of OPEC.

OPEC's stated mandate is challenging and not easy to fulfil. However, the continued existence of OPEC reveals that the organisation is relevant in protecting the interests of members and to a small extent the setting of world crude oil prices. Nevertheless, many African oil producing countries cannot meet the membership requirements of the organisation.<sup>87</sup> This makes OPEC an exclusive club for certain countries that meet its membership criteria, despite the fact that African oil producing countries that are non-OPEC members are also affected by OPEC's actions, which usually arise from the mandate of the organisation.

Additionally, there are indications that Art 2 (B) of the OPEC Statute contravenes Art XI (I) of the GATT 1994.<sup>88</sup> OPEC has established a production ceiling. This can be classified as production quotas for its members.<sup>89</sup> It has also been noted that OPEC has failed to manage oil consumption subsidies and corruption in its member states.<sup>90</sup> Article 2 (A) of the OPEC Statute provides that the organisation should

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<sup>86</sup> The IEA released 60 million barrels from the emergency stocks of its member countries. The IEA justified the release citing a shortage in oil supply due to the ongoing oil supply disruptions from Libya. OPEC was of the opinion that the release would adversely affect oil prices. See OPEC Bulletin Industry and Nature in Balance EU-OPEC (2011) Dialogue: 8<sup>th</sup> Ministerial Meeting (XLII) 10 (hereafter OPEC Bulletin 2011).

<sup>87</sup> Article 7 of the OPEC Statute sets out the membership requirements. The major requirement is being a substantial net exporter of crude petroleum.

<sup>88</sup> See Lautenberg F R Busting Up The Cartel: The WTO Case against OPEC (2004) A Report from the Office of Senator Frank R. Lautenberg 1-2 (hereafter Lautenberg F R 2004). See also De Fazio P 'DeFazio Urges President to Stand Up to OPEC Price Gouging' available at [http://www.defazio.house.gov/index.php?option=com\\_content&task=view&id=712&Itemid=70](http://www.defazio.house.gov/index.php?option=com_content&task=view&id=712&Itemid=70) (accessed 01 November 2012). See also Marceau G 'The WTO in the Emerging Energy Governance Debate' Pauwelyn J (ed) *Global Challenges at the Intersection of Trade, Energy and the Environment* (2010) 27 (hereafter Marceau G 2010 a). The control of the amount of oil produced in OPEC member states amounts to use of quotas which is prohibited under WTO law. See also Guerra A J *The World Trade Organisation and Oil* (2001) Oxford Institute for Energy Studies 29 (hereafter Guerra A J 2001). The author discusses GATT Art XI and its possible contravention by OPEC member states. Additionally, the taxes paid in the OPEC member countries by the companies engaged in oil production are usually very low and it has been argued that these may amount to prohibited subsidies under WTO law. See also Wälde T W (2007) 568. See also chapter 3 sections 3.4.1 and 3.4.2.

<sup>89</sup> The production quotas are built into the price band mechanism, which is used to regulate production of oil in the member countries. See Horn M (2004) 269.

<sup>90</sup> On average, the percentile rank for control of corruption in 2012 for OPEC member states was only 34%. This is largely due to a majority of the members having a percentile rank below 50%. See Transparency

safeguard the members' interests.<sup>91</sup> This can be interpreted as the basis for oil consumption subsidies maintained in OPEC member states.<sup>92</sup> Nonetheless, this provision can be used to control corruption in the OPEC member states.<sup>93</sup> Production quotas, oil consumption subsidies, and corruption may affect countries, such as Angola and Nigeria, which have concurrent membership of both OPEC and the WTO. Similarly, countries such as Ghana that are considering OPEC membership find themselves in a challenging position, with regard to their commitments under the WTO framework.

### 1.2.3 The Relationship between OPEC and African Countries

The relationship between OPEC and Africa is often analysed by looking at OPEC's African member countries such as Algeria, Nigeria, and Angola. However, other African countries, such as, Chad, Gabon, Sudan, Republic of Congo, Equatorial Guinea and Ghana, currently contribute to oil production.<sup>94</sup> These countries that are non-OPEC members also contribute to the stability of the price of oil. Many of the above have not joined OPEC because they are not substantial net exporters of oil,<sup>95</sup> while others have been barred by the prohibitive membership fees.<sup>96</sup> Also, the fact that OPEC limits production of oil has kept some countries out.<sup>97</sup> The relationship

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International 'Corruption Perceptions Index 2012' available at <http://www.Transparency.org/cpi2012/results> (accessed 24 May 2013).

<sup>91</sup> Article 2 (A) of the OPEC Statute.

<sup>92</sup> See chapter 4 section 4.4.2 for a detailed discussion.

<sup>93</sup> See chapter 4 section 4.4.3 for a detailed discussion.

<sup>94</sup> Bahgat G 'Africa's oil potential and implications' 2007 *OPEC Review* 96 (hereafter Bahgat G 2007). Sudan has been invited to OPEC meetings as an observer but it is not a member. See Royal Norwegian Embassy in Abuja 'Norway Helps Prepare Ghana for the Oil Age' available at [http://www.emb-norway.com.ng/News\\_and\\_events/development/Norway\\_Ghana\\_oil\\_cooperation/](http://www.emb-norway.com.ng/News_and_events/development/Norway_Ghana_oil_cooperation/) (accessed 24 May 2013).

<sup>95</sup> Article 7 of the OPEC Statute requires prospective members to be substantial net exporters of oil.

<sup>96</sup> See Lesova P 'Indonesia Considers Whether to Leave OPEC Cartel A Net Oil Importer, Indonesia has Different Interests from OPEC, Analysts Say' available at <http://www.marketwatch.com/story/indonesia-considers-whether-to-leave-opec-cartel> (accessed 24 May 2013). Ecuador suspended its membership between 1992 and 2007 due to the high membership fees.

<sup>97</sup> See Sudan Tribune 'Sudan is Considering Joining OPEC Oil Cartel: Official' available at <http://sudantribune.com/spip.php?article33544> (accessed 24 May 2013). It is possible the subsequent secession of South Sudan from Sudan affected Sudan's proposed membership of OPEC. Most of Sudan's oil reserves are now located in South Sudan, a sovereign state. See De Waal A 'Sudan and South Sudan in 2013: Rise or Fall Together' available at <http://globalpublicsquare.blogs.cnn.com/2012/12/20/sudan-and-south-sudan-in-2013-rise-or-fall-together/> (accessed 24 May 2013).

between OPEC and non-OPEC African oil producing countries has been largely silent.

On the contrary, it has been noted that OPEC's relationship with other oil producing countries, such as Russia, Norway, and Mexico, has been cordial.<sup>98</sup> It can be argued that such relationships are crucial for OPEC as both Russia and Norway are big oil producing countries, compared to the African oil producing countries that are non-OPEC members. Since 2005, OPEC has started to work closely with the European Union and this co-operation has been cited as helping both parties understand their energy challenges.<sup>99</sup> This has not been the case with Africa. Although Angola joined OPEC in 2007,<sup>100</sup> the author is of the opinion that this is not indicative of a close relationship between African oil producing countries and OPEC. It can be argued that Angola only replaced Gabon which suspended its membership of OPEC in 1994.<sup>101</sup>

The relationship between OPEC and African countries can also be viewed from an aid perspective. In this regard, a brief evaluation of the OPEC Fund for International Development (OFID) is necessary. Some commentators are of the opinion that close ties exist between the OFID and Africa.<sup>102</sup> The OFID has also implemented a trade finance facility to support international trade in developing countries.<sup>103</sup> The effects of the OFID on international trade in Africa are certainly positive.

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<sup>98</sup> Desta G M 'The GATT/WTO system and international trade in petroleum: an overview' (2003) 21 *J. Energy & Nat. Resources L.* 387 (hereafter Desta G M 2003).

<sup>99</sup> OPEC Bulletin (2011) 6.

<sup>100</sup> See OPEC 'Brief History' available at [http://www.opec.org/opec\\_web/en/about\\_us/24.htm](http://www.opec.org/opec_web/en/about_us/24.htm) (accessed 17 August 2011).

<sup>101</sup> See OPEC 'Brief History' available at [http://www.opec.org/opec\\_web/en/about\\_us/24.htm](http://www.opec.org/opec_web/en/about_us/24.htm) (accessed 17 August 2011).

<sup>102</sup> Aissi S 'African Development and the Role of the OPEC Fund' Shihata F I (ed) *The OPEC Fund for International Development The Formative Years* (1983) 74 (hereafter Aissi S 1983). See also OFID 'OFID Extends Second Grant in Humanitarian Assistance for Famine Victims in Ethiopia and Kenya' available at [http://www.ofid.org/NewsPress/tabid/87/articleid/1559/Default.aspx?dnnprintmode=true&mid=426&SkinSrc=\[G\]Skins%2F\\_default%2FNo+Skin&ContainerSrc=\[G\]Containers%2F\\_default%2FNo+Container](http://www.ofid.org/NewsPress/tabid/87/articleid/1559/Default.aspx?dnnprintmode=true&mid=426&SkinSrc=[G]Skins%2F_default%2FNo+Skin&ContainerSrc=[G]Containers%2F_default%2FNo+Container) (accessed 08 March 2013). See also OFID 'OFID Approved Emergency Assistance Grant for Famine Victims in Somalia' available at <http://www.ofid.org/NewsPress/tabid/87/ArticleId/1558/OFID-approves-emergency-assistance-grant-for-famine-victims-in-Somalia.aspx> (accessed 08 March 2013). The above are examples of grants that OFID has recently extended to African countries.

<sup>103</sup> See OFID 'Trade Finance Facility' available at <http://www.ofid.org/PROJECTSOPERATIONS/TradeFinanceFacility.aspx> (accessed 24 May 2013).

OPEC's relationship with African oil producing countries, both OPEC members and non-OPEC members, thus has both positive and negative implications. Even though many African countries may benefit from the OFID, they are faced with some of the negative effects of OPEC's control of oil production in its member states. This affects the price of oil which keeps fluctuating depending on the production quotas authorised by OPEC. This in turn affects the economic planning of these countries.

## 1.3 The World Trade Organisation (WTO)

### 1.3.1 A Brief History

The history of the WTO dates back to 1945 after the Second World War.<sup>104</sup> The intention at the time had been to create a trade institution similar to the Bretton Woods institutions, that is, the World Bank and the International Monetary Fund (IMF).<sup>105</sup> The organisation that had been contemplated by about 50 countries at the time was the International Trade Organisation (ITO).<sup>106</sup> This organisation was supposed to be a specialised agency of the United Nations.<sup>107</sup> Unfortunately, the

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<sup>104</sup> See WTO 'UNDERSTANDING THE WTO: BASICS-The GATT years: from Havana to Marrakesh' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 20 September 2011). See also Van den Bossche P *The Law and Policy of the World Trade Organisation Texts, Cases and Materials* (2008) 78 (hereafter Van den Bossche P 2008). The history of the WTO can be traced back to 1945 when the United States invited its allies to enter into negotiations to conclude a multilateral agreement on trade in goods. See also WTO 'World Trade Organisation Analytical Index Guide to GATT Law and Practice' (2012) 3 available at [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/intro\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/intro_e.pdf) (accessed 25 May 2013). See also generally Wilkinson R *The WTO Crisis and the Governance of Global Trade* (2006) (hereafter Wilkinson R 2006). See also Krueger A O 'Introduction' Krueger A O (ed) *The WTO as an International Organization* (2000) 3 (hereafter Krueger A O 2000).

<sup>105</sup> See WTO 'UNDERSTANDING THE WTO: BASICS-The GATT years: from Havana to Marrakesh' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 20 September 2011). See also Van den Bossche P (2008) 78

<sup>106</sup> See WTO 'UNDERSTANDING THE WTO: BASICS-The GATT years: from Havana to Marrakesh' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 20 September 2011). See also Van den Bossche P (2008) 78.

<sup>107</sup> See WTO 'UNDERSTANDING THE WTO: BASICS-The GATT years: from Havana to Marrakesh' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 20 September 2011). See also Van den Bossche P (2008) 78.

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organisation never came into being as the charter upon which it was based was too ambitious.<sup>108</sup>

However, prior to the ITO, several countries with the intention of fast-tracking trade liberalisation had been negotiating an agreement to reduce and bind customs tariffs: the GATT.<sup>109</sup> To circumvent the requirements for a change in national laws before the adoption of the GATT, countries that had negotiated the Agreement also negotiated a Protocol of Provisional Application.<sup>110</sup> The GATT was signed in 1947 and came into force in 1948.<sup>111</sup> The Protocol of Provisional Application was the basis upon which the GATT 1947 came into being.<sup>112</sup> The GATT was adopted by the contracting countries and it commenced the regulation of international trade.<sup>113</sup>

The GATT 1947 was successful in the reduction of tariffs on trade in goods.<sup>114</sup> The first five negotiating rounds also focused on the reduction of tariffs and built on the success of the GATT. The various negotiating rounds, namely, Geneva 1947, Annecy 1949, Torquay 1951, Geneva 1956, and Dillon 1960-1, were quite successful in this regard.<sup>115</sup> However, non-tariff barriers to trade were also emerging as a serious threat to international trade. Thus from the Kennedy Round, 1964 to 1967, the Tokyo Round 1973 to 1979 through to the Uruguay Round 1986 to 1994, the negotiations

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<sup>108</sup> See WTO 'UNDERSTANDING THE WTO: BASICS-The GATT years: from Havana to Marrakesh' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 20 September 2011). See also Van den Bossche P (2008) 78.

<sup>109</sup> Van den Bossche P (2008) 78.

<sup>110</sup> Van den Bossche P (2008) 79.

<sup>111</sup> Van den Bossche P (2008) 78. It had been contemplated by the participating countries that the GATT would be attached to the ITO charter; however negotiators were aware that it was not possible to wait for the ITO charter to bring the GATT into effect. Thus the GATT was adopted without the ITO charter. The Protocol of Provisional Application was applicable to part II of the GATT. Parts I and III were to be adopted without the protocol exceptions. See Jackson J H *The World Trading System Law and Policy of International Economic Relations* (1997) 40 (hereafter Jackson J H 1997) for a detailed discussion.

<sup>112</sup> See WTO 'UNDERSTANDING THE WTO: BASICS-The GATT years: from Havana to Marrakesh' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 20 September 2011) The tariff negotiations started in 1945 and the countries that participated in the tariff negotiations were also part of the negotiations to establish the ITO. The ITO charter was concluded in 1948 but it was never ratified by the various countries, thus it was never established. See also Van den Bossche P (2008) 78-79.

<sup>113</sup> See WTO 'UNDERSTANDING THE WTO: BASICS-The GATT years: from Havana to Marrakesh' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 20 September 2011).

<sup>114</sup> Van den Bossche P (2008) 80.

<sup>115</sup> Van den Bossche P (2008) 81.

focused on non-tariff barriers.<sup>116</sup> The Uruguay Round also gave birth to the WTO, a new organisation that was charged with administering the different international trade agreements including the GATT 1947.<sup>117</sup> Currently, WTO negotiations have stalled with the protracted Doha Round.<sup>118</sup>

### 1.3.2 The WTO Mandate

The Marrakesh Agreement establishing the WTO provides the mandate of the organisation.<sup>119</sup> The Marrakesh Agreement consists of various agreements that are included in the Annexes. The multilateral agreements contained in Annexes 1-3, are equally binding on the WTO members.<sup>120</sup> However, the plurilateral agreements contained in Annex 4 are only binding on the members that have accepted them.<sup>121</sup> Articles II and III of the Marrakesh Agreement provide the functions of the organisation. Article II (1) sums up the mandate of the organisation as follows:

‘The WTO shall provide the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.’<sup>122</sup>

The mandate makes the WTO the premier organisation in the regulation of trade among its members. The agreements that are particularly important in this thesis are:

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<sup>116</sup> Van den Bossche P (2008) 81. See also WTO ‘UNDERSTANDING THE WTO: BASICS-The GATT years: from Havana to Marrakesh’ available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 26 September 2011).

<sup>117</sup> Van den Bossche P (2008) 84. The GATT 1947 is now part of the GATT 1994. See World Trade Organisation *The Legal Texts The Results of the Uruguay Round of Multilateral Trade Negotiations-Marrakesh Agreement Establishing the World Trade Organisation* (2002) 4 (hereafter World Trade Organisation 2002). The Marrakesh Agreement establishing the WTO in this thesis is hereafter the Marrakesh Agreement and in some cases the WTO Agreement.

<sup>118</sup> Sally R Whither the WTO? A Progress Report on the Doha Round (2003) CATO Institute No. 23 2 (hereafter Sally R 2003). See also Sallie J & Watson K W Regulatory Protectionism A Hidden Threat to Free Trade (2013) CATO Institute No. 723 10 (hereafter Sallie J & Watson K W 2013).

<sup>119</sup> World Trade Organisation (2002) 4.

<sup>120</sup> Van den Bossche P (2008) 44. See also *Brazil - Measures Affecting Desiccated Coconut* (Appellate Body Report) [1997] WT/DS22/AB/R 12. The Appellate Body emphasised the single undertaking nature of the Marrakesh Agreement. This is especially true for the Multilateral Agreements

<sup>121</sup> Article II of the Marrakesh Agreement. Currently only two plurilateral Agreements are in existence, the Agreement on trade in Civil Aircraft and the GPA. See also World Trade Organisation (2002) 383.

<sup>122</sup> Article II (1) of the Marrakesh Agreement.



the GATT, the SCM Agreement and the GPA.<sup>123</sup> All WTO members are bound by both the GATT and the SCM which are multilateral Agreements.<sup>124</sup> The GPA is a plurilateral agreement and is only binding on accepting members.<sup>125</sup> Currently none of the African members of the WTO is a party to the GPA.<sup>126</sup> However, the GPA may be a useful tool against corruption in the oil sector in Africa.

## 1.4 The General Agreement on Tariffs and Trade (GATT)

The GATT regulates trade in goods by the WTO members. It is argued in this thesis that oil before and after refinement can be considered a good subject to the GATT. This section discusses some of the reasons for the classification of oil as a good under the GATT. The discussion of trade in energy services is beyond the scope of this thesis.<sup>127</sup>

### 1.4.1 Classification of Crude Oil as a Good

The prohibition of quantitative restrictions through quotas and related measures is provided for in Art XI of the GATT. Article XI only applies to trade in goods. It is therefore important to investigate whether oil, especially crude oil is a good for purposes of the GATT. It can be argued that OPEC member states, the majority of

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<sup>123</sup> These Agreements cover the regulation of production quotas, oil consumption subsidies and the control of corruption. These are the key areas that are examined in this thesis.

<sup>124</sup> World Trade Organisation (2002) 4.

<sup>125</sup> See WTO 'The Plurilateral Agreement on Government Procurement (GPA)' available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed 27 May 2013).

<sup>126</sup> See WTO 'Parties and Observers to the GPA' available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm) (accessed 27 May 2013).

<sup>127</sup> In the past some countries have requested that the WTO engage oil producing countries and commence the liberalization of trade in energy services. See Permanent Delegation of the European Commission to the International Organisations in Geneva 'Collective Request in Energy Services' available at <http://www.ifg.org/pdf/collective-request-in-energy-services.pdf> (accessed 07 November 2013). See also World Trade Organisation Communication from Canada Initial Negotiating Proposal on Oil and Gas Services (2001) S/CSS/W/58.

which are also WTO member states, appear to contravene Art XI of the GATT.<sup>128</sup> This has adverse effects on the international trade in oil in Africa.<sup>129</sup>

A counter narrative suggests that OPEC production quotas fall beyond the scope of practices regulated under Art XI.<sup>130</sup> This argument is mainly founded on the premise that OPEC production quotas affect oil in situ, and that therefore, crude oil is not a good that can be regulated at that stage of production. Additional support for this position is based on the principle of permanent sovereignty over natural resources. Nonetheless, the author argues to the contrary. Based on the reasons given below, it can be argued that oil, including crude oil at the stage of production and in some

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<sup>128</sup> Angola, Ecuador, Kuwait, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and, Venezuela are members of both the WTO and OPEC. Additionally Algeria, Iran, Iraq, and, Libya are all observers at the WTO and are in the process of accession with the WTO. See Worika I L (2010) 89.

<sup>129</sup> Angola and Nigeria are members of both the WTO and OPEC while Algeria and Libya are observers at the WTO. See Worika I L (2010) 89. In the event that the above provision of the GATT is challenged, the above African oil exporting countries will be found to be in contravention of their obligations under Article XI (I) of the GATT.

<sup>130</sup> World Trade Organisation World Trade Report 2010 Trade in Natural Resources (2010) WTO Secretariat 166 (hereafter World Trade Organisation 2010). In this report it is argued that the language of Art XI regulates export restrictions and not production limitations. See also Desta M G 'Legal Issues of OPEC Production Management Practices: An Overview' Werner J & Ali A H (eds) *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought* (2009) 19-20 (hereafter Desta M G 2009). The learned author rescinds his earlier position discussed below, and states that by its nature, Art XI (I) of the GATT requires that the following factors are met, that is, there is a product, the product is ready for exportation, and, the product is already destined for another contracting party. Accordingly, OPEC production quotas which target crude oil before production do not qualify as export quotas. See also Cossy M 'Energy Trade and WTO Rules: [Reflections] on Sovereignty over Natural Resources, Export Restrictions and Freedom of Transit' Herrmann C & Terhechte J P (eds.), *European Yearbook of International Economic Law (EYIEL)*, Vol. 3 (2012) 290-291 (hereafter Cossy M 2012). The author argues that the principles of state sovereignty over natural resources do not permit the regulation of OPEC production quotas by the WTO. See also Desta M G Legal Issues of OPEC Production Management Practices under WTO Law and the Antitrust Law of non-OPEC Countries (2010) *Journal of Energy & Natural Resources Law* Vol 28 No 4 450-451 (hereafter Desta M G 2010). See also Broome S A 'Conflicting obligations for oil exporting nations?: Satisfying membership requirements of both OPEC and the WTO' (2006) *The Geo. Wash. Int'l L. Rev* Vol 38-2 418-417 (hereafter Broome S A 2006). See also Worika I L (2010) 90. The learned author argues that OPEC production management policies should be distinguished from production quotas and export restrictions. See also Ehring L & Chianale G F 'Export Restrictions in the Field of Energy' Selivanova Y (ed) *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (2012) 134-135 (hereafter Ehring L & Chianale G F 2012). These learned authors argue that OPEC production quotas equally affect oil for domestic consumption and oil for export. See also Cottier T Towards a Framework Agreement on Energy (2013) Workshop on the Role of Intergovernmental Agreements in Energy Policy, Session 4 4 (hereafter Cottier T 2013). The learned author indicates that OPEC production control practices are outside the scope of the WTO Agreements. See also Selivanova Y 'Managing the Patchwork of Agreements in Trade and Investment' Goldthau A & Witte J M (eds) *Global Energy Governance The New Rules of the Game* (2010) 50 (hereafter Selivanova Y 2010). Selivanova Y argues that the WTO covers trade in energy goods. However, she further argues that due to the fact that WTO rules are biased towards market access, they do not fully cover supply side issues such as export restrictions.

cases before extraction, is a good and should be regulated by the WTO.<sup>131</sup> The latter position has been supported by only a few authors.<sup>132</sup>

The arguments in support of regulation of oil as a good are divided into five thematic areas: the WTO jurisprudence on natural resources in the natural state; arguments regarding national sovereignty; tradeability of crude oil before extraction; the application of OPEC production quotas; and the Harmonised Code System classification for oil. It is submitted by the author that these themes strongly indicate that oil is a good for purposes of the GATT. Accordingly, OPEC production quotas are within the ambit of practices that are regulated under Art XI (1) of the GATT.

### **(a) The WTO Jurisprudence on Natural Resources in their Natural State**

The WTO dispute settlement body through its organs has handled a number of disputes on natural resources. An examination of these disputes and the interpretation of the various WTO agreements with regard to natural resources is therefore relevant. In discussing the jurisprudence of the WTO the author does not make an attempt to discuss all the decisions that relate to natural resources. However, relevant decisions on oil, minerals, and other natural resources are examined.

Prior to the appellate body decision in *the China-Raw Materials* decision,<sup>133</sup> commentators had observed that the decision would set the tone for export

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<sup>131</sup> Detailed arguments on the regulation of export restrictions under the GATT are made in chapter 3 section 3.4.1 and 3.4.2.

<sup>132</sup> Desta M G 'The GATT/WTO system and international trade in petroleum: an overview' (2003) *Journal of Energy & Natural Resources Law* Vol 21 No 4 394-397 (hereafter Desta M G 2003). However, the learned author has since argued against this position. See also Botha L How do the Current WTO Disciplines Apply to the Trade of Energy Goods and Services? (2009) A Discussion Paper Commissioned by USAID Southern Africa Global Competitiveness Hub 11 (hereafter Botha L 2009). The author argues that defacto OPEC production quotas are GATT inconsistent as they amount to export restrictions. See also Lautenberg F R (2004) 1-2. See also De Fazio P 'DeFazio Urges President to Stand Up to OPEC Price Gouging' available at [http://www.defazio.house.gov/index.php?option=com\\_content&task=view&id=712&Itemid=70](http://www.defazio.house.gov/index.php?option=com_content&task=view&id=712&Itemid=70) (accessed 01 November 2012). See also Marceau G (2010 a) 27. The learned author opines that challenges in accessing oil supplies due to licensing restrictions may be inconsistent with Art XI of the GATT. However, the above author only reports the observations of some WTO members and does not appear to provide her own opinion. See also United Nations Conference on Trade and Development Trade Agreements, Petroleum and Energy Policies (2000) Executive Summary UNCTAD/ITCD/TSB/9 2 (hereafter United Nations Conference on Trade and Development 2000). See also Selivanova Y The WTO and Energy WTO Rules and Agreements of Relevance to the Energy Sector (2007) ICTSD Programme on Trade and Environment 15-16 (hereafter Selivanova Y 2007). The author observes that restrictions on the export of energy goods may contravene Art XI of GATT. However, the argument is not made on the basis of oil production quotas.

restrictions on natural resources and energy products.<sup>134</sup> In this case China did not deny that it had restricted the export of refractory-grade bauxite.<sup>135</sup> It was argued that the restriction was temporary and therefore protected under Art XI (2) of the GATT.<sup>136</sup> The argument was rejected by the appellate body.<sup>137</sup> The issue as to whether refractory-grade bauxite was a good did not arise as it was never contested. The restrictions did not directly affect the production of bauxite; they were imposed on the export of the raw material.<sup>138</sup> To this end, the decision does not shed sufficient light on whether crude oil in its natural state is a good subject to GATT rules.

Similarly, in the *United States-Superfund* case,<sup>139</sup> the contention of the complainants was premised on the taxes levied on petroleum.<sup>140</sup> The dispute dealt with exported petroleum. Again, the argument as to whether the WTO could regulate crude oil in its natural state did not arise. The *United States-Gasoline* dispute also dealt with petroleum after refinement and did not consider crude oil in its natural state.<sup>141</sup> The *European Communities-Asbestos* dispute considered restrictions on the import of asbestos.<sup>142</sup> Accordingly, the dispute did not address the question of natural resources in their natural state. Although all the above disputes are founded on natural resources, the issues in all these disputes arise out of restriction on export and import and therefore do not address production restriction. Nonetheless, the disputes indicate that trade in processed natural resources is subject to the GATT and WTO rules.

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<sup>133</sup> See *China – Measures Related to the Exportation of Various Raw Materials* (Appellate Body Report) [2011] WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R.

<sup>134</sup> Cossy M (2012) 289. See also Marceau G ‘The WTO in the emerging energy governance debate’ (2010) *Global Trade and Customs Journal* Vol 5 Issue 3 88 (hereafter Marceau G 2010 b).

<sup>135</sup> See *China – Measures Related to the Exportation of Various Raw Materials* (Appellate Body Report) [2011] WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R 127.

<sup>136</sup> See *China – Measures Related to the Exportation of Various Raw Materials* (Appellate Body Report) [2011] WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R 127.

<sup>137</sup> See *China – Measures Related to the Exportation of Various Raw Materials* (Appellate Body Report) [2011] WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R 133.

<sup>138</sup> See *China – Measures Related to the Exportation of Various Raw Materials* (Appellate Body Report) [2011] WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R.

<sup>139</sup> See *United States - Taxes on Petroleum and Certain Imported Substances* (Panel Report) [1987] (L/6175 - 34S/136).

<sup>140</sup> See *United States - Taxes on Petroleum and Certain Imported Substances* (Panel Report) [1987] (L/6175 - 34S/136) 2.

<sup>141</sup> See *United States - Standards for Reformulated and Conventional Gasoline* (Appellate Body Report) [1996] WT/DS2/AB/R.

<sup>142</sup> See *European Communities — Measures Affecting Asbestos and Products Containing Asbestos* (Appellate Body Report) [2001] WT/DS135/AB/R 1.

Be that as it may, the appellate body of the WTO has expressed its opinion on the issue at hand. Although the subject matter of the relevant dispute is not oil or mineral resources, the dispute is helpful in guiding the debate on regulation of natural resources and crude oil in the natural state. In the *United States-Lumber IV* dispute, the appellate body addressed the issue of whether fungible goods, such as unfelled trees, can be considered to be goods for purposes of the SCM Agreement.<sup>143</sup> The appellate body held that the term 'goods' for purposes of the SCM Agreement, includes immovable goods and fungible goods.<sup>144</sup> However, the appellate body also noted that the definition of goods under the GATT is different as that Agreement exclusively regulates imported and exported goods.<sup>145</sup>

It is respectfully submitted that the distinction between the definition of 'goods' in the SCM and the GATT does not hold.<sup>146</sup> Crude oil is a fungible good in its natural state, and can be traded as such. It should be noted that the WTO regulates trade and, as such, commodities that are traded by members are regulated. Unfelled trees were the subject of the above dispute because they are considered goods under the WTO framework. To this end, an attempt by the appellate body to distinguish between goods under the GATT and the SCM is confusing and impractical.<sup>147</sup> Although the

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<sup>143</sup> See *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber From Canada* (Appellate Body Report) [2004] WT/DS257/AB/R Para 68.

<sup>144</sup> See *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber From Canada* (Appellate Body Report) [2004] WT/DS257/AB/R Paras 58-60, 62-63 and 66.

<sup>145</sup> See *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber From Canada* (Appellate Body Report) [2004] WT/DS257/AB/R Para 63.

<sup>146</sup> The author respectfully disagrees with the reasoning of the appellate body. First, the preamble of the GATT 1947 clearly indicates the intention of the parties to the Agreement. The Agreement was made to develop the full use of the resources of the world and to expand the production and exchange of goods. Although the appellate body did not expressly indicate the particular annex of the WTO Agreement, the context and the previous paragraphs of the decision indicate that they were referring to the GATT. The GATT is not limited to imported and exported goods or exchange. As indicated in the preamble, it also extends to production; production is related to exchange. Secondly, the appellate body relied on the distinction between the terms 'goods' in the SCM Agreement and 'products' in some provisions of the GATT. However, these terms are used interchangeably in the GATT. The Preamble and other provisions such as Art V refer to goods while Arts, I, II, III, and XI among others refer to products. The GATT does not explain the distinction. Further, the preparatory notes of the GATT 1947 also use both terms. See United Nations Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (1946) generally (hereafter United Nations 1946). See also United Nations Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment (1947) generally (hereafter United Nations 1947). For a contrary opinion, see Cossy M (2012) 285. Also the SCM is one of the various multilateral agreements on trade in goods under Annex 1A of the Marrakesh Agreement. This Annex also covers the GATT.

<sup>147</sup> The SCM Agreement was negotiated to expand on the regulations for subsidies not to depart from the provisions contained in the GATT 1947. See Lowenfeld A F (2008) 217-238.

WTO/GATT case law is not binding, this decision suggests that natural resources in their natural state can be regulated by the WTO. Similarly, it can be argued that crude oil in its natural state is a good and can be regulated by the GATT.

### **(b) Arguments Regarding National Sovereignty Over Natural Resources**

Commentators have suggested that the principle of permanent sovereignty over natural resources does not permit the classification of crude oil in situ as a good.<sup>148</sup> Basically, the principle posits that states should use their natural resources as they deem fit.<sup>149</sup> It has been argued that this principle has attained the character of customary international law.<sup>150</sup> While the relevance of the principle is conceded, this argument is not sufficient to justify the view that crude oil is not a good for purposes of the GATT.

A careful review of the principle reveals that the sovereignty of states over their natural resources should be exercised with due regard to other international law obligations.<sup>151</sup> In light of the above, after 1995, countries voluntarily signed and ratified the Marrakesh Agreement and its Annexures. By doing so, the member states acknowledged a restriction on the sovereignty of their states with regard to international trade. This position is clearly illustrated in the preparatory notes that led up to the GATT 1947.<sup>152</sup> Accordingly, it can be argued that crude oil in its natural

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<sup>148</sup> Worika I L (2010) 291. See also Marceau G (2010 b) 88.

<sup>149</sup> Desta G M (2010) 454 citing Schrijver N *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997).

<sup>150</sup> Desta G M (2010) 454. See also Hofbauer J A *The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications* (unpublished LL.M thesis Faculty of Law University of Iceland, 2009) 3-4 (hereafter Hofbauer J A 2009). The author provides a detailed history of the numerous United Nations resolutions that led to Resolution 1803, which forms the basis of the principle. The author also highlights international cases where the principle has been applied.

<sup>151</sup> Preamble, Art. 1, Paras 5-7, United Nations General Assembly – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217. See also Schrijver N *Sovereignty over Natural Resources Balancing Rights and Duties* (1997) 2 (hereafter Schrijver N 1997). In the foregoing text, the author argues that in the age of globalisation and increasing international co-operation, permanent state sovereignty over natural resources appears to be diminishing. See also Organisation for Economic Co-operation and Development Environmental Principles and Concepts (1995) OECD/GD(95) 124 para 21 9 (hereafter Organisation for Economic Co-Operation and Development 1995). It has been observed that due to the fact that natural resources are pivotal to the survival of humankind, the principle of permanent sovereignty is now alive to the foregoing status quo. See also Barnes R *Property Rights and Natural Resources* (2009) 232 (hereafter Barnes R 2009). See also Art 18(1) of the ECT.

<sup>152</sup> United Nations (1946) Section C Art 1 (k) 12. It had been proposed by some members that export restrictions should be permitted for the preservation of scarce natural resources even if there were no

state is a good and that the principle of permanent sovereignty over natural resources is not absolute.

### (c) Tradeability of Oil Before Extraction

Crude oil in situ is tradeable based on the fact that at the appraisal stage the volume of crude oil in a particular oil well is ascertainable.<sup>153</sup> It has been noted that at this stage the volumes are accurate to a large extent; information generated at this stage is used to indicate proved reserves.<sup>154</sup> Furthermore, proved reserves have an effect on the oil contracts that are executed before extraction of the oil. Oil contracts executed before extraction of the resource render oil in situ tradeable. This position is also illustrated by financing agreements which indicate that crude oil before extraction has a loan value.<sup>155</sup> As indicated below, concession agreements and production sharing agreements (PSAs) deal with crude oil before extraction. Thus it can be argued that oil before extraction is a tradeable commodity and should be subject to the GATT.

‘In modern concession agreements, the oil company usually retains ownership of any oil that is produced, and is thus free to sell it at the world price. In a PSA, ownership of the oil is split between the IOC and the host State (or its national oil company). In

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restrictions on domestic consumption. This position was heavily criticised on the ground that it could unduly restrict access to raw materials.

<sup>153</sup> Appraisal of an oil well takes place after a discovery has been made. At this stage, the discovery is evaluated using seismic 2D/3D data. The volume of the well is accurately considered and the thickness of the crude evaluated. At this stage, the production capacity of a well is determined. See generally Imaduddin M Petroleum Exploration, Development and Production Process (2008) BAPEX BUET (hereafter Imaduddin M 2008). See also Faculty of Engineering Chulalongkorn University ‘Petroleum Economics Overview of Petroleum Exploration and Production 14’ available at [www.mining.eng.chula.ac.th/CU\\_ETM/OverviewE&P.pdf](http://www.mining.eng.chula.ac.th/CU_ETM/OverviewE&P.pdf) (accessed 05 November 2012). See also Environmental Management in Oil and Gas Exploration and Production ‘Overview of the Oil and Gas Exploration and Production Process 7’ available at [www.etechnical.org/newpdfs/lessImpact/Att\\_Aoverview.pdf](http://www.etechnical.org/newpdfs/lessImpact/Att_Aoverview.pdf) (accessed 05 November 2012).

<sup>154</sup> Proved reserves are quantities of crude oil that are determined by geologists and engineers with reasonable certainty. Although there are various methods of proving reserves, all methods indicate that there has to be high level of accuracy. See Watkins G C ‘Oil scarcity: what have the past three decades revealed’ (2006) *Energy Policy* 34 509 (hereafter Watkins G C 2006). See also British Petroleum Energy in Focus (2004) Statistical Review of World Energy 4 (hereafter British Petroleum 2004). See also Society of Petroleum Engineers Oil and Gas Reserves Committee Comparison of Selected Reserves and Resource Classifications and Associated Definitions (2005) Mapping Sub Committee Final Report 31-32 (hereafter Society of Petroleum Engineers 2005).

<sup>155</sup> Rain J W The American Experience in Oil and Gas Financing (2004) Thompson & Knight 6 (hereafter Rain J W 2004). See also Fattouh B North African Oil and Foreign Investment in Changing Market Conditions (2008) Oxford Institute for Energy Studies WPM 37 7 (hereafter Fattouh B 2008).

the service contract, ownership remains with the host State or its national oil company.<sup>156</sup>

It has been argued with regard to tradeability of natural resources, that tradeability of goods and tradeability of production licences should be distinguished.<sup>157</sup> Some commentators have argued that a state permit to exploit natural resources does not confer possession rights on the party exploiting the natural resource.<sup>158</sup> However, as discussed above, in most concession agreements, the party permitted to exploit the natural resources usually gets a right of possession to some of the natural resources or oil produced. This is especially true for modern concession agreements and PSAs.<sup>159</sup>

#### (d) The Application of OPEC Production Quotas

Even if it is conceded that crude oil in situ is not a good, it can be argued that OPEC quotas target crude oil at the production stage (after extraction), which subjects the commodity to WTO/GATT rules. Strictly defined, 'crude oil production' includes the separation of crude oil from condensates, gas and other materials.<sup>160</sup> OPEC defines crude oil to exclude condensates;<sup>161</sup> this indicates that OPEC quotas only affect crude oil at the point of separation.<sup>162</sup> By definition, OPEC oil production quotas should be applied at the point of separation, which is part of the production

<sup>156</sup> Brinsmead S 'Oil Concession Contracts and the Problem of Hold-Up (2007) 19' available at [http://www.dundee.ac.uk/cepmlp/journal/html/Vol17/article17\\_11.php](http://www.dundee.ac.uk/cepmlp/journal/html/Vol17/article17_11.php) (accessed 22 March 2012) (hereafter Brinsmead S 2007) citing Barrows G *Worldwide Concession Contracts And Petroleum Legislation* (1983) 1.

<sup>157</sup> See Desta M 'To What Extent are WTO Rules Relevant to Trade in Natural Resources?' available at [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_forum\\_e/wtr10\\_destam\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_destam_e.htm) (accessed 27 May 2013).

<sup>158</sup> See Desta M 'To What Extent are WTO Rules Relevant to Trade in Natural Resources?' available at [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_forum\\_e/wtr10\\_destam\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_destam_e.htm) (accessed 27 May 2013)

<sup>159</sup> Brinsmead S (2007) 19

<sup>160</sup> The above definition is based on the definition of crude oil by various entities, such as, the United States Energy Information Administration 'Glossary - Crude Oil' available at <http://www.eia.gov/tools/glossary/index.cfm> (accessed 27 May 2013). Crude Oil is defined as a mixture of hydrocarbons that exist in the liquid phase in natural underground reservoirs and remains liquid at atmospheric pressure after passing through surface separating facilities. See also OPEC 'Definitions Crude Oil' available at <http://www.opec.org/library/Annual%20Statistical%20Bulletin/interactive/2009/FileZ/definition.htm> (accessed 27 May 2013).

<sup>161</sup> Sandra R 'OPEC's next challenge-rethinking their quota system' (2003) *Oil & Gas Journal* Vol 101.29 1 (hereafter Sandra R 2003). See also De Sousa L 'OPEC Quotas and Crude Oil Production The Oil Drum' available at [www.theoil Drum.com/node/7363](http://www.theoil Drum.com/node/7363) (accessed 05 November 2012).

<sup>162</sup> See OPEC 'Definitions Crude Oil' available at <http://www.opec.org/library/Annual%20Statistical%20Bulletin/interactive/2009/FileZ/definition.htm> (accessed 27 May 2013).



stage. Unlike the previous arguments, it can be argued that at this stage, crude oil has been extracted and what is left of the process is separation. Crude oil at this stage can no longer be defined as oil in situ. It is an identifiable commodity and can be traded. On the basis of this observation, oil can be subject to the GATT.

### **(e) The Harmonised System Code Classification for Oil**

Oil has a Harmonised System Code (HS Code) classification. The ordinary meaning of the term 'good' refers to a commodity that is tradeable.<sup>163</sup> However, the definition of 'goods' in WTO jurisprudence refers to such commodities listed under the HS Code and indicated in the members' schedule of concessions.<sup>164</sup> This Code was developed by the World Customs Organisation.<sup>165</sup> This classification is used for purposes of setting tariffs and indicating members' products that are subject to GATT commitments.<sup>166</sup> This definition of 'goods' is not expressly provided in the GATT.<sup>167</sup> It is indeed understandable why this definition was excluded. It is quite difficult to determine what commodities should be subjected to GATT rules as new products are released every day. Comparatively, the General Agreement on Trade in Services (GATS) which attempts to define services creates more challenges than solutions to understanding covered services.<sup>168</sup>

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<sup>163</sup> 'Goods' are defined as merchandise or possessions. See Oxford Dictionaries 'Good' available at <http://oxforddictionaries.com/definition/english/good> (accessed 27 May 2013).

<sup>164</sup> See Chapter 27 of the Harmonised Commodity Description and Coding System (HS Code) which classifies natural mineral fuels and other energy goods. The code has been relied upon in various WTO disputes in the interpretation of like products under Arts I and III of GATT. This presence of natural mineral fuels in the classification, as one of the commodities is an indicator that oil is covered under the WTO disciplines. See Botha L (2009) 3 and 4. See also Van den Bossche P (2008) 351-356 on WTO disputes that have applied the HS Code. See also Smith F & Woods L 'A distinction without a difference: exploring the boundary between goods and services in the World Trade Organi[s]ation and the European Union' (2005) *Columbia Journal of European Law* 12-1 19-20 (hereafter Smith F & Woods L 2005).

<sup>165</sup> See World Customs Organisation 'Overview - What is the Harmoni[s]ed System (HS)?' available at <http://www.wcoomd.org/en/topics/nomenclature/overview.aspx> (accessed 29 May 2013).

<sup>166</sup> See World Customs Organisation 'HS Multi-Purposes Tool' available at <http://www.wcoomd.org/en/topics/nomenclature/overview/hs-multi-purposes-tool.aspx> (accessed 29 May 2013). See also WTO 'GOODS SCHEDULES Members' Commitments' available at [http://www.wto.org/english/tratop\\_e/schedules\\_e/goods\\_sched\\_ules\\_e.htm](http://www.wto.org/english/tratop_e/schedules_e/goods_sched_ules_e.htm) (accessed 29 May 2013).

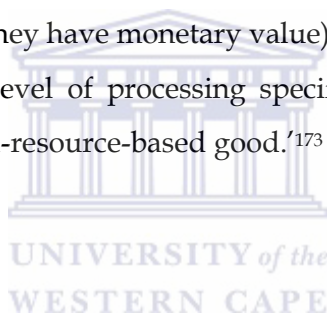
<sup>167</sup> See Smith F & Woods L (2005) 17.

<sup>168</sup> See Art I (3) (b) of the GATS which defines 'services' as services in any sector except services supplied in the exercise of government authority. See also GATS Art XXVIII (b). The definition is ambiguous and only excludes government services. It does not state which services are covered. Thus a definition of 'goods' would create a similar ambiguity.

Crude oil obtained from bituminous minerals has an HS Code classification, that is, 2709.<sup>169</sup> A good under the WTO/GATT legal framework is a commodity that is classified as a good in the HS Code and has been indicated in the members' schedule of concessions as subject to GATT regulations.<sup>170</sup> Therefore, oil, subject to the WTO members' schedules of concessions, is within the realm of the GATT.

Related to the foregoing discussion, an analysis was conducted based on the Vienna Convention on the Law of Treaties to define 'goods'.<sup>171</sup> The analysis proposed a test to determine the circumstances under which natural resources will be treated as goods under the WTO.<sup>172</sup> Natural resources have to comply with the following conditions:

- '1) they are listed as goods in the Member States' Schedules of Concessions on goods;
- 2) they are tradable (i.e., they have monetary value); and
- 3) they have reached a level of processing specified by the HS Nomenclature in relation to specific natural-resource-based good.'<sup>173</sup>



<sup>169</sup> See Harmonised System Code 'HS Code List' available at [http://www.hsodelist.com/bbs/board.php?bo\\_table=HScode&sca=27](http://www.hsodelist.com/bbs/board.php?bo_table=HScode&sca=27) (accessed 29 May 2013).

<sup>170</sup> The three African countries that are the focus of this research all list crude oil in their schedules of concessions. Angola lists crude oil (270900) in its schedule of concessions, with a maximum ad valorem duty of 20. See Angola's schedule of concessions 2012, on file with the author. Nigeria lists crude oil (270900) in its schedule of concessions, with a maximum ad valorem duty of 5. See Nigeria's schedule of concessions 2012, on file with the author. Ghana lists crude oil (270900) in its schedule of concessions, with a maximum ad valorem duty of 0. It also indicates that crude oil is 100 percent duty free. See Ghana's schedule of concessions 2012, on file with the author. See also WTO 'GOODS SCHEDULES Members' Commitments' available at [http://www.wto.org/english/tratop\\_e/schedules\\_e/goods\\_schedules\\_e.htm](http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm) (accessed 29 May 2013).

<sup>171</sup> See Desta M 'To what extent are WTO rules relevant to trade in natural resources?' available at [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_forum\\_e/wtr10\\_destam\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_destam_e.htm) (accessed 29 May 2013). The use of the Vienna Convention on the Law of Treaties to interpret WTO agreements should be approached with caution. As noted by one of the leading international trade law scholars, some of the WTO members are not signatories and others have not ratified the Vienna Convention on the Law of Treaties. However, it has been argued that the Vienna Convention on the Law of Treaties can be characterised as international customary law. To this end, the above arguments on the definition of goods under the WTO, based on the provisions of the Vienna Convention of the Law of Treaties are only persuasive. See Jackson J H 'Process and procedure in WTO dispute settlement' (2009) 42 *CORNELL INT'L L.J.* 236-237 (hereafter Jackson J H 2009).

<sup>172</sup> See Desta M 'To what extent are WTO rules relevant to trade in natural resources?' available at [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_forum\\_e/wtr10\\_destam\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_destam_e.htm) (accessed 29 May 2013).

<sup>173</sup> See Desta M 'To what extent are WTO rules relevant to trade in natural resources?' available at [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_forum\\_e/wtr10\\_destam\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_destam_e.htm) (accessed 29 May 2013).

Nigeria, Angola and Ghana which are the case studies in this thesis, provide for petroleum oils and oils obtained from bituminous mineral crude, in their schedules of concessions. Thus the first condition is satisfied in respect of these countries. The second condition has also been discussed under tradeability of oil before extraction. Finally, oil defined in the HS Code as petroleum oils and oils obtained from bituminous minerals, oil, may also be traded after extraction but before refinement. The HS Code recognises this fact and thus classifies oil as a tradeable good. The above discussion strongly suggests that oil is a tradeable good and is subject to international trade regulation by the WTO/GATT. This is true for oil before extraction and after extraction from the oil wells, but before refinement.

In light of the foregoing, some provisions of the WTO legal framework stand out with regard to possible violations by OPEC member states that are also WTO members. These provisions are Art XI (on the prohibition of quantitative restrictions) of the GATT and Arts 3 and 5 (on prohibited and actionable subsidies under the SCM Agreement). The GPA is also discussed as it is a relevant tool in ensuring transparency and controlling corruption. It can be argued that measures adopted in OPEC countries that contravene these provisions, affect the liberalisation of oil trade.

#### **1.4.2 Article XI of the GATT**

It has been argued by some commentators that the production quotas maintained by OPEC fall outside the ambit of Art XI (I) of the GATT, and therefore do not violate the provision.<sup>174</sup> However, in *Japan- Trade in Semiconductors*,<sup>175</sup> a dispute that was decided under the GATT framework, the panel stated as follows:

‘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

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<sup>174</sup> Broome S A (2006) 415. A detailed discussion of Art XI is undertaken in chapter 3 section 3.4.1 of the thesis. Also, the North American Free Trade Area Agreement (NAFTA) which has specific provisions on trade in energy goods founded on the GATT, prohibits quantitative restrictions in Art 603. Of course, this blanket prohibition is subject to various exceptions and reservations.

<sup>175</sup> See *Japan - Trade in Semi-Conductors* (Panel Report) [1988] (L/6309 - 35S/116) 28.

exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure.<sup>176</sup>

It can be argued that production quotas maintained by OPEC member countries restrict the sale for export of oil, as only a certain amount of oil is available for sale and export.<sup>177</sup> The measures undertaken by OPEC member states restrict oil production and supply and affect and impair the benefits accruing to other WTO members, including African oil producing countries that are not OPEC members.<sup>178</sup>

The panel in *Japanese-Measures on Imports of Leather* stated thus:

‘In any event, the Panel wished to stress that the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons e.g., it would lead to increased transaction costs and would create uncertainties which could affect investment plans.’<sup>179</sup>

The measures effected by OPEC member states in the quest to comply with their OPEC Statute obligations lead to uncertainties in the investment plans of non-OPEC oil producing countries.

There is further support for the view that the production quotas maintained by OPEC member states fall within the category of export restrictions. The 1950 Report of the Working Party on the use of Quantitative Restrictions for Protective and Commercial Purposes is particularly relevant in this regard.<sup>180</sup> Some of the export restrictions that are inconsistent with the GATT and do not fall under the exceptions include, export restrictions used by a contracting party to avoid price competition

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<sup>176</sup> See *Japan - Trade in Semi-Conductors* (Panel Report) [1988] (L/6309 - 35S/116) 28.

<sup>177</sup> See chapter 3 sections 3.4.1 and 3.4.2.

<sup>178</sup> Non-OPEC countries are coerced into a global oil price system that is partly dependent on production quotas maintained by OPEC.

<sup>179</sup> See Report of the Panel on *Japanese Measures on Imports of Leather* (Panel Report) [1984] (L/5623 - 31S/94) 14.

<sup>180</sup> WTO ‘Analytical Index of the GATT Article XI General Elimination of Quantitative Restrictions’ available at [http://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art11\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art11_e.pdf) (accessed on 20 May 2013) citing the Report of the Working Party on the use of Quantitative Restrictions for Protective and Commercial Purposes (1950) GATT/CP.4/33, republished as “The Use of Quantitative Restrictions for Protective and Commercial Purposes,” Sales No. GATT/1950-3.

among exporters.<sup>181</sup> Production quotas are used to enforce the OPEC objectives. The main objective of the organisation, as discussed above, is to control the price of oil on the world market. OPEC production quotas are therefore used to avoid price competition.

Article XX of the GATT, which is the general exceptions clause provides some justification for the use of production quotas by WTO members.<sup>182</sup> However, this is also subject to debate as the chapeau of the clause prohibits measures which constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.<sup>183</sup>

## 1.5 The SCM Agreement

Subsidies to the oil and gas sector distort markets in other oil producing countries. OPEC member countries and some major oil producing countries have been accused of granting subsidies for oil and gas production and consumption.<sup>184</sup> It can be argued that these subsidies contravene Arts 3 and 5 of the SCM Agreement.<sup>185</sup> Art 1 of the SCM Agreement defines a subsidy as a financial contribution by government or a public body that confers a benefit on a specific enterprise or industry or group of

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<sup>181</sup> WTO 'Analytical Index of the GATT Article XI General Elimination of Quantitative Restrictions' available at [http://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art11\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art11_e.pdf) (accessed on 20 May 2013) citing the Report of the Working Party on the use of Quantitative Restrictions for Protective and Commercial Purposes (1950) GATT/CP.4/33, republished as "The Use of Quantitative Restrictions for Protective and Commercial Purposes," Sales No. GATT/1950-3.

<sup>182</sup> See chapter 3 section 3.4.2 for a detailed discussion.

<sup>183</sup> Article XX (g) of the GATT allows countries to implement measures that relate to the conservation of exhaustible natural resources. It can be argued that crude oil is an exhaustible natural resource. However, the production quotas result into discrimination of other oil producing countries that are non OPEC members, thus this is inconsistent with the chapeau of Art XX. See also Desta G M (2003) 397, who argues that OPEC production quotas are justified by Art XX (g). The author respectfully disagrees with this line of argument as the chapeau of Art XX as indicated above, places certain limitations on this argument. The argument is further developed in chapter 3 section 3.4.2.

<sup>184</sup> Iran is one of the countries that have been implicated for heavily subsidising its energy consumption. Mexico and the United Arab Emirates have been implicated as well. These countries have now undertaken measures to reform and phase out these subsidies. See IEA et al The Scope of Fossil-Fuel Subsidies in 2009 and a Roadmap for Phasing out Fossil-Fuel Subsidies (2010) 24 (hereafter IEA et al 2010b). See also generally Hochman G & Zilberman D (2011a).

<sup>185</sup> Agreement on Subsidies and Countervailing Measures 1994 Apr. 15, 1994, Annex 1A of the Marrakesh Agreement (hereafter referred to as the SCM Agreement). Arts 3 and 5 of the SCM Agreement provide for prohibited and actionable subsidies.

enterprises.<sup>186</sup> Further, Art 2 is also relevant, as it defines 'specificity'.<sup>187</sup> Subsidies that are specific to certain industries may be actionable.<sup>188</sup> Actionable subsidies are those that cause injury to the domestic industry of another member.<sup>189</sup> Thus the nascent economies of some African oil producing countries have been affected by the subsidies granted by OPEC countries to their oil companies and consumers.<sup>190</sup> This may amount to a violation of the rules on subsidies under the SCM Agreement. On the other hand, the requirement of specificity does not apply to prohibited subsidies under Art 3 of the SCM.<sup>191</sup> Thus where oil consumption subsidies are contingent on the use of domestic over imported oil, they may be considered prohibited subsidies.<sup>192</sup>

## 1.6 Corruption and the GPA

Corruption is rife in the oil sector in Africa.<sup>193</sup> The WTO does not directly address the problem of corruption. The GPA which can control corruption in government procurement is in place, but this is a plurilateral agreement which does not apply to all contracting parties.<sup>194</sup> This presents a big challenge to the WTO legal framework and the regulation of international oil trade. That said, the statement below explains the relationship between corruption and government procurement.

'Given that firms (domestic and foreign) want to secure lucrative government contracts, and that some officials may be motivated by personal self interest as well

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<sup>186</sup> See Art 1 of the SCM Agreement. See also Botha L (2009) 13.

<sup>187</sup> See Art 2 of the SCM Agreement. The provision has been interpreted to include de facto specificity which might be attributed to granting disproportionately large amounts of the subsidy to particular groups and predominant use of the subsidy by a select group. See chapter 3 section 3.4.3 for a detailed discussion.

<sup>188</sup> See Art 5 of the SCM Agreement. See chapter 3 section 3.4.3 for a detailed discussion.

<sup>189</sup> See Art 5 of the SCM Agreement.

<sup>190</sup> See Business Day Online 'Subsidy Removal Cripples Fuel Smuggling Across Nigerian Borders' available at [http://www.businessdayonline.com/NG/index.php/news/76-hot-topic/31798-subsidy-remo\\_val-cripples-fuel-smuggling-across-nigerian-borders](http://www.businessdayonline.com/NG/index.php/news/76-hot-topic/31798-subsidy-remo_val-cripples-fuel-smuggling-across-nigerian-borders) (accessed 16 October 2012).

<sup>191</sup> See chapter 3 section 3.4.3.

<sup>192</sup> See chapter 3 section 3.4.3.

<sup>193</sup> It is worth noting that corruption has been part of the oil industry in Africa as far back as the scramble for African oil in about 1957. See Clarke D *Africa: Crude Continent The Struggle for Africa's Oil Prize* (2010) 70 (hereafter Clarke D 2010).

<sup>194</sup> See Eigen P 'There will be no Development with Corrupt Governance-and WTO is the Natural Universal Guardian Against Corruption (2002) World Trade Organisation Symposium' available at [http://www.wto.org/english/tratop\\_e/dda\\_e/paper\\_peter\\_eigen.pdf](http://www.wto.org/english/tratop_e/dda_e/paper_peter_eigen.pdf) (accessed 21 October 2011).

as by promoting the public interest, it should come as no surprise that corruption and collusion are a feature of government procurement.<sup>195</sup>

Further, the proliferation of national oil companies makes the discussion of corruption and government procurement in the international oil trade relevant.<sup>196</sup>

The WTO legal framework does not address the challenge of crude oil price stabilisation. OPEC has the legal framework to address this challenge. Nevertheless, the OPEC legal framework may be inconsistent with some of the basic provisions of the WTO legal framework. The two legal frameworks have gaps that have to be addressed to create an effective framework for the regulation of international oil trade. This is particularly important for emerging African oil producing countries whose development hinges on effective governance and regulation of international oil trade.

## 1.7 Oil Production and Trade in Africa

A discussion of oil production and trade in all African oil producing countries would be very broad, mainly because of the number of countries involved. Accordingly, this thesis focuses on oil production and trade in particular African oil producing countries, such as Nigeria, Angola and Ghana. Nigeria and Angola are members of both the WTO and OPEC,<sup>197</sup> while Ghana has recently commenced commercial oil production and is a member of the WTO.<sup>198</sup> Ghana is not a member of OPEC. Nigeria and Angola are used as examples in discussing the duality of regulations on international trade in oil.<sup>199</sup> On the other hand, Ghana is discussed as

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<sup>195</sup> Evenett S.J & Hoekman B (eds) *The WTO and Government Procurement. Critical Perspectives on the Global Trading System and the WTO* (2006) xix (hereafter Evenett S.J & Hoekman B (eds) 2006).

<sup>196</sup> Stevens P National Oil Companies: Good or Bad? - A Literature Survey (2003) National Oil Companies Workshop presentation, World Bank 4 (hereafter Stevens P 2003).

<sup>197</sup> See Worika I L (2010) 89.

<sup>198</sup> See WTO 'Ghana and the WTO' available at [http://www.wto.org/english/thewto\\_e/countries\\_e/ghana\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/ghana_e.htm) (accessed 29 May 2013). See Voice of America 'Ghana Begins Commercial Oil Production Wednesday' available at <http://www.voanews.com/content/ghana-begins-commercial-oil-production-wednesday--111891959/157053.html> (accessed 29 May 2013). Ghana commenced commercial oil production in considerably large quantities in 2010. See also chapter 6 section 6.1.2. It should also be noted that prior to 2010, Ghana had produced oil from the Saltpond area. However, production from this area was minimal.

<sup>199</sup> See chapter 3 sections 3.4.1, 3.4.2 and 3.4.3.

## Chapter 1: Introduction and Background

the major case study, to determine whether the duality of regulations on international trade in oil, would affect an emerging African oil producing country.<sup>200</sup>

The choice of Ghana as the main case study for the research is also motivated by the fact that the thesis and publications therefrom, can help Ghana make an informed decision on its decision to join OPEC. Ghana is located in West Africa. It shares borders with Cote d'voire to the west, Burkina Faso to the north, Togo to the east, and the Atlantic Ocean to the south.<sup>201</sup> In 2007, Ghana discovered commercially viable deposits of crude in an area currently referred to as the Jubilee oil fields.<sup>202</sup> The fields are reported to be able to produce about 120,000 barrels of oil per day.<sup>203</sup> The Ghanaian government expected to gain about US \$ 400 million in revenue from crude oil in 2011.<sup>204</sup> It is apparent that the economy of Ghana is bound to improve.<sup>205</sup> However, this economic improvement can only be sustained if the international trade in oil is properly regulated.

Efficient regulation of the international trade in oil will ensure that Ghana adequately exploits its comparative advantage in the production of crude oil. Ghana currently has various laws regulating the oil sector.<sup>206</sup> These laws include the Constitution of the Republic of Ghana 1992, the Petroleum (Exploration and Production) Act 1984, the Petroleum Commission Act 2011, and the Petroleum Revenue Management Act 2011 among others.<sup>207</sup> Currently, Ghana is in the process

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<sup>200</sup> See generally chapter 6 of the thesis.

<sup>201</sup> See Infoplease 'Ghana' available at [www.infoplease.com/ipa/A0107584.html](http://www.infoplease.com/ipa/A0107584.html) (accessed 9 March 2012).

<sup>202</sup> See Ghana Energy Summit 'Ghana: The New Land of Opportunity for Oil and Gas Investment' available at [http://maritimehubafrica.com/uploads/news\\_attachment/Report\\_Ghana\\_Oil\\_Opportunities.pdf](http://maritimehubafrica.com/uploads/news_attachment/Report_Ghana_Oil_Opportunities.pdf) (accessed 29 May 2013). See also BBC News Africa 'Ghana Oil Begins Pumping for First Time' available at <http://www.bbc.co.uk/news/world-africa-11996983> (accessed 28 September 2011). Ghana's oil reserves are estimated at about 3 billion barrels of oil. For a general discussion of discovery of crude oil in Ghana see MacCaskie T C 'The United States, Ghana and oil: global and local perspectives' (2008) *Afr Aff (Lond)* 107 428 (hereafter MacCaskie T C 2008). See also Clarke D (2010) 183.

<sup>203</sup> See Ghana Energy Summit 'Ghana: The New Land of Opportunity for Oil and Gas Investment' available at [http://maritimehubafrica.com/uploads/news\\_attachment/Report\\_Ghana\\_Oil\\_Opportunities.pdf](http://maritimehubafrica.com/uploads/news_attachment/Report_Ghana_Oil_Opportunities.pdf) (accessed 29 May 2013).

<sup>204</sup> See Ghana Energy Summit 'Ghana: The New Land of Opportunity for Oil and Gas Investment' available at [http://maritimehubafrica.com/uploads/news\\_attachment/Report\\_Ghana\\_Oil\\_Opportunities.pdf](http://maritimehubafrica.com/uploads/news_attachment/Report_Ghana_Oil_Opportunities.pdf) (accessed 29 May 2013).

<sup>205</sup> It was reported that the gross domestic product of Ghana would rise from about 5 percent to 20 percent in the first few years of production. See Green M 'Crude realities; Can Ghana Escape Africa's Oil Curse?' *Financial Times London* 28 August 2008. 7.

<sup>206</sup> See chapter 6 section 6.2.4.

<sup>207</sup> See chapter 6 section 6.2.4.



of enacting oil legislation, viz, the Petroleum (Exploration and Production) Bill 2011 which will repeal the existing Petroleum (Exploration and Production) Act 1984.<sup>208</sup> Some of these laws provide for the regulation of production quotas, oil consumption subsidies and corruption. An examination of Ghana's legal framework and the policy instruments regarding production quotas, oil consumption subsidies and corruption is undertaken in chapter six of the thesis.

## 1.8 The Research Questions

The questions that are the focus of this thesis are: Firstly, whether there is a duality of legal regimes presented by OPEC and the WTO in the regulation of international trade in oil. Secondly, does the duality of legal regimes affect the regulation of production quotas, subsidies, and corruption in African oil producing countries? Broadly, the above questions seek to provide an answer to whether OPEC and WTO regulations affect the liberalisation of the international trade in oil.

## 1.9 Objectives of the Research

The aim of this research is to provide answers to the following concerns, so that, depending on the results, African solutions for African problems can be crafted to improve the international trade in oil in Africa:

1. Is the WTO institutional and legal framework sufficient for the regulation of production quotas, subsidies and corruption in African oil producing countries?
2. Is the OPEC institutional and legal framework sufficient for the regulation of production quotas, subsidies and corruption in African oil producing countries?

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<sup>208</sup> See chapter 6 section 6.2.4.

3. What is the legal framework for the regulation of oil trade in Ghana and how does it relate to OPEC and the WTO and the regulation of the stated key areas?
4. What are the solutions to the shortcomings, if any, in the OPEC and WTO legal frameworks for the regulation of the stated key areas in the international trade in oil?

## 1.10 Significance of the Research

The research contributes to the broad discussion on international trade and energy.<sup>209</sup> The thesis focuses on the regulation of production quotas, subsidies and corruption.<sup>210</sup> The apparent disharmony in the regulation of the three stated key areas is present in many oil producing countries that are members of both OPEC and the WTO.<sup>211</sup> These key areas are interrelated.<sup>212</sup> OPEC and the WTO approach them differently.<sup>213</sup> Nonetheless, a further explanation of why these particular areas are examined in the thesis is necessary.

It has been noted that the WTO objectives are meant to open export markets and limit import restrictions or domestic distortions, such as subsidies.<sup>214</sup> In this regard, production quotas, subsidies and corruption affect export markets and cause domestic distortions in trade. The effect on export markets is twofold. First, the amount of oil available to the export markets is restricted. Second, in some cases subsidies may encourage smuggling to the export markets. This may undermine the domestic production of oil in these export markets. The domestic distortions are

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<sup>209</sup> See World Trade Organisation (2010) 166. See also Desta M G (2003) 394-397. See also Desta M G (2009) 19-20, Cossy M (2012) 290-291, Broome S A (2006) 418 and Worika I L (2010) 90.

<sup>210</sup> See chapter 1 sections 1.2 and 1.3.

<sup>211</sup> Angola, Ecuador, Kuwait, Nigeria, Qatar, Saudi Arabia, United Arab Emirates, and, Venezuela are members of both the WTO and OPEC. Additionally Algeria, Iran, Iraq, and, Libya are all observers at the WTO and are in the process of accession with the WTO. See Worika I L (2010) 89.

<sup>212</sup> Pauwelyn J 'Global Challenges at the Intersection of Trade, Energy and the Environment: An Introduction' Pauwelyn J (ed) *Global Challenges at the Intersection of Trade, Energy and the Environment* (2010) 2 (hereafter Pauwelyn J 2010).

<sup>213</sup> See chapter 5 section 5.4.

<sup>214</sup> Pauwelyn J (2010) 2.

more direct and evident where production quotas, subsidies, and corruption are practiced.

The main case study around which this research is structured makes it particularly relevant. Ghana is yet to join OPEC; this provides a unique opportunity to study the legal framework of an oil producing country that is a non-OPEC member.<sup>215</sup> Additionally, the case study provides a platform to examine whether the key areas are sufficiently regulated in the non-OPEC member states. The research also identifies challenges to the WTO legal framework and provides practical solutions for them.

## 1.11 Methodology

The research is primarily based on an analysis of relevant primary and secondary literature.<sup>216</sup> A review of the literature on OPEC and the WTO, as well as the regulation of international oil production and trade in Africa has been undertaken. The author has relied on various methods to illustrate the arguments in the thesis. In some instances, statistics and data from various sources have been used, while in other cases, specific examples are applied. Both these methods have challenges; often statistics are wrought with generalisations, which are of course necessary to collate figures from different sources.<sup>217</sup> Similarly, specific examples seem to create the impression that the same behavior is relevant to another set of facts.<sup>218</sup> This is not always true. Even so, illustrations are necessary. The author is aware of the above challenges. In addition to the above, the author undertook a field trip to Ghana and held informal discussions with various government officials in Ghana's oil sector. These officials requested that their names be withheld. Thus notes of these discussions are on file with the author and where such information has been relied upon, the source is indicated as 'notes of discussions with officials in Ghana's oil sector.'

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<sup>215</sup> See chapter 6 generally.

<sup>216</sup> The study can be classified as a desktop study. The thesis relies on published articles, treaties, legislative enactments, textbooks, reported cases and reports on OPEC and the WTO and oil regulation generally.

<sup>217</sup> Jackson J H (1997) 28.

<sup>218</sup> Jackson J H (1997) 28.

The study compares the WTO and OPEC legal systems as regards the regulation of production quotas, oil consumption subsidies, and corruption in oil producing countries. Therefore it entails a comparative legal enquiry. Comparative legal studies have been defined as the comparison of legal systems to among other things understand the different systems.<sup>219</sup> Comparative legal studies include an investigation of historical and philosophical issues relating to law, and crafting responses to improve legal regimes.<sup>220</sup> One of the fundamental objectives of comparative legal studies is international harmonisation and unification of laws.<sup>221</sup> To this end, the thesis aspires to find common ground between the OPEC framework and the WTO legal system. Establishing commonalities in this regard will improve the regulation of the three key areas mentioned above. The thesis also reveals the divergences and advances solutions for harmonisation.

A successful comparative study includes: a clear framework of what is being compared, a succinct understanding of the purposes of the comparison, and, a grasp of the techniques of comparison.<sup>222</sup> An indication has been provided of the organisations and the specific areas that are the subject of this study,<sup>223</sup> as well as the purpose of the comparison to be undertaken.<sup>224</sup> With regard to techniques, there are various methodological approaches to comparative legal studies including: the historical method, the functional approach, legal harmonisation and unification, methods of reviewing customary law, economic analysis, law and cultural method, and the convergence approach.<sup>225</sup> The thesis in the main applies the historical, functional, and harmonisation and unification methods of comparative legal studies.

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<sup>219</sup> Okeke C N *Methodological Approaches to Comparative Legal Studies in Africa* (2012) The Centre for Comparative Law in Africa University of Cape Town 1 (hereafter Okeke C N 2012).

<sup>220</sup> Okeke C N (2012) 1.

<sup>221</sup> McDougal M S 'The comparative study of law for policy purposes: value clarification as an instrument of democratic world order' (1952) *Faculty Scholarship Series* Paper 2475 26 (hereafter McDougal M S 1952).

<sup>222</sup> McDougal M S (1952) 29-30. See also Okeke C N (2012) 12.

<sup>223</sup> See chapter 1 sections 1.2 and 1.3.

<sup>224</sup> See chapter 1 generally.

<sup>225</sup> Okeke C N (2012) 12-19 citing Glendon M A et al *Comparative Legal Traditions* (2007) 6, 11. The Historical method involves the study of the history of laws. It has been noted that 'comparative law without the history of the law is an impossible task.' The history of both OPEC and the WTO and their respective agreements is discussed in chapter 1 sections 1.2 and 1.3. Further, the functional approach to comparative law seeks to investigate the problems and rules in different legal systems and how these rules solve problems in their respective legal systems. This method has been identified as the major theory of comparative legal

It can be argued, and rightly so, that due to the nature of the legal regimes of the organisations, especially the OPEC legal regime, the study cannot properly be construed as a comparative study.<sup>226</sup> Nonetheless, a broad comparison of practices, rules and problems in the two systems is undertaken and against this background, the study is referred to as a comparative legal study.

### 1.12 Outline of the Chapters

**Chapter One:** Introduction and Background. The chapter provides the background to the research, a statement of the research problem, scope of the research, its objectives and its methodology. The chapter also indicates why OPEC and the WTO are the focus of this research and provides motivation for the use of Ghana as the main case study.

**Chapter Two:** Conceptualising the International Trade in Oil in Africa. The chapter briefly discusses the relevant economic, international organisation and international law theories that inform the international trade in oil in Africa. This chapter examines the classical and neoclassical economic theories of international trade, the liberal and realist theories of international organisation, and the international law theories that explain the implementation of international treaty obligations. This chapter sets a basis for the analysis in the subsequent chapters.

**Chapter Three:** The WTO and the International Trade in Oil. The chapter contains a history of the evolution of oil trade in the GATT/WTO legal framework. It also

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studies. The approach is particularly relevant to this study as the WTO and the OPEC member states appear to have similar problems. As noted in the background, member states in both systems have continued to rely on production quotas, maintain oil consumption subsidies, and permit corruption in oil related transactions. The functional theory is not without shortcomings in this study. While the WTO has rules to regulate the above disciplines, OPEC rules are not expressly stated in the Statute. It is currently argued that legal harmonisation and unification are not only an objective of comparative legal studies. Harmonisation and unification are now considered to constitute the methodology of comparative legal studies. This approach to comparative legal analysis is relevant to this study which investigates treaties that are relevant in the regulation of international trade in oil. The treaties that led to the creation of OPEC and the WTO were negotiated with the objective of achieving harmony in international trade. However, the WTO agreements are more comprehensive than the OPEC Statute which only regulates a single commodity. The two sets of Agreements therefore appear to advance disharmony within the field of international trade.

<sup>226</sup> Although the distinct systems have similar problems, as discussed above, one of the systems has express rules regulating production quotas, subsidies, and government procurement and corruption while the other (OPEC) lacks such express rules.

## Chapter1: Introduction and Background

discusses the institutional framework of the WTO. The chapter provides an analysis of the GATT provisions on production quotas, a review of the SCM Agreement, and a discussion of corruption under the GPA. The examination of the relevant provisions of the WTO legal framework and the above mentioned areas is focused on Africa.

**Chapter Four:** OPEC and the Regulation of the International Trade in Oil. The chapter commences with a discussion of the OPEC institutional framework. The chapter addresses the price stabilisation tools of OPEC, particularly production quotas. The chapter also discusses subsidies in OPEC member states and evaluates the effectiveness of the OPEC legal framework in addressing the corruption problem in African oil producing countries. African examples, notably Nigeria and Angola are relied upon in the discussion.

**Chapter Five:** Comparison between the WTO and OPEC. This chapter investigates the relationship between these two organisations. The comparison analyses the institutional frameworks and the relevant legal frameworks of the organisations. The chapter highlights the distinctions between these organisations with regard to the regulation of production quotas, subsidies and corruption. This chapter sets a platform for the application of the key legal arguments to oil production in Ghana as an African case study.

**Chapter Six:** Crude Oil Production and Trade in Ghana. This chapter builds on the discussion in the earlier chapters and supplements the discussion on production quotas, subsidies and corruption. The discussion in this chapter presents a view of an oil producing country that is not an OPEC member. The discussion is guided by the policy and legal framework regulating the oil sector in Ghana.

**Chapter Seven:** Summary of Conclusions and Recommendations. This chapter provides a conclusion to the thesis. Additionally, the chapter draws on the discourse in the previous chapters and provides practical recommendations for improvement of an effective institutional and legal framework for the international trade in oil in Africa.

### 1.13 Conclusion

The importance of a comprehensive legal framework to regulate the international trade in oil cannot be overstated. As has been indicated, there are two main legal frameworks that affect international trade in oil, viz; the OPEC legal framework and the WTO legal framework. The OPEC legal framework mainly revolves around the stabilisation of oil prices for its member states. The legal framework of the WTO is broad. However, for purposes of this thesis, the provisions on production quotas, subsidies and government procurement and corruption are the most relevant. The discussion reveals that the legal frameworks of the two organisations are distinct.

Ghana represents an African oil producing country in the early stages of the development of its oil sector. While it is a member of the WTO, it is not a member of OPEC. However, OPEC practices impact on the oil trade of non-OPEC members. Ghana has laws regulating its oil sector. However, these laws may not be alive to the challenges identified in the international trade of oil. Nigeria and Angola which are members of both organisations have to advocate for harmonisation of the rules in the international trade of oil. The next section discusses the theories that inform the international trade in oil in Africa.

## CHAPTER 2

# CONCEPTUALISING THE INTERNATIONAL TRADE IN OIL IN AFRICA

*'Shall I answer briefly, or at length?'*<sup>1</sup>

### 2.1. Introduction

The globalisation of trade continues to rise astronomically.<sup>2</sup> This applies to the export of oil and other natural resources.<sup>3</sup> Despite having a small market share, oil exports from Africa to other regions of the world have continued growing.<sup>4</sup> With reference to Africa's increasing share of global oil trade, this chapter examines the major theories that inform the international trade in oil.<sup>5</sup> The international trade in oil is mainly analysed from the export/supply side. It is important to understand these theories as they explain the roles and objectives of the two organisations that

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<sup>1</sup> Francis Ysidro Edgeworth (1845-1926) was one of the prominent neoclassical economists. When he was asked a particularly difficult question at his final oral examination at Oxford University, he posed the above question. This question is relevant to this chapter as there is an abundance of theories on international trade. However, the chapter is limited to the primary theories that form the foundation for other theories. It is important to state at the outset that the chapter does not attempt to discuss all theories of international trade. In the same light, economic theories of international trade and international organisation theories are quite complex and the discussion herein is merely an overview of these theories. See Appleyard D & Field A J *International Economics Trade Theory and Policy* (1995) 60 (hereafter Appleyard D & Field A J 1995). See also Armstrong D et al *International Organisation in World Politics* (2004) 11 (hereafter Armstrong D et al 2004).

<sup>2</sup> Van den Bossche P (2008) 6. In 1948, world exports of goods amounted to US \$ 58 billion. This figure has substantially risen and global export of goods in 2010 amounted to about US \$ 14 851 billion. See WTO 'International trade statistics 2011' available at [http://www.wto.org/english/res\\_e/statis\\_e/its2011\\_e/its2011\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2011_e/its2011_e.pdf) (accessed 18 August 2012).

<sup>3</sup> In 2010, Global exports of fuel and other mineral resources amounted to US \$ 3 062 billion. WTO 'International trade statistics 2011' available at [http://www.wto.org/english/res\\_e/statis\\_e/its2011\\_e/its2011\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2011_e/its2011_e.pdf) (accessed 18 August 2012).

<sup>4</sup> This applies to the period between 2005 and 2010. On average oil exports from Africa grew by about 0.2%. Africa has the third largest oil reserves and this is bound to increase with recent oil discoveries in Ghana and Uganda. Thus its market share will also increase as production increases. See WTO 'International trade statistics 2011' available at [http://www.wto.org/english/res\\_e/statis\\_e/its2011\\_e/its2011\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2011_e/its2011_e.pdf) (accessed 18 August 2012). See also African Development Bank Group Crude Oil and Natural Gas Production in Africa and the Global Market Situation (2010) Commodities Brief Vol 1 Issue 4 1 (hereafter African Development Bank Group 2010).

<sup>5</sup> The main economic theories that are discussed are the classical and neoclassical theories. While it is acknowledged that there are alternative economic theories of international trade, these are beyond the scope of this thesis. The above theories of international trade comprehensively illustrate the characteristics of international trade. See Appleyard D & Field A J (1995) 19 and 59.



are involved in the international trade in oil. The World Trade Organisation (WTO) was formed to consolidate and enhance the gains of trade liberalisation, while the Organisation of Petroleum Exporting Countries (OPEC) was primarily formed to ensure that member states receive profitable returns from their oil resources.<sup>6</sup> It can therefore be argued that while the WTO pursues a liberalist ideology, OPEC pursues a trade restrictive agenda.<sup>7</sup> This chapter analyses the classical and neoclassical economic theories with a view to understanding the broad economic framework of the two organisations. It also seeks to establish an appropriate theoretical framework for the regulation of the international trade in oil in Africa.

Related to the above economic theories, the chapter provides a summary of the basic theories of international organisation. These theories explain the rationales behind the formation of the WTO and OPEC. The chapter does not attempt to discuss all the theories of international organisation. Accordingly, only liberal and neoliberal theories as well as realist and neorealist theories of international organisation and some of their variants are discussed.

In addition to the economic and international organisation theories of international trade, an appraisal of some of the legal theories that affect the adoption of international trade agreements is also undertaken.<sup>8</sup> To this end, the chapter discusses the international law theories of monism and dualism.<sup>9</sup> This is helpful in evaluating the implementation of international legal obligations, especially WTO and OPEC obligations, in domestic legal regimes.

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<sup>6</sup> See chapter 1 sections 1.2.2 and 1.3.2.

<sup>7</sup> Trade restrictive practices by OPEC include production quotas that limit oil production and export. Oil consumption subsidies can also be said to be trade restrictive as they distort the international trade in oil. See chapter 3 section 3.4.

<sup>8</sup> Various legal theories indeed apply to the international trade discipline. However, the focus of the thesis is on the regulation of the international trade in oil in Africa. The discussion in this regard is limited to theories that affect the implementation of international obligations on international trade in oil in the domestic legal framework. As such, the relevant theories that are discussed are monism and dualism. See Cranston R A *Theory for International Commercial Law?* (2006) Congreso Internacional de Derecho Mercantil 2 (hereafter Cranston R A 2006).

<sup>9</sup> Dugard J *International Law A South African Perspective* 4 ed (2013) 42 (hereafter Dugard J 2013). See also Starke J G 'Monism and dualism in the theory of international law' 17 *Brit. Y.B. Int'l L.* 66 (1936) 67 (hereafter Starke J G 1936). The author is aware of a third theory which disputes the legality of international law. However, that theory is outside the scope of this inquiry owing to the fact the WTO and OPEC legal frameworks have been generally accepted as binding on the member states.

The increasing visibility of Africa in the production and trade of crude oil merits a comprehensive discussion of the relevant economic and legal theories that are related to oil production and trade in Africa. This discussion is meant to guide appropriate responses to the regulation of the international trade in oil in Africa.

The chapter commences with a discussion of the classical economic theory and how it relates to both the WTO and OPEC. This section also reflects on this theory and the international trade in oil in Africa. The chapter then proceeds to discuss the neoclassical economic theory. The subsequent sections of the chapter engage with the discourse on the theory of international organisation and legal theories on the implementation of international trade obligations. An appropriate normative marriage between the economic, international organisation and legal theories is also proposed in the chapter.<sup>10</sup>

## 2.2 Economic Theories of International Trade

Various economic theories and frameworks have been used to explain international oil trade. Some of the prominent theories and frameworks that have been relied upon include: the theory of exhaustible resources, the free-rider problem and game theory.<sup>11</sup> These are important but have certain limitations which inform their exclusion in this chapter. The theory of exhaustible resources is relevant in explaining the basis for oil production and oil prices. However, the theory is constrained by data challenges and the fact that the price of oil has not been in tandem with the theory.<sup>12</sup> The free-rider problem is primarily based on the public

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<sup>10</sup> The term 'normative marriage' is used to refer to the marriage of standards from the economic, international organisation and legal fields.

<sup>11</sup> Benchekroun H & Withagen C *The Optimal Depletion of Exhaustible Resources: A Complete Characterization* (2011) Department of Economics, CIREQ, McGill University and Department of Spatial Economics, VU University Amsterdam 2 (hereafter Benchekroun H & Withagen C 2011). See also Dwivedi D N *Microeconomics Theory & Applications* (2006) 569 (hereafter Dwivedi D N 2006). See also Herath G *Game Theory Applications in Natural Resource Management Review of Evidence, Problems and Potential* (2006) The 6th Meeting on Game Theory and Practice 2 (hereafter Herath G 2006).

<sup>12</sup> Chermak J M & Patrick R H *A Microeconometric Test of the Theory of Exhaustible Resources* (1999) Department of Economics University of New Mexico and Faculty of Management Rutgers University 2 (hereafter Chermak J M & Patrick R H 1999). See also Hamilton J D *Oil Prices, Exhaustible Resources, and Economic Growth* (2011) Department of Economics University of California, San Diego 3-5 (hereafter Hamilton J D 2011).

goods theory. Public goods are defined to possess the following characteristics: collective consumption, non-rival consumption and non-exclusion.<sup>13</sup> Crude oil and refined oil do not possess these characteristics, thus they cannot be defined as public goods. To this end, application of the free-rider theory to the international trade of oil is challenging.<sup>14</sup> Additionally, both non-cooperative and cooperative game theories are informed by strategies to achieve benefit from a common good.<sup>15</sup> This is similar to the more practical theories on international organisation and how these affect the international trade in oil.<sup>16</sup> Thus due to space constraints, the international organisation theories are discussed as opposed to game theory.

### 2.2.1 The Classical Theory-An Introduction

The classical theory of international trade is generally attributed to early economic writers who criticised the mercantilist theory of international trade.<sup>17</sup> A detailed discussion of mercantilism and how it affected international trade is beyond the scope of this study. Nonetheless, the major tenets of the theory are discussed to provide a background for the discourse on the classical theory of international trade.

It has been noted by various authors that mercantilism cannot be classified as a formal school of economic thought.<sup>18</sup> Accordingly, it is defined as a collection of economic thoughts that were prominent in Europe between 1500 and 1750.<sup>19</sup> The most significant theme of mercantilism was the need to maintain a positive balance

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<sup>13</sup> Dwivedi D N (2006) 567.

<sup>14</sup> The free-rider problem has been noted in cartels. Multinational oil companies have been accused of benefitting from OPEC production quotas. However, due to the fact that the free-rider problem is based on public goods, it is not applied to OPEC in this thesis. See Bejesky R 'Geopolitics, oil law reform, and commodity market expectations' (2011) *Oklahoma Law Review* Vol. 63 No 2 234 (hereafter Bejesky R 2011).

<sup>15</sup> Hang P D K *Essays in Game Theory and Natural Resource Management* (unpublished Doctoral Thesis Tilburg University 2003) 3 (hereafter Hang P D K 2003).

<sup>16</sup> See chapter 2 section 2.3.

<sup>17</sup> Appleyard D & Field A J (1995) 19.

<sup>18</sup> Appleyard D & Field A J (1995) 19. Adam Smith described a system similar to mercantilism to refer to trade ideology that emphasised the importance of a positive balance of trade. See Viner J *Studies in the Theory of International Trade* (1960) 3 (hereafter Viner J 1960). See also Smith A *The Wealth of Nations* 5 ed annotated by Cannan E (2003) 543 (hereafter Smith A 2003).

<sup>19</sup> Appleyard D & Field A J (1995) 19.

of trade.<sup>20</sup> This involved ensuring that the volume of exports by merchants was greater than the volume of imports.<sup>21</sup> It was informed by the need to restrict the amount of precious metal (specie) leaving the state.<sup>22</sup> A high volume of exports allowed states to obtain precious metal from other states. The wealth of a state was measured by the amount of precious metal it had in its reserves and not the productivity of the state.<sup>23</sup> The theory therefore advocated trade restriction.

Currently, OPEC relies on production quotas as the tool of choice for price stabilisation.<sup>24</sup> Additionally, OPEC has been criticised for failing to regulate oil consumption subsidies in the member states.<sup>25</sup> This situation points to the use or encouragement of the use of tools that perpetuate trade restriction. To this end, OPEC identifies with the mercantilist theory through its perpetuation of trade restriction.

On the contrary, the WTO was formed to discourage trade restriction. The history of the WTO can be traced to the end of the Second World War.<sup>26</sup> Some authors have advanced trade restriction as one of the fundamental reasons that led to the Second World War.<sup>27</sup> The countries that pioneered the talks for an international organisation to regulate trade were motivated by the legacy and negative effects of trade

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<sup>20</sup> The positive balance of trade was not always limited to commodities, and various authors at the time noted that the balance of trade should include non-commodity items, such as payment of foreign loans. See Appleyard D & Field A J (1995) 20. See also Viner J (1960) 6-13. The idea of a positive balance of trade was advanced by Mun *England's Treasure by Forraign Trade, or The Ballance of our Forraign Trade is the Rule of our Treasure* (1664). See Streb J M Hume's Specie-Flow Mechanism and the 16th Century Price Revolution (2010) Universidad del Cema 5 (hereafter Streb J M 2010).

