

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**THE ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES,
COMPETITION AND THE WORLD TRADE ORGANIZATION**

Might a WTO agreement on competition constitute a threat to OPEC?

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SUMMARY

Does the Organization of Petroleum Exporting Countries (OPEC) have more to lose than to gain from a possible World Trade Organization (WTO) agreement on competition? On the one hand, the absence of such an agreement does not shelter OPEC from lawsuits based on national competition laws; but on the other hand a WTO agreement based on the Doha programme and focussed on the repression of hardcore cartels might encourage suits either at the level of that national legislation or within WTO under the terms of the agreement. Consequently, to avoid legal proceedings at either level, the inclusion of ad hoc provisions in any WTO agreement on this subject will be necessary.

EXECUTIVE SUMMARY¹

Might the conclusion of a World Trade Organization (WTO) agreement on competition create a threat to the Organization of Petroleum Exporting Countries (OPEC)? The fears of the OPEC member countries are being expressed with increasing frequency as the outlines of such an agreement become clearer, especially within the framework of the Doha work programme. Will not the general prohibition of cartels which is central to the draft agreement lead to the inclusion of OPEC in the list of proscribed entities?

On the other hand, would the threat of antitrust suits disappear if the WTO agreement on competition were not to be adopted?

The initial stage of the analysis demonstrates that this could be the case. Since the creation of OPEC in 1960 no complaint against it has been brought before WTO. The situation is unlikely to change, although during recent years some inclination to take such a step has been observed. The situation with regard to suits in national courts hearing competition cases is different, although during the same period OPEC has been relatively spared from such suits, to a considerable extent on account of the case-law established during the first antitrust suit brought against it in the United States. However, various converging factors suggest that that case-law may shortly be subject to a review reflecting a new interpretation of the defences of immunity and sovereignty; such a review would shatter the protection hitherto provided by these two elements. Other regions of the world, and in particular the European Union, in the wake of a more extensive implementation of their anti-cartel competition policies, might become more active and contemplate action against OPEC.

In this context, what would be the incidence of an agreement, based on the draft which emerged from the Doha Ministerial Conference, which might be adopted by WTO?

- Would it increase the likelihood of antitrust proceedings against OPEC, and even make for an increase in their number, thanks to the *international legitimacy bestowed on the combat against cartels*? This is the risk inherent in an agreement which leaves open the question of definition of a hardcore cartel.
- Alternatively, would it put an end to those threats by the insertion in the agreement of provisions recognizing the *legitimacy of exceptions* taking into account specific features such as those of OPEC? This is the guarantee which only the inclusion of an ad hoc mechanism in the agreement can provide if it is desired to avoid the foreseeable upsurge in antitrust proceedings before national authorities and/or WTO, according to the rules ultimately adopted.

¹ The author expresses his warmest thanks to Philippe Brusick, Frédéric Jenny, Hassan Qaqaya and Spencer Weber Waller for their invaluable assistance at different stages in the preparation of this study.

INTRODUCTION

Will a possible agreement on competition adopted by the World Trade Organization (WTO) constitute a threat to the Organization of Petroleum Exporting Countries (OPEC)²? This is a fear continually being expressed by the countries concerned, particularly since the Ministerial Declaration adopted at the Doha Conference in 2001 included in its provisions on competition measures condemning "hardcore cartels".³ Is there not a danger that OPEC may be classified as a cartel of this kind and as such liable to proceedings under an agreement which might be concluded on the basis of the Doha proposal? As is stated in the consolidated report on the issues discussed during the regional post-Doha seminars organized on the initiative of UNCTAD, "*this issue deserves further clarification*" (para. 56).⁴

This all the more likely since, as an alternative possibility, the prospect of a WTO agreement on competition gives rise among importing countries to a hope that at last they will be able to challenge the practices of OPEC, which they have no hesitation in describing as "cartelized". To take one example: such a hope is finding expression in India, where a strand of opinion is using the case of OPEC in an attempt to modify the official position, which is, generally speaking, one of the positions most categorically opposed to a WTO agreement on competition.⁵ Similarly, in the view of the European Union a WTO agreement on competition would provide a more suitable framework for dealing with the case of OPEC.⁶

² OPEC was founded in 1960 at the Baghdad Conference on the initiative of five countries: Venezuela, Iraq, Iran, Saudi Arabia and Kuwait. As new members joined the number of members increased to 13; at present it stands at 11 following a number of withdrawals (Qatar in 1961, Indonesia in 1962, the Libyan Arab Jamahiriya in 1969, Algeria in 1970, Nigeria in 1971, Ecuador (1973-1992), the United Arab Emirates (1973) and Gabon (1974). Only Indonesia, Kuwait, Nigeria, Qatar and Venezuela are members of WTO. Algeria and Saudi Arabia are at an advanced stage in the process of accession; applications from the other countries for accession would be blocked by veto, particularly on the part of the United States.

³ The provisions on competition are contained in paragraphs 23-25 of the Doha Ministerial declaration. In particular, paragraph 25 sets the mandate emerging from the Conference as follows: "In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility applied to address them." See the Doha Ministerial Declaration adopted on 14 November 2001 at the Fourth Session of the WTO Ministerial Conference, Doha, Qatar [WT/MIN(10)DEC/1, 20 November 2001]. The text of paragraphs 23 and 24 will be found in Annex 1.

⁴ WTO (2002c), "Closer Multilateral Cooperation on Competition Policy: the Development Dimension, a consolidated report on issues discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy", a paper from UNCTAD distributed at the meeting of the Working Group on cartels held on 1 and 2 July 2002 (WT/WGTCP/W/197, 15 August 2002). The full text of paragraph 56 will be found in Annex 3.

⁵ Mehta, Pradep S. (2001), "Editor's note", 7-Update, Vol. 2 (2) :1 "*no doubt that OPEC is the most hardcore and the most damaging cartel. The Ministerial Declaration adopted in the Fourth Ministerial Conference of the WTO at Doha is of particular interest in this regard. The proposal on competition policy in the declaration provides explicitly for provisions on hardcore cartels. If the members of the WTO really get into an agreement on competition with such a provision, the oil importing countries may be able to raise the issue of OPEC at the WTO*".

⁶ Easton, Adam et al. (2000), "OPEC ministers prepare to raise crude oil output levels at Vienna meeting", *Platts Petrochemical Report*, Vol 19 (36): 1 ("*...European Union energy commissioner Loyola de Palacios .. played down rumours that the European Commission was considering action against OPEC*").

Fears on the one hand, hopes on the other: what justifications can be offered for either?

A priori, none. One central option open to the Working Group on the Interaction between Trade and Competition Policy is that a WTO agreement on competition should only apply to the sanctioning of the behaviour of private enterprises, and not to the behaviour of governments, in the field of competition; and OPEC is a grouping of States. In adopting this approach any WTO agreement on competition would reflect the conventional range of national competition laws. This legal criterion would by itself suffice to place OPEC outside the scope of any disciplines which might be accepted. Moreover, and importantly, a WTO agreement on competition would not apply to all forms of cartels. Those which could produce justifications in the form of economic efficiency or public interest would fall within a "justifiable" category and fall outside the scope of application of the agreement. Only cartels which could not advance such justifications would fall within the "hardcore cartel" category. Thus even if OPEC was designated as a cartel, justifications – at least of public interest – would exclude it from the scope of the agreement. How then could such an agreement constitute a threat to OPEC?

On the other hand, both fears and hopes apparently spring from the hypothesis that the threat of antitrust proceedings against OPEC would not become a reality until after the conclusion of the WTO agreement; in present circumstances no such threat exists. The paradox now becomes apparent: *why would a ban on cartels contained in a WTO agreement on competition have an effect on OPEC which it would not, or does not, have when contained in national legislation on competition?*

The aim of this study is to set out the elements of critical analysis which demonstrate the erroneous nature of the basis on which this question rests.