<sup>21</sup> Appleyard D & Field A J (1995) 20.

<sup>22</sup> Mercantilists assumed that international trade was a zero sum game and that only one country would benefit from trade. This was one of the reasons for criticism of the theory by classical economists. See Appleyard D & Field A J (1995) 19. See also Viner J (1960) 6.

<sup>23</sup> Appleyard D & Field A J (1995) 20. See also Viner J (1960) 15.

<sup>24</sup> OPEC Res I.1.3 1960 See OPEC Secretariat 'OPEC production agreements: a detailed listing' 2003 *OPEC Review* 66 (hereafter OPEC Secretariat 2003).

<sup>25</sup> Hochman G & Zilberman D (2011a) 2.

<sup>26</sup> See chapter 1 section 1.3.1.

<sup>27</sup> It has been noted that the Great Depression of the 1930s was to a large extent caused and maintained by the trade restrictive practices of some countries. The Second World War was caused by among other factors, the harsh economic environment attributed to the Great Depression. Thus it can be argued that trade restriction was one of the causes of the Second World War. See Eichengreen B & Irwin D A *The Slide to Protectionism in the Great Depression: Who Succumbed and Why?* (2009) National Bureau of Economic Research Working Paper Series 1 (hereafter Eichengreen B & Irwin D A 2009). See also Matziorinis K 'The Causes of the Great Depression: A Retrospective 11' available at [www.canbekeconomics.com/research/papers/TheGreatDepression\\_and\\_Europe.pdf](http://www.canbekeconomics.com/research/papers/TheGreatDepression_and_Europe.pdf) (accessed 16 November 2012). See also Jackson J H (1997) 13.

restriction.<sup>28</sup> The WTO regulates and discourages quotas, subsidies and corruption.<sup>29</sup> To this end, the WTO does not identify with the mercantilist theory. The WTO is aware of the economic situation of less developed countries and therefore provision has been made to provide flexibilities in the trade rules.<sup>30</sup> This allows for the gradual elimination of trade restrictive measures without creating economic shocks in the less developed countries. The African group in WTO negotiations has increasingly asserted itself and is a good forum to engage in discussions on oil trade.<sup>31</sup>

Narrowing the discussion to Africa, oil production in Africa is largely open. Africa often does not have the capital to undertake oil exploration and production.<sup>32</sup> Accordingly, the continent relies on foreign oil companies to produce oil. To this end, production of oil in Africa is not trade restrictive. This statement is qualified by the fact that Africa's largest oil producing countries are all OPEC members.<sup>33</sup> This affects international trade in oil in Africa.<sup>34</sup> The OPEC member states maintain production quotas.<sup>35</sup> These quotas entrench the monopolistic nature of OPEC and restrict international trade in oil.<sup>36</sup> Oil consumption subsidies are also trade restrictive as they undermine competition and the market determination of oil prices.<sup>37</sup> Fuel consumption subsidies cost Nigeria about US \$ 7.5 billion in 2010.<sup>38</sup> It is

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<sup>28</sup> See WTO 'The GATT Years: from Havana to Marrakesh' available at [http://www.wto.org/english/thewtoe/whatis/tife/fact4\\_e.htm](http://www.wto.org/english/thewtoe/whatis/tife/fact4_e.htm) (accessed 20 August 2012).

<sup>29</sup> See chapter 3 section 3.4 for a discussion on the regulation of production quotas, subsidies, and corruption in the WTO.

<sup>30</sup> See GATT Arts XXXVI, XXXVII and XXXVIII. These provisions allow African oil producing countries to gradually eliminate trade distorting practices.

<sup>31</sup> Trade Law Centre for Southern Africa *The World Trade Organisation - An African Perspective, More than a Decade Later* (2009) 26 (hereafter Trade Law Centre for Southern Africa 2009).

<sup>32</sup> International oil companies, such as, ExxonMobil, BP, Shell, Total, Chevron and Texaco, have a huge presence in African oil production. They are supported by a large number of small independents that are involved in exploration. See Clarke D (2010) 413-424 and 529.

<sup>33</sup> Libya, Nigeria, Algeria and Angola are Africa's largest oil producers and also hold the biggest oil reserves in Africa. See OPEC 'OPEC Share of World Crude Oil Reserves 2011' available at [http://www.opec.org/opec\\_web/en/data\\_graphs/330.htm](http://www.opec.org/opec_web/en/data_graphs/330.htm) (accessed 20 August 2012). See also Clarke D (2010) 87,125,225 and 234. See also OPEC 'Member Countries Crude Oil Production Allocations' available at [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/datagraphs/Producti\\_onLevels.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/datagraphs/Producti_onLevels.pdf) (accessed 20 August 2012) for data on production allocation by OPEC between 1982 and 2007.

<sup>34</sup> Oil production and trade are separate processes. It has been noted that there is limited oil trade between African states. See African Development Bank and the African Union (2009) 53.

<sup>35</sup> See OPEC 'Member Countries Crude Oil Production Allocations' available at [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/datagraphs/Producti\\_onLevels.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/datagraphs/Producti_onLevels.pdf) (accessed 20 August 2012).

<sup>36</sup> See chapter 4 section 4.4.1, for a detailed discussion of production quotas under the OPEC Statute.

<sup>37</sup> See chapter 4 section 4.4.2, for a detailed discussion of oil consumption subsidies. See also IEA at al (2010) 11.

therefore apparent that international trade in oil in Africa is largely trade restrictive due to the fact that the largest oil producers are OPEC members and engage in trade restrictive practices.<sup>39</sup> Although oil production may not be trade restrictive due to monetary constraints implicit in the oil production process, oil trade after production is trade restrictive due to OPEC practices in the largest oil producing countries in Africa. The mercantilist theory encouraged trade restriction. OPEC perpetuates trade restrictive practices in some African oil producing countries.

## 2.2.2 The Classical Theory-David Hume, Adam Smith and David Ricardo

The above scholars were very influential in guiding the classical theory of international trade. Their arguments were founded on the rejection of the mercantilist theory of international trade. The major contributions of these scholars to the classical theory are discussed below. The classical theorists emphasised the wellbeing of the citizens as opposed to the welfare of the monarchy.<sup>40</sup>

### 2.2.2.1 David Hume-The Price-Specie-Flow Mechanism

David Hume contested the mercantilist view that a nation could continue accumulating precious metal or specie without any adverse consequences to its competitive position.<sup>41</sup> He argued that the continued accumulation of precious metal

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<sup>38</sup> Ghana and Cameroon have also been identified as incurring costs in maintaining fuel subsidies. Thus this challenge is not limited to OPEC member states. However, since OPEC aims to stabilise oil prices, it can be argued that the Organisation should discourage these market distorting practices by its member states such as Nigeria. See African Development Bank Group 'Fuel Subsidies in Africa' available at <http://www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/fuel-subsidies-in-africa-8812/> (accessed 20 August 2012).

<sup>39</sup> Although it can be argued that oil production in Africa is open, trade in oil is trade restrictive, as discussed above.

<sup>40</sup> Jackson J H (1997) 14.

<sup>41</sup> Appleyard D & Field A J (1995) 22. Hume's work was published in *Political Discourses* (1752). The Price-Specie-Flow Mechanism was part of his essay 'On the balance of trade'. See Streb J M (2010) 2. It has been argued that the critique of mercantilism preceded Hume. A theory similar to the Price-Specie-Flow mechanism has been attributed to Cantillon R *Essai sur la nature du commerce en general*, written in 1730 but only published in 1755. However, his critique of mercantilism is complex and sophisticated. Accordingly, Hume's work is relied upon in this chapter. See Thornton M Cantillon, Hume and the Rise of Anti-Mercantilism (2006) Ludwig von Mises Institute 10-13 (hereafter Thornton M 2006).

would lead to an increase in money supply as well as prices and wages.<sup>42</sup> This would ultimately increase imports and reduce exports of the state.<sup>43</sup> On the other hand, a state that lost precious metal due to a higher volume of imports would experience a decrease in money supply.<sup>44</sup> This would in turn reduce the prices and wages in the state.<sup>45</sup> The state would then increase its volume of exports and reduce its volume of imports due to low prices and low wages.<sup>46</sup>

Thus the mercantilist theory and its emphasis on the accumulation of precious metal was not an efficient method of maintaining a positive balance of trade over a long period of time.<sup>47</sup> David Hume assumed that changes in money supply always affected prices and wages and not output and employment.<sup>48</sup> Hume also complained about the lack of comprehensive data on balance of payments.<sup>49</sup> Thus the Price-Specie-Flow Mechanism has limitations.<sup>50</sup> Hume advocated free trade and argued that precious metal could not be controlled by the state over a long period of time.<sup>51</sup>

Hume's arguments on the Price-Specie-Flow Mechanism support free trade.<sup>52</sup> Similarly, the WTO advocates free trade.<sup>53</sup> This creates a connection between Hume's argument and the ethos of the WTO. Hume's conception of free trade

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<sup>42</sup> Appleyard D & Field A J (1995) 23. See also Cherunilam F *International Economics* 5 ed (2008) 123 (hereafter Cherunilam F 2008).

<sup>43</sup> Appleyard D & Field A J (1995) 23. See also Cherunilam F (2008) 123.

<sup>44</sup> Appleyard D & Field A J (1995) 23. See also Cherunilam F (2008) 123.

<sup>45</sup> Appleyard D & Field A J (1995) 23. See also Cherunilam F (2008) 123.

<sup>46</sup> Appleyard D & Field A J (1995) 23. See also Paganelli M P 'David Hume on monetary policy: a retrospective approach' (2009) *The Journal of Scottish Philosophy* 7 (1) 81 (hereafter Paganelli M P 2009).

<sup>47</sup> It has been argued that accumulating specie leads to inflation and affects the standard of living. See Jackson J H (1997) 15.

<sup>48</sup> Appleyard D & Field A J (1995) 23.

<sup>49</sup> Streb J M (2010) 10.

<sup>50</sup> Appleyard D & Field A J (1995) 23.

<sup>51</sup> Arnon A *David Hume and Classical Monetary Theory* (2011) The Thomas Guggenheim Program for the History of Economic Thought 13 (hereafter Arnon A 2011). It is worth noting that Hume's support of free trade was qualified by his opinion on the need to protect infant domestic industries, through taxation of similar goods produced by foreign industries. See McGee R W 'The economic thought of David Hume' (1989) *Hume Studies* Volume 15 Number 1 184 (hereafter McGee R W 1989). Further, due to some of Hume's trade restrictive opinions, he has been described as a moderate protectionist and a philosopher who did not advocate for free trade to the extent that economists like Adam Smith did. The author concedes that such criticism is founded on the work of Hume. However, Hume's Price-Specie-Flow mechanism was essentially premised on free trade. See Viner J (1960) 91-92.

<sup>52</sup> Arnon A (2011) 13.

<sup>53</sup> See WTO 'Free Trade Helps Reduce Poverty, Says New WTO Secretariat Study' available at [http://www.wto.org/english/news\\_e/pres00\\_e/pr181\\_e.htm](http://www.wto.org/english/news_e/pres00_e/pr181_e.htm) (accessed 20 August 2012). See also Van den Bossche P (2008) 15-20, 21-24, for a detailed discussion of the benefits of free trade and the reasons for trade restrictive measures.

involved minimal government involvement. He argued that the state would not maintain a positive balance of trade over time, through accumulating precious metal and controlling exports and imports. Despite advocating some protectionist practices such as shielding infant domestic industries from competition, his Price-Specie-Flow Mechanism was a foundation for the opening up of international trade.

Unlike the WTO, OPEC restricts trade through the use of production quotas to stabilise prices.<sup>54</sup> OPEC also ignores oil consumption subsidies in the member states, despite indications that these subsidies are market distorting and are also trade restrictive.<sup>55</sup> OPEC's objectives and practices are inconsistent with Hume's support for free trade. However, as noted above, Hume supported the protection of infant industries against competition. To this end, OPEC's trade restrictive practices may be related to Hume's argument.

Corruption has been attributed to the high degree of government involvement in oil economies.<sup>56</sup> This is especially true for many of the OPEC member states.<sup>57</sup> Thus Hume's argument for limited government and free trade would not provide an appropriate environment for corrupt practices. Nevertheless, the WTO, which advocates free trade, has not taken a central role in fighting corruption.<sup>58</sup> The Government Procurement Agreement (GPA) which provides for transparency in government procurement does not apply to all members and is of very limited application.<sup>59</sup>

In accordance with the observation in section 2.2.1, African oil production is open to international oil companies.<sup>60</sup> However, oil trade in Africa is greatly influenced by the trade restrictive policies of OPEC. This is due to the fact that the largest oil

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<sup>54</sup> See chapter 4 section 4.4.1.

<sup>55</sup> IEA et al (2010b) 11. See also chapter 4 section 4.4.2.

<sup>56</sup> Montinola G & Jackman R W 'Sources of corruption: a cross-country study' (2002) *B.J.Pol.S.* 32,158 (hereafter Montinola G & Jackman R W 2002).

<sup>57</sup> Montinola G & Jackman R W (2002) 158. See also chapter 4 sections 4.4.3 and 4.5.

<sup>58</sup> The GATT Art X promotes transparency. However, this is not sufficient for corruption at the point of procurement. Corrupt practices may subsist even where trade regulations have been published by member states. The GATT anti-corruption framework is limited. See Ala'I P 'The WTO and the anti-corruption movement' (2008) *Loyola University Chicago International Law Review* 6, No. 1 260 (hereafter Ala'I P 2008).

<sup>59</sup> GPA Art 1.

<sup>60</sup> Clarke D (2010) 413-424 and 529.



producing countries are also OPEC member states.<sup>61</sup> Thus Hume's arguments for free trade are largely inconsistent with Africa's international trade in oil.

### 2.2.2.2 Adam Smith – Absolute Advantage

Adam Smith's work, which focuses on absolute advantage and the invisible hand, was published in *An Inquiry into the Nature and Causes of the Wealth of Nations* in 1776.<sup>62</sup> Adam Smith rejected the mercantilist notion that a nation's wealth was based on its accumulation of precious metal.<sup>63</sup> He argued that a nation's wealth was founded on its productivity, that is, the production of final goods and services.<sup>64</sup> He further argued that productivity flourished in an environment where people were free to pursue their own interests.<sup>65</sup> A laissez faire environment was the best way to increase a nation's wealth.<sup>66</sup> Adam Smith's concept of laissez faire has often been presented as an argument against state involvement in the economy.<sup>67</sup> However, he was not totally averse to state involvement:<sup>68</sup>

'Smith, indeed, goes back and forth when he expresses his opinion on the state's functions. To him, the least government is certainly the best, simply because he believes that governments are spendthrift, irresponsible, and unproductive. Nevertheless, he has a flexible view of government's role in promoting general welfare through public works and institutions.'<sup>69</sup>

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<sup>61</sup> Clarke D (2010) 87, 125, 225 and 234.

<sup>62</sup> Arnon A (2011) 24. See also Appleyard D & Field A J (1995) 24. The invisible hand is also mentioned in Adam Smith's work, *The Theory of Moral Sentiments*. However, the discussion in this chapter is mainly limited to the *Wealth of Nations*. The invisible hand was also mentioned in Adam Smith's *History of Astronomy*. See Minowitz P 'Adam Smith's invisible hands' (2004) *Econ Journal Watch*, Volume 1, Number 3 382 (hereafter Minowitz P 2004). See also Kennedy G 'Adam Smith and the invisible hand: from metaphor to myth' (2009) *Econ Journal Watch* Volume 6, Number 2 240 (hereafter Kennedy G 2009). Kennedy argues that the invisible hand is only a metaphor and does not amount to anything more than that. Nevertheless, the metaphor is relevant in understanding the regulation of international trade through other forces like competition and not the state. See also Smith A (2003) 572.

<sup>63</sup> Appleyard D & Field A J (1995) 24.

<sup>64</sup> Appleyard D & Field A J (1995) 24.

<sup>65</sup> Appleyard D & Field A J (1995) 24. See also Minowitz P (2004) 385. See also Kennedy G (2009) 252.

<sup>66</sup> Appleyard D & Field A J (1995) 24.

<sup>67</sup> Nagger T 'Adam Smith's laissez faire' (1977) *The American Economist* Vol. 21 Issue 2 36 (hereafter Nagger T 1977).

<sup>68</sup> Nagger T (1977) 36.

<sup>69</sup> Nagger T (1977) 36.

Adam Smith contended that the proper role of the government was to ensure that there were no barriers to trade.<sup>70</sup> Related to the arguments on laissez faire, he argued that states should specialise and focus production on those commodities where they had an absolute advantage.<sup>71</sup> That is, a trading partner should produce and export commodities where the absolute labour required per-unit of production is less than that of the prospective trading partner.<sup>72</sup> The explanation that follows places the discussion of absolute advantage within the context of international trade in oil.

Assume that country Y takes one hour to produce a barrel of crude oil and four hours to produce a ton of steel, and country X takes two hours to produce a barrel of oil and three hours to produce a ton of steel. Thus in country Y one ton of steel will exchange for four barrels of oil and in country X one ton of steel will exchange for one and a half barrels of oil. Thus country Y has an absolute advantage in the production of oil as it takes less time, and country X has an absolute advantage in the production of steel as it takes less time to produce. Thus absolute advantage motivates countries to trade with others. If the countries were to trade at an exchange rate of one ton of steel for three barrels of oil, then country Y would get steel for less oil in country X, and country X would get oil for less steel in country Y.<sup>73</sup>

It should be noted that Adam Smith's theory was based on the assumption that the labour required to produce the different commodities as well as all other factors, were similar in all states.<sup>74</sup> This is not the situation in the real world. The theory also presupposes that all states have an absolute advantage in the production of certain

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<sup>70</sup> Appleyard D & Field A J (1995) 24. See also Crowder W J 'Comparative Advantage and the Gains from Trade 3-4' available at [http://www.uta.edu/faculty/crowder/data/Lecture\\_02\\_2011.pdf](http://www.uta.edu/faculty/crowder/data/Lecture_02_2011.pdf) (accessed 14 November 2012).

<sup>71</sup> Appleyard D & Field A J (1995) 25. See also Berkshire Encyclopedia of Sustainability: The Business of Sustainability 'Free Trade 239' available at [http://www.berkshirepublishing.com/assets/pdf/FreeTrade\\_Thrasher.pdf](http://www.berkshirepublishing.com/assets/pdf/FreeTrade_Thrasher.pdf) (accessed 14 November 2012).

<sup>72</sup> Appleyard D & Field A J (1995) 25. It is worth noting at this stage, that although Adam Smith may have advocated for trade between nations, he was aware of the challenge of creating an environment of total free trade. See Campbell R H et al (eds) *Adam Smith An Inquiry into the Nature and Causes of the Wealth of Nations* (1981) Vol I and II 536 (hereafter Campbell R H 1981).

<sup>73</sup> The example used above has been adapted from an illustration of absolute advantage by Adam Smith in Appleyard D & Field A J (1995) 26.

<sup>74</sup> See World Economy 'Absolute Advantage 4' available at <http://www2.econ.uu.nl/users/marrewijk/pdf/marrewijk/absolute%20advantage.pdf> (accessed 21 August 2012).

goods, which is not an accurate description of global trade.<sup>75</sup> Nonetheless, the theory of absolute advantage highlighted the benefits of free trade and laissez faire.

The concept of free trade and the rationale thereof, as proposed by Adam Smith, are closely related to the objectives of the WTO. Free trade with minimal restrictions is the most appropriate environment for international trade. The WTO is at the forefront of eliminating trade barriers among states.<sup>76</sup> The WTO trade rules relate to Adam Smith's work in this regard. Art XI of the GATT advocates the elimination of quotas.<sup>77</sup> This is meant to encourage free trade. Arts 3 and 5 of the SCM regulate subsidies.<sup>78</sup> These regulations prohibit trade restrictive practices. The GPA generally, provides rules that encourage transparency, and thus helps to eliminate corruption.<sup>79</sup>

The theory of absolute advantage has limitations and has been criticised by other economists.<sup>80</sup> Nonetheless, the theory established a basis for international trade. The theory indeed shows that there are advantages in trading with other states. Similarly, the WTO framework was established to encourage and regulate international trade between states. Although Adam Smith to a limited extent considered state intervention necessary in the economy, such involvement was necessary for the provision of public works and institutions.<sup>81</sup> Adam Smith argued that the main role of the state was the removal of trade barriers.<sup>82</sup>

OPEC relies on production quotas to stabilise prices; however production quotas restrict trade. Additionally, OPEC is yet to provide comprehensive regulations for oil consumption subsidies and the control of corruption.<sup>83</sup> These practices are trade restrictive and are irreconcilable with the arguments of Adam Smith on absolute advantage, free trade and international trade.

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<sup>75</sup> See World Economy 'Absolute Advantage 4' available at <http://www2.econ.uu.nl/users/marrewijk/pdf/marrewijk/absolute%20advantage.pdf> (accessed 21 August 2012).

<sup>76</sup> The various GATT negotiations after 1947 focused on the reduction of tariff barriers to trade. After the 1960s the negotiations focused on non-tariff barriers. See Van den Bossche (2008) 81.

<sup>77</sup> See chapter 3 section 3.4.1 for a detailed discussion.

<sup>78</sup> See chapter 3 section 3.4.3 for a detailed discussion.

<sup>79</sup> See chapter 3 section 3.4.4 for a detailed discussion.

<sup>80</sup> See World Economy 'Absolute Advantage 4' available at <http://www2.econ.uu.nl/users/marrewijk/pdf/marrewijk/absolute%20advantage.pdf> (accessed 21 August 2012).

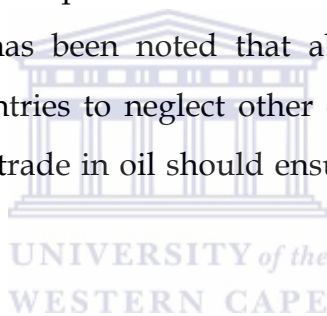
<sup>81</sup> Nagger T (1977) 36.

<sup>82</sup> Appleyard D & Field A J (1995) 24.

<sup>83</sup> See chapter 4 sections 4.4.2 and 4.4.3 for a detailed discussion.

Oil trade in Africa is restricted by OPEC production quotas as well as oil consumption subsidies and corruption.<sup>84</sup> These key areas require regulation. The WTO provides regulation for these three areas; however, the GATT/WTO have been shy in the application of these regulations to oil trade generally.<sup>85</sup> Regulation of the above areas will ensure that the oil trade in Africa produces profitable returns for the resource rich countries.

International trade in all fields should be free of restrictions. However, it has been argued that free trade and the western model of trade does not suit Africa,<sup>86</sup> and that Africa requires gradual introduction of regulations to promote free trade, taking into account domestic industries and other factors such as employment.<sup>87</sup> As already noted the WTO legal framework is alive to this need and provides special and differential treatment for the implementation of WTO rules in less developed countries.<sup>88</sup> Additionally, it has been noted that absolute advantage encourages resource rich developing countries to neglect other commodities.<sup>89</sup> Thus a gradual introduction of trade rules to trade in oil should ensure that other commodities are not neglected.



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<sup>84</sup> The biggest oil producing countries in Africa are OPEC members and are subject to OPEC production quotas. Corruption in Africa is estimated to cost about US \$ 148 billion annually (25% of African GDP). See Clarke D (2010) 22, 87, 125, 225 and 234. Fuel subsidies cost Nigeria about US \$ 7.5 billion in 2010. See African Development Bank Group 'Fuel Subsidies in Africa' available at <http://www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/fuel-subsidies-in-africa-8812/> (accessed 20 August 2012).

<sup>85</sup> See chapter 3 section 3.2 for a detailed discussion.

<sup>86</sup> See The Guardian 'Free Trade is not what Africa Needs, Mr. Cameron' available at <http://www.guardian.co.uk/global-development/poverty-matters/2011/jul/19/david-cameron-africa-free-trade> (accessed 21 August 2012). See also African Knowledge for Development Networks 'Africa Trade Forum 2012: Boosting Intra-Africa Trade and Establishing the Continental Free Trade Area' available at <http://knowledge.africa-devnet.org/group/aria/page/africa-trade-forum-2012-boosting-intra-africa-trade-and> (accessed 20 May 2013) for a contrary view.

<sup>87</sup> See The Guardian 'Free Trade is not what Africa Needs, Mr. Cameron' available at <http://www.guardian.co.uk/global-development/poverty-matters/2011/jul/19/david-cameron-africa-free-trade> (accessed 21 August 2012).

<sup>88</sup> See GATT 1994 Arts XXXVI, XXXVII, and, XXXVIII.

<sup>89</sup> Appleyard D & Field A J (1995) 39.

### 2.2.2.3 David Ricardo-Comparative Advantage

David Ricardo built on the theory of absolute advantage.<sup>90</sup> He refined absolute advantage and his theory of comparative advantage to a large extent advances our understanding of the benefits of international trade.<sup>91</sup> David Ricardo's seminal work on comparative advantage was published in *The Principles of Political Economy and Taxation* (1817).<sup>92</sup> It is worth noting that his theory was subject to assumptions and is limited in its application.<sup>93</sup>

David Ricardo noted that absolute advantage was founded on perfect mobility of factors of production in a particular country.<sup>94</sup> However, due to the immobility of factors of production between different countries, it was possible to have different factor prices in different countries and therefore gains from trade due to comparative advantage.<sup>95</sup> Accordingly, a country may have an absolute advantage over a potential trading partner in more than one commodity.<sup>96</sup> Nevertheless, such countries may still engage in international trade because it is cheaper to import a particular commodity from a trading partner due to relative cost differences.<sup>97</sup> The

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<sup>90</sup> Appleyard D & Field A J (1995) 29. See also Viner J (1960) 440.

<sup>91</sup> Appleyard D & Field A J (1995) 29. See also Viner J (1960) 442. The theory of comparative advantage and its broad use in economics is attributed to David Ricardo. However in 1815, Torrens had proposed a similar theory although he did not comprehensively discuss the theory. See Ruffin R J 'David Ricardo's discovery of comparative advantage' (2002) *History of Political Economy* (34) (4) 733 (hereafter Ruffin R J 2002). See also Jackson J H (1997) 15.

<sup>92</sup> Appleyard D & Field A J (1995) 29.

<sup>93</sup> See Appleyard D & Field A J (1995) 29-30 for a detailed discussion of the assumptions. The theory assumed that factors of production are mobile between alternative uses within a country and immobile externally (between countries). It also assumed that the relative value of a commodity is based solely on its relative labour content. Further, that the costs of production are constant. See also Costinot A & Donaldson D Ricardo's Theory of Comparative Advantage: Old Idea, New Evidence (2012) NBER Working Papers 17969 1 (hereafter Costinot A & Donaldson D 2012) for a discussion of some of the limitations of comparative advantage. See also Tian Y 'A new idea about Ricardo's comparative advantage theory on condition of multi-commodity and multi-country' (2008) *International Journal of Business and Management* Vol 3 no 12 156 (hereafter Tian Y 2008). Comparative advantage does not explain multi-commodity transactions between two countries.

<sup>94</sup> Appleyard D & Field A J (1995) 29-30 Perfect mobility of factors of production implies that the factors are completely mobile between alternative uses and the factor prices in the alternative uses are the same.

<sup>95</sup> Appleyard D & Field A J (1995) 29-30.

<sup>96</sup> Appleyard D & Field A J (1995) 30.

<sup>97</sup> Appleyard D & Field A J (1995) 30. See also Samuelson P A 'Where Ricardo and Mill rebut and confirm arguments of mainstream economists supporting globali[s]ation' (2004) *Journal of Economic Perspectives*—Volume 18, Number 3 142 (hereafter Samuelson P A 2004). Samuelson argues that international trade does not always produce benefits for trading partners and may harm the economy of one of the partners in the long term. This is premised on the fact that technological advancement in one of the trading partner countries may lead to production of cheaper goods or services which were previously the comparative advantage of

illustration below contextualises comparative advantage within the framework of international trade in oil.

Assume that country Y takes eight hours to produce a barrel of oil and nine hours to produce a ton of steel, and country X takes 12 hours to produce a barrel of oil and 10 hours to produce a ton of steel. Country Y has an absolute advantage in the production of both oil and steel. The concept of absolute advantage would discourage trade between the two countries. However, country Y is more efficient in the production of oil. Although country X has no absolute advantage, it has a smaller relative disadvantage in the production of steel, that is, a difference of one hour between the countries, compared to a difference of two hours for oil production. Therefore before trade, in country Y one barrel of oil will cost  $8/9$  tons of steel and in country X one barrel of oil will cost 1.2 tons of steel. Thus country Y should concentrate on the production of oil where it is more efficient and can earn 1.2 tons of steel from country X. Country X should concentrate on the production of steel since it can earn 1.125 barrels of oil for a ton of steel from country Y.<sup>98</sup>

It is apparent from the above example that even where a country has an absolute advantage in more than one commodity, it can trade with other countries that have relative cost differences for similar products.<sup>99</sup> Thus international trade is possible even where a country has no absolute advantage.

David Ricardo's theory of comparative advantage succinctly explains the benefits of international trade. The WTO is founded on the promotion of international trade. The theory of comparative advantage has been identified as one of the principles

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the other trading partner. On the contrary, it has been argued that international trade cannot harm the economy of the trading partners in the long term. Technological advancement of a trading partner may allow that country to produce import competing goods. However, this will over time negatively affect the price of the goods and improve the terms of trade for the other trade partner. This argument highlights the numerous benefits of comparative advantage and indicates that international trade is not a zero-sum game. See Bhagwati J et al 'The muddles over outsourcing' (2004) *The Journal of Economic Perspectives*, Vol. 18, No. 4 104 (hereafter Bhagwati J et al 2004).

<sup>98</sup> The example used above has been adapted from an illustration of absolute advantage by David Ricardo in Appleyard D & Field A J (1995) 31.

<sup>99</sup> Appleyard D & Field A J (1995) 33.

that justify international trade.<sup>100</sup> Regulation of trade restrictive practices, such as, production quotas, subsidies and corruption, is meant to encourage international trade. Due to the special needs of developing countries and less developed countries, it is necessary to provide support for international trade in Africa.<sup>101</sup> Provisions for special and differential treatment strive to harmonise trade regulation and the interests of developing countries.

Despite the provision of special and differential treatment for developing countries in the WTO trade rules,<sup>102</sup> African member states have not fully benefited from international trade.<sup>103</sup> This is largely due to the fact that market access for the commodities where Africa has a comparative advantage has not been provided.<sup>104</sup> This is especially true for agricultural products.<sup>105</sup> Thus there is a need to make the WTO trade regime more proactive and aware of the African situation. Rhetoric and aid are not sufficient.

The Doha Round has brought African member states together,<sup>106</sup> and they have been, and remain, very vocal in the negotiations.<sup>107</sup> However, the negotiations are lopsided as African member states are currently focusing on agriculture despite the fact that the continent is resource rich, and oil has been neglected or diplomatically

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<sup>100</sup> See WTO 'Comparative advantage is dead? Not at all, Lamy tells Paris Economists' available at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl152\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl152_e.htm) (accessed 22 August 2012).

<sup>101</sup> It has been argued that comparative advantage indicates that international trade between industrialised countries and developing countries is possible. However, developing countries argue that they usually trade at a disadvantage. This has been attributed to the protectionist tendencies of developing countries that hinder their specialisation and efficient allocation of resources to areas where they should concentrate production. See Appleyard D & Field A J (1995) 39.

<sup>102</sup> See GATT 1994 Arts XXXVI, XXXVII and XXXVIII. See also Trade Law Centre for Southern Africa (2009) 1.

<sup>103</sup> International trade in Africa faces a number of challenges. These include political unrest, uncertainty in customs policies, corruption and lack of transparency. See Trade Law Centre for Southern Africa (2009) 197.

<sup>104</sup> African countries require preferential market access. However, this has to be provided cautiously as it could hurt the global economy. Preferential market access hurts the global economy where it is provided for goods where a country has no comparative advantage. See Ianchovichina E et al Unrestricted Market Access for Sub-Saharan Africa: How much is it worth and who pays? (2001) C.E.P.R. Discussion Papers 2820 7-8 (hereafter Ianchovichina E et al 2001).

<sup>105</sup> Africa's dominant non-oil exports are agricultural products. See Ianchovichina E et al (2001) 8.

<sup>106</sup> Trade Law Centre for Southern Africa (2009) 26.

<sup>107</sup> Trade Law Centre for Southern Africa (2009) 26.

excluded from the WTO agenda.<sup>108</sup> This may be due to the fact that African oil is traded internationally and is not affected by market access challenges.<sup>109</sup>

OPEC policies undermine free trade. However, it is in the interest of the OPEC member states to trade oil. Thus they engage in international trade in oil where they have a comparative advantage.<sup>110</sup> To a large extent comparative advantage has encouraged international trade in oil even for OPEC member states. However, this trade is affected by the trade restrictive policies of OPEC which eventually affect the price of oil on the world market.<sup>111</sup>

#### **2.2.2.4 A Summary of the Classical Theory and International Trade in Oil in Africa**

The classical theory of international trade provides a framework for international trade in oil in Africa. The theory promotes free trade and international trade. Further, the theory discourages trade restriction. The mercantilist era which defined trade restriction and the self-interest of states was the foundation for the classical theory.

The classical theory rejected the mercantilist notion of trade. David Hume highlighted the disadvantages of a positive balance of trade and the accumulation of precious metal as the basis for international trade. Such a conception of trade rendered trade one sided. International trade under the mercantilist theory would only benefit one state at the expense of a trading partner. The WTO discourages trade restrictions and to this extent does not identify with the mercantilist conception

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<sup>108</sup> Trade Law Centre for Southern Africa (2009) 8.

<sup>109</sup> Oil exports account for a substantial portion of exports from Sub-Saharan Africa. See Ianchovichina E et al (2001) 8.

<sup>110</sup> It has been argued that the United States buys oil on the international oil markets because it is cheaper than oil extraction in the United States. See Institute for International Economics 'Has US Comparative Advantage Changed? Does this Affect Sustainability?' available at [http://www.piie.com/publications/chapters\\_preview/47/3iie2644.pdf](http://www.piie.com/publications/chapters_preview/47/3iie2644.pdf) (accessed 22 August 2012).

<sup>111</sup> Oil consumption subsidies are mainly implemented through price control regulations. This affects the market price of oil in countries that provide these subsidies. It also encourages smuggling of oil which affects prices in the neighboring countries that do not provide oil consumption subsidies. See IEA et al (2010b) 7. Likewise, production quotas affect the global price of oil. An increase or decrease of production quotas affects the quantity of oil on the world market and affects the prices. See Kohl W L 'OPEC behaviour, 1998-2001' (2002) *The Quarterly Review of Economics & Finance* 42 210 (hereafter Kohl W L 2002).



of international trade. On the other hand, OPEC advances trade restrictive policies and is similar to the mercantilist theory in this regard.

Like David Hume, Adam Smith deconstructed the mercantilist conception of international trade. Using free trade and absolute advantage, he advocated international trade under a laissez faire system. Similarly, the WTO relates to the classical theory and absolute advantage as it promotes international trade and discourages trade restrictive policies. OPEC trade restrictive practices depart from the classical theory and absolute advantage. OPEC, which has a strong hold on the international trade in oil in Africa, promotes trade restriction through the use of production quotas and oil consumption subsidies. Free trade policies in Africa have to be sensitive to the plethora of challenges that African nations face. Thus the policies have to be introduced gradually.

David Ricardo, like Adam Smith, encourages international trade, but unlike Adam Smith, he relies on comparative advantage. David Ricardo demonstrated that states can benefit from international trade even where one state has an absolute advantage in all tradeable commodities between the trading partners. The relative difference in price is an incentive for trade. Thus all countries can benefit from international trade. The WTO relates to David Ricardo's doctrine of comparative advantage. Although OPEC is trade restrictive, comparative advantage explains why OPEC members dominate the global oil trade. The next section discusses the neoclassical theory of international trade and how it relates to the international trade in oil in Africa.

### **2.2.3 The Neoclassical Theory of International Trade**

The neoclassical theory of international trade expands on the discussion of the classical theory of international trade. The neoclassical theory attempts to refine the classical theory and to relax some of its limitations by providing additional factors,

such as technology.<sup>112</sup> The neoclassical theory also expands on the demand side factors that affect international trade.<sup>113</sup>

The discussion of the neoclassical theory of international trade examines: the factor proportions analysis of Heckscher-Ohlin,<sup>114</sup> the factor price equalisation theory of Paul Samuelson,<sup>115</sup> economies of scale and demand side factors of Staffan Linder,<sup>116</sup> the technology gap arguments of Michael Posner,<sup>117</sup> and finally looks at the position of tariffs in the neoclassical trade theory.<sup>118</sup> All these contributions have modified the classical theory of international trade, and the neoclassical theory has been defined as the contemporary foundation of international trade.<sup>119</sup>

### 2.2.3.1 Factor Proportions - Heckscher-Ohlin

The factor proportions theory of trade was developed by two prominent economists, Eli Heckscher (1879-1952) and Bertil Ohlin (1899-1979).<sup>120</sup> Bertil Ohlin's *Interregional and International Trade* (1933)<sup>121</sup> was greatly motivated by the work of his teacher, Eli Heckscher.<sup>122</sup>

The factor proportions theory provides that different goods require different quantities of various factors of production.<sup>123</sup> Further, the theory provides that different countries are endowed with different amounts of these factors of production.<sup>124</sup> Accordingly, the relative cost of the factors of production in the

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<sup>112</sup> See chapter 2 section 2.2.1. See also Appleyard D & Field A J (1995) 29-30 for a detailed discussion of some of the limitations of the theory of comparative advantage.

<sup>113</sup> The classical theory of international trade mainly relied on labour as a factor of production. Thus the neoclassical theory expands on the supply side factor of labour and also looks at the demand side factors that affect consumption. See Appleyard D and Field A J (1995) 59.

<sup>114</sup> Grimwade N *International Trade New Patterns of Trade, Production and Investment* (1989) 10 (hereafter Grimwade N 1989). See also Van Marrewijk C et al *International Economics Theory, Application, and Policy* (2007) 131 (hereafter Van Marrewijk C et al 2007).

<sup>115</sup> Grimwade N (1989) 14. See also Van Marrewijk C et al (2007) 93.

<sup>116</sup> Grimwade N (1989) 16. See also Van Marrewijk C et al (2007) 372-373.

<sup>117</sup> Grimwade N (1989) 19.

<sup>118</sup> Grimwade N (1989) 24. See also Van Marrewijk C et al (2007) 372.

<sup>119</sup> Van Marrewijk C et al (2007) 72. See also Appleyard D & Field A J (1995) 57.

<sup>120</sup> Grimwade N (1989) 10.

<sup>121</sup> Van Marrewijk C et al (2007) 130.

<sup>122</sup> Van Marrewijk C et al (2007) 130.

<sup>123</sup> Grimwade N (1989) 10.

<sup>124</sup> Grimwade N (1989) 10. See also Redding S J *Empirical Approaches to International Trade* (2006) London School of Economics and CEPR 2 (hereafter Redding S J 2006).

different countries is not the same.<sup>125</sup> Following from the comparative advantage theory of David Ricardo, the theory states that countries will produce goods in which they have a comparative advantage,<sup>126</sup> that is, goods whose factors of production are relatively cheap as compared to those of a trading partner.<sup>127</sup>

It is worth noting at this stage that the factor proportions theory expands on the comparative advantage theory by considering more than one factor of production.<sup>128</sup> Unlike the comparative advantage theory which only considered labour, the factor proportion theory also relies on capital as a factor of production.<sup>129</sup> Nonetheless, the theory is based on certain assumptions and is therefore limited in application.<sup>130</sup>

The factor proportions theory improves on the comparative advantage theory. Accordingly, the theory further illustrates the advantages of international trade. The WTO relates to the theory in this regard. However, the theory assumes that there are no barriers to trade.<sup>131</sup> This assumption ignores one of the main objectives of the WTO, which is to improve international trade and eliminate barriers to trade.<sup>132</sup> Production quotas and oil consumption subsidies are barriers to trade.<sup>133</sup> Nevertheless, the theory improves on the comparative advantage theory and advocates international trade generally.

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<sup>125</sup> Grimwade N (1989) 10. See also Redding S J (2006) 2.

<sup>126</sup> Grimwade N (1989) 10.

<sup>127</sup> Grimwade N (1989) 10. See also Leamer E E *The Heckscher-Ohlin Model in Theory and Practice* (1995) Princeton Studies in International Finance 1 (hereafter Leamer E E 1995).

<sup>128</sup> See chapter 2 section 2.2.2.3. See also Grimwade N (1989) 10. See also Redding S J (2006) 2.

<sup>129</sup> Grimwade N (1989) 10. See also Redding S J (2006) 2.

<sup>130</sup> Some of the assumptions on which the theory is based are: that there are two factors of production, two goods and two countries, that there is no product differentiation, that the proportions of the factors of production required to produce a certain good are the same in both countries, that the countries have a similar level of technology, that factors of production are mobile within a particular country but immobile between countries, etc. See Grimwade N (1989) 11-14. It has been argued that these assumptions do not hold in the real world. The theory was subjected to empirical testing by Wassily Leontieff. His results revealed that the theory could not explain trade patterns in the real world. However, various explanations, such as, the year of his study, that is, 1947, was not representative of general trade patterns. Various countries were recovering from the effects of the Second World War. See Rahim S 'What use is the neoclassical theory of international trade?' (1999) *The Lahore Journal of Economics*, Vol 4 No. 1 91-92 (hereafter Rahim S 1999).

<sup>131</sup> Grimwade N (1989) 11.

<sup>132</sup> See Art 2 of the Marrakesh Agreement. See Art XI of the GATT. See also Arts 3 and 5 of the SCM.

<sup>133</sup> See Art XI of the GATT. See also Arts 3 and 5 of the SCM.

Production quotas are implemented in a trade restrictive manner and affect international trade in oil.<sup>134</sup> Production quotas affect global oil prices as well as the production of other goods.<sup>135</sup> In the same light, oil consumption subsidies are not expressly regulated by OPEC.<sup>136</sup> It appears that OPEC condones oil consumption subsidies.<sup>137</sup> These subsidies are trade restrictive and affect the international trade in oil.<sup>138</sup> Although OPEC member states exercise their comparative advantage in the production of crude oil,<sup>139</sup> they allow and maintain market distorting measures that affect trade in oil in other countries. The trade restrictive practices maintained by OPEC affect the full liberalisation of global oil trade. It can therefore be argued that these trade restrictive practices are barriers to trade.

International trade in oil in Africa is greatly influenced by OPEC oil production and trade policies. To this end, production quotas and oil consumption subsidies abound in the large African oil producing countries.<sup>140</sup> This is due to the fact that these countries are all OPEC member states.<sup>141</sup> Trade restrictions affect the benefits and gains obtained from international trade. They affect global prices of crude oil as well as the revenue that African oil countries receive from their oil resources. OPEC's trade restrictive practices do not share any common features with the factor proportions theory, save for the fact that they constitute barriers to trade. Even then, barriers to trade are not recognised by the factor proportions theory.

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<sup>134</sup> OPEC does not provide an explicit formula for production quota allocation. See Gault J et al 'How does OPEC allocate quotas?' (1999) *Journal of Energy Finance and Development* 4 137 (hereafter Gault J et al 1999). See also chapter 3 section 3.4.1 and section 3.4.2. See also chapter 4 section 4.4.1 on how OPEC production allocations affect the trade policies of other countries.

<sup>135</sup> Kohl W L (2002) 210.

<sup>136</sup> See chapter 4 sections 4.4.2 and 4.5 for a detailed discussion.

<sup>137</sup> IEA et al (2010b) 11.

<sup>138</sup> Bacon R & Kojima M *Phasing Out Subsidies Recent Experiences with Fuel in Developing Countries* (2006) Public Policy for the Private Sector World Bank Oil Gas and Mining Policy Division Note No 310 2 (hereafter Bacon R & Kojima M 2006). Oil consumption subsidies encourage smuggling and affect oil prices in other countries. See also chapter 4 section 4.4.2.

<sup>139</sup> Leamer E E (1995) 1.

<sup>140</sup> See chapter 4 sections 4.4.1, 4.4.2 and 4.5.

<sup>141</sup> Clarke D (2010) 22, 87,125,225 and 234. The biggest oil producing countries in Africa (Algeria, Nigeria, Libya and Angola) are OPEC members and are subject to OPEC production quotas. See also OPEC 'Member Countries' available at [http://www.opec.org/opec\\_web/en/about\\_us/25.htm](http://www.opec.org/opec_web/en/about_us/25.htm) (accessed 29 August 2012).

### 2.2.3.2 Factor Price Equalisation – Paul Samuelson

The factor price equalisation theory improved on the factor proportions theory of Heckscher-Ohlin.<sup>142</sup> The theory was developed by Paul Samuelson in 1948.<sup>143</sup> The theory also benefited from the work of Wolfgang Stolper.<sup>144</sup> These economists argued that factor price equalisation may lead to the disappearance of the benefits derived from trade between two trading partners.<sup>145</sup>

The factor price equalisation theory provides that if all the assumptions of the Heckscher-Ohlin theory are maintained, the incentive to trade over the long term may be eliminated.<sup>146</sup> The opening up of international trade between two trading partners with different factor prices and different comparative costs will lead to a ‘tendency towards’ the equalisation of factor prices in the different countries and will eliminate the incentive to trade.<sup>147</sup>

If there are two trading partners, one specialising in the production of capital intensive goods and the other having a comparative advantage in the production of labour intensive goods, then the demand for capital in the former will lead to a rise in the rate of profit compared to the wage rate.<sup>148</sup> Similarly, in the latter, the demand for labour will lead to a rise in the wage rate compared to the rate of profit. Subsequently, the factor prices in the two countries will tend towards equality.<sup>149</sup>

The foregoing state of affairs will slowly erode the comparative advantage and the incentive to trade between the countries.<sup>150</sup> However it has been noted that such a point would never be reached in the real world.<sup>151</sup> Paul Samuelson has also argued

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<sup>142</sup> Grimwade N (1989) 14. See also Samuelson A ‘International trade and the equalisation of factor prices’(1948) *The Economic Journal*, Vol. 58, No. 230 163 (hereafter Samuelson A 1948).

<sup>143</sup> Grimwade N (1989) 14. It has been argued the theory was developed in 1949. However, this does not affect the substance of the theory or the debate in this chapter. See also Appleyard D & Field A J (1995) 128.

<sup>144</sup> Grimwade N (1989) 15. See also Appleyard D & Field A J (1995) 132.

<sup>145</sup> Grimwade N (1989) 15. See also Redding S J (2006) 2.

<sup>146</sup> Grimwade N (1989) 14. See also Samuelson A (1948) 169.

<sup>147</sup> It has been noted that the term ‘tendency towards’ is used because the process of price equalisation usually does not come to a conclusion. See Grimwade N (1989) 14. See also Appleyard D & Field A J (1995) 129. See also Samuelson A (1948) 170.

<sup>148</sup> Grimwade N (1989) 14. See also Appleyard D & Field A J (1995) 129.

<sup>149</sup> Grimwade N (1989) 14. See also Appleyard D & Field A J (1995) 129.

<sup>150</sup> Grimwade N (1989) 14.

<sup>151</sup> Grimwade N (1989) 15.

that with more final goods and more factors of production in a more general setting, factor prices will not become equal.<sup>152</sup> Thus the differences in the factor prices will get smaller but will not completely disappear.<sup>153</sup> It is important to note that Ohlin had argued that there was a tendency for factor rewards to narrow; however, he did not completely develop the price equalisation theory.<sup>154</sup>

The Stolper-Samuelson theory is an off-shoot of the factor proportions theory.<sup>155</sup> It relies on the assumption that with two final goods and two factors of production, an increase in the price of the final good of one will increase the rewards of the factor of production that is relevant in the production of that specific good and reduce the rewards of the factor of production for the other good.<sup>156</sup> Thus the opening up of trade may have adverse effects on certain sectors of the economy.<sup>157</sup> If the price of the capital intensive goods rises, then the rewards of capital, the factor of production, will also increase.<sup>158</sup> This will have a negative impact on the other good, which might be labour intensive.<sup>159</sup> The rewards of labour (wage rate) will depreciate and this will adversely affect persons involved in the production of the labour intensive good.<sup>160</sup>

Assuming that labour is an abundant resource in a particular country, then such country will promote free trade for labour intensive goods. It follows that the owners of the abundant resource will be inclined towards free trade, while the owners of the scarce resource will be inclined towards trade restriction.<sup>161</sup> This is due to the fact that free trade will increase the wage rate of the persons involved in the production of labour while trade restriction will protect the scarce resource (capital) from losing value.<sup>162</sup>

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<sup>152</sup> Van Marrewijk C et al (2007) 93.

<sup>153</sup> Grimwade N (1989) 15.

<sup>154</sup> Van Marrewijk C et al (2007) 93. See also Samuelson A (1948) 163.

<sup>155</sup> Grimwade N (1989) 15. See also Appleyard D & Field A J (1995) 132.

<sup>156</sup> Grimwade N (1989) 15. See also Appleyard D and Field A J (1995) 132.

<sup>157</sup> Grimwade N (1989) 15.

<sup>158</sup> Van Marrewijk C et al (2007) 100.

<sup>159</sup> Van Marrewijk C et al (2007) 100.

<sup>160</sup> Van Marrewijk C et al (2007) 100.

<sup>161</sup> Appleyard D & Field A J (1995) 133.

<sup>162</sup> Appleyard D and Field A J (1995) 133.

It is thus interesting to note, that comparative advantage may benefit one trading partner more than the other, especially in situations where one of the trading partners is the owner of the abundant factor of production. The price equalisation theory and the Stolper-Samuelson theory explain trade restriction and trade liberalisation in the context of comparative advantage. The theory provides realistic limitations to comparative advantage.

The WTO advocates free trade; this is partly premised on the advantages of international trade.<sup>163</sup> These advantages are rooted in comparative advantage and the fact that trade benefits all partners involved. However, it is also true that while free trade has improved some sectors in Africa, it has negatively affected other sectors in various African economies.<sup>164</sup> Infant industries require a certain level of protection.<sup>165</sup> It is also noted that despite the enthusiastic push for free trade by the West, many of the developed countries continue to protect some of their industries and markets.<sup>166</sup> However, as previously noted, market access has not had any substantial negative effect on oil trade in Africa.<sup>167</sup> This is mainly attributed to the fact that oil is a crucial factor in the production of various goods and does not face serious market access challenges.<sup>168</sup>

OPEC has been criticised for protecting the oil sector in the member countries.<sup>169</sup> This has mainly been achieved through the use of production quotas and oil consumption subsidies.<sup>170</sup> Production quotas are closely related to the reasons for trade restriction advanced by the Stolper-Samuelson theory. Comparative advantage

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<sup>163</sup> Van den Bossche (2008) 81.

<sup>164</sup> Ianovichina E et al (2001) 7-8.

<sup>165</sup> This position has been criticised and subsidies have been suggested as an alternative. However, subsidies to such industries will only be practical if they are compliant with the SCM Agreement. See Arnon A (2011) 13. See also Jackson J H (1997) 24.

<sup>166</sup> The United States and the European Union have been criticised for subsidising their agricultural sectors to the detriment of the agricultural sectors of various African countries. See Trade Law Centre for Southern Africa (2009) 7. See also *United States- Subsidies on Upland Cotton* (Appellate Body Report) [2004] WT/DS267/AB/R 289. Benin and Chad joined the dispute as third parties. The Appellate Body held that payments to domestic users of United States upland cotton were subsidies contingent on the use of domestic over imported goods contrary to Art 3 of the SCM Agreement.

<sup>167</sup> Ianovichina E et al (2001) 8.

<sup>168</sup> Ianovichina E et al (2001) 8.

<sup>169</sup> Hochman G & Zilberman D (2011a) 2.

<sup>170</sup> Hochman G & Zilberman D (2011a) 2.

adversely affects some sectors of the economy.<sup>171</sup> However, the oil sector is generally not affected by the adverse effects of comparative advantage.<sup>172</sup> Thus the trade restriction advanced in the theory is to some extent different from the trade restriction maintained by OPEC. Trade restriction in the Stolper-Samuelson theory is meant to protect the industries that rely on scarce resources, relative to the resources that are required in the production of other goods by a trading partner.

Trade restrictions under OPEC are meant to control global oil prices. It can be argued that the convergence between both types of trade restriction is the maintaining of a healthy profit margin from trade. Despite this subtle difference, the objective of both types of protectionism is to protect a particular industry.

### **2.2.3.3 The Demand Side, Technological Gap, and Tariff Theories**

The previous sections engaged with neoclassical theories of trade that are most relevant to the international trade in oil. This section discusses additional neoclassical theories. These theories are not as prominent as the previous theories discussed in sections 2.2.3.1 and 2.2.3.2 that form the basis of the neoclassical international trade theories.

The demand side theory of international trade is mainly attributed to Staffan Linder.<sup>173</sup> Staffan Linder emphasised the importance of demand side factors of international trade in manufactured goods.<sup>174</sup> He noted that while supply side factors (resource endowments) were important in the international trade of primary products, the trade pattern of manufactured goods was also influenced by demand side factors.<sup>175</sup> This theory is pivotal in explaining incentives for trade in manufactured goods. However, crude oil is largely a primary good.<sup>176</sup>

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<sup>171</sup> Grimwade N (1989) 15.

<sup>172</sup> Ianchovichina E et al (2001) 8.

<sup>173</sup> Grimwade N (1989) 16.

<sup>174</sup> Grimwade N (1989). 16. See also Appleyard D & Field A J (1995) 168.

<sup>175</sup> Grimwade N (1989) 16.

<sup>176</sup> See the text of Ad Art XVI of GATT, which defines primary products as; ‘...any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily



The technological gap theory is closely related to the demand side factors theory of Staffan Linder, as it mainly focuses on manufactured goods.<sup>177</sup> The theory is attributed to a number of economists; however, Michael Posner was the first scholar to incorporate technological differences in explaining patterns of trade.<sup>178</sup> The theory is also referred to as the imitation lag hypothesis and relaxes the assumption in the Heckscher-Ohlin theory.<sup>179</sup> The theory states that trading partners do not always have the same level of technology.<sup>180</sup> Accordingly, there is a delay in the imitation or transfusion of technology from one country to another.<sup>181</sup> Thus the country with new technology will export the new product before the technology is adopted by other producing countries.<sup>182</sup>

It is acknowledged that technological advancements have opened up hitherto inaccessible oil fields for oil production. Deep sea oil production in Norway and oil production in Canada has been possible due to new technology.<sup>183</sup> This has helped increase oil production outside the OPEC countries.<sup>184</sup> However, OPEC still holds the world's largest oil reserves and to this end advancement in technology is yet to substantially affect the oil trade in the OPEC member states.<sup>185</sup> It is also unlikely that the new technology will be used in oil production in many of the OPEC member

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required to prepare it for marketing in substantial volume in international trade.' Crude oil can be classified as a primary product.

<sup>177</sup> Grimwade N (1989) 19.

<sup>178</sup> Grimwade N (1989) 19.

<sup>179</sup> Appleyard D & Field A J (1995) 163.

<sup>180</sup> Appleyard D & Field A J (1995) 163.

<sup>181</sup> Appleyard D & Field A J (1995) 163.

<sup>182</sup> Appleyard D & Field A J (1995) 164.

<sup>183</sup> The combined effort of government, academia and the oil companies has enabled the development of new technology and encouraged deep sea drilling in Norway. See Norwegian Academy of Technological Sciences 'Norwegian Petroleum Technology a Success Story' available at <http://www.msintef.no/upload/Petroleumsforskning/dokumenter/Forskningsboken.en.pdf> (accessed 4 September 2012). Canada has developed technology that allows it to extract oil in the oil sands. See Canadian Association of Petroleum Producers 'A Revolution in Heavy Oil Technology' available at <http://www.capp.ca/ENERGYSUPPLY/INNOVATIONSTORIES/WATER/Pages/undergroundCombustion.aspx> (accessed 4 September 2012).

<sup>184</sup> Non-OPEC countries currently produce about 60% of the world's oil. However, it has been noted that oil reserves in these countries are quickly diminishing. See Johnson T 'Non-OPEC Oil Production' available at <http://www.cfr.org/natural-resources-management/non-opec-oil-production/p14554> (accessed 4 September 2012).

<sup>185</sup> OPEC holds about 81.33 per cent of proven reserves and the non-OPEC countries hold about 18.67 per cent, as per statistical data for 2010. See OPEC 'OPEC Share of World Crude Oil Reserves 2011' available at <http://www.opec.org/opecweb/en/datagraphs/330.htm> (accessed 20 August 2012).

states, apart from those where deep sea oil drilling is necessary or those with heavy oil sands.

The tariff theory examines the restrictions that countries impose to protect their domestic markets and industries.<sup>186</sup> Usually tariffs are used to limit imports. Accordingly, the relevance of the tariff theory to international trade in oil is not as pronounced as to trade in other commodities. African countries have market access for their oil exports and generally tariffs on oil are quite low.<sup>187</sup> Thus a detailed discussion of the tariff theory is beyond the scope of this study.

#### **2.2.3.4 A Summary of the Neoclassical Theory and International Trade in Oil in Africa**

The neoclassical theory of international trade improves and refines the classical theory of international trade.<sup>188</sup> The neoclassical theory relaxes the assumptions of the comparative advantage theory and addresses some of the challenges of the comparative advantage theory.<sup>189</sup> The neoclassical theory of international trade realistically portrays the international trade in oil in Africa. It provides tangible explanations for free trade and international trade and also realistically explains the motivation for trade restrictions in international trade. This is also true for the international trade in oil in Africa.

The Heckscher-Ohlin theory refines the comparative advantage theory.<sup>190</sup> It provides for more than one factor of production and also assumes that states require different quantities of the various factors of production to produce similar goods.<sup>191</sup> The theory to a large extent supports international trade and in this regard is similar to the characteristics that define the WTO. However, the theory assumes that there are

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<sup>186</sup> Grimwade N (1989) 24. See also Van Marrewijk C et al (2007) 157.

<sup>187</sup> The United States which is one of the world's largest oil consumers maintains very low tariffs on petroleum and oil imports at about five to ten cents per barrel. Further, tariffs are waived under the African Growth and Opportunities Act and the North American Free Trade Agreement. See Nerurkar N US Oil Imports and Exports (2012) Congressional Research Service 17 (hereafter Nerurkar N 2012).

<sup>188</sup> See chapter 2 section 2.2.3.

<sup>189</sup> See chapter 2 section 2.2.3.

<sup>190</sup> See chapter 2 section 2.2.3.1.

<sup>191</sup> See chapter 2 section 2.2.3.1.

no barriers to trade.<sup>192</sup> Trade barriers, such as production quotas, affect the oil trade in Africa. This is largely due to the trade restrictive practices of OPEC.<sup>193</sup>

The Paul Samuelson theory of price equalisation builds on the Heckscher-Ohlin theory.<sup>194</sup> It explains the depreciation of the incentive to trade between trading partners.<sup>195</sup> This is attributed to the gradual reduction of factor prices in the different countries.<sup>196</sup> Notwithstanding the above argument, Paul Samuelson has noted that the strongest argument for free trade is that, it promotes higher standards of living amongst trading partners.<sup>197</sup>

The above theory was further modified by the Stolper-Samuelson theory which to a great extent highlights the fact that some sectors of the economy may be adversely affected by international trade.<sup>198</sup> The theory contextualises trade restriction and explains why countries engage in protectionism.<sup>199</sup> It should be noted that the type of trade restriction that is motivated by the comparative advantage theory is different from the type of trade restriction that is maintained by the OPEC member states through production quotas.

The other theories that inform the neoclassical genre are also relevant to the study. These include: the demand side theory of Staffan Linder, the technological gap theory of Michael Posner and the tariff theory.<sup>200</sup> However, these theories mainly relate to manufactured goods and the use of tariffs to protect domestic industries.<sup>201</sup>

The neoclassical theory of international trade is particularly relevant in explaining international trade in oil, as it illustrates the incentives of free trade and the advantages of international trade. Additionally, the theory provides some insight into why countries engage in trade restrictive practices. Although the type of trade

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<sup>192</sup> See chapter 2 section 2.2.3.1. See also Grimwade N (1989) 11.

<sup>193</sup> See chapter 2 section 2.2.3.1.

<sup>194</sup> See chapter 2 section 2.2.3.2. See also Grimwade N (1989) 14.

<sup>195</sup> See chapter 2 section 2.2.3.2. See also Grimwade N (1989) 14.

<sup>196</sup> Grimwade N (1989) 14.

<sup>197</sup> Jackson J H (1997) 12 citing Samuelson P *Economics* (1980) 651.

<sup>198</sup> See chapter 2 section 2.2.3.2.

<sup>199</sup> Grimwade N (1989) 15.

<sup>200</sup> See chapter 2 section 2.2.3.3.

<sup>201</sup> See chapter 2 section 2.2.3.3.

restriction maintained by OPEC is different from the trade restriction that arises out of comparative advantage, the two are similar as they are both intended to protect a particular resource or industry. The neoclassical theory of international trade like the classical theory does not substantively explain the cause of rampant corruption in the area of international trade in oil.

### 2.3 Theories of International Organisation

This section examines theories that explain the relevance and origin of international organisations that are significant to international trade in oil. Similar to the discussion in section 2.2, the discussion of the relevant theories is limited to mainstream theories that affect international organisations that are prominent in the trade in oil. The discussion is relevant as it provides a basis for the examination of the role of both the WTO and OPEC in regulating production quotas, oil consumption subsidies and corruption.<sup>202</sup> The WTO is indeed an international organisation; however, with regard to OPEC, it is arguable as to whether it is an international organisation.<sup>203</sup> These two organisations are involved in implementing the above economic theories in respect of the international trade in oil.<sup>204</sup> Theories of international organisation are mainly informed by political factors.<sup>205</sup>

In the previous section, the thesis highlighted the theories that inform the benefits of and challenges to trade between nations. The benefits of trade between nations have encouraged increased trade between nations and fostered globalisation.<sup>206</sup>

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<sup>202</sup> A detailed analysis of the WTO and OPEC and how they regulate production quotas, oil consumption subsidies and corruption is discussed in chapters 3 and 4.

<sup>203</sup> See chapter 4 section 4.2 for a detailed discussion of the status of OPEC as an international organisation. See also Karns M P & Mingst K A *International Organizations The Politics and Processes of Global Governance* (2004) 7 (hereafter Karns M P & Mingst K A 2004).

<sup>204</sup> See chapter 2 section 2.2 on economic theories of international trade.

<sup>205</sup> International relations theories explain international organisation and global governance. Global governance was largely motivated by political factors such as the end of the Cold War, and the contested nature of sovereignty. See Karns M P & Mingst K A (2004) 24-25 and 35. International organisation refers to interstate arrangements and also relationships between NGOs and non-state actors. See Thompson A & Snidal D *International Organisation* (1999) University of Chicago 692 (hereafter Thompson A & Snidal D 1999).

<sup>206</sup> Joseph Stiglitz, a prominent economist, has defined 'globalisation' as the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flow of goods, services, capital,

Accordingly, a critical appraisal of globalisation is necessary as it establishes a context for the examination of theories relating to the international organisations that are involved in international trade in oil.<sup>207</sup>

The apparent disharmony between globalisation and state sovereignty is also discussed as it provides insights into the theories of international organisation.<sup>208</sup> While increased trade has been attributed to globalisation, various inequalities have also been attributed to it.<sup>209</sup> This section also examines the negative attributes of globalisation and how they inform international organisation theory.

Globalisation has been supported by economic liberalisation and democracy.<sup>210</sup> With regard to globalisation and economic liberalisation, it has been argued by some scholars that globalisation has highlighted the prominence of the private sector in business.<sup>211</sup> Nonetheless, the role of the state in business and economic activity is also important and this has been the subject of various neoclassical economic theories.<sup>212</sup> The role of state governments in regulating international trade led to the creation of various intergovernmental organisations to regulate and provide norms for the conduct of international trade. The formation of the WTO in 1995 and OPEC in 1960 was a result of the recognition of the role states have to perform in regulating global commerce.<sup>213</sup>

There are various challenges to the international regulation of commerce through international organisations.<sup>214</sup> One of these is the disharmony between individual state interests and global interests.<sup>215</sup> Thus in some instances, globalisation appears

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knowledge, and people across borders. See Van den Bossche P (2008) 3 citing J Stiglitz Globalization and its Discontents (2002) 9. See also Karns M P & Mingst K A (2004) 22.

<sup>207</sup> Karns M P & Mingst K A (2004) 26.

<sup>208</sup> Karns M P & Mingst K A (2004) 25-26. See also Jönsson C & Tallberg J 'Institutional Theory in International Relations (2000)' available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=534142&fileId=625444> (accessed 5 September 2012) (hereafter Jönsson C & Tallberg J 2000). The authors discuss interdependency sovereignty which provides that states can regulate various activities across their borders. This form of sovereignty is closely related to globalisation.

<sup>209</sup> Van den Bossche P (2008) 11-12.

<sup>210</sup> Karns M P & Mingst K A (2004) 22.

<sup>211</sup> Karns M P & Mingst K A (2004) 22.

<sup>212</sup> See chapter 2 section 2.2.3.

<sup>213</sup> See chapter 1 Sections 1.2 and 1.3.

<sup>214</sup> Van den Bossche P (2008) 11-12.

<sup>215</sup> Karns M P & Mingst K A (2004) 25.

to compete with state sovereignty.<sup>216</sup> Some international organisations, like the WTO, have attempted to resolve this challenge through the use of consensus in decision making.<sup>217</sup> This encourages negotiation and the different member states receive benefits in exchange for compromises in certain sectors of trade. This is the ideal situation. However, in most cases for African states, decisions through consensus have not always produced the best results.<sup>218</sup> On the other hand, international organisations, such as OPEC, rely on voting for procedural matters and decisions of the Board of Governors and this encourages non-compliance.<sup>219</sup>

### 2.3.1 Liberalism and Neoliberalism

This section briefly discusses liberalism and neoliberalism and how these theories relate to international organisations. The liberal theory is premised on the assumption that human nature is good and that people can improve the moral and material conditions of their existence.<sup>220</sup> Liberals hold that injustice, war and aggression are a result of corrupt social institutions, and misunderstandings between leaders.<sup>221</sup> Further, that aggression and war can be eliminated through the collective

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<sup>216</sup> Hocking B & McGuire S *Trade Politics International, Domestic and Regional Perspectives* (1999) 194 (hereafter Hocking B & McGuire S 1999). See also Jönsson C and Tallberg J (2000) 6. In terms of theories of international relations, 'sovereignty' is defined as the institutionalisation of public authority within mutually exclusive jurisdictional domains. This definition succinctly links sovereignty to the international relations it provides for states' mutual recognition of jurisdictions.

<sup>217</sup> See chapter 3 sections 3.3.1 and 3.3.2 for a detailed discussion of decision making through consensus at the WTO.

<sup>218</sup> The protracted Doha Round of WTO negotiations justify the above statement. African countries have come together to demand appropriate rules for agriculture, special and differential treatment, etc. This is due to the fact that previously in the negotiation of the Marrakesh Agreement and the other WTO agreements, African countries were not actively involved despite the fact that the decisions to adopt these agreements were reached through consensus. See Southern and Eastern African Trade Information and Negotiation Institute and the Institute for Global Dialogue *Compilation of the formal African Proposals to the WTO* (2005) 1 (hereafter Southern and Eastern African Trade Information and Negotiation Institute and the Institute for Global Dialogue 2005).

<sup>219</sup> Decisions on matters other than those on procedural matters are made through unanimous agreement at the OPEC Conference. Decisions on procedural matters are made through voting; this also applies to decision making at the Board of Governors. See chapter 4 sections 4.3.1 and 4.3.2 for a detailed discussion of the decision making processes in OPEC.

<sup>220</sup> Karns M P & Mingst K A (2004) 35. 'Liberalism' has been defined as idealism by some authors. The tenets of the two theories of international organisation are similar. They emphasise reason and the good nature of humanity. See Guzzini S (1998) 16-17.

<sup>221</sup> Karns M P & Mingst K A (2004) 35. 'War' is defined as a failure of rational communication. See also Guzzini S (1998) 17.

action of states.<sup>222</sup> To this end, liberals advocate the establishing of international organisations based on democratic principles.<sup>223</sup>

On the other hand, neoliberalism or neoliberal institutionalism posits that disagreements hinder state co-operation.<sup>224</sup> However, states can work together with the assistance of international organisations.<sup>225</sup> Accordingly, unlike liberals, neoliberals are less optimistic about the advantages of co-operation.<sup>226</sup> They are aware that state co-operation or international organisation can lead to negative consequences for some parties.<sup>227</sup> This argument may be founded in the circumstances that led to the critique of liberalism after the Second World War and the rise of realism at the time.<sup>228</sup>

Liberalism and neoliberalism have contributed to the development of other theories of international organisation that are closely related to the above primary theories. These include: functionalism, international regime theory, and collective goods theory.<sup>229</sup> Functionalism provides that international organisations and governance arise out of the needs of people and the various states.<sup>230</sup> It has been noted that functionalism explains the creation of many intergovernmental organisations.<sup>231</sup> Another relevant theory is the international regime theory, which provides for the

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<sup>222</sup> Idealists argued that war was caused by a non-democratic environment. Thus it was posited that the democratisation of government from the national to the international level could protect the world from aggression. This line of argument was founded on the theory that non-democratic diplomatic relations of the 19<sup>th</sup> century formed the breeding ground for egoism, nationalism and war. See Karns M P & Mingst K A (2004) 35. See also Guzzini S (1998) 17.

<sup>223</sup> Although liberals/idealists advocate international co-operation, the theory was heavily criticised after the League of Nations, which was founded on idealism, failed to stop the Italian invasion of Ethiopia, and the German expansionist policies leading up to the Second World War. See Guzzini S (1998) 18-19.

<sup>224</sup> Karns M P & Mingst K A (2004) 35 citing Grieco J *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism* (1993) 117.

<sup>225</sup> Karns M P & Mingst K A (2004) 35 citing Grieco J *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism* (1993) 117.

<sup>226</sup> Karns M P & Mingst K A (2004) 39.

<sup>227</sup> Karns M P & Mingst K A (2004) 39.

<sup>228</sup> Karns M P & Mingst K A (2004) 39.

<sup>229</sup> Karns M P & Mingst K A (2004) 40. See also Jönsson C & Tallberg J (2000) 10 for a further discussion of the international regime theory.

<sup>230</sup> Karns M P & Mingst K A (2004) 40. See also Bennett A L *International Organisations Principles and Issues* 4 ed (1983) 13-14 (hereafter Bennett A L 1983). See also Armstrong D et al (2004) 11. For a detailed discussion of functionalism see Alvarez J E *International Organi[s]ations as Law-makers* (2005) 17-28 (hereafter Alvarez J E 2005).

<sup>231</sup> Karns M P & Mingst K A (2004) 40. See also Bennett A L (1983) 13.

informal norms and rules of behaviour that arise out of international law.<sup>232</sup> These informal rules may be codified and are classified as regimes.<sup>233</sup> International regime theory emphasises the role of intergovernmental organisations in shaping and maintaining regimes.<sup>234</sup> Finally, the collective or public good theory is relevant in explaining the creation of international organisations.<sup>235</sup> The theory posits that in the provision of a common good, it is economically rational for the producers of such good to come together instead of fighting against each other.<sup>236</sup> However, since the decisions of one state affect other states, this might affect certain states' economic planning and policy.

The liberal and neoliberal theories of international organisation are helpful in understanding the creation of the organisations that are involved in the regulation of international trade in oil, viz the WTO and OPEC.<sup>237</sup> The WTO was formed to reduce barriers to trade and encourage free trade.<sup>238</sup> Accordingly the organisation leans towards functionalism and to a limited extent the collective good theory, in the event that free markets are interpreted as a public good. On the contrary, OPEC was formed by states that had a common interest, to ensure that oil production benefitted the producing states and that the states received profitable prices for their natural resource.<sup>239</sup> To this end, the organisation leans towards the collective good theory. The analysis in this section is limited to the liberal and neoliberal understanding of international organisation.

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<sup>232</sup> Karns M P & Mingst K A (2004) 42. See also Thompson A & Snidal D (1999) 706-707.

<sup>233</sup> Karns M P & Mingst K A (2004) 42. See also Bennett A L (1983) 16-17. See also Armstrong D et al (2004) 12.

<sup>234</sup> Karns M P & Mingst K A (2004) 42.

<sup>235</sup> Karns M P & Mingst K A (2004) 44.

<sup>236</sup> Karns M P & Mingst K A (2004) 44.

<sup>237</sup> See chapter 1 sections 1.2 and 1.3.

<sup>238</sup> See detailed discussion in chapter 1 section 1.3.

<sup>239</sup> See detailed discussion in chapter 1 section 1.2.



### 2.3.2 Realism and Neorealism

Realism holds that individuals act to fulfil their personal interests.<sup>240</sup> Accordingly on the international plane, states are the main actors and act to protect their national interests.<sup>241</sup> Realists theorise that international organisations are only as strong as the individual state members.<sup>242</sup> Further, that international organisation is often subject to manipulation by some state members.<sup>243</sup> Neorealism is related to realism.<sup>244</sup> However the two theories differ on the importance of the international system in explaining international politics.<sup>245</sup> While it is acknowledged that there is no authoritative hierarchy in the international system, states have different capabilities and this distribution of capabilities or power affects international politics and relations.<sup>246</sup> Realists believe that there is very little incentive for states to co-operate.<sup>247</sup> The arguments of the realist school appear to fail in the presence of evidence which indicates that very many intergovernmental organisations have been formed over the years and very few have been dissolved.<sup>248</sup> There are very many incentives for states to co-operate.

Realism and neorealism have influenced the development of other theories. These include the hegemonic stability theory and the rational choice theory.<sup>249</sup> The hegemonic stability theory is greatly influenced by the liberal collective goods theory.<sup>250</sup> The theory holds that the global world economy is maintained by the

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<sup>240</sup> Karns M P & Mingst K A (2004) 45. See also Guzzini S (1998) 19 citing Carr E H *Twenty Years' Crisis* (1939). Realists criticised idealism on the basis that the idealists disregarded state interests, politics, and practice. For a detailed discussion of realism see Burgstaller M *Theories of Compliance with International Law* (2005) 95 (hereafter Burgstaller M 2005).

<sup>241</sup> Karns M P & Mingst K A (2004) 45. See also Guzzini S (1998) 19.

<sup>242</sup> Karns M P & Mingst K A (2004) 46.

<sup>243</sup> Karns M P & Mingst K A (2004) 46. See also Guzzini S (1998) 21.

<sup>244</sup> Karns M P & Mingst K A (2004) 46.

<sup>245</sup> Neorealism is founded on the fact that international relations are influenced by several factors on the international level. These include: trade negotiation, global management of information, and distribution of wealth among others. See Karns M P & Mingst K A (2004) 46. See also Guzzini S (1998) 139 for a detailed discussion of neorealism.

<sup>246</sup> Karns M P & Mingst K A (2004) 46-47. Neorealist authors such as Waltz K, defined national or domestic relations as hierarchical, and international relations as anarchical. See Guzzini S (1998) 18 and 139.

<sup>247</sup> Karns M P & Mingst K A (2004) 47. See also Guzzini S (1998) 10. See also Alvarez J E (2005) 29.

<sup>248</sup> Thompson A & Snidal D (1999) 698.

<sup>249</sup> Karns M P & Mingst K A (2004) 47-49. See also Guzzini S (1998) 143. See also Armstrong D et al (2004) 13.

<sup>250</sup> Karns M P & Mingst K A (2004) 48. See also Guzzini S (1998) 145 for a detailed discussion of the various schools of thought within the hegemonic stability theory.

power of a dominant state.<sup>251</sup> It has been noted that an open market economy is a public good and that it is maintained by a dominant power which exercises economic and political power over other states.<sup>252</sup> Thus where a state has an advantage over other states in the production of a valuable commodity, it can manipulate other states to commit to an open market economy.<sup>253</sup> The rational choice theory is based on the assumption that state actions are based on their subjective needs.<sup>254</sup> Additionally, states also enter into international arrangements so that they can predict the behaviour of other states.<sup>255</sup>

It can be deduced from the above discussion that both the WTO and OPEC are structured around both the hegemonic stability theory and the rational choice theory. With regard to the hegemonic stability theory, the creation of the WTO was greatly influenced by the USA and the European powers as the dominant states, while the creation of OPEC was greatly facilitated by Iraq and Saudi Arabia as the dominant producers.<sup>256</sup>

It should be noted that while OPEC does not operate a free market, it is a dominant producer of oil, and this explains the coalition of some of the world's largest oil producing countries.<sup>257</sup> Similarly, both the WTO and OPEC have some characteristics of the rational choice theory. All member states of these organisations acceded to these international arrangements to advance their subjective needs.

Although the mainstream realist theory is reluctant to acknowledge the importance of international arrangements, the variants of realism, such as the hegemonic

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<sup>251</sup> Karns M P & Mingst K A (2004) 49. See also Guzzini S (1998) 143 citing Keohane R O 'The Theory of Hegemonic Stability and Changes in International Economic Regimes, 1967-1977', in Holsti O R et al (eds) *Change in the International System* (1980) 131-62. See also Snidal D 'The limits of hegemonic stability theory' (1985) *International Organisation* 39, 4 (Autumn) 579-614 (hereafter Snidal D 1985).

<sup>252</sup> Karns M P & Mingst K A (2004) 49.

<sup>253</sup> Karns M P & Mingst K A (2004) 49.

<sup>254</sup> Karns M P & Mingst K A (2004) 48. See also Jönsson C & Tallberg J (2000) 7. See also Guzzini S (1998) 67.

<sup>255</sup> Karns M P & Mingst K A (2004) 48.

<sup>256</sup> See chapter 1 section 1.2. See also Desta G M (2003) 527.

<sup>257</sup> See chapter 1 section 1.2.

stability theory and the rational choice theory, provide strong support for international organisations, especially in international commerce.<sup>258</sup>

This section briefly provides the background to the creation of the organisations relevant to the international trade in oil in Africa. It highlights the theoretical context for the creation of organisations, such as, the WTO and OPEC. Following from the above discussion, it is also necessary to examine the implementation of international obligations flowing from these organisations. The next section discusses theories on implementation of international obligations created by the WTO and OPEC.

## 2.4 Implementation of Obligations under International Agreements

When countries enter into international arrangements and form intergovernmental organisations, they are bound by the obligations that arise out of these organisations. It is therefore important to examine how these obligations are implemented in the individual states. This section provides a background to the regulation of production quotas, oil consumption subsidies and corruption by both the WTO and OPEC, which will be examined in the later chapters.<sup>259</sup> The hierarchy of competing international obligations is also discussed as a prelude to the examination of the implementation of international obligations created by both the WTO and OPEC.<sup>260</sup>

It is now generally accepted that international organisations in many cases are sources of international law.<sup>261</sup> This is mainly through treaties and state practice that is established by these international organisations. International law is unequivocal in stating that special rules prevail over general rules,<sup>262</sup> *lex specialis derogat legi generali*.<sup>263</sup> However, even with the aid of this rule, it is not clear whether WTO obligations supersede OPEC obligations.<sup>264</sup> It can be argued that WTO rules are *lex*

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<sup>258</sup> Karns M P & Mingst K A (2004) 50.

<sup>259</sup> See chapter 3 section 3.4 and chapter 4 sections 4.4 and 4.5.

<sup>260</sup> Dugard J (2013) 437 highlights the complex nature of international trade obligations.

<sup>261</sup> Alvarez J E (2005) xv and 120.

<sup>262</sup> Shaw M N *International Law* 5 ed (2003) 116 (hereafter Shaw M N 2003).

<sup>263</sup> Shaw M N (2003) 116.

<sup>264</sup> The Marrakesh Agreement came into force in 1995, while the OPEC Statute came into force in 1960. See chapter 1 sections 1.3 and 1.2.

specialis in the regulation of international trade. Similarly, there is strength in the argument that OPEC rules are *lex specialis* in the regulation of the international trade in oil in the member states.

The Vienna Convention on the Law of Treaties is to some extent instructive in resolving the above issue.<sup>265</sup> It is trite, that where treaties regulate the same subject matter,<sup>266</sup> the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.<sup>267</sup> In this case, it would appear that provisions contained in the Marrakesh Agreement and the Annexures thereto, are the higher norm and that provisions in the OPEC Statute have to comply with the Marrakesh Agreement. However, the differences in the two agreements do not permit a conclusive answer as to which of the two is the higher norm.<sup>268</sup>

In light of the above debate, countries that have concurrent membership of both the WTO and OPEC are faced with two conflicting sets of obligations.<sup>269</sup> Although there is no conclusive answer to the question of the hierarchy of WTO and OPEC obligations, the debate seems to lean towards the WTO establishing the higher norm. Another question is how the member states implement these international obligations in their domestic legal regimes. Monism and dualism are the basic doctrines in resolving this question.<sup>270</sup>

### 2.4.1 Monism and Dualism

Monism holds that international law and municipal law are part of the same juridical reality.<sup>271</sup> Further, that international law is supreme in relation to municipal

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<sup>265</sup> Article 30 of the Vienna Convention on the Law of Treaties (1969).

<sup>266</sup> It is argued that both Agreements regulate international trade in oil, and although the WTO deals with international trade generally, its rules are more specific. See chapter 3 section 3.4 and chapter 4 section 4.4 for a detailed discussion.

<sup>267</sup> Article 30 (3) and (4) of the Vienna Convention on the Law of Treaties (1969).

<sup>268</sup> See chapter 5 generally.

<sup>269</sup> See chapter 3 section 3.4, chapter 4 section 4.4 and chapter 5 generally.

<sup>270</sup> Shaw M N (2003) 121-124. See also Dugard J (2013) 42-43. See also Ginsburg T et al 'Commitment and diffusion: how and why national constitutions incorporate international law' (2008) *University of Illinois Law Review* 204 (hereafter Ginsburg T et al 2008).

<sup>271</sup> Starke JG (1936) 67.

law.<sup>272</sup> Accordingly, municipal courts are under an obligation to apply rules of international law without necessarily adopting these rules in their domestic legal regimes.<sup>273</sup> It is now generally accepted that the whole body of international law cannot be applied in the domestic context without addressing the peculiarities of the domestic legal regime.<sup>274</sup> This has introduced the harmonisation theory which is closely related to the monist theory.<sup>275</sup>

Related to the above, dualism posits that international law and domestic law are different.<sup>276</sup> The dualist theory relies on distinctions, such as the subjects of the two legal regimes,<sup>277</sup> the sources of the two legal regimes,<sup>278</sup> and the fact that legislation is to be obeyed while international law relies on the principle of *pacta sunt servanda*.<sup>279</sup> Thus dualists argue that international law can only bind states if the states adopt international law in their domestic legal regimes.<sup>280</sup> It follows that domestic law is superior to international law.<sup>281</sup>

It is important to note that the two theories recognise international law as a valid legal regime.<sup>282</sup> However, the difference rests in the hierarchy between the two sets of norms. The Vienna Convention on the Law of Treaties is not clear on which of the two theories is superior to the other.<sup>283</sup> The author believes that an attempt to create a hierarchy between the two theories would be too subjective and would undermine

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<sup>272</sup> Shaw M N (2003) 50. See also Maniruzzaman A F M 'State contracts in contemporary international law: monist versus dualist controversies' (2001) *EJIL* Vol. 12 No. 2 312 (hereafter Maniruzzaman A F M 2001).

<sup>273</sup> Dugard J (2013) 42.

<sup>274</sup> Dugard J (2013) 42.

<sup>275</sup> Dugard J (2013) 42.

<sup>276</sup> Shaw M N (2003) 121. See also Dugard J (2013) 42.

<sup>277</sup> The subjects of domestic law are individuals while the subjects of international law are to a large extent states. See Bhuiyan S *National Law in WTO Law Effectiveness and Good Governance in the World Trading System* (2007) 29 (hereafter Bhuiyan S 2007).

<sup>278</sup> International law arises out of the collective will of states, while domestic law arises out of the will of a particular state. See Bhuiyan S (2007) 29.

<sup>279</sup> Agreements must be carried out in good faith. This is the basis for the enforcement of international obligations arising from treaties. See Bhuiyan S (2007) 29. See also Shaw M N (2003) 49.

<sup>280</sup> Dugard J (2013) 42. See also Bhuiyan S (2007) 29.

<sup>281</sup> Shaw M N (2003) 121.

<sup>282</sup> Starke JG (1936) 69. See generally Turley J 'Dualistic values in the age of international jurisprudence' (1992-1993) 44 *Hastings L.J.* (hereafter Turley J 1992-1993).

<sup>283</sup> Article 26 of the Vienna Convention on the Law of Treaties provides for the principle of *pacta sunt servanda*. It does not create a hierarchy between international law and domestic law. International treaties are to be respected by the states out of good faith. Accordingly, the provision recognises the sovereignty of states. On the other hand, Art 27 of the Vienna Convention on the Law of Treaties provides that states cannot invoke national laws to justify non-compliance with international obligations. This seems to provide that international law is superior to domestic law. See Bhuiyan S (2007) 58-59.

the sovereignty of states as well as the element of good faith in the enforcement of treaty obligations.<sup>284</sup> Nonetheless, it can be argued that based on the authority of Art 27 of the Vienna Convention on the Law of Treaties, which provides that states cannot invoke municipal law as justification for non-compliance with international law obligations, the convention seems to indicate that international law obligations are superior to municipal law obligations.<sup>285</sup>

### 2.4.2 The WTO, OPEC and the Monist-Dualist Controversy

The monist-dualist controversy is state centred and relates to the different methods that states adopt to implement international law obligations. Both the WTO agreements and OPEC Statute provide for the implementation of their respective obligations in domestic legal regimes. The Marrakesh Agreement provides that states shall ensure the conformity of their laws, regulations and administrative procedures with obligations provided in the Agreement and the Annexures.<sup>286</sup> Similarly, the OPEC Statute provides that states shall fulfil in good faith the obligations arising under the Statute.<sup>287</sup> It is apparent from the foregoing discussion that the Marrakesh Agreement provides a higher standard than the OPEC Statute in the implementation of the obligations under the respective treaties. The Marrakesh Agreement does not provide for good faith, it seems to focus on conformity.

The language of the Marrakesh Agreement suggests that WTO obligations are superior to domestic legal regimes.<sup>288</sup> Additionally, some authors have argued that the Marrakesh Agreement seems to impose the direct application of its obligations on the member states.<sup>289</sup> Accordingly, from a state perspective, this would favour a

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<sup>284</sup> This view is founded on the argument of Harris D *Cases and Materials on International Law* 7 ed (2010) 62 (hereafter Harris D 2010).

<sup>285</sup> See Art 27 of the Vienna Convention on the Law of Treaties. It should be noted that this provision is subject to Art 46 of the Vienna Convention on the Law of Treaties. Nevertheless, Art 46 has been interpreted narrowly. See *Land and Maritime Boundary between Cameroon and Nigeria Case* I.C.J Reports [2002] 430.

<sup>286</sup> See Art XVI (4) Marrakesh Agreement.

<sup>287</sup> See Art 3 of the OPEC Statute.

<sup>288</sup> Bhuiyan S (2007) 58.

<sup>289</sup> Cottier T & Schefer K N 'The relationship between World Trade Organi[s]ation law, national and regional law' (1998) 1 *J. Int'l Econ. L.* 120 (hereafter Cottier T & Schefer K N 1998). See also Cottier T 'A Two-Tier Approach to WTO Decision-Making' Steger D P (ed) *Redesigning the World Trade Organization for the Twenty-first Century* (2009) 48 (hereafter Cottier T 2009).

monist approach to implementation of international obligations.<sup>290</sup> However, the author respectfully disagrees with this position. In terms of implementation, the decision primarily rests on the states. Thus states, depending on their domestic systems will apply a monist or dualist approach to implement international treaty obligations.

The OPEC Statute is consistent with the language of the Vienna Convention on the Law of Treaties.<sup>291</sup> States are enjoined to implement international obligations in good faith. The provision emphasises the sovereignty of states and permits states to implement obligations arising from the Statute with due regard to their sovereignty. However, it is also clear that the language of the Statute is weak and this may affect the implementation of obligations arising from the treaty. Some authors have noted that OPEC resolutions<sup>292</sup> are only binding on the member states after they have ratified the resolutions.<sup>293</sup> This argument is not alive to the fact that some OPEC member states are monist and therefore treaty obligations become part of their domestic laws without ratification.<sup>294</sup>

The discussion on implementation of international obligations reveals that there are competing obligations with regard to international trade in oil. It is not clear which of these norms is superior to the other.<sup>295</sup> However, on the basis of the fact that the Marrakesh Agreement is a more recent treaty, it can be said to be the higher norm. Additionally, the implementation of competing international obligations in domestic

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<sup>290</sup> Cottier T & Schefer K N (1998) 120.

<sup>291</sup> See Art 26 of Vienna Convention on the Law of Treaties.

<sup>292</sup> Stoehr L (1979) 94-95. OPEC Resolutions have the same effect as treaties.

<sup>293</sup> Themaat V V *The Challenging Structure of International Economic Law* (1981) 177 (hereafter Themaat V V 1981).

<sup>294</sup> Angola is an OPEC member state and it is monist. It has however been argued that even in monists countries, implementation of international obligations is not easy. See Meerkotter A SALC Litigation Manual Series Equal rights for all: Litigating cases of HIV-related discrimination (2011) Southern Africa Litigation Centre 14 (hereafter Meerkotter A 2011).

<sup>295</sup> Article 30 (4) of the Vienna Convention on the Law of Treaties appears to provide guidance on competing obligations in international treaties regulating the same subject matter. The provision provides that as between state parties to all treaties, the later treaty is applicable. The former treaty will only apply to the extent that it is not incompatible with the later treaty. As between state parties to both treaties and state parties to one treaty, the treaty that applies to both states shall apply. However, this provision cannot be applied to the WTO and OPEC scenario. It can be argued that the WTO has wider application than the OPEC Statute and therefore the two do not regulate the same subject matter. Further, it can be argued that the WTO GATT 1947 preceded the OPEC Statute of 1962. However, the GATT 1994 incorporated provisions of the GATT 1947. This makes the relationship complex and creates a grey area.

jurisdictions is provided for in both the Marrakesh Agreement and the OPEC statute. It has been argued by some authors<sup>296</sup> that the language of the two treaties leans towards particular theories on the application of international law in domestic legal regimes. However, such arguments appear to ignore the state centred nature of the implementation of international treaty obligations.

Implementation of international obligations is state centred and the implementation provisions in either the OPEC Statute or the Marrakesh Agreement do not substantially affect the monist-dualist controversy. The next section summarises the conceptual framework that defines international trade in oil in Africa. These include: economic theories of international trade, theories of international organisation and theories that explain implementation of international obligations in domestic legal regimes.

## 2.5 A Normative Marriage

The nature of the study cannot be limited to a strict legal analysis.<sup>297</sup> International trade in oil is informed by an interdisciplinary background, which is mainly economics and law.<sup>298</sup> Politics and international organisation also play a fundamental role in the discourse.<sup>299</sup> The interdisciplinary nature of natural resources trade and governance has been noted by other authors who have preferred to describe the phenomenon as the 'political economy.'<sup>300</sup> This section highlights the most relevant theories from the different disciplines and provides a theoretical avenue for the discussion in the subsequent chapters.

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<sup>296</sup> Bhuiyan S (2007) 58. See also Themaat V V (1981) 177.

<sup>297</sup> Some commentators have argued for a normative analysis in studying the WTO. See Birkbeck C D 'Reinvigorating Debate on WTO Reform: The Contours of a Functional and Normative Approach to Analyzing the WTO System' Steger D P *Redesigning the World Trade Organization for the Twenty-first Century* (2009) 28 (hereafter Birkbeck C D 2009).

<sup>298</sup> Themaat V V (1981) 5-6. See also Hocking B & McGuire S (1999) 3. See also Van den Bossche P (2008) 3.

<sup>299</sup> Themaat V V (1981) 6. See also Hocking B & McGuire S (1999) 3.

<sup>300</sup> See Isham J et al 'The varieties of resource experience: Natural resource export structures and the political economy of economic growth' (2005) *The World Bank Economic Review*, Vol. 19, No. 2 145 (hereafter Isham J et al 2005). See also Auty R M & Gelb A H *Political Economy of Resource Abundant States* (2000) Annual Bank Conference on Development Economics 2 (hereafter Auty R M & Gelb A H 2000).



The economic theories provide the basis for the international trade in oil.<sup>301</sup> Accordingly, the most relevant economic theories in this regard deserve to be discussed first. The comparative advantage theory of David Ricardo to a great extent provides the basis for trade generally.<sup>302</sup> This also applies to international trade. This makes the theory quite relevant in explaining the role of the WTO generally.<sup>303</sup> However, the comparative advantage theory of international trade has greatly been improved upon by other neoclassical theories. These theories currently explain international trade in oil in Africa. The Stopler-Samuelson theory explains and fills in the gaps in the comparative advantage theory.<sup>304</sup> For example, the theory explains why trading partners engage in trade restriction.

Closely related to the neoclassical theories and their conceptualisation of international trade in oil, are the theories of international organisation.<sup>305</sup> International organisation is related to the concept of globalisation and politics.<sup>306</sup> The liberal and neoliberal theories of international organisation which to a great extent encourage international organisation and globalisation are the most relevant in explaining international trade in oil.<sup>307</sup> Functionalism is key to explaining the formation of both the WTO and OPEC.<sup>308</sup> On the other hand, the collective goods theory underpins the formation of OPEC.<sup>309</sup> Realism and neorealism also explain international organisation around international trade in oil.<sup>310</sup> However, realism and neorealism are not as strong as the liberal and neoliberal theory in their support for international organisation.

Finally, the implementation of international obligations arising from international treaties sums up the discussion on the conceptualisation of international trade in

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<sup>301</sup> Economic theory, though not conclusive, helps to provide direction to the policies that inform international trade. See Jackson J H (1997) 9.

<sup>302</sup> See chapter 2 sections 2.2.2.3.

<sup>303</sup> See chapter 2 sections 2.2.2.3.

<sup>304</sup> See chapter 2 sections 2.2.3.2.

<sup>305</sup> See chapter 2 section 2.3.

<sup>306</sup> See chapter 2 section 2.3.

<sup>307</sup> See chapter 2 section 2.3.1.

<sup>308</sup> See chapter 2 section 2.3.1.

<sup>309</sup> See chapter 2 section 2.3.1.

<sup>310</sup> See chapter 2 section 2.3.2.

oil.<sup>311</sup> International organisations have a strong role in the regulation of international trade in oil. However, the implementation of obligations from both the WTO and OPEC is a state decision.<sup>312</sup> The main theories that explain the implementation of international law obligations are the monist and dualist theories.<sup>313</sup> Both these theories are equally relevant and countries can rely on either to implement international law obligations on the regulation of international trade in oil.<sup>314</sup> However, it also appears that although these theories are relevant, the economic theories and the theories of international organisation present more practical reasons as to why states opt for international organisations and the implementation of international law obligations. Theories on implementation of international law obligations are mainly procedural and are not a determinant of what international norms states choose to implement.

## 2.6 Conclusion

The chapter has briefly highlighted the relevant theories and ideas that define international trade in oil. Where possible, reference has been made to Africa, to place the discussion within an African context. International trade and the reasons for trade are best explained by the neoclassical international trade theories. These are closely related to the theories of international organisation. The liberal and neoliberal theories of international organisation support the creation of international organisations. To this end, international organisations that are involved in the regulation of international trade in oil, viz the WTO and OPEC, are justified by the liberal and neoliberal theories of international organisation.

International obligations arising from these international organisations and their treaties and resolutions have to be implemented by the member states. The theories of monism and dualism explain the process by which member states implement international obligations. It is clear that these theories are all interrelated. This

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<sup>311</sup> See chapter 2 section 2.4.

<sup>312</sup> See chapter 2 section 2.4.2.

<sup>313</sup> See chapter 2 section 2.4.1.

<sup>314</sup> See chapter 2 section 2.4.2.

## Chapter 2: Conceptual Framework

multidisciplinary combination provides a basic framework that defines international trade in oil in Africa. The next chapter examines the role of the WTO in regulating international trade in oil.



## CHAPTER 3

### THE WORLD TRADE ORGANISATION (WTO) AND INTERNATIONAL TRADE IN OIL

*'The WTO Agreement, including all its elaborate Annexes, is probably fully understood by no nation that has accepted it, including some of the richest and most powerful trading nations that are members.'*<sup>1</sup>

#### 3.1 Introduction

The previous chapter examined the theoretical foundation for the regulation of international trade in oil. This chapter builds on that discussion. It starts off with a discussion of the history of the regulation of oil trade in the General Agreement on Tariffs and Trade (GATT)/WTO legal framework. The discussion provides guidance on why oil regulation seems silent in the WTO legal framework. Further, the chapter provides a discussion of the institutional framework of the WTO. The chapter places special emphasis on the organs of the WTO, decision making and the dispute settlement mechanisms in the Organisation. The institutional framework is relevant in establishing whether the structures of the WTO are appropriate for the regulation of international trade in oil.<sup>2</sup> The discussion is guided by applicable GATT/WTO case law and examples on how African countries and other WTO member states utilise the WTO organs.

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<sup>1</sup> The above statement describes the complex nature of the Organisation and the agreements of the WTO. This chapter is alive to this challenge. The analysis of the WTO system in this chapter does not cover all areas of the WTO but is limited to the international trade in oil and the relevant agreements. See Jackson J H *The World Trade Organisation: Constitution and Jurisprudence* (1998) 1 (hereafter Jackson J H 1998). See also Jackson J H (1997) 25.

<sup>2</sup> Some authors have identified the WTO as an institution. However, for purposes of this study, the WTO is identified as an organisation and the various administrative organs of the WTO are referred to as institutions. See Jackson J H (1997) 31. Thus an examination of the administrative structure is referred to as the institutional structure. Authors such as Jackson J H *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006) 106 (hereafter Jackson J H 2006), have adopted the later approach. Nevertheless, the terms 'institutions', 'bodies' and 'organs' are also used interchangeably to refer to the institutions of the WTO in this chapter.

Additionally, production quotas, subsidies and corruption are also discussed. Further, motivation for the discussion of these particular areas is also provided in the chapter. A discussion of these key areas in the legal framework is very important in evaluating the ability of the WTO to regulate international trade in oil. The discourse on the regulation of these particular areas is guided by jurisprudence established from GATT/WTO case law. Due to the dearth of jurisprudence on the regulation of the international trade in oil, the chapter relies on general GATT/WTO disputes to explain the various WTO agreements that are relevant to the regulation of international trade in oil. The discussion also relies on African examples.

### **3.2 Development of International Trade in Oil under the GATT/WTO Framework**

There is uncertainty as to the classification of crude oil as a good under the GATT/WTO framework. This uncertainty is reflected in the approaches GATT contracting parties and WTO members have adopted to potential disputes over oil-related matters. This section provides insights to explain why GATT contracting parties and WTO member countries have been hesitant to curb some of the trade restrictive practices. The section is broad in nature and looks at diverse areas of oil trade. It is not limited to the three key areas, that is: production quotas, oil consumption subsidies and corruption. Further, it also in some cases relies on the discussion of natural resources and international trade.

Prior to the GATT 1947, and during the trade negotiations leading to the GATT, Europe did not have a flourishing domestic oil sector, thus the levies on the importation of crude oil in Europe were relatively low.<sup>3</sup> Accordingly, the regulation of oil trade was not one of the issues considered to be important at the time.<sup>4</sup> This partly explains the lack of direct provisions in the GATT regulating the international trade in oil.<sup>5</sup> However, some authors have argued that the negotiations leading up to

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<sup>3</sup> Guerra A J (2001) 13.

<sup>4</sup> Guerra A J (2001) 13.

<sup>5</sup> Some authors have attributed the lack of direct rules on energy to the fact that at the time the GATT was negotiated, trade in energy was the preserve of a few multinational companies. This is true for oil trade

the GATT 1947 involved negotiations on natural resources and the regulation of the same.<sup>6</sup> This is evident in Art XX (g) of GATT. This provision though dealing with natural resources generally affects the international trade in oil.

Elsewhere, the increasing tariffs on the importation of oil were affecting the economies of large oil producers and exporters such as Venezuela and Mexico.<sup>7</sup> After the Second World War, the USA which had been a leading oil exporter became an oil importer.<sup>8</sup> The Revenue Act passed by the United States changed the country's policy on oil levies.<sup>9</sup> At the time, the USA which imported most of its oil from Venezuela, imposed levies on oil at the rate of US \$ 0.21 cents per barrel.<sup>10</sup> The USA reversed its earlier position where oil had been a duty free commodity.<sup>11</sup> The two countries later signed a treaty of trade reciprocity and modified the above tariffs as indicated below.<sup>12</sup>

'For quantities below 5 per cent of domestically refined supply in the preceding year, a 50 per cent tariff reduction (from [US] \$ 0.21 per [barrel] to [US] \$ 0.105 per barrel) was allowed; for imports above this amount, the full [US] \$ 0.21 per barrel remained. Tariffs for gasoline and lube oil remained unchanged.'

This position was further modified by a trade treaty signed between Mexico and the USA.<sup>13</sup> This treaty reduced oil tariffs by 50 percent and abolished quotas. The treaty included a most favored nation (MFN) clause which extended the tariff treatment to other countries such as Venezuela.<sup>14</sup> It should be noted at this stage that negotiations

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which was dominated by the seven sisters before the creation of OPEC. See Cottier T et al Energy in WTO Law and Policy (2009) Individual Project No. 6 1 (hereafter Cottier T et al 2009). See also chapter 1 section 1.2.1.

<sup>6</sup> The language of Art XX (g) suggests that the contracting parties intended to protect their sovereignty over natural resources. It is respectfully submitted that this position is correct. Indeed the provision provides for the conservation of natural resources. Thus the GATT contracting parties would have discussed the regulation of trade in natural resources. See Broome S A (2006) 423-425.

<sup>7</sup> Guerra A J (2001) 13.

<sup>8</sup> Guerra A J (2001) 13. The United States embarked on a policy drive to regulate oil imports. See generally Kellam R O 'Regulation of oil imports' (1961) *Duke Law Journal* Vol 2 (hereafter Kellam R O 1961).

<sup>9</sup> Guerra A J (2001) 13.

<sup>10</sup> Guerra A J (2001) 13.

<sup>11</sup> Guerra A J (2001) 13.

<sup>12</sup> Guerra A J (2001) 13.

<sup>13</sup> Guerra A J (2001) 13.

<sup>14</sup> Guerra A J (2001) 13.

on the GATT 1947 had not commenced.<sup>15</sup> Due to the absence of a multilateral trade framework at this stage, trade treaties to solve international trade issues could only be concluded with selected countries.

After 1947, oil prices continued rising and due to the GATT 1947 and also the need to reduce oil prices in major oil consuming states, the tariffs on oil were further reduced.<sup>16</sup> This curtailed further debate on the regulation of natural resources and oil under the GATT. However, the 1950s witnessed a positive change and restrictions on the export of raw materials were considered GATT inconsistent by the working party on the GATT.

'Back in 1950, a GATT Working Party examined the use of export restrictions on raw materials "necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilisation plan" (Article XX (I)). The group concluded that the Agreement does not permit the imposition of restrictions upon the export of a raw material in order to protect *or* promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its material, or by reducing the supply of such materials available to foreign competitors.'<sup>17</sup>

The above position of the working group, though generally dealing with raw materials shows that the GATT/ WTO has remained interested in advancing the liberalisation of trade for all goods including natural resources. The above position is particularly important in the discussion of natural resources and more specifically oil. The GATT /WTO jurisprudence does not provide guidance on whether materials under Art XX (I) of GATT include natural resources. However, the author submits that the language of Art XX (I) refers to materials used in domestic production. To this end, natural resources and oil are used in domestic production and may therefore be treated as raw materials.

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<sup>15</sup> The negotiations on the regulation of international trade only began in 1945. See Van den Bossche P (2008) 78. See also Lowenfeld A F (2008) 25.

<sup>16</sup> Guerra A J (2001) 14.

<sup>17</sup> Guerra A J (2001) 14 and 15.

It is worth noting that as far back as 1955, the GATT had been involved in regulating international trade in oil.<sup>18</sup> Ceylon, present day Sri Lanka requested a release from its obligations under Art XI of the GATT for petroleum products.<sup>19</sup> The request was made under Art XVIII of GATT on government assistance to economic development.<sup>20</sup> This request was made despite the fact that the country had not included petroleum products in its schedule of concessions.<sup>21</sup> A Working Party examined the matter and reported to the contracting parties who adopted the report of the Working Party and granted a temporary release.<sup>22</sup>

In 1965, the GATT introduced part IV to the GATT. This part deals with trade and development.<sup>23</sup> Part IV of the GATT allows less developed countries more favourable and acceptable conditions of access to world markets for primary products.<sup>24</sup> Further, the developed countries should not expect reciprocity for commitments made to allow less developed countries greater market access for primary products.<sup>25</sup> Part IV of the GATT recognises the fact that less developed countries have a limited export base.<sup>26</sup> It was premised on the sentiments reflected in the statement below:

‘contracting parties were also tasked with devising measures to stabili[s]e and improve conditions in world markets for the primary exports of developing

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<sup>18</sup> Desta G M (2003) 388.

<sup>19</sup> Desta G M (2003) 388 citing GATT Release Granted to Ceylon under Article XVIII regarding Petroleum Products Decision of 30 November 1955 BISD 4S/30 37. See also World Trade Organisation Application of Article XVIII Section C, of GATT 1947 (2002) WT/COMTD/39/Add.1 7. The measures for which the release was granted involved quantitative restrictions on the importation of specified petroleum products.

<sup>20</sup> Desta G M (2003) 388.

<sup>21</sup> Desta G M (2003) 388.

<sup>22</sup> World Trade Organisation Application of Article XVIII Section C, of GATT 1947 (2002) WT/COMTD/39/Add.1 7.

<sup>23</sup> WTO ‘World Trade Organisation Report on Natural Resources (2010) 162’ available at [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_e.htm) (accessed 21 March 2012) See also World Trade Organisation Preparations for the Fourth Session of the Ministerial Conference (2001) WT/GC/W/442.

<sup>24</sup> See Art XXXVI (4) of GATT. See also the text of Ad Art XVI Section B (2) of GATT which defines primary products as; ‘...any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.’ This indicates that even in 1965, the GATT dealt with the regulation of trade in natural resources.

<sup>25</sup> See Art XXXVI (8) of GATT.

<sup>26</sup> See Art XXXVI (4) of GATT.



countries in order to enable them to attain “stable, equitable and remunerative prices”, and to provide them with expanding resources for economic development.’<sup>27</sup>

Primary products have been defined to refer to processed goods ready for trading.<sup>28</sup> Crude oil can be traded in various forms, before extraction, once extracted from the ground and after it has been refined.<sup>29</sup> Thus it may be argued that crude oil after extraction can be treated as a primary good. It is interesting to note that the GATT may have envisaged the regulation of trade in natural resources and oil.

The mandatory oil imports programme of the USA, between 1959 and 1973, had the effect of limiting the amount of oil that was imported into the USA.<sup>30</sup> Despite the fact the USA was a member of the GATT at the time, no complaint was made against it for this import restriction. The USA justified the restriction arguing that importation of oil from politically unpredictable suppliers would compromise its national security.<sup>31</sup> It is submitted that due to the political and economic power of the USA other GATT contracting parties might have shied away from challenging this measure. It has also been argued that the measure by the USA was meant to protect its domestic oil industry.<sup>32</sup> The imposition of import restrictions to protect domestic industries is GATT inconsistent yet this measure was never challenged.<sup>33</sup>

In 1986, several countries led by Canada challenged taxes imposed on imported crude oil and petroleum products by the USA under the Superfund Amendments and Reauthorisation Act of 1986.<sup>34</sup> The said taxes were higher than the taxes levied on similar goods that were produced in the USA.<sup>35</sup> The dispute indicates that the GATT was centrally involved in the regulation of oil trade. Despite the fact that the

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<sup>27</sup> WTO ‘World Trade Organisation Report on Natural Resources (2010) 163’ available at [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_e.htm) (accessed 21 March 2012).

<sup>28</sup> See text of Ad Art XVI Section B (2) of GATT.

<sup>29</sup> See chapter 1 section 1.4.1.

<sup>30</sup> Zillman D. N ‘Energy trade and national security exception to the GATT’ (1994) 12 *J. Energy & Nat. Resources L.* 122 (hereafter Zillman D N 1994) citing Presidential Proclamation No 3279, 12 March 1959. The United States also banned the export of Alaskan oil.

<sup>31</sup> Zillman D N (1994) 122.

<sup>32</sup> Zillman D N (1994) 122.

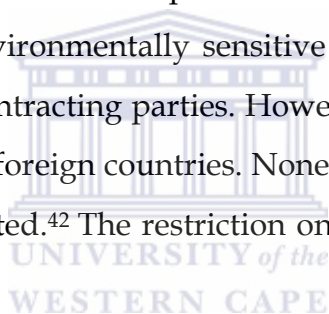
<sup>33</sup> See Article XI of GATT.

<sup>34</sup> *United States-Taxes on Petroleum and Certain Imported Substances*, (Panel Report) [1987] L/6175, BISD 34S/136 (also referred to as the Superfund case). 1

<sup>35</sup> *United States-Taxes on Petroleum and Certain Imported Substances* (Panel Report) [1987] L/6175, BISD 34S/136 1.

dispute mainly focused on taxes, the taxes were levied on crude oil and petroleum products. The GATT panel found that the contested taxes impaired the benefits accruing to the different petroleum producing countries that were exporting crude oil and petroleum products to the USA.<sup>36</sup> This was a bold step forward in the regulation of oil trade. It is interesting to note that some OPEC member states made submissions to the panel and strongly objected to the taxes that had been imposed by the USA.<sup>37</sup>

However, in the 1990s the USA continued to maintain a ban on the export of oil transported through the trans-Alaska pipeline.<sup>38</sup> Export of this oil could only be made subject to presidential exceptions.<sup>39</sup> The USA maintained the ban on the basis of political and environmental concerns.<sup>40</sup> It has also been noted by Zillman, that the ban was initiated because the USA had experienced strong resistance in building an 800-mile pipeline through environmentally sensitive terrain.<sup>41</sup> This export ban was not contested by the GATT contracting parties. However, in 1996, the ban was lifted and some oil was exported to foreign countries. Nonetheless between 2004 and 2011, no oil from Alaska was exported.<sup>42</sup> The restriction on the export of Alaska oil is, on



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<sup>36</sup> *United States-Taxes on Petroleum and Certain Imported Substances* (Panel Report) [1987] L/6175, BISD 34S/136 16.

<sup>37</sup> Nigeria and Kuwait made submissions to the panel. See *United States-Taxes on Petroleum and Certain Imported Substances* (Panel Report) [1987] L/6175, BISD 34S/136 2.

<sup>38</sup> The trans-Alaska Pipeline Authori[s]ation Act of 1973 opened up the Alaska oil fields but banned the export of oil produced in these oil fields. This oil has potential market in Japan, Korea and North East Asia due to proximity. The ban created an artificial supply of cheap oil on the United States west coast and affected the import of oil from other producing countries as they could not compete. It has been stated that export of this oil to these countries would only cost about 50 cents per barrel. See Zillman D N (1994) 122. See also Van Vactor S A 'Time to End the Alaskan Oil Export Ban' available at <http://www.cato.org/pubs/pas/pa-227.html> (accessed 28 March 2012).

<sup>39</sup> The pipeline was constructed during the Arab oil embargoes of the 1970s and was intended to make the United States energy independent. See Zillman D N (1994) 122. See also Van Vactor S A 'Time to End the Alaskan Oil Export Ban' available at <http://www.cato.org/pubs/pas/pa-227.html> (accessed 28 March 2012).

<sup>40</sup> The political concerns were advanced by the United States Maritime industry, which would have exclusive rights to transport the oil between United States Ports, after it had reached Valdez in Alaska. Under the Merchant Marine Act of 1920, cargoes transported between United States Ports had to be transported by United States-flag vessels. The maritime industry which stood to benefit, argued that banning export would enhance national security and create jobs. Congress adopted the legislation banning export, to challenge the OPEC oil embargo at the time. See Zillman D N (1994) 122. See also Van Vactor S A 'Time to End the Alaskan Oil Export Ban' available at <http://www.cato.org/pubs/pas/pa-227.html> (accessed 28 March 2012) for a detailed discussion.

<sup>41</sup> Zillman D N (1994) 122.

<sup>42</sup> See EIA 'How Much Oil is Produced in Alaska and Where Does it Go?' available at <http://www.eia.gov/tools/faqs/faq.cfm?id=35&t=6> (accessed 28 April 2013).

the face of it contrary to the provisions of Art XI of GATT. Nonetheless, WTO member states have not challenged the USA measures.

In 2006, Mandelson, the top trade negotiator for the European Union, called for a new round of trade talks.<sup>43</sup> He reiterated the need to subject international trade in oil to the same trade rules as other goods.<sup>44</sup> It has been stated by Sakmar that the call is not misconceived.<sup>45</sup> International trade in oil like other goods is subject to WTO trade rules, however, countries have opted, due to political and economic reasons, to exclude oil from GATT/ WTO regulation.<sup>46</sup> This is evident in some of the cases described above.<sup>47</sup>

Currently, the WTO Doha Round is on-going.<sup>48</sup> It has been noted that oil exporting countries did not join the GATT or the Doha negotiations as issues relating to oil production and oil trade were not on the agenda.<sup>49</sup> However, currently, some OPEC members have joined the WTO and are involved in the Doha negotiations.<sup>50</sup> Saudi Arabia which is one of the major powers in OPEC has recently joined the WTO.<sup>51</sup> Prior to Saudi Arabia joining the WTO, some commentators had opined that the WTO lacked rules on trade in oil and that the organisation had nothing to offer the

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<sup>43</sup> Sakmar S L 'Bringing energy trade into the WTO: the historical context, current status, and potential implications for the Middle East region' (2008) 18 *Ind. Int'l & Comp. L. Rev* 89 (hereafter Sakmar S L 2008) citing Champion M & Juliane von Reppert B *Politics & Economics: EU Trade Chief Poses WTO Rules in Energy Sector* WALL ST. J, June 23, 2006, at A6.

<sup>44</sup> The call to subject international trade in oil to trade rules under the GATT was premised on the escalating global oil prices. See Sakmar S L (2008) 89.

<sup>45</sup> Sakmar S L (2008) 89.

<sup>46</sup> Sakmar S L (2008) 90.

<sup>47</sup> See above discussion on the mandatory oil Imports programme and the ban on export of oil transported through the trans-Alaska oil pipeline.

<sup>48</sup> UNCTAD 'The Trade /Energy Interface and the Doha Round of Trade Negotiations (2002) 1' available at [http://r0.unctad.org/ghg/download/other/kuwait\\_seminar\\_2.pdf](http://r0.unctad.org/ghg/download/other/kuwait_seminar_2.pdf) (accessed 19 September 2012).

<sup>49</sup> UNCTAD 'The Trade /Energy Interface and the Doha Round of Trade Negotiations (2002) 1' available at [http://r0.unctad.org/ghg/download/other/kuwait\\_seminar\\_2.pdf](http://r0.unctad.org/ghg/download/other/kuwait_seminar_2.pdf) (accessed 19 September 2012). See also chapter 3 section 3.2 for a further discussion on the history of petroleum/oil regulation under the GATT/WTO.

<sup>50</sup> Saudi Arabia, Nigeria, Kuwait, Qatar, United Arabs Emirates and Venezuela are now WTO members. See Desta G M (2003) 528. See also WTO 'Kingdom of Saudi Arabia and the WTO' available at [http://www.wto.org/english/thewto\\_e/countries\\_e/saudi\\_arabia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm) (accessed 19 September 2012).

<sup>51</sup> The Kingdom of Saudi Arabia joined WTO in 2005. See WTO 'Kingdom of Saudi Arabia and the WTO' available at [http://www.wto.org/english/thewto\\_e/countries\\_e/saudi\\_arabia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm) (accessed 19 September 2012).

country.<sup>52</sup> Of course Saudi Arabia went on to join the WTO and issues regarding its oil trade policies were examined during the accession.<sup>53</sup> Nonetheless, it is still not clear what impact the Doha Round will have on the regulation of production quotas, oil consumption subsidies, and control of corruption. However, some authors have noted that issues on energy negotiation during the Doha Round should involve OPEC and the IEA which is composed of some of the largest oil importing countries.<sup>54</sup> This will allow the WTO and these two organisations to deal with the regulation of production quotas, oil consumption subsidies and corruption.

Initially, the Doha agenda contained provisions on 'hardcore' cartels.<sup>55</sup> It has been argued that the intention of the provisions on cartels was meant to tackle the OPEC dilemma.<sup>56</sup> However, some authors and the WTO noted that the provisions on 'hardcore' cartels were meant to affect private enterprises and not states.<sup>57</sup> This position cannot be clarified as the discussions were later shelved. The Doha Round clearly demonstrates the lack of consensus in the WTO as the organisation expands its membership.<sup>58</sup> Critical issues that affect international trade in oil have since been dropped from the Doha agenda due to lack of consensus. Issues such as the interaction between trade and competition policy, which were meant to initiate debate on transparency and 'hardcore' cartels have since been dropped from the Doha agenda.<sup>59</sup> Likewise, transparency in government procurement has also been

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<sup>52</sup> Milthorp P & Christy D 'Energy Issues in Selected WTO Accessions' Selivanova Y (ed) *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (2012) 259 (hereafter Milthorp P & Christy D 2012).

<sup>53</sup> Issues such as dual pricing were discussed during the accession of Saudi Arabia. See Milthorp P & Christy D (2012) 271.

<sup>54</sup> Martin W & Mattoo A Unfinished Business? The WTO's Doha Agenda (2011) The International Bank for Reconstruction and Development/The World Bank 410 (hereafter Martin W and Mattoo A 2011).

<sup>55</sup> Panagariya A Developing Countries at Doha: A Political Economy Analysis (2002) Department of Economics, University of Maryland 17 (hereafter Panagariya A 2002). A 'hardcore' cartel is a formal cartel. See WTO 'Doha Declaration Explained' available at [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm#investment](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#investment) (accessed 19 September 2012).

<sup>56</sup> Panagariya A (2002) 17.

<sup>57</sup> Rezzouk M The Organization of Petroleum Exporting Countries, Competition and The World Trade Organization. Might a WTO Agreement on Competition Constitute a Threat to OPEC? (2003) UNCTAD Series on Questions of Competition Law and Policy 34-36 (hereafter Rezzouk M 2003).

<sup>58</sup> It can be argued that the increasing number of OPEC member states in the WTO has stifled debate on the regulation of international trade in oil.

<sup>59</sup> See WTO 'Doha Declaration Explained' available at [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm#investment](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#investment) (accessed 19 September 2012).

dropped from the agenda.<sup>60</sup> However, discussions on subsidies continue in the Rules Negotiating Group.<sup>61</sup> While discussions on subsidies have been maintained, progress in the Doha Round has been slow.<sup>62</sup> It is apparent from the above discussion that issues on OPEC production quotas, which may have been discussed under 'hardcore' cartels, may not see the light of day. Additionally, the issue of transparency in government procurement has been shelved and it may take another round of negotiations to address this issue. The status of the Doha Round with regard to international trade in oil raises a complex question as to whether the WTO is an appropriate framework for the regulation of production quotas, oil consumption subsidies and corruption.

Currently, Africa has positioned itself as a major player in the WTO system. This is evident in the Doha Round where Africa has come out strongly to advocate trade terms focused on development of the continent.<sup>63</sup> African countries have noted that some of the WTO trade provisions and the trade policies of WTO member states, like the USA, do not advance the interests of African countries.<sup>64</sup> The African Growth and Opportunity Act (AGOA), enacted by the USA to allow African countries greater market access, has been criticised.<sup>65</sup> However, this criticism should be guided and should take note of the advantages Africa stands to gain from the improvement

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<sup>60</sup> See WTO 'Doha Declaration Explained' available at [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm#investment](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#investment) (accessed 19 September 2012). Even though transparency in government procurement did not gain momentum under the Doha Round, the parties to the GPA have recently agreed to further improve the agreement. See WTO 'Historic Deal Reached on Government Procurement' available at [http://www.wto.org/english/newse/news11\\_e/gpro\\_15dec11\\_e.htm](http://www.wto.org/english/newse/news11_e/gpro_15dec11_e.htm) (accessed 07 May 2013).

<sup>61</sup> See WTO 'Doha Declaration Explained' available at [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm#investment](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#investment) (accessed 19 September 2012).

<sup>62</sup> Wold C et al 'Leveraging climate change benefits through the World Trade Organi[s]ation: are fossil fuel subsidies actionable?' (2012) *Georgetown Journal of International Law* Vol 43 No. 3 639 (hereafter Wold C et al 2012).

<sup>63</sup> Montague D From Cotton to Petroleum: African Economic Viability and Global Priorities (2003) Policy Brief for the Globalization Research Center – Africa 1 (hereafter Montague D 2003). Currently African countries are organised under different groups and are advocating for reform of WTO rules under the Doha round. These groups include: African, Caribbean and Pacific countries (ACP), African Group and the G-90. See WTO 'Groups in the WTO' available at [http://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.pdf](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf) (accessed 28 April 2013).

<sup>64</sup> African countries are mainly interested in improving rules regulating agriculture and non-agricultural market access. See Montague D (2003) 5. See also Kessie E & Addo K African Countries and the WTO Negotiations on the Dispute Settlement Understanding (2008) ICTSD 5 (hereafter Kessie E & Addo K 2008).

<sup>65</sup> Montague D (2003) 5.

of international trade in oil. The excerpt below portrays the negative sentiments exhibited by the African countries towards the AGOA:

'...despite the fact that African economies derive 70% of their income from agriculture, in 2002, 75% of AGOA imports were of petroleum products.<sup>66</sup> Three hundred billion dollars a year spent on agricultural subsidies by Northern countries entrenches the system that restricts developing countries to mining sector raw material export at the expense of agricultural development.'<sup>67</sup>

'AGOA does little to support African agriculture and instead concreti[s]es a system geared towards oil and strategic mineral production.'<sup>68</sup>

The above position is misconceived to the extent that it questions Africa's ability to reap from the oil sector. Africa should utilise the AGOA provisions in so far as they allow greater market access for African oil.

With regard to the Doha Round, African oil producing countries should advocate the regulation of subsidies in the oil sector to improve trade in oil.<sup>69</sup> African countries should also utilise the dispute settlement mechanism to challenge production quotas.<sup>70</sup> This will make the sector more lucrative and will substantially reduce corruption and encourage development in African oil producing countries. Additionally, the regulation of the above areas, especially subsidies and production quotas, will allow African oil producing countries greater market access.<sup>71</sup> Nevertheless, it is conceded that the development of the oil sector in Africa should

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<sup>66</sup> Montague D (2003) 4 citing US Department of Commerce report, US Africa Trade Profile March 2003.

<sup>67</sup> Montague D (2003) 4.

<sup>68</sup> Montague D (2003) 5.

<sup>69</sup> Especially since rules negotiations under the Doha round include the Agreement on Subsidies and Countervailing Measures. See WTO 'The Rules Negotiations' available at [http://www.wto.org/english/tratope/rulesneg\\_e/rulesneg\\_e.htm](http://www.wto.org/english/tratope/rulesneg_e/rulesneg_e.htm) (accessed 27 April 2013).

<sup>70</sup> It has been noted that African WTO member countries have not utilised the dispute settlement process. This has been attributed to various factors including the fact that African countries enjoy a small share of global trade. See generally Kessie E & Addo K (2008). Even then, it is only prudent that the small share is jealously protected.

<sup>71</sup> The removal of subsidies in the oil sector will allow all oil producing countries to compete fairly. The price of oil in many countries will be dictated by market forces. Thus African countries will be able to produce and sell oil at competitive prices. The removal or regulation of production quotas maintained by OPEC member states will increase the amount of oil available for sell, thus African oil producing countries will have more oil to supply to the market. These adjustments will greatly enhance the market access of African oil producing countries.

not be done at the expense of development of Agriculture in Africa, especially in African countries that are resource poor.

The brief discussion above indicates that in the 1950s and 1960s, the GATT contracting parties diligently engaged in the regulation of oil trade and other natural resources. However, the 1970s to date indicate lack of enthusiasm on the part of GATT contracting parties to regulate oil trade. Some WTO member countries have continued to engage in GATT inconsistent practices in dealing with their oil sector. Countries such as the United States have engaged in GATT inconsistent practices and justified the same using security and political reasons. Discussions on the international trade of oil under the Doha round have been at best, ambivalent. The foregoing discussion also shows that Africa, despite the fact that it is a resource rich continent and has witnessed an increasing volume of crude oil discoveries, has remained silent on the relationship between oil and the GATT/WTO framework.

Currently, some countries are proposing that oil like other goods be subjected to GATT provisions and are encouraging debate on the relationship between the WTO and the oil sector.<sup>72</sup> However, African countries maintain that focus on the oil sector is misguided and the debate should focus on Agriculture. This position reflects a lack of commitment on the part of African countries to fast track development in Africa. Natural resources and oil also contribute to the income of African countries and should both be given ample attention.

Most African oil producing countries are WTO member states.<sup>73</sup> The WTO is thus a convenient and available forum to guide the regulation of international trade in oil especially with regard to subsidies, production quotas and corruption in Africa. The WTO has institutions which are key in the implementation of the agreements that

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<sup>72</sup> Sakmar S L (2008) 89.

<sup>73</sup> Algeria, Angola, Benin, Cameroon, Chad, Democratic Republic of Congo, Congo, Côte d'Ivoire, Egypt, Gabon, Ghana, Equatorial Guinea, Libya, Mauritania, South Africa, Niger, Nigeria, South Sudan and Sudan are the African oil and gas producing countries. See African Petroleum Producers Association 'Member Countries' available at <http://www.appa.int/en/pmbres/pmc.htm> (accessed 28 April 2013). It should be noted that apart from Algeria, Libya, Equatorial Guinea, South Sudan and Sudan, all the African oil producing countries are members of the WTO. Further Algeria, Libya, Equatorial Guinea and Sudan are all observers and are negotiating membership of the WTO. See WTO 'Members and Observers' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (accessed 28 April 2013).

regulate the above mentioned areas. A brief discussion of these institutions is essential in understanding the specific agreements and the areas that are regulated.<sup>74</sup>

### 3.3 Institutional Framework of the WTO

A discussion of the institutional framework of the WTO is relevant and provides a basis for the examination of the relationship between international trade in oil and the various organs of the WTO. The institutional framework highlights the relationship between the various organs and the regulation of subsidies, production quotas, and corruption in the oil sector in Africa. This section analyses the role of the Ministerial Conference, the various roles of the General Council, the relevant committees of the WTO and the council for trade in goods. The chapter also analyses the dispute settlement mechanisms, and the decision making processes in the organisation. A diagrammatic representation of the institutional structure of the WTO is provided below.

The discussion of the institutional structure of the WTO does not include the Secretariat. The Secretariat has its origins in the Interim Commission for the ITO.<sup>75</sup> It was created to prepare the ground for the ITO; it mainly serves a support role for the other institutions of the WTO.<sup>76</sup>

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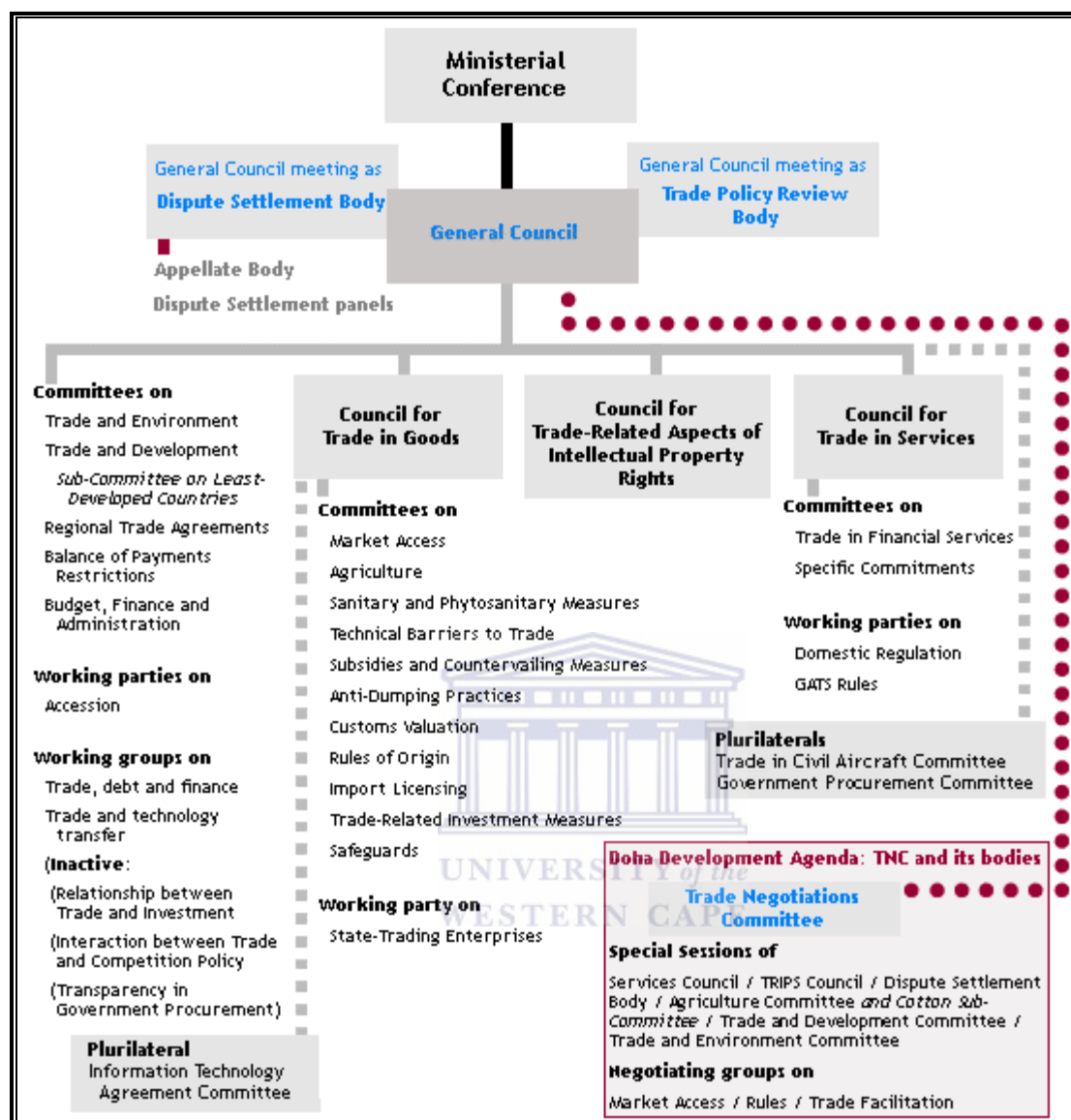
<sup>74</sup> For a detailed discussion of the WTO organs see Van den Bossche P *The Law and Policy of the World Trade Organisation Texts, Cases and Materials* (2005) 119 -135 (hereafter Van den Bossche P 2005).

<sup>75</sup> Jackson J H (1997) 42.

<sup>76</sup> The authors discuss the limited powers of the Secretariat and the Director-General, who is the head of the Secretariat. The Director-General is described as a broker as opposed to a decision- maker. See Jackson J H (1997) 42. See also Hoekman B M & Kostecki M M *The Political Economy of the World Trading System The WTO and Beyond* 2 ed (2001) 54 (hereafter Hoekman B M & Kostecki M M 2001).



Figure 3.1 Institutional Framework of the WTO



Source: WTO 'Organi[s]ation Chart' available at [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/wto\\_agree\\_02\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_02_e.htm) (accessed 24 April 2012).

**Key**

- Reporting to General Council (or a subsidiary)
- Reporting to Dispute Settlement Body
- ■ ■ Plurilateral committees inform the General Council or Goods Council of their activities, although these agreements are not signed by all WTO members
- ● ● Trade Negotiations Committee reports to General Council

### 3.3.1 The Ministerial Conference, Decision Making and Functions

#### A) The Ministerial Conference and Decision Making

The Ministerial Conference is one of the organs that should be at the helm of directing and guiding the international trade in oil. This organ makes decisions that affect all members and adopts authoritative interpretations of the WTO agreements.<sup>77</sup> Some of the provisions that regulate this body are yet to be tested and the organ has been silent on international trade in oil. However, the provisions discussed below illustrate the potential that the Ministerial Conference has in regulating international trade in oil.

Article IV of the Marrakesh Agreement generally provides for the institutional structure of the WTO.<sup>78</sup> Art IV (1) provides for the Ministerial Conference. The body is composed of representatives of all the members and is supposed to meet at least once every 2 years.<sup>79</sup> The Ministerial Conference performs the functions of the WTO and has the authority to take decisions on all matters under the multilateral trade agreements, if requested by a member.<sup>80</sup> The above discussion indicates that the body has the potential of impacting on WTO inconsistent practices that affect international trade in oil, especially production quotas and subsidies that are regulated in multilateral agreements. However, the meetings of the body are too few and this affects the mandate of the body.

Some scholars have rightly defined the Ministerial Conference as the top-most organ of the WTO.<sup>81</sup> It is composed of minister-level representatives from all member countries.<sup>82</sup> The Ministerial Conference has convened eight times since the formation

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<sup>77</sup> See Art IV (1) of the Marrakesh Agreement. See also Jackson J H (1997) 64. See also Hoekman B M & Kostecki M M (2001) 50.

<sup>78</sup> Van den Bossche P (2008) 117.

<sup>79</sup> See Art IV (1) of the Marrakesh Agreement. See also Jackson J H (2006) 106.

<sup>80</sup> See Art IV (1) of the Marrakesh Agreement. See also Hoekman B 'The WTO: Functions and Basic Principles' Hoekman B et al (eds) *Development, Trade, and the WTO A Handbook* (2002) 47 (hereafter Hoekman B 2002).

<sup>81</sup> Van den Bossche P (2008) 120.

<sup>82</sup> Van den Bossche P (2008) 120.

of the WTO in 1995.<sup>83</sup> The composition of the Ministerial Conference permits member countries to make decisions that are informed by political and economic considerations of the members. The regulation of international trade in oil requires political will of the member states. To this end, the organ is an appropriate avenue for commencing debate on the regulation of production quotas, oil consumption subsidies and corruption in the oil sector.

The Ministerial Conference performs an oversight function and has decision making powers under the multilateral agreements of the WTO.<sup>84</sup> The Ministerial Conference has general powers under Art IV (1) of the Marrakesh Agreement and has more specific powers provided in the multilateral agreements.<sup>85</sup> Some scholars and international trade practitioners have argued as to whether the powers under the above provision lay down political or legal commitments.<sup>86</sup> However, the language of Art IV (1) is clear. The commitments are legal.<sup>87</sup> The clause provides as follows;

‘...The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.’<sup>88</sup>

In light of the above provision, and the observation that the provision provides legal obligations, the Ministerial Conference is a suitable organ for undertaking debate and eventually decisions on the legality of production quotas and oil consumption subsidies in the oil sector.

The Ministerial Conference can only exercise its powers in accordance with the decision making powers under the Marrakesh Agreement and other relevant

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<sup>83</sup> Singapore 1996, Geneva 1998, Seattle 1999, Doha 2001, Cancun 2003, Hong Kong 2003, Geneva 2009 and Geneva 2011. See Van den Bossche P (2008) 120. See also WTO ‘Ministerial Conferences’ available at [http://www.wto.org/english/thewto\\_e/minist\\_e/minist\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/minist_e.htm) (accessed 28 April 2013).

<sup>84</sup> See Deree C ‘WTO Leadership and Reform: The Need for a Ministerial Conference’ available at <http://www.voxeu.org/index.php?q=node/2952> (accessed 24 April 2012). See also Van den Bossche P (2008) 120.

<sup>85</sup> Van den Bossche P (2008) 120.

<sup>86</sup> Van den Bossche P (2008) 120 citing Pieter-Jan Kuijper the former Director of the WTO Legal Affairs Division.

<sup>87</sup> Van den Bossche P (2005) 123.

<sup>88</sup> See Art IV (1) of the Marrakesh Agreement.

multilateral trade agreements. Related to the above, Art IX of the Marrakesh Agreement provides for decision-making under the GATT/WTO.<sup>89</sup> Decision-making by the WTO is usually done through consensus.<sup>90</sup> Decisions reached by consensus are those, where no member present at the meeting where the decision is taken, formally objects to the decision.<sup>91</sup> Art IX (1) does not make a distinction between political or legal matters. The provision applies to all decisions.

It can be argued that decisions made through consensus have to be respected by all members since all those present at the meeting are involved in the decision making process.<sup>92</sup> However, due to the complexity of international trade rules, members may agree to particular positions without understanding the implications of these decisions for their domestic trade policies.<sup>93</sup> Similarly, decisions on the elimination of production quotas and oil consumption subsidies may be made by members without realising the political and economic impact of these decisions on the domestic policies of the state. Therefore it is important that decisions on the above areas are comprehensively discussed to ensure that all members understand the effects.

An example of the decision making power of the Ministerial Conference is provided below. At the 8<sup>th</sup> Ministerial Conference in Geneva, a number of decisions were taken by the body.<sup>94</sup> The Ministerial Conference agreed and directed that members should not initiate complaints under Art XXIII 1(b) and (c) of GATT 1994.<sup>95</sup> It was also decided that members should maintain the current practice of not imposing

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<sup>89</sup> See Art IX (1) of the Marrakesh Agreement provides for decision making by consensus. Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At a meeting of the Ministerial Conference or General Council, each member shall have one vote. The WTO framework also provides for unanimity in situations where the principle provisions of the covered agreements such as non-discrimination have to be amended. See Hoekman B M & Kostecki M M (2001) 57.

<sup>90</sup> See Art IX (1) of the Marrakesh Agreement.. Members have to engage in bargaining and consultation before consensus is reached, this is often not highlighted. See Hoekman B M & Kostecki M M (2001) 56.

<sup>91</sup> Footnote 1 to Art IX of Marrakesh Agreement.

<sup>92</sup> That said, consensus has its limitations. It should be noted that decision making through consensus is not available to members who are absent when decisions are taken. This in some way affects the legitimacy of these decisions. Additionally, this type of decision making also constrains the efficiency of the WTO as some members though present may prevent progress. See Jackson J H (2006) 50.

<sup>93</sup> Decisions through consensus have limitations and yet the other decision making options in the GATT are ignored. See Steger D 'Why Institutional Reform of the WTO Is Necessary' Steger D P (ed) *Redesigning the World Trade Organization for the Twenty-first Century* (2009) 16 (hereafter Steger D 2009). The green room process to arrive at consensus is preferred to the voting procedures in the GATT. See Cottier T (2009) 47.

<sup>94</sup> See WTO 'Official documents of the Geneva Ministerial' available at [http://www.wto.org/english/thewto/minist\\_e/min11\\_e/official\\_doc\\_e.htm#adopted](http://www.wto.org/english/thewto/minist_e/min11_e/official_doc_e.htm#adopted) (accessed 11 May 2012).

<sup>95</sup> World Trade Organisation (2011) TRIPS Non-Violation and Situation Complaints WT/L/842.

customs duties on electronic transmission until the next session in 2013.<sup>96</sup> As argued above, such decisions are legally binding.

It is debatable as to whether the failure to comply with the above decisions can be a ground to initiate proceedings under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).<sup>97</sup> However, Appendix 1 of the DSU provides that the Marrakesh Agreement is a covered Agreement. It can therefore be argued that disputes under Art IX (1) of the Marrakesh Agreement may be subject to DSU proceedings. This makes the decision making powers of the Ministerial Conference particularly relevant to the regulation of international trade in oil. In the event that members agree to eliminate production quotas and oil consumption subsidies, non-compliance with such decisions can be a ground for legal action.

### **B) Adopting Authoritative Interpretations**

Further, Art IX (2) of the Marrakesh Agreement provides that the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of the Marrakesh Agreement and the multilateral trade agreements.<sup>98</sup> It is submitted that this power to adopt interpretations of WTO agreements is a legal commitment and not a political commitment. The adoption of interpretations is performed by the highest organ of the WTO.<sup>99</sup> The interpretations adopted by the Ministerial Conference are binding on all members.<sup>100</sup> Some authors have stated that the provision on adopting authoritative interpretations has not been used sufficiently by the WTO.<sup>101</sup> However, there is evidence of decisions made by the appellate body affirming the power of the Ministerial Conference to adopt authoritative interpretations. Adoption of authoritative interpretations of the WTO agreements puts the organ in a key position to guide international trade in oil. The

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<sup>96</sup> World Trade Organisation (2011) Work Programme on Electronic Commerce WT/L/843.

<sup>97</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes Annex 2 of the Marrakesh Agreement (DSU).

<sup>98</sup> See Art IX (2) of the Marrakesh Agreement.

<sup>99</sup> Van den Bossche P (2008) 142.

<sup>100</sup> Van den Bossche P (2008) 142.

<sup>101</sup> Van den Bossche P (2008) 142. See also Ehlermann C & Ehring L 'The authoritative interpretation under article IX:2 of the agreement establishing the World Trade Organi[s]ation: current law, practice and possible improvements' (2005) *Journal of International Economic Law* 8(4), 803–824 (hereafter Ehlermann C & Ehring L 2005).

discussion below illustrates the mandate of the Ministerial Conference under Art IX (2) of the Marrakesh Agreement.

In *Japan-Alcoholic Beverages II*,<sup>102</sup> the appellate body disagreed with the panel's findings that panel decisions adopted by the Dispute Settlement Body (DSB) are conclusive and constitute subsequent practice<sup>103</sup> as understood under the Vienna Convention on the Law of Treaties.<sup>104</sup> This decision confirms the position that the power to adopt authoritative interpretations is a preserve of the Ministerial Conference and the General Council. The appellate body made the following observation:

'We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the WTO Agreement. Article IX: 2 of the WTO Agreement provides: 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements'. Article IX: 2 provides further that such decisions "shall be taken by a three-fourths majority of the Members." The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.'<sup>105</sup>

### C) Waiving Obligations

The Ministerial Conference also has powers to waive obligations imposed on a member by the Marrakesh Agreement or any of the multilateral trade agreements.<sup>106</sup> Generally, the decision to grant a waiver has to be taken by at least three-fourths of

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<sup>102</sup> See *Japan-Alcoholic Beverages II* (Appellate Body Report) [1996] WT/DS8/AB/R; WT/DS10/AB/R, and WT/DS11/AB/R 13.

<sup>103</sup> Subsequent Practice is defined as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation. See *Japan-Alcoholic Beverages II* (Appellate Body Report) [1996] WT/DS8/AB/R; WT/DS10/AB/R, and WT/DS11/AB/R 13.

<sup>104</sup> See *Japan-Alcoholic Beverages II* (Appellate Body Report) [1996] WT/DS8/AB/R; WT/DS10/AB/R, and WT/DS11/AB/R 13.

<sup>105</sup> See *Japan-Alcoholic Beverages II* (Appellate Body Report) [1996] WT/DS8/AB/R; WT/DS10/AB/R, and WT/DS11/AB/R 13.

<sup>106</sup> See Art IX (3) of the Marrakesh Agreement.

the members unless otherwise provided.<sup>107</sup> The waivers are granted in exceptional circumstances and the Ministerial Conference has to state the exceptional circumstances justifying the decision and the terms and conditions governing the application of the waiver.<sup>108</sup>

In practice waivers are not granted by a three-fourths majority but rather by consensus.<sup>109</sup> Article IX (3) does not have substantive rules on the grant of waivers. The Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 has expanded the rules on grant of waivers under the GATT.<sup>110</sup> The request for a waiver or an extension of a waiver has to describe the measures which the member proposes to take, the specific policy objectives the member seeks to pursue, and, how GATT obligations inhibit these policy objectives.<sup>111</sup>

Over the years a number of waivers have been granted by the Ministerial Conference. The most prominent waiver, which is relevant to international trade in natural resources, is the waiver granted to Australia, Brazil, Canada, Israel, Japan, Korea, the Philippines, Sierra Leone, Thailand, the United Arab Emirates and the United States.<sup>112</sup> The waiver which was granted in 2003 and extended in 2006 prohibits trade in blood diamonds.<sup>113</sup> The waiver was adopted as a result of the Kimberly process.<sup>114</sup> Members have been exempted from MFN commitments with regard to the trade in diamonds with countries that are not part of the initiative.<sup>115</sup>

It is clear from the above discussion that waivers have been granted with regard to regulation of the international trade of natural resources. This provision provides

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<sup>107</sup> See Art IX (3) of the Marrakesh Agreement.

<sup>108</sup> See Art IX (4) of the Marrakesh Agreement.

<sup>109</sup> Van den Bossche P (2008) 148. See also The General Council (1995) Decision-Making Procedures Under Articles IX and XII of the WTO Agreement adopted on 15 November 1995 WT/GC/M/8 and WT/L/93 Para 1. See also Feichtner I 'The waiver power of the WTO: opening the WTO for political debate on the reconciliation of competing interests' (2009) *The European Journal of International Law* Vol. 20 No. 3 619 (hereafter Feichtner I 2009).

<sup>110</sup> Van den Bossche P (2008) 114.

<sup>111</sup> See Art 1 of the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 Annex 1A of the Marrakesh Agreement.

<sup>112</sup> Van den Bossche P (2008) 114.

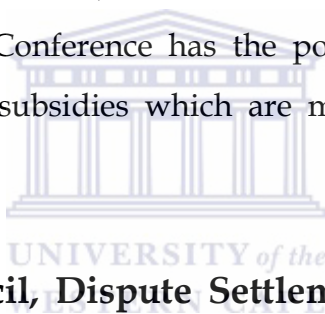
<sup>113</sup> Van den Bossche P (2008) 114.

<sup>114</sup> Van den Bossche P (2008) 114.

<sup>115</sup> Van den Bossche P (2008) 114.

flexibility for members to retain control of oil related policies. Oil dependent member states can rely on the above provision to seek waivers to pursue policies that are essential for their economic needs where necessary. However, the process of granting waivers is quite strict and is protected from abuse. Thus although member states may seek waivers to allow policies that protect their domestic interests, these waivers have to comply with the rules.

Besides the powers and functions discussed above, there are other specific powers of the Ministerial Conference which include, appointment of the Director General and setting out the powers, duties, conditions of service and the terms of office of the Director General,<sup>116</sup> the power to adopt regulations governing the duties and conditions of service of the staff of the Secretariat,<sup>117</sup> the power to adopt amendments to the WTO Agreement,<sup>118</sup> and the authority to approve accessions to the WTO.<sup>119</sup> The Ministerial Conference has the potential to regulate production quotas and oil consumption subsidies which are matters covered in multilateral agreements.



### **3.3.2 The General Council, Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB)**

The role of the General Council is provided in Art IV (2) of the Marrakesh Agreement. The General Council is composed of ambassador-level diplomats and meets once every 2 months.<sup>120</sup> The General Council has the authority to act on behalf

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<sup>116</sup> See Art VI (2) of the Marrakesh Agreement.

<sup>117</sup> See Art VI (3) of the Marrakesh Agreement. The power has previously been exercised by the Ministerial Conference when a decision was taken at Marrakesh relating to the necessary organisational and financial consequences that would flow from the establishment of the WTO including staffing of Secretariat. See Footer M E *An Institutional and Normative Analysis of the WTO* (2006) 46-47 (hereafter Footer M E 2006).

<sup>118</sup> See Art X of the Marrakesh Agreement. This power was exercised in 2005, when the TRIPS Agreement was amended. Nonetheless, the amendments are yet to come into effect as they have not been accepted by all the members. The amendment relates to the conditions for the grant of a compulsory licence for the production of essential medicines. See WTO 'Members Accepting Amendment of the TRIPS Agreement' available at [http://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm) (15 May 2012). See also Van den Bossche P (2008) 144.

<sup>119</sup> See Art XII of the Marrakesh Agreement.

<sup>120</sup> Van den Bossche P (2008) 114. See Rules of Procedure of the General Council WT/L/161. See also WTO 'WTO General Council' available at [http://www.wto.org/english/thewto\\_e/gcounc\\_e/gcounc\\_e.htm](http://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm) (14 May 2012).



of the Ministerial Conference which is supposed to meet once every 2 years.<sup>121</sup> The General Council also acts as the DSB and the TPRB.<sup>122</sup> Art IV (2), (3) and (4) of the Marrakesh Agreement provide as follows;

'2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the Committees provided for in paragraph 7.

3. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.

4. The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the [Trade Policy Review Mechanism] TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfilment of those responsibilities.'<sup>123</sup>

It is interesting to note that the General Council exercises powers of the Ministerial Conference when the latter is not in session. The General Council unlike the Ministerial Conference meets often. Additionally the composition of the General Council also provides legitimacy to the decisions of the body. Ambassador-level representatives like ministers provide political legitimacy to the General Council. This makes the organ relevant in the regulation of international trade in oil. Decisions on the oil sector require political will and this is can be harnessed in the General Council. The General Council has other functions provided in the Marrakesh Agreement.

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<sup>121</sup> WTO 'WTO General Council' available at [http://www.wto.org/english/thewto\\_e/gcounc\\_e/gcounc\\_e.htm](http://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm) (14 May 2012). See also Jackson J H (1997) 63.

<sup>122</sup> See Art IV (3) and (4) of the Marrakesh Agreement. See also Van den Bossche P (2008) 122.

<sup>123</sup> See Art IV (2), (3) and (4) of the Marrakesh Agreement.

It has been noted by some authors that even when the Ministerial Conference is in session, it handles other matters and the specific powers of the Ministerial Conference are exercised by the General Council.<sup>124</sup> Thus most of the specific powers cited in section 3.3.1 above, are actually exercised by the General Council.<sup>125</sup> The General Council has appointed all the five Directors General of the WTO.<sup>126</sup> The power to grant waivers and the authority to approve accessions is also exercised by both the Ministerial Conference and the General Council.<sup>127</sup> The above powers exercised by the General Council revert to the Ministerial Conference when it is in session.<sup>128</sup> These powers rarely revert to the Ministerial Conference as it handles other matters when it convenes.<sup>129</sup>

The specific powers of the General Council provided in the Marrakesh Agreement and other multilateral agreements include; Art VII (3) of the Marrakesh Agreement which provides that the General Council shall adopt the financial regulations and the annual budget estimate by a two-thirds majority comprising more than half of the WTO members. The budget of the WTO is modest and is indicative of the limited scope of activities that are handled by the Secretariat.<sup>130</sup> The budget for the WTO in 2012 was estimated to be CHF 196,003,900.<sup>131</sup> Pursuant to Art VII (1) and Article VII (2), the Director General presents the annual budget estimate and financial statement of the WTO, to the Committee on Budget, Finance and Administration. The Committee reviews the budget and makes recommendations to the General Council.<sup>132</sup> The Committee is also enjoined to propose financial regulations to the General Council.<sup>133</sup>

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<sup>124</sup> Van den Bossche P (2008) 122 citing Kuijper P J 'Some Institutional Issues Presently Before the WTO' Kennedy D & Southwick J (eds) , *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (2002) 83.

<sup>125</sup> Footer M E (2006) 47.

<sup>126</sup> Footer M E (2006) 47.

<sup>127</sup> Footer M E (2006) 47.

<sup>128</sup> Footer M E (2006) 49.

<sup>129</sup> See Van den Bossche P (2008) 120.

<sup>130</sup> Van den Bossche P (2008) 162.

<sup>131</sup> See WTO 'WTO Secretariat budget for 2012' available at [http://www.wto.org/english/thewto\\_e/secret\\_e/budget\\_e.htm](http://www.wto.org/english/thewto_e/secret_e/budget_e.htm) (accessed 15 May 2012).

<sup>132</sup> See Art VII (1) of the Marrakesh Agreement.

<sup>133</sup> See Art VII (2) of the Marrakesh Agreement.

Unlike the powers of the Ministerial Conference that are performed by the General Council, the powers under Art VII (3) appear to be focused on formalising decisions made by other organs of the WTO.

Article V (1) and (2) of the Marrakesh Agreement provide that the General Council shall make appropriate arrangements for effective cooperation with intergovernmental organisations and for cooperation and consultation with non-governmental organisations concerned with matters related to the WTO.<sup>134</sup> This provision is very important in the regulation of international trade in oil. The regulation of international trade in oil requires the cooperation of both the exporting countries and the consuming countries. Thus the General Council is an appropriate forum for the commencement of cooperation between members (and their respective intergovernmental organisations, such as OPEC) with regard to international trade in oil.<sup>135</sup> The General Council has granted a number of intergovernmental organisations observer status to some of its meetings.

‘The General Council has allowed some intergovernmental organizations to observe its meetings. In 1995 and 1996, the General Council accorded ad hoc observer status to seven international intergovernmental organizations, including: the United Nations, UNCTAD, IMF, the World Bank, FAO, WIPO, and the OECD. Subsequently, the IMF and the World Bank were granted permanent observer status in General Council meetings by the terms of their respective cooperation agreements. In its meetings of 7 February 1997, the General Council granted permanent observer status to the United Nations, UNCTAD, FAO, WIPO, and the OECD. In the General Council meeting of 10 December 1997, the ITC, as a joint technical cooperation agency between the WTO and UNCTAD, was “invited, as appropriate, to attend meetings of those WTO bodies it wished to attend without having to submit a request for observer status”.’<sup>136</sup>

The above discussion demonstrates the potential of the General Council in building linkages between states and other actors. The regulation of international trade in oil

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<sup>134</sup> See Art V(1) and (2) of the Marrakesh Agreement.

<sup>135</sup> It should be noted that this kind of cooperation is yet to be seen at the WTO.

<sup>136</sup> See WTO ‘Interpretation and Application of Art V’ available at [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/wto\\_agree\\_03\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_03_e.htm) (accessed 29 April 2013).

can benefit from such linkages as all relevant organisations will have a platform to discuss international trade in oil.

The General Council established its rules of procedure as required under the WTO Agreement.<sup>137</sup> General Council meetings are convened by the Director General and prior notice is given for the meetings.<sup>138</sup> The Agenda for the meetings are communicated at the time the notices for the meetings are sent to the members.<sup>139</sup> Decision-making in the meetings is made in accordance with Art IX of the Marrakesh Agreement.<sup>140</sup> The meetings of the General Council are held in private.<sup>141</sup> This has attracted a substantial amount of criticism. Meetings held behind closed doors lack transparency.<sup>142</sup> However, given the decision making rules of the WTO where decisions are made through consensus after negotiations,<sup>143</sup> the negotiations may reveal national secrets that may generate unnecessary public criticism.

The General Council provides an appropriate platform for driving WTO policy especially when the Ministerial Conference is not in session. This is an example of the institutional strength of the WTO. International trade in oil can benefit from such institutions which provide continuous engagement with key trade matters.

### 3.3.2.1 The Dispute Settlement Body (DSB)

The General Council also acts as the DSB.<sup>144</sup> The DSB administers the rules and procedures contained in the Understanding on Rules and Procedures Governing the

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<sup>137</sup> Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council WT/L/161 25 July 1996.

<sup>138</sup> Rule 2 of the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council WT/L/161 25 July 1996.

<sup>139</sup> Rule 3 of the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council WT/L/161 25 July 1996.

<sup>140</sup> Decisions are made through consensus. Rule 33 of the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council WT/L/161 25 July 1996.

<sup>141</sup> Rule 37 of the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council WT/L/161 25 July 1996.

<sup>142</sup> Van den Bossche P (2008) 122.

<sup>143</sup> See Art IX of the Marrakesh Agreement.

<sup>144</sup> See Art IV (3) of the Marrakesh Agreement. It is worth noting that the DSB has its own Chairman and the Chairman of the General Council is not the chairman of the Dispute Settlement Body. See Art 1 (2) of the DSU.

Settlement of Disputes (DSU).<sup>145</sup> The DSB has been described as an alter ego of the General Council.<sup>146</sup> The preceding discussion examines the functions of the DSB. The importance of the DSU to the multilateral trading system is based on the pervasiveness of trade conflict which in most cases leads to political conflict.<sup>147</sup> Conflict in the oil sector is rife and a formal dispute settlement mechanism is necessary to ensure stable oil trade.<sup>148</sup>

Article 2(1) of the DSU provides the mandate and the guidelines for the DSB. The DSB has the authority to establish panels, adopt panel and appellate body reports, maintain surveillance of implementation of rulings and recommendations, and authorise suspension of concessions and other obligations under the covered agreements.<sup>149</sup> The DSB makes its decisions under the DSU through reverse consensus.<sup>150</sup> It should be noted, that recommendations and rulings of the DSB have to be consistent with rights and obligations under the DSU and the covered agreements.<sup>151</sup> Further, the provisions of the DSU are without prejudice to the rights of members to seek authoritative interpretation of provisions of a covered agreement.<sup>152</sup>

In line with the discussion in section 3.3.1 above, authoritative interpretation by the Ministerial Conference is a distinct procedure and is not part of the dispute settlement process under the DSU.<sup>153</sup> The presence of the DSB within the structures of the WTO makes the organisation suitable for the regulation of international trade in oil. Members have a forum to resolve disputes in an amicable manner. The

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<sup>145</sup> See Art 2 (1) of the DSU. See also Jackson J H (2006) 152-159.

<sup>146</sup> Van den Bossche P (2008) 235.

<sup>147</sup> Jackson J H (1997) 13 citing Hawkins H U.S. Department of State, Commercial Policy Series 74 (1994) 3.

<sup>148</sup> Euclid A (2004) 424.

<sup>149</sup> See Art 2 (1) of the DSU. With respect to disputes under plurilateral trade agreements, only the parties to the agreement may participate in the decision. See Bhuiyan S (2007) 89 for a detailed discussion. See also Hoekman B M & Kostecki M M (2001) 76-77.

<sup>150</sup> Consensus in this regard is negative or reverse consensus. The decisions of the DSB are deemed to have been adopted by the body unless there are objections by one of the members. See Art 2 (4) of the DSU.

<sup>151</sup> See Art 3 (4) of the DSU. The above provision may seem to suggest that international law rules have no place in the resolution of disputes under the DSU. However, the DSU in fact envisages situations where recourse may be made to international law principles. See Art 3 (2) of the DSU. See also Bhuiyan S (2007) 93-98.

<sup>152</sup> See Art 3 (9) of the DSU.

<sup>153</sup> See *Japan-Alcoholic Beverages II* (Appellate Body Report) [1996] WT/DS8/AB/R; WT/DS10/AB/R, and WT/DS11/AB/R 13.

discussion below provides a broad analysis of the elaborate dispute settlement procedure of the WTO.

The section provides a broad overview of the dispute settlement process. The dispute settlement process has various rules. Nonetheless, the discourse in the section below does not cover all the intricacies of the dispute settlement process. It is a broad overview meant to highlight the strength and weaknesses of the process and the benefits that oil producing countries can derive from the process. As noted in the introduction to the chapter, case law on the regulation of international trade in oil is limited. Accordingly, other cases that explain the relevant issues in the dispute settlement process are relied upon.

### **A) An Overview of the Dispute Settlement Process-Panel Proceedings**

The first stage in the dispute settlement process is notification and consultations.<sup>154</sup> The aggrieved member seeks consultation with the member state which has deprived it of its benefits under the GATT or any of the covered agreements.<sup>155</sup> Consultations have to be notified to the DSB and the relevant councils and committees by the member requesting consultation.<sup>156</sup> The member, to whom the request is made, has to respond to the aggrieved member within 10 days after the date of receipt of the request.<sup>157</sup> Consultations have to commence within 30 days after receipt of the notice.<sup>158</sup>

With regard to matters of urgency and in particular perishable goods, the consultations have to be held within 10 days after receipt of the request and the matter has to be concluded within 20 days after receipt of the request for consultations.<sup>159</sup> If the matter is not settled within 60 days after the date of request for consultations was received by the offending member, then the party who made

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<sup>154</sup> See Art 4 (2) of the DSU. See also Bhuiyan S (2007) 89.

<sup>155</sup> Lowenfeld A F (2008) 162.

<sup>156</sup> See Art 4 (4) of the DSU.

<sup>157</sup> See Art 4 (3) of the DSU. The parties may agree to vary the period within which the response is to be made. Pursuant to Article 4 (11) of the DSU other interested members may apply to join the consultations, if they have a substantial interest in the matter.

<sup>158</sup> See Art 4 (3) of the DSU. If the consultations do not commence in 30 days, the requesting member may directly apply for the establishment of a panel.

<sup>159</sup> See Art 4 (8) of the DSU.

the request may apply for the establishment of a panel.<sup>160</sup> The appellate body has emphasised the importance of consultations. However, the appellate body has also recognised that the DSU envisages situations where matters may be heard by the panel without going through consultation. In *Mexico-Corn Syrup*,<sup>161</sup> the appellate body discussed the above issue extensively.

'...We agree with Mexico on the importance of consultations. Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole.<sup>162</sup>

'...as a general matter, consultations are a prerequisite to panel proceedings. However, this general proposition is subject to certain limitations. ...

Article 4.3 of the DSU relates the responding party's conduct towards consultations to the complaining party's right to request the establishment of a panel. When the responding party does not respond to a request for consultations, or declines to enter into consultations, the complaining party may dispense with consultations and proceed to request the establishment of a panel. In such a case, the responding party, by its own conduct, relinquishes the potential benefits that could be derived from those consultations.'<sup>163</sup>

Consultations allow parties to pursue alternative methods of resolving the dispute. This makes the dispute settlement process attractive. The international trade in oil can benefit from such a dispute settlement system.

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<sup>160</sup> See Art 4 (7) of the DSU.

<sup>161</sup> See *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (Appellate Body Report) [2001] WT/DS132/AB/RW 18.

<sup>162</sup> See *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (Appellate Body Report) [2001] WT/DS132/AB/RW 18.

<sup>163</sup> See *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (Appellate Body Report) [2001] WT/DS132/AB/RW 20.

The second stage of the dispute settlement process is establishment of a panel. This is done pursuant to Art 4 (7) and Art 6 of the DSU. The panel should be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB Agenda.<sup>164</sup> The DSB may decline to establish the panel where consensus is reached not to establish the panel.<sup>165</sup> The request for the establishment of a panel has to be made in writing.<sup>166</sup> The request should indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint.<sup>167</sup> The panel's terms of reference should also be set out in the request.<sup>168</sup> The working procedures of the panel are contained in Appendix 3 of the DSU.<sup>169</sup> The panel may decide to follow other procedures after consulting members.<sup>170</sup>

Panels are composed of well-qualified governmental and or non-governmental individuals, academics who have taught or published in the area of international trade, persons who have served as representatives of members or contracting parties to GATT or on any committee, council or covered agreement, and, persons who have served on or presented a case to a panel.<sup>171</sup> Article 6 of the DSU has been the subject of some disputes. In *Australia-Automotive Leather* the panel interpreted Article 6 with regard to the establishment of multiple panels in one dispute.<sup>172</sup> The qualifications of panellists are another highlight in the dispute settlement process of the WTO. Thus oil-related disputes can be resolved by experts.

The third stage in the dispute settlement process is proceedings before the panel.<sup>173</sup> The panel normally consists of three persons appointed by the Secretariat.<sup>174</sup> The

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<sup>164</sup> The DSB meets as often as necessary to carry out its functions. In practice it meets at least once a month and convenes other special meetings to discuss matters arising. See Art 6 (1) of the DSU. See also Van den Bossche P (2008) 237.

<sup>165</sup> See Art 6 (1) of the DSU.

<sup>166</sup> See Art 6 (2) of the DSU.

<sup>167</sup> See Art 6 (2) of the DSU.

<sup>168</sup> See Art 7 of the DSU.

<sup>169</sup> See Art 12 of the DSU.

<sup>170</sup> See Art 12 of the DSU.

<sup>171</sup> See Art 8 of the DSU.

<sup>172</sup> See *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (Panel Report) [1999] WT/DS126/R 98.

<sup>173</sup> Lowenfeld A. F (2008) 163.

<sup>174</sup> See Art 8 (5) of the DSU.



proceedings of the panel are confidential and only the parties can attend the proceedings.<sup>175</sup> The names of the panellists are usually taken from an indicative list maintained by the Secretariat.<sup>176</sup> Parties to the dispute are presented with names and they should not oppose the nominations except for compelling reasons.<sup>177</sup> Where the parties cannot agree on the composition of the panel, the Director General in consultation with the chairman of the DSB and the chairman of the relevant council or committee appoints the panellists.<sup>178</sup>

The parties to the dispute should be given ample time to prepare their submissions.<sup>179</sup> These parties have to make written submissions.<sup>180</sup> The oral submissions of the parties are made during the substantive meetings of the panel.<sup>181</sup> The panel usually fixes the timetable for the panel process within one week after the terms of reference have been agreed upon.<sup>182</sup> Appendix three of the DSU provides the proposed timetable for panel decisions.<sup>183</sup> Related to the above arguments, especially the procedure of the panel discussed above, the appellate body in *Argentina – Textiles and Apparel*,<sup>184</sup> has also noted that the working procedures in Appendix three of the DSU are not cast in stone and that the working procedures can be varied after consultation with the parties.

The entire process described above should not take more than 6 months, and in cases of urgency, the process from the date of setting terms of reference to issuance of the final report should not take more than 3 months.<sup>185</sup> The final report of the panel is adopted by the DSB within 60 days of circulation of the final report.<sup>186</sup> The adoption is done through reverse consensus.<sup>187</sup> Parties cannot block the adoption of the report

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<sup>175</sup> Lowenfeld A. F (2008) 163. See also Art 14 of the DSU.

<sup>176</sup> See Art 8 (4) of the DUS.

<sup>177</sup> See Art 8 (6) of the DSU.

<sup>178</sup> See Art 8 (7) of the DSU.

<sup>179</sup> See Art 8 (4) of the DSU.

<sup>180</sup> See Art 8 (6) of the DSU.

<sup>181</sup> See Rules 5-9 of Appendix 3 Working Procedures, DSU.

<sup>182</sup> See Art 12 (12) of the DSU.

<sup>183</sup> See Rule 12 of Appendix 3 of the DSU.

<sup>184</sup> See *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (Appellate Body Report) [1998] WT/DS56/AB/R 29.

<sup>185</sup> See Art 12 (8) of the DSU.

<sup>186</sup> See Art 16 (4) of the DSU.

<sup>187</sup> Van den Bossche P (2008) 236.

unless all the members decide not to adopt the report.<sup>188</sup> The panel proceedings are often quick and this is another feature of the dispute settlement process that would benefit the oil sector and the regulation of production quotas, oil consumption subsidies and corruption.

### **B) The Appeal Process**

The fourth stage of the dispute settlement process is the appeal process.<sup>189</sup> The dispute settlement process of the WTO is comprehensive and allows parties to appeal the decisions of a panel. This gives members opportunity to resolve disputes amicably. The appeal process would allow members to obtain redress for oil-related disputes. Article 16 of the DSU provides that where a party to a dispute formally notifies the DSB of its decision to appeal the report of the panel, the panel report shall not be adopted until the appeal is concluded. The appeal of the panel report is limited to issues of law in the panel report and the legal interpretation developed by the panel.<sup>190</sup>

The appellate body is composed of seven persons, three of whom adjudicate a particular dispute.<sup>191</sup> The members of the appellate body serve in rotation.<sup>192</sup> The DSB appoints persons to serve on the appellate body and its members serve a term of 4 years.<sup>193</sup> The members can only be reappointed once.<sup>194</sup> Only parties to the dispute can appeal a panel decision.<sup>195</sup> The appeal process should not exceed 60 days

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<sup>188</sup> This provision has been heralded as one of the areas where the WTO has improved on the GATT framework. A single member can no longer block the adoption of a panel report. See Article 16 (4) of the DSU. See also Jackson J H (1997) 125. See also Jackson J H (2006) 144. See also Palmeter D *The WTO as a Legal System Essays on International Trade Law and Policy* (2004) 329 (hereafter Palmeter D 2004).

<sup>189</sup> For further reading on the WTO appellate process see Joergens K J 'True appellate procedure or only a two-stage process? A comparative view of the appellate body under the WTO dispute settlement understanding' (1998-1999) 30 *Law & Pol'y Int'l Bus* 219-227 (hereafter Joergens K J 1998-1999).

<sup>190</sup> See Art 17 (6) of the DSU.

<sup>191</sup> See Art 17 (1) of the DSU.

<sup>192</sup> See Art 17 (1) of the DSU. The members of the appellate body have to have demonstrated expertise in law, international trade and the subject matter of the covered agreement. Members of the Appellate Body should not be affiliated to any government. See Art 17 (3) of the DSU.

<sup>193</sup> See Art 17 (2) of the DSU.

<sup>194</sup> See Art 17 (2) of the DSU.

<sup>195</sup> Third parties cannot appeal a panel decision, but where they have notified the DSB that they have substantial interest in the matter, they can submit written submissions and can be heard by the appellate body. See Art 17 (4) of the DSU.

from the date a party notifies the DSB of its intention to appeal, to the circulation of the final report of the appellate body.<sup>196</sup>

In cases where the appeal process takes more than 60 days, the appellate body should inform the DSB, in writing, of the reasons for the delay together with an estimate of the period within which its report will be submitted.<sup>197</sup> Nonetheless, the appeal process cannot take more than 90 days.<sup>198</sup> The working procedures of the appellate body are drawn by the appellate body in consultation with chairman of the DSB and the Director General.<sup>199</sup> The procedures are then communicated to the members.<sup>200</sup> The proceedings of the appellate body are confidential.<sup>201</sup> In *US – Lead and Bismuth*, the appellate body recognised the broad powers of the appellate body to adopt its own working procedures as long as the same are consistent with the DSU.<sup>202</sup>

Further, the appellate body may uphold, modify or reverse the legal findings and conclusions of the panel.<sup>203</sup> The appellate body reports are adopted through reverse consensus.<sup>204</sup> Article 19 of the DSU provides that where the appellate body finds that a measure is inconsistent with a covered agreement, it should recommend that the member concerned bring the measure into conformity with that agreement. The appellate body ensures that justice is achieved in the dispute settlement process. Thus international trade in oil can benefit from such a dispute settlement system. Generally Africa has not been active in the WTO dispute settlement proceedings including appellate proceedings.<sup>205</sup> Thus although the platform may be available, African member states have not sufficiently utilised it.

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<sup>196</sup> See Art 17 (5) of the DSU.

<sup>197</sup> See Art 17 (5) of the DSU.

<sup>198</sup> See Art 17 (5) of the DSU.

<sup>199</sup> See Art 17 (9) of the DSU.

<sup>200</sup> See Art 17 (9) of the DSU.

<sup>201</sup> See Art 17 (10) of the DSU.

<sup>202</sup> See *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (Appellate Body Report) [2000] WT/DS138/AB/R 14.

<sup>203</sup> See Art 17 (10) of the DSU.

<sup>204</sup> See Art 17 (10) of the DSU.

<sup>205</sup> *Mosoti V* 'In our own image, not theirs: damages as an antidote to the remedial deficiencies in the WTO dispute settlement process; a view from Sub-Saharan Africa' (2001) 19 *B.U. Int'l L.J.* 232 (hereafter *Mosoti V* 2001).

### C) Surveillance, Implementation of Decisions and Remedies

The final stage of the dispute settlement process is surveillance of implementation of recommendations and rulings as well as remedies for non-compliance with recommendations of the panel and appellate body.<sup>206</sup> Parties who fail to comply with the recommendations of the panel or appellate body may be subjected to compensation or suspension of concessions.<sup>207</sup> These remedies should be proportional to the level of impairment suffered by the complaining member.<sup>208</sup> The appellate body has expressed itself on the issue of proportional remedies. In *US – Cotton Yarn*, the appellate body held that remedies had to be commensurate with the injury suffered.<sup>209</sup>

The DSB and the procedures discussed above indicate that the resolution of disputes at the WTO is to a large extent transparent. This is necessary in the settlement of disputes regarding international trade in oil. In the past some oil producing countries have experienced conflicts over oil fields.<sup>210</sup> Due to the lack of transparent dispute settlement procedures, the disputes have or may be resolved through violence and aggression. It is necessary to point out that most of the oil conflicts arise from matters that are not regulated under the Marrakesh Agreement and the other covered agreements. Thus such disputes cannot be resolved under the DSU. However, disputes arising out of production quotas and oil consumption subsidies may be viable for redress under the DSU.

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<sup>206</sup> See Arts 21 and 22 of the DSU.

<sup>207</sup> See Art 22 of the DSU. Article 24 of the DSU provides that the above remedies should be used with restraint against Least- Developing Countries.

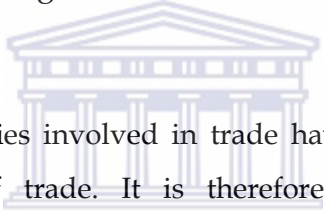
<sup>208</sup> See Art 22 (4) of the DSU.

<sup>209</sup> See *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (Appellate Body Report) [2001] WT/DS192/AB/R 37.

<sup>210</sup> See *Euclid A* (2004) 424 on the dispute between Iraq and Kuwait. Uganda and the Democratic Republic of Congo may experience conflict due to oil exploration on Lake Albert. Lake Albert is shared by both countries. However it is submitted that disputes over oil fields are not within the mandate of the DSU. See De Kock P & Sturman K *The Power of Oil: Charting Uganda's Transition to a Petro-State* (2012) SAIIA Governance of Africa's Resources Programme 54 (hereafter De Kock P & Sturman K 2012).