However, the threat of anti-cartel prosecution of OPEC is not solely subject to the existence of a WTO agreement on competition. The experience of prosecution of OPEC in the United States is a preliminary element supporting this thesis. It would thus be risky to believe, or to admit the belief, that if a WTO agreement is not concluded, the threat of anti-cartel prosecution would be averted. In fact, the question to be asked is one of knowing whether the emphasis laid on the determined prosecution of international cartels in recent years will continue to exempt OPEC. The – foreseeable- increase in the number of antitrust threats levelled at OPEC in recent years, particularly in the United States, reflects this. Might not these suits be the harbingers of a trend which could threaten the basis of the defence which could have played a dissuasive role in the past? In this connection the inconclusive character of the most recent decision dismissing an antitrust complaint against OPEC (August 2002) might reflect a new trend in events which has been developing for some years, in particular on account of the campaign waged by some elements in the Senate which are particularly hostile towards OPEC; the intensity of that campaign has been such as to inspire a belief that it is the starting signal for "open season on OPEC".⁷

Likewise, one cannot discount the possibility of antitrust proceedings against OPEC deriving from an agreement on competition concluded within WTO, even if that agreement

because of the high prices ... Introducing competition policy within WTO jurisdiction, however, was one of the longer-term goals of the Commission.")

⁷ Waller, Spencer Weber (2002), "Suing OPEC", working paper, The Institute for Consumer Antitrust Studies, Loyola University, Chicago School of Law ("*Does that mean it is open season on OPEC?*")

only applies to the activities of private enterprises. The fact that in its conclusions the Working Group accepted the principle of exemption of intergovernmental agreements on basic commodities, in response to fears brought to the attention of the Group by UNCTAD, clearly validates this hypothesis.⁸ In fact, what need is there for an exemption if the agreement applies only to private enterprises? A linkage is necessary here to establish a basis for the exemption; but the question remains of what its contents would be and whether those contents would be appropriate to the particular situation of OPEC.

The study is divided into three parts. The first part considers the question of whether OPEC is a cartel. The reply is based rather on the behaviour patterns observed in that organization than on principles. Has OPEC followed the behaviour patterns of private cartels as described in economic models and/or patterns similar to those followed by known private cartels? The replies given immediately offer a number of alternative possibilities of interpretation to competition authorities.

The second part is concerned with the risks of prosecution under competition law within the framework of present circumstances, that is to say, in the absence of a WTO agreement on competition. Within that framework will the antitrust threats against OPEC continue to retain their present "marginal" nature in the same way? The study puts into perspective certain tendencies which have recently developed in the implementation of competition policy – particularly in the United States – and concludes that there has been a "polarization" of factors which make an increase in antitrust pressures on OPEC "probable".

The third and final part considers the possible conclusion of a WTO agreement on competition in the light of the following question: will a WTO agreement on competition increase or relieve these pressures? The response excludes neither possibility, in the light of the contents of the agreement, and makes some proposals concerning the specific mechanism to be adopted to deal with the case of OPEC in the event that a WTO agreement on competition is concluded.

⁸ See the documents published by the Working Group, in particular WTO (2002), "Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council" (WT/WGTCP/6, 9 December 2002).

PROLOGUE

Some elements of terminology

Two hundred years ago, when Adam Smith castigated businessmen whose meetings ended with conspiracies to fleece consumers, he was certainly referring to *private cartels*. It may then be asked whether the idea that States can form cartels and pursue the same ends reveals either the absence of a chapter in *Inquiry into the Nature and Causes of the Wealth of Nations* or an improper (to say the least) lumping together in a single category of two completely different types of organization. In other words, from the competition standpoint, on the basis of what elements can one consider collusion between firms and collusion between States as one and the same? To appreciate the issues underlying this question, it would seem useful to recall certain elementary concepts.⁹

A. Competition

First of all, why did Adam Smith rail against private enterprises meeting privately? Because in so meeting those enterprises were choosing to replace the competition process by a concertation process. These two processes do not yield the same results.