### 3.3.2.2 The Trade Policy Review Body (TPRB)

The General Council also acts as the TPRB.<sup>211</sup> The TRPB implements the Trade Policy Review Mechanism (TPRM).<sup>212</sup> The TPRM is meant to improve members' adherence to the rules and commitments under the multilateral and plurilateral trade agreements.<sup>213</sup> It helps members better understand trade policies and improves transparency.<sup>214</sup> The TPRM provides that trade policies and practices of all members shall be subject to review.<sup>215</sup> Members are also enjoined to provide regular reports describing their trade policies and practices.<sup>216</sup> The TPRM encourages transparency in international trade.<sup>217</sup> This makes the TPRB particularly relevant to international trade in oil. The organ will perform an important role in ensuring that members understand trade policies and how they affect their oil-based economies. The organ will also ensure that oil producing countries exercise transparency in the conduct of oil trade:

  
'Individuals and companies involved in trade have to know as much as possible about the conditions of trade. It is therefore fundamentally important that regulations and policies are transparent.'<sup>218</sup>

The trade policy reviews are helpful in identifying trends and providing solutions to problems that restrict international trade and trade in natural resources. The statement below justifies the above reason. Reports of the organ are instrumental in shaping international trade policy on natural resources. The regulation of international trade by the WTO will allow the organ perform a similar role in oil trade. An example of content of the reports of the organ and its observations on natural resources trade is provided below:

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<sup>211</sup> See Art IV (4) of the Marrakesh Agreement.

<sup>212</sup> See Art IV (4) of the Marrakesh Agreement.

<sup>213</sup> See Annex 3 of the Marrakesh Agreement Rule A (i).

<sup>214</sup> See Annex 3 of the Marrakesh Agreement Rule A (i) and Rule B.

<sup>215</sup> The frequency of reviews will depend on the members' share of world trade in a recent representative period. See Annex 3 of the Marrakesh Agreement Rule C.

<sup>216</sup> See Annex 3 of the Marrakesh Agreement Rule D.

<sup>217</sup> Although the TPRM does not enforce compliance with WTO regulations, it creates informal avenues for peer review and encourages transparency. These informal avenues promote compliance with WTO regulations. See Bhuiyan S (2007) 74.

<sup>218</sup> World Trade Organisation *Understanding the WTO* (2008) 53 (hereafter World Trade Organisation 2008).

‘Available evidence suggests that there is a strong incidence of export taxes on natural resources relative to other sectors. According to the WTO’s Trade Policy Reviews (TPRs), export taxes on natural resources appear twice as likely as export taxes in other sectors. In fact, natural resource sectors account for fully [sic] one-third of all export taxes – although they represent less than a quarter of total tradable sectors.’<sup>219</sup>

### **3.3.3 The Council for Trade in Goods, Committee on Subsidies and Countervailing Measures, and the Government Procurement Committee**

All the councils and committees of the WTO are generally supervised by the General Council.<sup>220</sup> In practice, the committees have a moderate level of independence due to the technical nature of their work.<sup>221</sup>

#### **3.3.3.1 The Council for Trade in Goods**

The Council for Trade in Goods is particularly important as it is charged with ensuring that the GATT is implemented.<sup>222</sup> The language of the Marrakesh Agreement is clear in this regard and emphasises the importance of the Council for Trade in Goods.

‘There shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the “Council for TRIPS”), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as “GATS”). The Council for TRIPS shall oversee the

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<sup>219</sup> The statement deals with export taxes on natural resources. This includes taxes on oil. See WTO World Trade Report 2010 Trade in Natural Resource (2010) 116 (hereafter World Trade Organisation 2010).

<sup>220</sup> Article IV (5) of the Marrakesh Agreement provides that the specialised councils shall operate under the general guidance of the General Council.

<sup>221</sup> Van den Bossche P (2008) 126.

<sup>222</sup> See Art IV (5) of the Marrakesh Agreement.

functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the “Agreement on TRIPS”). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.’<sup>223</sup>

The Council for Trade in Goods is the most prominent of the three councils. This may be due to the fact that the regulation of trade in goods is the oldest mandate of the GATT, dating back to 1947. As mentioned above, these councils act within the broad framework of the General Council. Nonetheless, the independence of the Council for Trade in Goods and the other councils is manifest in the above provision. The Councils are enjoined to carry out functions assigned to them in their respective agreements and also functions assigned to them by the General Council. Further, the Councils establish their rules of procedure. Although this is subject to the General Council, it indicates the leverage that has been afforded to the councils under the Marrakesh Agreement. The Council for Trade in Goods ensures that the GATT is implemented. Thus since the GATT contains provisions on the regulation of production quotas, the organ will be relevant in implementing the provisions on quota restrictions in the oil producing countries.<sup>224</sup> Further like all other councils, the Council for Trade in Goods has the power to create subsidiary bodies.<sup>225</sup> The Council for trade has established the Committee on Subsidies and Countervailing Measures.

### **3.3.3.2 Committee on Subsidies and Countervailing Measures**

Article 24 of the SCM established a Committee on Subsidies and Countervailing Measures.<sup>226</sup> The Committee performs functions that are assigned to it under the Agreement as well as by the members. The functions of the committee and relevant provisions of the SCM Agreement are further discussed in section 3.4.3 of this

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<sup>223</sup> See Art IV (5) of the Marrakesh Agreement.

<sup>224</sup> See Art XI of GATT.

<sup>225</sup> See Art IV (6) of the Marrakesh Agreement.

<sup>226</sup> See Art 24 of the SCM Agreement.

chapter. Be that as it may, the Committee plays a central role in regulating subsidies and ensuring that subsidies in international trade are eliminated. The committee particularly supervises the notification of subsidies under Art 25 of the SCM Agreement.<sup>227</sup>

It has been noted that subsidies are some of the issues that affect international trade in oil. OPEC member states have been accused of granting subsidies to their domestic consumers.<sup>228</sup> In addition to the cost incurred in maintaining oil consumption subsidies,<sup>229</sup> these subsidies affect the price of oil. Thus the Committee could play a central role in supervising oil consumption subsidies.

### 3.3.3.3 Committee on Government Procurement

This Committee is not supervised by the Council for Trade in Goods. It is established by a plurilateral agreement, the GPA. Article XXI of the GPA states that the committee shall be made up of representatives from the parties to the Agreement. The parties to the GPA assign the responsibilities of the Committee.<sup>230</sup>

Corruption in government entities is one of the issues that affect international trade in oil in Africa.<sup>231</sup> The Committee can be very relevant if the agreement is multilateral. Currently the GPA is plurilateral and applies to only 41 member states.<sup>232</sup> That includes the 27 States that comprise the European Union.<sup>233</sup> Thus although the Committee has the potential of promoting transparency in international trade in oil, like the GPA, its impact is limited. It should also be noted that currently African members of the WTO have not embraced the GPA.<sup>234</sup>

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<sup>227</sup> See Art 25 of the SCM Agreement.

<sup>228</sup> IEA et al (2010b) 24. See also generally Hochman G & Zilberman D (2011a).

<sup>229</sup> Lang K The First Year of the G-20 Commitment on Fossil-Fuel Subsidies: A commentary on lessons learned and the path forward (2011) The Global Subsidies Initiative (GSI) of the International Institute for Sustainable Development (IISD) 10 (hereafter Lang K 2011).

<sup>230</sup> See Art XXI (1) of the GPA.

<sup>231</sup> See chapter 3 section 3.4.4.

<sup>232</sup> See WTO 'Parties and Observers to the GPA' available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm) (accessed 04 June 2012).

<sup>233</sup> See WTO 'Parties and Observers to the GPA' available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm) (accessed 04 June 2012).

<sup>234</sup> Mosoti V 'The WTO Agreement on Government Procurement: a necessary evil in the legal strategy for development in the poor world?' 2004 *U. Pa. J. Int'l Econ. L.* 596-597 (hereafter Mosoti V 2004).



The above organs, that is the Ministerial Conference, the General Council in all its manifestations, the special Councils, and the Committees are relevant in ensuring the implementation of the WTO legal framework. The organs are especially relevant in enforcing the legal framework with regard to international trade in oil. The Ministerial Conference does not meet often and this may affect the efficiency of the organ. However, the General Council which has a similar mandate keeps the organisation running. The DSB is an important body and it may be an important platform for the resolution of issues affecting international trade in oil. The above statement however is qualified with regard to Africa where for various reasons, the dispute settlement mechanism has not been sufficiently utilised. The Committee on Subsidies and Countervailing Measures will play a crucial role in the regulation of oil consumption subsidies, if the members of the WTO are keen on regulating these subsidies. Finally, although the Committee on Government Procurement has potential in improving transparency and eliminating corruption in international oil trade, the GPA is a plurilateral agreement and this affects the impact of the Committee. It is however evident that the WTO, to a great extent has a credible institutional framework that can positively impact on the regulation of international trade in oil in Africa.

The following section builds on the above discussion by looking at the main legal arguments with regard to international trade in oil, that is, production quotas, oil consumption subsidies and corruption under the GPA. It is necessary to examine the legal framework and its ability to regulate international trade in oil.

### **3.4 Relevant Legal Framework of the WTO**

Article II (2) of the Marrakesh Agreement summarises the relevant legal framework of the WTO. It states that agreements and associated legal instruments included in Annexes 1, 2 and 3 (the multilateral trade agreements) are integral parts of the Marrakesh Agreement and are binding on all members.<sup>235</sup> The above provision

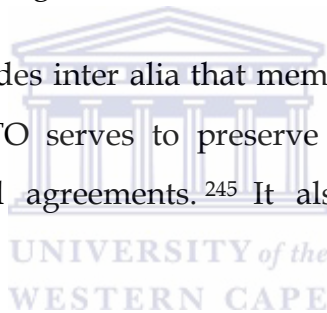
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<sup>235</sup> See Art II (2) of the Marrakesh Agreement.

envisages the above agreements as the major sources of WTO law.<sup>236</sup> Article II (3) provides for plurilateral agreements as additional sources of law.<sup>237</sup> The plurilateral agreements are only binding on those members that have accepted them. Accordingly, the GPA can only be a source of law where a member has accepted the application of the agreement.<sup>238</sup>

The above are not contested sources of law.<sup>239</sup> However, authors note that there are other sources of law, which do not provide for specific enforceable rights and obligations.<sup>240</sup> These sources include WTO dispute settlement reports,<sup>241</sup> acts of WTO bodies, agreements concluded in the context of the WTO, customary international law,<sup>242</sup> general principles of law, other international agreements, subsequent practice of WTO members,<sup>243</sup> teachings of the most highly qualified publicists and the negotiating history of the WTO agreements.<sup>244</sup>

Article 3 (2) of the DSU provides *inter alia* that members recognise that the dispute settlement system of the WTO serves to preserve the rights and obligations of members under the covered agreements.<sup>245</sup> It also provides that the dispute



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<sup>236</sup> The term ‘sources of law’ in this context mainly refers to laws that regulate production quotas, oil consumption subsidies and corruption in oil trade. However, before discussing the above key areas, this section discusses WTO sources of law generally. See Mavroidis P C ‘No outsourcing of law? WTO law as practiced by WTO courts’ (2008) *The American Journal of International Law* Vol. 102 No. 3 421-474 (hereafter Mavroidis P C 2008). The author in the above article defines sources of law as laws that WTO member are obligated to observe due to their membership.

<sup>237</sup> See Art II (3) of the Marrakesh Agreement.

<sup>238</sup> See Annex 4 to the Marrakesh Agreement.

<sup>239</sup> The agreements and annexes are the principal sources of law. See Van den Bossche P (2008) 53.

<sup>240</sup> Van den Bossche P (2008) 42. See also generally Palmetier D (2004).

<sup>241</sup> The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to the dispute in that particular case, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report. This position subsists in the WTO legal framework See *European Economic Community - Restrictions on Imports of Dessert Apples*, (Panel Report) [1989] BISD 36S/93 para 12.1.

<sup>242</sup> The appellate body stressed the need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Art 31(1) of the Vienna Convention on the Law of Treaties. It also stressed that this general rule of interpretation had attained the status of a rule of customary or general international law. See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 16.

<sup>243</sup> It should be noted that single isolated acts do not constitute subsequent practice. As such in *Japan-Alcoholic Beverages II*, (Appellate Body Report) [1996] WT/DS8/AB/R; WT/DS10/AB/R, and WT/DS11/AB/R 13, it was held that panel reports adopted by the DSB do not constitute subsequent practice. It is the sequence of acts that establish subsequent practice.

<sup>244</sup> Van den Bossche P (2008) 42.

<sup>245</sup> See Art 3 (2) of the DSU.

settlement system serves to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.<sup>246</sup>

In line with the above provisions, Art 3 (2) of the DSU establishes a hierarchy in the sources of law.<sup>247</sup> The principal source of law is the WTO agreements. These are equivalent to particular international conventions establishing rules expressly recognised by the contesting parties. The above provisions also highlight the existence of secondary sources of law which are relevant in interpreting the principal sources of law. The most relevant sources of law in this regard are the GATT, the SCM Agreement and the GPA. These Agreements are key in the regulation of international trade in oil.<sup>248</sup> The above Agreements are discussed in light of possible violations of WTO obligations by WTO members that are also OPEC member states.

### 3.4.1 GATT Article XI -Production Quotas

Generally quantitative restrictions including production quotas are harmful to international trade.<sup>249</sup> It has also been noted that government criteria for establishing quantitative restrictions are susceptible to abuse and can breed corruption.<sup>250</sup> Article XI of GATT prohibits quantitative restrictions and provides as follows:

'No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.'<sup>251</sup>

Production quotas maintained by OPEC take the form of export restrictions.<sup>252</sup> It can be argued that production restrictions are different from export restrictions and

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<sup>246</sup> See Art 3 (2) of the DSU.

<sup>247</sup> See Palmetier D & Mavroidis P C 'The WTO legal system: Sources of law' (1998) *The American Journal of International Law* Vol. 92 No. 3 398-413 (hereafter Palmetier D & Mavroidis P C 1998).

<sup>248</sup> See Guerra A J (2001) 14. See also Broome S A (2006) 415. See also Botha L (2009) 3 and 4. See also Desta G M (2003) 388. See also Desta G M (2010) 499. See generally Cottier et al (2009).

<sup>249</sup> Hoekman B M & Kostecki M M (2001) 155.

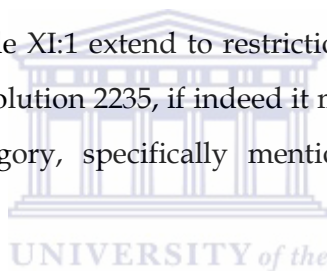
<sup>250</sup> Jackson J H (1997) 153.

<sup>251</sup> See Art XI (1) of the GATT.

<sup>252</sup> Broome S A (2006) 416.

therefore that OPEC production quotas do not fall within the ambit of Art XI.<sup>253</sup> However, as noted in chapter one, production quotas affect the amount of oil available for export and can therefore be considered an export restriction.<sup>254</sup> It has been argued by some commentators that OPEC production quotas are both production and export restrictions and that this puts these restrictions beyond the regulation of Art XI of the GATT.<sup>255</sup> However, there is no indication in the GATT that Art XI was enacted to regulate only export restrictions, and to exclude production restrictions that affect export. Unfortunately, the DSB has not had the opportunity to pronounce itself on this matter.<sup>256</sup> Nonetheless, there are several disputes that discuss the provision generally and are instructive on the issue. For example, in *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* the panel noted thus:

‘...the disciplines of Article XI:1 extend to restrictions of a de facto nature. It is also readily apparent that Resolution 2235, if indeed it makes effective a restriction, fits in the broad residual category, specifically mentioned in Article XI:1, of “other measures”.’<sup>257</sup>



This panel decision is very important as it indicates that the panel will investigate restrictions of a de facto nature. It is the submission of the author that OPEC production quotas are restrictions of a de facto nature. Additionally, as discussed in chapter one, it is irrelevant whether the measure restricting export is legally binding or mandatory.<sup>258</sup> The position on the legal status of the restrictive measure has been clarified by a GATT panel:

‘The Panel then examined the contention of the Japanese Government that the measures complained of were not restrictions within the meaning of Article XI:1 because they were not legally binding or mandatory. In this respect the Panel noted that Article XI:1, unlike other provisions of the General Agreement, did not refer to

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<sup>253</sup> Desta G M (2010) 450.

<sup>254</sup> See chapter 1 section 1.4.2.

<sup>255</sup> Ehring L & Chianale G F (2012) 134-135.

<sup>256</sup> Generally, the WTO has not been very successful in eliminating quotas. See Jackson J H (1997) 153.

<sup>257</sup> See *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, (Panel Report) [2000] WT/DS155/R 117.

<sup>258</sup> See chapter 1 section 1.4.2.

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.<sup>259</sup>

The above position is relevant given the status of OPEC production quotas. It can be argued that these production quotas are not legally binding and that members sometimes dispense with these quotas. However, as indicated above the nature and legal status of the measure is not one of the considerations in deciding whether Art XI (1) has been violated. Article XI (1) of the GATT 1994 retained the same provision as that in the GATT 1947. Thus cases, such as the one above, that were decided under the GATT 1947 are relevant to this discussion.

Further, OPEC countries that are also WTO members have not followed the proper procedures to waive their obligations under the GATT. In *Japanese Measures on Imports of Leather*,<sup>260</sup> the panel held as follows:

'The Panel noted that Article XI: 1 prohibits the use of quantitative restrictions. It recognized that situations might exist in which the maintenance of such restrictions would be justified under the relevant GATT provisions. It noted, however, that Japan had not invoked any provision of the General Agreement to justify the maintenance of the import restrictions on leather. The Panel decided that in such circumstances it was not for it to establish whether the present measures would be justified under any GATT provision or provisions. The Panel considered that the special historical, cultural and socio-economic circumstances referred to by Japan could not be taken into account by it in this context since its terms of reference were to examine the matter "in the light of the relevant GATT provisions" and these provisions did not provide such a justification for import restrictions. It noted that a panel report adopted by the CONTRACTING PARTIES in 1983 had, in a similar situation, concluded "that [such matters] did not come within the purview of Articles XI and XIII of the GATT and ... lay outside its consideration". The Panel therefore found that

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<sup>259</sup> See *Japan - Trade in Semi-Conductors* (Panel Report) [1988] (L/6309 - 35S/116) 28.

<sup>260</sup> See *Japanese Measures on Imports of Leather* (Panel Report) [1984] (L/5623 - 31S/94) 12.

the Japanese import restrictions at issue, made effective through quotas and import licenses, contravened Article XI:1.<sup>261</sup>

The above dispute, although dealing with import restrictions shows that socio-economic circumstances do not provide exceptions to obligations under Art XI of the GATT. Further, that where a WTO member fails to comply with Art XI, justification for non-compliance has to be provided by such party. The justification should rely on GATT provisions. Thus the justification for OPEC production quotas, which is stabilisation of crude oil prices, does not pass the test established above.

The burden of proof regarding disputes over compliance with Art XI is on the party making the assertion. Thus if a party alleges that Art XI has been violated, such a party has to provide proof. In *India – Quantitative Restrictions*,<sup>262</sup> the appellate body confirmed the panel decision that the burden of proof was on the USA which was the complainant. This indicates that WTO members that choose to challenge OPEC production quotas will have to prove the assertion that the quotas are inconsistent with Art XI of the GATT.

It appears from the above discussion that a broad construction of Art XI of the GATT renders OPEC production quotas GATT inconsistent. OPEC member countries that are also WTO members, such as Nigeria and Angola, may therefore be found to be in violation of Art XI of the GATT.

It has been argued by some authors that because OPEC production quotas affect oil in situ, the commodity is outside the realm of WTO/GATT regulation.<sup>263</sup> Further that if the commodity is subject to WTO regulation then OPEC member countries can rely on the exceptions in the GATT.<sup>264</sup> The argument on oil in situ has been dealt with in chapter one.<sup>265</sup> To this end, a critical examination of the general exceptions clause in the GATT is required.

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<sup>261</sup> See *Japanese Measures on Imports of Leather* (Panel Report) [1984] (L/5623 - 31S/94) 12.

<sup>262</sup> See *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (Appellate Body Report) [1999] WT/DS90/AB/R 31-32.

<sup>263</sup> Broome S A (2006) 419. See also Desta G M (2010) 455. See also the discussion on oil as a good in the first part of chapter 1 section 1.4.1.

<sup>264</sup> Broome S A (2006) 419.

<sup>265</sup> See chapter 1 section 1.4.1.

### 3.4.2 GATT Art XX Exceptions

Article XX of the GATT provides a general exception to Art XI.<sup>266</sup> The provision permits quantitative restrictions in specific instances. The provision provides a broad range of exceptions. However Arts XX (g) and XX (h) are the most relevant to this discussion. The relevant clauses state as follows;

‘Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

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

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved.

The exception provided for in this subparagraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.<sup>267</sup>

Article XX has a peculiar method of interpretation. The measure at issue has to fit within one of the exceptions in the subparagraphs and then also conform to the requirements in the chapeau. This position was confirmed by the appellate body in *US-Gasoline*.<sup>268</sup>

‘In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the

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<sup>266</sup> See Art XX of the GATT.

<sup>267</sup> See Art XX (g), (h) and Ad Art XX Subparagraph (h) of the GATT.

<sup>268</sup> See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 22.

requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX (g); second, further appraisal of the same measure under the introductory clauses of Article XX.<sup>269</sup>

The above method of interpretation has been adopted in discussing the above exceptions. Article XX (g) provides for an exception to GATT obligations, where a member state invokes measures relating to the conservation of an exhaustible natural resource if such measures are made effective in conjunction with restrictions on domestic production. The wording of this subparagraph is particularly important. This subparagraph has three major elements.<sup>270</sup> These are: relating to; conservation of exhaustible natural resources; and made effective in conjunction with restrictions on domestic production.<sup>271</sup>

The first element, which is 'relating to' was discussed in *Canada-Herring and Salmon*.<sup>272</sup> The panel held that the measure had to be primarily aimed at conservation of exhaustible natural resources.<sup>273</sup> OPEC production quotas are not primarily aimed at conservation of exhaustible natural resources but rather price stabilisation.<sup>274</sup> With regard to the second element, the mandate of OPEC is price stabilisation and not conservation of the environment.<sup>275</sup> Thus the exception cannot be invoked to justify OPEC production quotas. The last element of this subparagraph is very important,

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<sup>269</sup> See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 22.

<sup>270</sup> Some authors note that Art XX (g) has a three tier structure. See Van den Bossche P (2008) 634.

<sup>271</sup> Van den Bossche P (2008) 634.

<sup>272</sup> See *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon* (Panel Report) [1988] (L/6268 - 35S/98) 12.

<sup>273</sup> See *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon* (Panel Report) [1988] (L/6268 - 35S/98) 12.

<sup>274</sup> See discussion of OPEC mandate in chapter 1 section 1.2.2. It can be argued that the appellate body in *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) [1998] WT/DS58/AB/R 53 provided a broader interpretation of the phrase 'relating to.' The test required in this case was that the measure must be reasonably related to the end pursued. Thus OPEC member states may argue that conservation of an exhaustible natural resource is reasonably related to the production quotas. The author is alive to this possibility and this justifies the analysis of the other parts of Art XX (g).

<sup>275</sup> See discussion of OPEC mandate in chapter 1 section 1.2.2. It is conceded that crude oil is an exhaustible natural resource. However, production quotas are not intended to conserve crude oil but rather to influence global oil prices. Conservation of crude oil can be undertaken under other less restrictive measures such as investing in alternative energy sources and increasing taxes on oil production. These measures do not violate Art XI. See *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) [1998] WT/DS58/AB/R 51-54.



and that is, 'made effective in conjunction with restrictions on domestic production.'<sup>276</sup> OPEC production quotas apply to production generally. There is no distinction between production of oil for export and domestic consumption. However, the last element has been interpreted to mean 'together with' the first and second elements. Thus since the OPEC production quotas are not primarily aimed at conservation of an exhaustible natural resource, the exception does not apply.

This above discussion clearly indicates that restrictions on domestic production are GATT inconsistent. This strongly supports the argument that OPEC production quotas violate Art XI of the GATT. In the event that they pass the three-tier test in Art XX (g), it is unlikely that the quotas will conform to the requirements of the chapeau. In *US-Gasoline*<sup>277</sup> it was held as follows:

'The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of Article XX is generally the prevention of 'abuse of the exceptions of [what was later to become] Article [XX].' This insight drawn from the drafting history of Article XX is a valuable one. The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words, the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.'<sup>278</sup>

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<sup>276</sup> The appellate body has interpreted the term 'in conjunction' to mean together with or jointly with. See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 20.

<sup>277</sup> See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 22.

<sup>278</sup> See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 22.

Justification of OPEC production quotas under Art XX (g) of GATT should not be used to violate obligations and rights under Art XI.<sup>279</sup> The argument that production quotas are intended to conserve an exhaustible natural resource when the OPEC statute clearly stipulates that the mandate of the organisation is price stabilisation amounts to abuse of Art XX (g).<sup>280</sup> The rights of other WTO members that are not OPEC members under Art XI are defeated by arguments that OPEC production quotas are meant to conserve an exhaustible natural resource. OPEC quotas are therefore inconsistent with the requirements in the chapeau of Art XX.

The exception under Art XX (h) caters for intergovernmental commodity agreements.<sup>281</sup> In 1993, the Group on Environmental Measures and International Trade requested for a note on the above agreements.<sup>282</sup> This note explores all the important aspects of this provision. It was reported by the GATT Secretariat at the time that no commodity agreement had been formally brought to its attention.<sup>283</sup> Thus even though OPEC was already in existence, the OPEC statute had not been notified to the WTO as a commodity agreement. Intergovernmental commodity agreements have their origin in the Havana charter and were supposed to be open to all members.<sup>284</sup>

'There is no single definition of an international commodity agreement. However, criteria have encompassed, inter alia, that they be international in scope with representation from both producers and consumers, covering a substantial proportion of world trade in the commodity, and in the form of a legally binding international treaty. International commodity agreements generally entail that governments of producer countries and importing countries have agreed to take common steps concerning the production and trade of a specific commodity.'<sup>285</sup>

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<sup>279</sup> See chapter 6 section 6.2.4 for a further discussion on the chapeau and production quotas.

<sup>280</sup> See Art 2 of the OPEC Statute.

<sup>281</sup> Article XX (h) of the GATT.

<sup>282</sup> GATT Secretariat Trade Provisions Contained in Existing Multilateral Environmental Agreements Vis-à-vis GATT Principles and Provisions Article XX (h) (1993) Group on Environmental Measures and International Trade TRE/W/17 1 (hereafter GATT Secretariat 1993).

<sup>283</sup> GATT Secretariat (1993) 1.

<sup>284</sup> GATT Secretariat (1993) 1.

<sup>285</sup> GATT Secretariat (1993) 5.

It is quite clear from the above discussion that the OPEC statute cannot be regarded as an intergovernmental commodity agreement. It does not have representation from the consumers and the governments of importing countries were not consulted. Thus Art XX (h) cannot be relied upon by OPEC member states. Nonetheless, the application of intergovernmental commodity agreements appears to be changing. The Doha Draft Modalities for Agriculture provide that intergovernmental commodity agreements between 'producing countries' should be recognised under Art XX(h) of GATT.<sup>286</sup> However, these draft modalities are not binding and since 2008, no progress has been achieved on this front. It is also noted that the chapeau of Art XX as discussed above does not condone OPEC production quotas.<sup>287</sup>

OPEC production quotas cannot therefore be justified under Art XX (g) and (h) of the GATT. This is mainly based on the fact that these quotas are intended for price stabilisation. Further, OPEC is not recognised as an intergovernmental commodity agreement at the WTO. Accordingly, OPEC production quotas are inconsistent with Art XI of the GATT. Due to the fact that OPEC production quotas fail to satisfy requirements under Art XX (g) and (h) of the GATT, a detailed inquiry into the chapeau is unnecessary.<sup>288</sup>

### 3.4.3 Subsidies and Countervailing Measures- SCM Agreement

In 2008, the International Energy Association (IEA) revealed that fossil fuel subsidies to consumers amounted to about US \$ 557 billion.<sup>289</sup> Oil consumption subsidies are

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<sup>286</sup> The Doha Draft Modalities for Agriculture TN/AG/W/4/Rev.4 para 100.

<sup>287</sup> See discussion above on the chapeau. See also *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 22.

<sup>288</sup> For a discussion of the chapeau and production quotas, see chapter 6 section 6.2.4.

<sup>289</sup> OPEC disagreed with this estimate as it was based on the price gap approach. The price gap is the difference between a reference price and the actual retail (end-use) price. For net importing countries, reference prices were based on the import parity price: the price of a product at the nearest international hub adjusted for quality differences plus the cost of freight and insurance to the importing country, plus the cost of internal distribution and marketing and any value-added tax (VAT). For net exporting countries, reference prices were based on the export parity price: the price of a product at the nearest international hub adjusted for quality difference, minus the cost of freight and insurance back to the exporting country, plus the cost of internal distribution and marketing and any VAT. OPEC is of the view that subsidy estimates in oil rich countries should be based on the cost of production. See IEA et al (2010a) 15-16. See also Cottier et al (2009) 11.

the highest contributors to fossil fuel subsidies globally.<sup>290</sup> The 2010 World Energy Outlook Report indicates that oil consumption subsidies are highest in the OPEC member states.<sup>291</sup> Oil consumption subsidies are part of the broader category of fossil fuel consumption subsidies.<sup>292</sup> Oil consumption subsidies are mainly implemented through price control regulations.<sup>293</sup>

The G-20 leaders recognised that inefficient fossil fuel subsidies encourage wasteful consumption, distort markets, impede investment in clean energy sources and undermine efforts to deal with climate change.<sup>294</sup> However, it has been noted that the task of eliminating subsidies relating to fossil fuel is not an easy endeavor.<sup>295</sup> Apart from oil consumption subsidies, many oil producing countries also provide production subsidies. It should be noted that no systematic effort has been made in reporting and quantifying production subsidies for fossil fuels.<sup>296</sup> This does not mean that these subsidies do not exist. However, due to the above challenge, the discussion of petroleum or fossil fuel subsidies in this regard is limited to oil consumption subsidies in OPEC member states.

Subsidies as understood in the WTO legal framework are defined in chapter one of this thesis.<sup>297</sup> The major elements arising from the definition of a subsidy are

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<sup>290</sup> Between 2007 and 2009, oil consumption subsidies were in the range of USD 100 to 300 billion annually. See IEA et al (2010b) 18.

<sup>291</sup> See Tanaka N 'World Energy Outlook 2010' available at [http://www.energy.eu/publications/weo\\_2010-China.pdf](http://www.energy.eu/publications/weo_2010-China.pdf) (accessed 07 June 2012). It should be noted that oil consumption subsidies are different from dual pricing. Dual pricing is where the domestic price of a good is lower than the export price. There are instances where dual pricing may be considered a subsidy. However due to the lack of data on export and domestic prices of oil in different African oil producing countries, the issue of dual pricing is beyond the scope of the discussion. See Yanovich A (2012) 21 for a detailed discussion. See also Pogoretsky V 'Energy Dual Pricing in International Trade: Subsidies and Anti-dumping Perspectives' Selivanova Y (ed) *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (2012) 199-211.

<sup>292</sup> See Tanaka N 'World Energy Outlook 2010' available at [http://www.energy.eu/publications/weo\\_2010-China.pdf](http://www.energy.eu/publications/weo_2010-China.pdf) (accessed 07 June 2012).

<sup>293</sup> IEA et al (2010b) 6.

<sup>294</sup> G-20 Leaders' statement: The Pittsburgh Summit. (2009) Pittsburgh, PA, 24–25.

<sup>295</sup> Lang K (2011) 8.

<sup>296</sup> Fossil fuel production subsidies have been estimated at about US \$ 100 billion per year. IEA et al (2010a) 15. See also GSI (Global Subsidies Initiative) (2010), 'Defining Fossil-Fuel Subsidies for the G-20: Which Approach is Best,' Global Subsidies Initiative of the International Institute for Sustainable Development cited in IEA et al (2010b) 14.

<sup>297</sup> Article 1 (1.1) (a) (1) of the SCM Agreement, defines a subsidy as a financial contribution by government or a public body that confers a benefit to a specific enterprise or industry or group of enterprises. See chapter 1 sections 1.1.1 and 1.5. This definition raises two important questions. That is; cost to the government and benefit to a particular industry. It has been argued that the emphasis of the definition should focus on benefit as opposed to cost. It has been succinctly illustrated by Jackson J H (1997) 295, that governments can

financial contribution, by government or a public body and conferring a benefit.<sup>298</sup> It is worth noting that government revenue that is foregone is also a financial contribution.<sup>299</sup> Revenue foregone does not apply where domestic laws exempt particular products from taxation. For example, it cannot be argued that because Nigeria chose to exempt petroleum products from value added tax (VAT), the government had made a financial contribution under Art 1 of the SCM Agreement.<sup>300</sup> However, where the Nigerian government transfers funds to a government program to reduce the cost of petroleum products for select groups in society, that may amount to a financial contribution within the meaning of Arts 1 (1.1) (a) (1) (iv) of the SCM Agreement.<sup>301</sup> In the Nigerian case, the population benefit from low oil prices at the pump. Persons that are involved in various businesses, especially the transport industry and the producers of petroleum products take advantage of such subsidies.<sup>302</sup> It can also be argued that oil producers in Nigeria indirectly benefit from the subsidy due to the available market for oil created by the low subsidised prices.

It is argued in this thesis that oil consumption subsidies may be found to be inconsistent with Art 3 (1) (b) of the SCM Agreement. The provision states as follows:

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maintain subsidies without incurring costs. Thus the analysis of what amounts to a subsidy should focus on benefit. See also chapter 6 section 6.2.4 for further discussion on subsidies.

<sup>298</sup> Van den Bossche P (2005) 555.

<sup>299</sup> See Art 1 (1.1) (a) (1) (ii) of the SCM Agreement. The revenue foregone depends on the taxation rules of the WTO member; if the tax rules provide that a good should be taxed then it should be taxed. If the tax is foregone contrary to the taxation rules then that amounts to a financial contribution. See Van den Bossche P (2005) 556.

<sup>300</sup> See Economic Confidential 'Subsidy-Govt Grants Waiver for Oil Importing Companies-FIRS' available at <http://economicconfidential.net/new/financial/tax-matters/897-subsidy-govt-grants-waiver-for-oil-importing-companies-firs> (accessed 30 April 2013).

<sup>301</sup> Financial contribution does not have to be direct. It may take the form of a government practice involving the transfer of funds. See Van den Bossche P (2005) 556. The Nigeria subsidy program involves the Petroleum Products Pricing and Regulatory Agency (a government body) making subsidy payments to marketers of petroleum products, to reduce the ex-pump cost of petroleum products. The subsidies ultimately benefit petroleum consumers. See The Sun 'Nigeria saves N1.9trn in oil subsidy payment last year – PPPRA' available at <http://sunnewsonline.com/new/cover/nigeria-saves-n1-9trn-in-oil-subsidy-payment-last-year-pppra/> (accessed 30 April 2013).

<sup>302</sup> It has been noted that one of the policy goals of Nigeria's fuel subsidy is to improve the transport system. It can be argued that due to the above consideration, persons involved in the transport industry will greatly benefit from the subsidy. However, the transport industry is a service sector and the SCM Agreement may not apply. See Onwe O J 'Economic Implications of Petroleum Policies in Nigeria: An Overview' (2012) *American International Journal of Contemporary Research* Vol. 2 No. 5 64 (hereafter Onwe O J 2012).

'3(1) Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited...

... (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.'<sup>303</sup>

The language of the above provision was been interpreted by the appellate body. The term 'contingent' was interpreted to refer to subsidies contingent in both law and fact.<sup>304</sup> Thus oil consumption subsidies offered by OPEC member states may violate Art 3 (1) (b) of the SCM Agreement. This is so irrespective of the fact that the subsidies are provided in the law or are offered as a matter of fact. In *Canada-Autos*<sup>305</sup> the appellate body held thus:

'Finally, we believe that a finding that Article 3.1(b) extends only to contingency 'in law' upon the use of domestic over imported goods would be contrary to the object and purpose of the SCM Agreement because it would make circumvention of obligations by Members too easy. ...For all these reasons, we believe that the Panel erred in finding that Article 3.1(b) does not extend to subsidies contingent 'in fact' upon the use of domestic over imported goods. We, therefore, reverse the Panel's broad conclusion that 'Article 3.1(b) extends only to contingency in law.'<sup>306</sup>

As noted above, OPEC member states heavily subsidise oil consumption.<sup>307</sup> Thus it can be argued that where such subsidies induce consumers to buy and use locally produced oil as opposed to imported oil, such subsidies will be held to be inconsistent with the SCM Agreement.<sup>308</sup> Such subsidies may affect the markets of other oil producing countries especially the emerging oil producers in Africa. The

<sup>303</sup> See Art 3 of the SCM Agreement.

<sup>304</sup> See *Canada – Certain Measures Affecting the Automotive Industry* (Appellate Body Report) [2000] WT/DS139/AB/R WT/DS142/AB/R 47.

<sup>305</sup> See *Canada – Certain Measures Affecting the Automotive Industry* (Appellate Body Report) [2000] WT/DS139/AB/R WT/DS142/AB/R 47.

<sup>306</sup> See *Canada – Certain Measures Affecting the Automotive Industry* (Appellate Body Report) [2000] WT/DS139/AB/R WT/DS142/AB/R 47.

<sup>307</sup> The term 'fossil fuel' in this regard mainly refers to oil. See Tanaka N 'World Energy Outlook 2010' available at [http://www.energy.eu/publications/weo\\_2010-China.pdf](http://www.energy.eu/publications/weo_2010-China.pdf) (accessed 07 June 2012).

<sup>308</sup> It can be argued that such oil consumption subsidies that in effect also benefit domestic oil producers are protected under Art III (8) (a) of the GATT. Even then such subsidies are actionable. Article III (8) (a) of the GATT provides for payments made exclusively to producers. In this case the contested subsidies are not directly and exclusively paid to oil producers. See Sykes A O *The Economics of WTO Rules on Subsidies and Countervailing Measures* (2003) John M. Olin Law & Economics Working Paper No. 186 19 (hereafter Sykes A O 2003).

subsidies discussed above are prohibited under the SCM Agreement.<sup>309</sup> According to Art 4 (7) of the SCM Agreement if a panel finds that a measure is a prohibited subsidy, the subsidising member has to withdraw the measure without delay.<sup>310</sup> The SCM Agreement provides additional procedures for the resolution of disputes involving subsidies.<sup>311</sup> However, in Nigeria the subsidies do not encourage consumption of domestic over imported oil. The country mainly depends on imported oil products due to a low oil refining capacity.<sup>312</sup>

Prohibited subsidies such as those discussed above, are deemed to be specific and do not have to undergo the test of specificity in Art 2 of the SCM Agreement.<sup>313</sup> It should be noted that all other subsidies can only be regarded as inconsistent with the SCM Agreement if they are specific to a particular industry.<sup>314</sup> The above position has been clarified by a WTO panel:

‘As with any analysis under the SCM Agreement, the first issue to be resolved is whether the measures in question are subsidies within the meaning of Article 1 that are specific to an enterprise or industry or group of enterprises or industries within the meaning of Article 2 [sic].’<sup>315</sup>

Article 2 of the SCM Agreement provides principles to be applied in defining specificity for purposes of Art 1. Although the provision provides express rules to determine specificity, it also provides for de facto specificity.<sup>316</sup> For example where the subsidy is in fact predominantly used by certain enterprises, even though it might be available to all.<sup>317</sup> In this regard, it can be argued that oil consumption

<sup>309</sup> See Art 3 of the SCM Agreement.

<sup>310</sup> See Art 4 (7) of the SCM Agreement.

<sup>311</sup> See Art 4 of the SCM Agreement.

<sup>312</sup> See Reegle ‘Nigeria (2012) Energy Reliance’ available at <http://www.reegle.info/policy-and-regulatory-overviews/NG> (accessed 30 April 2013).

<sup>313</sup> See Art 2 (3) of the SCM Agreement.

<sup>314</sup> See Arts 1 and 2 of the SCM Agreement.

<sup>315</sup> See *Indonesia - Certain Measures Affecting the Automobile Industry* (Panel Reporting) [1998] WT/DS54/R WT/DS55/R WT/DS59/R WT/DS64/R 370.

<sup>316</sup> See Art 2 (c) of the SCM Agreement. See also United Nations Conference on Trade and Development Dispute Settlement World Trade Organisation Subsidies and Countervailing Measures (2003) UNCTAD/EDM/Misc.232/Add.15 14. See also Jackson J H (1997) 297.

<sup>317</sup> See Art 2 (c) of the SCM Agreement. See also Jackson J H (1997) 297. See also Holmer A F & Bello J H ‘The U.S.- Canada Lumber Agreement: past as prologue’ (1987) *International Lawyer* 21 1185 (hereafter Holmer A F & Bello J H 1987).

subsidies in Nigeria in fact benefit persons involved in the transport industry, who rely on the subsidised oil as well as the domestic oil producers who are guaranteed a market for their commodity.<sup>318</sup> However, it should be noted that the transport industry is a services sector and therefore is beyond the scope of the SCM Agreement. The specificity of the oil consumption subsidy to the domestic oil producers is also questionable. The oil consumption subsidy applies to all oil products in Nigeria, that is imported and domestically produced oil products.<sup>319</sup>

Article 5 of the SCM Agreement provides for actionable subsidies.<sup>320</sup> These will be challenged where the subsidies cause adverse effects to the domestic industry of another member.<sup>321</sup> The subsidies should affect like products.<sup>322</sup> Oil consumption subsidies affect the domestic oil industries of other countries.<sup>323</sup> The Nigerian oil subsidy program encouraged oil smuggling to Cameroon.<sup>324</sup> At the beginning of 2012, the smuggling reduced as the government started cutting back on the subsidies.<sup>325</sup> It should be noted that actionable subsidies will attract countervailing measures if they cause material injury or serious prejudice.<sup>326</sup> Accordingly, a detailed examination of oil consumption subsidies and material injury is pertinent to the above discussion. However, due to the lack of credible data on the volumes of subsidised oil imports and prices of oil in Cameroon, such an analysis has not been undertaken and it cannot be said with certainty that Nigerian oil consumption subsidies have caused material injury to the oil producing industry in Cameroon.

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<sup>318</sup> Onwe O J (2012) 64.

<sup>319</sup> Petroleum Products Pricing Regulatory Agency Revised Guidelines for the Administration of Petroleum Support Fund (PSF) (2009) Part III Principle 1.

<sup>320</sup> See Art 5 of the SCM Agreement.

<sup>321</sup> See Art 5 (a) of the SCM Agreement. See also Van den Bossche P (2005) 569.

<sup>322</sup> Petroleum consumed in the different countries is the same and has similar characteristics. See Van den Bossche P (2005) 568 for a discussion on 'likeness.'

<sup>323</sup> Domestic industry refers to domestic producers as a whole of the like product. See Art 16 (1) of the SCM Agreement. In this case the domestic industry in Cameroon would be producers of oil products.

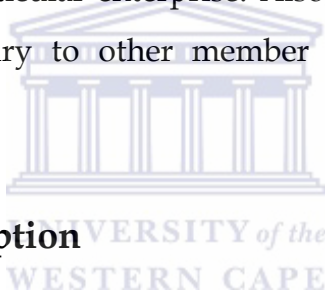
<sup>324</sup> It is estimated that fuel smuggled from Nigeria accounts for about 30% of the petroleum consumed in Cameroon. This affects the oil producers in Cameroon as the country is also an oil producing country. See Cameroon 'General Facts' available at <http://www.finpro.fi/documents/10304/ee3bdcdc-1247-428b-9f70-58ad5375c01d> (accessed 16 October 2012). See also Reuters 'Nigeria Investigates \$4 bln Fuel Subsidy Fraud' available at <http://www.reuters.com/article/2012/01/19/nigeria-fuel-scam-idUSL6E8CJ3TH20120119> (accessed 30 April 2013). See also Jackson J H (1997) 294.

<sup>325</sup> The high incidence of smuggling may imply that the cheap oil from Nigeria was affecting the price of oil in Cameroon. See Business Day 'Subsidy Removal Cripples Fuel Smuggling Across Nigerian Borders' available at <http://www.businessdayonline.com/NG/index.php/news/76-hot-topic/31798-subsidy-removal-cripples-fuel-smuggling-across-nigerian-borders> (accessed 30 April 2013).

<sup>326</sup> Jackson J H (1997) 294.



The SCM Agreement also provides redress for violations under Arts 3 and 5.<sup>327</sup> These include: withdrawal of the subsidy for prohibited subsidies, and either removal of adverse effects, or withdrawal of the subsidy, for actionable subsidies.<sup>328</sup> If neither of these remedies is acceptable to the infringing country, the complainant may impose countervailing measures.<sup>329</sup> The SCM Agreement has rules that may be interpreted to cover oil consumption subsidies. It is evident that oil consumption subsidies and the manner in which they are provided in some African oil producing countries, might be interpreted as a financial contribution. These subsidies may in some cases be found inconsistent with provisions on prohibited subsidies. However, it is difficult to prove that these subsidies encourage the use of domestic over imported oil. Therefore it cannot be said that they are prohibited. With regard to actionable subsidies, there are challenges with regard to determining whether these subsidies are specific to a particular enterprise. Also, there is little proof that these subsidies cause material injury to other member states that are oil producing countries.



### 3.4.4 The GPA and Corruption

During the ITO negotiations, the USA proposed that governmental purchases and contracts should be treated like other measures relating to trade in goods and be subject to national treatment and MFN treatment.<sup>330</sup> This proposal was rejected by other states because it would have affected their legislation which provided preference to domestically produced goods.<sup>331</sup> In December 1977, the GATT secretariat prepared a draft document for negotiations on government procurement.<sup>332</sup> The draft was prepared after the Organisation for Economic Co-

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<sup>327</sup> Palmeter D (2004) 346.

<sup>328</sup> See Arts 4 (7) and 7 (8) of the SCM Agreement.

<sup>329</sup> See Arts 4 (10) and 7 (9) of the SCM Agreement.

<sup>330</sup> Blank A & Marceau G 'The history of the government procurement negotiations since 1945' (1996) *Public Procurement Law Review* 5 1 (hereafter Blank A & Marceau G 1996). See also Guimarães de Lima e Silva V 'The revision of the WTO Agreement on Government Procurement: to what extent might it contribute to the expansion of current membership?' (2008) *Public Procurement Law Review* Issue 2 62 (hereafter Guimarães de Lima e Silva V 2008).

<sup>331</sup> Blank A & Marceau G (1996) 77.

<sup>332</sup> GATT Multilateral Trade Negotiations Group "Non-Tariff Measures" Sub-Group "Government Procurement" Summing-up by the Chairman MTN/NTM/42 1978.

operation and Development (OECD) draft instrument on government purchasing policies, procedures and practices was presented to the GATT.<sup>333</sup>

The draft Integrated text for negotiations on government procurement led to negotiations which resulted into the GPA after the Tokyo round and came into force in 1981.<sup>334</sup> Further negotiations resulted into a new GPA which came into force in 1996.<sup>335</sup> Parties to the GPA continued negotiations and in 2012, the Committee on Government Procurement adopted the results of the negotiations.<sup>336</sup> The negotiations were meant to make the GPA simpler and more appealing to WTO members.<sup>337</sup> Article I (1) of the GPA states that it applies to any law, regulation, procedure or practice regarding any procurement by entities covered by the agreement.<sup>338</sup> As noted in section 3.3.3.3 above, the GPA is plurilateral and only applies to particular members.<sup>339</sup>

Corruption has been defined as an illegal payment to a public organisation or agent.<sup>340</sup> The above definition has shortcomings as it appears to disregard activities other than illegal payments that may motivate public officials to refrain from making decisions or to influence decisions to benefit particular groups. Transparency International defines corruption as the abuse of entrusted power for private gain.<sup>341</sup> This definition is broad and covers all forms of inducements that may motivate the abuse of public office.<sup>342</sup> It has been noted by some authors that due to the methods

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<sup>333</sup> Blank A & Marceau G (1996) 97.

<sup>334</sup> Blank A & Marceau G (1996) 102.

<sup>335</sup> Agreement on Government Procurement Annex 4 of the Marrakesh Agreement (GPA).

<sup>336</sup> Adoption of the Results of the Negotiations Under Article XXIV:7 of the Agreement on Government Procurement, Following their Verification and Review, as Required by the Ministerial Decision of 15 December 2011 (GPA/112), Paragraph 5GPA/113 2 April 2012.

<sup>337</sup> Guimarães de Lima e Silva V (2008) 66.

<sup>338</sup> See Art I (1) of the GPA.

<sup>339</sup> See chapter 3 section 3.3.3.3. See also Hoekman B M & Kostecki M M (2001) 378.

<sup>340</sup> Mehrara M et al 'The corruption and income distribution in OPEC and OECD Countries: a comparative study' (2011) *Int. J. Eco. Res* 2(6) 51 (hereafter Mehrara M et al 2011).

<sup>341</sup> See Transparency International 'What is the Corruption Perceptions Index' available at [http://cpi.transparency.org/cpi2011/in\\_detail/](http://cpi.transparency.org/cpi2011/in_detail/) (accessed 07 June 2012).

<sup>342</sup> The above definition has been criticised as being too restrictive as it does not consider the international dimension of corruption. However, the criticism lacks a strong foundation. Although transparency international investigates corruption in individual states as opposed to cross-border corruption, the method of investigation does not affect its definition of corruption. Besides, the definition can be expanded to include cross-border corruption. The criticism also appears weak in light of the fact that events that facilitate cross-border corruption happen in particular jurisdictions. The only strong point of the above criticism is the fact that the definition appears to disregard the persons who induce corruption, the persons who pay to influence

of collection and disposal of revenue in OPEC member states, the incidence of corruption is high:

'Most crucially for our purposes, in every OPEC state, the government acquires, owns and disposes of all oil revenues. Substituting for direct taxation, these revenues insulate political leaders from political demands and obligations and provide them with an unconstrained freedom to manoeuvre that is rare elsewhere. Indeed, the opportunities for rent-seeking thus generated are of a distinctively high scale. Thus, a well-placed analyst writes that these revenues are used to 'secure political peace, if not loyalty, ensure public employment as the first option, distribute patronage when effective and coopt the opposition whenever possible.'<sup>343</sup>

Disposal of oil revenue in OPEC member states and procurement are related. Disposal of revenue will in some cases lead to procurement. The GPA is a moderately reliable tool in curbing corruption at the stage of revenue disposal.<sup>344</sup> The GPA provides for tendering procedures and qualification of suppliers.<sup>345</sup> These provisions enable a peer review mechanism that allows other states to challenge illegal tendering processes. The Committee on Government Procurement provides additional support as it supervises implementation of this Agreement. The provisions on tendering and qualification of suppliers are very relevant to the oil sector and greatly reduce corruption. However, this Agreement is plurilateral and has limited application.

'Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.'<sup>346</sup>

There is no jurisprudence on the above provision from the WTO.<sup>347</sup> Nonetheless, the language is clear. The provision ensures that trade restrictive practices are

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public officials. See Shaxson N Oil, Corruption and the Resource Curse (2007) Royal Institute of International Affairs Vol 38 No.6 Africa and Security 1126 and 1130 (hereafter Shaxson N 2007).

<sup>343</sup> Montinola G & Jackman R W (2002) 158.

<sup>344</sup> It has been argued that the GPA can be a helpful tool in reducing corruption and rent seeking. See Hoekman B M & Kosteci M M (2001) 380.

<sup>345</sup> See Arts VII and VIII of the GPA.

<sup>346</sup> See Art VII of the GPA.

eliminated from procurement and that transparency reigns in the procurement process.<sup>348</sup> It is worth noting that the GPA has flexibilities that allow developing and less developed countries to waive some of the obligations.<sup>349</sup> However this is done within the GPA framework and in a manner that does not encourage corruption. The GPA has not been widely applied due to provisions that allow member states to apply the agreement only to particular entities.<sup>350</sup> This allows member states to circumvent obligations in the GPA. The above reason informed the panel's decision in *Korea – Measures Affecting Government Procurement*:

'In light of our findings in Section VII, above, we conclude that the entities which have been conducting procurement for the IIA project are not covered entities under Korea's Appendix I of the GPA and are not otherwise covered by Korea's obligations under the GPA.'<sup>351</sup>

The GPA has the potential of promoting transparency and reducing corruption in international trade in all sectors, including international trade in oil. However, the plurilateral nature of the agreement and its application only to particular entities, affects its impact. The author is aware that other provisions such as Art X of the GATT also address transparency.<sup>352</sup> However, the discussion of transparency in the GATT is broad and not specific to procurement; thus it is beyond the scope of this study.

### 3.5 Conclusion

The WTO rules apply to international trade in oil. It is apparent that the indifferent attitude of the organisation to the regulation of international trade in oil and other

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<sup>347</sup> Debate on transparency and corruption at the WTO is really low to the extent that some commentators have erroneously noted that issues of corruption in the multilateral negotiations 'are not even a glimmer in the eye[s] of multilateral trade negotiators.' See Steger D (2009) 16-17.

<sup>348</sup> See Art XVII of the GPA. See also Evenett S J 'Multilateral Disciplines and Government Procurement' Hoekman B et al (eds) *Development, Trade, and the WTO A Handbook* (2002) 420 (hereafter Evenett S J 2002). The GPA discourages corruption and rent seeking among government officials.

<sup>349</sup> See Art V of the GPA.

<sup>350</sup> See Art I of the GPA.

<sup>351</sup> See *Korea – Measures Affecting Government Procurement* (Panel Report) [2000] WT/DS163/R 191.

<sup>352</sup> See generally Ala'I P 'From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance' Steger D P *Redesigning the World Trade Organization for the Twenty-first Century* (2009) (hereafter Ala'I P 2009).

oil related disputes might be explained by lack of political will on the part of WTO members. African countries appear to be silent on international trade in oil despite the increasing proven oil reserves on the continent.

The Ministerial Conference, the General Council and all its alter egos and the special councils and committees ensure that the various agreements of the WTO are implemented. African oil producing countries can benefit from these institutions especially the DSB. The organs can also ensure that illegal and trade restrictive practices are eliminated from the international trade in oil. Nonetheless, some of the oil related disputes are not covered in the WTO agreements and this may create challenges for the DSB in resolving such disputes. Decision making in the WTO and the different organs of the organisation is inclusive and allows for the participation of all members. Based on the composition of the Ministerial Conference and the General Council, these bodies have the political legitimacy to transform international trade rules to effectively regulate international trade in oil. The institutional framework to regulate international trade in oil is sufficient and can be effective if the WTO legal framework is improved to specifically apply to international trade in oil.

The legal framework of the WTO is comprehensive and covers a broad range of areas in international trade. There are rules to regulate production quotas, oil consumption subsidies, and corruption. Nonetheless, these rules can be improved to apply directly to international trade in oil. Article XI of the GATT on the regulation on quantitative restrictions is a possible avenue for investigating the compliance of OPEC production quotas with GATT obligations. The discussion of the SCM Agreement and its rules on prohibited and actionable subsidies also indicates that oil consumption subsidies may be inconsistent with WTO obligations. However, the SCM Agreement has challenges especially with regard to the determination of specificity of oil consumption subsidies and the determination of material injury to other oil producing member states. This is the position in some African oil producing countries such as Nigeria. The GPA has challenges and may not be an appropriate tool for the control of corruption in the international trade in oil. The

### Chapter 3: The WTO and International Trade in Oil

GPA is plurilateral and none of the African oil producing WTO members are parties to it. The WTO legal framework has to be improved to cater for trade restrictive practices in international trade of oil.

The next chapter examines the institutional and legal framework of OPEC. Building on the discussion in this chapter, chapter four investigates whether the OPEC Statute is an appropriate instrument for the regulation of international trade in oil.



## CHAPTER 4

### THE ORGANISATION OF PETROLEUM EXPORTING COUNTRIES (OPEC) AND THE REGULATION OF INTERNATIONAL TRADE IN OIL

#### 4.1 Introduction

Chapter three examined the institutional and legal framework of the World Trade Organisation (WTO), particularly, how production quotas, oil consumption subsidies, and corruption are regulated by the organisation. This chapter adopts a similar framework and examines the regulation of the above areas and the institutions within OPEC that are relevant to the regulation of these key areas. The chapter also discusses non-WTO alternatives to OPEC regulation of the above key areas. These alternatives are discussed in the context of Nigeria and Angola due to the fact that OPEC lacks express rules to regulate subsidies and control corruption.<sup>1</sup> The above discussion is relevant to the discourse as it highlights the existence of other legal and extralegal interventions that are available for the regulation of issues such as corruption in the oil sector, which are not sufficiently addressed by the OPEC Statute.

OPEC countries produce about 40 percent of the world's oil and hold about 80 percent of the world's proven oil reserves.<sup>2</sup> The above statistics indicate that OPEC is and will continue to have a vested interest in the production and the international trade in oil. Nonetheless, as discussed in the first and third chapters OPEC relies on production quotas as a tool for stabilisation of oil prices.<sup>3</sup> These quotas are inconsistent with Art XI of the General Agreement on Tariffs and Trade (GATT).<sup>4</sup>

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<sup>1</sup> These African countries are members of both the WTO and OPEC. See chapter 4 section 4.5.

<sup>2</sup> See Institute for the Analysis of Global Security 'The Geopolitics of Oil' available at [www.iags.org/geopolitics.html](http://www.iags.org/geopolitics.html) (accessed 12 July 2012).

<sup>3</sup> See chapter 1 section 1.2.2.

<sup>4</sup> Production quotas maintained by OPEC take the form of export restrictions. See chapter 3 sections 3.4.1 and 3.4.2.

They also affect the liberalisation of international trade in oil.<sup>5</sup> This chapter critically examines the justification for these quotas under the OPEC Statute.

Chapter three also discussed oil consumption subsidies and their relationship to the Agreement on Subsidies and Countervailing Measures (SCM Agreement).<sup>6</sup> Oil consumption subsidies in the OPEC member states appear to be provided as a matter of practice and are not directly regulated by the OPEC Statute.<sup>7</sup> Nevertheless, oil consumption subsidies may be inconsistent with the SCM Agreement. However, there are challenges with regards to determination of specificity of these subsidies and whether they cause material injury to the domestic oil industries of other member countries.<sup>8</sup> Building on the discussion in the preceding chapter, this chapter examines the implication of oil consumption subsidies on international trade in oil and the justification for oil consumption subsidies under the OPEC Statute.

Corruption and the lack of transparency continue to affect the oil sector in many countries.<sup>9</sup> The Government Procurement Agreement (GPA) provides a solution to this problem as it sets rules for government procurement.<sup>10</sup> However, the Agreement has challenges.<sup>11</sup> In comparison, the OPEC Statute does not directly provide for the

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<sup>5</sup> Production quotas restrict price competition among the OPEC member states. It has been argued by some authors that OPEC has not been very successful in eliminating price competition. This has been attributed to OPEC members cheating on their production allocations. However, OPEC member states control a large percentage of oil production and trade and thus their policies on production restriction still have an effect on global oil prices. See Zycher B 'The Concise Encyclopedia of Economics OPEC' available at <http://www.econlib.org/library/Enc1/OPEC.html> (accessed 26 April 2013). It has also been argued that trade restrictive practices such as quotas discourage innovation and only encourage rent seeking. Thus trade restriction is an enabling environment for corruption. See Looney R 'Profiles of corruption in the Middle East' (2005) *Journal of South Asian and Middle Eastern Studies* Vol XXVIII No. 4 8 (hereafter Looney R 2005).

<sup>6</sup> See chapter 3 section 3.4.3.

<sup>7</sup> Article 2 of the OPEC Statute provides the mandate of the organisation. It does not expressly provide for the subsidisation of oil consumption. However, the provision states that one of the principal aims of the organisation is to safeguard the individual and collective interests of the members. Politically, subsidisation of oil consumption builds political capital. Thus it can be argued that oil consumption subsidies are indirectly provided for in the OPEC Statute under Art 2. See also chapter 3 section 3.4.3.

<sup>8</sup> See chapter 3 section 3.4.3.

<sup>9</sup> Oil and gas and mining are the most corrupt industries according to a corruption index published by transparency international. See Clean Technica 'Oil and Gas Industry Leads Global Corruption Index: US More Corrupt than Qatar' available at <http://cleantechnica.com/2011/05/07/oil-and-gas-industry-leads-global-corruption-index-us-more-corrupt-than-qatar/> (accessed 12 July 2012).

<sup>10</sup> See chapter 3 section 3.4.4.

<sup>11</sup> See chapter 3 section 3.4.4.



regulation of corruption. However, empirical studies have revealed that trade restrictive policies such as quotas and subsidies encourage corruption.<sup>12</sup>

The discussion of production quotas, subsidies and corruption in this chapter is undertaken together with the institutions that are established to implement the OPEC Statute. That is, the Conference, the Board of Governors (the Board), and the Secretariat.<sup>13</sup> An examination of the institutions and the various roles they perform is relevant as it sets ground for the discussion of the legal framework on production quotas, oil consumption subsidies, and corruption.

The discourse in the chapter commences with a discussion of the various preliminary issues related to the nature of OPEC as an organisation. It is necessary to unpack these issues so as to understand the mandate of the organisation. Secondly, the chapter provides a detailed analysis of the roles of the various organs or institutions in the OPEC Statute, and then focuses on the investigation of the legal framework of OPEC and the regulation of production quotas, oil consumption subsidies, and corruption. African examples are relied upon in the discourse. Finally, the chapter examines non-WTO alternatives to OPEC regulation in some African oil producing countries.

## **4.2 Understanding the Nature of OPEC and the Regulation of Oil Production**

This section examines preliminary issues that are relevant to understanding the nature of OPEC and its mandate. The section reveals one major theme, that OPEC is an exclusive club for net oil exporting and producing countries whose main interest is price control.

Article 7 of the OPEC Statute is relevant to the above discussion.<sup>14</sup> One of the membership requirements of the organisation is that a prospective member should

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<sup>12</sup> See Dutt P 'Trade Protection and Bureaucratic Corruption: An Empirical Investigation' available at [http://faculty.insead.edu/dutt/Research/corruption\\_trade05.pdf](http://faculty.insead.edu/dutt/Research/corruption_trade05.pdf) (accessed 26 April 2013).

<sup>13</sup> See chapter 3 of the OPEC Statute.

<sup>14</sup> See Art 7 (C) of the OPEC Statute.

be a substantial net exporter of crude oil with similar interests to those of other members.<sup>15</sup> The name of the organisation and the above provision seem to suggest that all countries that export oil may join the organisation. Thus it can be argued that countries like South Africa that have refineries, and which export oil products may seem like potential members. However, these countries do not have similar interests as those of the OPEC members because they do not produce crude oil.

Another topical issue which should be highlighted at the outset is whether OPEC operates as a cartel.<sup>16</sup> Some scholars have described OPEC as a profit maximising cartel.<sup>17</sup> A profit maximising cartel is defined as an organised group of producers formed to obtain higher prices by restricting production or dividing the market.<sup>18</sup> This is achieved through restricting supply and controlling production of crude oil.<sup>19</sup> While it is debatable as to whether OPEC is a cartel, it is evident that OPEC restricts production and limits supply.<sup>20</sup> As such, the organisation may be described as a profit maximising cartel.

The other issue which is relevant to the discussion is whether OPEC is a commodity organisation. In 2005, OPEC's director for research, Dr. Shihab, described the organisation as having its roots in a commodity organisation.<sup>21</sup> He further noted that

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<sup>15</sup> See Art 7 (C) of the OPEC Statute.

<sup>16</sup> The office of fair trading in the United Kingdom has defined a cartel as an agreement between businesses not to compete with each other. The agreement is usually secret, verbal and often informal. This definition ignores international organisations that are legally set up to discourage competition. Some scholars have divided up cartels into different categories and have provided for state run export cartels. These, they say, are motivated by both political and economic factors and are distinct from private international profit maximising cartels. The latter definition, state run export cartels, appears to include organisations such as OPEC. See Office of Fair Trading 'What is a Cartel?' available at <http://www.ofl.gov.uk/OFTwork/competition-act-and-cartels/cartels/what-cartel#.UXriGVKQndk> (accessed 26 April 2013). See also Evenett S J et al International Cartel Enforcement: Lessons from the 1990s (2001) Economic Department Working Series 1-1 3 (hereafter Evenett S J et al 2001). The reasons that have been advanced to exclude OPEC from classification as a cartel include; the fact that production quotas were not introduced at the onset and only appeared in 1983, that the Organisation lacks a monitoring system to ensure compliance with quotas. Further, that the Organisation does not have a mechanism to ensure that countries do not violate the quotas. See Alhajji A F & Huettner D 'OPEC and other commodity cartels: a comparison' (2000) *Energy Policy* 28 1151 (hereafter Alhajji A F & Huettner D 2000). See also Griffin J M & Xiong W 'The incentive to cheat: an empirical analysis of OPEC' (1997) 40 *J.L. & Econ* 289 (hereafter Griffin J M & Xiong W 1997).

<sup>17</sup> Alhajji A F & Huettner D (2000) 1151-1152.

<sup>18</sup> Alhajji A F & Huettner D (2000) 1152.

<sup>19</sup> Alhajji A F & Huettner D (2000) 1152.

<sup>20</sup> Alhajji A F & Huettner D (2000). See also generally, Griffin J M & Xiong W (1997). See also chapter 1 section 1.2.2.

<sup>21</sup> See OPEC 'Oil and Development: The Role of OPEC: A Historical Perspective and Outlook to the Future' available at [http://www.opec.org/opec\\_web/en/press\\_room/894.htm](http://www.opec.org/opec_web/en/press_room/894.htm) (accessed 19 July 2012).

OPEC is largely a single-commodity organisation.<sup>22</sup> However, a commodity organisation is composed of both producers and consumers.<sup>23</sup> This is true for tin, coffee, cocoa, sugar, and wheat.<sup>24</sup> The foregoing discussion is consistent with the debate in chapter three which indicates that the OPEC Statute is not recognised as a commodity agreement under the WTO framework.<sup>25</sup> However reference to OPEC as a commodity organisation may be motivated by the fact the organisation regulates the production of crude oil, which is a commodity.

Related to the discussion in the introductory paragraphs of this section is the price stabilisation role of OPEC. Despite the fact that OPEC does not directly set the price of oil, its production quotas affect the price of oil on the world market.<sup>26</sup> OPEC fixes production quotas with the intention of influencing the price of oil on the world market. The oil price collapse of 1998-1999 illustrates the above argument.<sup>27</sup>

'When OPEC oil ministers met in Jakarta, November 26-December 1 1997, with the Brent oil price at [US] \$ 20/barrel, they decided to increase their output ceiling from 25 to 27.5 million barrels/day.<sup>28</sup>

Two years later the Jakarta meeting was termed "one of the biggest mistakes in OPEC history" by the Venezuelan Energy Minister Ali Rodriguez (MEES, April 3 2000). By not foreseeing the decline in Asian oil demand precipitated by the currency and banking crises in the fall of 1997, as compounded by other factors, OPEC had contributed to an oversupply in the oil market in 1998 and a collapse in oil prices which caused major damage to OPEC economies.<sup>29</sup>

The discussion in this section shows that OPEC is interested in dictating the price of oil. Evidence from the wording of the OPEC Statute in Arts 4 and 7, indicates the

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<sup>22</sup> See OPEC 'Oil and Development: The Role of OPEC: A Historical Perspective and Outlook to the Future' available at [http://www.opec.org/opec\\_web/en/press\\_room/894.htm](http://www.opec.org/opec_web/en/press_room/894.htm) (accessed 19 July 2012).

<sup>23</sup> This distinguishes commodity agreements or organisations from cartels. See Themaat V V (1981) 89. OPEC which was negotiated outside the framework of the Havana Charter or the principles of the United Nations Conference on Trade and Development is not a commodity organisation. See Khan K *The Law and Organisation of International Commodity Agreements* (1982) 9 (hereafter Khan K 1982).

<sup>24</sup> Themaat V V (1981) 88.

<sup>25</sup> See chapter 3 section 3.4.2. See also GATT Secretariat (1993) 1

<sup>26</sup> See chapter 1 section 1.2.2 for a detailed discussion.

<sup>27</sup> Mtsiva V C (ed) *Oil and Natural Gas Issues and Policies* (2003) 11 (hereafter Mtsiva V C (ed) 2003).

<sup>28</sup> Kohl W L (2002) 210.

<sup>29</sup> Kohl W L (2002) 211.

role of price stabilisation. Further, the membership requirements also directly point to this mandate. The classification of OPEC as a cartel, and sometimes, albeit erroneously as a commodity organisation also highlights the price control mandate of the organisation.

### 4.2.1 International Legal Status of OPEC

Another preliminary discussion is the debate on the international legal status of the organisation.<sup>30</sup> This debate is relevant in analysing the impact and the role of OPEC's institutions. The functions and powers of the institutions, including enforcement of production quota decisions are affected by the legal status of the organisation.

Investigating the international legal status of an organisation is mainly informed by two approaches.<sup>31</sup> These are: the inductive approach and the objective approach.<sup>32</sup> It has been argued under the inductive approach, that OPEC has international legal personality.<sup>33</sup> The author concurs with this argument because the OPEC Statute recognises the international legal personality of the Organisation. Under the objective approach, the *Reparation case*<sup>34</sup> established the criteria for determining international legal personality. That is, the organisation must be more than a center that regulates state conduct, it should have an infrastructure, it should perform special tasks, and it should have a life of its own. OPEC satisfies all the above

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<sup>30</sup> Lashbrooke E C 'Suits against international organisations in federal court: OPEC, a case study'(1982) 12 *Cal. W. Int'l L.J.* 308-316 (hereafter Lashbrooke E C 1982).

<sup>31</sup> Lashbrooke E C (1982) 306.

<sup>32</sup> The inductive approach requires that the organisations' governing documents either expressly or impliedly indicate that an organisation has international legal personality. The objective approach on the other hand relies on the structure of the organisation and the principles of international law to evaluate whether an organisation has international legal personality. See Lashbrooke E C (1982) 306 citing Rama M, *International Legal Personality and Implied Powers of International Organizations* (1970) 44 *BRIT. Y. B. INT'L L.* 111, 112.

<sup>33</sup> This is based on the fact that OPEC's governing documents impliedly confer international legal personality on the Organisation. The inductive approach relies on third party states accepting the status of the organisation as having international legal personality. That said, some countries like the USA do not recognise OPEC as an international organisation and this casts some doubt on the argument. See Lashbrooke E C (1982) 306 and 312 for a detailed discussion. See also *International Association of Machinists and Aerospace Workers V The Organisation of Petroleum Exporting Countries* 694 F. 2d 1354 (9<sup>th</sup> Cir 1981) for further reading.

<sup>34</sup> *Reparation for Injuries Suffered in the Service of the United Nations* [1949] I.C.J. 174 cited in Lashbrooke E C (1982) 310.

conditions and to this end can be regarded as having international legal personality.<sup>35</sup>

Article 2 of the text of the draft articles on the responsibility of international organisations defines an international organisation as an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality.<sup>36</sup> OPEC has been identified as an international organisation with international legal personality.<sup>37</sup> In order to cover organisations established by states on the international plane without a treaty, Art 2 above refers, as an alternative to treaties, to any 'other instrument governed by international law.' This wording is intended to include instruments such as resolutions adopted by an international organisation or by a conference of states. Examples of international organisations that have been so established include the Pan American Institute of Geography and History (PAIGH), and OPEC.<sup>38</sup>

The OPEC headquarters agreement is further proof that the organisation indeed has international legal personality.<sup>39</sup> This agreement recognises OPEC's status as an international organisation under Austrian law.<sup>40</sup> Generally, headquarter agreements provide immunity to international organisations.<sup>41</sup> Such immunity is recognised under international law.<sup>42</sup> The above agreement and the recognition of the agreement by Austria provide further evidence for the classification of OPEC as an international organisation with international legal personality. Additionally, OPEC

<sup>35</sup> See Lashbrooke E C (1982) 310 for a detailed discussion. See also Ajomo M A 'An appraisal of the Organisation of Petroleum Exporting Countries (OPEC)' (1977-1978) 13 *Tex. Int'l L. J.* Vol 13: 11 26 (hereafter Ajomo M A 1977-1978).

<sup>36</sup> United Nations Report of the International Law Commission Sixty-third session (26 April–3 June and 4 July–12 August 2011) General Assembly Official Records Sixty-sixth session Supplement No. 10 (A/66/10) 52 (hereafter United Nations Report Supplement No. 10 (A/66/10) 2011).

<sup>37</sup> United Nations Report Supplement No. 10 (A/66/10) (2011) 73.

<sup>38</sup> United Nations Report Supplement No. 10 (A/66/10) (2011) 73.

<sup>39</sup> Headquarters Agreement between Austria and OPEC 1974 as amended Volume 2098, I-36477.

<sup>40</sup> Austrian Official Gazette BGBL 382/74 of 11 July 1974 and BGBL 379/85 of 13 September 1985. See also Treccani 'Organi[s]ation of the Petroleum Exporting Countries (OPEC)' available at [http://www.treccani.it/export/sites/default/Portale/sito/altre\\_aree/Tecnologia\\_e\\_Sienze\\_applicate/enciclopedia/inglese/inglese\\_vol\\_4/559-574\\_x10.7x\\_ing.pdf](http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Sienze_applicate/enciclopedia/inglese/inglese_vol_4/559-574_x10.7x_ing.pdf) (accessed 27 April 2013).

<sup>41</sup> See Treccani 'Organi[s]ation of the Petroleum Exporting Countries (OPEC)' available at [http://www.treccani.it/export/sites/default/Portale/sito/altre\\_aree/Tecnologia\\_e\\_Sienze\\_applicate/enciclopedia/inglese/inglese\\_vol\\_4/559-574\\_x10.7x\\_ing.pdf](http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Sienze_applicate/enciclopedia/inglese/inglese_vol_4/559-574_x10.7x_ing.pdf) (accessed 27 April 2013).

<sup>42</sup> See Treccani 'Organi[s]ation of the Petroleum Exporting Countries (OPEC)' available at [http://www.treccani.it/export/sites/default/Portale/sito/altre\\_aree/Tecnologia\\_e\\_Sienze\\_applicate/enciclopedia/inglese/inglese\\_vol\\_4/559-574\\_x10.7x\\_ing.pdf](http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Sienze_applicate/enciclopedia/inglese/inglese_vol_4/559-574_x10.7x_ing.pdf) (accessed 27 April 2013).

has been identified as an intergovernmental organisation; such organisations are recognised subjects of international law.<sup>43</sup> The institutions of OPEC are founded in an international organisation with legal personality; as such the institutions either expressly or impliedly exercise real power.

This section provides evidence of the fact that OPEC has international legal capacity. As such, OPEC's institutions are vested with real power and have legal capacity. The next section discusses the institutional framework of OPEC and evaluates the capacity of these institutions to regulate production quotas, oil consumption subsidies, and government procurement-related corruption.

### **4.3 OPEC Institutions and the Regulation of International Trade in Oil**

OPEC has three major institutions that are involved in the implementation of the OPEC Statute. These are: the Conference, the Board of Governors, and the Secretariat.<sup>44</sup> These institutions are actively involved in the regulation of production quotas, which is the main method through which OPEC ensures the coordination and unification of petroleum policies of the member states.<sup>45</sup> These institutions are the foundation of the legal structure of OPEC which is discussed in the next section of this chapter. The figure below illustrates the linkages between the various institutions of OPEC.

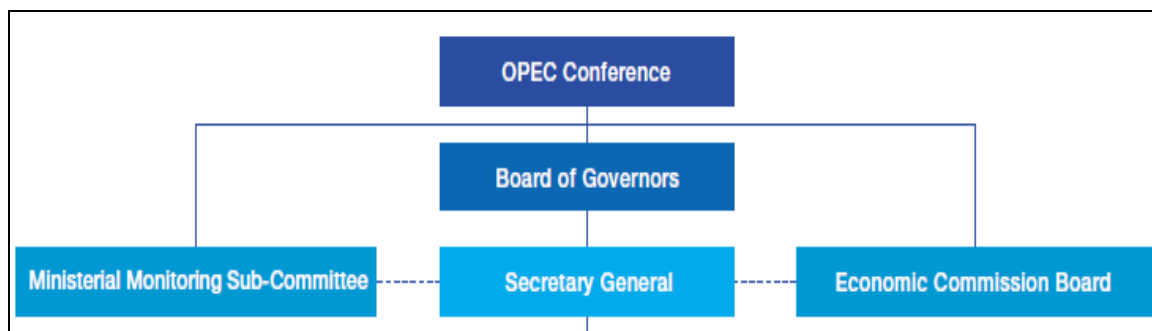
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<sup>43</sup> Karns M P & Mingst K A (2004) 7.

<sup>44</sup> See Art 9 of the OPEC Statute.

<sup>45</sup> See chapter 1 section 1.2.2.

**Figure 4.1 Institutional Framework of OPEC**



Source: OPEC 'Organi[s]ation Organigram' available at [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/about\\_us/OPECOrganigram0413.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/about_us/OPECOrganigram0413.pdf) (accessed 27 April 2013). The Secretariat is represented by the office of the Secretary General. See discussion in chapter 4 section 4.3.3.

This section also examines the decision making processes of the institutions and the dispute settlement mechanisms. Further, an analysis of the impact of the OPEC Economic Commission and the Ministerial Monitoring sub-committee has been undertaken.<sup>46</sup> These institutions are instrumental in price stabilisation and monitoring of compliance with production quotas. The potential of the above institutions to regulate oil consumption subsidies and corruption is also discussed.

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### 4.3.1 The Conference

The Conference is the supreme organ of OPEC.<sup>47</sup> It is made up of delegations from the member states, which are normally headed by ministers in charge of oil, mines, and energy.<sup>48</sup> Meetings of the Conference require a quorum of at least three quarters of the full members and each of the delegations is entitled to one vote.<sup>49</sup> The Conference meets at least twice a year.<sup>50</sup> The decisions of the Conference other than decisions on procedural matters require the unanimous agreement of all full

<sup>46</sup> See chapter 4 section 4.3.4.

<sup>47</sup> See Art 10 of the OPEC Statute.

<sup>48</sup> Due to the composition of this body, its membership varies and depends on the persons holding particular offices in the member states. This is bound to create challenges with regard to consistency. See Art 11 (A) of the OPEC Statute.

<sup>49</sup> See Art 11 (B) and (C) of the OPEC Statute. See also Art 7 of the OPEC Statute for a distinction between full and associate membership.

<sup>50</sup> See Art 12 of the OPEC Statute.

members.<sup>51</sup> Conference resolutions usually become effective after 30 days from the date of the meeting or after such a period as the Conference may determine, unless the members notify the Secretariat to the contrary.<sup>52</sup>

The OPEC Statute vests the Conference with very broad powers. Article 2 of the Statute provides the principal aims of the organisation. These include: the coordination and unification of petroleum policies of member countries.<sup>53</sup> Article 15 of the Statute places this duty primarily on the Conference.<sup>54</sup> The Conference is charged with formulating the general policy of the organisation.<sup>55</sup> A reconciliation of the above provisions reveals that the general policy of the organisation has to be structured along the principal mandate of the organisation. Suffice it to note that the discussion of petroleum policies and measures to stabilise petroleum prices is usually the agenda of OPEC Conference meetings.<sup>56</sup> The choice of tools used by the Conference to stabilise petroleum prices is one of the focus areas discussed in this chapter. Production quotas are the tool of choice used by the OPEC Conference to stabilise prices.<sup>57</sup> As noted in chapter three of the thesis, production quotas are inconsistent with the GATT.<sup>58</sup> Further discussion of the OPEC Statute and production quotas is undertaken in the next section of the chapter.

As noted in the above discussion there is a relationship between Art 2 and Art 15 of the OPEC Statute. Article 2 provides for the coordination and unification of petroleum policies of the member states. This provision is closely linked to Art 15 which states that the Conference is supposed to formulate the general policy of the organisation. To this end, the policies formulated by the Conference have to be

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<sup>51</sup> Where a full member is absent, the resolutions are considered effective unless the member notifies its dissent to the secretariat at least 10 days prior to the publication of the resolution. See Art 11 (C) of the OPEC Statute.

<sup>52</sup> See Art 11 (C) of the OPEC Statute.

<sup>53</sup> See Art 2 (A) of the OPEC Statute.

<sup>54</sup> See Art 15 (1) of the OPEC Statute.

<sup>55</sup> See Art 15 (1) of the OPEC Statute.

<sup>56</sup> See Treccani 'Organization of the Petroleum Exporting Countries (OPEC)' available at [http://www.treccani.it/export/sites/default/Portale/sito/altre\\_aree/Tecnologia\\_e\\_Sienze\\_applicate/enciclopedia/inglese/inglese\\_vol\\_4/559-574\\_x10.7x\\_ing.pdf](http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Sienze_applicate/enciclopedia/inglese/inglese_vol_4/559-574_x10.7x_ing.pdf) (accessed 27 April 2013).

<sup>57</sup> See Treccani 'Organization of the Petroleum Exporting Countries (OPEC)' available at [http://www.treccani.it/export/sites/default/Portale/sito/altre\\_aree/Tecnologia\\_e\\_Sienze\\_applicate/enciclopedia/inglese/inglese\\_vol\\_4/559-574\\_x10.7x\\_ing.pdf](http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Sienze_applicate/enciclopedia/inglese/inglese_vol_4/559-574_x10.7x_ing.pdf) (accessed 27 April 2013).

<sup>58</sup> See Art XI of the GATT. See chapter 3 of sections 3.4.1 and 3.4.2.



consistent with Art 2 of the OPEC Statute. Thus the use of production quotas to stabilise oil prices is initiated by the Conference.

As discussed in the third chapter, oil consumption subsidies are most prominent in the OPEC member states.<sup>59</sup> This can be attributed to the policies of the OPEC member states. Generally, fossil fuel subsidies distort markets and create barriers to clean energy investment.<sup>60</sup> Additionally, these subsidies hasten the decline of exports and reduce export earnings over the long term.<sup>61</sup> Between 2007 and 2010, global oil consumption subsidies cost over US \$ 100 billion annually.<sup>62</sup> It is therefore surprising that the OPEC Conference appears to have acquiesced to the continued use of oil consumption subsidies in its member states.

There is an urgent need to reduce these subsidies in the member states as a reduction in these subsidies will maximise profits from oil trade, and help wean OPEC member states off production quotas as a tool for profit maximisation. As noted in this section, the OPEC Statute does not directly regulate oil consumption subsidies. However, the Conference plays a role in unifying petroleum policies of the member states. Thus the Conference can rely on its mandate to harmonise member country policies on oil consumption subsidies. This will provide a platform to craft an organisational policy to regulate oil consumption subsidies.

Corruption in the OPEC member states remains a big challenge.<sup>63</sup> Despite this fact, the OPEC Statute is silent on transparency and corruption although it advocates the

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<sup>59</sup> See chapter 3 section 3.4.3.

<sup>60</sup> See IEA 'IEA Analysis of Fossil-Fuel Subsidies' available at [http://www.worldenergyoutlook.org/media/weowebiste/energysubsidies/ff\\_subsidies\\_slides.pdf](http://www.worldenergyoutlook.org/media/weowebiste/energysubsidies/ff_subsidies_slides.pdf) (23 July 2012).

<sup>61</sup> See IEA 'IEA Analysis of Fossil-Fuel Subsidies' available at [http://www.worldenergyoutlook.org/media/weowebiste/energysubsidies/ff\\_subsidies\\_slides.pdf](http://www.worldenergyoutlook.org/media/weowebiste/energysubsidies/ff_subsidies_slides.pdf) (23 July 2012).

<sup>62</sup> See IEA 'IEA Analysis of Fossil-Fuel Subsidies' available at [http://www.worldenergyoutlook.org/media/weowebiste/energysubsidies/ff\\_subsidies\\_slides.pdf](http://www.worldenergyoutlook.org/media/weowebiste/energysubsidies/ff_subsidies_slides.pdf) (23 July 2012).

<sup>63</sup> On average, Transparency International corruption perception index shows that the score for corruption in 2011 for OPEC member states was between 0 and 4.9. This data indicates that OPEC has not been very successful in combating corruption in its member states. See Transparency International 'Corruption Perception Index' available at <http://www.Transparency.org/cpi2011/results> (accessed 27 April 2013). Pleskov I argues that a more oil dominated economy does not lead to corruption. This position is subject to debate, the figures above highlight a failure to control corruption in the OPEC member states. While it can be argued that there are other factors that affect transparency and encourage corruption, oil is the biggest source of revenue in the OPEC member states. Consequently, misuse of government funds is greatly related to revenue from oil sales. See Pleskov I 'Determinants of Corruption in OPEC and Eurozone Countries:

protection of the best interests of the producing countries to protect a steady income from petroleum.<sup>64</sup> Article 15 of the OPEC Statute provides that the Conference ought to direct general policy of the organisation. Thus the Conference should make policies to encourage transparency and to reduce corruption. Similar to the regulation of oil consumption subsidies, the legal framework is not clear on the control of corruption. However, the various member states have domestic mechanisms to control corruption.<sup>65</sup> The Conference should rely on these domestic interventions to create a policy on control of corruption and to encourage transparency.

### 4.3.2 The Board of Governors

The Board of Governors (hereafter the Board) is charged with implementing decisions of the Conference.<sup>66</sup> The Board has been compared to the board of governors of a commercial entity.<sup>67</sup> The Board is composed of governors nominated by the member states and confirmed by the Conference.<sup>68</sup> All members have to be represented at Board meetings; however a quorum of two thirds is required to hold board meetings.<sup>69</sup> Each governor of the Board is entitled to only one vote.<sup>70</sup> A simple majority of governors attending is required to make Board decisions.<sup>71</sup> The Board is supposed to meet at least twice a year, although it can also hold extraordinary meetings.<sup>72</sup>

As noted above, the Board plays a very important function, which is implementation of Conference decisions. Thus decisions on production quotas have to be implemented by the Board. The Board is also important as it will have to implement

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Does Religion Make a Difference?' available at [http://business.pages.tcnj.edu/files/2011/07/Plesko\\_v.thesis.pdf](http://business.pages.tcnj.edu/files/2011/07/Plesko_v.thesis.pdf) (23 July 2012).

<sup>64</sup> See OPEC Statute Art 2 (C).

<sup>65</sup> See chapter 4 section 4.5.

<sup>66</sup> See Art 20 (1) of the OPEC Statute.

<sup>67</sup> See OPEC 'About OPEC' available at [http://www.opec.org/opec\\_web/en/press\\_room/178.htm](http://www.opec.org/opec_web/en/press_room/178.htm) (accessed 23 July 2012).

<sup>68</sup> See Art 17 (A) of the OPEC Statute.

<sup>69</sup> See Art 17 (B) of the OPEC Statute.

<sup>70</sup> See Art 17 (D) of the OPEC Statute.

<sup>71</sup> See Art 17 (D) of the OPEC Statute.

<sup>72</sup> See Arts 18 (A) and (B) of the OPEC Statute.

decisions on oil consumption subsidies and corruption when direct rules are made by the Conference. The Board also prepares the agenda for the Conference.<sup>73</sup> This is equally important as it makes the Board an important organ in driving the policy of the organisation. Policies to regulate oil consumption subsidies and corruption can be brought to the attention of the Conference through the Board.