The competition-based process gives rise to a market situation in which enterprises act *independently* to attain their objectives (usually the achievement of maximum profit). It finds expression in terms of rivalry, with each firm striving to outdistance its competitors. At the level of results this process has two important consequences:

- Each enterprise is forced to achieve efficiency in order to offer the best choice of goods and services on the market in terms of price, quality, services (or a combination of one or more of these factors (and others) which consumers will be able to evaluate;
- Only efficient enterprises will be able to affect the market, which is exercising a constant pressure making for innovation and technological progress.

B. Anti-competitive practices

In contrast, enterprises may attempt to break away from the discipline of the competition process by means of practices which prevent that process from functioning. Fundamentally this is achieved by *concertation* in place of independence in decision-making on prices, production levels, customer allocation, etc.

These decisions, which were previously taken by each enterprise in ignorance of the strategies of all the others, are now the outcome of *explicitly secret agreements* to change the situation which would result from equilibrium in competition to the advantage of the members of the cartel:

⁹ For more details see Carleton, Dennis W., and Perloff, Jeffrey M. (2001), *Modern Industrial Organization*, Scott, Foresman/Little, Glenview, Illinois.

- Vis-à-vis consumers, who would be faced with a smaller supply or range of goods and services at higher prices;
- Vis-à-vis competing companies, which would find inefficient enterprises being maintained in the market and the market sealed off to prevent the entry of new and more efficient companies.

However, agreements between companies have not always been considered as inevitably having harmful effects or as being unable to compensate for those effects by gains elsewhere. For many years this relaxed view of cartels has delayed the adoption of rules on competition. Instead agreements were – and still are – authorized, or encouraged, by governments.

Export cartels are typical examples of this approach. In 1918, shortly after the first measures taken to implement their antitrust legislation, the United States adopted the *Webb-Pomerene Export Trade Act*, which grants immunity from antitrust proceedings to American exporters forming cartels for their operations abroad. More recently – in 1982 – the *Export Trading Company Act* relaxed the regulations even further, going so far as to permit an anti-competitive impact within the boundaries of the United States.¹⁰

Mention may be made of other examples of authorizations of cartels, viz.,

(a) Liner conferences;

(b) "Depression" cartels in industries deemed to need stability of prices and production in order to permit rationalization of structures and absorption of excess capacity in a number of sectors (for example, steel, aluminium, shipbuilding, chemical industries, etc.); and

(c) "Crisis" cartels organized for various industries to fix prices and ration production and distribution during periods of shortage.

These authorized forms of cartel – sometimes referred to as public cartels – differ from private cartels in that the latter imply a secret agreement on the methods by which the members derive mutual benefits, those methods being generally unknown or likely to be detected by outside parties.

The more recent concept of the "hardcore cartel" is another manner of expressing this ambivalence of cartels. The expression has found widespread acceptance since the Organisation for Economic Co-operation and Development adopted it as the central element in its anti-cartel recommendation.¹¹ According to the OECD definition, a hardcore cartel typically engages in four types of practices:

- Price-fixing;
- Collusive tendering;

¹⁰ Whitney, James D, (1933), "The causes and consequences of Webb-Pomerene associations : a reappraisal", *Antitrust Bulletin*, Vol. 38(2): 395, 2 June 1993.

¹¹ OECD (1998), "Recommendation of the Council concerning Effective Action against Hard Core Cartels"[C(98)35/Final]. See Annex 2 of the present study.

- Establishment of output restrictions or quotas;
- Sharing or division of markets.