### 4.3.3 The Secretariat

Originally the Secretariat did not exist as a separate entity.<sup>74</sup> The duties of the Secretariat were performed by the Board.<sup>75</sup> The chairman of the Board also acted as the Secretary General.<sup>76</sup> As the office of the Secretary General became more demanding, a separate entity was created under the 1965 OPEC Statute.<sup>77</sup> Until 1969, the OPEC Statute was silent on the qualifications required for the position of Secretary General.<sup>78</sup> However, these gaps in the OPEC Statute have now been filled through Conference resolutions.<sup>79</sup>

Article 25 provides for the Secretariat; the organ carries out executive functions of the organisation under the supervision of the Board.<sup>80</sup> The Secretary General is the authorised legal representative of the organisation.<sup>81</sup> Article 29 of the Statute provides that the Secretary General organises and administers the work of the organisation.<sup>82</sup> This is similar to the implementation role of the Board.<sup>83</sup> Thus the offices of the Secretary General and the Secretariat have a fundamental role to play in the implementation of production quotas. As noted earlier, due to the practice of cheating on production quotas in OPEC countries, it can be argued that the

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<sup>73</sup> See Art 20 (9) of the OPEC Statute.

<sup>74</sup> OPEC Res. II.6 (1961), the organisation was composed of the Conference and Board of Governors. See Stoehr L (1979) 98.

<sup>75</sup> Stoehr L (1979) 98.

<sup>76</sup> Stoehr L (1979) 98.

<sup>77</sup> Stoehr L (1979) 98.

<sup>78</sup> Ajomo M A (1977-1978) 19.

<sup>79</sup> OPEC Resoution XX 117. See Art 28 (A) of the OPEC Statute.

<sup>80</sup> See Art 25.of the OPEC Statute

<sup>81</sup> See Art 27 of the OPEC Statute.

<sup>82</sup> See Art 29 of the OPEC Statute.

<sup>83</sup> See Art 20 (1) of the OPEC Statute.

Secretariat and the Board have not been very effective in implementing production quotas.

Article 32 of the OPEC Statute provides for the different organs that work with the Secretariat.<sup>84</sup> These departments also highlight some of the functions of the Secretariat. These include: the division for research, the administration and human resource department, the public relations and information department.<sup>85</sup>

The division for research conducts research programs and ought to place particular emphasis on energy and related matters.<sup>86</sup> This division should be a good starting point for a discourse on oil consumption subsidies and corruption as there are no direct rules to regulate these key areas.

Related to the foregoing argument, Art 33 of the OPEC Statute also provides the functions of the administration and human resource departments.<sup>87</sup> One of these functions is ensuring that the organisation is aware of policy changes in the international petroleum industry, which might affect the organisation.<sup>88</sup> This department can be a good entry point in discussing a way forward on the regulation of oil consumption subsidies and corruption in the oil sector. The issue of oil consumption subsidies and the burden they impose on the global economy has been acknowledged by several European countries.<sup>89</sup> Against this background, it can be argued that the challenge of oil consumption subsidies is a policy challenge affecting the international oil sector. Nonetheless, OPEC and in particular the administration and human resource department, has not directed substantial effort to reform this area. The same is true for corruption and transparency in the oil sector.

The public relations and information department is charged with disseminating news of general interest regarding the organisation and the member countries on

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<sup>84</sup> See Art 32 of the OPEC Statute.

<sup>85</sup> See Art 33 (A) (1) of the OPEC Statute on the functions of the division for research.

<sup>86</sup> See Art 33 (A) (1) of the OPEC Statute.

<sup>87</sup> See Art 33 (B) (3) of the OPEC Statute.

<sup>88</sup> See Art 33 (B) (3) of the OPEC Statute.

<sup>89</sup> See BBC News 'IEA calls for cuts to 'wasteful' fossil fuel subsidies' available at <http://www.bbc.co.uk/news/business-15167748> (accessed 20 March 2013). See also Radler M 'IEA, OECD call for fossil fuel subsidy reforms' available at <http://www.ogj.com/articles/2011/10/iea-oecd-call-for-fuel-subsidy-reforms.html> (accessed 20 March 2013).

energy and related matters.<sup>90</sup> Oil consumption subsidies and production quotas may be inconsistent with the WTO legal regime.<sup>91</sup> Thus OPEC member states that are also WTO members should be aware of these inconsistencies. Likewise, corruption is a critical issue in some OPEC member states; this has to be addressed by the organisation.<sup>92</sup> The above department is relevant in achieving these objectives.

Accordingly, the Secretariat and the above departments are pivotal in ensuring that production quotas, oil consumption subsidies, and corruption are discussed by the OPEC member states. OPEC also has subsidiary organs that complement the functions and roles of the above institutions. These include: the OPEC Economic Commission and the Ministerial Monitoring sub-committee.

#### 4.3.4 Subsidiary Organs

The OPEC Economic Commission and the Ministerial Monitoring sub-committee are classified as subsidiary organs because they operate within the broad framework of the above institutions. The Economic Commission is a specialised body operating within the framework of the Secretariat and the Conference.<sup>93</sup> The Ministerial Monitoring sub-Committee is also a specialised organ of OPEC and was formed in 1993 at the 10<sup>th</sup> meeting of the Ministerial Monitoring Committee.<sup>94</sup> Article 36 of the OPEC Statute permits the Conference to establish specialised organs.<sup>95</sup> These organs operate within the general framework of the Secretariat.<sup>96</sup>

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<sup>90</sup> See Art 33 (C) (2) of the OPEC Statute.

<sup>91</sup> Oil consumption subsidies will only be found to be inconsistent where specificity can be established for purposes of actionable subsidies. Similarly, with regard to actionable subsidies, inconsistency with the SCM Agreement will only occur where there is proof that domestic oil is preferred over imported oil. See chapter 3 sections 3.4.1, 3.4.2, and 3.4.3.

<sup>92</sup> See Transparency International 'Corruption Perception Index' available at <http://www.Transparency.org/cpi2011/results> (accessed 27 April 2013)

<sup>93</sup> See OPEC 'About OPEC' available at [http://www.opec.org/opecweb/en/press\\_room/178.htm](http://www.opec.org/opecweb/en/press_room/178.htm) (accessed 24 July 2012). See also Treccani 'Organizzazione of the Petroleum Exporting Countries (OPEC)' available at [http://www.treccani.it/export/sites/default/Portale/sito/altrearee/TecnologiaeScienzeapplicated/enciclopedia/inglese/inglese\\_vol\\_4/559-574\\_x10.7x\\_ing.pdf](http://www.treccani.it/export/sites/default/Portale/sito/altrearee/TecnologiaeScienzeapplicated/enciclopedia/inglese/inglese_vol_4/559-574_x10.7x_ing.pdf) (accessed 27 April 2013).

<sup>94</sup> See Treccani 'Organizzazione of the Petroleum Exporting Countries (OPEC)' available at [http://www.treccani.it/export/sites/default/Portale/sito/altre\\_aree/Tecnologia\\_e\\_Scienze\\_applicate/enciclopedia/inglese/inglese\\_vol\\_4/559-574\\_x10.7x\\_ing.pdf](http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Scienze_applicate/enciclopedia/inglese/inglese_vol_4/559-574_x10.7x_ing.pdf) (accessed 27 April 2013).

<sup>95</sup> See Art 36 (A) of the OPEC Statute.

<sup>96</sup> See Art 36 (B) of the OPEC Statute.

#### 4.3.4.1 The OPEC Economic Commission

In 1964 the Economic Commission was established at the seventh conference of the organisation.<sup>97</sup> The fundamental objectives of the Economic Commission are:

'[to] Examine the position of petroleum prices on a permanent basis; Study all economic and other factors that may in any way affect petroleum prices and price structure significantly; Submit to OPEC countries reports on the position of petroleum prices, including relevant economic factors and current status of the Commission's recommendations.'<sup>98</sup>

The Economic Commission promotes stability in the international oil market.<sup>99</sup> Currently OPEC relies on production quotas to influence world oil prices.<sup>100</sup> Thus the Economic Commission is centrally involved in the review and generation of these production quotas. The Economic Commission is therefore one of the organs that entrench production quotas in the OPEC regulatory framework.

#### 4.3.4.2 The Ministerial Monitoring sub-committee

The Ministerial Monitoring sub-committee was formed to monitor oil production and exports in member countries.<sup>101</sup> The sub-committee exercises a supervisory function and ensures that countries comply with the quota allocations. This organ like the Economic Commission entrenches production quotas in the OPEC regulatory framework. Although the Ministerial Monitoring sub-committee exercises a monitoring function, the OPEC Statute does not provide for a formal dispute settlement mechanism or a strong enforcement regime.<sup>102</sup> Thus the Ministerial

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<sup>97</sup> Ajomo M A (1977-1978) 23.

<sup>98</sup> Vafai J 'Production control in the petroleum industry: a critical analysis' (1971) *Santa Clara Law Review* Vol 11 No 2 192 (hereafter Vafai J 1971).

<sup>99</sup> See OPEC 'About OPEC' available at [http://www.opec.org/opec\\_web/en/press\\_room/178.htm](http://www.opec.org/opec_web/en/press_room/178.htm) (accessed 24 July 2012).

<sup>100</sup> See generally chapter 1 section 1.2.2.

<sup>101</sup> See OPEC 'About OPEC' available at [http://www.opec.org/opec\\_web/en/press\\_room/178.htm](http://www.opec.org/opec_web/en/press_room/178.htm) (accessed 24 July 2012). See also Treccani 'Organi[s]ation of the Petroleum Exporting Countries (OPEC)' available at [http://www.treccani.it/export/sites/default/Portale/sito/altre\\_aree/Tecnologia\\_e\\_Sienze\\_applicate/enciclopedia/inglese/inglese\\_vol\\_4/559-574\\_x10.7x\\_ing.pdf](http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Sienze_applicate/enciclopedia/inglese/inglese_vol_4/559-574_x10.7x_ing.pdf) (accessed 27 April 2013).

<sup>102</sup> The organisation had intended to create an intergovernmental court. However, this was never realized. OPEC established the Ministerial Monitoring Committee to check violations of OPEC decisions. However,

Monitoring sub-committee has to watch all its members closely to ensure that they maintain their quotas. In a way, the organ's hands are tied as it can do very little in the event of non-compliance with the quota allocations.

The discussion above shows that OPEC is an international organisation with legal personality.<sup>103</sup> The institutions of the organisation have power to make decisions concerning petroleum policies of the member states. Generally, OPEC institutions make policy and implement petroleum policies of the organisation. The institutions also ensure that members comply with production quotas. The issue of production quotas, though an area of concern is attended by cheating which affects the role of the institutions. The unsuccessful regulation of production quotas by the institutions or organs of OPEC may create a strong entry point for the elimination of these quotas and compliance with WTO obligations under Art XI of the GATT on export restrictions.<sup>104</sup>

OPEC institutions, especially the Secretariat, present very many avenues for the discussion and eventual regulation of oil consumption subsidies and corruption. However, these have not been attended to as they fall outside the scope of OPEC's principal objective, which is price stability. The next section examines OPEC's legal framework for the regulation of production quotas, oil consumption subsidies and corruption.

#### **4.4 OPEC's Legal Framework**

OPEC's legal framework is provided in the OPEC Statute, the resolutions and policies that are enacted by the various OPEC institutions. Due to lack of a formal

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the monitors are sent to the member states for short periods of time and they do not certify exports. Thus the incentive to cheat on quotas is a challenge to the organisation. Other similar organisations such as the Tin Council have enforcement and punishment mechanisms; failure to comply with production quotas is penalized by a lower quota for the next quarter. Although, the punishment mechanism is not a dispute settlement process, the punishment mechanism is a strong deterrence tool. The lack of a dispute settlement process in OPEC puts the organisation at risk of conflicts created by cheating. The presence of such conflicts is a good entry point to initiate discussions on the removal of production quotas. See See Stoehr L (1979) 104. See also Alhajji A F & Huettner D (2000) 1154. See also Desta G M (2003) 527.

<sup>103</sup> See chapter 4 section 4.2.1.

<sup>104</sup> See chapter 3 section 3.4.1.

dispute settlement mechanism, there are no judicial precedents that have interpreted provisions in the OPEC Statute.<sup>105</sup> However, Art 2 of the OPEC Statute provides a broad mandate for the organisation.<sup>106</sup> OPEC's legal framework is premised on Art 2. It should be noted that despite the fundamental nature of Art 2, the provision does not comprehensively define the areas that are subject to OPEC regulation:

'The principal aim of the Organization shall be the coordination and unification of the petroleum policies of Member Countries and the determination of the best means for safeguarding their interests, individually and collectively.'<sup>107</sup>

Article 2 of the OPEC Statute does not explicitly provide for the regulation of production quotas, oil consumption subsidies and corruption in the member states. Nevertheless, the mandate to regulate these focus areas can be implied from the provisions discussed in this section. Article 11(C) on the mandate of members to make decisions during Conference meetings is also relevant.<sup>108</sup>

#### 4.4.1 Production Quotas

Production quotas have been part of the OPEC legal framework since 1960.<sup>109</sup> The first resolution of OPEC urged members to create a system for price stabilisation through the restriction of production.<sup>110</sup> However, a more recent history of production quotas can be traced back to the 1980s.<sup>111</sup> OPEC introduced a production ceiling for its member states in 1982.<sup>112</sup> Production was capped at 18 million barrels per day.<sup>113</sup>

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<sup>105</sup> See chapter 4 section 4.3.4.2.

<sup>106</sup> See Art 2 of the OPEC Statute.

<sup>107</sup> See Art 2 (A) of the OPEC Statute.

<sup>108</sup> See Arts 2 and 11 (C) of OPEC Statute.

<sup>109</sup> OPEC Res I.1.3 1960. See Iran Petro 'Agreement Concerning the Creation of the Organisation of Petroleum Exporting Countries' available at <http://www.iranpetrotech.com/wp-content/uploads/2011/03/UN6363-OPEC.pdf> (accessed 27 April 2013).

<sup>110</sup> OPEC Res I.1.3 1960. See OPEC Secretariat (2003) 66.

<sup>111</sup> Alhajji A F & Huettner D (2000) 1153.

<sup>112</sup> The decision to introduce a production ceiling was made at the 63rd (Extraordinary) Meeting of the OPEC Conference on 19–20 March 1982. See OPEC Secretariat (2003) 67.

<sup>113</sup> OPEC Secretariat (2003) 67.



Production quotas are created through Conference resolutions supported by Art 2 of the OPEC Statute.<sup>114</sup> Conference resolutions are made through negotiations at OPEC Conference meetings.<sup>115</sup> As a result of the above negotiations, resolutions are made, which form the basis for production agreements. Accordingly, a thorough discussion of the legal status of Conference resolutions, especially the inconsistency between Art 11 (B) and (C) is necessary.<sup>116</sup> The Art 11 inconsistency affects the binding nature of OPEC Conference resolutions.

Second, it is also important that the legality of production quotas is examined. Between 1982 and 1990, OPEC was overwhelmed by excessive supply, thus member countries with high per capita incomes accepted low quotas while those with low per capita incomes were given high quotas.<sup>117</sup> Post 1990, OPEC has been faced with a low surplus production capacity and production quotas have been allocated on the basis of individual state capacity as opposed to economic and political factors.<sup>118</sup> One of the challenges faced by OPEC's quota system is the lack of an explicit formula for quota allocation.<sup>119</sup> OPEC has attempted to create such a formula but has been unsuccessful.<sup>120</sup> The above challenge together with the inconsistency in Art 11 of the OPEC Statute, affect the legality of production quotas. The legal status of production quotas in this chapter is limited to the OPEC statute and not the WTO. It has also been argued that the fixing of production quotas is inconsistent with the member states' sovereign rights to regulate the exploitation of their natural resources.<sup>121</sup> In this regard a review of state sovereignty and natural resource regulation is also relevant.

It is apparent from the above discussion that two critical issues affect the legality of OPEC production quotas. These issues are: the binding nature of OPEC Conference

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<sup>114</sup> See Art 2 (A) and Art 11 of the OPEC Statute.

<sup>115</sup> OPEC Secretariat (2003) 68.

<sup>116</sup> See Art 11 of the OPEC Statute.

<sup>117</sup> Gault J et al (1999) 138.

<sup>118</sup> The factors influencing quota allocation are not clearly defined. See Gault J et al (1999) 138.

<sup>119</sup> Gault J et al (1999) 137.

<sup>120</sup> Gault J et al (1999) 137 citing Middle East Economic Survey, Vol. XXX, No. 1, 13 October 1986, pp. A3-A4.

<sup>121</sup> OPEC Secretariat (2003) 68.

resolutions and the relationship between production quotas and the sovereign right of member states to regulate the exploitation of their natural resources.

### A. Binding Nature of OPEC Conference Resolutions

Decisions of the Conference, the supreme organ of OPEC are made through resolutions at Conference meetings.<sup>122</sup> Apart from decisions on procedural matters all other decisions have to be made through unanimous agreement of the full members.<sup>123</sup> The term 'unanimous' refers to a situation where two or more people are fully in agreement with regard to an opinion, decision or vote held or carried by all parties involved.<sup>124</sup> However, the term is not defined in the OPEC statute. Nonetheless, decision making through unanimity is a common practice in international organisations.<sup>125</sup>

The nature of decision making at Conference meetings is through negotiation and resolutions. The quorum required to convene meetings is three quarters of all members.<sup>126</sup> The provision on quorum for Conference meetings refers to members while the provision on decision making refers to full members.<sup>127</sup> Currently all OPEC members are full members, thus the inconsistency in the language of Art 11 (B) and (C) may not present any challenges.<sup>128</sup> The above notwithstanding, the provisions and the legality of the resolutions are bound to be contested when OPEC admits associate members. While the associate members are expected to participate in OPEC meetings, as per the provision on quorum, they are only allowed to vote on procedural matters. This renders the resolutions of the Conference arbitrary. A

<sup>122</sup> See discussion of Conference meetings in chapter 4 section 4.3.1.

<sup>123</sup> The OPEC Statute creates a distinction between founder members, full members and associate members. Article 11 (C) of the OPEC statute. See also Art 7 of the OPEC Statute

<sup>124</sup> See Oxford Dictionaries 'Unanimous' available at <http://oxforddictionaries.com/definition/english/unanimous> (accessed 27 July 2012).

<sup>125</sup> *Themaat V V* (1981) 42.

<sup>126</sup> See Art 11 (B) of the OPEC Statute.

<sup>127</sup> The OPEC statute provides that whenever the term member refers to full member unless the context indicates the contrary. See Art 7 (F) of the OPEC Statute. It cannot be argued that Art 11 (B) was meant to exclude associate members and only refers to full members. Such an argument would indicate that it was never intended that associate members attend meetings of the OPEC Conference. Thus the context of Article 11 (B) indicates that it refers to all members.

<sup>128</sup> OPEC has five founder member states and all the other states are full members. See Treccani 'Organization of the Petroleum Exporting Countries (OPEC)' available at [http://www.treccani.it/export/sites/default/Portale/sito/altre\\_aree/TecnologiaeScienzeapplicate/enciclopedia/inglese/inglesevol4/559-574x10.7x\\_ing.pdf](http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/TecnologiaeScienzeapplicate/enciclopedia/inglese/inglesevol4/559-574x10.7x_ing.pdf) (accessed 27 April 2013).

further lacuna in the OPEC Statute is the lack of a provision on whether Conference resolutions affect associate members. In the event that such resolutions have no effect on associate members, then the above contradiction is redundant and OPEC resolutions may not be considered to be arbitrary.

Following from the above discussion, it appears that OPEC resolutions bind full members that make the resolutions, but have no legal effect on the associate members that are not allowed to vote on these decisions.<sup>129</sup> These resolutions may also be classified as unilateral declarations.<sup>130</sup> That is, they can be enforced by the associate members against the full members. However, the full members may not be able to enforce the resolutions unless the associate members implement the resolutions. Production quotas arrived at through resolutions of the Conference may therefore not be enforceable against associate members.

Further, Art 11 (C) of the OPEC Statute provides that Conference resolutions become effective 30 days after the date on which the Conference meeting is held or after such period as indicated by the Conference.<sup>131</sup> In the event of the absence of a full member, the resolutions become effective after 30 days, unless the absent member communicates its decision to the contrary, at least 10 days before the publication of the decision by the Secretariat.<sup>132</sup> The language of the OPEC Statute indicates that the resolutions are legally binding. The use of the term 'effective' denotes the binding nature of these resolutions. However, it can be argued that these resolutions are mere recommendations and are not binding on the member states as there is no formal enforcement mechanism in the OPEC Statute.<sup>133</sup> It should be noted that these decisions are still relevant as they can and they do contribute to the creation of

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<sup>129</sup> See *Themaat V V* (1981) 42 for a detailed discussion of binding decisions and recommendations or policy directives with a weak or no legal effect.

<sup>130</sup> See *Norway V. Denmark* [1933] P.C.I.J. Ser. A/B, No. 53, 71. See also *Australia & New Zealand V. France* [1974] I.C.J. 253, 457.

<sup>131</sup> See Art 11 (C) of the OPEC Statute.

<sup>132</sup> See Art 11 (C) of the OPEC Statute.

<sup>133</sup> Some commentators have argued that decisions that have a weak legal effect are not binding. See *Themaat V V* (1981) 42. See also discussion in chapter 4 section 4.3.4.2 on the lack of enforcement mechanisms in the OPEC Statute.

legitimate expectations which may be recognised as soft law.<sup>134</sup> Accordingly, it can be argued that production quotas fixed through resolutions of the Conference are not legally binding on all members, especially the associate members. However, these resolutions may also be categorised as soft law.

### **B. State Sovereignty and OPEC Production Quotas**

The relationship between sovereign rights of OPEC member states and production quotas is relevant to this discussion. In 1962, the United Nations reiterated the right of states to permanent sovereignty over their natural resources.<sup>135</sup> The resolution established a custom that allows states to manage their natural resources.<sup>136</sup> It has been argued that the principle of permanent sovereignty over natural resources is now recognised in international law.<sup>137</sup> Although the declaration was made against the background of investors exploiting host states,<sup>138</sup> the principle is applicable to the relations between OPEC and its member states. Production quotas may interfere with state sovereignty where they inhibit member states from realising the benefits of their oil resources and regulating oil production. This conclusion is supported by the fact that OPEC lacks an explicit formula for the determination of production quotas.<sup>139</sup> However, as noted in chapter one, the principle of permanent state sovereignty over natural resources is not absolute.<sup>140</sup> OPEC member states voluntarily joined the organisation and are therefore bound by its rules.

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<sup>134</sup> Abbott K W & Snidal D 'Hard and soft law in international governance' (2000) *International Organization* 54 3 423 (hereafter Abbott K W & Snidal D 2000) for a detailed discussion of soft law. Soft law may be created where a state internationalises an area of exclusive state competence through negotiation and subsequent agreement by way of treaties or international agreements. In this case legitimate expectations may be created on the basis of such treaty or international agreement. See Wesierski T G 'A framework for understanding "Soft Law"' (1984) *McGill Law Journal* Vol 30 58-59 (hereafter Wesierski T G 1984). See also Schreuer C & Kriebaum U 'At What Time Must Legitimate Expectations Exist?' Werner J and Ali A H (eds) *A Liber Amicorum: Thomas Wälde Law Beyond Conventional Thought* (2009) 265 (hereafter Schreuer C & Kriebaum U 2009).

<sup>135</sup> Permanent Sovereignty over Natural Resources, G.A. res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962).

<sup>136</sup> Desta G M (2010) 454.

<sup>137</sup> *Armed Activities on the territory of the Congo (Dem Rep Congo V Uganda)* Judgment, I.C.J. Reports [2005] p77 Para 244.

<sup>138</sup> Vielleville D E & Vasani B S 'Sovereignty over natural resources versus rights under investment contracts: which one prevails?' (2008) *Transnational Dispute Management* Vol 5 Issue 2 1 (hereafter Vielleville D E & Vasani B S 2008).

<sup>139</sup> Gault J et al (1999) 137.

<sup>140</sup> See chapter 1 section 1.4.1 for a detailed discussion.

The above discussion indicates that the legal status of OPEC production quotas is questionable. The production quotas are a result of Conference resolutions. These resolutions are arbitrary and in some cases undermine the sovereign rights of states to regulate their oil resources. Therefore, it cannot be said with certainty that production quotas under the OPEC Statute are legally binding.

#### 4.4.2 Oil Consumption Subsidies

The definition of fossil fuel subsidies is not clear and there is an ongoing debate on the same.<sup>141</sup> The G-20 working group on energy and finance failed to agree on a definition.<sup>142</sup> However, it has been proposed that the G-20 adopt the WTO definition which is all inclusive and has been interpreted by the dispute settlement body.<sup>143</sup> This chapter relies on the WTO definition of subsidy.<sup>144</sup> As noted earlier, oil consumption subsidies belong to the broad category of fossil fuel subsidies.<sup>145</sup> Oil consumption subsidies are highest in the OPEC member states.<sup>146</sup>

The OPEC Statute does not directly provide for the regulation of oil consumption subsidies.<sup>147</sup> However, Art 2 (A) of the OPEC Statute can be interpreted as the basis for oil consumption subsidies in the OPEC member states.<sup>148</sup> The provision states that one of the principal aims of the organisation is the determination of the best means of safeguarding the members' interests individually and collectively.<sup>149</sup>

Oil consumption subsidies can be used to maintain political control in oil exporting countries.<sup>150</sup> Thus OPEC may ignore oil consumption subsidies in the member states

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<sup>141</sup> Lang K (2011) 10.

<sup>142</sup> Lang K (2011) 10.

<sup>143</sup> Lang K Defining Fossil-Fuel Subsidies for the G-20: Which Approach is Best? (2010) Policy Brief The Global Subsidies Initiative 3 (hereafter Lang K 2010).

<sup>144</sup> See chapter 3 section 3.4.3 for a detailed discussion.

<sup>145</sup> See chapter 3 section 3.4.3.

<sup>146</sup> See chapter 3 section 3.4.3. Petroleum prices at the pump in OPEC countries are significantly lower than prices in non OPEC member states. See also Hochman G & Zilberman D (2011a) 2.

<sup>147</sup> See chapter 3 section 3.4.3 and chapter 4 Section 4.1.

<sup>148</sup> See Art 2 (A) of the OPEC Statute.

<sup>149</sup> See Art 2 (A) of the OPEC Statute.

<sup>150</sup> IEA et al (2010b) 42. See also Hochman G & Zilberman D (2011a) 2.

where it is in the best interest of the states' political agenda.<sup>151</sup> Additionally, subsidies can also be used to support the poor.<sup>152</sup> This argument is subject to debate; counter arguments have been made which strongly support the view that oil consumption subsidies mainly benefit the rich and middle class who consume more oil.<sup>153</sup> Nonetheless, the above reason can be used to justify the provision of oil consumption subsidies in OPEC member states. It can be argued that the above reasons represent the members' individual interests and are within the broad framework of Art 2 of the OPEC Statute.<sup>154</sup>

However, oil consumption subsidies are a burden to the global economy and aggravate oil price volatility.<sup>155</sup> The high demand for oil in the first half of 2008 despite high price increases has been attributed to countries subsidising oil consumption.<sup>156</sup> Related to this argument, oil consumption subsidies encourage smuggling.<sup>157</sup> This is due to the fact that fuel is easy to store, which makes it easy to transport to other states that have high fuel prices.<sup>158</sup> Individual domestic interests and political concerns are not sufficient to justify oil consumption subsidies. The market distortions created by the subsidies have global consequences.<sup>159</sup>

Additionally, oil consumption subsidies affect domestic oil refining.<sup>160</sup> Oil rich countries such as Angola, Iran and Nigeria, which are OPEC member states, are faced with artificially high oil demand due to oil consumption subsidies and rely on imported refined oil products.<sup>161</sup> Consequently, these countries cannot afford to invest in expanding their refining capacity.<sup>162</sup> To this end, protecting individual state

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<sup>151</sup> The use of subsidies to maintain low oil prices has negative consequences in the long run. When subsidising countries seek to increase oil prices, they usually face resistance from the NGOs and the people. See Bacon R & Kojima M (2006) 2.

<sup>152</sup> It has been noted that subsidies are an imperfect tool for alleviating poverty. See Lang K (2011) 10. See also IEA et al (2010b) 13.

<sup>153</sup> IEA et al (2010b) 13. See also Bacon R & Kojima M (2006) 2.

<sup>154</sup> See Art 2 (A) of the OPEC Statute.

<sup>155</sup> IEA et al (2010b) 10.

<sup>156</sup> IEA et al (2010b) 11.

<sup>157</sup> Nigeria, Iraq and Venezuela are some of the OPEC member states that have experienced smuggling of oil from their territories. See Bacon R & Kojima M (2006) 2.

<sup>158</sup> Bacon R & Kojima M (2006) 2.

<sup>159</sup> See chapter 3 section 3.4.3 on the effects of oil consumption subsidies.

<sup>160</sup> IEA et al (2010b) 12.

<sup>161</sup> IEA et al (2010b) 12.

<sup>162</sup> IEA et al (2010b) 12.

interests as provided in the OPEC Statute is not a sufficient reason to provide oil consumption subsidies as they affect the domestic oil industry in the long run.

The gradual reduction of oil consumption subsidies is necessary and highlights the benefits of comparative advantage. In 2010 United Arab Emirates started reducing its oil consumption subsidies.<sup>163</sup> The price of gasoline went up by 26 percent.<sup>164</sup> This improved the profits of retail oil traders and also pushed up oil sales in neighboring Oman.<sup>165</sup> This indicates that the provision of oil consumption subsidies is not the most appropriate method of protecting individual state interests.

Although Ghana is not an OPEC member and was not an oil producer in 2005, the country managed to reduce oil consumption subsidies through a transparent process that involved the provision of cheap education as a trade-off.<sup>166</sup> Other countries can learn from this creative example. Ghana reduced its subsidies after realising that global petroleum prices were increasing and it could not sustain its petroleum subsidy programme.<sup>167</sup> That said, the country is yet to achieve substantial success in the elimination of its oil subsidy program.<sup>168</sup>

The OPEC Statute does not expressly regulate oil consumption subsidies. However, the broad nature of Art 2 of the OPEC Statute provides a strong basis for the provision of these subsidies. Although it can be argued that oil consumption subsidies are consistent with the OPEC Statute, these subsidies have many negative economic consequences. However, despite the negative effects of these subsidies, it is difficult to prove that they are inconsistent with the SCM Agreement.<sup>169</sup>

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<sup>163</sup> IEA et al (2010b) 25.

<sup>164</sup> IEA et al (2010b) 25.

<sup>165</sup> IEA et al (2010b) 25.

<sup>166</sup> Bacon R & Kojima M (2006) 4.

<sup>167</sup> Bacon R & Kojima M (2006) 4.

<sup>168</sup> See chapter 6 section 6.2.4.

<sup>169</sup> See chapter 3 section 3.4.3.

### 4.4.3 Corruption

The discussion of corruption in this chapter is much broader than the discussion of the same in chapter three.<sup>170</sup> However, the definition of corruption adopted in chapter three applies to this discussion.<sup>171</sup> The OPEC Statute does not have mechanisms to control corruption. As noted above, corruption in the OPEC member states is a serious issue.<sup>172</sup> As discussed in chapter three, the incidence of corruption in the OPEC member states has been attributed to the high level of government involvement in the oil sector.<sup>173</sup> Nonetheless, some authors have noted that there is no relationship between oil dominant economies and corruption.<sup>174</sup> This is not true for OPEC member states. Be that as it may, OPEC is currently involved in partnerships with other international energy organisations to encourage transparency in international oil markets.<sup>175</sup>

'Looking ahead, there is evidently much for the producers and consumers to talk about and cooperate on. The focus should be on finding common ground, looking for shared solutions, where and when appropriate, developing an environment that is conducive to reaching constructive end results, and having input from each and every stakeholder. The IEF's informal producer-consumer dialogue is an essential ingredient in this as we look to advance market stability, improve transparency and provide greater predictability.'<sup>176</sup>

The above statement indicates a strong commitment from OPEC to tackle corruption and transparency related to oil markets. This is in line with OPEC's broad mandate in Art 2 of the OPEC Statute.<sup>177</sup> The above partnerships are a good foundation for OPEC's review of its policies and regulations on corruption and transparency in the

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<sup>170</sup> The discussion of corruption under the WTO legal framework is limited to government procurement. See chapter 3 section 3.4.4.

<sup>171</sup> Transparency International has defined corruption as the abuse of entrusted power for private gain. See chapter 3 section 3.4.4 for a detailed discussion.

<sup>172</sup> See chapter 4 section 4.1.

<sup>173</sup> Montinola G & Jackman R W (2002) 158.

<sup>174</sup> Pleskov I 'Determinants of Corruption in OPEC and Eurozone Countries: Does Religion Make a Difference? (2009)' available at <http://business.pages.tcnj.edu/files/2011/07/Pleskov.thesis.pdf> (23 July 2012).

<sup>175</sup> Salem E A OPEC's Perspective on the Producer-Consumer Dialogue (2012) The Global Energy Dialogue 13<sup>th</sup> International Energy Forum 22 (hereafter Salem E A 2012).

<sup>176</sup> The statement was made by the Secretary General of OPEC. See Salem E A (2012) 22.

<sup>177</sup> See Art 2 (a) of the OPEC Statute. The Organisation is charged with the determination of the best means for safeguarding members interests, individually and collectively.



member states. This section indicates that OPEC's legal framework on corruption and transparency is almost non-existent. This creates conditions in which corruption can flourish in the member states. OPEC's current partnerships with other international energy organisations to eliminate corruption in the oil sector is a positive indication of its commitment to improving transparency and controlling corruption. Due to the weak legal framework on production quotas, oil consumption subsidies, and corruption in the OPEC member states, alternatives for the regulation of these key areas are discussed in the next section.

#### 4.5 Alternatives to OPEC Regulation

This section discusses non-WTO alternatives to OPEC regulation of production quotas, oil consumption subsidies and corruption.<sup>178</sup> The section discusses other interventions that have an effect on the regulation of production quotas, oil consumption subsidies and corruption in the OPEC member countries. This section commences by examining over-regulation at the international level, particularly with regard to corruption and finally addresses domestic interventions for regulation of the above key areas, as alternatives to OPEC regulation. The discussion of domestic regulation relies on Nigeria and Angola as examples.

Production quotas and oil consumption subsidies are regulated by the WTO although they are not expressly regulated by OPEC.<sup>179</sup> However, the domestic interventions regulating these two key areas in OPEC member countries will be discussed at a later point in this section of the thesis.<sup>180</sup> Related to that, corruption on the other hand, although not expressly regulated by OPEC, is to some extent regulated by the WTO GPA.<sup>181</sup> Nonetheless, there are various international and regional interventions which also help control this practice.<sup>182</sup> These international

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<sup>178</sup> WTO regulation of production quotas, oil consumption subsidies and corruption is discussed in chapter 3 of the thesis.

<sup>179</sup> See chapter 3 sections 3.4.1, 3.4.2 and 3.4.3.

<sup>180</sup> These two key areas will be discussed with reference to Nigeria and Angola, which are members of both OPEC and the WTO.

<sup>181</sup> See chapter 3 section 3.4.4.

<sup>182</sup> Although the Dodd-Frank Act of the United States of America also promotes transparency in the oil sector, as oil companies have to disclose payments made to foreign governments, it is a domestic law and it is

and regional instruments and interventions on corruption are discussed in the next section.

### A) International and Regional Instruments and Interventions

The international and regional instruments and interventions include: the Extractive Industries Transparency Initiative (EITI),<sup>183</sup> the United Nations Convention against Corruption (UNCAC),<sup>184</sup> the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions<sup>185</sup> and the African Union Convention on Preventing and Combating Corruption.<sup>186</sup> These instruments create alternatives to regulating corruption in the oil sector in OPEC member countries.

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therefore not discussed in this section. See Revenue Watch Institute ‘Dodd-Frank’ available at <http://www.revenuewatch.org/issues/dodd-frank> (accessed 10 April 2013).

<sup>183</sup> The EITI principles underscore the importance of transparency, accountability and transparency of payments made in the natural resources sector. This is a strong intervention against corruption. See EITI ‘The EITI Rules 2011’ available at [http://eiti.org/files/2011-11-01\\_2011\\_EITI\\_RULES.pdf](http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf) (accessed 10 April 2013).

<sup>184</sup> The purpose of this convention is to combat corruption efficiently and effectively. It is also meant to facilitate international cooperation against corruption. See UN General Assembly ‘United Nations Convention Against Corruption A/58/422’ available at <http://www.unhcr.org/refworld/docid/4374b9524.html> (accessed 10 April 2013). UNCAC has various provisions on the prevention of corruption in the public and private sector. It also provides for the criminal prosecution of corrupt practices. See generally Argandoña A The United Nations Convention Against Corruption and its Impact on International Companies (2006) ‘la Caixa’ Chair of Corporate Social Responsibility and Corporate Governance Working Paper No. 656 (hereafter Argandoña A 2006). Even though there are various provisions in the UNCAC aimed at prevention of corruption, its main contribution is the prosecution of corrupt practices in the oil sector. It is respectfully submitted that prosecution of corrupt practices in Africa is not always the best way to prevent corruption in the oil sector. Corruption in the oil sector is in most cases undertaken by highly placed government officials, who are protected from prosecution. Thus the most appropriate method of corruption control in the oil sector is sufficient regulations and monitoring mechanisms. See generally Søreide T Corruption in Petroleum –Within and Beyond the Sector (2011) Impact of corruption on the environment and the United Nations Convention against Corruption as a tool to address it, fourth Conference of States Parties to the United Nations Convention against Corruption (hereafter Søreide T 2011).

<sup>185</sup> This Convention is extra-territorial and criminalises bribes provided by foreign public officials. See OECD ‘Convention on Combating Bribery of Foreign Public Officials in International Business Transactions DAF/IME/BR(97) 20’ available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/38028044.pdf> (accessed 10 April 2013). This Convention is limited in application and membership due to its focus on the supply side of corrupt transactions, that is, officials who offer the bribes. Although this Convention is important it cannot effectively regulate the supply side and demand side of corrupt practices in the oil transactions in Africa. See OECD ‘Bribery and Corruption’ available at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (accessed 03 May 2013).

<sup>186</sup> See the African Union ‘African Union Convention on Preventing and Combating Corruption’ available at <http://www.unhcr.org/refworld/docid/493fe36a2.html> (accessed 10 April 2013). This Convention like the UNCAC focuses on prosecution of persons involved in corrupt practices. Prosecution is not the most appropriate form of controlling corruption in the oil sector. Additionally, some African oil producing countries have not signed or ratified the Convention. See African Union ‘List of Countries Which Have Signed, Ratified/Accessed to the African Convention on Preventing and Combating Corruption’ available at <http://www.au.int/en/sites/default/files/Corruption.pdf> (accessed 03 May 2013).

However, the prevalence of various international instruments also highlights the challenge of over-regulation and the effect it might have on the private oil companies involved in oil production and trade in Africa.<sup>187</sup> While the foregoing argument has been noted, the thesis mainly seeks to protect the interests of the citizens of countries involved in the international trade in oil. To this end, the various regulatory instruments may be useful in ensuring that countries' oil revenues are not misappropriated. The EITI is further discussed with reference to Nigeria and Angola.

Nigeria joined OPEC in 1971<sup>188</sup> and later also joined the WTO in 1995.<sup>189</sup> Angola has recently joined OPEC<sup>190</sup> but has been a member of the WTO since 1996.<sup>191</sup> The other international instruments although relevant, do not particularly address the oil industry.<sup>192</sup> The above observation does not allow a detailed discussion of the other international and regional instruments elaborated above.<sup>193</sup>



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<sup>187</sup> It has been argued that over-regulation can affect the competitiveness of the oil industry in the long run. These arguments have been made in the area of environmental regulations, which sometimes are too expensive to implement and in some cases render oil production from mature fields unprofitable. However, proponents of this argument concede that tight environmental regulations have made the industry cleaner. The same argument can be made for regulations on corruption in the oil sector. It may be argued that the cost of implementing various regulations on corruption may turn away some prospective investors in the oil sector. Nevertheless, if the citizens of the oil producing countries are to benefit from their oil resources, corruption has to be curbed at all costs. What should be discouraged is overlapping regulations on corruption from various organs. Thus it may be appropriate for the OPEC member countries to rely on existing initiatives such as EITI as opposed to OPEC developing rules on corruption. Regulations should be few but stringent. See Harris A & Khare A 'Sustainable development issues and strategies for Alberta's oil industry' (2002) *Technovation* 22 577 (hereafter Harris A & Khare A 2002).

<sup>188</sup> See OPEC 'Nigeria Facts and Figures' available at [http://www.opec.org/opec\\_web/en/about\\_us/167.htm](http://www.opec.org/opec_web/en/about_us/167.htm) (accessed 25 April 2013).

<sup>189</sup> See WTO 'Nigeria and the WTO' available at [http://www.wto.org/english/thewto\\_e/countries\\_e/nigeria\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/nigeria_e.htm) (accessed 25 April 2013).

<sup>190</sup> Angola joined OPEC in 2007. See OPEC 'Angola Facts and Figures' available at [http://www.opec.org/opec\\_web/en/about\\_us/147.htm](http://www.opec.org/opec_web/en/about_us/147.htm) (accessed 25 April 2013).

<sup>191</sup> See WTO 'Angola and the WTO' available at [https://www.wto.org/english/thewto\\_e/countries\\_e/angola\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/angola_e.htm) (accessed 25 April 2013).

<sup>192</sup> The Articles of Association of the EITI Association expressly indicate that the objective of the Association is to make the EITI principles and criteria, the internationally acceptable standard for transparency in the oil, gas and mining sectors. See EITI 'EITI Rules 2011 Edition, Articles of Association Article 2 (2)' available at [http://eiti.org/files/2011-11-01\\_2011\\_EITI\\_RULES.pdf](http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf) (accessed 24 April 2013).

<sup>193</sup> The other international and regional instruments discussed above include: the United Nations Convention against Corruption (UNCAC), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the African Union Convention on Preventing and Combating Corruption.

Nigeria is reported to be an EITI compliant country.<sup>194</sup> That is in terms of publishing all payments made by the oil companies to the government.<sup>195</sup> The figures for government revenues and company payments tally.<sup>196</sup> However, do the EITI reports on government revenues and company payments cover all aspects of transparency? It is argued that although the EITI system of reporting payments and revenues is a great innovation for monitoring transparency in the oil sector, it is not fool proof.<sup>197</sup> Nevertheless, unlike other EITI implementing countries, Nigeria's laws on implementation of the EITI cover expenditure transparency in addition to revenue transparency.<sup>198</sup> However, the lack of mechanisms to monitor contracts transparency is an avenue for corruption. On the other hand corruption and bribery have been reported in the Angolan oil sector. In 2011, the International Monetary Fund (IMF) reported that about US \$ 32 billion was unaccounted for from the sale of crude oil in Angola.<sup>199</sup> Even then, as of April 2013, Angola was not EITI compliant.<sup>200</sup> Thus EITI interventions cannot be applied to the Angolan government.

### B) Domestic Legislation

Similar to the discussion of the international instruments and interventions, the discourse on domestic legislation is analysed within the framework of the Nigerian and Angolan legislation. The section does not attempt to discuss all relevant laws and only discusses those laws that substantially affect production quotas, oil

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<sup>194</sup> See EITI 'Nigeria' available at <http://eiti.org/Nigeria> (accessed 11 April 2013).

<sup>195</sup> See EITI 'Nigeria' available at <http://eiti.org/Nigeria> (accessed 11 April 2013).

<sup>196</sup> See EITI 'Nigeria' available at <http://eiti.org/Nigeria> (accessed 11 April 2013).

<sup>197</sup> It has been noted by some authors that transparency in the extractive sector involves contracts transparency, revenue transparency and expenditure transparency. The EITI has been criticised for focusing only on revenue transparency. However, some commentators have lauded the initiative for its strict mandate. Nonetheless, the concentration on only revenue still creates room for corruption at the stages of awarding contracts and spending revenue from the oil sector. See Uzioqwe U M *Exploring Multi-Stakeholder Initiatives for Natural Resource Governance the Example of the Nigerian Extractive Industries Transparency Initiative (NEITI)* (2012) (unpublished PHD thesis University of Birmingham) 67. (hereafter Uzioqwe U M 2012). See also Rosenblum P & Maples S *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (2009) Revenue Watch Institute 16 (hereafter Rosenblum P & Maples S 2009).

<sup>198</sup> Uzioqwe U M (2012) 74. It should be noted that expenditure transparency is not the major focus of the EITI in Nigeria even if it is provided in the EITI framework in Nigeria. See McNeil M & Malena C (eds) *Demanding Good Governance Lessons from Social Accountability Initiatives in Africa* (2010) World Bank 152 (hereafter McNeil M & Malena C (eds) 2010).

<sup>199</sup> Revenue Watch Institute *Reporting on In-kind Revenue through the EITI* (2012) Background paper to the EITI Working Group 2 (hereafter Revenue Watch Institute 2012).

<sup>200</sup> See Revenue Watch Institute 'Angola-Transparency Snapshot' available at [http://www.revenue\\_watch.org/countries/africa/angola/transparency-snapshot](http://www.revenue_watch.org/countries/africa/angola/transparency-snapshot) (accessed 11 April 2013).

consumption subsidies and corruption. It is worth noting that since the two countries are OPEC members, production quotas are regulated within the OPEC framework discussed above.<sup>201</sup> Domestic legislation only compliments the OPEC regulation of production quotas.

In Nigeria, the Petroleum Act of 1969 permits the minister of petroleum resources to make regulations for the conservation of oil resources.<sup>202</sup> Pursuant to the above provisions of the Petroleum Act 1969, the minister enacted the Petroleum (Drilling and Production) Regulations of 1969. However, the regulations are not clear on the mandate of the minister and other government officials to issue directions on production quotas. That having been said, the Petroleum Act of 1969 provides powers to the minister to regulate petroleum production.<sup>203</sup> This may involve restricting petroleum production to conserve the environment.<sup>204</sup> It is interesting to note that although the Petroleum Act of 1969 was enacted before Nigeria joined OPEC, it created space for the restriction of oil production, albeit for conservation purposes. It can be argued that it was easy to rely on the same law to maintain OPEC quotas after the country joined OPEC.

Similarly, the Nigerian National Petroleum Corporation Act of 1977 provides for the regulation of oil production.<sup>205</sup> It provides for the creation of the Nigerian National Petroleum Corporation.<sup>206</sup> One of the functions of the corporation is to engage in oil production.<sup>207</sup> The Act also provides for the creation of the petroleum inspectorate department which regulates the production of oil in Nigeria.<sup>208</sup> However, the petroleum inspectorate was merged with the ministry of petroleum resources and no longer exists as a regulatory body.<sup>209</sup> Regulation of the oil industry in Nigeria is

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<sup>201</sup> See chapter 4 section 4.4.1.

<sup>202</sup> See section 9 (1) (b) (ii) of the Petroleum Act Chapter 350 No 51 of 1969. Currently the oil sector is regulated by the ministry of petroleum resources.

<sup>203</sup> See section 9 (1) (b) (ii) of the Petroleum Act Chapter 350 No 51 of 1969.

<sup>204</sup> See section 9 (1) (b) (ii) of the Petroleum Act Chapter 350 No 51 of 1969.

<sup>205</sup> Nigerian National Petroleum Corporation Act Chapter 320 of 1977.

<sup>206</sup> See section 1 (1) of the Nigerian National Petroleum Corporation Act Chapter 320 of 1977.

<sup>207</sup> See section 5 (1) (a) of the Nigerian National Petroleum Corporation Act Chapter 320 of 1977.

<sup>208</sup> See section 10 (2) (a) of the Nigerian National Petroleum Corporation Act Chapter 320 of 1977.

<sup>209</sup> See Department of Petroleum Resources 'Historical Background' available at <http://www.dprnigeria.com/aboutus.html> (accessed 25 April 2013).

currently undertaken by the department of petroleum resources.<sup>210</sup> The Nigerian National Petroleum Corporation Act of 1977 entrenches production quotas as it appears to provide powers to the regulatory authority to restrict petroleum production. These powers are not expressly provided but are implied. Since the Nigerian National Petroleum Corporation Act of 1977 was enacted after the country joined OPEC, it is not naïve to argue that the Act was adopted with OPEC oil production restrictions in mind.

It can therefore be argued that Nigeria's domestic laws on production quotas cannot strictly be interpreted as alternatives to OPEC regulation. Even though Nigeria may not comply with its OPEC quotas at all times, the domestic laws reinforce its OPEC obligations. Lastly, although the Petroleum Act only provides for regulation of oil resources for conservation purposes, Nigeria's membership of OPEC implicitly extends the regulation of oil production beyond conservation to restrict oil production for price stability. Nigeria's oil legislation is under review and a bill on the regulation of the upstream and downstream activities in the oil sector is currently before the National Assembly.<sup>211</sup>

With regard to Angola, the government supervises and monitors development and production of oil resources. Oil production plans are approved by the government and production is also monitored.<sup>212</sup> Protection of the environment is one of the issues that have to be considered by licensees and concessioners in oil production.<sup>213</sup> Additionally, licensees and concessioners have to produce oil in a rational manner and also comply with international standards in the oil sector.<sup>214</sup> This creates an amiable framework for the imposition of OPEC production quotas. Angola is similar to the Nigerian example; the laws that regulate oil production are not really alternatives to OPEC regulation as the country is a member of OPEC. Accordingly, it

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<sup>210</sup> See Department of Petroleum Resources 'Historical Background' available at <http://www.dprnigeria.com/aboutus.html> (accessed 25 April 2013).

<sup>211</sup> The Petroleum Industry Bill may cure some of the organisational challenges of the Nigerian National Petroleum Corporation and the Petroleum Inspectorate Department. See Nigerian National Petroleum Corporation Processing & Monitoring of Nigerian Crude/Gas Production and Proper Accounting of Sales (2011) 93 (hereafter Nigerian National Petroleum Corporation 2011).

<sup>212</sup> See sections 7(2), 21, 64(6), 65 (1), 70, 71 and 76 of the Petroleum Activities Law 10/04 of 2004.

<sup>213</sup> See Section 7(2) of the Petroleum Activities Law 10/04 of 2004.

<sup>214</sup> See Section 21 (1) of the Petroleum Activities Law 10/04 of 2004.

has to comply with OPEC production allocations. Like Nigeria, Angola's current petroleum legislation was enacted before the country joined OPEC. However, since the regulations create space for the restriction of petroleum production for purposes of protection of the environment among others, it can be argued that these regulations can also be applied for the restriction of oil production to comply with OPEC obligations.

Both countries provide oil consumption subsidies. Nigeria established a Petroleum Products Pricing Regulatory Agency.<sup>215</sup> One of the main functions of this body is to determine the pricing policy on petroleum products.<sup>216</sup> In determining the pricing policy for various oil products, certain products are subsidised and they are mainly utilised by certain industries such as the transport sector.<sup>217</sup> The Petroleum Products Pricing Regulatory Agency relies on the petroleum support fund to provide subsidies.<sup>218</sup> However, in 2011, the petroleum support fund did not have resources to support the oil consumption subsidy program and funding for the subsidies was provided through the excess crude account.<sup>219</sup> Nigeria has currently phased out subsidies for diesel but maintains subsidies for kerosene and gasoline.<sup>220</sup>

Additionally, oil consumption subsidies in Nigeria have encouraged smuggling of oil to Cameroon.<sup>221</sup> Therefore it may be argued that oil consumption subsidies in Nigeria affect the domestic industry of another WTO member. In 2011, oil consumption subsidies in Nigeria cost 4.7 per cent of GDP.<sup>222</sup> Efforts to eliminate oil

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<sup>215</sup> See section 1 of the Petroleum Products Pricing Regulatory Agency Act No. 8 of 2003. See also Adelabu N S 'The political economy of oil deregulation in Nigeria's fourth republic: prospects and challenges' (2012) *Journal of Emerging Trends in Educational Research and Policy Studies* 3(3) 195-196 (hereafter Adelabu N S 2012).

<sup>216</sup> See section 7 of the Petroleum Products Pricing Regulatory Agency Act No. 8 of 2003.

<sup>217</sup> See Adenikinju A 'Energy Pricing and Subsidy Reform in Nigeria' available at <http://www.oecd.org/tad/envtrade/42987402.pdf> (accessed 12 April 2013). See also Adelabu N S (2012) 196.

<sup>218</sup> See International Monetary Fund 'Case Studies on Energy Subsidy Reform: Lessons and Implications' available at <http://www.imf.org/external/np/pp/eng/2013/012813a.pdf> (accessed 24 April 2013).

<sup>219</sup> See International Monetary Fund 'Case Studies on Energy Subsidy Reform: Lessons and Implications' available at <http://www.imf.org/external/np/pp/eng/2013/012813a.pdf> (accessed 24 April 2013).

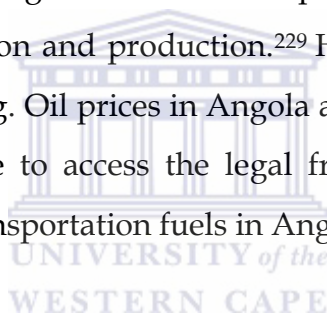
<sup>220</sup> See International Monetary Fund 'Case Studies on Energy Subsidy Reform: Lessons and Implications' available at <http://www.imf.org/external/np/pp/eng/2013/012813a.pdf> (accessed 24 April 2013).

<sup>221</sup> See Business Day 'Subsidy Removal Cripples Fuel Smuggling Across Nigerian Borders' available at <http://www.businessdayonline.com/NG/index.php/news/76-hot-topic/31798-subsidy-removal-cripples-fuel-smuggling-across-nigerian-borders> (accessed 27 April 2013).

<sup>222</sup> See International Monetary Fund 'Case Studies on Energy Subsidy Reform: Lessons and Implications' available at <http://www.imf.org/external/np/pp/eng/2013/012813a.pdf> (accessed 24 April 2013).

consumption subsidies in Nigeria have not been successful.<sup>223</sup> It is clear that Nigeria, an OPEC member state maintains an oil consumption subsidy program which has caused domestic and extraterritorial challenges. The domestic legislation in Nigeria facilitates the provision of oil consumption subsidies.<sup>224</sup> It is worth noting that OPEC has not played a key role in eliminating oil consumption subsidies in Nigeria.

Angola also provides oil consumption subsidies.<sup>225</sup> It provides about US \$ 1 billion in oil consumption subsidies annually.<sup>226</sup> The average subsidisation rate for fuel in Angola is estimated to be 26.8 percent.<sup>227</sup> It has also been noted that oil consumption subsidies in Angola are mainly applied to transportation fuels. These include diesel and petroleum.<sup>228</sup> This indicates that the subsidies are mainly utilised by a specific sector. Even though the subsidies may be provided to all, they are utilised by a select sector. As of April 2013, the Angolan state oil company, is both an oil concessioner and the regulator of exploration and production.<sup>229</sup> However, its mandate does not extend to regulating oil pricing. Oil prices in Angola are regulated by the ministry of finance.<sup>230</sup> It was not possible to access the legal framework used to provide oil consumption subsidies for transportation fuels in Angola.



<sup>223</sup> See International Monetary Fund ‘Case Studies on Energy Subsidy Reform: Lessons and Implications’ available at <http://www.imf.org/external/np/pp/eng/2013/012813a.pdf> (accessed 24 April 2013).

<sup>224</sup> It can be argued that since the Petroleum Products Pricing Regulatory Agency Act of 2003 was enacted after Nigeria had joined OPEC, the regulations reflect the organisation’s stance towards the imposition of oil consumption subsidies.

<sup>225</sup> See Institute for Energy Research ‘Developing Countries Subsidise Fossil Fuels, Artificially Lowering Prices’ available at <http://www.instituteforenergyresearch.org/2013/01/03/developing-countries-subsidize-fossil-fuel-consumption-creating-artificially-lower-prices/> (accessed 12 April 2013).

<sup>226</sup> See Institute for Energy Research ‘Developing Countries Subsidise Fossil Fuels, Artificially Lowering Prices’ available at <http://www.instituteforenergyresearch.org/2013/01/03/developing-countries-subsidize-fossil-fuel-consumption-creating-artificially-lower-prices/> (accessed 12 April 2013).

<sup>227</sup> See IEA ‘Fossil-Fuel Consumption Subsidy Rates as a Proportion of the Full Cost of Supply, 2011’ available at <http://www.iea.org/subsidy/index.html> (accessed 12 April 2013).

<sup>228</sup> See US Energy Administration Information ‘Angola’ available at <http://www.eia.gov/countries/cab.cfm?fips=AO> (accessed 12 April 2013).

<sup>229</sup> See Sonangol ‘Sonangol E &P’ available at [http://www.sonangol.co.ao/wps/portal/!ut/p/c1/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os3hDI5AQUzN\\_QwMDwyBTA09DR2djAy8XYwNXU6B8JLJ8gIUbUN4\\_MMDHx9XQwNyUIt1mBHSHg1yLU7-7uxFeeQNzCwLypgTkzSDyBjiAo4G-n0d-bqp-QW5ohEGmZ5aJo6liAF-PPjU/dl2/d1/L2dJQSEvUUI3QS9ZQnB3LzZfMURUVDU2TzEwMFA4RjBJMU9RUEXMRTEwVjY!/](http://www.sonangol.co.ao/wps/portal/!ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os3hDI5AQUzN_QwMDwyBTA09DR2djAy8XYwNXU6B8JLJ8gIUbUN4_MMDHx9XQwNyUIt1mBHSHg1yLU7-7uxFeeQNzCwLypgTkzSDyBjiAo4G-n0d-bqp-QW5ohEGmZ5aJo6liAF-PPjU/dl2/d1/L2dJQSEvUUI3QS9ZQnB3LzZfMURUVDU2TzEwMFA4RjBJMU9RUEXMRTEwVjY!/) (accessed 12 April 2013).

<sup>230</sup> See Ministry of Finance ‘Oil and Diamonds’ available at <http://translate.google.co.za/translate?hl=en&sl=pt&u=http://www.minfin.gv.ao/&prev=/search%3Fq%3Dministry%2Bof%2Bfinance%2B Angola%26hl%3Den%26biw%3D1366%26bih%3D622&sa=X&ei=ZRFoUa-SCImyhAfzhIDoDw&sqi=2&ved=0CDMO7gEwAA> (accessed 12 April 2013).



Information on the legal framework regulating Angola's oil subsidy program is not readily available. The validity of the available information has also been questioned.<sup>231</sup> It is also worth noting that the available information is usually published in Portuguese. This was challenging to the author who is not fluent in Portuguese. Nonetheless, Angola is an OPEC member state and it provides oil consumption subsidies. However, for the above reasons, the author was not able to examine the domestic legal framework against which these subsidies are provided.

The final part of this section discusses the domestic regulation of corruption in the oil sector in both Nigeria and Angola. The discussion builds on the international and regional alternatives for the regulation of corruption in OPEC member countries discussed above.

In Nigeria, the Petroleum Act of 1969 does not provide for penal provisions against corruption in the oil sector.<sup>232</sup> It is therefore not surprising that the country has been dogged by several corruption related practices in its oil sector.<sup>233</sup> Against this background, the minister of petroleum resources established a petroleum revenue special task force.<sup>234</sup> The body was mainly charged with enhancing accountability in petroleum operations.<sup>235</sup> The petroleum revenue task force has recommended that an oil sector transparency law should be enacted.<sup>236</sup> Laws against corruption do not always translate into reduced incidences of corruption; however, the laws set a foundation for identifying and prosecuting persons involved in corrupt practices.<sup>237</sup>

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<sup>231</sup> Open Societies Initiative for Southern Africa 'Oil Revenues in Angola: Much more information but not enough transparency' available at <http://www.osisa.org/other/economic-justice/angola/oil-revenues-angola-much-more-information-not-enough-transparency> (accessed 12 April 2013).

<sup>232</sup> See the Petroleum Act Chapter 350 No 51 of 1969.

<sup>233</sup> Ribadu N who conducted investigations into corruption in Nigeria's oil sector reported that in the last 10 years, Nigeria lost US \$ 35 billion to corruption. See Guardian Africa Network 'Nigeria: How to Lose \$ 35 bn' available at <http://www.guardian.co.uk/world/2012/nov/13/nigeria-oil-corruption-ribadu> (accessed 25 April 2013). Oil trade is one of the biggest sources of government revenue in Nigeria. The national budget of Nigeria is greatly supported by oil production and trade. Accordingly most of the funds that are misappropriated by the government officials are part of the oil revenue. See Ngonzi O 'Overview of the 2013 Budget' available at [http://www.budgetoffice.gov.ng/bof\\_2013-update\\_/CME\\_Budget\\_Speech1.pdf](http://www.budgetoffice.gov.ng/bof_2013-update_/CME_Budget_Speech1.pdf) (accessed 25 April 2013).

<sup>234</sup> Ribadu M N & Shasore O Final Report of the Petroleum Revenue Task Force (2012) 6 (hereafter Ribadu M N & Shasore O 2012).

<sup>235</sup> Ribadu M N & Shasore O (2012) 6.

<sup>236</sup> Ribadu M N & Shasore O (2012) 117.

<sup>237</sup> Some empirical studies have suggested that competition is a more effective tool for control of corruption, especially in countries where the laws and the judicial system are not well developed. See Ades A & Di

Despite the fact that a general legal framework to tackle corruption in Nigeria was enacted in 2000,<sup>238</sup> it has been argued by some commentators that the law in isolation cannot curb corruption in Nigeria.<sup>239</sup> The foregoing argument is credible given the fact that after the Corrupt Practices and other Related Offences Act of 2000 was enacted, corruption in the oil sector continued unabated.<sup>240</sup> Nonetheless, the lack of express regulations on corruption in the OPEC Statute, coupled with the lack of sufficient domestic laws against corruption, may have contributed to the high incidence of corruption in Nigeria's oil sector.

Angola's oil sector has not been free of corruption related scandals.<sup>241</sup> Related to that, the lack of transparency in reporting oil revenues has continued to taint the reputation of the country.<sup>242</sup> Some commentators note that between 1997 and 2002, the oil sector in Angola generated revenue of up to US \$ 17.8 billion.<sup>243</sup> However, there are no reports indicating how this revenue was expended.<sup>244</sup> The lack of transparency has been compounded by the State Secrecy Act enacted in 2002,<sup>245</sup> which criminalises the disclosure of state financial information.<sup>246</sup> This environment is a perfect breeding ground for corruption. Nonetheless, Angola has laws against corruption. One of the most important laws on corruption is the Law of the High Authority against Corruption 1996.<sup>247</sup> The law creates a body to control corruption in

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Tella R 'The new economics of corruption: a survey and some new results' (1997) *Political Studies* XLV 514 (hereafter Ades A & Di Tella R 1997).

<sup>238</sup> See the Corrupt Practices and other Related Offences Act No. 5 of 2000.

<sup>239</sup> See generally Ocheje P D 'Law and social change: a socio-legal analysis of Nigeria's corrupt practices and other related offences act, 2000' (2001) *Journal of African Law* 45 2 (hereafter Ocheje P D 2001).

<sup>240</sup> See Guardian Africa Network 'Nigeria: How to Lose \$ 35 bn' available at <http://www.guardian.co.uk/world/2012/nov/13/nigeria-oil-corruption-ridabu> (accessed 25 April 2013).

<sup>241</sup> See Global Witness 'Angola' available at <http://www.globalwitness.org/campaigns/corruption/oil-gas-and-mining/angola> (accessed 25 April 2013). See also Soares De Oliveira R 'Business success, Angola-style: postcolonial politics and the rise and rise of Sonangol' (2007) *J. of Modern African Studies*, 45, 4 608 (hereafter Soares De Oliveira R 2007). The most recent scandal is the involvement of senior officials of Sonangol and government in the private oil companies in Angola. Basically officials are allocating their companies blocks for oil production. See Ramos M L Angola's Oil Industry Operation (2012) Open Society Initiative for Southern Africa 7 (hereafter Ramos M L 2012).

<sup>242</sup> Davis G A 'Book Reviews-Angola: Anatomy of an Oil State 2 ed by Tony Hodges' (2005) *The Energy Journal* Vol 26 Issue 4 130 (hereafter Davis G A 2005).

<sup>243</sup> Meredith M *The State of Africa A History of the Continent since Independence* (2011) 615 (hereafter Meredith M 2011).

<sup>244</sup> Meredith M (2011) 615.

<sup>245</sup> State Secrecy Act No. 10 of 2002.

<sup>246</sup> Meredith M (2011) 615.

<sup>247</sup> Law of the High Authority against Corruption No. 3 of 1996.

Angola.<sup>248</sup> Despite the fact that this law came into force in 1996, it has been reported that the body is not operational.<sup>249</sup> This demonstrates the lack of political will to actually tackle corruption in the oil sector in Angola.

Other laws such as the Penal Code<sup>250</sup> and the Laws of Crimes against the Economy of 1999<sup>251</sup> are also part of the legal framework against corruption in Angola. Angola has laws against corruption but lacks the political will to utilise the laws for the control of corruption in the oil sector. It should be noted that like in the Nigerian case, these laws are not specifically meant to tackle corruption in the oil sector. Angola joined OPEC with laws against corruption. Thus it cannot be argued that the absence of regulations on corruption in the OPEC statute affected the regulation of corrupt practices in Angola's oil sector. This distinguishes Angola from Nigeria.

## 4.6 Conclusion

OPEC is an international organisation and its major mandate is price stabilisation. The Conference which is the supreme organ of the organisation does not implement its decisions. This role is left to the Secretariat and to some extent the Board and other subsidiary bodies. The institutions of the organisation implement resolutions of the Conference. However, the legal status of these resolutions, mainly due to their arbitrary nature, is questionable. The institutions also face challenges in implementation due to the fact that the organisation has weak enforcement mechanisms and does not have a formal dispute settlement procedure. Nonetheless, the institutions entrench practices that maintain oil production quotas. The institutions are largely silent on the regulation of oil consumption subsidies and the control of corruption. Accordingly, the OPEC institutions are not sufficient for the regulation of international trade in oil.

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<sup>248</sup> See Art 1 of the Law of the High Authority against Corruption No. 3 of 1996.

<sup>249</sup> Ramos M L (2012) 18.

<sup>250</sup> Penal Code of 1886.

<sup>251</sup> This law holds real potential for the fight against corruption in Angola. It provides for forfeiture and seizure of goods that are obtained illegally and also criminalises corrupt practices. See Laws of Crimes against the Economy No. 6 of 1999.

The OPEC Statute is mainly procedural and does not explicitly provide the core areas that are regulated by the organisation. Thus the legal framework of the organisation is difficult to examine. Nevertheless, Art 2 of the Statute gives the organisation a broad mandate. Production quotas are regulated on the basis of Art 2 of the OPEC Statute. On the other hand, oil consumption subsidies and corruption are also not expressly regulated by the OPEC Statute. Nonetheless, oil consumption subsidies can be supported under the broad language of Art 2 of the OPEC Statute. The regulatory framework for corruption and transparency is weak. The legal framework for the regulation of production quotas and oil consumption subsidies is not strong enough to support these market distorting policies. Further, there is a need for the legal framework to regulate corruption in OPEC member states. On the basis of the discussion in this chapter, it can be argued that the OPEC legal framework is not sufficient to regulate international trade in oil.

OPEC member countries like Nigeria and Angola can rely on other interventions such as EITI to control corruption in the oil sector. This can be supplemented by their domestic legal regimes which have not been effective. Nigeria and Angola also have domestic laws that appear to support OPEC production quotas. This is also true for oil consumption subsidies especially in the case of Nigeria. The next chapter examines the relationship between the WTO and OPEC in terms of the institutional and legal frameworks.

## CHAPTER 5

# A COMPARATIVE ANALYSIS OF THE WORLD TRADE ORGANISATION (WTO) AND THE ORGANISATION OF PETROLEUM EXPORTING COUNTRIES (OPEC)

### 5.1 Introduction

Chapter four examined the role of OPEC in the regulation of production quotas, oil consumption subsidies, and corruption. The analysis in chapter four, built on the discussion in chapter three which employed a similar structure to discuss the above key areas in the context of the WTO. Both these chapters have relied on African examples to contextualise the debate and keep the theme of the discussion focused on Africa.

Chapter five provides a comparative synthesis of the debates arising in chapters three and four. The chapter examines the institutional structures of the WTO and OPEC.<sup>1</sup> The chapter also highlights and discusses the similarities and differences that exist in the legal frameworks of the two organisations. Like previous chapters, the term 'international trade in oil', is used to refer to the regulation of production quotas, oil consumption subsidies and control of corruption. It should be noted that a limited part of the comparison between the two organisations was undertaken in chapter three.<sup>2</sup> This was mainly done to illustrate the application of WTO agreements and provisions that relate to international trade in oil.

It is worth noting that although the title of this chapter indicates that the study is a comparative analysis, the comparison undertaken in the chapter is in some ways distinct from the traditional understanding of a comparative legal analysis in the

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<sup>1</sup> The WTO and OPEC are both international organisations and are treated as such in this chapter.

See chapter 1 section 1.3.1, chapter 2 section 2.3 and chapter 4 section 4.2.1.

<sup>2</sup> See chapter 3 sections 3.4.1, 3.4.2, 3.4.3 and 3.4.4.

strict sense.<sup>3</sup> The analysis in the chapter follows the broad framework established in chapters three and four. As noted in chapter one, OPEC and the WTO are the most relevant organisations in the regulation of international trade in oil.<sup>4</sup> This also applies to Africa where some of the largest African oil producing countries are members of both the WTO and OPEC.<sup>5</sup> Thus the comparison in this chapter occasionally draws from African examples to keep the focus of the discussion on Africa.

The author is also aware of the challenges involved in comparing the roles of two organisations that have different theoretical backgrounds.<sup>6</sup> However, as noted in the previous chapters, both the WTO and OPEC have a central role to play in the regulation of production quotas, oil consumption subsidies, and the control of corruption. Accordingly, a comparison of the institutions involved, and the legal framework of the two organisations is indeed feasible.

The first section analyses the institutions of both organisations and how these relate to the regulation of the international trade in oil. The decision making processes in both organisations and how these affect the regulation of production quotas, oil consumption subsidies, and the control of corruption are also discussed.<sup>7</sup> Ample

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<sup>3</sup> Comparative legal studies ensure that problems in one legal system are addressed in an identical fashion in another legal system. However, in the present case, both systems have shortcomings and challenges. Although one system may appear to be more appropriate than the other, the challenges in the weaker system cannot be solved by directly applying the framework of one to the other. Additionally, while the WTO has agreements on the regulation of subsidies and corruption in government procurement, OPEC does not have such express agreements and provisions. Nonetheless, one of the objectives of comparative legal studies is international harmonisation and unification of laws. To this end, this chapter seeks to argue for the harmonisation with modification, of the laws regulating production quotas, oil consumption subsidies, and control of corruption in oil producing countries. See Morosini F 'Globalisation & law: beyond traditional methodology of comparative legal studies and the example from private international law' (2005) 13 *Cardozo J Int'l & Comp. L.* 541 and 543 (hereafter Morosini F 2005). See also Okeke C N (2012) 7. See also chapter 1 section 1.11.

<sup>4</sup> See chapter 1 sections 1.2 and 1.3.

<sup>5</sup> Angola and Nigeria are members of both the WTO and OPEC. See Worika I L (2010) 89.

<sup>6</sup> See chapter 2 sections 2.2, 2.3, 2.4 and 2.5 for a detailed discussion. See also Hrbatá V 'No international organisation is an island...the WTO's relationship with the WIPO: a model for the governance of trade linkage areas?' (2010) *Journal of World Trade* 44, No.1 1-2 (hereafter Hrbatá V 2010).

<sup>7</sup> Decision making in this context is limited to its effects on the regulation of the key areas that are the subject of this study. Nonetheless, great insights and proposals on decision making especially at the WTO have been made by various authors. For a detailed account on some of these proposals see Elsig M & Cottier T 'Reforming the WTO: the decision-making triangle revisited' Cottier T & Elsig M (eds) *Governing the World Trade Organization Past, Present and Beyond Doha* (2011) 289 (hereafter Elsig M & Cottier T 2011).

attention is also given to the discussion of dispute settlement procedures in both organisations and how this affects international trade in oil.

The second section narrows the discussion to the legal framework and the challenges and strengths in both the WTO agreements and the OPEC Statute. The discussion is focused on the regulation of production quotas, oil consumption subsidies, and the control of corruption. This section of the thesis also provides a comparative summary for the chapter. The analysis from the second section and to a small extent the other section of the chapter, are then applied to the case study, Ghana in chapter six.

The WTO has its origins in the adoption of the GATT in 1947.<sup>8</sup> On the other hand, OPEC was created in 1960.<sup>9</sup> The geopolitical climate at the time may also explain the differences in the negotiations and the content of the WTO agreements and the OPEC Statute. The GATT and the ITO Charter were negotiated after the Second World War, distrust still reigned at the time and this may have affected the adoption of the charter establishing the ITO.<sup>10</sup> The GATT 1947 may have been adopted because it primarily focused on the reduction of tariffs and did not appear to affect the sovereignty of states in determining their trade regulations like the ITO charter. Conversely, the OPEC Statute was negotiated during the cold war.<sup>11</sup> It is therefore not surprising that the oil producing countries got together to protect their resources. Although literature indicates that the cold war started around 1945, it did not affect the GATT 1947, which was key in reducing tariffs across the board.<sup>12</sup> Despite the fact that both organisations were formed during the cold war, GATT which later gave birth to the WTO was formed at the beginning of the cold war while OPEC was formed during the cold war. This may explain the liberalisation agenda of the former and the trade restrictive leaning of the latter.

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<sup>8</sup> See chapter 1 section 1.3.

<sup>9</sup> See chapter 1 section 1.2.

<sup>10</sup> Van den Bossche P (2008) 78.

<sup>11</sup> Lafeber W *America, Russia, and the Cold War 1945-2002* 9 ed (2004) 33 (hereafter Lafeber W 2004). See also Leffler M P *The Struggle for Germany and the Origins of the Cold War* (1996) Sixth Alois Mertes Memorial Lecture 12-13 (hereafter Leffler M P 1996).

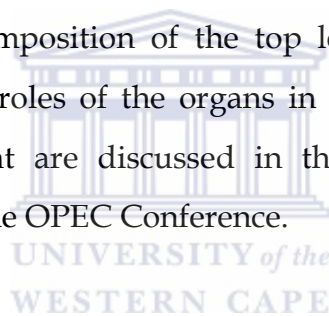
<sup>12</sup> Lafeber W (2004) 33. See also Leffler M P (1996) 12-13.

## 5.2 Institutional Framework for both the WTO and OPEC

The discussion of the institutional framework of the above organisations is pivotal to the discussion of the legal framework and the implementation and regulation of production quotas, oil consumption subsidies, and control of corruption. The discussion of the institutional framework is divided into three parts. That is, the top-level organs, the mid-level organs and the subsidiary organs.<sup>13</sup> Implicit in the discussion of these organs, the section also addresses the decision making procedures and powers of both organisations. The first part of this section examines and compares the top-level organs of both organisations.

### 5.2.1 Top-Level Organs

The section discusses the composition of the top level organs, their schedule of meetings and the powers or roles of the organs in the regulation of international trade in oil. The organs that are discussed in this section are the Ministerial Conference of the WTO and the OPEC Conference.



#### 5.2.1.1 Composition and Schedule of Meetings

At the highest level, both organisations are guided by ministerial-level organs.<sup>14</sup> The Ministerial Conference is the top most organ of the WTO, while the Conference is the top most organ of OPEC.<sup>15</sup> The implication of the above observation is that the members of both organs have responsibilities outside the organisations, that is, domestic obligations as members of the executive branch in their respective countries. Second, the above composition requirement reveals that the members of both organs may not be technocrats. Usually, ministerial appointments are not based on technical expertise but rather are based on political considerations. This to some

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<sup>13</sup> There are several institutions in the two organisations. It is therefore necessary to categorise the institutions to provide a comprehensible analysis. Accordingly, the top most organs are classified as top-level, the organs that implement the decisions of the top-level are classified as mid-level organs, and the organs that are supervised by the mid-level organs and have specific mandates are classified as subsidiary organs.

<sup>14</sup> See chapter 3 section 3.3.1 and chapter 4 section 4.3.1. In both organisations the representatives are usually at ministerial level.

<sup>15</sup> See chapter 3 section 3.3.1 and chapter 4 section 4.3.1.



extent affects the deliberations of both organs. It also attracts additional costs as the members require a host of advisors to guide them during discussions in the above organs.

Nonetheless, with respect to the political character of the members of these organs, ministerial-level representatives are necessary and give the organisations legitimacy. Additionally, the political character emphasises the sovereignty of the member states. The implementation of International law and treaties in particular largely depends on good faith.<sup>16</sup> Accordingly, obligations under treaties require political will. Thus the membership of the top-level organs of both organisations strive to build political will. The membership of the top organs provide legitimacy to the organisations and the decisions made by the organs.

The schedule of top-level organ meetings is another issue that merits discussion. The Ministerial Conference of the WTO meets at least once every two years, while the OPEC Conference meets twice every year.<sup>17</sup> It is apparent from the foregoing that Ministerial Conference meetings occur less frequently compared to OPEC Conference meetings. This distinction may not explain any substantial differences in the roles of the two organs. However, the infrequent meetings of the WTO may affect the momentum of the organisation. Although the General Council exercises powers of the Ministerial Conference when the latter is not in session, the composition of the General Council lacks the clout and political credibility possessed by the Ministerial Conference.<sup>18</sup> This may affect decision making at the WTO. The frequent meetings of ministerial-level representatives at OPEC ensure that decisions are made promptly.

### **5.2.1.2 Decision Making**

Decision making at the Ministerial Conference is done through consensus, while decision making at the OPEC Conference is through voting and unanimous

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<sup>16</sup> See discussion on *pacta sunt servanda* in chapter 2 section 2.4.1.

<sup>17</sup> See Art IV (1) of the Marrakesh Agreement and OPEC Statute Art 12.

<sup>18</sup> See Art IV (2) of the Marrakesh Agreement.

agreement of all full members.<sup>19</sup> The WTO only reverts to voting in the event that decision making cannot be achieved through consensus.<sup>20</sup> Before discussing the differences or similarities between consensus and unanimous methods of decision making, it should be noted that the unanimous agreement required under the OPEC Conference only applies to full members.<sup>21</sup>

Decision making through consensus at the Ministerial Conference is deemed to have been achieved if there are no objections by any of the members present, to decisions made at a meeting.<sup>22</sup> As noted previously, OPEC has no formal dispute settlement mechanism, accordingly, provisions in the OPEC Statute have not been subjected to interpretation.<sup>23</sup> Further, the OPEC Statute is thin on detail and the provision on unanimous agreement is not explained in the statute. A dictionary meaning of the term 'unanimous' is therefore the first point of reference. The Oxford online dictionary defines 'unanimous' as two or more people being in agreement.<sup>24</sup> In light of the above definition, it is clear that the two methods of decision making are similar; both envisage situations where all parties are in agreement.<sup>25</sup> This implies that there are no objections. It appears that voting at the OPEC Conference only applies to procedural matters.<sup>26</sup>

However, with due regard to the foregoing similarity, it is clear that decision making at the OPEC Conference is not as inclusive as the Ministerial Conference.<sup>27</sup> This creates a subtle difference in the decision making processes of the organs. This is

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<sup>19</sup> See chapter 3 section 3.3.1 and chapter 4 section 4.3.1.

<sup>20</sup> See Art IX (I) of the Marrakesh Agreement.

<sup>21</sup> See chapter 4 section 4.4.1 for a detailed discussion of the nature of OPEC Conference decisions.

<sup>22</sup> See footnote 1 to Art IX of the Marrakesh Agreement.

<sup>23</sup> See chapter 4 section 4.4.1.

<sup>24</sup> See Oxford Dictionaries 'Unanimous' available at <http://oxforddictionaries.com/definition/english/unanimous?q=unanimous> (accessed 26 September 2012). See also chapter 4 section 4.4.1.

<sup>25</sup> A note of caution is required in light of the above observation. Unanimity and consensus may differ since unanimity requires the participation of all members, while consensus applies to the members present. See Jackson J H (1997) 65.

<sup>26</sup> See Art 11 (c) of the OPEC Statute.

<sup>27</sup> See chapter 4 sections 4.3.1 and 4.4.1 on the discriminatory nature of OPEC decision making that excludes associate members.

bound to affect the coherence and harmony of OPEC as it grows to include associate members.<sup>28</sup>

### 5.2.1.3 Powers of the Top-Level Organs

The Ministerial Conference has powers to adopt authoritative interpretations of the Marrakesh Agreement and the other covered agreements.<sup>29</sup> Subsequently all decisions of the other WTO organs such as the DSB, which purport to interpret the WTO agreements, are subject to interpretation by the Ministerial Conference.<sup>30</sup> Practically, this mandate of the Ministerial Conference allows the body to exercise an oversight function over other bodies of the organisation. Second, it ensures that interpretation of the Marrakesh Agreement is provided by the specific representatives of the members and not technocrats. It can therefore be argued that this power entrenches decision making through consensus by WTO members through their representatives.

Conversely, the OPEC Conference is vested with powers to approve amendments to the OPEC Statute.<sup>31</sup> The powers to approve amendments are specific and although interpretation and amendment may be closely related, the powers are distinct.<sup>32</sup> Be that as it may, the OPEC Conference is vested with very wide powers under the Statute. Article 16 provides a catch-all clause which enjoins the Conference to exercise all powers that are not expressly assigned to any other OPEC organ.<sup>33</sup> Accordingly, due to the fact that powers to interpret the OPEC Statute are not assigned to any organ in the statute, it can be argued that the powers may be exercised by the Conference.

The powers of the Ministerial Conference to interpret WTO agreements have not been exercised with regard to production quotas (Art XI of the GATT) and oil

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<sup>28</sup> See chapter 4 section 4.4.1 for a detailed discussion.

<sup>29</sup> See Art IX (2) of the Marrakesh Agreement.

<sup>30</sup> See chapter 3 section 3.3.1 for a detailed discussion.

<sup>31</sup> See Art 15(9) of the OPEC Statute.

<sup>32</sup> See Arts IX (2) and X of the Marrakesh Agreement. Interpretation should not be done in a manner that undermines the amendment provided in Art X.

<sup>33</sup> See Art 16 of the OPEC Statute.

consumption subsidies (Arts 3 and 5 of the SCM Agreement). Although this power is available to the Ministerial Conference, it has not been used to interpret provisions that affect international trade in oil. Nonetheless, the above position is better than the OPEC Statute which does not expressly provide for the power. Article 16 of the OPEC Statute is a very broad provision and it might be difficult for the OPEC Conference to engage in interpretation in the absence of a specific power to do so.

The power to interpret provisions of the OPEC Statute, especially Arts 2 and 15 which provide the broad mandate of the Organisation and the Conference, is fundamental to the regulation of international trade in oil.<sup>34</sup> It can be argued that the above provisions impose an obligation on the Conference to deal with production quotas, oil consumption subsidies, and corruption.<sup>35</sup> Although these areas are not specifically provided for in the OPEC Statute, they are practices that are prominent in the OPEC member countries.<sup>36</sup> The Conference is enjoined to formulate general policy for the organisation.<sup>37</sup> Thus Arts 2 and 15 should be interpreted by the Conference to include the above areas and regulate the same.

It is apparent from the foregoing discussion, that although the power to interpret the respective agreements is necessary, in some cases, it has not been exercised and in other cases, the power is not expressly conferred. This makes it difficult to rely on this power to advocate reform in the regulation of production quotas, oil consumption subsidies and the control of corruption. Accordingly, the power of amendment which is clear and available in both the Marrakesh Agreement and the OPEC Statute, and which is exercised by the top-level organs, can be used to ensure that production quotas, oil consumption subsidies, and corruption are sufficiently regulated. This especially applies to OPEC which does not have express regulations on production quotas, oil consumption subsidies and corruption.

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<sup>34</sup> See chapter 4 section 4.3.1 on the powers of the OPEC Conference.

<sup>35</sup> See chapter 4 section 4.3.1.

<sup>36</sup> See chapter 1 section 1.2 and chapter 4 section 4.4.

<sup>37</sup> See Art 15 (1) of the OPEC Statute.

The other power which is relevant to this discussion is the power to waive obligations under the WTO agreements.<sup>38</sup> In practice, decisions to grant such waivers are made through consensus of the members.<sup>39</sup> Waivers are instrumental in accommodating the special needs of African countries. The waiver on MFN treatment and trade in blood diamonds and the waiver granted to the EC to provide preferential treatment to goods from Africa are relevant to international trade in oil.<sup>40</sup> The waiver that was granted to facilitate the Kimberly process prevents trade rules from enabling human rights and other related violations.<sup>41</sup> The above waiver is different from the waiver granted to the EC which is meant to increase market access for goods from Africa.<sup>42</sup>

Both types of waivers are relevant to international trade in oil, which should not facilitate conflict in Africa. Thus the Ministerial Conference can exercise its powers to limit the application of the MFN principle to oil from conflict areas. On the other hand, currently market access for oil from Africa is not a challenge.<sup>43</sup> However, in the event that market access for oil presents challenges in Africa, mechanisms exist under the WTO regime to grant preferential treatment to African oil producing countries.

The OPEC Statute does not provide for powers to waive obligations under the Agreement. However, as noted above, Art 16 is broad and vests the OPEC Conference with wide powers.<sup>44</sup> It follows that Art 16 can be interpreted to include the power to waive OPEC obligations. A critical review of such an interpretation of Art 16 reveals that the provision has to be applied cautiously. It presents real potential such as waiving quota requirements for African oil producing countries, to increase production and finance development projects. The power can also be used to waive obligations regulating oil consumption subsidies in the event that the OPEC Statute is amended to expressly regulate these subsidies.

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<sup>38</sup> See chapter 3 section 3.3.1 and Art IX (3) of the Marrakesh Agreement.

<sup>39</sup> Van den Bossche P (2008) 148.

<sup>40</sup> See chapter 3 section 3.3.1 for a detailed discussion.

<sup>41</sup> See chapter 3 section 3.3.1.

<sup>42</sup> See chapter 3 section 3.3.1.

<sup>43</sup> See chapter 2 sections 2.2.2.3 and 2.2.3.2.

<sup>44</sup> See Art 16 of the OPEC Statute.

The WTO top-level organ has express powers to ensure smooth regulation of international trade in oil. Although the OPEC Statute provides wide powers to its top-level organ, it does not provide specific powers to provide authoritative interpretations of the OPEC Statute and to waive obligations thereunder. The top-level organs work closely with mid-level organs which organs are more permanent and have a presence of technical personnel. The next section identifies and examines the roles of mid-level organs in both organisations. The discussion is focused on the powers of these organs and their involvement in international trade in oil.

### 5.2.2 Mid-Level Organs

The term 'mid-level' organs in this context refers to those organs that are composed of high-level representatives, are de facto the managerial organs of the organisations and have a permanent status.<sup>45</sup> Accordingly, the mid-level organs discussed in this section are divided into the organs with such characteristics at the WTO and similar organs under OPEC. Such organs at the WTO include the General Council and all its alter egos, that is, the DSB and the TPRB.<sup>46</sup> Relevant organs under the OPEC structure include the Board of Governors and the Secretariat.<sup>47</sup> It can be deduced from this paragraph, that the mid-level organs are composed of various organs at both the WTO and OPEC. This presents a more complex task in terms of the organisation of the section and the analysis required.

The section commences with an evaluation of the composition of these organs, and their schedule of meetings, the section then delves into the decision making roles of these organs and other powers that are instrumental in the regulation of international trade in oil, finally, the section examines the dispute settlement role of these organs. Dispute settlement may be interpreted as one of the general roles of the mid-level organs. The role is important in ensuring the seamless regulation of

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<sup>45</sup> See chapter 3 section 3.3.2 and chapter 4 sections 4.3.2 and 4.3.3. See also Art IV (2), (3) and (4) of the Marrakesh Agreement. See also Arts 17, 18, and 25 of the OPEC Statute. See also Stoehr L (1979) 97. See also Themaat V V (1981) 116.

<sup>46</sup> See chapter 3 section 3.3.2.

<sup>47</sup> See chapter 4 section 4.3.2 and 4.3.3.

international trade in oil and the relations between members of both organisations.<sup>48</sup>

To this end, the role deserves special attention.

Mid-level organs perform most of the functions that should ordinarily be performed by the top-level organs.<sup>49</sup> The above observation implies that the discussion in this section is to some extent more demanding than the previous section. To limit the scope of the section, some of the issues that are discussed in the foregoing section will not be dealt with in detail. Nevertheless, the section also highlights the linkages between the top-level and mid-level organs.

### 5.2.2.1 Composition and Schedule of Meetings

Unlike top-level organs which are composed of ministerial-level representatives, the members of the mid-level organs are merely high-level representatives.<sup>50</sup> While it can be argued that mid-level organ representatives are also political appointees and that they are not any different from the representatives in the top-level organs, the representatives at the mid-level organs are usually technocrats and are more permanent.<sup>51</sup> The mid-level organs are the managerial structures of the organisations.<sup>52</sup> The permanent status of the mid-level organs makes them particularly relevant.

The OPEC Board of Governors is composed of technocrats. Although this is not explicitly indicated in the OPEC Statute, a review of the governors indicates that

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<sup>48</sup> See chapter 3 section 3.3.2.1 and chapter 4 section 4.3.4.2. OPEC does not have a formal dispute settlement mechanism; the Ministerial Monitoring sub-committee is not a dispute settlement body. See also *Themaat V V* (1981) 116. Further, Art 16 of the OPEC Statute provides that all powers that are not expressly assigned to other organs shall be exercised by the Conference. Accordingly, the foregoing provision makes the OPEC Conference the Dispute Settlement Body of the Organisation. It should be noted that such an interpretation presents practical problems. The composition of the Conference and the infrequent meetings of the body render it a poor choice for a dispute settlement body. On the other hand, the Board of Governors which meets more frequently, is more permanent and also has high level representatives is a more ideal choice for a dispute settlement body.

<sup>49</sup> See chapter 3 section 3.3.2 and chapter 4 sections 4.3.2 and 4.3.3.

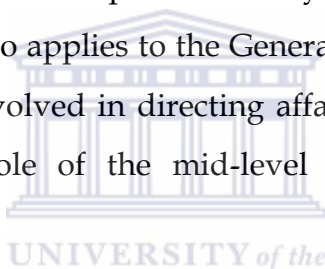
<sup>50</sup> See chapter 5 section 5.2.1.

<sup>51</sup> See OPEC Statute Art 28 on the qualifications required for a Secretary General. See also *Stoehr L* (1979) 97. See also *Themaat V V* (1981) 116. See list and qualifications of OPEC Secretaries General- (1961-2008). All Secretaries General exhibit a wealth of technical qualifications and vast experience in the oil sector. See OPEC 'Secretaries General of OPEC' available at [http://www.opec.org/opecweb/staticfiles/project/media/downloads/50<sup>th</sup>anniversary/Secretaries General.pdf](http://www.opec.org/opecweb/staticfiles/project/media/downloads/50<sup>th</sup>anniversary/Secretaries%20General.pdf) (accessed 8 October 2012).

<sup>52</sup> *Stoehr L* (1979) 97. See also *Themaat V V* (1981) 116.

they have the technical competence to deal with OPEC issues and international trade in oil.<sup>53</sup> The depth of technical expertise is also reflected in the office of the Secretary General.<sup>54</sup> This is also true for the WTO General Council. The General Council is made up of ambassador-level representatives.<sup>55</sup> The representatives at this level unlike the Ministerial Conference usually have technical expertise.<sup>56</sup> Although this is not a requirement under WTO law, it is common practice. The practice of appointing technical representatives in both organisations serves to illustrate the administrative and managerial obligations of these bodies.

The OPEC Secretariat is the administrative hub of the organisation.<sup>57</sup> It is involved in the day to day management of the organisation.<sup>58</sup> Although the OPEC Board of Governors is not really an administrative body, it is charged with implementing decisions of the Conference, this puts the body within close proximity to an administrative body.<sup>59</sup> This also applies to the General Council, which together with other subsidiary organs, is involved in directing affairs at the WTO.<sup>60</sup> Accordingly, due to the administrative role of the mid-level organs, these bodies have a



<sup>53</sup> Dr Majid Al Moneef who was appointed alternate chairman of the board of governors for 2012, has a doctorate and was previously professor of Economics. See OPEC Bulletin Spirit of the Union UAE Celebrates (2012) 160<sup>th</sup> OPEC Conference Report 14 (hereafter OPEC Bulletin 2012). See also KAPSARC ‘Majid Al Moneef’ available at [http://www.kapsarc.org/kapsarc/IACMembers/MajidAl\\_Moneef](http://www.kapsarc.org/kapsarc/IACMembers/MajidAl_Moneef) (accessed 08 October 2012). The Chairman of the OPEC Board of Governors, Mr. Issa Shahin Al Ghanim is the Director, Strategic Planning & Policy Directorate Qatar Petroleum. Both the Angolan and Nigerian OPEC governors work with their respective petroleum ministries. See OPEC ‘OPEC Governors 2012’ available at [http://www.opec.org/opecweb/staticfiles/project/media/downloads/\\_general\\_/OPECGovernors.pdf](http://www.opec.org/opecweb/staticfiles/project/media/downloads/_general_/OPECGovernors.pdf) (accessed 08 October 2012).

<sup>54</sup> See OPEC ‘Secretaries General’ available at [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/50th\\_anniversary/Secretaries\\_General.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/50th_anniversary/Secretaries_General.pdf) (accessed 8 October 2012).

<sup>55</sup> See chapter 3 section 3.3.2.

<sup>56</sup> The current chairperson of the General Council, Ambassador Elin Johansen from Norway, was formerly head of the Dispute Settlement Body. See Third World Network ‘WTO General Council Elects its Chair, Approves Two Waivers’ available at <http://www.twinside.org.sg/title2/wto.info/2012/twninfo120210.htm> (accessed 08 October 2012). The permanent representative of Angola at the WTO General Council Ambassador Arcanjo Maria Do Nascimento is a lawyer and has substantial legal experience. See OHCHR ‘Officers of the Human Rights Council’s Fifth Cycle (2010 - 2011)’ available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Bureau5thCycle.aspx> (accessed 08 October 2012). Dr. Martin Ihoeghian Uhomobhi, the permanent representative of Nigeria has a doctorate in international relations and has substantial experience in international relations. See United Nations ‘Biographical Note on Martin Ihoeghian Uhomobhi President of Human Rights Council for 2008-2009’ available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view/01/F7CFA04CCD1554A9C125746E00560AC5?opendocument> (accessed 08 October 2012).

<sup>57</sup> See chapter 4 section 4.3.3 and Art 25 of the OPEC Statute.

<sup>58</sup> See Art 25 of the OPEC Statute.

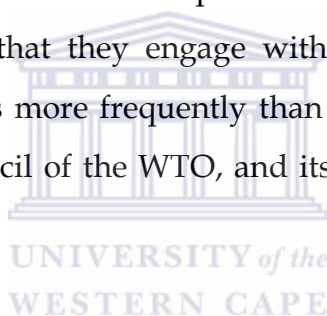
<sup>59</sup> See chapter 4 section 4.3.2.

<sup>60</sup> See chapter 3 section 3.3.2.



prominent role in the regulation of international trade in oil. The mid-level organs in most cases deal with the member states and are at the forefront of identifying the challenges that have to be resolved by the member states. The technical expertise of the representatives at this level lends credence to the above argument.

As noted in the introduction to this section, the mid-level organs have a permanent status. The status of these organs is considered permanent as the representatives are in most cases permanent.<sup>61</sup> In comparison to the top-level organs, the mid-level organs also meet more frequently than the top-level organs.<sup>62</sup> The composition of mid-level organ representatives is more stable than the top-level organ representatives.<sup>63</sup> The description of the mid-level organs as permanent is set within the above parameters. Likewise, the above observation demonstrates that the mid-level organs should have a substantial impact on the regulation of international trade in oil due to the fact that they engage with the member states and their international trade obligations more frequently than the top-level organs. It can be argued that the General Council of the WTO, and its sister organs, that is, the DSB



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<sup>61</sup> See chapter 3 section 3.3.2. See also chapter 4 section 4.3.2 and chapter 4 section 4.3.3. The WTO General Council usually meets once every two months. See Van den Bossche P (2008) 114. See also Rule 1 Rules of Procedure for Meetings of the General Council WT/L/161. The OPEC Board of Governors meets twice a year but can also hold extra ordinary meetings. See OPEC Statute Art 18 (A) and (B). The OPEC Secretariat carries out executive functions. To this end it is a permanent body. In most cases, the representatives of the member states at the WTO have permanent missions. The representatives of some African oil producing countries such as Nigeria, Ghana and Angola at the WTO all have permanent missions in Geneva. See OHCHR 'Officers of the Human Rights Council's Fifth Cycle (2010 - 2011)' available at [http://www.ohchr.org/EN/HRBodies/HRC/Pages/Bureau5thCyc\\_le.aspx](http://www.ohchr.org/EN/HRBodies/HRC/Pages/Bureau5thCyc_le.aspx) (accessed 08 October 2012). See also United Nations 'Biographical Note on Martin Ihoeghian Uhomobhi President of Human Rights Council for 2008-2009' available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/F7CFA04CCD1554A9C125746E00560AC5?opendocument> (accessed 08 October 2012). See also Ghana Mission 'Ghana Permanent Mission Geneva' available at <http://www.ghanamission.ch/mission2.html> (accessed 08 October 2012).

<sup>62</sup> The WTO General Council usually meets once every two months. See Van den Bossche P (2008) 114. See also Rule 1 Rules of Procedure for Meetings of the General Council WT/L/161. The OPEC Board of Governors meets twice a year but can also hold extra ordinary meetings. See OPEC Statute Art 18 (A) and (B).

<sup>63</sup> See chapter 3 section 3.3.1 and chapter 4 section 4.3.1. The top-level organs are composed of ministerial-level representatives. These have domestic political obligations and may not always be available. This affects the consistency of country positions as ministers especially in Africa are reshuffled frequently. See Bratton M & Van De Walle N 'Popular protest and political reform in Africa' (1992) *Comparative Politics* Vol. 24 No. 4 427 (hereafter Bratton M & Van De Walle N 1992). See also Ngomane T et al 'Public sector agricultural extension system in the Northern province of South Africa: A system undergoing transformation' (2002) *Journal of International Agricultural and Extension Education* Vol 9. No. 3 32 (hereafter Ngomane T et al 2002). See also Tripp A M 'The changing face of authoritarianism in Africa: the case of Uganda' (2004) *Africa Today* Vol 50 No.3 16 (hereafter Tripp A M 2004).

and the TPRB are permanent organs. Similarly, the OPEC Secretariat and to a lesser extent the Board of Governors are both permanent organs.

The WTO also has a Secretariat whose functions are similar to the OPEC Secretariat. However, the WTO Secretariat lives in the shadow of the General Council and performs an advisory and administrative support role,<sup>64</sup> unlike OPEC where the day to day running of the organisation is left to the Secretariat and in some cases, the Board of Governors. At the WTO, the Secretariat, although larger than the OPEC Secretariat, has a limited role.<sup>65</sup> The above reason limits the potential of the WTO Secretariat in taking on a prominent role in the regulation of production quotas, oil consumption subsidies and control of corruption. Accordingly, a detailed discussion of the WTO Secretariat is beyond the scope of this thesis.

It has been noted in the foregoing discussion that the meetings of the mid-level organs are more frequent than the meetings of the top-level organs.<sup>66</sup> The frequency of the meetings of the mid-level organs makes them a viable forum for the regulation of international trade in oil. Unlike the top-level organs, where the OPEC Conference meets more frequently than the WTO Ministerial Conference, at the mid-level organs, both organisations have the potential to meet frequently.<sup>67</sup> The presence of technical representatives at the mid-level organs, and the frequency of meetings make the organs a vital factor in the regulation of international trade in oil. However, the lack of political clout similar to that exhibited in the top-level organs, may hinder quick

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<sup>64</sup> See Art VI of the Marrakesh Agreement. The WTO secretariat is headed by the Director General. The Secretariat is made up of staff appointed by the Director General. The Secretariat is not influenced by the members of the WTO. See also Desta M G (2003) 525. The learned author argues that the secretariats of both the WTO and OPEC are similar. This is only true to the extent that the institutions perform administrative functions. The OPEC Secretariat under the office of the Secretary General is part of the governance structure of OPEC and has a much broader mandate than the WTO Secretariat.

<sup>65</sup> See Art VI (3) of the Marrakesh Agreement. The duties of the Secretariat are determined by regulations adopted by the Ministerial Conference. The Secretariat cannot take on duties outside the scope defined by these regulations. In comparison see Arts 25-29 of the OPEC Statute. The duties of the Secretariat and the Secretary General are spelt out in the Statute. Additionally, unlike the WTO, the OPEC Secretariat is headed by the Secretary General. See also Steger D (2009) 17.

<sup>66</sup> See Art IV (1) of the Marrakesh Agreement. The WTO Ministerial Conference meets at least once every two years. In contrast, the General Council meets whenever it is necessary. See Art IV (2) of the Marrakesh Agreement. See also Rule 1 Rules of Procedure for Meetings of the General Council WT/L/161. The OPEC Conference meets twice a year. See OPEC Statute Art 12. See also chapter 5 section 5.2.1 for a detailed discussion of the top-level organs. In comparison, the OPEC Board of Governors meets twice every year but also holds extraordinary meetings. This is further supplemented by the meetings of the Secretariat which are bound to be frequent due to the fact that the organ is a permanent body.

<sup>67</sup> See chapter 5 section 5.2.1.

decision making in the mid-level organs.<sup>68</sup> The next section examines the decision making procedures of the mid-level organs.

### 5.2.2.2 Decision Making

Analogous to the decision making processes in the Ministerial Conference of the WTO, decisions of the General Council are also made through consensus.<sup>69</sup> The Marrakesh Agreement describes the consensus decision making process.<sup>70</sup> This has been the subject of discussion under the top-level organs and will not be comprehensively discussed in this section. In the event that decisions cannot be reached through consensus, the members may resort to voting through ballot.<sup>71</sup> The decision making processes of the DSB which is an alter ego of the General Council involves a process described as reverse consensus.<sup>72</sup> This is different from consensus as defined in Art IX of the Marrakesh Agreement, as the consensus in the DSU Art 16 (4) is couched in the language of a negative obligation.

The decision making processes of the Board of Governors are quite different from the OPEC Conference.<sup>73</sup> Although voting at the OPEC Conference is limited to procedural matters, at the Board of Governors meetings, it is the only method of decision making.<sup>74</sup> Unlike decision making at the Conference, the OPEC Statute does not make a distinction between full and associate members at the Board of Governors.<sup>75</sup> Although the OPEC Statute provides that the term 'members' refers to

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<sup>68</sup> See chapter 5 section 5.2.1.2.

<sup>69</sup> See chapter 3 section 3.3.2. See also Rule 33 of the Rules of Procedure for Meetings of the General Council WT/L/161.

<sup>70</sup> See Art IX of the Marrakesh Agreement. See also chapter 5 section 5.2.1.2 for a detailed discussion. See also chapter 3 section 3.3.1.

<sup>71</sup> See Rule 34 of the Rules of Procedure for Meetings of the General Council WT/L/161. See also Art IX (1) of the Marrakesh Agreement. Voting as a decision making process is hardly used at the WTO. See Third World Network 'Why the WTO Decision-Making System of Consensus Works Against the South' available at [www.twinside.org.sg/title/bgl3-cn.htm](http://www.twinside.org.sg/title/bgl3-cn.htm) (accessed 09 September 2012). Voting has not been relied on extensively at the WTO. One of the rare occasions it was relied on, was the accession of Ecuador in 1995. See Steger D & Shpilkovskaya N 'Internal Management of the WTO: Room for Improvement' Steger D P (ed) *Redesigning the World Trade Organization for the Twenty-first Century* (2009) 113 (hereafter Steger D & Shpilkovskaya N 2009).

<sup>72</sup> See chapter 3 section 3.3.2.1. See also Art 16 (4) of the DSU.

<sup>73</sup> See OPEC Statute Art 11 (c). See also chapter 5 section 5.2.1.2 and chapter 4 section 4.3.1 for a detailed discussion of the decision making processes of the OPEC Conference.

<sup>74</sup> See OPEC Statute Art 17 (D). See also chapter 4 section 4.3.2.

<sup>75</sup> See OPEC Statute Arts 11 (c) and 17.

full members, this is not clear for all provisions that may affect associate members.<sup>76</sup> Subsequently, it is reasonable to conclude that all OPEC members including associate members are free to appoint governors, further that these governors can be involved in decision making at this level. The above conclusion renders Art 17 of the OPEC Statute irreconcilable with Art 11 of the same, which permits only full members to engage in decision making on non-procedural issues.<sup>77</sup> The OPEC Secretariat is a permanent body; however, its schedule of meetings is not indicated in the OPEC Statute. This may be explained by the fact that the secretariat meets whenever appropriate.

It is succinctly clear that the mid-level organs of the WTO and OPEC rely on distinct methods of decision making. The General Council and the DSB rely on consensus, while the OPEC Board of Governors relies on voting to reach decisions. Decision making through consensus although inclusive, is slow.<sup>78</sup> This is bound to affect decision making at the General Council. Decision making through voting at the Board of Governors may deliver quick decisions, but some members do not always agree with decisions and this may lead to member states failing to implement Board decisions.<sup>79</sup> The above challenge at OPEC together with a weak enforcement mechanism and the lack of a formal dispute settlement process, affect the strength of decisions of the OPEC Board of Governors. Decision making processes are pivotal in exercising the powers of the mid-level organs that are relevant in the regulation of international trade in oil. The next section analyses the powers of the mid-level organs of both the WTO and OPEC.

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<sup>76</sup> See OPEC Statute Art 7 (F). See also Art 7 (D) of the OPEC Statute which permits associate members to attend and engage in the deliberations of the OPEC Conference and the Board of Governors. It is inconceivable how a country (associate member) that does not have similar interests to those of the members can participate in the meetings of the Organisation. See OPEC Statute Art 7 (C). This inconsistency requires that the Statute explicitly identifies the members that are permitted to appoint governors.

<sup>77</sup> See OPEC Statute Arts 11 and 17.

<sup>78</sup> See Wold C et al 'Leveraging climate change benefits through the World Trade Organi[s]ation: Are fossil fuel subsidies actionable?' (2012) *Georgetown Journal of International Law* Vol 43 No. 3 639 on the slow progress of the Doha Round of WTO negotiations due to lack of consensus.

<sup>79</sup> OPEC members cheat on production quotas. See Griffin J M & Xiong W (1997) 289.

### 5.2.2.3 Powers of the Mid-Level Organs

The discussion of the powers of the mid-level organs for both organisations draws from the powers of the General Council and its alter egos in chapter three and the powers of the OPEC Board of Governors and the OPEC Secretariat in chapter four. The powers are discussed in the context of the international trade in oil. African examples are relied upon where possible to maintain the focus of the study on Africa. Where African examples are not provided, examples from other countries are relied upon to inform regulation of production quotas, oil consumption subsidies and control of corruption in African oil producing countries.

The powers to grant waivers, adopt authoritative interpretations of the Marrakesh Agreement and the multilateral agreements, and to appoint the Director General are exercised by both the WTO General Council and the Ministerial Conference.<sup>80</sup> The power to provide waivers and adopt authoritative interpretations of the WTO agreements has been discussed under the top-level organs and will not be discussed in this section.<sup>81</sup> In the same light, the power to appoint the Director General which is vested in the Ministerial Conference has in the past been exercised by the General Council.<sup>82</sup> However such powers are not explicitly vested in the General Council and as such are not discussed in detail.<sup>83</sup>

In light of the above discussion, this section focuses on the specific powers of the General Council. The section concentrates on powers that are exclusively exercised by the organ and are relevant to the regulation of international trade in oil. The most relevant power in this regard is facilitation of effective cooperation with other intergovernmental organisations.<sup>84</sup> This provision is particularly relevant as it establishes linkages with other organisations that are involved in the regulation of the international trade of oil.<sup>85</sup> In 2003 OPEC applied for observer status at the

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<sup>80</sup> See chapter 3 sections 3.3.1 and 3.3.2.

<sup>81</sup> See chapter 5 section 5.2.1.3.

<sup>82</sup> See chapter 3 section 3.3.2. See also Art VI of the Marrakesh Agreement.

<sup>83</sup> See chapter 3 section 3.3.2.

<sup>84</sup> See chapter 3 section 3.3.2. See also Art V of the Marrakesh Agreement.

<sup>85</sup> See chapter 3 section 3.3.2 for a detailed discussion.

WTO.<sup>86</sup> However, OPEC is yet to be accorded such status.<sup>87</sup> The above state of affairs might imply that the WTO does not consider OPEC to have responsibilities similar to those of the WTO.<sup>88</sup> Second, the delay in granting OPEC observer status might be confirmation that OPEC production quotas are inconsistent with the WTO obligations.<sup>89</sup>

The OPEC mid-level organs do not have powers to facilitate cooperation with other intergovernmental organisations. However, the organisation has endeavored to cooperate with organisations such as the IEA.<sup>90</sup> This power is not expressly provided anywhere in the OPEC Statute. In such cases, the OPEC Statute provides that the Conference is the appropriate organ to exercise such powers.<sup>91</sup> The lack of express powers to enhance cooperation with intergovernmental organisations affects OPEC's capacity to work closely with other similar organisations such as the WTO. Failure to grant OPEC observer status indicates that the WTO and OPEC do not share a harmonious relationship. This is a challenge to oil producing countries generally and African oil producing countries that are yet to join OPEC.

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<sup>86</sup> The Secretary General informed the ministerial meeting of the need to engage with the WTO although the statement was made in the context of trade in energy services. The author respectfully submits that the proposed terms of engagement are too restrictive. International trade in oil encompasses a broad range of issues such as production quotas, oil consumption subsidies and control of corruption. OPEC does not regulate services related to oil production but regulates the actual activity of oil production. See OPEC 'Statement by OPEC Secretary General to the Arab Ministerial Meeting' available at [http://www.opec.org/opec\\_web/en/press\\_room/917.htm](http://www.opec.org/opec_web/en/press_room/917.htm) (accessed 10 October 2012). OPEC was only granted observer status at the fifth Ministerial Conference of the WTO in Cancun. See WTO Ministerial Conference Fifth Session Cancun Provisional List of Participants (2003) WT/MIN(03)/INF/5 3.

<sup>87</sup> See WTO 'Intergovernmental Organisations Granted Observer Status to WTO Bodies' available at [http://www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](http://www.wto.org/english/thewto_e/igo_obs_e.htm) (accessed 10 October 2012). See also Lautenberg F R (2004) 7.

<sup>88</sup> OPEC had applied for observer status on the Committee on Trade and Development. The issue was not fully resolved at this meeting. However, the discussions indicate that some countries such as the United States have reservations with regard to OPEC's observer status in the WTO. This might indicate that some members do not feel that OPEC has responsibilities similar to those of the WTO. See WTO Committee on Trade and Development Twenty-Ninth Session Note on the Meeting of 28 June and 10 July 2000 (2000) WT/COMTD/M/29 2. See also Art 5 Marrakesh Agreement. See also WTO Guidelines for Observer Status for International Intergovernmental Organi[s]ations in the WTO Annex 3 WT/L/161. Rule 2 provides that only those intergovernmental organisations that have competence and a direct interest in trade policy matters shall be considered. Thus the refusal or delay to grant OPEC observer status may indicate that it has no competence to deal with trade policy matters. The author is of the opinion that refusal to grant OPEC observer status on that ground is unreasonable. The WTO is abdicating from its role of dealing with OPEC to manage the GATT inconsistent practices of OPEC.

<sup>89</sup> See chapter 3 sections 3.4.1 and 3.4.2 for a detailed discussion.

<sup>90</sup> See OPEC 'Cooperation Between Producers & Consumers: an OPEC View' available at [http://www.opec.org/opec\\_web/en/press\\_room/915.htm](http://www.opec.org/opec_web/en/press_room/915.htm) (accessed 13 May 2013).

<sup>91</sup> See Article 16 of the OPEC statute.

The DSB of the WTO is the General Council in a modified form.<sup>92</sup> The DSB is charged with the establishment of WTO panels, appointment of appellate bodies and the adoption of panel and appellate reports and implementation of rulings.<sup>93</sup> OPEC does not have a similar institution and a formal dispute settlement process is non-existent.<sup>94</sup> The above status of OPEC presents challenges to African oil producing members. As noted above such conditions encourage violence and aggression.<sup>95</sup> The lack of a formal dispute settlement process under OPEC structures strengthens the argument for WTO regulation of international trade in oil.

The TPRB is also an alter ego of the General Council.<sup>96</sup> Basically, the organ ensures that members adhere to WTO rules.<sup>97</sup> The organ also encourages transparency in the conduct of international trade.<sup>98</sup> The organ conducts reviews of the trade practices of the member states.<sup>99</sup> Subsequently countries are advised on international trade trends. The OPEC Secretariat has divisions that perform roles that are similar to the mandate of the TPRB.<sup>100</sup> These include the division for research and the public relations and information department.<sup>101</sup> These organs are charged with conducting research and disseminating news and information on oil and energy to the OPEC member states.<sup>102</sup> The research and advisory function of the above mid-level organs is relevant to international trade in oil. African oil producing countries require technical assistance to appreciate the complexities of international trade in oil.<sup>103</sup>

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<sup>92</sup> See chapter 3 section 3.3.2.1 for a detailed discussion.

<sup>93</sup> See chapter 3 section 3.3.2.1 for a detailed discussion.

<sup>94</sup> See chapter 4 section 4.3.4.2. A detailed discussion of the implications of the dispute settlement processes or lack thereof is discussed later in this chapter. It can be argued that OPEC has an informal dispute resolution process. However, this is not indicated in the OPEC Statute.

<sup>95</sup> See chapter 3 section 3.3.2.1. See also Euclid A (2004) 424.

<sup>96</sup> See chapter 3 section 3.3.2.2.

<sup>97</sup> See chapter 3 section 3.3.2.2.

<sup>98</sup> See chapter 3 section 3.3.2.2.

<sup>99</sup> See chapter 3 section 3.3.2.2.

<sup>100</sup> See chapter 4 section 4.3.3.

<sup>101</sup> See chapter 4 section 4.3.3.

<sup>102</sup> See chapter 4 section 4.3.3.

<sup>103</sup> Generally technical assistance to African Countries is important for the realisation of the benefits of international trade in Africa. Organisations such as the International Trade Centre, United States Agency for International Development, World Customs Organisation and several others have been involved in providing technical assistance to boost international trade in Africa. This also applies to trade in oil. African oil producing countries can benefit from the research on their trade policies that affect international trade in oil. See USAID 'USAID – World Customs Organization Trade Facilitation Conference' available at [http://sa.usaid.gov/southern\\_africa/content/usaaid-%E2%80%93-world-customs-organization-trade-](http://sa.usaid.gov/southern_africa/content/usaaid-%E2%80%93-world-customs-organization-trade-)

From an OPEC perspective, the Board of Governors implements decisions of the Conference.<sup>104</sup> The body also draws the agenda for Conference meetings.<sup>105</sup> These are very important roles.<sup>106</sup> This makes the organs instrumental in dictating policy and discussions at the Conference. Likewise, at the WTO, decisions of the Ministerial Conference are implemented by the General Council and other subsidiary organs.<sup>107</sup> The agenda for Ministerial Conference meetings is drawn by the WTO Secretariat which is a non-executive body.<sup>108</sup> In both cases, the mid-level organs perform a critical role in implementing and directing decisions and activities of the top-level organs. The bottom-up approach, where the technocrats direct policies at the highest level, is bound to improve international trade in oil.<sup>109</sup> It is important that African countries build technical capacity such that the interests of African oil producing countries are actively pursued in both organisations.

The OPEC Secretariat exercises the executive functions of the organisation.<sup>110</sup> Unlike the WTO Secretariat, which does not exercise executive powers,<sup>111</sup> the OPEC Secretariat is headed by the Secretary General and the organ has executive powers.<sup>112</sup> The organ also performs administrative functions for the organisation.<sup>113</sup> The mid-level organs for both organisations have the potential to perform the biggest role in

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*facilitation-conference* (accessed 13 May 2013). See also WTO 'The WTO and the International Trade Centre (ITC)' available at [http://www.wto.org/english/thewto\\_e/coher\\_e/wto\\_itc\\_e.htm](http://www.wto.org/english/thewto_e/coher_e/wto_itc_e.htm) (accessed 13 May 2013).

<sup>104</sup> See chapter 4 section 4.3.2.

<sup>105</sup> See chapter 4 section 4.3.2.

<sup>106</sup> See chapter 4 section 4.3.2 for a detailed analysis.

<sup>107</sup> See chapter 3 section 3.3.3. The Councils of the WTO implement the specific multilateral and plurilateral agreements. To this end, decisions made concerning these agreements have to be implemented by the Councils. However, although the Councils are independent, they are supervised by the General Council.

<sup>108</sup> The provisional agenda for the meetings of the Ministerial Conference is drawn by the WTO Secretariat. WTO Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council (1996) WT/L/161 Rule 3.

<sup>109</sup> See chapter 5 section 5.2.2.1 on the composition of the mid-level organs. The organs are mainly composed of technocrats.

<sup>110</sup> See chapter 4 section 4.3.3.

<sup>111</sup> The role of the WTO secretariat is limited in terms of governance of the organisation. This has been attributed to the member-driven nature of the WTO. The foregoing observations were also noted in the Sutherland Report. See Elsig M 'WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?' Steger D P (ed) *Redesigning the World Trade Organization for the Twenty-first Century* (2009) 63 (hereafter Elsig M 2009).

<sup>112</sup> The WTO Secretariat is considered non-executive, as it is not part of the executive structure of the WTO elaborated in Art IV of the Marrakesh Agreement. On the other hand, the Secretary General is the head of the OPEC Secretariat and is part of the executive structure of the organisation. Article 25 of the OPEC Statute clearly indicates that the organ has executive powers.

<sup>113</sup> See chapter 4 section 4.3.3.



regulating the international trade in oil. The above organs are assisted by subsidiary organs in the execution of their enormous tasks. However, as noted above, one of the most prominent roles of the mid-level organs is and should be dispute settlement. In light of this observation, the next section examines the dispute settlement role or the lack thereof and its implication for international trade in oil in Africa.

### 5.2.2.4 Dispute Settlement

Dispute settlement is pivotal to maintaining a sustainable international trade regime. Despite this fact, international trade in oil has been closed out of the dispute settlement process of the WTO. Further, OPEC which has a strong hold on international trade in oil, especially the determination of production quotas, has no formal dispute settlement process.<sup>114</sup> This state of affairs is bound to affect the regulation of international trade in oil. From an African perspective, disputes over oil exploration and production acreage continue to affect the oil sector. This section highlights the disputes affecting the oil sector in Africa, it argues that a dispute settlement process will improve the regulation of the oil sector in Africa.<sup>115</sup> The discussion of dispute settlement is undertaken in relation to the mid-level organs because these organs have the technical capacity to handle the dispute settlement process. The capacity of the WTO dispute settlement system to handle these disputes is also discussed.<sup>116</sup>

Currently, Angola and the Democratic Republic of Congo (DRC) are feuding over oil exploration and production acreage.<sup>117</sup> It has been argued that Angola's rise to

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<sup>114</sup> It may be argued that OPEC has an informal dispute settlement process. This can be inferred from the language of Art 3 of the OPEC Statute. The provision provides that obligations under the Statute shall be observed through good faith. Against this background, it can be argued that disputes arising out of the non-observance of such obligations can be resolved informally. However, this argument does not hold as member states have continued cheating on the production quotas and OPEC has not been able to resolve oil related disputes in some of the member states.

<sup>115</sup> One of the goals of international dispute settlement is the control of armed conflict. Thus in this regard, the WTO can be a helpful forum for resolving disputes over oil in Africa, which in some cases have escalated into armed conflicts. See Jackson J H (2006) 147.

<sup>116</sup> See chapter 3 section 3.3.2.1.

<sup>117</sup> Blocks 14 and 15 located in the Atlantic Ocean Coastline are currently controlled by Angola. These blocks are the subject of a dispute between Angola and the DRC. The DRC claims that the blocks are located in its Exclusive Economic Zone. An Exclusive Economic Zone is an area where coastal states have sovereign rights to exploit natural resources. See International Crisis Group Black Gold in the Congo: Threat to

second position on the list of African oil producing countries is attributed to the production of oil from DRC territory.<sup>118</sup> Efforts have been made to resolve the conflict through regional and international interventions.<sup>119</sup> However, as of 2012, the conflict was yet to be resolved. It should be noted that both Angola and the DRC are susceptible to aggression and are recovering from years of civil war.<sup>120</sup> Angola is a member of both the WTO and OPEC.<sup>121</sup> The DRC is not a member of OPEC but is a WTO member.<sup>122</sup>

This dispute has not been brought before the WTO because of the organisation's position on the regulation of oil trade and also the fact that the dispute is related to border conflicts.<sup>123</sup> On the other hand, the parties cannot rely on OPEC to settle the dispute because the organisation lacks a dispute settlement process. This is compounded by the fact that DRC is not an OPEC member. Although the above example does not affect the regulation of production quotas, oil consumption subsidies and corruption, it illustrates the deficiency of the WTO dispute settlement framework and the effect of the lack of an OPEC dispute settlement framework.

Another oil related conflict in Africa is the impending war between Sudan and South Sudan over the oil fields in South Sudan.<sup>124</sup> The conflict is to a large extent

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Stability or Development Opportunity? (2012) Africa Report No. 188 2-3 (hereafter International Crisis Group 2012). See also Vines A & Weimer M A Report of the CSIS Africa Program Angola Assessing the Risks to Stability (2011) Centre for Strategic and International Studies 17 (hereafter Vines A & Weimer M A 2011).

<sup>118</sup> International Crisis Group (2012) 3.

<sup>119</sup> The DRC and Angola signed an Agreement which created a common interest zone. However, the Agreement has been rejected by the DRC. Further the DRC commenced proceedings against Angola at the UN Commission on the Limits of the Continental Shelf. The interventions are yet to yield any tangible results. See International Crisis Group (2012) 3.

<sup>120</sup> See International Crisis Group 'DR Congo Conflict History' available at <http://www.crisisgroup.org/fr/publication-type/key-issues/Research%20Resources/Conflict%20Histories/DR%20Congo%20Conflict%20History.aspx> (accessed 14 May 2013). See also Malaquias A 'Ethnicity and Conflict in Angola: Prospects for Reconciliation' available at <http://www.iss.org.za/pubs/Books/Angola/6Malaquias.pdf> (accessed on 14 May 2013).

<sup>121</sup> See WTO 'Angola and the WTO' available at [http://www.wto.org/english/thewto\\_e/countries\\_e/angola\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/angola_e.htm) (accessed 14 October 2012). See also OPEC 'Angola Facts and Figures' available at [http://www.opec.org/opec\\_web/en/about\\_us/147.htm](http://www.opec.org/opec_web/en/about_us/147.htm) (accessed 14 October 2012).

<sup>122</sup> See WTO 'Democratic Republic of the Congo and the WTO' available at [http://www.wto.org/english/thewto\\_e/countries\\_e/democratic\\_republique\\_congo\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/democratic_republique_congo_e.htm) (accessed 14 May 2013).

<sup>123</sup> See chapter 3 section 3.2 for a detailed discussion on oil regulation by the WTO.

<sup>124</sup> The Comprehensive Peace Agreement has not been successful in averting conflict between the two states. South Sudan claims that the Agreement is not transparent and that Sudan is not distributing the oil wealth equitably. South Sudan has therefore stopped the export of oil from the oil wells located near the border of the two countries. See Global Witness 'South Sudan and Sudan' available at <http://www.>

precipitated by the failure to share revenue in a transparent manner.<sup>125</sup> South Sudan is neither a member of the WTO nor OPEC.<sup>126</sup> On the other hand, Sudan is in the process of accession to the WTO.<sup>127</sup> The country is also not a member of OPEC.<sup>128</sup> The lack of a comprehensive dispute settlement process to adjudicate over oil related disputes may disrupt oil trade in Africa.

It is apparent from the above discussion that the above disputes mainly relate to territory and the location of the oil fields. The WTO dispute settlement process only applies to the WTO agreements. Border and territory disputes are outside the mandate of the dispute settlement process. This presents a challenge in relying on the WTO dispute settlement process to settle oil related disputes in Africa. However, the dispute settlement process exists and if the WTO is amenable to actively engaging with international trade in oil, rules on the same can be developed. In the same light, OPEC has the option of developing a dispute settlement process to deal with oil related disputes. However, the membership requirements present challenges as the organisation is open to only a select number of countries. The next section examines the subsidiary-level organs of both the WTO and OPEC. The subsidiary organs have very specific mandates and are supervised by the mid-level organs.

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[globalwitness.org/campaigns/corruption/oil-gas-and-mining/sudan-and-south-sudan](http://globalwitness.org/campaigns/corruption/oil-gas-and-mining/sudan-and-south-sudan) (accessed 14 October 2012). See also United States Institute of Peace ‘Sudan, South Sudan Strike Oil Deal’ available at <http://www.usip.org/publications/sudan-south-sudan-strike-oil-deal> (accessed 14 October 2012). Currently, the two countries appear to have reached an agreement on the fees to be paid by South Sudan to transport oil through the territory of Sudan. However, some issues such as the location of the Abeyi oil fields are still outstanding and are yet to be resolved. The African Union was instrumental in finding solutions to the above impasse.

<sup>125</sup> See Global Witness ‘South Sudan and Sudan’ available at <http://www.globalwitness.org/campaigns/corruption/oil-gas-and-mining/sudan-and-south-sudan> (accessed 14 October 2012).

<sup>126</sup> See Yee A ‘Accession to OPEC Possible for South Sudan’ available at <http://www.thenational.ae/business/energy/accession-to-pec-possible-for-south-sudan> (accessed 14 October 2012).

<sup>127</sup> See WTO ‘Accession Sudan’ available at [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_soudan\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_soudan_e.htm) (accessed 14 October 2012). The country is currently an observer at the WTO. See WTO ‘Groups in the WTO’ available at [http://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.pdf](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf) (accessed 14 October 2012).

<sup>128</sup> See Siona C ‘Angola, Sudan ask for OPEC Membership’ available at <http://www.chron.com/business/energy/article/Angola-Sudan-to-ask-for-OPEC-membership-1582149.php> (accessed 14 October 2012).

### 5.2.3 Subsidiary Organs

The subsidiary organs are supervised by the mid-level organs and have very specific mandates. These organs implement specific tasks in both the WTO agreements and the OPEC Statute. Accordingly, the organs that are treated as such in this section are: the OPEC Economic Commission,<sup>129</sup> the OPEC Ministerial Monitoring sub-committee,<sup>130</sup> the WTO Council for Trade in Goods,<sup>131</sup> the Committee on Subsidies and Countervailing Measures<sup>132</sup> and the Committee on Government procurement.<sup>133</sup> All the above subsidiary organs operate within the framework of the mid-level organs. The OPEC Statute is very clear and provides that the specialised organs operate under the Secretariat.<sup>134</sup> Similarly, at the WTO, the above organs are all supervised by the General Council which is a mid-level organ.<sup>135</sup>

The mandate of the OPEC subsidiary organs entrenches oil production quotas; they monitor oil prices and ensure that member states comply with quota allocations.<sup>136</sup> The above mandate entrenches a GATT inconsistent practice. On the other hand, the WTO subsidiary organs that are discussed in this section have specific mandates that relate to, among other areas, oil production quotas, oil consumption subsidies and corruption in government procurement.<sup>137</sup>

The WTO top-level, mid-level and subsidiary organs are appropriate institutions for the regulation of international trade of oil. The organs have specific mandates and the mid-level organs have a dispute settlement process which is crucial to the regulation of international trade in oil. The OPEC organs especially the mid-level organs are also active. However, OPEC organs appear to entrench practices such as production quotas which are inconsistent with the GATT. It should also be noted that the mandate and the potential of the WTO organs to regulate international trade

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<sup>129</sup> See chapter 4 section 4.3.4.1.

<sup>130</sup> See chapter 4 section 4.3.4.2.

<sup>131</sup> See chapter 3 section 3.3.3.1.

<sup>132</sup> See chapter 3 section 3.3.3.2.

<sup>133</sup> See chapter 3 section 3.3.3.3.

<sup>134</sup> See OPEC Statute Art 36 (B). See also chapter 4 section 4.3.4.

<sup>135</sup> See Art IV (5) of the Marrakesh Agreement. See also chapter 3 section 3.3.3.

<sup>136</sup> See chapter 4 sections 4.3.4.1 and 4.3.4.2.

<sup>137</sup> See chapter 3 sections 3.3.3.1, 3.3.3.2 and 3.3.3.3.

in oil can only be nurtured if the WTO agreements are expanded to specifically address international trade in oil. This is particularly true for oil consumption subsidies and corruption.

### **5.3 Examining the Duality of Legal Regimes: the WTO and OPEC Perspectives**

This section of the chapter examines the regulation of production quotas, oil consumption subsidies, and corruption in oil producing countries. The section relies on the arguments developed in chapters three and four to develop a comparison between the OPEC Statute and the WTO agreements in the regulation of the above areas. The section commences with a discussion on production quotas, proceeds to oil consumption subsidies and concludes with the discussion of corruption. The discussion focuses on African oil producing countries.

#### **5.3.1 Production Quotas**

Article XI (I) of the GATT prohibits the institution of export restrictions on products destined for the territory of another member state.<sup>138</sup> As noted in chapter three, the OPEC production quota affects the amount of oil available for export.<sup>139</sup> Additionally, prohibited restrictions under Art XI (I) can be either of a de facto or de jure nature.<sup>140</sup> It is also worth noting that the provision applies to all restrictions, irrespective of the fact that the restrictions are based on laws or legal mandatory obligations.<sup>141</sup> The provision applies to broad measures.

Article 2 (B) of the OPEC Statute provides the broad framework for the institution of oil production quotas.<sup>142</sup> The clause provides price stabilisation as one of the mandates of the organisation.<sup>143</sup> OPEC relies on oil production quotas to stabilise

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<sup>138</sup> See chapter 3 section 3.4.1 for a detailed discussion.

<sup>139</sup> See chapter 3 section 3.4.1.

<sup>140</sup> See chapter 3 section 3.4.1 for a detailed discussion.

<sup>141</sup> See chapter 3 section 3.4.1 for a detailed discussion.

<sup>142</sup> See Art 2 of the OPEC Statute. See also chapter 4 section 4.4.1.

<sup>143</sup> See Art 2 of the OPEC Statute.

prices.<sup>144</sup> It is clear that these quotas are inconsistent with Art XI (1) of the GATT discussed above. Oil production quotas are set through production agreements that restrict the amount of oil that can be produced by the OPEC member states.<sup>145</sup>

The GATT provides exceptions to the obligations created in Art XI (I). However, the exceptions are not sufficient to allow the nature of production quotas that are maintained under the OPEC Statute.<sup>146</sup> The exceptions under Art XX (g) provide for conservation of natural resources.<sup>147</sup> The production quotas maintained under the OPEC Statute are meant to stabilise oil prices and not to conserve exhaustible natural resources. It may be argued that the price stabilisation is related to conservation of exhaustible natural resources. However, OPEC production quotas do not pass the three pillar test or the contents of the chapeau necessary to establish compliance with the exception in Art XX (g) of the GATT.<sup>148</sup>

Similarly, Art XX (h) of the GATT 1994 provides an exception to the obligations in Art XI (I).<sup>149</sup> However, the clause provides for intergovernmental commodity organisations notified to the WTO.<sup>150</sup> Although OPEC may be regarded as an intergovernmental commodity agreement it has not been notified to the WTO.<sup>151</sup> Accordingly, Art 2 (B) of the OPEC Statute which forms the foundation of production quotas is based on a Statute which has not been notified to the WTO as an intergovernmental agreement.

Related to the above arguments, OPEC oil production quotas also have internal deficiencies.<sup>152</sup> African oil producing countries that are members of both organisations have to comply with obligations under Art XI (I) of the GATT. The WTO has been slow to fully integrate and accommodate the international trade in oil

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<sup>144</sup> See chapter 4 section 4.4.1.

<sup>145</sup> See chapter 4 section 4.4.1.

<sup>146</sup> See chapter 3 section 3.4.2.

<sup>147</sup> See Art XX (g) of the GATT.

<sup>148</sup> See chapter 3 section 3.4.2 for a detailed discussion.

<sup>149</sup> See Art XX (h) of the GATT. See also chapter 3 section 3.4.2.

<sup>150</sup> See Art XX (h) of the GATT.

<sup>151</sup> See chapter 4 section 4.2. The argument that OPEC is an intergovernmental commodity organisation is not tenable.

<sup>152</sup> See chapter 4 section 4.4.1 for a detailed discussion.

in the implementation of international trade obligations.<sup>153</sup> However, if the political consensus is achieved, international trade in oil will be subjected to GATT regulation and countries with dual membership will be affected. As noted in chapter four, the domestic laws of Nigeria and Angola entrench oil production quotas.<sup>154</sup> This may be attributed to the fact that they are members of OPEC.<sup>155</sup> These countries may be found to be in violation of their GATT obligations.

### 5.3.2 Oil Consumption Subsidies

Articles 3 and 5 of the SCM Agreement apply to subsidies that are maintained on the basis of laws and those that are provided as a matter of fact.<sup>156</sup> Prohibited subsidies under Art 3 of the SCM Agreement do not need to be specific.<sup>157</sup> On the other hand, actionable subsidies that are specific to a particular industry are considered to be inconsistent with WTO obligations.<sup>158</sup> Further, such actionable subsidies have to create adverse effects on the economy of another WTO member.<sup>159</sup> It has been noted that oil consumption subsidies encourage smuggling.<sup>160</sup> This affects the domestic oil industries of other countries.<sup>161</sup> Additionally, these subsidies are usually utilised by particular industries such as the transport industry and domestic oil producers.<sup>162</sup> To this end, it can be argued that these subsidies are specific in terms of de facto specificity.<sup>163</sup> However, there are challenges in making this argument. The transport sector provides a service and as such is not regulated under the SCM Agreement.<sup>164</sup>

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<sup>153</sup> See chapter 3 section 3.2.

<sup>154</sup> See chapter 4 section 4.5.

<sup>155</sup> See chapter 4 section 4.5.

<sup>156</sup> See chapter 3 section 3.4.3.

<sup>157</sup> See chapter 3 section 3.4.3.

<sup>158</sup> See chapter 3 section 3.4.3.

<sup>159</sup> See Art 5 of the SCM Agreement.

<sup>160</sup> See chapter 4 sections 4.4.2 and 4.5. See also chapter 3 section 3.4.3.

<sup>161</sup> See chapter 4 section 4.4.2. See also chapter 3 section 3.4.3. The removal of fuel subsidies in Nigeria has crippled the smuggling business. Smuggling of fuel to Cameroon has decreased. See Business Day 'Subsidy Removal Cripples Fuel Smuggling Across Nigerian Borders' available at <http://www.businessdayonline.com/NG/index.php/news/76-hot-topic/31798-subsidy-removal-cripples-fuel-smuggling-across-nigerian-borders> (accessed 14 May 2013).

<sup>162</sup> See chapter 4 section 4.5.

<sup>163</sup> See chapter 3 section 3.4.3.

<sup>164</sup> See chapter 3 section 3.4.3.

Similarly, the effect of smuggling and the export of subsidised oil products to other African countries are difficult to determine due to lack of data.<sup>165</sup>

This is the case with the oil subsidy program in Nigeria; it is difficult to determine the specificity of the subsidy and also to determine whether it affects the domestic industry of another WTO member, Cameroon.<sup>166</sup> In the same light, in Nigeria, it cannot be proven that oil consumption subsidies induce consumers to buy domestically produced oil over imported oil, and that therefore such subsidies are in contravention of Art 3 of the SCM Agreement.<sup>167</sup> Thus although oil consumption subsidies maintained by OPEC members, may be treated as financial contributions under Art 1 of the SCM Agreement, in practice, proving that these subsidies are inconsistent with Arts 3 and 5 of the SCM Agreement may present challenges.<sup>168</sup>

Oil consumption subsidies under the OPEC Statute are not expressly stipulated.<sup>169</sup> However, Art 2 (A) of the OPEC Statute provides that the organisation shall determine the best means of safeguarding members' interests, individually and collectively.<sup>170</sup> Accordingly, it can be argued that oil consumption subsidies which are in most cases instituted to build political capital may be classified as individual interests of the member countries.<sup>171</sup> Nevertheless, such a provision in the OPEC Statute does not render the subsidies inconsistent with Arts 3 and 5 of the SCM Agreement.<sup>172</sup>

### 5.3.3 Corruption and Government Procurement

It has been noted that in OPEC member states, the government has an unprecedented level of involvement in the acquisition and disposal of revenue.<sup>173</sup> Despite this observation, the OPEC Statute does not expressly provide for the control

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<sup>165</sup> See chapter 3 section 3.4.3.

<sup>166</sup> See chapter 3 section 3.4.3.

<sup>167</sup> See chapter 3 section 3.4.3.

<sup>168</sup> See chapter 3 section 3.4.3.

<sup>169</sup> See chapter 4 section 4.4.2.

<sup>170</sup> See chapter 4 section 4.4.2 for a detailed discussion.

<sup>171</sup> See chapter 4 section 4.4.2 for a detailed discussion.

<sup>172</sup> See chapter 3 section 3.4.3.

<sup>173</sup> Montinola G & Jackman R W (2002) 158. See also chapter 4 section 4.4.3.



of corruption.<sup>174</sup> This creates suitable ground for corruption. The GPA seeks to control corruption and encourage transparency in government procurement in some WTO member states.<sup>175</sup> It is clear that due to the unrestricted involvement of the government in the oil sector in the OPEC member states, a mechanism to regulate government procurement is crucial for the control of corruption.

The GPA which provides for uniform tendering and qualification procedures may help in monitoring the disposal of government revenue.<sup>176</sup> Additionally, due to the fact that the GPA is an international agreement, an environment of peer review is created. However, the GPA is a plurilateral agreement and only applies to a few countries.<sup>177</sup> The GPA has not been very successful due to its limited application.<sup>178</sup> Procurement related corruption in Africa is common in the oil sector. The oil sectors in Liberia, Uganda, Nigeria and Angola have been dogged by corruption related scandals.<sup>179</sup> The OPEC Statute does not provide for the regulation of corruption. However, international interventions have been undertaken by the organisation to combat the growing incidence of corruption.<sup>180</sup> In terms of African OPEC members such as Nigeria and Angola, the domestic laws on corruption have not been successful in controlling corruption in their oil sectors.<sup>181</sup> In this case, both the WTO and OPEC have very weak laws to control corruption in the oil sector.

The legal framework of both the WTO and OPEC reveals a challenge in the regulation of international trade in oil. The WTO legal framework on quantitative restrictions is to a large extent sufficient for the regulation of oil production quotas. On the other hand, the OPEC Statute does not have express provisions on

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<sup>174</sup> See chapter 4 section 4.4.3.

<sup>175</sup> See Arts 7 and 8 of the GPA. See also chapter 3 section 3.4.4.

<sup>176</sup> See Arts 7 and 8 of the GPA.

<sup>177</sup> See also chapter 3 section 3.4.4.

<sup>178</sup> See also chapter 3 section 3.4.4.

<sup>179</sup> See Butty J 'Watchdog Group Warns of Oil Corruption in Liberia' available at <http://apperi.org/2011/09/27/watchdog-group-warns-of-oil-corruption-in-liberia/> (accessed 16 October 2012). See also Business Anti-Corruption Portal 'Public Procurement and Contracting' available at <http://www.Business-anti-corruption.org/country-profiles/sub-saharan-africa/angola/corruption-levels/public-procurement-and-contracting/> (accessed 16 October 2012). See also Izama A 'Uganda: Oil, Corruption and Entitlement' available at <http://www.guardian.co.uk/world/africa-blog/2012/oct/01/uganda-oil> (accessed 16 October 2012). See also Smith P 'Nigeria: The Great \$6.8bn Oil Scandal' available at <http://apperi.org/2012/07/30/nigeria-the-great-6-8bn-oil-scandal/> (accessed 16 October 2012).

<sup>180</sup> See chapter 4 section 4.4.3.

<sup>181</sup> See chapter 4 section 4.5.

production quotas; however, its mandate is premised on the stabilisation of crude oil prices and it relies on production quotas to stabilise oil prices. The SCM Agreement has challenges with regard to determination of specificity and injury to the domestic industry of another member. This affects the regulation of prohibited and actionable oil consumption subsidies. The OPEC Statute has no express provisions on oil consumption subsidies. Finally, both organisations have insufficient rules for the control of corruption in the oil sector. The next section provides a comparative summary of the two organisations. The section is limited to the institutional and legal frameworks for both OPEC and the WTO. The section is intended to guide the discussion in chapter six on Ghana and chapter seven on the conclusions and recommendations.

#### 5.4. A Comparative Summary

The section highlights some of the similarities and differences between the WTO and OPEC. The summary focuses on production quotas, oil consumption subsidies and corruption.

In terms of the institutional structure of the two organisations, the composition of the top-level organs is instrumental in legitimizing the high-level decisions of both organisations. It is important to understand that decisions on international trade in oil require political will. The top-level organs are an important platform for building political acceptance of the organisations' decisions. The powers of the WTO top-level organs are more specific than those of the OPEC top-level organs.

In both cases, the mid-level organs are comprised of representatives with technical knowledge. Additionally, the mid-level organs perform the bulk of the roles of both organisations. This makes the mid-level organs a good entry point for the discussion of the regulation of international trade in oil. The mid-level organs are also important for enhancing cooperation between organisations that are relevant to the regulation of international trade in oil. However, although the WTO mid-level organs have specific powers to encourage such cooperation, the WTO has not

granted OPEC observer status. On the other hand, OPEC does not have specific powers to encourage cooperation with other organisations.

Dispute settlement is another area where the mid-level organs are relevant in the regulation of international trade in oil. The WTO has specific rules and institutions to guide dispute settlement. This does not mean that the dispute settlement process has been applied to settlement of oil related disputes. Nonetheless, the broad framework exists. To the contrary, OPEC does not have formal rules on dispute settlement. This affects its regulation of international trade in oil in Africa.

The subsidiary organs in both organisations have very specific mandates. It is clear that these bodies are instrumental in implementation of the policies and rules of both organisations. While the WTO subsidiary organs may be relevant in eliminating WTO inconsistent practices in international trade in oil, the OPEC subsidiary organs entrench the institution of production quotas.

From a legal perspective, it is clear that OPEC production quotas cannot be supported under the WTO legal framework. However, the WTO faces challenges in building consensus to accommodate and regulate international trade in oil. This is a challenge for the regulation of international trade in oil in Africa.

It may be argued that oil consumption subsidies are inconsistent with WTO rules on subsidies, especially Art 3 of the SCM Agreement. However there are challenges in proving that oil consumption subsidies maintained by OPEC member states such as Nigeria, encourage the use of domestic over imported oil. Additionally, for actionable subsidies, it is difficult to determine specificity of oil consumption subsidies in some countries like Nigeria. There is little proof to suggest that these subsidies cause injury to the domestic oil industries of other members.

Finally, government procurement and corruption are related. This is especially true in Africa where procurement related scandals have been reported in the oil sector. The GPA which would have been a useful tool in combating such corruption is limited in application. Although OPEC does not have a mechanism to regulate

corruption, the organisation has endeavored to engage in international partnerships to reduce the incidence of the same.

This summary indicates that although the WTO may be a useful forum in commencing the active regulation of international trade in oil, the consensus requirement is still a major hindrance, especially with regard to the regulation of production quotas. Additionally, although there are rules on subsidies it cannot be said with certainty that oil consumption subsidies are inconsistent with the SCM Agreement. The GPA is also too limited and may not be a suitable framework for the control of corruption in African oil producing countries.

## 5.5 Conclusion

The institutions of both organisations have top-level, mid-level and subsidiary organs. However, the OPEC Statute does not provide a comprehensive mandate to its institutions. To the contrary, the WTO agreements are comprehensive and elaborately provide specific powers to the institutions. That said, the dispute settlement process of the WTO may be of limited application to oil related disputes since most of the disputes involve disputes over territory and acreage.

The WTO legal framework has provisions on the regulation of production quotas, oil consumption subsidies, and corruption in government procurement. On the face of it, it might appear to be sufficient; however, there are serious challenges with regard to oil consumption subsidies and corruption. The OPEC legal framework which entrenches practices that are harmful to the oil sector is weak and can be challenged. Accordingly, it can be argued that the WTO system is a more conducive regime for the regulation of international trade in oil in Africa, as it has effective institutions and a more comprehensive legal framework. The next chapter applies the issues identified in chapter five to Ghana an emerging African oil producing country.

## CHAPTER 6

### OIL PRODUCTION AND TRADE IN GHANA

#### 6.1 Introduction

The previous chapter examined the similarities and differences between the World Trade Organisation (WTO) and the Organisation of Petroleum Exporting Countries (OPEC). The chapter highlighted the challenges that are implicit in the regulation of production quotas, oil consumption subsidies, and corruption in both systems. The author endeavored to relate the discussion to Africa and African examples were relied upon. However, it is necessary to further relate and ground the analysis in Africa. To this end, the discussion here is focused on Ghana. The Ghanaian example provides a deeper analysis of the above areas. Although, the Ghanaian example may not apply to all African countries, the discussion in this chapter will guide the regulation of international trade in oil in Africa from a Ghanaian perspective.

Ghana is currently a member of the WTO and it has indicated that it might join OPEC after it stabilises its oil production.<sup>1</sup> Even then, appetite for OPEC membership is low.<sup>2</sup> This observation at first sight seems to make Ghana an unlikely candidate for the case study as it is not a member of both organisations. However, it provides an additional perspective to the study, that is, the standpoint of an emerging African oil producing country, and how it will handle its WTO obligations if it chooses to join OPEC. Additionally, the choice of Ghana as a case study will

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<sup>1</sup> See Ghana Oil and Gas 'Ghana Unlikely to Join OPEC on Commencement of Production' available at <http://ghanaoilonline.org/2011/01/ghana-unlikely-to-join-opec-on-commencement-of-production/> (accessed 10 December 2012). See also Government of Ghana Official Website 'Ghana not in Haste to Join OPEC' available at <http://www.ghana.gov.gh/index.php/news/general-news/3313-ghana-not-in-haste-to-join-opec> (accessed 10 December 2012). See also WTO 'Ghana and the WTO' available at [http://www.wto.org/english/thewto\\_e/countries\\_e/ghana\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/ghana_e.htm) (accessed 02 May 2013).

<sup>2</sup> Discussions with various officials in Ghana's oil sector revealed that they are not keen on joining OPEC. It is respectfully submitted that the decision to join OPEC should take into consideration Ghana's WTO obligations. Notes of discussions with Ghana oil sector officials are on file with the author. Between 2010 and 2011, Ghana produced about 26 million barrels of oil from the jubilee oil field. It is expected that production in 2013 will increase considerably to about 120 000 barrels per day. See Ministry of Finance 2012 Annual Report on Petroleum Funds (2013) 15 (hereafter Ministry of Finance 2013).

inform other emerging African oil producing countries on their decisions to join OPEC and whether the same would improve their regulatory framework without compromising their obligations under the WTO agreements.

The first section of the chapter provides a brief background to oil production and trade in Ghana. The section also discusses the geographic location of Ghana. Additionally, the location of the oil fields in Ghana is illustrated. This discussion is crucial to understanding oil production in Ghana. The section also provides a synopsis of the historical context, which includes the history of oil production in Ghana and its experience with the WTO. Secondly, the chapter provides a discussion of the policy and legal framework for crude oil production and trade in Ghana. The chapter examines the domestic policy and legal instruments regulating production quotas, oil consumption subsidies, and the laws on corruption in the oil sector.

### 6.1.1 Geographic Location of Ghana and the Offshore Oil Fields

The discussion of the geographic location of Ghana and its oil fields is only meant to provide context to the subsequent discourse on the regulation of international trade in oil in Ghana. In light of the above, the discussion is limited in scope. Ghana is located off the coast of the Atlantic Ocean.<sup>3</sup> The country shares borders with Togo to the East, Burkina Faso to the North, and, Côte d'Ivoire to the West.<sup>4</sup> Ghana's recent oil discoveries and production can be attributed to its location and proximity to the Atlantic Ocean.<sup>5</sup> A number of countries on the African West Coast have commercially viable deposits of crude oil.<sup>6</sup>

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<sup>3</sup> Clarke D (2010) 335-336.

<sup>4</sup> Clarke D (2010) 335-336. See also chapter 6 figure 6.1 below.

<sup>5</sup> Most of Ghana's major oil and gas finds are located in the Atlantic Ocean. See chapter 6 figure 6.2 below. The Atlantic Ocean has been the source of various deep sea oil discoveries as well as enormous discoveries in Brazil. The discoveries in the Atlantic Ocean have been attributed to the geographic makeup of the ocean floor. See World Ocean Review 'Energy' available at <http://worldoceanreview.com/en/energy/fossil-fuels/> (accessed 04 December 2012). For a contrary opinion on the formation of crude oil, the abiotic process posits that crude oil is produced in the mantle of the earth and seeps through bedrocks to deposit in the sedimentary rocks. See Corsi J R 'Discovery backs Theory Oil not Fossil Fuel' available at <http://www.wnd.com/2008/02/45838/> (accessed 04 December 2012).

<sup>6</sup> African Development Bank Crude Oil and Natural Gas Production in Africa and the Global Market Situation (2010) Commodities Brief Volume 1, Issue 4 1 (hereafter African Development Bank 2010).

In 2007, Ghana celebrated its Golden Jubilee.<sup>7</sup> The country also discovered sizeable deposits of crude oil.<sup>8</sup> The location of the discovery is currently referred to as the Jubilee oil fields. The Jubilee oil fields are located between the deepwater Tano block and the Cape Three Points block.<sup>9</sup> Although there are other oil fields in the various blocks on Ghana's continental shelf, the discovery in the Jubilee field is by far, the largest.<sup>10</sup>

The geographic location of the Jubilee oil fields, and the proximity of the fields to Takoradi,<sup>11</sup> where gas can be stored on land, and the refinery at Tema,<sup>12</sup> which is further up along the coast of Ghana make oil production economically viable. From

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<sup>7</sup> See Left S 'The Guardian Pride, Poverty and Promise: Ghana's Golden Jubilee' (2007) available at <http://www.guardian.co.uk/world/2007/mar/06/sarahleft> (accessed 05 December 2012).

<sup>8</sup> See Kosmos Energy 'Ghana-Oil and Gas Development' available at <http://www.Kosmosenergy.com/operations-ghana.php> (accessed 03 December 2012). The capacity of the jubilee oil fields is estimated to hold 800 million barrels of recoverable light crude and to have a potential of about 3 billion barrels. See Zaney G D 'Ghana's Petroleum Revenue Management Bill (2011)' available at <http://www.ghana.gov.gh/index.php/news/features/5860--ghanas-petroleum-revenue-management-bill> (accessed 02 May 2013).

<sup>9</sup> See Tullow Oil Ghana 'Jubilee Field' available at <http://www.tulloil.com/ghana/index.asp?pageid=11> (accessed 03 December 2012). The oil fields are located 60 kilometers from Efasu and 135 Kilometers from Takoradi. See Zaney G D 'Ghana's Petroleum Revenue Management Bill (2011)' available at <http://www.ghana.gov.gh/index.php/news/features/5860--ghanas-petroleum-revenue-management-bill> (accessed 02 May 2013).

<sup>10</sup> See Tullow Oil Ghana 'Key Facts' available at <http://www.tulloil.com/ghana/index.asp?pageid=30> (accessed 03 December 2012). Other oil blocks include the offshore Keta Basin and the offshore Saltpond Basin. See Ghana Oil Info 'Exploration Upstream Sector' available at <http://www.ghanaoilinfo.com/?page=exploration&factid=957> (accessed 04 December 2012).

<sup>11</sup> The Bulk Oil Storage and Transportation (BOST) Company of Ghana is in advanced stages of constructing a gas and petroleum terminal and storage facility in Pumpuni near Takoradi. See BOST 'BOST Gears Up for Gas Storage Facility' available at <http://www.bost.com.gh/?cat=5> (accessed 04 December 2012). Oil production in the Jubilee oil fields is undertaken on a Floating Production Storage and Offloading (FPSO) vessel located near the oil field. Gas from the oil field will be transported to Takoradi which is about 6 hours from the FPSO. See also African Development Bank Ghana Jubilee Field Project Summary of the Environmental Impact Assessment (EIA) (2009) 6 (hereafter African Development Bank 2009). The Tema Oil Refinery has experienced some technical challenges in the past. However, plans are underway to expand the refinery and to increase its capacity. See Ministry of Energy Energy Update Energy for a Better Ghana Developments in the Energy Sector 2009-2012 (2012) 13 (hereafter Ministry of Energy 2012). Officials in charge of the Tema Oil Refinery are optimistic that after expansion it will meet a substantial portion of domestic oil products demand. See Notes of discussions with officials in Ghana's oil sector on file with the author.

<sup>12</sup> It has been reported that the Tema Oil Refinery is not configured to refine crude oil from the Jubilee oil fields. Further, that the Jubilee oil fields produce sweet light oil. However, the Tema Refinery is also configured to refine light and sweet crudes such as Brass River, Forcados, and Palanca blend. Also the API for oil from the Jubilee oil fields appears to fall within the range of oil refined at Tema Oil Refinery. See The Chronicle 'Tema Oil Refinery cannot refine Jubilee Oil –Tullow' available at <http://ghanaiian-chronicle.com/tema-oil-refinery-cannot-refine-jubilee-oil-tullow/> (accessed 04 December 2012). See also Energy World Africa 'Tema Oil Refinery' available at <http://www.energyworldafrica.com/pdf/Tema%20Oil%20Refinary.pdf> (accessed 02 May 2013).

a trade perspective, the proximity of the Jubilee oil fields to onshore storage facilities and the refinery make production and trade profitable.<sup>13</sup>

There are subsisting arguments on the proposal to refine crude oil from the Jubilee oil fields at the Tema Refinery.<sup>14</sup> The arguments against the proposal appear to be motivated by several considerations including commerce and economic benefit for the country.<sup>15</sup> Conversely, it can be argued that refining oil in Tema also has benefits. Unlike crude oil, the various refined products may provide a wide revenue base for the country.<sup>16</sup> The author submits that resolution of the above issue should be based on economic considerations; the option that provides more revenue to the country should be preferred. It has been argued by some government officials in the Ghana oil sector that the decision to refine oil from the Jubilee oil fields at the Tema Oil Refinery should be implemented only after the oil has attained a technical value.<sup>17</sup> This can only happen after the oil has been exported to various refineries around the world. This argument is persuasive and justifies the delay in refining oil from the Jubilee oil fields at the Tema Oil Refinery.



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<sup>13</sup> Commentators have noted that geographical location has an impact on international trade and transport. Countries with ports and access to international sea routes trade more than landlocked countries. See Behar A & Venables A J Transport Costs and International Trade (2010) University of Oxford Department Of Economics Discussion Paper Series 4 (hereafter Behar A & Venables A J 2010).

<sup>14</sup> See The Chronicle 'Tema Oil Refinery cannot refine Jubilee Oil –Tullow' available at <http://ghanaian-chronicle.com/tema-oil-refinery-cannot-refine-jubilee-oil-tullow/> (accessed 04 December 2012). Some government officials in the oil sector have noted that Tema Oil Refinery does not have the capacity to refine the Ghana government portion of crude lifted from the Jubilee oil field. They further note that Tema Oil Refinery may not have the financial capacity to meet the requirements for purchasers of oil from Ghana National Petroleum Corporation which markets the government's portion of oil from the Jubilee oil field. See Notes of discussions with officials in Ghana's oil sector on file with the author.

<sup>15</sup> It has been noted that the market for crude is quite similar to the market for refined petroleum. However, the market for light crude is higher than the market for heavy crude because it is easier to refine light crude. Moreover, the refining capacity for heavy crude is quite limited. See Grant K et al Understanding Today's Crude Oil and Product Markets (2006) A Policy Analysis Study Lexecon 19-20 (hereafter Grant K et al 2006). Thus Ghana may derive more economic benefit from exporting its crude as opposed to refining.

<sup>16</sup> See Highbeam Business 'Petroleum Refining' available at <http://business.highbeam.com/industry-reports/chemicals/petroleum-refining> (accessed 05 December 2012).

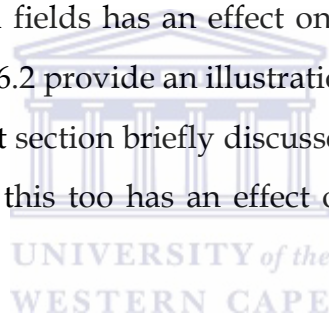
<sup>17</sup> See Notes of discussions with officials in Ghana's oil sector on file with the author. The technical value is sometimes referred to as the refining value. This refers to the value a refiner expects for products from a particular type of crude oil less operating costs. Crude oil less the refining value provides the estimated profit margin from a particular type of crude oil. See Oil and Gas Journal 'Achieving Maximum Crude Oil Value Depends on Accurate Evaluation' available at <http://www.ogj.com/articles/print/volume-100/issue-2/processing/achieving-maximum-crude-oil-value-depends-on-accurate-evaluation.html> (accessed 02 May 2013).



Another issue that arises out of the discussion of the geographic location of the Jubilee oil fields is conflicts over maritime borders with neighboring Côte d'Ivoire.<sup>18</sup> The Jubilee oil fields are located close to the border of the two countries. Currently, the issue is under control although it might be a source of unrest in the future and may affect oil production and trade.<sup>19</sup>

Finally, due to the geographic location of Ghana and the oil fields, transportation of oil to the international markets is cheap.<sup>20</sup> On the downside, the location of the offshore fields and production facilities in the Atlantic Ocean, have implications for control of disposal of hazardous waste and prevention of pollution.<sup>21</sup> This is bound to have an effect on the cost of oil production and trade in the offshore fields in Ghana.

The geographic location of oil fields has an effect on oil trade and production. The figures below, figures 6.1 and 6.2 provide an illustration of the location of Ghana and the offshore oil fields. The next section briefly discusses the historic context of Ghana. Like the geographic location, this too has an effect on oil trade and production in Ghana.



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<sup>18</sup> See Africa and the World 'A Dispute between Ghana and Ivory Coast over Ghana's Oil Wealth' available at <http://www.africaw.com/forum/f17/a-dispute-between-ghana-and-ivory-coast-over-t2210/> (accessed 05 December 2012).

<sup>19</sup> Ghana is confident the dispute will not escalate due to good relations with the neighboring states. Even so, this issue might affect oil production in the future. See Addo N A Governance and Economic Trends in Africa: Lessons from Ghana (2012) Meeting Summary Chatham House 4 (hereafter Addo N A 2012).

<sup>20</sup> The fluids containing oil from the subsea oil field are processed on board the FPSO. The export tankers that transport the oil to various international destinations moor next to the FPSO. This eliminates the high transport costs associated with onshore oil fields where oil from the wells has to be transported to storage facilities and then transported for export. See Tullow Oil Ghana 'FPSO Progress' available at <http://www.tullowoil.com/ghana/index.asp?pageid=41> (accessed 02 May 2013).

<sup>21</sup> See generally Tullow Oil Ghana Jubilee Field Phase 1 Development DRAFT Non-Technical Executive Summary of Environmental Impact Statement (2009) (hereafter Tullow Oil 2009). See also generally African Development Bank 2009.

FIGURE 6.1 MAP OF GHANA



Source: UNDP ‘Map of Ghana’ available at <http://www.undp-gha.org/design/presscenter/news&event.php?id=249> (accessed 03 December 2012).

FIGURE 6.2 MAP OF GHANA SHOWING THE OFFSHORE OIL ACREAGE



Source: OXFAM ‘Ghana's Offshore Oil Fields’ available at <http://www.oxfamamerica.org/articles/the-coming-oil-boom-in-ghana> (accessed 03 December 2012).

### 6.1.2 Historical Context of Ghana's Oil Production and Trade

This section provides a basic discussion of Ghana's colonial and post-colonial history. The pre-colonial era is only referred to where necessary. A detailed discussion of that period is beyond the scope of the thesis.<sup>22</sup> The general historical context sets the tone for the discussion of the history of oil production and trade in Ghana. The section also relies on the trade policy reviews to offer insights on Ghana's performance within the WTO framework. It should be noted that the section does not attempt to provide a comprehensive discussion of the history of Ghana.

The section is divided into three parts. The first part deals with the general history of Ghana. The second part discusses the history of oil production and trade in Ghana. Finally, the section reflects on Ghana's membership of the WTO and the impact it has had on international trade in the country. The analysis arising out of this section sets a background for a more elaborate discussion of the regulation of production quotas, oil consumption subsidies, and the control of corruption in the contemporary era of Ghanaian oil production and trade.

#### A) General History of Ghana

In 1957, Ghana gained independence from Britain.<sup>23</sup> The boundaries of the new country were created along the frontiers that had marked the colonial territory referred to as the Gold Coast and some territory from present day Togo.<sup>24</sup> Ghana was politically organised at the time and was the first African country to be granted independence.<sup>25</sup> Dr. Kwame Nkrumah was the first prime minister and he led the

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<sup>22</sup> For a detailed discussion of the pre-colonial era, see generally Kimble D *A Political History of Ghana The Rise of Gold Coast Nationalism 1850-1928* (1963) (hereafter Kimble D 1963). See also Mokhtar G (ed) *General History of Africa II Ancient Civilizations of Africa* (1990) 330-331 (hereafter Mokhtar G (ed) 1990).

<sup>23</sup> Meredith M (2011) 25.

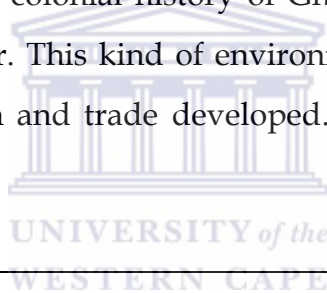
<sup>24</sup> The name 'Gold Coast' initially only referred to the coastal area. Later the whole colony created under the Imperial Orders in Council of 1901, was referred to as the Gold Coast including the Kingdom of Ashanti and other inland territory. The Orders in Council only came into effect in 1902. Togo was formerly under German rule but after 1919, it was administered by Britain and France. The modern state of Ghana is named after the African empire of Ghana that ceased to exist in about the 13<sup>th</sup> Century. See Fage J D *Ghana A Historical Interpretation* (1961) 3-4 and 65 (hereafter Fage J D 1961). See also Kimble D (1963) xv. See also Mckenna A (ed) *The History of Western Africa* (2011) 124 and 207 (hereafter Mckenna A (ed) 2011).

<sup>25</sup> It has been reported that Ghana had an able civil service, an effective parliament, organised political parties, an impartial judiciary and an able prime minister. The opposition and government both had able politicians.

country to independence.<sup>26</sup> At the time Ghana was granted independence, it had flourishing trade in cocoa, gold, timber, and bauxite.<sup>27</sup> Moreover, by 1907 efficient trade routes had been established and internal barriers to trade were being removed.<sup>28</sup> It is also worth noting that by the time Ghana gained independence, the country had a deep-water port at Takoradi.<sup>29</sup> This may be attributed to the trade mentioned above.

In February 1966, Kwame Nkrumah was overthrown and the country went through a succession of military regimes.<sup>30</sup> In 1992, Ghana returned to normalcy and the first presidential elections were held.<sup>31</sup> In 2001, the country had a transfer of power to another political party and currently enjoys a fair level of democracy and transparency.<sup>32</sup>

The general colonial and post-colonial history of Ghana is one of promise, failure, and resurrection, in that order. This kind of environment was the broad context in which Ghana's oil production and trade developed. Nevertheless, a more specific



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See Meredith M (2011) 18-27. During the colonial era, there were African representatives on both the legislative and executive councils. See Fage J D (1961) 76-81.

<sup>26</sup> The prominent political parties at the time of independence were the United Gold Coast Convention and the Convention People's Party which led Ghana to independence. See Fage J D (1961) 84-85.

<sup>27</sup> Trade in gold existed prior to the colonial era. Foreign companies only took on gold mining on a permanent basis in the late nineteenth century. The Portuguese were involved in trade and had built forts on the coast. Although the author is also aware of slave trade and how it shaped the creation of country, the discussion on the same is too extensive and is beyond the scope of the thesis. See Meredith M (2011) 27. See also Fage J D (1961) 44-45 and 65. See also Kimble D (1963) 15.

<sup>28</sup> Roads and a railway system were constructed. A telegraph system was also put in place. See Kimble D (1963) 25-33.

<sup>29</sup> At the time the proposal to build the harbour was made there was some opposition from some representatives on the legislative committee but this did not stop the project. See Fage J D (1961) 79. See also Kimble D (1963) 57.

<sup>30</sup> Between 1966 and 1992, Ghana was largely dominated by military regimes. However, there were some civilian governments between 1969-1972, and 1979-1981. See Mckenna A (ed) (2011) 133. See also Abdulai A G Political Context Study-Ghana (2009) Human rights, Power and Civic Action research project, Universities of Oslo, Leeds and Ghana 2 (hereafter Abdulai A G 2009).

<sup>31</sup> In 1992 a new Constitution was enacted and a multi-party democracy established in 1993. See Mckenna A (ed) (2011) 133. See also Abdulai A G (2009) 1.

<sup>32</sup> President Jerry Rawlings was in power between 1992 and 2001. The transition to another political party in 2001 was thus an important milestone in Ghana. See Mckenna A (ed) (2011) 133. See also Haynes J 'Limited' democracy in Ghana and Uganda. What is most important to international actors: stability or political freedom?' (2010) *Journal of Contemporary African Studies*, 19:2, 192-195 (hereafter Haynes J 2010). See also generally Crawford G 'Making democracy a reality?' The politics of decentralisation and the limits to local democracy in Ghana' (2009) *Journal of Contemporary African Studies*, 27:1 57-83 (hereafter Crawford G 2009).

historical discussion of oil production and trade is necessary to fully understand the oil sector of Ghana.

## B) History of Oil Production and Trade in Ghana

It has been noted that oil wells were drilled in Western Ghana as far back as 1896.<sup>33</sup> However, oil production only commenced between 1978 and 1985 in the Saltpond field.<sup>34</sup> The Saltpond field was discovered in 1970 by Signal/ Amoco,<sup>35</sup> and between 1978 and 1985, a total of about 3.47 million barrels of oil were produced from the oilfield.<sup>36</sup> Apart from the Saltpond discovery, a number of oil discoveries were made between 1970 and 1980.<sup>37</sup> These included: Volta Tano 1X in offshore Tano well, and discoveries by Phillips in North and South Tano in 1978-1980.<sup>38</sup>

It is surprising to note that the above oil discoveries and the production of oil from the Saltpond field were made during an era dominated by military regimes and

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<sup>33</sup> Oil wells were drilled in Half Asini as a result of oil seeps discovered in the Tano basin. See GNPC 'Activities: Exploration and Production' available at <http://www.gnpcghana.com/activities/explorationIntro.asp> (accessed 07 December 2012). See also Oil and Gas Financial Journal 'Ghana' available at <http://www.ogfi.com/articles/2010/10/ghana.html> (accessed 07 December 2012). Prior to the 1970 oil discoveries, the West African Oil and Fuel Co. Ltd was prominent in exploration efforts in Ghana. See also Sutherland R 'Exploration History and Regional Geology' available at <http://www.tulloil.com/files/pdf/ghana/exploration-history-and-regional-geology.pdf> (accessed 07 December 2012). See also Banful A J 'The legal regime of Ghana's upstream petroleum industry and the role of GNPC as player and regulator' (2010) *Ghana Policy Journal* Vol 4 Special Issue 69 (hereafter Banful A J 2010). See also Adjaye J A 'Oil production and Ghana's economy: what can we expect?' (2010) *Ghana Policy Journal* Vol 4 Special Issue 36 (hereafter Adjaye J A 2010). The author of the foregoing article notes that oil in Ghana was discovered in 1970. However, this article does not take note of earlier oil discoveries. It is respectfully submitted that the above position is inaccurate.

<sup>34</sup> See GNPC 'Activities: Exploration and Production' available at <http://www.gnpcghana.com/activities/explorationIntro.asp> (accessed 07 December 2012). See also Tullow Oil Ghana 'Introduction to Ghana-Hydrocarbon Exploration in Ghana' available at <http://www.tulloil.com/ghana/index.asp?pageid=27> (accessed 07 December 2012).

<sup>35</sup> Some commentators have noted that the Saltpond discovery was made by US firm AgriPetco; however, this is inaccurate as the discovery was attributed to a consortium of Signal/Amoco. In 1970 Signal/ Amoco discovered oil in the Saltpond field although the field was later developed by AgriPetco in 1978. See Saltpond Offshore Producing Company Limited 'Ghana Government to Revamp Saltpond Oil Project' available at <http://www.saltpondoffshore.com/newsreleases2.html> (accessed 07 December 2012). See also GNPC 'Saltpond Field' available at [http://www.gnpcghana.com/upload/general/saltpondfield\\_sopcl.pdf](http://www.gnpcghana.com/upload/general/saltpondfield_sopcl.pdf) (accessed 07 December 2012). For a contrary opinion see Adjaye J A (2010) 36.

<sup>36</sup> See Tullow Oil Ghana 'Introduction to Ghana-Hydrocarbon Exploration in Ghana' available at <http://www.tulloil.com/ghana/index.asp?pageid=27> (accessed 07 December 2012).

<sup>37</sup> See Sutherland R 'Exploration History and Regional Geology' available at <http://www.tulloil.com/files/pdf/ghana/exploration-history-and-regional-geology.pdf> (accessed 07 December 2012).

<sup>38</sup> See Sutherland R 'Exploration History and Regional Geology' available at <http://www.tulloil.com/files/pdf/ghana/exploration-history-and-regional-geology.pdf> (accessed 07 December 2012). See also Banful A J (2010) 69-70.

coup d'états, with limited civilian government between 1979 and 1981.<sup>39</sup> Accordingly, although discoveries were made during the period of political instability, it can be argued that Ghana's oil potential was not fully exploited during this era due to the prevailing instability. Another question that arises from the foregoing discussion is why the other oil discoveries, such as the Volta Tano 1X and the North and South Tano discoveries were never developed for production? The answer seems to lie in the fact that in some instances heavy oil and gas were discovered; this was true for the onshore Tano area where the African and Eastern Trade Company encountered heavy oil.<sup>40</sup> This may have discouraged production due to the lack of technical capacity required to produce heavy oil. Additionally, it has been noted that oil exploration that was being undertaken under the Ghana-Soviet friendship pact, in the Volta basin was interrupted by the 1966 coup d'état.<sup>41</sup> However, the discovery in the Volta basin was made in 1970 and failure to develop the oil field cannot be attributed to the 1966 coup d'état.<sup>42</sup> Although it cannot be said with certainty, the political instability in Ghana that defined the period between 1970 and 1980 may have affected oil production.<sup>43</sup>

In 1985, the Saltpond field was closed and it was only reopened in 2000 when the Saltpond Offshore Producing Company Limited took over.<sup>44</sup> Production of oil from this field has been affected by complaints about its productivity<sup>45</sup> and the poor infrastructure.<sup>46</sup>

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<sup>39</sup> Abdulai A G (2009) Appendix 1 33. See also Banful A J (2010) 70.

<sup>40</sup> Banful A J (2010) 69.

<sup>41</sup> Banful A J (2010) 70. See also Ghana Oil and Gas 'Extent of Oil and Gas Deposits in Ghana and Environmental and Strategic Concerns' available at [http://www.ghanaoilandgasonline.com/index\\_051.htm](http://www.ghanaoilandgasonline.com/index_051.htm) (accessed 07 December 2012).

<sup>42</sup> See Sutherland R 'Exploration History and Regional Geology' available at <http://www.tulloil.com/files/pdf/ghana/exploration-history-and-regional-geology.pdf> (accessed 07 December 2012).

<sup>43</sup> Abdulai A G (2009) Appendix 1 33.

<sup>44</sup> See Saltpond Offshore Producing Company Limited 'Background' available at <http://www.Saltpondoffshore.com/presentstatus.html> (accessed 07 December 2012).

<sup>45</sup> See also Oil and Gas Financial Journal 'Ghana' available at [http://www.ogfj.com/articles\\_/2010/10/ghana.html](http://www.ogfj.com/articles_/2010/10/ghana.html) (accessed 07 December 2012).

<sup>46</sup> See Saltpond Offshore Producing Company Limited 'SOPCL to Increase Production' available at <http://www.saltpondoffshore.com/newsreleases1.html> (accessed 07 December 2012).

Although data for oil exports from Ghana for the period 1978 to 2010 is not available, in 2011, the country earned about US \$ 1.97 billion from crude oil export.<sup>47</sup> The Jubilee oil fields produced about 23 million barrels of crude oil in 2011.<sup>48</sup> The Saltpond field produced an average of 700 barrels of crude oil per day.<sup>49</sup> It is evident from the above brief discussion that Ghana is currently an oil producing and exporting state.<sup>50</sup> It is therefore necessary to examine the history of the general international trade framework in Ghana. The analysis is mainly based on the two trade policy reviews that have been conducted by the WTO.

### C) Ghana and the WTO

Ghana joined the WTO in 1995 and has been an active member compared to other African countries.<sup>51</sup> Ghana was a third party in the *European Communities – Regime for the Importation, Sale and Distribution of Bananas* WTO dispute.<sup>52</sup> Currently, no African country has participated in the WTO dispute settlement as a complainant.<sup>53</sup> As such, participation in the dispute settlement process as a third party is commendable for an African state.<sup>54</sup> Also, Ghana's former trade minister was

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<sup>47</sup> See World Economic Outlook data, IMF 'Ghana' available at <http://www.econstats.com/weo/CGHA.htm> (accessed 07 December 2012). See also Open Oil 'Ghana Oil Almanac' available at <http://openoil.net/wp/wp-content/uploads/2012/08/Ghana-Almanac-PDF.pdf> (accessed 07 December 2012). Data on oil production during that period is scanty and unreliable.

<sup>48</sup> It should also be noted that the Jubilee oil field is performing below the projected capacity of 120 000 barrels per day. This has been attributed to poor well design among other factors. See Public Interest and Accountability Committee Report on Petroleum Revenue Management for 2011 Annual Report (2011) 8 (hereafter Public Interest and Accountability Committee 2011). See also Bernstein Liebhard LLP 'Bernstein Liebhard LLP announces that a Securities Class Action Lawsuit has been Filed against Kosmos Energy, Ltd' available at <http://www.bernlieb.com/kosmos-energy-ltd-securities-class-action> (accessed 03 May 2013). See also Ministry of Finance (2012) 5.

<sup>49</sup> Public Interest and Accountability Committee (2011) 1.

<sup>50</sup> Clarke D (2010) 183 and 157.

<sup>51</sup> See WTO 'Ghana and the WTO' available at [http://www.wto.org/english/thewtoe/countries\\_e/ghana\\_e.htm](http://www.wto.org/english/thewtoe/countries_e/ghana_e.htm) (accessed 10 December 2012).

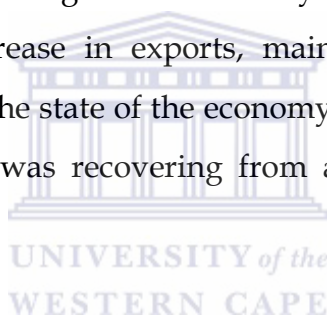
<sup>52</sup> It should be noted that in addition to Ghana; Chad, Senegal, Côte d'Ivoire and Madagascar were also third parties in this dispute. See *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (Appellate Body Report) [1997] WT/DS27/AB/R 3.

<sup>53</sup> Madolo N & Nakawaga J 'Introduction The Importance of An African Voice in "Global" International Economic Law' Madolo N (ed) *International Economic Law The Voices of Africa* (2012) 8 (hereafter Madolo N & Nakawaga J 2012). Although there are no disputes by African complainants under the WTO, it has been noted that the GATT had two such disputes. These were: *US-Subsidy on Unmanufactured Tobacco* (Working Party Report) [1967] BISD 15S/116. In this dispute Malawi was the complainant. See also *Canada-Measures Affecting Sale of Gold Coins* (Panel Report) [1985] L/5863 (unadopted). In this matter South Africa was the complainant.

<sup>54</sup> See Madolo N & Nakawaga J (2012) 8. In addition to the *European Communities — Regime for the Importation, Sale and Distribution of Bananas* WTO dispute discussed above, there are only ten other disputes where African countries have been third parties in WTO dispute settlement proceedings.

seconded by the African Union for the position of Director General of the WTO.<sup>55</sup> Additionally, Ghana has been transparent in notifying its obligations as required under the WTO agreements.<sup>56</sup> It is also worth noting that Ghana's participation in the African Group has helped African countries advocate trade regulatory reform that is alive to the challenges in Africa.<sup>57</sup> The above examples are evidence of Ghana's active role in the WTO. The trade review reports offer more insight into Ghana's international trade and the WTO framework.

In the 2001 trade review report of Ghana by the WTO Secretariat, it was noted that Ghana had made extensive reforms since the 1990s.<sup>58</sup> These reforms included trade and investment liberalisation aimed at making Ghana the main trading point in West Africa.<sup>59</sup> The fragile economy that characterised the 1990s was tackled through controlling inflation and increasing the tax base by re-introducing VAT.<sup>60</sup> The late 1990s also witnessed an increase in exports, mainly primary commodities and imports as a share of GDP.<sup>61</sup> The state of the economy in the 1990s may be explained by the fact that the country was recovering from a long period of political and economic instability.



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<sup>55</sup> See African News 'Ghana's Alan Kyerematen Readies for WTO Top Job' available at [http://www.africanews.com/site/Ghanas\\_Alان\\_Kyerematen\\_readies\\_for\\_WTO\\_top\\_job/list\\_messages/42277](http://www.africanews.com/site/Ghanas_Alان_Kyerematen_readies_for_WTO_top_job/list_messages/42277) (accessed 10 December 2012). He was subsequently dropped from the list of candidates. See also Ghana Web 'Alan Kyerematen Loses Out in his Quest to Become Next WTO Boss' available at <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=270777> (accessed 03 May 2013).

<sup>56</sup> Ghana notified the Committee on Subsidies and Countervailing Measures on its lack of an institution to monitor subsidies and undertake countervailing actions. See WTO Committee on Subsidies and Countervailing Measures Notification Under Arts 25.11 and 25.12 of the [SCM] Agreement Ghana (2011) G/SCM/N/202/GHA. Ghana has also notified the Committee on Import Licensing on the status of import licensing systems in Ghana. See WTO Committee on Import Licensing Agreement on Import Licensing Procedures Notification Under Articles 7.3, 1.4(a) and 8.2(b) of the Agreement (2009) G/LIC/N/3/GHA/4.

<sup>57</sup> WTO African Union Conference of Ministers of Trade 7th Ordinary Session (2011) Accra-Ghana WT/MIN(11)/9.

<sup>58</sup> See WTO 'Trade Policy Review Body: Ghana Report by the Secretariat- Summary Observations' available at [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp157\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp157_e.htm) (accessed 10 December 2012). The 1990s were a period of economic reform. However, the strong reliance on foreign aid also commenced in this period. See Whitfield L & Jones E Ghana-The Political Dimensions of Aid Dependence (2008) Global Economic Governance Working Paper 2007/32 7-8 (hereafter Whitfield L & Jones E 2008).

<sup>59</sup> See WTO 'Trade Policy Review Body: Ghana Report by the Secretariat- Summary Observations' available at [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp157\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp157_e.htm) (accessed 10 December 2012).

<sup>60</sup> See WTO 'Trade Policy Review Body: Ghana Report by the Secretariat- Summary Observations' available at [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp157\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp157_e.htm) (accessed 10 December 2012).

<sup>61</sup> See WTO 'Trade Policy Review Body: Ghana Report by the Secretariat- Summary Observations' available at [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp157\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp157_e.htm) (accessed 10 December 2012).



The 2001 trade review report also revealed that Ghana maintained very few export restrictions.<sup>62</sup> The export restrictions identified were on logs, parrots and bamboo.<sup>63</sup> Additionally, at the time of the Report, Ghana was considering stronger laws on government procurement.<sup>64</sup> Government procurement was not sufficiently regulated and this might have created avenues for corruption.<sup>65</sup> The Report also revealed that until 1996, Ghana National Petroleum Corporation (GNPC) the state oil company had a monopoly on the importation of oil and was heavily indebted.<sup>66</sup> The development of the monopoly might have been aided by the lack of sufficient laws on government procurement.<sup>67</sup> Although Ghana reported that it did not provide subsidies to aid export, the Report indicated that government provided tax rebates to exporters and that might have amounted to subsidies for exporters.<sup>68</sup> The Report did not examine oil production quotas; this might be attributed to the limited oil production at the time. Oil consumption subsidies were also not discussed in the Report. However, the Report highlights the need for laws on government procurement in the oil sector.

The above discussion indicates that the 1990s were an era of extensive reforms and reconstruction of the economy. Ghana adopted a positive stance towards trade liberalisation. This enabled the country recover from the dark era that had taken hold of the country's economy. It should be noted that although oil had been

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<sup>62</sup> See WTO 'Trade Policy Review Ghana Report by the Secretariat WT/TPR/S/81' available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=) (accessed 03 May 2013).

<sup>63</sup> See WTO 'Trade Policy Review Ghana Report by the Secretariat WT/TPR/S/81' available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=) (accessed 03 May 2013).

<sup>64</sup> See WTO 'Trade Policy Review Ghana Report by the Secretariat WT/TPR/S/81' available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=) (accessed 03 May 2013).

<sup>65</sup> See WTO 'Trade Policy Review Ghana Report by the Secretariat WT/TPR/S/81' available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=) (accessed 03 May 2013).

<sup>66</sup> See WTO 'Trade Policy Review Ghana Report by the Secretariat WT/TPR/S/81' available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=) (accessed 03 May 2013).

<sup>67</sup> See WTO 'Trade Policy Review Ghana Report by the Secretariat WT/TPR/S/81' available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=) (accessed 03 May 2013).

<sup>68</sup> See WTO 'Trade Policy Review Ghana Report by the Secretariat WT/TPR/S/81' available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=) (accessed 03 May 2013).

discovered prior to the 1990s, there was little or no domestic production during this period due to the closure of the Saltpond field.<sup>69</sup> Thus the Report does not extensively discuss Ghana's oil production and trade.

After 2001, Ghana continued to implement its trade liberalisation strategy although at a much slower pace compared to the 1990s.<sup>70</sup> State owned enterprises continued to play a significant role in the oil sector.<sup>71</sup> Further, a new law on government procurement and transparency was enacted in 2003; however, Ghana was not a signatory or observer to the GPA and that status is still the same as of 2013.<sup>72</sup>

At the time of the 2008 trade policy review report, it was also noted that Ghana did not apply any export restrictions or quotas.<sup>73</sup> Ghana also noted that it did not provide any form of subsidies or price support; however, the 2008 trade policy review report revealed that a number of export promotion activities were maintained by the government.<sup>74</sup> Related to the foregoing, it was also noted that Ghana maintained fuel subsidies as a tool for income redistribution and price stabilisation.<sup>75</sup> Due to the fact that at the time of the 2008 trade policy review report, oil production and trade from the Jubilee oil fields had not yet commenced, the review is limited in scope on the regulation of international trade in oil in Ghana. The information presented in the review on the oil sector is not detailed. However, the Report indicates that subsidies indeed existed in the oil sector and the issue of government procurement and transparency was being considered by the government. The Report did not address oil production quotas.

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<sup>69</sup> Domestic production in this regard refers to extraction of crude oil from oil fields in Ghana. On the other hand, Oil refining was taking place. The Tema Refinery increased its capacity in 1997. See Saltpond Offshore Producing Company Limited 'Background' available at <http://www.saltpondoffshore.com/presentstatus.html> (accessed 07 December 2012). See Tema Oil Refinery 'History' available at <http://www2.torghana.com/index.php/about-us/history> (accessed 10 December 2012).

<sup>70</sup> WTO Trade Policy Review Ghana Trade Policies and Practices by Measure (2008) WT/TPR/S/194 22 (hereafter WTO Trade Policy Review 2008a).

<sup>71</sup> WTO Trade Policy Review (2008a) 22.

<sup>72</sup> WTO Trade Policy Review (2008a) 22 and 37-38. The government procurement laws of Ghana are further discussed in the next section of the chapter. See chapter 6 section 6.2.

<sup>73</sup> WTO Trade Policy Review (2008a) 34.

<sup>74</sup> WTO Trade Policy Review (2008a) 36.

<sup>75</sup> WTO Trade Policy Review Ghana Trade Policies by Sector (2008) WT/TPR/S/194 54 (hereafter WTO Trade Policy Review 2008b).

The above discussion on the history of Ghana and its oil sector as well as the relationship of Ghana and the WTO provide a background to the analysis of the policy and legal framework on international trade in oil in Ghana. The discussion commences with the policy framework and then examines the legal framework. The main focus of the analysis is the regulation of oil production quotas, oil consumption subsidies, and the control of corruption in the oil sector.

## **6.2 The Broad Policy and Legal Framework on International Trade in Oil in Ghana**

### **6.2.1 The Fundamental Petroleum Policy 2009**

The main goal of the Fundamental Petroleum Policy (Policy) is twofold; first, the Policy is aimed at making the country a net exporter of oil and gas.<sup>76</sup> Second, the Policy aspires to making Ghana a major player in the oil and gas industry.<sup>77</sup> The Policy also highlights the recognition of Ghana's sovereignty over its natural resources and the protection of the rights of all stakeholders in the oil sector.<sup>78</sup> The Policy is meant to guide all legal and fiscal regimes affecting the oil sector in Ghana.<sup>79</sup>

One of the major guiding principles in the Policy is the recognition of the fact that oil is an exhaustible resource and production has to be managed in a sustainable manner.<sup>80</sup> This is to some extent countered by the fact that the Policy also provides for optimisation of production.<sup>81</sup> The two issues seem to be contradictory; however, the wording of the principle in the Policy qualifies optimisation of production, by providing for sustainability. Based on the above Policy objectives, it can be argued that the Policy provides for control of oil production for the conservation of an exhaustible natural resource. From an international trade perspective, such

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<sup>76</sup> Ministry of Energy Fundamental Petroleum Policy (2009) 2 (hereafter Ministry of Energy 2009).

<sup>77</sup> Ministry of Energy (2009) 2.

<sup>78</sup> Ministry of Energy (2009) 5.

<sup>79</sup> Ministry of Energy (2009) 5.

<sup>80</sup> Ministry of Energy (2009) 8.

<sup>81</sup> Ministry of Energy (2009) 8.

restriction or control does not fall foul of GATT provisions on export restrictions.<sup>82</sup> Article XX (g) of the GATT justifies and allows such production restrictions.<sup>83</sup> Although all forms of production restriction may ultimately encourage the violation of Art XI (I) of the GATT, the restriction envisaged in the Policy unlike OPEC production quotas, is consistent with GATT obligations.<sup>84</sup>

Further, the Policy also indicates that the government will establish a transparent fiscal regime for the collection and management of oil revenue.<sup>85</sup> This is an efficient way of reducing corruption in the oil sector in Ghana. Eliminating corruption in the oil sector in Ghana will remain a challenge due to the great involvement of the state in the upstream and downstream sectors of the oil industry in Ghana.<sup>86</sup> Thus transparent mechanisms for collection and disbursement of revenue from the oil sector will discourage the political elite and government technocrats from misappropriating oil revenue.

Finally, although the Policy provides for the need to regulate the downstream oil sector especially the sale and pricing of oil, and setting of pricing regulations, these are not exhaustively discussed.<sup>87</sup> The above provisions in the Policy are related to the provision of oil consumption subsidies, which may be maintained through price support. As noted in previous chapters oil consumption subsidies may in some cases violate Arts 3 and 5 of the SCM Agreement.<sup>88</sup>

## 6.2.2 The Energy Policy of Ghana 2010

The Energy Policy (Policy) provides for three major issues that affect the oil sector. These include revenue management, production management and provision of subsidies. The Policy encourages transparency in the collection and management of

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<sup>82</sup> It is argued in this thesis that oil production restrictions directly affect export and therefore amount to export restrictions.

<sup>83</sup> See chapter 3 section 3.4.2 for a detailed discussion.

<sup>84</sup> See chapter 3 section 3.4.1. See also chapter 4 section 4.4.1.

<sup>85</sup> Ministry of Energy (2009) 8.

<sup>86</sup> See chapter 6 section 6.2.4.

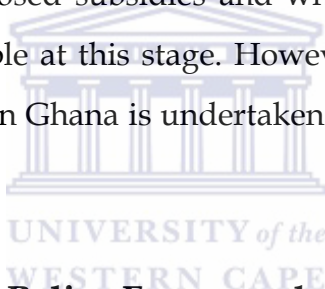
<sup>87</sup> Ministry of Energy (2009) 15.

<sup>88</sup> See chapter 3 section 3.4.3.

oil revenues in Ghana.<sup>89</sup> Similar to the Fundamental Petroleum Policy, the emphasis on transparency will discourage corruption.

Second, the Policy also alludes to the sustainable management of oil reserves and production in Ghana.<sup>90</sup> This Policy is similar to the Fundamental Petroleum Policy which provides for regulation of oil production as a means of conserving an exhaustible natural resource.<sup>91</sup> Both these issues are related and are protected under Art XX (g) of the GATT.<sup>92</sup> They do not constitute a violation of obligations under Art XI (1) of the GATT.<sup>93</sup>

Finally, the Policy provides for the provision of cross-subsidies between oil products.<sup>94</sup> The subsidies are meant to achieve national development objectives.<sup>95</sup> The Policy does not provide detailed information on these subsidies. Accordingly an objective analysis of the proposed subsidies and whether they are consistent with WTO obligations is not possible at this stage. However, further discussion of cross subsidisation in the oil sector in Ghana is undertaken in the next section on the legal framework.



### 6.2.3 An Overview of the Policy Framework

Related to the above Policies, Ghana also has a Policy on Local Content and Local Participation (Policy) in the oil sector.<sup>96</sup> However, this does not directly affect production quotas and oil consumption subsidies. The Policy provides for the participation of Ghanaian citizens in the oil and gas sector.<sup>97</sup> It further provides that such participants shall be selected in a transparent manner.<sup>98</sup> Although such provisions encourage transparency, local content rules can serve as a breeding

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<sup>89</sup> Ministry of Energy The Energy Policy of Ghana (2010) 16 (hereafter Ministry of Energy 2010).

<sup>90</sup> Ministry of Energy (2010) 16.

<sup>91</sup> Ministry of Energy (2010) 16.

<sup>92</sup> See chapter 3 section 3.4.2 for a detailed discussion.

<sup>93</sup> See chapter 3 section 3.4.1.

<sup>94</sup> Ministry of Energy (2010) 19.

<sup>95</sup> Ministry of Energy (2010) 19.

<sup>96</sup> Ministry of Energy Local Content and Local Participation in Petroleum Activities – Policy Framework (2011) (hereafter Ministry of Energy 2011).

<sup>97</sup> Ministry of Energy (2011) 11.

<sup>98</sup> Ministry of Energy (2011) 11.

ground for nepotism and also encourage politics of patronage. These conditions may encourage corruption in the oil sector.

The above Policies are related and are consistent on the regulation of international trade in oil in Ghana. Nonetheless, it should be noted that the provisions in the Policies are thin on detail and this does not permit a detailed analysis of the key areas. This shortcoming may be attributed to the fact that the above policy framework is only meant to guide legislation on the oil sector and that the various laws ought to provide detailed provisions on international trade in oil.

In sum, the policy framework for Ghana's oil sector is in some cases in line with Ghana's obligations under the WTO agreements. For example, the regulation of production for the protection of an exhaustible natural resource is consistent with WTO obligations. However, this may change if Ghana joins OPEC, where production is regulated for other reasons, such as price stabilisation, which is not part of the exceptions provided in Art XX of the GATT. The policy framework on oil subsidies is insufficient and does not reveal whether the proposed subsidies are oil consumption subsidies. However, the policy framework leans towards the provision of subsidies for oil products. If these subsidies are specific or directed at a particular industry or meant to encourage the consumption of local products they may violate obligations under Arts 3 and 5 of the SCM Agreement.

Finally, the Policies emphasise transparency in the oil sector. This may help Ghana combat corruption in the oil sector. Nevertheless, the Policy on local content may present problems which might encourage corruption. Although the policy framework is meant to guide the legal framework, the policies are quite recent as compared to the laws regulating oil production and trade in Ghana. Thus there might be some differences between the Policies and the laws. The next section discusses the legal framework.

## 6.2.4 The Legal Framework

The structure of this section is thematic as opposed to a separate discussion of each of the laws that regulate oil production and trade. There are numerous laws regulating the oil sector in Ghana; a discussion of each of these laws and their relationship to international trade in oil is unnecessary as some of the laws are not directly related to production quotas, oil consumption subsidies and corruption.<sup>99</sup> In addition to the above key areas also pertinent to international trade in oil, the section also discusses provisions on state sovereignty over natural resources in Ghana. This sets a background for discussion of the key areas.

### A) State Sovereignty Over Natural Resources

The Constitution of Ghana is the first point of call in examining the legal framework for oil production and trade. That Constitution provides that all minerals in the natural state are the property of the Republic of Ghana and are vested in the President who holds them on behalf of the people of Ghana.<sup>100</sup> Ordinarily, the term 'minerals'<sup>101</sup> excludes natural resources in a liquid state, and it can therefore be argued that Art 257 (6) of the Constitution does not cover oil. This lacuna has been noted and an amendment to the provision has been suggested.<sup>102</sup> The amendment refers to extractive natural resources, as opposed to minerals in the natural state.<sup>103</sup> The proposed amendment will clear all doubt regarding the interpretation of the above provision.

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<sup>99</sup> For example the Petroleum Income Tax Law, PNDC Law 188 of 1987, is not part of the analysis in this section. Also some provisions in the relevant laws are not discussed. The analysis in this section is limited to the relevant provisions and laws.

<sup>100</sup> See Art 257 (6) of the Constitution of the Republic of Ghana 1992.

<sup>101</sup> See Oxford Dictionaries 'Mineral' available at <http://oxforddictionaries.com/definition/english/mineral> (accessed 04 May 2013). It can be argued that oil does not always exist in a liquid state. This may be true for oil sands and oil shale. However, the oil sands are composed of sand, clay, water and bitumen. Thus are largely liquid. Oil shale is a sedimentary rock containing Kerogen which is used to make shale oil. However shale oil is not crude oil although it is a hydrocarbon. See Oil Sands Today 'What are Oil Sands?' available at <http://www.oilsandstoday.ca/Pages/default.aspx> (accessed 04 May 2013). See also Oil Shale and Tar Sands Programmatic EIS 'About Oil Shale' available at <http://ostseis.anl.gov/guide/oilshale/> (accessed 04 May 2013).

<sup>102</sup> The Institute of Economic Affairs Natural Resource Management in Ghana: A Case for Constitutional Amendment (2010) Constitutional Review Series 8 12 (hereafter The Institute of Economic Affairs 2010).

<sup>103</sup> The Institute of Economic Affairs (2010) 13.

Section 2 of the GNPC Act is consistent with the principle of state ownership of natural resources in Ghana, elaborated in the Constitution.<sup>104</sup> The section provides that one of the objects of GNPC is to ensure that the Republic of Ghana benefits from its oil resources.<sup>105</sup> The foregoing provision and other clauses under section 2, all indicate that oil resources in the natural state are owned by the Republic of Ghana. GNPC merely pursues the commercial aspects of Ghana's broad interest in the oil sector.

The Petroleum (Exploration and Production) Law, 1984 is also instructive on this issue. Section 1 (1) of this law provides that oil in the natural state is owned by the Republic of Ghana.<sup>106</sup> However, unlike the Constitution, the ownership rights are vested in the Provisional National Defence Council.<sup>107</sup> Of course, this provision has long been overtaken by events; with the enactment of the Constitution in 1992, Ghana is now a democracy. This inconsistency with the Constitution is rectified by the supremacy of the Constitution over all other laws.<sup>108</sup> This conclusion is made on the presumption that the term 'minerals' as used in the Constitution also includes oil.

The Petroleum Commission Act also indicates that petroleum resources are owned by the Republic of Ghana.<sup>109</sup> Similarly, although the Maritime Zones (Delimitation) law, 1984,<sup>110</sup> is not explicit, it too supports the view that natural resources in Ghana are owned by the Republic. The Act extends Ghana's sovereignty to the territorial sea.<sup>111</sup> It can therefore be argued that natural resources located within the territorial waters of Ghana belong to the Republic. In terms of ownership of Ghana's oil resources, it is clear that the resources are owned by the Republic of Ghana this has various implications for international trade.

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<sup>104</sup> Ghana National Petroleum Corporation Act, 1983 1 P.N.D.C.L. 64.

<sup>105</sup> See Section 2 (2) (b) of the Ghana National Petroleum Corporation Act, 1983 1 P.N.D.C.L. 64.

<sup>106</sup> The Petroleum (Exploration and Production) Law, 1984 P.N.D.C.L. 84.

<sup>107</sup> See Section 1 (1) of the Petroleum (Exploration and Production) Law, 1984 P.N.D.C.L. 84.

<sup>108</sup> See Art 1 (2) of the Constitution of the Republic of Ghana 1992.

<sup>109</sup> See Art 3 (1) of the Petroleum Commission Act, 2011 Act 821.

<sup>110</sup> Maritime Zones (Delimitation) law, 1984 1 P.N.D.C.L. 159.

<sup>111</sup> See Section 2 of the Maritime Zones (Delimitation) law, 1984 1 P.N.D.C.L. 159.



The most prominent issue appears to be the need for consent from the Republic, through the national legislative body, when dealing with oil resources.<sup>112</sup> Parliament has to be consulted and without parliamentary devolution of powers as in the case of GNPC,<sup>113</sup> transactions regarding oil resources that are made in the absence of such consent may be null and void.<sup>114</sup> It can also be argued that all matters relating to the management of Ghana's oil resources have to be handled in the best interests of the citizens. The issue of permanent sovereignty over natural resources is a common attribute of all the above provisions. However, as noted previously, sovereignty over natural resources does not imply that crude oil should not be subject to international trade obligations.<sup>115</sup> Suffice it to note that if Ghana voluntarily joined the WTO, its domestic laws should be consistent with its WTO obligations.

### **B) Production Quotas**

The policy framework indicates that it is in the best interests of the people of Ghana to control production.<sup>116</sup> The restriction of production is meant to conserve crude oil since it is a finite resource.<sup>117</sup> Even so, the policy framework also advocates optimum production.<sup>118</sup> These issues are reconcilable and are not inconsistent.<sup>119</sup> Section 2 of the Ghana National Petroleum Corporation Act is in line with the policy framework discussed above. The provision states that one of the objectives of GNPC is to ensure that petroleum operations are conducted in such a manner as to prevent adverse effects on the environment, resources, and the people of Ghana.<sup>120</sup> Section 10 (4) of the Petroleum (Exploration and Production) law also provides that production may be restricted to prevent the depletion of oil resources.<sup>121</sup> These provisions indicate

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<sup>112</sup> See Art 268 (1) of the Constitution of the Republic of Ghana 1992.

<sup>113</sup> Ghana National Petroleum Corporation Act, 1983 1 P.N.D.C.L. 64.

<sup>114</sup> Parliament may vote to dispense with the ratification of an oil related transaction. See Art 268 (2) of the Constitution of the Republic of Ghana 1992.

<sup>115</sup> See chapter 1 section 1.4.1.

<sup>116</sup> See chapter 6 sections 6.2.1, 6.2.2 and 6.2.3.

<sup>117</sup> See chapter 6 sections 6.2.1, 6.2.2 and 6.2.3.

<sup>118</sup> See chapter 6 sections 6.2.1, 6.2.2 and 6.2.3.

<sup>119</sup> See chapter 6 sections 6.2.1, 6.2.2 and 6.2.3.

<sup>120</sup> See Section 2 (e) of the Ghana National Petroleum Corporation Act, 1983 1 P.N.D.C.L. 64.

<sup>121</sup> See Section 10 (4) of the Petroleum (Exploration and Production) Law, 1984 P.N.D.C.L. 84.

that production of oil in Ghana may be restricted for two major reasons, to protect the environment, and to prevent the depletion of oil resources.<sup>122</sup>

Ghana as a member of the WTO is bound by obligations arising out of Art XI (1) of the GATT.<sup>123</sup> This provision prohibits restrictions on exports. As argued previously, restrictions on production have the effect of restricting exports.<sup>124</sup> This affects the imposition of quotas on oil production. However, Art XX (g) makes provision for such restrictions if the quotas are adopted to conserve an exhaustible natural resource and are made effective in conjunction with restrictions on domestic production or consumption.<sup>125</sup> For production restrictions to pass the test established in the exceptions listed under Art XX (g), it has been held that the restriction has to be primarily aimed at the conservation of an exhaustible natural resource.<sup>126</sup> It is quite clear that restriction of oil production in Ghana is primarily aimed at conservation of oil resources and protection of the environment.<sup>127</sup>

Second, the restriction has to be intended for the conservation of an exhaustible natural resource. The appellate body has interpreted this requirement taking into account the broad context of the preamble to the Marrakesh Agreement, which alludes to protection of the environment.<sup>128</sup> The term exhaustible natural resource refers to exhaustible mineral or other non-living natural resources as well as living natural resources.<sup>129</sup> Oil is an exhaustible natural resource and qualifies as such for purposes of Art XX (g). Accordingly, the restriction of oil production in Ghana for

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<sup>122</sup> The terms production restrictions and production quotas have the same meaning and they are used interchangeably in the chapter.

<sup>123</sup> See Art XI (1) of GATT.

<sup>124</sup> See chapter 3 sections 3.4.1 and 3.4.2.

<sup>125</sup> See chapter 3 section 3.4.2.

<sup>126</sup> See *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon* (Panel Report) [1988] (L/6268 - 35S/98) 12.

<sup>127</sup> See chapter 6 sections 6.2.1 and 6.2.2. See also Section 2 (e) of the Ghana National Petroleum Corporation Act, 1983 1 P.N.D.C.L. 64.

<sup>128</sup> See *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) [1998] WT/DS58/AB/R 48.

<sup>129</sup> See *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) [1998] WT/DS58/AB/R 48.

purposes of protecting oil reserves and conserving the environment is consistent with WTO obligations.<sup>130</sup>

Third, Art XX (g) requires that restrictions on exports and imports be made in conjunction with restrictions on domestic production or consumption. This has been interpreted to refer to even-handedness in the treatment of locally produced goods and imported goods.<sup>131</sup> The restriction of oil production in Ghana appears to apply to oil for domestic use and oil for export. There is nothing in the laws to suggest that the restriction of production for environmental purposes is meant to apply to only oil for export. The restriction is therefore even-handed. The appellate body has also stated that the clause means that restrictions on exports must work together with restrictions on domestic production or consumption.<sup>132</sup> Accordingly, it can be argued that Ghana's restrictions on oil production which apply to both oil for export and oil for domestic consumption are consistent with the requirements under Art XX (g).

Finally, the provisions in the chapeau are also part of the requirements that have to be established for a measure to satisfy the requirements in Art XX of the GATT.<sup>133</sup> The chapeau provides that measures should not be used as a means of unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.<sup>134</sup> The appellate body has held that the purpose of the chapeau is to ensure that the GATT is applied in good faith.<sup>135</sup> Further, that the limited exceptions under Art XX should not be abused.<sup>136</sup> The chapeau establishes three requirements in dealing with measures under Art XX. The measure must result in discrimination,<sup>137</sup> that is, arbitrary or unjustified discrimination.<sup>138</sup> Thus the first

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<sup>130</sup> See chapter 3 section 3.4.2.

<sup>131</sup> See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 21.

<sup>132</sup> See *China – Measures Related to the Exportation of Various Raw Materials* (Appellate Body Report) [2011] WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R 142.

<sup>133</sup> For a detailed discussion of the two tier test for measures under Article XX, see *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB /R 22.

<sup>134</sup> See Art XX of the GATT.

<sup>135</sup> See *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) [1998] WT/DS58/AB/R 61.

<sup>136</sup> See *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) [1998] WT/DS58/AB/R 44.

<sup>137</sup> See *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) [1998] WT/DS58/AB/R 44.

two requirements are dealt with together. It has been held that the discrimination envisaged under the chapeau is distinct from the discrimination in Arts I and III of the GATT.<sup>139</sup> The appellate body noted that if the same standard for discrimination in other parts of the GATT is applied to the chapeau, it would render the exceptions meaningless and have the retrospective effect of questioning whether there was discrimination in the substantive rules.<sup>140</sup>

Article XX proceeds on the premise that discrimination in the substantive rules occurred, but there is justification for such discrimination. Accordingly, the standards of discrimination in the chapeau are different from the standards in the substantive rules. Discrimination in this regard refers to discrimination between importing members and exporting members and also between different exporting members of the WTO.<sup>141</sup> It is also worth mentioning that unjustifiable discrimination has been interpreted to include measures that have the intention of coercing other members to make certain policy decisions in total disregard of the different conditions of the other member states.<sup>142</sup> The restriction of oil production in Ghana is not discriminatory. There is nothing to suggest that Ghana prohibits export of oil to countries that do not conserve their oil in a similar manner or restricts exports to other oil exporting countries that conserve their environment using alternative methods. Thus Ghana's production restrictions pass the first and second requirements for the test under the chapeau.

The third requirement of the test is whether the measure constitutes a disguised restriction on international trade.<sup>143</sup> The appellate body has noted that the concept of disguised restriction is related to unjustified and arbitrary discrimination.<sup>144</sup>

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<sup>138</sup> See Article XX of the GATT.

<sup>139</sup> See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 23.

<sup>140</sup> See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 23.

<sup>141</sup> See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 24.

<sup>142</sup> See *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) [1998] WT/DS58/AB/R 44.

<sup>143</sup> See chapeau of Article XX of GATT.

<sup>144</sup> See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 25.

Disguised restrictions may include unjustified and arbitrary discrimination meant to make a measure compliant with the exceptions under Art XX of GATT.<sup>145</sup> There is nothing to indicate that Ghana's oil production restrictions are discriminatory, accordingly, these restrictions cannot be interpreted as disguised restrictions on international trade.

Currently, there are indications that Ghana will directly limit export of oil from the Jubilee fields. This limitation is meant to cater for domestic consumption.<sup>146</sup> This type of export restriction may be found to be inconsistent with Art XI (I) of the GATT. It might be difficult to argue that the measure satisfies the first requirement under Art XX (g) of the GATT, which requires that the restriction should be primarily intended for the conservation of an exhaustible natural resource.<sup>147</sup> It might be argued that export restriction to provide for domestic needs is closely related to conserving the oil resources in Ghana. However, in that case conservation of oil resources would be only a secondary consideration. Ghana also imposes export taxes on certain hydrocarbon products.<sup>148</sup> Similarly, it might be argued that such restrictions are consistent with Art XX (i) of the GATT. However, restriction to meet domestic needs only applies to those periods when the domestic price is below the world price.<sup>149</sup> Accordingly such export restrictions on oil may violate Art XI (I) of the GATT. Although these concerns are legitimate, they are beyond the scope of the thesis as the restrictions are not production restrictions but rather direct export restrictions.

Currently, the production restrictions provided in Ghana's legal framework are compliant with WTO obligations. However, this may change if Ghana joins OPEC.

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<sup>145</sup> See *United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R 25.

<sup>146</sup> Oil from Jubilee held by GNPC may be sold to the Tema Refinery to meet domestic needs as opposed to export. See Adam B 'TOR can Refine Jubilee Oil, but...' available at <http://www.thebftonline.com/news/top-stories/2617> (accessed 13 December 2012). See also GNPC Model Petroleum Agreement of Ghana (2000) Article 15 (2).

<sup>147</sup> See *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon* (Panel Report) [1988] (L/6268 - 35S/98) 12.

<sup>148</sup> Kim J Recent Trends in Export Restrictions (2010) OECD Trade Policy Papers, No. 101 30 (hereafter Kim J 2010). See also Karapinar B Export Restrictions on Natural Resources: Policy Options and Opportunities for Africa (2010) World Trade Institute, University of Bern 10 (hereafter Karapinar B 2010).

<sup>149</sup> See Art XX (i) of the GATT.

The production restrictions maintained by OPEC are inconsistent with WTO obligations under Art XI (I) of GATT.<sup>150</sup> Moreover, OPEC production restrictions cannot be justified under Art XX (g) of the GATT.<sup>151</sup>

### C) Oil Consumption Subsidies

Section 2 of the National Petroleum Authority Act, 2005, provides the functions of the National Petroleum Authority of Ghana (the Authority). The provision enjoins the Authority to monitor the price ceiling of petroleum products in Ghana.<sup>152</sup> Besides the foregoing mandate, the Authority is also charged with protecting the interests of petroleum consumers in Ghana.<sup>153</sup> These clauses are the basis for the provision of oil consumption subsidies in Ghana. The Authority relies on a petroleum pricing formula.<sup>154</sup> This formula offers favourable oil prices to domestic consumers. The petroleum pricing formula was adopted in 2001, before the National Petroleum Authority Act was enacted.<sup>155</sup> Implicit in the formula is cross subsidisation of petroleum products which include kerosene and gas oil.<sup>156</sup>

Basically, cross subsidisation in Ghana is maintained through increasing the ex-refinery price of petroleum,<sup>157</sup> due to the fact that petroleum is mainly consumed by the wealthy sections of society.<sup>158</sup> The increase of ex-refinery petroleum prices keeps the ex-pump prices of kerosene and gas oil low.<sup>159</sup> The justification for the subsidisation of kerosene is that it is mainly consumed by the poor sections of

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<sup>150</sup> See chapter 3 section 3.4.1.

<sup>151</sup> See chapter 3 section 3.4.2.

<sup>152</sup> See Section 2 (a) of the National Petroleum Authority Act, 2005 Act 691.

<sup>153</sup> See Section 2 (e) of the National Petroleum Authority Act, 2005 Act 691.

<sup>154</sup> See Section 2 (a) of the National Petroleum Authority Act, 2005 Act 691.

<sup>155</sup> Centre for Policy Analysis Pricing Petroleum Products in Ghana —The Automatic Formula (2003) Ghana Selected Economic Issues No 5 1 (hereafter Centre for Policy Analysis 2003). See also Nnadikwe K High Oil Dependence in Ghana: to what Extent is Ghana Vulnerable to Oil Price Shock? (2010) Centre for Energy Petroleum, Mineral Law and Policy (CEPMLP), University of Dundee 5 for a detailed description of the formula (hereafter Nnadikwe K 2010).

<sup>156</sup> Centre for Policy Analysis (2003) 2-3.

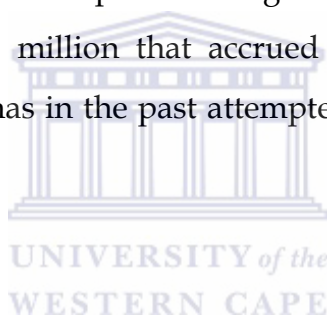
<sup>157</sup> See section 81 of the National Petroleum Authority Act, 2005 Act 691. 'Ex-refinery price means the amount of money equivalent to the actual cost of importing finished petroleum products and not exceeding the import parity price.'

<sup>158</sup> Centre for Policy Analysis (2003) 3.

<sup>159</sup> Centre for Policy Analysis (2003) 3. See also section 81 of the National Petroleum Authority Act, 2005 Act 691. 'Ex-pump price means the price at which a given quantity of a petroleum product is sold at a retail station dispensing pump.'

society.<sup>160</sup> Subsidisation of gas oil is also meant to benefit the poor as it runs the commercial transport system.<sup>161</sup> The wealthy sections of society depend on petroleum powered vehicles as opposed to gas oil.<sup>162</sup> The cross subsidisation program was meant to be self-financing; the taxation of other petroleum products was meant to fund the subsidies.<sup>163</sup> However, this system did not produce the desired results and the government only incurred more debt maintaining the subsidy program.<sup>164</sup>

Besides the cross subsidisation program, Ghana's petroleum pricing formula also provides subsidies for oil price stabilisation.<sup>165</sup> Ultimately, the beneficiaries of these subsidies are the consumers who enjoy low ex-pump prices. In 2012, Ghana's budget indicated that ex-pump petroleum prices for 2011 had to be subsidised by GH¢ 267 million.<sup>166</sup> Further, it has also been reported that government is encumbered with an outstanding debt of US \$ 80 million that accrued out of subsidising petroleum products in Ghana.<sup>167</sup> Ghana has in the past attempted to remove fuel subsidies but has not been successful.<sup>168</sup>



<sup>160</sup> Centre for Policy Analysis (2003) 3.

<sup>161</sup> Centre for Policy Analysis (2003) 3.

<sup>162</sup> Centre for Policy Analysis (2003) 3.

<sup>163</sup> Centre for Policy Analysis (2003) 7. See also German Technical Corporation International Fuel Prices Ghana (2009) 77 (hereafter German Technical Corporation 2009).

<sup>164</sup> Centre for Policy Analysis (2003) 4. Officials in Ghana's oil sector have indicated that they are in the final stages of phasing out the cross subsidisation program. Notes of discussions with officials in Ghana's oil sector are on file with the author.

<sup>165</sup> The second petroleum subsidy is maintained through the unified petroleum price fund. Sometimes government has to finance this margin that is built into the petroleum price. See National Petroleum Authority Pricing Petroleum Products in Ghana (2011) Oil for Development Workshop 9 (hereafter National Petroleum Authority 2011). Officials in Ghana's oil sector confirmed the above pricing formula and the price support by government. Notes of discussions with officials in Ghana's oil sector are on file with the author.

<sup>166</sup> Ministry of Finance and Economic Planning Ghana Budget Statement and Economic Policy of the Government for 2012 (2011) 48. See also Ministry of Energy 'Ghana Government spends GH¢ 760 million on Petroleum Subsidies Annually' available at <http://www.energymin.gov.gh/?p=398> (accessed 14 December 2012). It has been reported that currently the government requires about GH¢ 760 million annually to maintain the fuel subsidy program.

<sup>167</sup> See Ministry of Energy 'Ghana Government spends GH¢ 760 million on Petroleum Subsidies Annually' available at <http://www.energymin.gov.gh/?p=398> (accessed 14 December 2012).

<sup>168</sup> See Ghana Oil Watch 'ISODEC Welcomes Government Decision to Maintain Fuel Subsidy but Wants Further Debate on the Issue (2012)' available at <http://ghanaoilwatch.org/index.php/ghana-oil-and-gas-news/2733-isodec-welcomes-government-decision-to-maintain-fuel-subsidy-but-wants-further-debate-on-the-issue> (accessed 14 December 2012). See also Singh S 'Removing fuel subsidy: Easier Said Than Done' available at <http://www.mid-day.com/columnists/2012/sep/040912-Removing-fuel-subsidy-Easier-said-than-done.htm> (accessed 14 December 2012).

Ghana's cross subsidisation program may be inconsistent with the country's obligations under the SCM Agreement. Articles 1, 3 and 5 of the SCM Agreement are particularly important to the discussion. Article 1 of the SCM Agreement defines a subsidy as a financial contribution by the government or public body, within the territory of a member through various means.<sup>169</sup> The most relevant financial contributions for purposes of this discussion include: government revenue that is otherwise due being foregone or not collected,<sup>170</sup> potential direct transfer of funds,<sup>171</sup> and government making payments to a funding mechanism to carry out one of the functions indicated in subparagraphs (a) (1) (i) to (iii) of Art 1 of the SCM Agreement.<sup>172</sup> These financial contributions may be treated as subsidies if they confer a benefit to a particular industry or group of people in the country.<sup>173</sup>

It is therefore important to further examine each of the above provisions. In *US-Export Restraints*, the panel noted that the term financial contribution was included in Art 1 of the SCM Agreement to protect formal government measures from countervailing duty.<sup>174</sup> It was argued that not all government measures that provide financial contribution should be interpreted as subsidies.<sup>175</sup> The term was meant to prohibit direct transfers of economic resources from government to private entities, or indirect transfers from government through private entities to other private entities.<sup>176</sup> Accordingly, the list of financial contributions that may be considered as subsidies, are clearly enumerated in Art 1 of the SCM Agreement. It follows that one cannot conclude that simply because the government of Ghana ensures that ex-pump prices for kerosene and gas oil are cheap, a subsidy in terms of the SCM Agreement has been established. The inquiry has to take into account the specific

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<sup>169</sup> See Art 1 (1.1) (a) (1) of the SCM Agreement. See also chapter 3 section 3.4.3 for a discussion of subsidies under the SCM Agreement.

<sup>170</sup> See Art 1 (1.1) (a) (1) (ii) of the SCM Agreement.

<sup>171</sup> See Art 1 (1.1) (a) (1) (i) of the SCM Agreement.

<sup>172</sup> See Art 1 (1.1) (a) (1) (iv) of the SCM Agreement.

<sup>173</sup> See Art 1 (1.1) (b) of the SCM Agreement.

<sup>174</sup> See *United States - Measures Treating Export Restraints as Subsidies* (Panel Report) [2001] WT/DS 194/R 94.

<sup>175</sup> See *United States - Measures Treating Export Restraints as Subsidies* (Panel Report) [2001] WT/DS 194/R 94.

<sup>176</sup> See *United States - Measures Treating Export Restraints as Subsidies* (Panel Report) [2001] WT/DS 194/R 94.



financial contributions under subparagraph (a) (1) and (a) (2) of Art 1 of the SCM Agreement.

One of the types of financial contributions listed in Art 1 of the SCM Agreement is government revenue that is otherwise foregone or not collected. The appellate body has interpreted this provision and established guiding principles on the same.<sup>177</sup> A financial contribution for purposes of this provision will not arise only on account of government choosing not to raise revenue from a particular source.<sup>178</sup> Second, the term 'otherwise due' has been interpreted to refer to a defined comparative standard.<sup>179</sup>

In line with the foregoing discussion, Ghana's choice not to tax kerosene and gas oil in the same manner as petroleum cannot be interpreted as a subsidy simply because the government of Ghana chooses not to raise revenue from kerosene and gas oil. In terms of a comparative standard, the tax legal regime for petroleum products in Ghana can be relied upon as a comparative standard to examine revenue otherwise due. The Customs and Excise (Petroleum Taxes and Petroleum Related Levies) Act, 2005 clearly does not provide for a cross subsidy levy on kerosene and gas oil in the same manner as that imposed on petroleum.<sup>180</sup> The levy is charged on ex-refinery premium petroleum.<sup>181</sup> Thus based on the tax laws, it cannot be argued that failure to impose a similar levy on kerosene and gas oil amounts to revenue foregone, the revenue in any case is captured by the levy on ex-refinery premium petroleum.

On the other hand, it can be argued that due to the fact that the government of Ghana is incurring loans to finance the failed cross subsidisation program,<sup>182</sup> its actions constitute a potential direct transfer of funds to consumers of kerosene and

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<sup>177</sup> See *United States – Tax Treatment for "Foreign Sales Corporations"* (Appellate Body Report) [2001] WT/DS108/AB/R 31.

<sup>178</sup> See *United States – Tax Treatment for "Foreign Sales Corporations"* (Appellate Body Report) [2001] WT/DS108/AB/R 31. See also chapter 3 section 3.4.3.

<sup>179</sup> See *United States – Tax Treatment for "Foreign Sales Corporations"* (Appellate Body Report) [2001] WT/DS108/AB/R 31.

<sup>180</sup> See Section 6 of the Customs and Excise (Petroleum Taxes and Petroleum Related Levies) Act, 2005 Act 685.

<sup>181</sup> German Technical Corporation (2009) 76-77.

<sup>182</sup> See Ministry of Energy 'Ghana Government spends GH¢ 760 million on Petroleum Subsidies Annually' available at <http://www.energymin.gov.gh/?p=398> (accessed 14 December 2012).

gas oil.<sup>183</sup> In *Brazil-Aircraft*, the panel held that a potential direct transfer of funds occurs when an action gives rise to a benefit without taking into account the payment that is meant to finance that benefit.<sup>184</sup> In the present case, the government of Ghana has ensured that the National Petroleum Authority maintains the cross subsidy for kerosene and gas oil. The decision to maintain the subsidy is based on the government's promises to pay the money for the subsidy. The cross subsidisation program has been maintained through government taking on loans from the Tema Oil Refinery among others. These loans are yet to be paid and therefore cannot be regarded as a direct transfer of funds but they are a potential direct transfer.<sup>185</sup>

In terms of the other form of financial contribution, that is government making payments to a funding mechanism, the provision has been interpreted by the panel in *US – Export Restraints*.<sup>186</sup> It was noted that government effecting payments through a funding mechanism to achieve the other forms of financial contribution in Art 1 of the SCM Agreement, may amount to a financial contribution.<sup>187</sup> Ghana's second subsidy program, that which is financed through the unified petroleum price fund of the National Petroleum Fund, may be considered a financial contribution under Art 1 of the SCM Agreement.<sup>188</sup> It can be argued that this payment through the unified petroleum price fund is meant to further the objective of making a potential direct transfer of funds.

Subsequent to establishing that a financial contribution by the government has been made, the second stage of establishing a subsidy under Art 1 of the SCM Agreement is proving that a benefit has been conferred. The appellate body has interpreted

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<sup>183</sup> See Art 1 (1.1) (a) (1) (i) of the SCM Agreement.

<sup>184</sup> See *Brazil – Export Financing Programme for Aircraft* (Panel Report) [1999] WT/DS46/R 83. See also *Brazil – Export Financing Programme for Aircraft* (Appellate Body Report) [1999] WT/DS46/AB/R 45-46. The appellate body disagreed with the panel decision. Nevertheless, the panel decision provides insight on the interpretation of potential direct transfer of funds.

<sup>185</sup> Centre for Policy Analysis Ghana: *The Dawn of the Oil Economy, 2009-2012* (2011) CEPA Issues Paper No. 23 25 (hereafter Center for Policy Analysis 2011). Although some of the debts have been paid many are still outstanding.

<sup>186</sup> See *United States - Measures Treating Exports Restraints as Subsidies* (Panel Report) [2001] WT/DS 194/R 79.

<sup>187</sup> See *United States - Measures Treating Exports Restraints as Subsidies* (Panel Report) [2001] WT/DS 194/R 81.

<sup>188</sup> National Petroleum Authority (2011) 2 and 8.

'benefit' to mean an advantageous position than would have been available to the recipients of the financial contribution based on market conditions.<sup>189</sup> It is clear that without the cross subsidy for kerosene and gas oil, the consumers would have paid higher ex-pump prices for the products. The same is also true for the subsidy granted through the unified petroleum price fund. When Ghana attempted to remove the cross subsidy, the price of petroleum products went up by about 15 to 30 percent.<sup>190</sup> This indicates that the cross subsidy and the unified petroleum price fund provide favourable oil prices to consumers.

It may also be argued that domestic gas oil producers benefit from the oil consumption subsidies. Gas oil is one of the subsidised oil products and oil consumption data indicates that a high percentage of the gas oil is domestically produced.<sup>191</sup> Thus the domestic gas oil producers enjoy a high market share in Ghana due to demand for cheap subsidised gas oil.

It should also be noted that for a subsidy to be subjected to the remedies provided in parts II and III of the SCM Agreement, such a subsidy has to be specific.<sup>192</sup> The foregoing notwithstanding, it should further be noted that the requirement of specificity does not apply to Art 3 of the SCM Agreement.<sup>193</sup> Article 2 of the Agreement provides for specificity. Specificity can be divided into two broad categories. First, where the granting authority explicitly limits the subsidy to certain enterprises either directly or through establishing criteria which limits the subsidy to certain enterprises, and where it is shown that the subsidy although open to all is predominantly used by certain enterprises.<sup>194</sup> The panel in *US – Softwood Lumber IV*

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<sup>189</sup> See *Canada - Measures Affecting the Export of Civilian Aircraft* (Appellate Body Report) [1999] WT/DS70/AB/R 40.

<sup>190</sup> West Africa Insight Fuel Subsidy: Building Hardship on Citizens-Government Trust? (2012) 1 (hereafter West Africa Insight 2012). See also Sweet Crude Reports 'A Review of the Nigerian Energy Industry Fuel Prices Rise in Ghana as Govt Cuts Subsidies' available at <http://sweetcrudereports.com/2011/12/30/fuel-prices-rise-in-ghana-as-govt-cuts-subsidies/> (accessed 15 December 2012).

<sup>191</sup> National Petroleum Authority indicates that in 2012, gas oil imports amounted to 290 845 tonnes. On the other hand, domestic consumption of gas oil amounted to 1 326 126 tonnes. See National Petroleum Authority 'Downloads Petroleum Products Import Volumes and National Domestic Supply 2012' available at [http://www.npa.gov.gh/npa\\_new/Downloads.php](http://www.npa.gov.gh/npa_new/Downloads.php) (accessed 06 May 2013).

<sup>192</sup> See Art 1 (1.2) of the SCM Agreement.

<sup>193</sup> See Art 2 (2.3) of the SCM Agreement.

<sup>194</sup> See Art 2 (2.1) (a) to (c) of the SCM Agreement.

the panel confirmed the above position. De facto specificity can be relied upon to establish the requirements under Art 2 of the SCM Agreement.<sup>195</sup>

The cross subsidy in Ghana applies to kerosene and gas oil. The subsidy supported under the unified petroleum prices fund applies to all petroleum products. These subsidies apply to all consumers. However, the justification for the subsidy for gas oil clearly indicates that it is meant to benefit the commercial transport sector.<sup>196</sup> It can therefore be argued that the subsidy is predominantly used by the commercial transport sector and that de facto specificity has been established. If that is the case then with regard to specificity, the cross subsidy program and the subsidy under the unified petroleum prices fund cannot be considered specific under the SCM Agreement. The transport sector is a services sector and is not subject to the SCM Agreement. Related to the above, producers of gas oil indirectly benefit from the subsidies to enjoy a high market share relative to imported gas oil. It can be argued that de facto specificity exists for domestic producers of gas oil in Ghana. Although the subsidies may apply to all consumers, they predominantly apply to the domestic producers of gas oil.

As noted previously, subsidies under Art 3 of the SCM Agreement are deemed to be specific. Thus one does not have to prove specificity in this case. Article 3 (3.1) (b) of the SCM Agreement prohibits subsidies contingent upon the use of domestic over imported goods. The provision has been interpreted to refer to de jure contingency and de facto contingency.<sup>197</sup> De facto contingency has been interpreted to refer to a subsidy that is in fact tied to actual or anticipated use of a domestic good as opposed to an imported good.<sup>198</sup> There is nothing in the literature on Ghana's oil prices to suggest that domestically produced gas oil is cheaper than imported gas oil.

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<sup>195</sup> See *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada* (Panel Report) [2003] WT/DS257/R 105. The decision was subject to an appeal. However, the panel decision on de facto specificity still applies. See *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada* (Appellate Body Report) [2004] WT/DS257/AB/R.

<sup>196</sup> Centre for Policy Analysis (2003) 3.

<sup>197</sup> See *Canada – Certain Measures Affecting The Automotive Industry* (Appellate Body Report) [2000] WT/DS139/AB/R, WT/DS142/AB/R 32.

<sup>198</sup> The above interpretation was made in terms of Art 3 (3.1) (a) of the SCM Agreement. However, the terms 'contingent' in Art 3.1 (a) and 3.1 (b) are similar. See *Canada – Certain Measures Affecting the Automotive Industry* (Appellate Body Report) [2000] WT/DS139/AB/R WT/DS142/AB/R 47.

Although domestic producers of gas oil have a large market share, the prices for imported gas oil and domestically produced gas oil are the same.<sup>199</sup> Accordingly, it cannot be argued that the subsidy for gas oil and the subsidy under the unified petroleum prices fund is intended to encourage the use of domestically produced gas oil. Thus the oil consumption subsidy program is not a prohibited subsidy for purposes of the SCM Agreement.

Actionable subsidies are regulated under Art 5 of the SCM Agreement. Subsidies maintained or granted under this provision have to be specific.<sup>200</sup> As noted above, the oil consumption subsidies in Ghana may not be specific. However, in the event that specificity is established, then a determination may be made with regard to compliance with Art 5 of the SCM Agreement. Consequently, it would be important to determine whether the subsidies cause injury to the domestic industry of another member.<sup>201</sup> Additionally, a determination would have to be made on whether Ghana's oil consumption subsidies nullify or impair benefits accruing under the GATT.<sup>202</sup> In the same light, it would also be necessary to determine whether the subsidies cause serious prejudice to the interests of other members.<sup>203</sup>

However, it is important to note at this stage that Ghana's exports of gas oil are quite small.<sup>204</sup> It is estimated that in 2012, the country imported about 200 000 tonnes of gas oil per year and it consumed between 1 600 000 and 1 700 000 tonnes of locally produced gas oil.<sup>205</sup> Thus the volume of subsidised gas oil that would be exported is so small; this renders a detailed examination of the requirements for injury to the domestic industry of another member, under part V of the SCM Agreement redundant. The foregoing reason also makes a detailed examination of whether the

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<sup>199</sup> There is no distinction in the prices of imported and domestically produced gas oil. See National Petroleum Authority 'Downloads Historical Trend of Petroleum Prices in Ghana' available at [http://www.npa.gov.gh/npa\\_new/Downloads.php](http://www.npa.gov.gh/npa_new/Downloads.php) (accessed 06 May 2013).

<sup>200</sup> See Art 2 (2.3) of the SCM Agreement.

<sup>201</sup> See Art 5 (a) of the SCM Agreement. Injury under the SCM Agreement refers to material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry. See Footnote 45 of the SCM Agreement. See also chapter 3 section 3.4.3.

<sup>202</sup> See Art 5 (b) of the SCM and Article XXIII of the GATT.

<sup>203</sup> See Art 5 (c) of the SCM Agreement. See also chapter 3 section 3.4.3.

<sup>204</sup> Ghana exported about 1800 barrels per day of refined oil in 2008. This includes gas oil and fuel oils. See Index Mundi 'Ghana Distillate Fuel Oil Exports by Year' available at <http://www.indexmundi.com/energy.aspx?country=gh&product=fuel-oil&graph=exports> (accessed 06 May 2013).

<sup>205</sup> Energy Commission, Ghana 2012 Energy (Supply and Demand) Outlook for Ghana (2012) iii.

subsidy program causes nullification and impairment of benefits to other members and serious prejudice to the interests of other members unnecessary. This position may change as the volume of petroleum production in Ghana increases. Ghana's oil consumption subsidies at this stage are not actionable under the SCM Agreement. As the volume of oil production in Ghana increases, and in the event that the subsidy program is maintained, if the country joins OPEC, subsidisation may increase and may reach a level that may be interpreted as actionable under Art 5 of the SCM Agreement. Nonetheless, the specificity requirement under Art 2 of the SCM Agreement will have to be proven. At the moment it is difficult to determine whether oil consumption subsidies in some African countries are specific.<sup>206</sup> OPEC has not discouraged the use of oil subsidies and this may affect Ghana's obligations under the SCM Agreement.<sup>207</sup>

#### D) Corruption and Government Procurement

The involvement of the government in the oil industry in Ghana is prevalent in all sectors of oil production. GNPC is prominent in the upstream sector and generally government in the downstream sector as the sole shareholder in the Tema Oil Refinery.<sup>208</sup> The foregoing situation creates a basis for corruption. Needless to say that oil revenue, which currently accounts for a large portion of government revenue, puts the government at the center of collection and disposal of oil revenues.<sup>209</sup> Disposal of natural resources and revenue is closely related to government procurement.<sup>210</sup>

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<sup>206</sup> See chapter 3 section 3.4.3.

<sup>207</sup> See chapter 4 section 4.4.2.

<sup>208</sup> Section 2 (2) (a) and (3) (b) of the Ghana National Petroleum Corporation Act, 1983 P.N.D.C.L.64. See also Mbendi 'Tema Refinery' available at <http://www.mbendi.com/reth.htm> (accessed 16 December 2012). Although it has been reported that GNPC is the sole shareholder in the Tema Refinery, it is respectfully submitted that this is not accurate. Tema Refinery is not listed as one of the subsidiaries of GNPC. The government is indicated as the sole shareholder in the Refinery. See Tema Oil Refinery 'Corporate Profile' available at <http://www2.torghana.comm/index.php/corporate-profile> (accessed 16 December 2012). See also GNPC 'Subsidiaries' available at [http://www.gnpcghana.com/subsi\\_diaries/](http://www.gnpcghana.com/subsi_diaries/) (accessed 16 December 2012).

<sup>209</sup> See Bloomberg 'Ghana's Oil Revenue Rises 29% in Nine Months on Jubilee Output' available at <http://www.bloomberg.com/news/2012-10-25/ghana-s-oil-revenue-rises-29-in-nine-months-on-jubilee-output.html> (accessed 16 December 2012).

<sup>210</sup> See chapter 3 section 3.4.4.

The Petroleum (Exploration and Production) Law, 1984, provides that only GNPC is allowed to conduct oil exploration and production.<sup>211</sup> Other players in the upstream sector can only participate through agreements between such third parties, the government and GNPC.<sup>212</sup> This makes the government and GNPC the major players in the disposal of oil resources before exploration. Despite the presence of such a mandate there is nothing in the Act to control or regulate corruption or encourage transparency. It is therefore not surprising that the allocation of the blocks where the jubilee oil fields are located has been the source of various criticisms, which mainly point to corruption and a fiscal regime which unfairly benefited some parties.<sup>213</sup>

Similarly, the GNPC Act, 1983, states that GNPC may engage in petroleum operations and enter into petroleum exploration and production agreements.<sup>214</sup> Despite such a mandate, there are no provisions in the Act to control and discourage corrupt practices. It might be argued that GNPC is a corporate entity with a board of directors. However, the directors are appointed by the president on the advice of the Minister of Energy.<sup>215</sup> This may encourage the selection of loyal political allies as opposed to technocrats. Suffice it to note that Ghana does not have a specific corporate governance framework for state owned enterprises to encourage transparency in such entities.<sup>216</sup> This lacuna is remedied at least to a limited extent, by Art 268 of the Constitution which provides for parliamentary ratification of all natural resources transactions in Ghana.<sup>217</sup> This provision enjoins Parliament to ratify all transactions involving exploitation of natural resources.

In 2011, Ghana enacted the Petroleum Revenue Management Act. The Act provides that the management of petroleum revenue and savings should be transparent.<sup>218</sup>

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<sup>211</sup> See Section 2 (1) of the Petroleum (Exploration and Production) Law, 1984 P. N. D. C. L84.

<sup>212</sup> See Section 2 (1) of the Petroleum (Exploration and Production) Law, 1984 P. N. D. C. L84.

<sup>213</sup> See Upstream 'Jubilee Partner in Ghana Legal Probe' available at <http://www.upstreamonline.com/hardcopy/news/article1184639.ece> (accessed 06 May 2013). See also Global Witness 'Ghana Controversy Shows Need to Shine a Light on Oil Deals' available at <http://www.globalwitness.org/library/ghana-controversy-shows-need-shine-light-oil-deals> (accessed 16 December 2012).

<sup>214</sup> See Section 2 (3) (b) and (c) of the Ghana National Petroleum Corporation Act, 1983 P.N.D.C.L.64.

<sup>215</sup> See Section 5 (1) (c) of the Ghana National Petroleum Corporation Act, 1983 P.N.D.C.L.64.

<sup>216</sup> See generally Prempeh H K Reforming Corporate Governance in Ghana Part 2: The Public Sector (2002) Ghana Center for Democratic Development Briefing Paper Vol 3 No. 5 (hereafter Prempeh H K 2002).

<sup>217</sup> See Art 268 (1) of the Constitution of the Republic of Ghana 1992 as amended.

<sup>218</sup> See Section 49 (1) and (2) of the Petroleum Revenue Management Act, 2011 Act 815.

Further, the Act provides for the disclosure of information regarding the management of petroleum revenue and establishes a Public Interest and Accountability Committee (Committee).<sup>219</sup> In 2011, the Committee issued its first report and pointed out key concerns such as the difference between projected petroleum revenue and the actual revenue collected in 2011.<sup>220</sup> This was attributed to provisions in the Petroleum Income Tax Law which provides for capital cost recovery.<sup>221</sup> It also established that GNPC followed the public procurement law in identifying a marketing contractor for Ghana's share of oil from the Jubilee field.<sup>222</sup> It can be concluded in this regard, that the Act and the Committee will to some extent control corruption in the oil sector in Ghana.<sup>223</sup>

Finally, the Public Procurement Act, 2003, provides procurement rules for the government of Ghana.<sup>224</sup> The Act also provides for methods of procurement such as tendering, which encourage transparency.<sup>225</sup> The Act regulates the disposal of government property and creates offences to discourage corruption in government procurement.<sup>226</sup> The anomalies that have been reported concerning the disposal of oil acreage in the early stages of oil exploration in the jubilee fields seem to have been contained.<sup>227</sup> As noted, GNPC is currently adhering to the procurement laws.<sup>228</sup>

At the outset, oil production in Ghana was beset by corrupt practices. However, the legal regime on corruption and government procurement appears to be guiding the oil sector in the right direction. Ghana is not a signatory to the WTO GPA.<sup>229</sup> However, this has not stopped the country from establishing a legal framework that

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<sup>219</sup> See Sections 50, 51, and 52 of the Petroleum Revenue Management Act, 2011 Act 815.

<sup>220</sup> Public Interest and Accountability Committee Report on Petroleum Revenue Management for 2011 Annual Report (2012) 39 (hereafter the Public Interest and Accountability Committee 2011).

<sup>221</sup> Public Interest and Accountability Committee (2012) 39.

<sup>222</sup> Public Interest and Accountability Committee (2012) 40.

<sup>223</sup> It has been noted that the Public Interest and Accountability Committee may be faced with challenges in the implementation of its mandate and recommendations. This is a challenge that the body will have to overcome. See Prempeh H K & Kroon C The Political Economy Analysis of the Oil & Gas Sector in Ghana: Summary of Issues (2012) Star-Ghana 8 (hereafter Prempeh H K & Kroon C 2012).

<sup>224</sup> Part III of the Public Procurement Act, 2003 Act 663.

<sup>225</sup> See Sections 44 and 45 of the Public Procurement Act, 2003 Act 663.

<sup>226</sup> See Section 92 of the Public Procurement Act, 2003 Act 663.

<sup>227</sup> See Upstream 'Jubilee Partner in Ghana Legal Probe' available at <http://www.upstreamonline.com/hardcopy/news/article1184639.ece> (accessed 06 May 2013).

<sup>228</sup> Public Interest and Accountability Committee (2012) 40.

<sup>229</sup> See WTO 'Government Procurement Parties and Observers' available at [http://www.wto.org/english/t/rapot\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/t/rapot_e/gproc_e/memobs_e.htm) (accessed 06 May 2013).



encourages transparency. The main concern with regard to public procurement is liberalisation of procurement in the oil sector, especially due to the prominence of local content policies.<sup>230</sup> Corruption in the OPEC member states is quite high and there is no formal framework to control the same.<sup>231</sup> Thus Ghana's decision to join OPEC may impede efforts to actively control corruption in the oil sector.

### 6.3 Conclusion

Ghana's policy framework for oil production and trade is in line with its obligations under the WTO. Restriction of oil production is meant to protect the environment and to conserve an exhaustible natural resource; this is in line with Art XX (g) of the GATT. This position may change if Ghana joins OPEC where restrictions on oil production are meant to stabilise oil prices.

Second, Ghana maintains an oil consumption subsidy program for kerosene and gas oil, through the cross subsidisation mechanism. It also has a subsidy program under the unified petroleum prices fund. Despite the fact that these subsidies are financial contributions and they benefit certain sectors such as the commercial transport sector and the domestic oil producers, the subsidies are not prohibited or actionable under Arts 3 and 5 of the SCM Agreement. To this end, Ghana's oil consumption subsidies are consistent with Ghana's obligations under the WTO. Like the above conclusion on production quotas, an increase in the volume of oil production complemented by OPEC membership, may increase the level of subsidisation making the subsidies actionable. Even then, specificity of the oil consumption subsidies will have to be established.

Finally, Ghana has enacted laws to regulate the management of oil revenues and supplies. Currently, the laws appear to be successful and the Public Interest and Accountability Committee is performing its role of ensuring that the laws are implemented and the oil revenue is managed in a transparent manner. Similarly, the laws on government procurement also encourage transparency in government

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<sup>230</sup> Ministry of Energy (2011) 8.

<sup>231</sup> See chapter 4 section 4.4.3.

procurement. However, Ghana is not a party to the GPA; this may affect the liberalisation of government procurement especially due to Ghana's focus on local content in the oil sector. However, the GPA is not an appropriate tool for the control of corruption in the oil sector.<sup>232</sup> OPEC does not have a formal framework to control corruption, thus OPEC membership will not control corruption in Ghana.<sup>233</sup> The next chapter provides a summary of the conclusions and recommendations for the thesis.



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<sup>232</sup> See chapter 3 section 3.4.4.

<sup>233</sup> See chapter 4 section 4.4.3.

## CHAPTER 7

### A SUMMARY OF THE CONCLUSIONS AND RECOMMENDATIONS

#### 7.1 Introduction

The thesis sought to examine the regulation of international trade in oil from an African perspective. The previous chapters examined the regulation of production quotas, oil consumption subsidies, and control of corruption under both the WTO and OPEC legal regimes. African examples, such as, Nigeria, in some cases Angola, and Ghana as a main case study, were relied upon. On the whole, the thesis reveals that the WTO has a strong institutional capacity to regulate international trade in oil. However, apart from Art XI of the GATT on the regulation of production quotas, the WTO rules on subsidies and corruption have challenges in the regulation of international trade in oil. Conversely, OPEC has a weak institutional and legal framework for the regulation of international trade in oil.

This chapter provides a summary of the conclusions and the recommendations of the thesis. The first section of the chapter discusses the conclusions to the thesis and the second section provides practical recommendations for the regulation of international trade in oil. Finally, concluding remarks for the chapter are provided.

#### 7.2 A Summary of the Conclusions

This summary of conclusions collates all the conclusions arising from the research questions and the objectives of the thesis. These questions are answered in detail in the previous chapters. The intention of this section is to bring all these conclusions together, to provide a basis for the recommendations that are made in next section of this chapter. The summary of conclusions addresses the duality of legal regimes presented by OPEC and WTO regulations, the effect of such a duality on the

regulation of production quotas, oil consumption subsidies, and the control of corruption, whether the duality affects the full liberalisation of international trade in oil, whether the WTO institutional and legal framework is sufficient for the regulation of international trade in oil, whether the OPEC institutional and legal framework is sufficient for the regulation of international trade in oil, and finally examines the legal regime for the regulation of production quotas, oil consumption subsidies, and corruption in Ghana.

Chapters three, four, and five indicate that there is a duality of legal regimes presented by OPEC and the WTO in the regulation of international trade in oil.<sup>1</sup> The two organisations provide for regulations on production quotas, oil consumption subsidies, and the control of corruption.<sup>2</sup> However, although the WTO has express regulations for these key areas, OPEC regulations are not expressly provided in the OPEC Statute. Nonetheless, a broad interpretation of the Statute reveals that the organisation has the powers to regulate these key areas. Additionally, de facto, OPEC appears to have acquiesced to the use of oil consumption subsidies in its member states, as the incidence of these subsidies in the OPEC countries is high.<sup>3</sup> It should be noted that this duality of legal regimes affects the regulation of production quotas, oil consumption subsidies, and corruption.<sup>4</sup> Additionally, due to the fact the organisations have different theoretical backgrounds, the regulations of the two organisations are not compatible.<sup>5</sup> While the WTO generally aspires to encouraging liberalisation in international trade, OPEC is founded on production restriction to ensure profitable returns from oil trade.<sup>6</sup>

With regard to the institutional and legal frameworks of both the WTO and OPEC, the institutional framework of the WTO provides a better option for the regulation of international trade in oil.<sup>7</sup> The various top-level, mid-level and subsidiary organs can

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<sup>1</sup> See chapter 3 sections 3.3 and 3.4. See also chapter 4 sections 4.3 and 4.4. See also chapter 5 sections 5.2 and 5.3.

<sup>2</sup> See chapter 3 sections 3.4.1, 3.4.2, 3.4.3, and 3.4.4. See also chapter 4 sections 4.4.1, 4.4.2, and 4.4.3.

<sup>3</sup> See chapter 4 section 4.4.2.

<sup>4</sup> See chapter 5 sections 5.2 and 5.3.

<sup>5</sup> See chapter 2 generally.

<sup>6</sup> See chapter 1 sections 1.2 and 1.3. See also chapter 2 generally.

<sup>7</sup> See chapter 3 section 3.3 and chapter 5 section 5.2.

transform the regulation of international trade in oil. However, the WTO legal framework has to be interpreted and in some cases amended to provide for international trade in oil. This is especially true for WTO rules on subsidies, corruption and government procurement.<sup>8</sup> For example, the application of the oil consumption subsidy program in Nigeria to the SCM Agreement revealed that it is difficult to determine whether the subsidy is specific.<sup>9</sup> Also, the GPA is a plurilateral agreement with limited application and currently none of the African WTO members are parties to the Agreement.<sup>10</sup> The OPEC institutional framework is weak and mainly entrenches the GATT inconsistent practice of production quotas.<sup>11</sup> The OPEC legal framework is insufficient and the OPEC Statute does not provide express regulations for production quotas, oil consumption subsidies, and corruption in African oil producing countries.<sup>12</sup> Nonetheless, the broad powers in the OPEC Statute can be interpreted to cover the regulation of production quotas, oil consumption subsidies and the control of corruption in African oil producing countries.<sup>13</sup> It was also noted, especially, for Nigeria and Angola, that the domestic legal regimes entrench OPEC production quotas.<sup>14</sup> Further, oil consumption subsidies and corruption were prevalent in these two African oil producing OPEC member states.<sup>15</sup>

Currently, the Ghanaian perspective indicates that its oil production management regulations and its oil consumption subsidy programs are not in contravention of WTO obligations under the GATT and the SCM Agreement.<sup>16</sup> Ghana is not a party to the GPA, however, its Petroleum Revenue Management Act and its public procurement laws have helped control corruption in its oil sector.<sup>17</sup> This observation is made on the basis of the oil related scandals that were prevalent in Ghana before

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<sup>8</sup> See chapter 3 sections 3.4.3 and 3.4.4.

<sup>9</sup> See chapter 3 section 3.4.3.

<sup>10</sup> See chapter 3 section 3.4.4.

<sup>11</sup> See chapter 4 section 4.3.

<sup>12</sup> See chapter 4 section 4.4.

<sup>13</sup> See chapter 4 section 4.4.

<sup>14</sup> See chapter 4 section 4.5.

<sup>15</sup> See chapter 4 section 4.5.

<sup>16</sup> See chapter 6 section 6.2.4.

<sup>17</sup> See chapter 6 section 6.2.4.

the Act was enacted.<sup>18</sup> Presently, the oil production capacity in Ghana is still low and there is also very little incentive to join OPEC. In the event that Ghana chooses to join OPEC, especially after its volume of oil production has increased, then its production management regulations may be motivated by profit maximisation and not conservation of a finite natural resource.<sup>19</sup> This may violate Art XI of the GATT. Similarly, due to the fact that most OPEC countries maintain oil consumption subsidy programs, Ghana may follow the practices of other OPEC member states, and continue its oil consumption subsidy program. OPEC does not have a coherent framework for the control of corruption in its member states.<sup>20</sup> This may undermine Ghana's efforts to curb corruption in its oil sector, as other OPEC member states have not been successful in controlling corruption in their oil sectors.

### 7.3 Recommendations

It can be noted from the discussion in section 7.2 above, that although the WTO has a strong institutional framework, its legal framework especially on the regulation of oil consumption subsidies and corruption is insufficient. This section provides recommendations on the regulation of production quotas, oil consumption subsidies, and corruption in Africa. The section also provides some general recommendations before the concluding remarks for the chapter are made.

#### 7.3.1 Production Quotas

Article XI of the GATT on the regulation of quantitative restrictions can be interpreted to regulate production quotas. Moreover, the GATT in Art XX provides for general exceptions that can be used to override the obligations under Art XI; this caters for special circumstances. Thus the GATT and the WTO are the appropriate forums for the regulation of production quotas. WTO African oil producing countries that are also OPEC members have to ensure that they comply with their

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<sup>18</sup> See chapter 6 section 6.2.4.

<sup>19</sup> See chapter 6 section 6.2.4.

<sup>20</sup> See chapter 4 section 4.4.3.

GATT obligations. This might require relinquishing OPEC membership. The efficient regulation of production quotas will also require that WTO members provide for a GATT consistent method to address oil price volatility and to ensure oil price stability. That said, it is proposed that the term 'other measures' in Art XI be expressly provided in the GATT to avoid ambiguity. In light of the discussion in the previous chapters, 'other measures' can be defined to include production restriction that has a direct effect on the volume of exports. Nonetheless, amendment of this clause in the GATT may be too broad, and inapplicable to other goods, such as, agricultural commodities, where for food security and other related concerns, production restriction may be necessary over a long period of time. Thus this proposal should be captured in a specific WTO energy trade treaty.

### 7.3.2 Oil Consumption Subsidies

Articles 3 and 5 of the SCM Agreement provide for the regulation of prohibited and actionable subsidies. However, as noted in chapter three, it is difficult to determine whether oil consumption subsidies in countries like Nigeria, cause material injury to the domestic oil industries of other WTO members. This affects the determination of actionable subsidies under Art 5 of the SCM. It is important that African countries adopt a reporting mechanism on volumes of subsidized oil imported into their jurisdictions as well as creative methods of monitoring oil smuggled into various countries. Material injury under Art 15 of the SCM on the determination of injury in its present form does not cover smuggled oil. This is because subsidised oil encourages smuggling; this does not go through the formal import processes. A concerted effort between subsidizing countries and neighboring countries can be undertaken to produce credible data on smuggled oil. Similar multilateral processes have been undertaken in the reporting and monitoring of trade in 'blood diamonds.'

Further, with regard to specificity, and the determination of whether oil consumption subsidies are actionable in terms of Art 5 of the SCM, it is important that the definition of the term 'specificity' expressly provide for the service sector. Again, this requires a specific WTO energy treaty. The current SCM does not apply

to services, yet some of these subsidies are predominantly utilised by the services sector, such as, transport services.

With regard to Art 3 of the SCM, it is challenging to prove that oil consumption subsidies encourage the use of domestic oil over imported oil. In most African countries, domestic oil reserves are not sufficient to cater for domestic needs. Thus for countries, such as, Nigeria and Ghana, it cannot be said that their oil consumption subsidies encourage the use of domestic over imported oil. This makes it impossible to describe oil consumption subsidies as prohibited. It is proposed that the definition of prohibited subsidies be amended to cover subsidies that encourage substantial smuggling of oil to other oil producing countries. This will require a definition of the term 'substantial.' The foregoing term could be defined to refer to smuggling that negatively affects oil production and trade in other countries.

### 7.3.3 Corruption

The GPA has the potential of encouraging transparency in the oil sectors of African oil producing countries. However, the Agreement is plurilateral and countries may choose to apply it to selected industries. This limitation and the fact that no African country is a party to the Agreement render it inappropriate for the control of corruption in the oil sector. However, the rules of the GPA can guide the WTO in the creation of rules to regulate corruption in the oil sector. It is proposed that the WTO energy treaty include MFN and national treatment provisions on tendering processes for oil production and trade. This will make these processes more transparent and help curb corruption.

### 7.3.4 General Recommendations

It is evident from the discussion in sections 7.3.1, 7.3.2, and 7.3.3, that the WTO has the potential to regulate production quotas, oil consumption subsidies, and corruption. However, this requires either an amendment of the existing rules, or the negotiation of a new agreement to cover trade in energy. The WTO has previously



amended some agreements like the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) and the GPA. On the other hand, negotiating a new agreement on trade in energy will involve a lengthy process and may be difficult to conclude. This conclusion is plausible in light of the Doha round of negotiation which is yet to be concluded. Even then, amending the GATT, SCM Agreement, and the GPA to provide for comprehensive rules on the regulation of international trade in oil may be difficult. Thus a coherent agreement that addresses the peculiarities of trade in energy and trade in oil is the most appropriate avenue. This Agreement should be negotiated under the WTO framework. The ECT can be used as a guide for the WTO energy treaty.

Second, it is proposed that the WTO energy treaty cover the entire upstream, downstream and all related processes of oil production and trade. This will give the WTO dispute settlement process the mandate to handle oil disputes that may arise at any stage of oil production and trade.

Finally, the WTO should embark on a detailed study of the regulation of production quotas, oil consumption subsidies and corruption. These areas affect free trade in oil. Such a study will also highlight key provisions that will be necessary for the regulation of international trade in oil. These provisions can form the basis for a draft WTO energy treaty.

### **7.4 Concluding Remarks**

The chapter has discussed albeit briefly, the summary of conclusions of the thesis on the role of the WTO and OPEC in the regulation of international trade in oil, especially with regard to production quotas, oil consumption subsidies and corruption. That said, the recommendations provided in this chapter are mainly based on African examples and may therefore be limited in application.

## **BIBLIOGRAPHY:**

### BOOKS

African Development Bank and the African Union *Oil and Gas in Africa* (2009) Oxford: Oxford University Press

Alvarez J E *International Organi[s]ations as Law-makers* (2005) New York: Oxford University Press

Appleyard D & Field A J *International Economics Trade Theory and Policy* (1995) Chicago: IRWIN Inc

Armstrong D et al *International Organisation in World Politics* 3 ed (2004) Hampshire: Palgrave Macmillan

Baldwin R et al *Understanding Regulation Theory, Strategy, and Practice* 2 ed (2012) New York: Oxford University Press Inc

Barnes R *Property Rights and Natural Resources* (2009) Portland: Hart Publishing Ltd

Bennett A L *International Organisations Principles and Issues* 4 ed (1983) New Jersey: Prentice Hall

Bhuiyan S *National Law in WTO Law Effectiveness and Good Governance in the World Trading System* (2007) Cambridge: Cambridge University Press

Burgstaller M *Theories of Compliance with International Law* (2005) Leiden: Koninklijke Brill NV

Campbell R H et al (eds) *Adam Smith An Inquiry into the Nature and Causes of the Wealth of Nations* (1981) Vol I and II Indianapolis: Liberty Fund

Cherunilam F *International Economics* 5 ed (2008) New Delhi: Tata McGraw-Hill Publishing Company Limited

Clarke D *Africa: Crude Continent, The Struggle for Africa's Oil Prize* (2010) London: Profile Books Ltd

Danielsen A L *The Evolution of OPEC* (1982) New York: Harcourt Brace Jovanovich Publishers

Dugard J *International Law A South African Perspective* 4 ed (2013) Cape Town: Juta & Co Ltd

Dwivedi D N *Microeconomics Theory & Applications* (2006) Delhi: Dorling Kindersley Pvt Ltd

## Bibliography

Evenett S.J & Hoekman B (eds) *The WTO and Government Procurement. Critical Perspectives on the Global Trading System and the WTO* (2006) Cheltenham: Edward Elgar Publishing Limited

Fage J D *Ghana A Historical Interpretation* (1961) Wisconsin: University of Wisconsin Press

Footer M E *An Institutional and Normative Analysis of the World Trade Organisation* (2006) Leiden: Martinus Nijhoff Publishers

Goodman L M *The Asylum The Renegades who Hijacked the World's Oil Market* (2011) New York: HarperCollins Publishers

Grimwade N *International Trade New Patterns of Trade, Production and Investment* (1989) London: Routledge

Guzzini S *Realism in International Relations and International Political Economy, the Continuing Story of a Death Foretold* (1998) London: Routledge

Hallwood P & Sinclair S *Oil, Debt and Development – OPEC in the Third World* (1981) London: George Allen and Unwin

Harris D *Cases and Materials on International Law* 7 ed (2010) London: Sweet & Maxwell

Hocking B & McGuire S *Trade Politics International, Domestic and Regional Perspectives* (1999) London: Routledge

Hoekman B M & Kostecki M M *The Political Economy of the World Trading System The WTO and Beyond* 2 ed (2001) New York: Oxford University Press

Jackson J H *The World Trading System Law and Policy of International Economic Relations* (1997) Massachusetts: The Massachusetts Institute of Technology Press

Jackson J H *The World Trade Organisation: Constitution and Jurisprudence* (1998) London: Royal Institute of International Affairs

Jackson J H *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006) New York: Cambridge University Press

Jaidah A M *An Appraisal of OPEC Oil Policies – Energy Resources and Policies of the Middle East and North Africa* (1983) Essex: Longman Group Limited

Karns M P & Mingst K A *International Organisations, The Politics and Processes of Global Governance* (2004) Colorado: Lynne Rienner Publishers, Inc

Khan K *The Law and Organisation of International Commodity Agreements* (1982) The Hague: Martinus Nijhoff Publishers

## Bibliography

Kimble D *A Political History of Ghana The Rise of Gold Coast Nationalism 1850-1928* (1963) Oxford: Oxford University Press

Lafeber W *America, Russia, and the Cold War 1945-2002* (2004) 9 ed New York: McGraw-Hill Companies Inc

Lowenfeld A *International Economic Law* 2 ed (2008) Oxford: Oxford University Press

Mckenna A (ed) *The History of Western Africa* (2011) New York: Britannica Educational Publishing

Meredith M *The State of Africa A History of the Continent since Independence* (2011) Cape Town: Jonathan Ball Publishers (Pty) Ltd

Mtsiva V C (ed) *Oil and Natural Gas Issues and Policies* (2003) New York: Nova Science Publishers

Mokhtar G (ed) *General History of Africa II Ancient Civilizations of Africa* (1990) California: University of California Press

Palmeter D *The WTO as a Legal System Essays on International Trade Law and Policy* (2004) London: Cameron May Ltd

Parra F *Oil Politics A Modern History of Petroleum* (2010) New York: I.B. Tauris & Co Ltd

Southern and Eastern African Trade Information and Negotiation Institute and the Institute for Global Dialogue *Compilation of the formal African Proposals to the WTO* (2005) Johannesburg: Riaan de Villiers & Associates

Shaw M N *International Law* 5 ed (2003) Cambridge: Cambridge University Press

Schrijver N *Sovereignty over Natural Resources Balancing Rights and Duties* (1997) Cambridge: Cambridge University Press

Skeet I *OPEC: Twenty-Five Years of Prices and Politics* (1989) Cambridge: Press Syndicate of the University of Cambridge

Smith A *The Wealth of Nations* 5 ed annotated by Cannan E (2003) New York: Bantam Dell

Themaat V V *The Challenging Structure of International Economic Law* (1981) The Hague: Martinus Nijhoff Publishers

Trade Law Centre for Southern Africa *The World Trade Organisation - An African Perspective, more than a decade later* (2009) Stellenbosch: Trade Law Centre for Southern Africa

Van den Bossche P *The Law and Policy of the World Trade Organisation Texts, Cases and Materials* (2008) New York: Cambridge University Press

## Bibliography

Van den Bossche P *The Law and Policy of the World Trade Organisation Texts, Cases and Materials* (2005) Cambridge: Cambridge University Press

Van Marrewijk C et al *International Economics Theory, Application, and Policy* (2007) New York: Oxford University Press

Viner J *Studies in the Theory of International Trade* (1960) London: George Allen & Unwin Ltd

Wilkinson R *The WTO Crisis and the Governance of Global Trade* (2006) New York: Routledge

World Trade Organisation *The Legal Texts The Results of the Uruguay Round of Multilateral Trade Negotiations* (2002) Geneva: WTO Publications

World Trade Organisation *Understanding the WTO* (2008) Geneva: WTO Publications

### CHAPTERS AND SECTIONS IN BOOKS

Ala'I P 'From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance' Steger D P *Redesigning the World Trade Organization for the Twenty-first Century* (2009) Waterloo: The Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press

Aissi S 'African Development and the Role of the OPEC Fund' Shihata F I (ed) *The OPEC Fund for International Development the Formative Years* (1983) Kent: Croom Helm Ltd

Behr P 'Energy Nationalism Do Petrostates Threaten Global Energy Security?' Kassie G et al (eds) *International Issues in Social Work and Social Welfare Selections from CQ Researcher* (2010) California: SAGE Publications, Inc

Birkbeck C D 'Reinvigorating Debate on WTO Reform: The Contours of a Functional and Normative Approach to Analyzing the WTO System' Steger D P *Redesigning the World Trade Organization for the Twenty-first Century* (2009) Waterloo: The Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press

Cossy M 'Energy Trade and WTO Rules: [Reflections] on Sovereignty over Natural Resources, Export Restrictions and Freedom of Transit' Herrmann C & Terhechte J.P (eds.), *European Yearbook of International Economic Law (EYIEL)*, Vol. 3 (2012) Berlin: Springer-Verlag

Cottier T 'A Two-Tier Approach to WTO Decision-Making' Steger D P (ed) *Redesigning the World Trade Organization for the Twenty-first Century* (2009) Waterloo: The Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press

## Bibliography

Cottier T et al 'Energy in WTO Law and Policy' Cottier T & Delimatsis P (eds) *The Prospects of International Trade Regulation from Fragmentation to Coherence* (2011) New York: Cambridge University Press

Desta M G 'Legal Issues of OPEC Production Management Practices: An Overview' Werner J & Ali A H (eds) *A Liber Amicorum: Thomas Wälde - Law Beyond Conventional Thought* (2009) London: CMP Publishing Ltd

Ehring L & Chianale G F 'Export Restrictions in the Field of Energy' Selivanova Y (ed) *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (2012) Alphen aan den Rijn: Kluwer Law International

Elsig M 'WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?' Steger D P (ed) *Redesigning the World Trade Organization for the Twenty-first Century* (2009) Waterloo: The Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press

Elsig M & Cottier T 'Reforming the WTO: the decision-making triangle revisited' Cottier T & Elsig M (eds) *Governing the World Trade Organization Past, Present and Beyond Doha* (2011) New York: Cambridge University Press

Evenett S J 'Multilateral Disciplines and Government Procurement' Hoekman B et al (eds) *Development, Trade, and the WTO A Handbook* (2002) Washington: The World Bank

Hoekman B 'The WTO: Functions and Basic Principles' Hoekman B et al (eds) *Development, Trade, and the WTO A Handbook* (2002) Washington: The World Bank

Krueger A O 'Introduction' Krueger A O (ed) *The WTO as an International Organization* (2000) Chicago: The University of Chicago Press

Marceau G 'The WTO in the Emerging Energy Governance Debate' Pauwelyn J (ed) *Global Challenges at the Intersection of Trade, Energy and the Environment* (2010) Berlin: Global Public Policy Institute

Madolo N & Nakawaga J 'Introduction The Importance of An African Voice in "Global" International Economic Law' Madolo N (ed) *International Economic Law The Voices of Africa* (2012) Cape Town: Siber Ink

Milthorp P & Christy D 'Energy Issues in Selected WTO Accessions' Selivanova Y (ed) *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (2012) Alphen aan den Rijn: Kluwer Law International

Ogus A 'W(h)ither the Economic Theory of Regulation? What Economic Theory of Regulation?' Jordana J & Levi-Faur D (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004) Cheltenham: Edward Elgar Publishing Ltd

## Bibliography

Pauwelyn J 'Global Challenges at the Intersection of Trade, Energy and the Environment: An Introduction' Pauwelyn J (ed) *Global Challenges at the Intersection of Trade, Energy and the Environment* (2010) Berlin: Global Public Policy Institute

Pogoretskyy V 'Energy Dual Pricing in International Trade: Subsidies and Anti-dumping Perspectives' Selivanova Y (ed) *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (2012) Alphen aan den Rijn: Kluwer Law International

Sammi M V 'OPEC: Past, Present, and Future' Shojai S (ed) *The New Global Oil Market: Understanding Energy Issues in the World Economy* (1995) Connecticut: Greenwood Publishing Group

Selivanova Y 'Managing the Patchwork of Agreements in Trade and Investment' Goldthau A & Witte J M (eds) *Global Energy Governance The New Rules of the Game* (2010) Berlin: Global Public Policy Institute

Schreuer C & Kriebaum U 'At What Time Must Legitimate Expectations Exist?' Werner J & Ali A H (eds) *A Liber Amicorum: Thomas Wälde Law Beyond Conventional Thought* (2009) London: CMP Publishing Ltd

Steger D 'Why Institutional Reform of the WTO Is Necessary' Steger D P (ed) *Redesigning the World Trade Organization for the Twenty-first Century* (2009) Waterloo: The Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press

Steger D & Shpilkovskaya N 'Internal Management of the WTO: Room for Improvement' Steger D P (ed) *Redesigning the World Trade Organization for the Twenty-first Century* (2009) Waterloo: The Centre for International Governance Innovation (CIGI) and Wilfrid Laurier University Press

Worika I L 'Production, Management, OPEC and the WTO' Pauwelyn J (ed) *Global Challenges at the Intersection of Trade, Energy and the Environment* (2010) Berlin: Global Public Policy Institute

Wälde T W 'Organisation of Petroleum Exporting Countries' Istituto Della Enciclopedia Italiana and Fondata Da Giovanni Treccani S.p.A. *Encyclopaedia of Hydrocarbons International Law* (2007) Roma: Marchesi Grafiche Editoriali S.p.A.

Yanovich A 'WTO Rules and the Energy Sector' Selivanova Y (ed) *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (2012) Alphen aan den Rijn: Kluwer Law International.

## JOURNAL ARTICLES

Abbott K W & Snidal D 'Hard and soft law in international governance' (2000) *International Organization* 54 3

## Bibliography

Adelabu N S 'The political economy of oil deregulation in Nigeria's fourth republic: prospects and challenges' (2012) *Journal of Emerging Trends in Educational Research and Policy Studies* 3(3)

Ades A & Di Tella R 'The new economics of corruption: a survey and some new results' (1997) *Political Studies* XLV

Adjaye J A 'Oil production and Ghana's economy: what can we expect?' (2010) *Ghana Policy Journal* Vol 4 Special Issue.

Ajomo M A 'An appraisal of the Organisation of Petroleum Exporting Countries (OPEC)' (1977-1978) 13 *Tex. Int'l L. J.* Vol 13: 11

Ala'I P 'The WTO and the anti-corruption movement' (2008) *Loyola University Chicago International Law Review* 6, No. 1

Alhajji A F & Huettner D 'OPEC and other commodity cartels: a comparison' (2000) *Energy Policy* 28

Bahgat G 'Africa's oil potential and implications' 2007 *OPEC Review*

Banful A J 'The legal regime of Ghana's upstream petroleum industry and the role of GNPC as player and regulator' (2010) *Ghana Policy Journal* Vol 4 Special Issue

Bejesky R 'Geopolitics, oil law reform, and commodity market expectations' (2011) *Oklahoma Law Review* Vol. 63 No 2

Bhagwati J et al 'The muddles over outsourcing' (2004) *The Journal of Economic Perspectives*, Vol. 18, No. 4

Blank A & Marceau G 'The history of the government procurement negotiations since 1945' (1996) *Public Procurement Law Review* 5

Bratton M & Van De Walle N 'Popular protest and political reform in Africa' (1992) *Comparative Politics* Vol. 24 No. 4

Brémond V et al 'Does OPEC still exist as a cartel? An empirical investigation' (2011) *Journal of Energy Economics* (03) 10

Broome S A 'Conflicting obligations for oil exporting nations?: Satisfying membership requirements of both OPEC and the WTO' (2006) *The Geo. Wash. Int'l L. Rev* Vol 38-2

Crawford G 'Making democracy a reality'? The politics of decentralisation and the limits to local democracy in Ghana' (2009) *Journal of Contemporary African Studies*, 27:1

Cottier T & Schefer K N 'The relationship between World Trade Organi[s]ation law, national and regional law' (1998) 1 *J. Int'l Econ. L.*



## Bibliography

Davis G A 'Book reviews-Angola: anatomy of an oil state 2 ed by Tony Hodges' (2005) *The Energy Journal* Vol 26 Issue 4

Desta M G 'The GATT/WTO system and international trade in petroleum: an overview' (2003) *Journal of Energy & Natural Resources Law* Vol 21 No 4

Desta M G 'Legal Issues of OPEC production management practices under WTO law and the antitrust law of non-OPEC countries' (2010) *Journal of Energy & Natural Resources Law* Vol 28 No 4

Ehlermann C & Ehring L 'The authoritative interpretation under article IX: 2 of the agreement establishing the World Trade Organi[s]ation: current law, practice and possible improvements' (2005) *Journal of International Economic Law* 8(4)

Euclid A 'OPEC's Dominance of the Global Oil Market: The Rise of the World's Dependence on Oil' (2004) *Middle East Journal* (58) 3

Feichtner I 'The waiver power of the WTO: opening the WTO for political debate on the reconciliation of competing interests' (2009) *The European Journal of International Law* Vol. 20 No. 3

Gault J et al 'How does OPEC allocate quotas?' (1999) *Journal of Energy Finance and Development* 4

Ginsburg T et al 'Commitment and diffusion how and why national constitutions incorporate international law' 2008 *University of Illinois Law Review*

Griffin J M & Xiong W 'The incentive to cheat: an empirical analysis of OPEC' (1997) 40 *J.L & Econ*

Guimarães de Lima e Silva V 'The revision of the WTO Agreement on Government Procurement: to what extent might it contribute to the expansion of current membership?' (2008) *Public Procurement Law Review* Issue 2

Harris A & Khare A 'Sustainable development issues and strategies for Alberta's oil industry' (2002) *Technovation* 22

Haynes J 'Limited' democracy in Ghana and Uganda. What is most important to international actors: stability or political freedom?' (2010) *Journal of Contemporary African Studies*, 19:2

Horn M 'OPEC's optimal crude oil price' (2004) *Energy Policy* (32) 12

Holmer A F & Bello J H 'The U.S.- Canada Lumber Agreement: past as prologue' (1987) *International Lawyer* 21

Hrbatá V 'No international organisation is an island...the WTO's relationship with the WIPO: a model for the governance of trade linkage areas?' (2010) *Journal of World Trade* 44, No.1

## Bibliography

Isham J et al 'The varieties of resource experience: Natural resource export structures and the political economy of economic growth' (2005) *The World Bank Economic Review*, Vol. 19, No. 2

Jackson J H 'Process and procedure in WTO dispute settlement' (2009) 42 *CORNELL INT'L L.J.c*

Joergens K J 'True appellate procedure or only a two-stage process? A comparative view of the appellate body under the WTO dispute settlement understanding' (1998-1999) 30 *Law & Pol'y Int'l Bus.*

Kellam R O 'Regulation of oil imports' (1961) *Duke Law Journal* Vol 2

Kennedy G 'Adam Smith and the invisible hand: from metaphor to myth' (2009) *Econ Journal Watch* Volume 6, Number 2

Kohl W L 'OPEC behavior, 1998-2001' (2002) *The Quarterly Review of Economics and Finance* 42

Lashbrooke E C 'Suits against international organisations in federal court: OPEC, a case study' (1982) 12 *Cal. W. Int'l L.J.*

Looney R 'Profiles of corruption in the Middle East' (2005) *Journal of South Asian and Middle Eastern Studies* Vol XXVIII No. 4

MacCaskie T C 'The United States, Ghana and oil: global and local perspectives' (2008) *Afr Aff (Lond)* 107

Marceau G 'The WTO in the emerging energy governance debate' (2010) *Global Trade and Customs Journal* Vol 5 Issue 3

Maniruzzaman A F M 'State contracts in contemporary international law: monist versus dualist controversies' (2001) *EJIL* Vol. 12 No. 2.

Mavroidis P C 'No outsourcing of law? WTO law as practiced by WTO courts' (2008) *The American Journal of International Law* Vol. 102, No. 3

McDougal M S 'The comparative study of law for policy purposes: value clarification as an instrument of democratic world order' 1952 *Faculty Scholarship Series* Paper 2475

McGee R W 'The economic thought of David Hume' (1989) *Hume Studies* Volume 15, Number 1

Mehrara M et al 'The corruption and income distribution in OPEC and OECD countries: a comparative study' (2011) *Int. J. Eco. Res.*, 2(6)

Minowitz P 'Adam Smith's invisible hands' (2004) *Econ Journal Watch*, Volume 1, Number 3

## Bibliography

Montinola G & Jackman R W 'Sources of corruption: a cross-country study' (2002) *B.J.Pol.S.* 32

Morosini F 'Globalisation & law: beyond traditional methodology of comparative legal studies and the example from private international law' (2005) 13 *Cardozo J Int'l & Comp. L.*

Mosoti V 'In our own image, not theirs: damages as an antidote to the remedial deficiencies in the WTO dispute settlement process; a view from Sub-Saharan Africa' (2001) 19 *B.U. Int'l L.J.*

Mosoti V 'The WTO Agreement on Government Procurement: a necessary evil in the legal strategy for development in the poor world?' 2004 *U. Pa. J. Int'l Econ. L.*

Nagger T 'Adam Smith's laissez faire' (1977) *The American Economist* Vol. 21 Issue 2

Ngomane T et al 'Public sector agricultural extension system in the Northern province of South Africa: a system of undergoing transformation' (2002) *Journal of International Agricultural and Extension Education* Vol 9. No. 3.

Ocheje P D 'Law and social change: a socio-legal analysis of Nigeria's Corrupt Practices and Other Related Offences Act, 2000' (2001) *Journal of African Law* 45

OPEC Secretariat 'OPEC production agreements: a detailed listing' 2003 *OPEC Review*

Onwe O J 'Economic implications of petroleum policies in Nigeria: an overview' (2012) *American International Journal of Contemporary Research* Vol. 2 No. 5

Paganelli M P 'David Hume on monetary policy: a retrospective approach' (2009) *The Journal of Scottish Philosophy* 7 (1)

Palmeter D & Mavroidis P C 'The WTO legal system: sources of law' (1998) *The American Journal of International Law* Vol. 92 No. 3

Rahim S 'What use is the neoclassical theory of international trade?' (1999) *The Lahore Journal of Economics*, Vol 4 No. 1

Ruffin R J 'David Ricardo's discovery of comparative advantage' (2002) *History of Political Economy* (34) (4)

Sakmar S L 'Bringing energy trade into the WTO: the historical context, current status, and potential implications for the Middle East region' (2008) 18 *Ind. Int'l & Comp. L. Rev.*

Samuelson A 'International trade and the equalisation of factor prices' (1948) *The Economic Journal*, Vol. 58, No. 230

## Bibliography

Samuelson P A 'Where Ricardo and Mill rebut and confirm arguments of mainstream economists supporting globalization' (2004) *Journal of Economic Perspectives* – Volume 18, Number 3

Sandrea R 'OPEC's next challenge-rethinking their quota system' (2003) *Oil & Gas Journal* Vol 101.29.

Smith F & Woods L 'A distinction without a difference: exploring the boundary between goods and services in the World Trade Organi[s]ation and the European Union' (2005) *Columbia Journal of European Law* 12-1.

Snidal D 'The limits of hegemonic stability theory' (1985) *International Organisation* 39, 4 (Autumn)

Soares De Oliveira R 'Business success, Angola-style: postcolonial politics and the rise and rise of Sonangol' (2007) *J. of Modern African Studies*, 45, 4

Starke J G 'Monism and dualism in the theory of international law' (1936) 17 *Brit. Y.B. Int'l L.*

Stigler G 'The theory of economic regulation' (1971) 2 *Bell J. Econ & Management Sci* 2.1

Stoehr L 'OPEC as a legal entity' (1979) *Fordham International Law Journal* Volume 3, Issue 1

Tian Y 'A new idea about Ricardo's comparative advantage theory on condition of multi-commodity and multi-country' (2008) *International Journal of Business and Management* Vol 3 no 12

Tripp A M 'The changing face of authoritarianism in Africa: the case of Uganda' (2004) *Africa Today* Vol 50 No.3.

Turley J 'Dualistic values in the age of international legisprudence' (1992-1993) 44 *Hastings L.J.*

Vafai J 'Production control in the petroleum industry: a critical analysis' (1971) *Santa Clara Law Review* Vol 11 No 2

Vielleville D E & Vasani B S 'Sovereignty over natural resources versus rights under investment contracts: which one prevails?' (2008) *Transnational Dispute Management* Vol 5 Issue 2

Watkins G C 'Oil scarcity: what have the past three decades revealed' (2006) *Energy Policy* 34

Wesierski T G 'A framework for understanding "Soft Law"' (1984) *McGill Law Journal* Vol 30

## Bibliography

Wold C et al 'Leveraging climate change benefits through the World Trade Organization: are fossil fuel subsidies actionable?'(2012) *Georgetown Journal of International Law* Vol 43 No. 3

Zillman D. N 'Energy trade and national security exception to the GATT' (1994) 12 *J. Energy & Nat. Resources L*

## LEGISLATION

### Angola

Petroleum Activities Law 10/04 of 2004

State Secrecy Act No. 10 of 2002

Law of the High Authority against Corruption No. 3 of 1996

Penal Code of 1886

Laws of Crimes against the Economy No. 6 of 1999

### Ghana

The Constitution of the Republic of Ghana 1992

The Petroleum (Exploration and Production) Law, 1984 P.N.D.C.L. 84

Petroleum Commission Act, 2011 Act 821

Maritime Zones (Delimitation) law, 1984 1 P.N.D.C.L. 159

Petroleum Revenue Management Act, 2011 Act 815

Ghana National Petroleum Corporation Act, 1983 1 P.N.D.C.L. 64

Customs and Excise (Petroleum Taxes and Petroleum Related Levies) Act, 2005 Act 685

The Petroleum Income Tax Law, PNDC Law 188 of 1987

### Nigeria

Corrupt Practices and other Related Offences Act No. 5 of 2000

Petroleum Act Chapter 350 No 51 of 1969

Nigerian National Petroleum Corporation Act Chapter 320 of 1977

Petroleum Products Pricing Regulatory Agency Act No. 8 of 2003

## Bibliography

### AGREEMENTS AND CONVENTIONS

Agreement on Subsidies and Countervailing Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organi[s]ation, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 275 (1999), 1867 U.N.T.S. 14

Agreement on Government Procurement, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organi[s]ation, Annex 4, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 1869 U.N.T.S. 508 (Text available at 1915 U.N.T.S. 103)

Energy Charter Treaty (Annex 1 to the Final Act of the European Energy Charter Conference) 2080 UNTS 95; 34 ILM 360 (1995)

Headquarters Agreement between Austria and OPEC 1974 as amended Volume 2098, I-36477

General Agreement on Tariffs and Trade, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organi[s]ation, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)

Marrakesh Agreement Establishing the World Trade Organi[s]ation, 15 April 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994)

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

Statute of the International Court of Justice 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945)

The North American Free Trade Agreement 32 ILM 289, 605 (1993)

The OPEC Statute 443 UNTS 247; 4 ILM 1175 (1965 revision) as revised in 2006

The Vienna Convention on the Law of Treaties (1969) United Nations, Treaty Series, vol. 1155, p. 331

Tokyo Round Government Procurement Code LT/TR/PLURI/2

Understanding on Rules and Procedures Governing the Settlement of Disputes Annex 2 of the Marrakesh Agreement

Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 Annex 1A of the Marrakesh Agreement

## Bibliography

### DISSERTATIONS

Hang P D K *Essays in Game Theory and Natural Resource Management* (unpublished Doctoral Thesis Tilburg University, 2003)

Hofbauer J A *The Principle of Permanent Sovereignty over Natural Resources and Its Modern Implications* (unpublished LL.M thesis Faculty of Law University of Iceland, 2009)

Uziogwe U M *Exploring Multi-Stakeholder Initiatives for Natural Resource Governance the Example of the Nigerian Extractive Industries Transparency Initiative (NEITI)* (unpublished PHD thesis University of Birmingham, 2012)

### RESEARCH PAPERS, REPORTS, AND OTHER PUBLICATIONS

Abdulai A G *Political Context Study-Ghana* (2009) Human rights, Power and Civic Action research project, Universities of Oslo, Leeds and Ghana

Addo N A *Governance and Economic Trends in Africa: Lessons from Ghana* (2012) Meeting Summary Chatham House

African Development Bank Group *Crude Oil and Natural Gas Production in Africa and the Global Market Situation* (2010) Commodities Brief Vol 1 Issue 4

African Development Bank *Ghana Jubilee Field Project Summary of the Environmental Impact Assessment (EIA)* (2009)

Argandoña A *The United Nations Convention Against Corruption and its Impact on International Companies* (2006) "la Caixa" Chair of Corporate Social Responsibility and Corporate Governance Working Paper No. 656

Arnon A *David Hume and Classical Monetary Theory* (2011) The Thomas Guggenheim Program for the History of Economic Thought

*Adoption of the Results of the Negotiations Under Article XXIV:7 of the Agreement on Government Procurement, Following their Verification and Review, as Required by the Ministerial Decision Of 15 December 2011 (GPA/112), Paragraph 5GPA/113 2 April 2012*

Auty R M & Gelb A H *Political Economy of Resource Abundant States* (2000) Annual Bank Conference on Development Economics

Bacon R & Kojima M *Phasing Out Subsidies Recent Experiences with Fuel in Developing Countries* (2006) Public Policy for the Private Sector World Bank Oil Gas and Mining Policy Division Note No 310

Behar A & Venables A J *Transport Costs and International Trade* (2010) University of Oxford Department Of Economics Discussion Paper Series

## Bibliography

Bencheikroun H & Withagen C The Optimal Depletion of Exhaustible Resources: A Complete Characterization (2011) Department of Economics, CIREQ. McGill University and Department of Spatial Economics, VU University Amsterdam

Botha L How do the current WTO disciplines apply to the trade of energy goods and services? (2009) Discussion Paper commissioned by USAID Southern Africa Global Competitiveness Hub

British Petroleum Energy in Focus (2004) Statistical Review of World Energy

Centre for Policy Analysis Pricing Petroleum Products in Ghana – The Automatic Formula (2003) Ghana Selected Economic Issues No 5

Centre for Policy Analysis Ghana: The Dawn of the Oil Economy, 2009-2012 (2011) CEPA Issues Paper No. 23

Chermak J M & Patrick R H A Microeconometric Test of the Theory of Exhaustible Resources (1999) Department of Economics University of New Mexico and Faculty of Management Rutgers University

Cottier T et al Energy in WTO Law and Policy (2009) Individual Project No. 6

Cottier T Towards a Framework Agreement on Energy (2013) Workshop on the Role of Intergovernmental Agreements in Energy Policy, Session 4

Costinot A & Donaldson D Ricardo's Theory of Comparative Advantage: Old Idea, New Evidence (2012) NBER Working Papers 17969.

Cranston R A Theory for International Commercial Law? (2006) Congreso Internacional de Derecho Mercantil

De Kock P & Sturman K The Power of Oil Charting Uganda's Transition to a Petro-State (2012) SAIIA Governance of Africa's Resources Programme

Energy Commission, Ghana 2012 Energy (Supply and Demand) Outlook for Ghana (2012)

Eichengreen B & Irwin D A The Slide to Protectionism in the Great Depression: Who Succumbed and Why? (2009) National Bureau of Economic Research Working Paper Series

Evenett S J et al International Cartel Enforcement: Lessons from the 1990s (2001) Economic Department Working Series 1-1

Fattouh B An Anatomy of the Crude Oil Pricing System (2011) Oxford Institute for Energy Studies

Fattouh B North African Oil and Foreign Investment in Changing Market Conditions (2008) Oxford Institute for Energy Studies WPM 37



## Bibliography

GATT/CP.4/33, republished as "The Use of Quantitative Restrictions for Protective and Commercial Purposes," Sales No. GATT/1950-3

GATT Multilateral Trade Negotiations Group "Non-Tariff Measures" Sub-Group "Government Procurement" Summing-up by the Chairman MTN/NTM/42 1978.

GATT Secretariat Trade Provisions Contained in Existing Multilateral Environmental Agreements Vis-à-vis GATT Principles and Provisions Article XX (h) (1993) Group on Environmental Measures and International Trade TRE/W/17

German Technical Corporation International Fuel Prices Ghana (2009)

Global Witness Rigged? The Scramble for Africa's Oil, Gas and Minerals (2012)

GNPC Model Petroleum Agreement of Ghana (2000)

Grant K et al Understanding Today's Crude Oil and Product Markets (2006) A Policy Analysis Study Lexecon

Guerra A J The World Trade Organisation and Oil (2001) Oxford Institute for Energy Studies

G-20 Leaders Leaders' statement: The Pittsburgh Summit. (2009) Pittsburgh, PA

Hamilton J D Oil Prices, Exhaustible Resources, and Economic Growth (2011) Department of Economics University of California, San Diego

Herath G Game Theory Applications in Natural Resource Management Review of Evidence, Problems and Potential (2006) The 6th Meeting on Game Theory and Practice

Hochman G & Zilberman D The Political Economy of OPEC (2011) Energy Bioscience Institute University of California Berkeley.

Hochman G & Zilberman D OPEC and Cheap Fuel Policies (2011) Energy Biosciences Institute and the USDA Economic Research Services.

IEA et al The Scope of Fossil-Fuel Subsidies in 2009 and a Roadmap for Phasing out Fossil-Fuel Subsidies (2010)

IEA et al Analysis of the Scope of Energy Subsidies and Suggestions for the G-20 Initiative (2010).

Imaduddin M Petroleum Exploration, Development and Production Process (2008) BAPEX BUET

International Crisis Group Black Gold in the Congo: Threat to Stability or Development Opportunity? (2012) Africa Report No 188

## Bibliography

Ianchovichina E et al Unrestricted Market Access for Sub-Saharan Africa: How much is it worth and who pays? (2001) C.E.P.R. Discussion Papers 2820

Jönsson C & Tallberg J 'Institutional Theory in International Relations (2000)' available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=534142&fileId=625444> (accessed 5 September 2012).

Karapinar B Export Restrictions on Natural Resources: Policy Options and Opportunities for Africa (2010) World Trade Institute, University of Bern

Kessie E & Addo K African Countries and the WTO Negotiations on the Dispute Settlement Understanding (2008) ICTSD

Kim J Recent Trends in Export Restrictions (2010) OECD Trade Policy Papers, No. 101

Lang K The First Year of the G-20 Commitment on Fossil-Fuel Subsidies: A commentary on lessons learned and the path forward (2011) The Global Subsidies Initiative (GSI) of the International Institute for Sustainable Development

Lang K Defining Fossil-Fuel Subsidies for the G-20: Which Approach is Best? (2010) Policy Brief The Global Subsidies Initiative

Lautenberg F R Busting up the Cartel, the WTO Case Against OPEC (2004) A Report from the office of Senator Frank Lautenberg

Leffler M P The Struggle for Germany and the Origins of the Cold War (1996) Sixth Alois Mertes Memorial Lecture

Leamer E E The Heckscher-Ohlin Model in Theory and Practice (1995) Princeton Studies in International Finance

Mabro R A Dialogue Between Oil Producers and Consumers: The Why and the How (1991) Oxford Institute for Energy Studies

Martin W & Mattoo A Unfinished Business? The WTO's Doha Agenda (2011) The International Bank for Reconstruction and Development/The World Bank

Meerkotter A SALC Litigation Manual Series Equal rights for all: Litigating cases of HIV-related discrimination (2011) Southern Africa Litigation Centre

McNeil M & Malena C (eds) Demanding Good Governance Lessons from Social Accountability Initiatives in Africa (2010) World Bank

Ministry of Finance 2012 Annual Report on Petroleum Funds (2013)

Ministry of Finance and Economic Planning Ghana Budget Statement and Economic Policy of the Government for 2012 (2011)

## Bibliography

Ministry of Energy Energy Update Energy for a Better Ghana Developments in the Energy Sector 2009-2012 (2012)

Ministry of Energy Fundamental Petroleum Policy (2009)

Ministry of Energy The Energy Policy of Ghana (2010)

Ministry of Energy Local Content and Local Participation in Petroleum Activities – Policy Framework (2011)

Montague D From Cotton to Petroleum: African Economic Viability and Global Priorities (2003) Policy Brief for the Globalization Research Center – Africa

National Petroleum Authority Pricing Petroleum Products in Ghana (2011) Oil for Development Workshop

Nerurkar N US Oil Imports and Exports (2012) Congressional Research Service

Nigerian National Petroleum Corporation Processing & Monitoring of Nigerian Crude/Gas Production and Proper Accounting of Sales (2011)

Nnadikwe K High Oil Dependence in Ghana: to what Extent is Ghana Vulnerable to Oil Price Shock? (2010) Centre for Energy Petroleum, Mineral Law and Policy (CEPMLP), University of Dundee

Okeke C N Methodological Approaches to Comparative Legal Studies in Africa (2012) The Centre for Comparative Law in Africa University of Cape Town

OPEC Bulletin Spirit of the Union UAE Celebrates (2012) 160<sup>th</sup> OPEC Conference Report

Organisation for Economic Co-operation and Development Environmental Principles and Concepts (1995) OCDE/GD(95)

OPEC 'Annual Statistical Bulletin (2000)' available at [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/publications/ASB2000.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2000.pdf) (accessed 24 May 2013)

OPEC Bulletin Industry and Nature in Balance (2011) EU-OPEC Dialogue: 8<sup>th</sup> Ministerial Meeting (XLII)

OPEC OPEC Bulletin Spirit of the Union UAE Celebrates (2012) 160<sup>th</sup> OPEC Conference Report

Panagariya A Developing Countries at Doha: A Political Economy Analysis (2002) Department of Economics, University of Maryland

Petroleum Products Pricing Regulatory Agency Revised Guidelines for the Administration of Petroleum Support Fund (PSF) (2009)

## Bibliography

Pleskov I Determinants of Corruption in OPEC and Eurozone Countries: Does Religion Make a Difference? (2009) available at <http://business.pages.tcnj.edu/files/2011/07/Pleskov.thesis.pdf> (accessed 23 July 2012)

Posner R A Theories of Economic Regulation (1974) National Bureau of Economic Research Working Paper Series No. 41

Prempeh H K Reforming Corporate Governance in Ghana Part 2: The Public Sector (2002) Ghana Center for Democratic Development Briefing Paper Vol 3 No. 5.

Prempeh H K & Kroon C The Political Economy Analysis of the Oil & Gas Sector in Ghana: Summary of Issues (2012) Star-Ghana

Public Interest and Accountability Committee Report on Petroleum Revenue Management for 2011 Annual Report (2011)

Rain J W The American Experience in Oil and Gas Financing (2004) Thompson & Knight

Ramos M L Angola's Oil Industry Operation (2012) Open Society Initiative for Southern Africa

Redding S J Empirical Approaches to International Trade (2006) London School of Economics and CEPR

Revenue Watch Institute Reporting on In-kind Revenue through the EITI (2012) Background paper to the EITI Working Group

Rezzouk M The Organization of Petroleum Exporting Countries, Competition and The World Trade Organization. Might a WTO Agreement on Competition Constitute a Threat to OPEC? (2003) UNCTAD Series on Questions of Competition Law and Policy.

Ribadu M N & Shasore O Final Report of the Petroleum Revenue Task Force (2012)

Rosenblum P & Maples S Contracts Confidential: Ending Secret Deals in the Extractive Industries (2009) Revenue Watch Institute

Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council WT/L/161 25 July 1996

Rules of Procedure for Meetings of the General Council WT/L/161

Salem El-Badri A OPEC's Perspective on the Producer-Consumer Dialogue (2012) The Global Energy Dialogue 13<sup>th</sup> International Energy Forum

Sally R Whither the WTO? A Progress Report on the Doha Round (2003) CATO Institute No. 23

## Bibliography

Sallie J & Watson K W Regulatory Protectionism A Hidden Threat to Free Trade (2013) CATO Institute No. 723

Sankey P et al 'The End of the Oil Age 2011 and Beyond: A Reality Check (2010) 5' available at <http://bioage.typepad.com/files/1223fm-05.pdf> (accessed 08 June 2012)

Selivanova Y The WTO and Energy WTO Rules and Agreements of Relevance to the Energy Sector (2007) ICTSD Programme on Trade and Environment

Shaxson N Oil, Corruption and the Resource Curse (2007) Royal Institute of International Affairs Vol 38 No.6 Africa and Security

Society of Petroleum Engineers Oil and Gas Reserves Committee Comparison of Selected Reserves and Resource Classifications and Associated Definitions (2005) Mapping Sub Committee Final Report

Stevens P National Oil Companies: Good or Bad? - A Literature Survey (2003) National Oil Companies Workshop presentation, World Bank

Streb J M Hume's Specie-Flow Mechanism and the 16th Century Price Revolution (2010) Universidad del Cema

Søreide T Corruption in Petroleum -Within and Beyond the Sector (2011) Impact of corruption on the environment and the United Nations Convention against Corruption as a tool to address it, fourth Conference of States Parties to the United Nations Convention against Corruption

Sykes A O The Economics of WTO Rules on Subsidies and Countervailing Measures (2003) John M. Olin Law & Economics Working Paper No. 186

Tanaka N 'World Energy Outlook 2010' available at [http://www.energy.eu/publications/weo\\_2010-China.pdf](http://www.energy.eu/publications/weo_2010-China.pdf) (accessed 07 June 2012).

The Doha Draft Modalities for Agriculture TN/AG/W/4/Rev.4

The General Council (1995) Decision-Making Procedures Under Articles IX and XII of the WTO Agreement adopted on 15 November 1995 WT/GC/M/8 and WT/L/93

The Institute of Economic Affairs Natural Resource Management in Ghana: A Case for Constitutional Amendment (2010) Constitutional Review Series 8

Thompson A & Snidal D International Organisation (1999) 9800 University of Chicago

Thornton M Cantillon, Hume and the Rise of Anti-Mercantilism (2006) Ludwig von Mises Institute.

Tullow Oil Ghana Jubilee Field Phase 1 Development DRAFT Non-Technical Executive Summary of Environmental Impact Statement (2009)

## Bibliography

UNCTAD 'The Trade /Energy Interface and the Doha Round of Trade Negotiations (2002)' available at [http://r0.unctad.org/ghg/download/other/kuwait\\_semi\\_nar\\_2.pdf](http://r0.unctad.org/ghg/download/other/kuwait_semi_nar_2.pdf) (accessed 19 September 2012).

United Nations Report of the International Law Commission Sixty-third session (26 April–3 June and 4 July–12 August 2011) General Assembly Official Records Sixty-sixth session Supplement No. 10 (A/66/10) 52

United Nations General Assembly – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN Doc. A/5217.

United Nations Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (1946)

United Nations Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment (1947)

United Nations Conference on Trade and Development Trade Agreements, Petroleum and Energy Policies (2000) Executive Summary UNCTAD/ITCD/ TSB/9

United Nations Conference on Trade and Development Dispute Settlement World Trade Organisation Subsidies and Countervailing Measures (2003) UNCTAD/EDM/Misc.232/Add.15

Vines A & Weimer M A Report of the CSIS Africa Program Angola Assessing the Risks to Stability (2011) Centre for Strategic and International Studies

West Africa Insight Fuel Subsidy: Building Hardship on Citizens-Government Trust? (2012)

Whitfield L & Jones E Ghana-The Political Dimensions of Aid Dependence (2008) Global Economic Governance Working Paper 2007/32

WTO Trade Policy Review Ghana Trade Policies and Practices by Measure (2008) WT/TPR/S/194

WTO Trade Policy Review Ghana Trade Policies by Sector (2008) WT/TPR/S/194

WTO Ministerial Conference Fifth Session Cancun Provisional List of Participants (2003) WT/MIN(03)/ INF/5 3.

World Trade Organisation Communication from Canada Initial Negotiating Proposal on Oil and Gas Services (2001) S/CSS/W/58

World Trade Organisation Preparations for the Fourth Session of the Ministerial Conference (2001) WT/GC/W/442

## Bibliography

World Trade Organisation Application of Article XVIII Section C, of GATT 1947 (2002) WT/COMTD/39/Add.1

World Trade Organisation World Trade Report 2010 Trade in Natural Resources (2010) WTO Secretariat

World Trade Organisation Ministerial Conference Fifth Session Cancun Provisional List of Participants (2003) WT/MIN (03)/INF/5

World Trade Organisation Guidelines for Observer Status for International Intergovernmental Organizations in the WTO Annex 3 WT/L/161

WTO Committee on Trade and Development Twenty-Ninth Session Note on the Meeting of 28 June and 10 July 2000 (2000) WT/COMTD/M/29

WTO Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council (1996) WT/L/161

World Trade Organisation (2011) TRIPS Non-Violation and Situation Complaints WT/L/842

World Trade Organisation (2011) Work Programme on Electronic Commerce WT/L/843

World Trade Organisation Rules of Procedure of the General Council WT/L/161

WTO Committee on Subsidies and Countervailing Measures Notification Under Articles 25.11 and 25.12 of the [SCM] Agreement Ghana (2011) G/SCM/N/202/GHA

WTO Committee on Import Licensing Agreement on Import Licensing Procedures Notification Under Articles 7.3, 1.4(a) and 8.2(b) of the Agreement (2009) G/LIC/N/3/GHA/4

WTO African Union Conference of Ministers of Trade 7th Ordinary Session (2011) Accra-Ghana WT/MIN(11)/9

WTO Committee on Subsidies and Countervailing Measures Notification Under Arts 25.11 and 25.12 of the [SCM] Agreement Ghana (2011) G/SCM/N/202/ GHA.

### NEWSPAPER ARTICLES

Green M 'Crude realities; Can Ghana escape Africa's oil curse?' *Financial Times*. London (UK) 28 Aug 2008. 7

### WEBSITES AND INTERNET SOURCES

Adam B 'TOR can Refine Jubilee Oil, but...' available at <http://www.thebftonline.com/news/top-stories/2617> (accessed 13 December 2012)

## Bibliography

Adenikinju A 'Energy Pricing and Subsidy Reform in Nigeria' available at <http://www.oecd.org/tad/energy/42987402.pdf> (accessed 12 April 2013)

Africa and the World 'A Dispute between Ghana and Ivory Coast over Ghana's Oil Wealth' available at <http://www.africaw.com/forum/f17/a-dispute-between-ghana-and-ivory-coast-over-t2210/> (accessed 05 December 2012)

African Development Bank Group 'Fuel Subsidies in Africa' available at <http://www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/fuel-subsidies-in-africa-8812/> (accessed 20 August 2012)

African Knowledge for Development Networks 'Africa Trade Forum 2012: Boosting Intra-Africa Trade and Establishing the Continental Free Trade Area' available at <http://knowledge.africa-devnet.org/group/aria/page/africa-trade-forum-2012-boosting-intra-africa-trade-and> (accessed 20 May 2013)

African News 'Ghana's Alan Kyerematen Readies for WTO Top Job' available at [http://www.africanews.com/site/Ghanas\\_Alان\\_Kyerematen\\_readies\\_for\\_WTO\\_top\\_job/list\\_messages/42277](http://www.africanews.com/site/Ghanas_Alان_Kyerematen_readies_for_WTO_top_job/list_messages/42277) (accessed 10 December 2012)

African Petroleum Producers Association 'Member Countries' available at <http://www.appa.int/en/pmbres/pmc.htm> (accessed 28 April 2013)

African Union 'African Union Convention on Preventing and Combating Corruption' available at <http://www.unhcr.org/refworld/docid/493fe36a2.html> (accessed 10 April 2013)

African Union 'List of Countries Which Have Signed, Ratified/ Acceded to the African Convention on Preventing and Combating Corruption' available at <http://www.au.int/en/sites/default/files/Corruption.pdf> (accessed 03 May 2013)

Bagwell K & Staiger R W 'Economic Theory and the Interpretation of GATT/WTO (2003) 16' available at <http://www.ssc.wisc.edu/~rstaiger/econ.theory.gatt.wto.pdf> (accessed 07 March 2013)

BBC News Africa 'Ghana Oil Begins Pumping for First Time' available at <http://www.bbc.co.uk/news/world-africa-11996983> (accessed 28 September 2011)

BBC News 'IEA calls for cuts to 'wasteful' fossil fuel subsidies' available at <http://www.bbc.co.uk/news/business-15167748> (accessed 20 March 2013)

Berkshire Encyclopedia of Sustainability: The Business of Sustainability 'Free Trade 239' available at [http://www.berkshirepublishing.com/assets/pdf/FreeTrade\\_Thrasher.pdf](http://www.berkshirepublishing.com/assets/pdf/FreeTrade_Thrasher.pdf) (accessed 14 November 2012)

Bernstein Liebhart LLP 'Bernstein Liebhart Llp announces that a Securities Class Action Lawsuit has been Filed against Kosmos Energy, Ltd' available at <http://www.bernlieb.com/kosmos-energy-ltd-securities-class-action> (accessed 03 May 2013)



## Bibliography

Bloomberg 'Ghana's Oil Revenue Rises 29% in Nine Months on Jubilee Output' available at <http://www.bloomberg.com/news/2012-10-25/ghana-s-oil-revenue-rises-29-in-nine-months-on-jubilee-output.html> (accessed 16 December 2012)

BOST 'BOST Gears Up for Gas Storage Facility' available at <http://www.bost.com.gh/?cat=5> (accessed 04 December 2012)

Brinsmead S 'Oil Concession Contracts and the Problem of Hold-Up (2007) 19' available at [http://www.dundee.ac.uk/cepmlp/journal/html/Vol17/article17\\_11.php](http://www.dundee.ac.uk/cepmlp/journal/html/Vol17/article17_11.php) (accessed 22 March 2012)

Business Anti-Corruption Portal 'Public Procurement and Contracting' available at <http://www.Business-anti-corruption.org/country-profiles/sub-saharan-africa/angola/corruption-levels/public-procurement-and-contracting/> (accessed 16 October 2012)

Business Day 'Subsidy Removal Cripples Fuel Smuggling Across Nigerian Borders' available at <http://www.businessdayonline.com/NG/index.php/news/76-hot-topic/31798-subsidy-removal-cripples-fuel-smuggling-across-nigerian-borders> (accessed 30 April 2013)

Butty J 'Watchdog Group Warns of Oil Corruption in Liberia' available at <http://apperi.org/2011/09/27/watchdog-group-warns-of-oil-corruption-in-liberia/> (accessed 16 October 2012)

Cameroon 'General Facts' available at <http://www.finpro.fi/documents/10304/ee3bdcdc-1247-428b-9f70-58ad5375c01d> (accessed 16 October 2012)

Canadian Association of Petroleum Producers 'A Revolution in Heavy Oil Technology' available at <http://www.capp.ca/ENERGYSUPPLY/INNOVATIONSTORIES/WATER/Pages/undergroundCombustion.aspx> (accessed 4 September 2012)

Clean Technica 'Oil and Gas Industry Leads Global Corruption Index: US More Corrupt than Qatar' available at <http://cleantechnica.com/2011/05/07/oil-and-gas-industry-leads-global-corruption-index-us-more-corrupt-than-qatar/> (accessed 12 July 2012)

Corsi J R 'Discovery Backs Theory Oil not Fossil Fuel' available at <http://www.wnd.com/2008/02/45838/> (accessed 04 December 2012)

Crowder W J 'Comparative Advantage and the Gains from Trade 3-4' available at [http://www.uta.edu/faculty/crowder/data/Lecture\\_02\\_2011.pdf](http://www.uta.edu/faculty/crowder/data/Lecture_02_2011.pdf) (accessed 14 November 2012)

De Fazio P 'DeFazio Urges President to Stand Up to OPEC Price Gouging' available at [http://www.defazio.house.gov/index.php?option=com\\_content&task=view&id=712&Itemid=70](http://www.defazio.house.gov/index.php?option=com_content&task=view&id=712&Itemid=70) (accessed 01 November 2012)

## Bibliography

Department of Petroleum Resources 'Historical Background' available at <http://www.dprnigeria.com/aboutus.html> (accessed 25 April 2013)

Deree C 'WTO Leadership and Reform: The Need for a Ministerial Conference' available at <http://www.voxeu.org/index.php?q=node/2952> (accessed 24 April 2012)

De Sousa L 'OPEC Quotas and Crude Oil Production The Oil Drum' available at [www.theoil Drum.com/node/7363](http://www.theoil Drum.com/node/7363) (accessed 05 November 2012)

Desta M 'To What Extent are WTO Rules Relevant to Trade in Natural Resources?' available at [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_forum\\_e/wtr10\\_desta\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_desta_e.htm) (accessed 27 May 2013)

De Waal A 'Sudan and South Sudan in 2013: Rise or Fall Together' available at <http://globalpublicsquare.blogs.cnn.com/2012/12/20/sudan-and-south-sudan-in-2013-rise-or-fall-together/> (accessed 24 May 2013)

Dutt P 'Trade Protection and Bureaucratic Corruption: An Empirical Investigation' available at [http://faculty.insead.edu/dutt/Research/corruption\\_trade05.pdf](http://faculty.insead.edu/dutt/Research/corruption_trade05.pdf) (accessed 26 April 2013)

Economic Confidential 'Subsidy-Govt Grants Waiver for Oil Importing Companies-FIRS' available at <http://economicconfidential.net/new/financial/tax-matters/897-subsidy-govt-grants-waiver-for-oil-importing-companies-firs> (accessed 30 April 2013)

EIA 'How Much Oil is Produced in Alaska and Where Does it Go?' available at <http://www.eia.gov/tools/faqs/faq.cfm?id=35&t=6> (accessed 28 April 2013)

Eigen P 'There will be no Development with Corrupt Governance-and WTO is the Natural Universal Guardian against Corruption (2002) World Trade Organisation Symposium' available at [http://www.wto.org/english/tratop\\_e/dda\\_e/paper\\_peter\\_eigen.pdf](http://www.wto.org/english/tratop_e/dda_e/paper_peter_eigen.pdf) (accessed 21 October 2011)

EITI 'The EITI Rules 2011' available at [http://eiti.org/files/2011-11-01\\_2011\\_EITI\\_RULES.pdf](http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf) (accessed 10 April 2013)

EITI 'EITI Rules 2011 Edition, Articles of Association Article 2 (2)' available at [http://eiti.org/files/2011-11-01\\_2011\\_EITI\\_RULES.pdf](http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf) (accessed 24 April 2013)

EITI 'Nigeria' available at <http://eiti.org/Nigeria> (accessed 11 April 2013)

Energy World Africa 'Tema Oil Refinery' available at <http://www.energyworldafrica.com/pdf/Tema%20Oil%20Refinery.pdf> (accessed 02 May 2013)

Environmental Management in Oil and Gas Exploration and Production 'Overview of the Oil and Gas Exploration and Production Process 7' available at [www.etechnicalinternational.org/newpdfs/lessImpact/Att\\_Aoverview.pdf](http://www.etechnicalinternational.org/newpdfs/lessImpact/Att_Aoverview.pdf) (accessed 05 November 2012)

## Bibliography

Ethe O 'Is OPEC Good for Ghana' available at [http://www.africanews.com/site/Is\\_OPEC\\_good\\_for\\_Ghana/list\\_messages/28599](http://www.africanews.com/site/Is_OPEC_good_for_Ghana/list_messages/28599) (accessed 21 May 2013)

Faculty of Engineering Chulalongkorn University 'Petroleum Economics Overview of Petroleum Exploration and Production 14' available at [www.mining.eng.chula.ac.th/CU\\_ETM/OverviewE&P.pdf](http://www.mining.eng.chula.ac.th/CU_ETM/OverviewE&P.pdf) (accessed 05 November 2012)

Ghana Energy Summit 'Ghana: The New Land of Opportunity for Oil and Gas Investment' available at [http://maritimehubafrica.com/uploads/news\\_attachment/Report\\_Ghana\\_Oil\\_Opportunities.pdf](http://maritimehubafrica.com/uploads/news_attachment/Report_Ghana_Oil_Opportunities.pdf) (accessed 29 May 2013)

Ghana Mission 'Ghana Permanent Mission Geneva' available at <http://www.ghanamission.ch/mission2.html> (accessed 08 October 2012)

Ghana Oil and Gas 'Extent of Oil and Gas Deposits in Ghana and Environmental and Strategic Concerns' available at [http://www.ghanaoilandgasonline.com/index\\_051.htm](http://www.ghanaoilandgasonline.com/index_051.htm) (accessed 07 December 2012)

Ghana Oil and Gas 'Ghana Unlikely to Join OPEC on Commencement of Production' available at <http://ghanaoilonline.org/2011/01/ghana-unlikely-to-join-opec-on-commencement-of-production/> (accessed 21 May 2013)

Ghana Oil Info 'Exploration Upstream Sector' available at <http://www.ghanaoilinfo.com/?page=exploration&factid=957> (accessed 04 December 2012)

Ghana Oil Watch 'ISODEC Welcomes Government Decision to Maintain Fuel Subsidy but Wants Further Debate on the Issue (2012)' available at <http://ghanaoilwatch.org/index.php/ghana-oil-and-gas-news/2733-isodec-welcomes-government-decision-to-maintain-fuel-subsidy-but-wants-further-debate-on-the-issue> (accessed 14 December 2012)

Ghana Web 'Alan Kyerematen Loses Out in his Quest to Become Next WTO Boss' available at <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=270777> (accessed 03 May 2013)

Global Witness 'Angola' available at <http://www.globalwitness.org/campaigns/corruption/oil-gas-and-mining/angola> (accessed 25 April 2013)

Global Witness 'Ghana Controversy Shows Need to Shine a Light on Oil Deals' available at <http://www.globalwitness.org/library/ghana-controversy-shows-need-shine-light-oil-deals> (accessed 16 December 2012)

Global Witness 'South Sudan and Sudan' available at <http://www.globalwitness.org/campaigns/corruption/oil-gas-and-mining/sudan-and-south-sudan> (accessed 14 October 2012)

GNPC 'Activities: Exploration and Production' available at <http://www.gnpcghana.com/activities/explorationIntro.asp> (accessed 07 December 2012)

## Bibliography

GNPC 'Subsidiaries' available at <http://www.gnpcghana.com/subsidiaries/> (accessed 16 December 2012)

GNPC 'Saltpond Field' available at [http://www.gnpcghana.com/\\_upload/general/saltpondfield\\_sopcl.pdf](http://www.gnpcghana.com/_upload/general/saltpondfield_sopcl.pdf) (accessed 07 December 2012)

Government of Ghana Official Website 'Ghana not in Haste to Join OPEC' available at <http://www.ghana.gov.gh/index.php/news/general-news/3313-ghana-not-in-haste-to-join-opec> (accessed 10 December 2012)

Guardian Africa Network 'Nigeria: How to Lose \$ 35 bn' available at <http://www.guardian.co.uk/world/2012/nov/13/nigeria-oil-corruption-ridabu> (accessed 25 April 2013)

Harmonised System Code 'HS Code List' available at [http://www.hsodelist.com/bbs/board.php?bo\\_table=HScode&sca=27](http://www.hsodelist.com/bbs/board.php?bo_table=HScode&sca=27) (accessed 29 May 2013)

Highbeam Business 'Petroleum Refining' available at <http://business.highbeam.com/industry-reports/chemicals/petroleum-refining> (accessed 05 December 2012)

IEA 'Fossil-Fuel Consumption Subsidy Rates as a Proportion of the Full Cost of Supply, 2011' available at <http://www.iea.org/subsidy/index.html> (accessed 12 April 2013)

IEA 'Fossil-fuel subsidies – Methodology and Assumptions' available at <http://www.iea.org/publications/worldenergyoutlook/resources/energysubsidies/methodology/orcalculatingsubsidies/> (accessed 12 April 2013)

IEA 'History' available at <http://www.iea.org/aboutus/history/> (accessed 07 November 2012)

IEA 'IEA Analysis of Fossil-Fuel Subsidies' available at [http://www.worldenergyoutlook.org/media/weowebiste/energysubsidies/ff\\_subsidies\\_slides.pdf](http://www.worldenergyoutlook.org/media/weowebiste/energysubsidies/ff_subsidies_slides.pdf) (23 July 2012)

IEA et al 'Joint report by IEA, OPEC, OECD and World Bank on fossil-fuel and other energy subsidies: An update of the G20 Pittsburgh and Toronto Commitments 6' available at <http://www.oecd.org/site/tadffss/49006998.pdf> (accessed 24 May 2013)

Index Mundi 'Ghana Distillate Fuel Oil Exports by Year' available at <http://www.indexmundi.com/energy.aspx?country=gh&product=fuel-oil&graph=exports> (accessed 06 May 2013)

Infoplease 'Ghana' available at [www.infoplease.com/ipa/A0107584.html](http://www.infoplease.com/ipa/A0107584.html) (accessed 9 March 2012)

Institute for the Analysis of Global Security 'The Geopolitics of Oil' available at [www.iags.org/geopolitics.html](http://www.iags.org/geopolitics.html) (accessed 12 July 2012)

## Bibliography

Institute for Energy Research 'Developing Countries Subsidise Fossil Fuels, Artificially Lowering Prices' available at <http://www.instituteforenergyresearch.org/2013/01/03/developing-countries-subsidize-fossil-fuel-consumption-creating-artificially-lower-prices/> (accessed 12 April 2013)

Institute for International Economics 'Has US Comparative Advantage Changed? Does this Affect Sustainability?' available at <http://www.piie.com/publications/chapters/preview/47/3iie2644.pdf> (accessed 22 August 2012)

International Crisis Group 'DR Congo Conflict History' available at <http://www.crisisgroup.org/fr/publication-type/key-issues/Research%20Resources/Conflict%20Histories/DR%20Congo%20Conflict%20History.aspx> (accessed 14 May 2013)

International Monetary Fund 'Case Studies on Energy Subsidy Reform: Lessons and Implications' available at <http://www.imf.org/external/np/pp/eng/2013/012813a.pdf> (accessed 24 April 2013)

Iran Petro 'Agreement Concerning the Creation of the Organisation of Petroleum Exporting Countries' available at <http://www.iranpetrotech.com/wp-content/uploads/2011/03/UN6363-OPEC.pdf> (accessed 27 April 2013)

Izama A 'Uganda: Oil, Corruption and Entitlement' available at <http://www.guardian.co.uk/world/africa-blog/2012/oct/01/uganda-oil> (accessed 16 October 2012)

Johnson T 'Non-OPEC Oil Production' available at <http://www.cfr.org/natural-resources-management/non-opeo-oil-production/p14554> (accessed 4 September 2012)

KAPSARC 'Majid Al Moneef' available at <http://www.kapsarc.org/kapsarc/IACMembers/MajidAlMoneef> (accessed 08 October 2012)

Kosmos Energy 'Ghana-Oil and Gas Development' available at <http://www.Kosmosenergy.com/operations-ghana.php> (accessed 03 December 2012)

Left S 'The Guardian Pride, Poverty and Promise: Ghana's Golden Jubilee' (2007) available at <http://www.guardian.co.uk/world/2007/mar/06/sarahleft> (accessed 05 December 2012)

Lesova P 'Indonesia Considers Whether to Leave OPEC Cartel A Net Oil Importer, Indonesia has Different Interests from OPEC, Analysts Say' available at <http://www.marketwatch.com/story/indonesia-considers-whether-to-leave-opeo-cartel> (accessed 24 May 2013)

Luciani G 'Oil and Political Economy in the International Relations of the Middle East' available at <http://www.princeton.edu/~gluciani/pdfs/Chapter%20in%20Fawcett.pdf> (accessed 21 May 2013)

## Bibliography

Malaquias A 'Ethnicity and Conflict in Angola: Prospects for Reconciliation' available at <http://www.iss.org.za/pubs/Books/Angola/6Malaquias.pdf> (accessed on 14 May 2013)

Matziorinis K 'The Causes of the Great Depression: A Retrospective 11' available at [www.canbekeconomics.com/research\\_papers/The\\_Great\\_Depression\\_and\\_Europe.pdf](http://www.canbekeconomics.com/research_papers/The_Great_Depression_and_Europe.pdf) (accessed 16 November 2012)

Mbendi 'Tema Refinery' available at <http://www.mbendi.com/reth.htm> (accessed 16 December 2012)

Ministry of Energy 'Ghana Government spends GH¢ 760 million on Petroleum Subsidies Annually' available at <http://www.energymin.gov.gh/?p=398> (accessed 14 December 2012)

Ministry of Finance 'Oil and Diamonds' available at <http://translate.google.co.za/translate?hl=en&sl=pt&u=http://www.minfin.gov.ao/&prev=/search%3Fq%3Dministry%2Bof%2Bfinance%2B Angola%26hl%3Den%26biw%3D1366%26bih%3D622&sa=X&ei=ZRFoUa-SClmyhAfzhIDoDw&sqi=2&ved=0CDMQ7gEwAA> (accessed 12 April 2013)

National Petroleum Authority 'Downloads Historical Trend of Petroleum Prices in Ghana' available at [http://www.npa.gov.gh/npa\\_new/Downloads.php](http://www.npa.gov.gh/npa_new/Downloads.php) (accessed 06 May 2013)

National Petroleum Authority 'Downloads Petroleum Products Import Volumes and National Domestic Supply 2012' available at [http://www.npa.gov.gh/npa\\_new/Downloads.php](http://www.npa.gov.gh/npa_new/Downloads.php) (accessed 06 May 2013)

Ngonzi O 'Overview of the 2013 Budget' available at [http://www.budgetoffice.gov.ng/bof\\_2013-update/CME\\_Budget\\_Speech1.pdf](http://www.budgetoffice.gov.ng/bof_2013-update/CME_Budget_Speech1.pdf) (accessed 25 April 2013)

Norwegian Academy of Technological Sciences 'Norwegian Petroleum Technology a Success Story' available at [http://www.msintef.no/upload/Petroleumsforskning/dokumenter/Forskningsboken\\_en.pdf](http://www.msintef.no/upload/Petroleumsforskning/dokumenter/Forskningsboken_en.pdf) (accessed 4 September 2012)

OECD 'Bribery and Corruption' available at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (accessed 03 May 2013)

OECD 'Convention on Combating Bribery of Foreign Public Officials in International Business Transactions DAFFE/IME/BR(97) 20' available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/38028044.pdf> (accessed 10 April 2013)

Office of Fair Trading 'What is a Cartel?' available at <http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/what-cartel#.UXriGVKQndk> (accessed 26 April 2013)

## Bibliography

OFID 'OFID Approved Emergency Assistance Grant for Famine Victims in Somalia' available at <http://www.ofid.org/NewsPress/tabid/87/ArticleId/1558/OFID-approves-emergency-assistance-grant-for-famine-victims-in-Somalia.aspx> (accessed 08 March 2013)

OFID 'OFID Extends Second Grant in Humanitarian Assistance for Famine Victims in Ethiopia and Kenya' available at [http://www.ofid.org/NewsPress/tabid/87/articleid/1559/Default.aspx?dnnprintmode=true&mid=426&SkinSrc=\[G\]Skins%2F\\_default%2FNo+Skin&ContainerSrc=\[G\]Containers%2F\\_default%2FNo+Container](http://www.ofid.org/NewsPress/tabid/87/articleid/1559/Default.aspx?dnnprintmode=true&mid=426&SkinSrc=[G]Skins%2F_default%2FNo+Skin&ContainerSrc=[G]Containers%2F_default%2FNo+Container) (accessed 08 March 2013)

OFID 'Trade Finance Facility' available at <http://www.ofid.org/PROJECTSOPERATIONS/TradeFinanceFacility.aspx> (accessed 24 May 2013)

OHCHR 'Officers of the Human Rights Council's Fifth Cycle (2010 - 2011)' available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Bureau5thCycle.aspx> (accessed 08 October 2012)

Oil and Gas Financial Journal 'Ghana' available at <http://www.ogfj.com/articles/2010/10/ghana.html> (accessed 07 December 2012)

Oil and Gas Journal 'Achieving Maximum Crude Oil Value Depends on Accurate Evaluation' available at <http://www.ogj.com/articles/print/volume-100/issue-2/processing/achieving-maximum-crude-oil-value-depends-on-accurate-evaluation.html> (accessed 02 May 2013)

Oil Sands Today 'What are Oil Sands?' available at <http://www.oilsandstoday.ca/Pages/default.aspx> (accessed 04 May 2013)

Oil Shale and Tar Sands Programmatic EIS 'About Oil Shale' available at <http://ostseis.anl.gov/guide/oilshale/> (accessed 04 May 2013)

OPEC 'About OPEC' available at [http://www.opec.org/opec\\_web/en/press\\_room/178.htm](http://www.opec.org/opec_web/en/press_room/178.htm) (accessed 23 July 2012)

OPEC 'Angola Facts and Figures' available at [http://www.opec.org/opec\\_web/en/about\\_us/147.htm](http://www.opec.org/opec_web/en/about_us/147.htm) (accessed 14 October 2012)

OPEC 'Brief history' available at [http://www.opec.org/opec\\_web/en/about\\_us/24.htm](http://www.opec.org/opec_web/en/about_us/24.htm) (accessed 4 July 2011)

OPEC 'Cooperation between Producers & Consumers: an OPEC View' available at [http://www.opec.org/opec\\_web/en/press\\_room/915.htm](http://www.opec.org/opec_web/en/press_room/915.htm) (accessed 13 May 2013)

OPEC 'Definitions Crude Oil' available at <http://www.opec.org/library/Annual%20Statistical%20Bulletin/interactive/2009/FileZ/definition.htm> (accessed 27 May 2013)

OPEC 'Definitions' available at <http://www.opec.org/library/Annual%20Statistical%20Bulletin/interactive/2009/FileZ/definition.htm> (accessed 4 July 2011)

## Bibliography

OPEC 'Member Countries' available at [http://www.opec.org/opec\\_web/en/about\\_us/25.htm](http://www.opec.org/opec_web/en/about_us/25.htm) (accessed 18 September 2012)

OPEC 'Member Countries' Crude Oil Production Allocations (1000 b/d)' available at [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/data\\_graphs/ProductionLevels.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/data_graphs/ProductionLevels.pdf) (accessed 26 April 2013)

OPEC 'Nigeria Facts and Figures' available at [http://www.opec.org/opec\\_web/en/about\\_us/167.htm](http://www.opec.org/opec_web/en/about_us/167.htm) (accessed 25 April 2013)

OPEC 'Oil and Development: The Role of OPEC: A Historical Perspective and Outlook to the Future' available at [http://www.opec.org/opec\\_web/en/press\\_room/894.htm](http://www.opec.org/opec_web/en/press_room/894.htm) (accessed 19 July 2012)

OPEC 'OPEC Share of World Crude Oil Reserves 2011' available at [http://www.opec.org/opec\\_web/en/data\\_graphs/330.htm](http://www.opec.org/opec_web/en/data_graphs/330.htm) (accessed 20 August 2012)

OPEC 'Organi[s]ation Organigram' available at [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/about\\_us/OPECOrganigram0413.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/about_us/OPECOrganigram0413.pdf) (accessed 27 April 2013)

OPEC 'OPEC Governors 2012' available at [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/general/OPEC\\_Governors.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/general/OPEC_Governors.pdf) (accessed 08 October 2012)

OPEC 'Statement by OPEC Secretary General to the Arab Ministerial Meeting' available at [http://www.opec.org/opec\\_web/en/press\\_room/917.htm](http://www.opec.org/opec_web/en/press_room/917.htm) (accessed 10 October 2012)

OPEC 'Secretaries General of OPEC' available at [http://www.opec.org/opec\\_web/static\\_files\\_project/media/downloads/50thanniversary/SecretariesGeneral.pdf](http://www.opec.org/opec_web/static_files_project/media/downloads/50thanniversary/SecretariesGeneral.pdf) (accessed 8 October 2012)

Open Oil 'Ghana Oil Almanac' available at <http://openoil.net/wp/wp-content/uploads/2012/08/Ghaha-Almanac-PDF.pdf> (accessed 07 December 2012)

Open Societies Initiative for Southern Africa 'Oil Revenues in Angola: Much more information but not enough transparency' available at <http://www.osisa.org/other/economic-justice/angola/oil-revenues-angola-much-more-information-not-enough-transparency> (accessed 12 April 2013)

OXFAM 'Ghana's Offshore Oil Fields' available at <http://www.oxfamamerica.org/articles/the-coming-oil-boom-in-ghana> (accessed 03 December 2012)

Oxford Dictionaries 'Cartel' available at <http://oxforddictionaries.com/definition/english/cartel> (accessed 29 July 2012)

Oxford Dictionaries 'Good' available at <http://oxforddictionaries.com/definition/english/good> (accessed 27 May 2013)



## Bibliography

Oxford Dictionaries 'Mineral' available at <http://oxforddictionaries.com/definition/english/mineral> (accessed 04 May 2013)

Oxford Dictionaries 'Unanimous' available at <http://oxforddictionaries.com/definition/english/unanimous?q=unanimous> (accessed 26 September 2012)

Permanent Delegation of the European Commission to the International Organisations in Geneva 'Collective Request in Energy Services' available at <http://www.ifg.org/pdf/collective-request-in-energy-services.pdf> (accessed 07 November 2013)

Radler M 'IEA, OECD call for fossil fuel subsidy reforms' available at <http://www.ogj.com/articles/2011/10/iea-oecd-call-for-fuel-subsidy-reforms.html> (accessed 20 March 2013)

Reegle 'Nigeria (2012) Energy Reliance' available at <http://www.reegle.info/policy-and-regulatory-overviews/NG> (accessed 30 April 2013)

Republic of Ghana, Ministry of Finance and Economic Development 'Minister Leads Delegation To IMF/World Bank Meeting' available at <http://www.mofep.gov.gh/?q=news/220911> (accessed 07 March 2013)

Reuters 'Nigeria Investigates \$4 bln Fuel Subsidy Fraud' available at <http://www.reuters.com/article/2012/01/19/nigeria-fuel-scam-idUSL6E8CJ3TH20120119> (accessed 30 April 2013)

Revenue Watch Institute 'Angola-Transparency Snapshot' available at <http://www.revenuewatch.org/countries/africa/angola/transparency-snapshot> (accessed 11 April 2013)

Revenue Watch Institute 'Dodd-Frank' available at <http://www.revenuewatch.org/issues/dodd-frank> (accessed 10 April 2013)

Royal Norwegian Embassy in Abuja 'Norway Helps Prepare Ghana for the Oil Age' available at [http://www.emb-norway.com.ng/News\\_and\\_events/development/Norway\\_Ghana\\_oil\\_cooperation/](http://www.emb-norway.com.ng/News_and_events/development/Norway_Ghana_oil_cooperation/) (accessed 24 May 2013)

Saltpond Offshore Producing Company Limited 'Ghana Government to Revamp Saltpond Oil Project' available at <http://www.saltpondoffshore.com/newsreleases2.html> (accessed 07 December 2012)

Saltpond Offshore Producing Company Limited 'Background' available at <http://www.saltpondoffshore.com/presentstatus.html> (accessed 07 December 2012)

Saltpond Offshore Producing Company Limited 'SOPCL to Increase Production' available at <http://www.saltpondoffshore.com/newsreleases1.html> (accessed 07 December 2012)

## Bibliography

Schott J J 'Challenges Facing the World Trade Organisation' available at [http://www.piie.com/publications/chapters\\_preview/66/1ie2350.pdf](http://www.piie.com/publications/chapters_preview/66/1ie2350.pdf) (accessed 07 March 2013)

Singh S 'Removing fuel subsidy: Easier Said than Done' available at <http://www.mid-day.com/columnists/2012/sep/040912-Removing-fuel-subsidy-Easier-said-than-done.htm> (accessed 14 December 2012)

Siona C 'Angola, Sudan ask for OPEC Membership' available at [http://www.chron.com/business/energy/article/Angola-Sudan-to-ask-for-OPEC-membership-158214\\_9.php](http://www.chron.com/business/energy/article/Angola-Sudan-to-ask-for-OPEC-membership-158214_9.php) (accessed 14 October 2012)

Smith P 'Nigeria: The Great \$6.8bn Oil Scandal' available at <http://apperi.org/2012/07/30/nigeria-the-great-6-8bn-oil-scandal/> (accessed 16 October 2012)

Sonangol 'Sonangol E &P' available at [http://www.sonangol.co.ao/wps/portal!/ut/p/c1/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os3hDI5AQUzN\\_QwMDwyBTA09DR2djAy8XYwNXU6B8JLJ8gIUbUN4\\_MMDHx9XQwNyUIt1mBHSHg1yLU7-7uxFeeQNzcvLypgTkzSDyBjiAo4G-n0d-bqp-QW5ohEGmZ5aJo6liAF-PPjI!/dl2/d1/L2dJQSEvUUt3QS9ZQnB3LzZfMURUVDU2TzEwMFA4RjBJMU9RUExMRTEwVjY!/">\(accessed 12 April 2013\).](http://www.sonangol.co.ao/wps/portal!/ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os3hDI5AQUzN_QwMDwyBTA09DR2djAy8XYwNXU6B8JLJ8gIUbUN4_MMDHx9XQwNyUIt1mBHSHg1yLU7-7uxFeeQNzcvLypgTkzSDyBjiAo4G-n0d-bqp-QW5ohEGmZ5aJo6liAF-PPjI!/dl2/d1/L2dJQSEvUUt3QS9ZQnB3LzZfMURUVDU2TzEwMFA4RjBJMU9RUExMRTEwVjY!/)

Sudan Tribune 'Sudan is Considering Joining OPEC Oil Cartel: Official' available at <http://sudantribune.com/spip.php?article33544> (accessed 24 May 2013)

Sutherland R 'Exploration History and Regional Geology' available at <http://www.tullowoil.com/files/pdf/ghana/exploration-history-and-regional-geology.pdf> (accessed 07 December 2012)

Sweet Crude Reports 'A Review of the Nigerian Energy Industry Fuel Prices Rise in Ghana as Govt Cuts Subsidies' available at <http://sweetcrudereports.com/2011/12/30/fuel-prices-rise-in-ghana-as-govt-cuts-subsidies/> (accessed 15 December 2012)

Tema Oil Refinery 'History' available at <http://www2.torghana.com/index.php/about-us/history> (accessed 10 December 2012)

Tema Oil Refinery 'Corporate Profile' available at <http://www2.torghana.com/index.php/corporate-profile> (accessed 16 December 2012)

The Chronicle 'Tema Oil Refinery cannot refine Jubilee Oil –Tullow' available at <http://ghanaian-chronicle.com/tema-oil-refinery-cannot-refine-jubilee-oil-tullow/> (accessed 04 December 2012)

The Guardian 'Free Trade is not what Africa Needs, Mr. Cameron' available at <http://www.guardian.co.uk/global-development/poverty-matters/2011/jul/19/david-cameron-africa-free-trade> (accessed 21 August 2012)

## Bibliography

The New York Times 'Ecuador Set to Leave OPEC' available at <http://www.nytimes.com/1992/09/18/business/ecuador-set-to-leave-opec.html> (accessed 24 May 2013)

The Sun 'Nigeria saves N1.9trn in oil subsidy payment last year – PPPRA' available at <http://sunnewsonline.com/new/cover/nigeria-saves-n1-9trn-in-oil-subsidy-payment-last-year-pppra/> (accessed 30 April 2013)

The World Bank 'Data-Saudi Arabia' available at <http://data.worldbank.org/country/saudi-arabia> (accessed 24 May 2013)

The World Bank 'Data- United Arab Emirates' available at <http://data.worldbank.org/country/united-arab-emirates> (accessed 24 May 2013)

The World Bank 'Data-Nigeria' available at <http://data.worldbank.org/country/nigeria> (accessed 24 May 2013)

The World Bank 'Data-Angola' available at <http://data.worldbank.org/country/angola> (accessed 24 May 2013)

Third World Network 'WTO General Council Elects its Chair, Approves Two Waivers' available at [http://www.twinside.org.sg/title2/wto.info/2012/twninfo\\_120210.htm](http://www.twinside.org.sg/title2/wto.info/2012/twninfo_120210.htm) (accessed 08 October 2012)

Third World Network 'Why the WTO Decision-Making System of Consensus Works Against the South' available at [www.twinside.org.sg/title/bgl3-cn.htm](http://www.twinside.org.sg/title/bgl3-cn.htm) (accessed 09 September 2012)

Transparency International 'Corruption Perception Index' available at <http://www.Transparency.org/cpi2011/results> (accessed 27 April 2013)

Transparency International 'What is the Corruption Perceptions Index' available at [http://cpi.transparency.org/cpi2011/in\\_detail/](http://cpi.transparency.org/cpi2011/in_detail/) (accessed 07 June 2012)

Treccani 'Organization of the Petroleum Exporting Countries (OPEC)' available at [http://www.treccani.it/export/sites/default/Portale/sito/altre\\_aree/Tecnologia\\_e\\_Scienze\\_applicate/enciclopedia/inglese/inglese\\_vol\\_4/559-574\\_x10\\_7x\\_ing.pdf](http://www.treccani.it/export/sites/default/Portale/sito/altre_aree/Tecnologia_e_Scienze_applicate/enciclopedia/inglese/inglese_vol_4/559-574_x10_7x_ing.pdf) (accessed 27 April 2013)

Tullow Oil Ghana 'FPSO Progress' available at <http://www.tulloil.com/ghana/index.asp?pageid=41> (accessed 02 May 2013)

Tullow Oil Ghana 'Introduction to Ghana-Hydrocarbon Exploration in Ghana' available at <http://www.tulloil.com/ghana/index.asp?pageid=27> (accessed 07 December 2012)

Tullow Oil Ghana 'Jubilee Field' available at <http://www.tulloil.com/ghana/index.asp?pageid=11> (accessed 03 December 2012)

## Bibliography

Tullow Oil Ghana 'Key Facts' available at <http://www.tulloil.com/ghana/index.asp?pageid=30> (accessed 03 December 2012)

UNCTAD 'The Trade /Energy Interface and the Doha Round of Trade Negotiations (2002) 1' available at [http://r0.unctad.org/ghg/download/other/kuwait\\_seminar\\_2.pdf](http://r0.unctad.org/ghg/download/other/kuwait_seminar_2.pdf) (accessed 19 September 2012)

UNDP 'Map of Ghana' available at <http://www.undp-gha.org/design/presscenter/news&event.php?id=249> (accessed 03 December 2012)

UN General Assembly 'United Nations Convention Against Corruption A/58/422' available at <http://www.unhcr.org/refworld/docid/4374b9524.html> (accessed 10 April 2013)

United Nations 'Biographical Note on Martin Ihoeghian Uhomobhi President of Human Rights Council for 2008-2009' available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/F7CFA04CCD1554A9C125746E00560AC5?opendocument> (accessed 08 October 2012)

United States Energy Information Administration 'Glossary - Crude Oil' available at <http://www.eia.gov/tools/glossary/index.cfm> (accessed 27 May 2013)

United States Institute of Peace 'Sudan, South Sudan Strike Oil Deal' available at <http://www.usip.org/publications/sudan-south-sudan-strike-oil-deal> (accessed 14 October 2012)

Upstream 'Jubilee Partner in Ghana Legal Probe' available at <http://www.upstreamonline.com/hardcopy/news/article1184639.ece> (accessed 06 May 2013)

USAID 'USAID - World Customs Organization Trade Facilitation Conference' available at [http://sa.usaid.gov/southern\\_africa/content/usaaid-%E2%80%93-world-customs-organization-trade-facilitation-conference](http://sa.usaid.gov/southern_africa/content/usaaid-%E2%80%93-world-customs-organization-trade-facilitation-conference) (accessed 13 May 2013)

US Energy Administration Information 'Angola' available at <http://www.eia.gov/countries/cab.cfm?fips=AO> (accessed 12 April 2013)

Van Vactor S A 'Time to End the Alaskan Oil Export Ban' available at <http://www.cato.org/pubs/pas/pa-227.html> (accessed 28 March 2012)

Voice of America 'Ghana Begins Commercial Oil Production Wednesday' available at <http://www.voanews.com/content/ghana-begins-commercial-oil-production-wednesday--111891959/157053.html> (accessed 29 May 2013)

Wearden G 'Oil Prices Volatile as OPEC Talks Down Shortage Fears' available at <http://www.guardian.co.uk/business/2011/mar/08/oil-prices-volatile-iran-opec-production> (accessed 24 May 2013)

## Bibliography

World Customs Organisation 'Overview - What is the Harmoni[s]ed System (HS)?' available at <http://www.wcoomd.org/en/topics/nomenclature/overview.aspx> (accessed 29 May 2013)

World Customs Organisation 'HS Multi-Purposes Tool' available at <http://www.wcoomd.org/en/topics/nomenclature/overview/hs-multi-purposes-tool.aspx> (accessed 29 May 2013)

World Economy 'Absolute Advantage 4' available at <http://www2.econ.uu.nl/users/marrewijk/pdf/marrewijk/absolute%20advantage.pdf> (accessed 21 August 2012)

World Economic Outlook data, IMF 'Ghana' available at <http://www.econstats.com/weo/CGHA.htm> (accessed 07 December 2012)

World Ocean Review 'Energy' available at <http://worldoceanreview.com/en/energy/fossil-fuels/> (accessed 04 December 2012)

WTO 'Accession Sudan' available at [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_soudan\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_soudan_e.htm) (accessed 14 October 2012)

WTO 'Analytical Index of the GATT Article XI General Elimination of Quantitative Restrictions' available at [http://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art11\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art11_e.pdf) (accessed on 20 May 2013)

WTO 'Angola and the WTO' available at [http://www.wto.org/english/thewto\\_e/countries\\_e/angola\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/angola_e.htm) (accessed 14 October 2012)

WTO 'Comparative advantage is dead? Not at all, Lamy tells Paris Economists' available at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl152\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl152_e.htm) (accessed 22 August 2012)

WTO 'Democratic Republic of the Congo and the WTO' available at [http://www.wto.org/english/thewto\\_e/countries\\_e/democratic\\_republique\\_congo\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/democratic_republique_congo_e.htm) (accessed 14 May 2013)

WTO 'Doha Declaration Explained' available at [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm#investment](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#investment) (accessed 19 September 2012)

WTO 'Free Trade Helps Reduce Poverty, Says New WTO Secretariat Study' available at [http://www.wto.org/english/news\\_e/pres00\\_e/pr181\\_e.htm](http://www.wto.org/english/news_e/pres00_e/pr181_e.htm) (accessed 20 August 2012)

WTO 'Ghana and the WTO' available at [http://www.wto.org/english/thewtoe/countries\\_e/ghana\\_e.htm](http://www.wto.org/english/thewtoe/countries_e/ghana_e.htm) (accessed 10 December 2012)

## Bibliography

- WTO 'GOODS SCHEDULES Members' Commitments' available at [http://www.wto.org/english/tratop\\_e/schedules\\_e/goods\\_schedules\\_e.htm](http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm) (accessed 29 May 2013)
- WTO 'Groups in the WTO' available at [http://www.wto.org/english/tratop\\_e/dda\\_e/negotiating\\_groups\\_e.pdf](http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf) (accessed 28 April 2013)
- WTO 'Historic Deal Reached on Government Procurement' available at [http://www.wto.org/english/newse/news11\\_e/gpro\\_15dec11\\_e.htm](http://www.wto.org/english/newse/news11_e/gpro_15dec11_e.htm) (accessed 07 May 2013)
- WTO 'Intergovernmental Organisations Granted Observer Status to WTO Bodies' available at [http://www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](http://www.wto.org/english/thewto_e/igo_obs_e.htm) (accessed 10 October 2012)
- WTO 'International Trade Statistics 2011' available at [http://www.wto.org/english/res\\_e/statis\\_e/its2011\\_e/its2011\\_e.pdf](http://www.wto.org/english/res_e/statis_e/its2011_e/its2011_e.pdf) (accessed 18 August 2012)
- WTO 'Interpretation and Application of Article V' available at [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/wto\\_agree\\_03\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_03_e.htm) (accessed 29 April 2013)
- WTO 'Kingdom of Saudi Arabia and the WTO' available at [http://www.wto.org/english/thewto\\_e/countries\\_e/saudi\\_arabia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm) (accessed 19 September 2012)
- WTO 'Members Accepting Amendment of the TRIPS Agreement' available at [http://www.wto.org/english/tratop\\_e/trips\\_e/amendment\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm) (accessed 15 May 2012)
- WTO 'Members and Observers' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (accessed 28 April 2013)
- WTO 'Ministerial Conferences' available at [http://www.wto.org/english/thewto\\_e/minist\\_e/minist\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/minist_e.htm) (accessed 28 April 2013)
- WTO 'Nigeria and the WTO' available at [http://www.wto.org/english/thewtoe/countries\\_e/nigeria\\_e.htm](http://www.wto.org/english/thewtoe/countries_e/nigeria_e.htm) (accessed 19 September 2012)
- WTO 'Official Documents of the Geneva Ministerial' available at [http://www.wto.org/english/thewtoe/minist\\_e/min11\\_e/official\\_doc\\_e.htm#adopted](http://www.wto.org/english/thewtoe/minist_e/min11_e/official_doc_e.htm#adopted) (accessed 11 May 2012)
- WTO 'Organi[s]ation Chart' available at [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/wto\\_agree\\_02\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_02_e.htm) (accessed 24 April 2012)
- WTO 'Parties and Observers to the GPA' available at [http://www.wto.org/english/tratop\\_e/gpro\\_c\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gpro_c_e/memobs_e.htm) (accessed 04 June 2012)

## Bibliography

- WTO 'The GATT years: from Havana to Marrakesh' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 18 September 2012)
- WTO 'The Plurilateral Agreement on Government Procurement (GPA)' available at [http://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (accessed 27 May 2013)
- WTO 'The Rules Negotiations' available at [http://www.wto.org/english/tratop\\_e/rulesneg\\_e/rulesneg\\_e.htm](http://www.wto.org/english/tratop_e/rulesneg_e/rulesneg_e.htm) (accessed 27 April 2013)
- WTO 'The WTO and the International Trade Centre (ITC)' available at [http://www.wto.org/english/thewto\\_e/coher\\_e/wto\\_itc\\_e.htm](http://www.wto.org/english/thewto_e/coher_e/wto_itc_e.htm) (accessed 13 May 2013)
- WTO 'Trade Policy Review Body: Ghana Report by the Secretariat- Summary Observations' available at [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp157\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp157_e.htm) (accessed 10 December 2012)
- WTO 'Trade Policy Review Ghana Report by the Secretariat WT/TPR/S/81' available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S0091.aspx?language=E&CatalogueIdList=81179%2c65371%2c20713&CurrentCatalogueIdIndex=2&FullTextSearch=) (accessed 03 May 2013)
- WTO 'UNDERSTANDING THE WTO: BASICS-The GATT years: from Havana to Marrakesh' available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 20 September 2011)
- WTO 'World Trade Organisation Analytical Index Guide to GATT Law and Practice (2012) 3' available at [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/intro\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/intro_e.pdf) (accessed 25 May 2013)
- WTO 'World Trade Organisation Report on Natural Resources (2010) 162' available at [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_e.htm) (accessed 21 March 2012)
- WTO 'WTO General Council' available at [http://www.wto.org/english/thewto\\_e/gcounc\\_e/gcounc\\_e.htm](http://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm) (accessed 14 May 2012).
- WTO 'WTO Secretariat budget for 2012' available at [http://www.wto.org/english/thewto\\_e/secret\\_e/budget\\_e.htm](http://www.wto.org/english/thewto_e/secret_e/budget_e.htm) (accessed 15 May 2012)
- Yee A 'Accession to OPEC Possible for South Sudan' available at <http://www.thenational.ae/business/energy/accession-to-opec-possible-for-south-sudan> (accessed 14 October 2012)
- Zaney G D 'Ghana's Petroleum Revenue Management Bill (2011)' available at <http://www.ghana.gov.gh/index.php/news/features/5860--ghanas-petroleum-revenue-management-bill> (accessed 02 May 2013).

## Bibliography

Zycher B 'The Concise Encyclopedia of Economics OPEC' available at <http://www.econlib.org/library/Enc1/OPEC.html> (accessed 26 April 2013)

## LIST OF CASES:

### GATT/WTO Appellate Body and Panel Reports

*Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (Appellate Body Report) [1998] WT/DS56/AB/R

*Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, (Panel Report) [2000] WT/DS155/R

*Australia - Subsidies Provided to Producers and Exporters of Automotive Leather* (Panel Report) [1999] WT/DS126/R

*Brazil - Export Financing Programme for Aircraft* (Panel Report) [1999] WT/DS46/R

*Brazil - Export Financing Programme for Aircraft* (Appellate Body Report) [1999] WT/DS46/AB/R

*Brazil - Measures Affecting Desiccated Coconut* (Appellate Body Report) [1997] WT/DS22/AB/R

*Canada - Certain Measures Affecting the Automotive Industry* (Appellate Body Report) [2000] WT/DS139/AB/R WT/DS142/AB/R

*Canada - Measures Affecting the Export of Civilian Aircraft* (Appellate Body Report) [1999] WT/DS70/AB/R

*Canada - Measures Affecting Exports of Unprocessed Herring and Salmon* (Panel Report) [1988] (L/6268 - 35S/98)

*Canada - Measures Affecting Sale of Gold Coins* (Panel Report) [1985] L/5863 (unadopted)

*China - Measures Related to the Exportation of Various Raw Materials* (Appellate Body Report) [2011] WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R

*European Communities - Measures Affecting Asbestos and Products Containing Asbestos* (Appellate Body Report) [2001] WT/DS135/AB/R

*European Communities - Regime for the Importation, Sale and Distribution of Bananas* (Appellate Body Report) [1997] WT/DS27/AB/R

*European Economic Community - Restrictions on Imports of Dessert Apples*, (Panel Report) [1989] BISD 36S/93



## Bibliography

*India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (Appellate Body Report) [1999] WT/DS90/AB/R

*Indonesia - Certain Measures Affecting the Automobile Industry* (Panel Reporting) [1998] WT/DS54/R WT/DS55/R WT/DS59/R WT/DS64/R

*Japan-Alcoholic Beverages II*, (Appellate body Report) [1996] WT/DS8/AB/R; WT/DS10/AB/R, and WT/DS11/AB/R

*Japanese Measures on Imports of Leather* (Panel Report) [1984] (L/5623 - 31S/94)

*Japan - Trade in Semi-Conductors* (Panel Report) [1988] (L/6309 - 35S/116)

*Korea – Measures Affecting Government Procurement* (Panel Report) [2000] WT/DS163/R

*Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* (Appellate Body Report) [2001] WT/DS132/AB/RW

*United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada* (Panel Report) [2003] WT/DS257/R

*United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada* (Appellate Body Report) [2004] WT/DS257/AB/R

*United States - Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) [1998] WT/DS58/AB/R

*United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (Appellate Body Report) [2000] WT/DS138/AB/R

*United States - Measures Treating Exports Restraints as Subsidies* (Panel Report) [2001] WT/DS194/R

*United States - Standards for Reformulated and Conventional Gasoline*, (Appellate Body Report) [1996] WT/DS2/AB/R

*United States-Subsidy on Unmanufactured Tobacco* (Working Party Report) [1967] BISD 15S/116

*United States- Subsidies on Upland Cotton* (Appellate Body Report) [2004] WT/DS267/AB/R

*United States – Tax Treatment for "Foreign Sales Corporations"* (Appellate Body Report) [2001] WT/DS108/AB/R

*United States-Taxes on Petroleum and Certain Imported Substances (Superfund case)* (Panel Report) [1987] L/6175, BISD 34S/136

## Bibliography

*United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (Appellate Body Report) [2001] WT/DS192/AB/R

### Other Cases

*Armed Activities on the territory of the Congo (Dem Rep Congo V Uganda) Judgment*, I.C.J. Reports [2005] 77 Para 244

*Australia & New Zealand V. France* [1974] I.C.J. 253, 457

*International Association of Machinists and Aerospace Workers V The Organisation of Petroleum Exporting Countries* 694 F. 2d 1354 (9<sup>th</sup> Cir 1981)

*Land and Maritime Boundary between Cameroon and Nigeria Case* I.C.J Reports [2002] 430

*Norway V. Denmark* [1933] P.C.I.J. Ser. A/B, No. 53, 71