This is the standpoint adopted by the Working Group and which forms the basis of the Doha Ministerial Declaration. The examples quoted during the discussions in the Working Group are enlightening: cartels for vitamins, heavy electrical equipment, thermal fax paper, synthetic fibres, chemical products for textiles, stainless steel tubes used in the exploration and transportation of oil and gas, etc.¹²

C. Competition policy

Competition policy, in its broadest sense, is the expression of the attitude of the public authorities of a country towards the conditions of competition in its domestic markets. It comprises a number of aspects, such as the liberalization of commerce, privatizations, the repeal of regulations, etc. In its narrower sense as used here, competition policy formally consists of legislation on competition, i.e., a set of regulations designed to penalize behaviour by enterprises which would prevent the competitive process from producing its beneficial effects.¹³ This policy is implemented by a competition authority; it generally covers the fields of agreements, monopolies and mergers and acquisitions. The ambivalent nature of these activities is reflected at operational level by two approaches adopted in the examination of cases:

- The *per se* approach, under which an infraction is condemned as such;
- The rule-of-reason approach, which allows a restriction of competition which is compensated by gains elsewhere.

D. OPEC

Where is OPEC situated in relation to the range of cartel practices and the criteria of competition policy which have just been briefly mentioned? On the basis of the concept of the private cartel and of the usual scope of policy one can draw a line of demarcation which the legal criterion is sufficient to establish:

"A private cartel is said to exist when two or more firms which are not de facto or de jure controlled by a Government enter into an explicit agreement to fix prices, to allocate market share or sales quotas, or to engage in bid-rigging in one or more markets (...) The definition therefore *rules out* cartels that involve *State enterprises* (as in the case of OPEC)¹⁴". (Emphasis added by author.)

If cartelization appears to relate *in all cases* to *entrepreneurial* behaviour, it must be recognized that in the case of OPEC the meetings are not meetings of enterprises – or even of the publicly-owned oil companies of the member States. They are meetings of the member

¹² WTO (2002), "Provisions on hardcore cartels", background note by the Secretariat (WT/WGTCP/W/191, 20 JUNE 2002).

¹³ Thus essentially in a manner equivalent to the US anti-trust laws.

¹⁴ UNCTAD (2003), *Can developing economies benefit from WTO negotiations on binding disciplines for hard core cartels?*, a paper prepared by Simon Evenett at the request of UNCTAD (UNCTAD/DITC/CLP/2003/3, page 3; United Nations, New York and Geneva.

States themselves. Thus States which authorize cartel practices have come to engage *directly* in those practices. The range of types of cartel must be extended to include a new category of "*multiple-nation cartels*" which have a distinctive character defined not only by the judicial criterion but also by a logic of operation which extends beyond entrepreneurial rationality.¹⁵

At the end of this brief prologue we are in possession of the elements of terminology which will enable us to begin the study proper.

¹⁵ In this connection see Levy, Rick (1982): "The Applicability of the Antitrust Laws to International Cartels Involving Foreign Governments", *The Yale Law Journal*, Vol. 91(4), pp. 765-791.

PART I

DISCUSSION OF THE NATURE OF OPEC: CLUMSY CARTEL OR CLUMSY MODELS?¹⁶

The first step in this study is to decide whether OPEC is a cartel. This question has been at the forefront of economic analysis ever since the increases in oil prices which occurred during the 1970s. In accordance with a well-established ritual, new models are appearing in large numbers, all seeking to reach a conclusion by the same method: the question of whether or not OPEC is a cartel is put, and an answer is sought by testing the different interpretations of OPEC's behaviour. James M. Griffin, a pioneer in this type of exercise, predicted during the mid-1980s that later versions of the models might well contain technical refinements but were unlikely to contain many innovations of substance.¹⁷ Thus in the end dissatisfaction sets in when one observes that practically nothing of any interest has been written on the subject since the end of the 1980s¹⁸; one of the most recent versions of the exercise even wonders whether research into the subject is possible.¹⁹

However, an analysis of these models is essential for anyone wishing to ascertain the type of influence which could orientate the opinion of an antitrust authority to which a case implicating OPEC is referred. Thus the problem is not one of validating one theory rather than another, but instead one of highlighting the elements in each theory which would point to evidence for the prosecution and the defence in the context of a complaint of cartel behaviour brought against OPEC. Each model advances a different interpretation – but on the basis of the same facts – of the nature and behaviour of OPEC.

1. FACTS TO BE CONSIDERED

Four clearly differentiated periods (Annex 5) deserve study.

A. The years 1960-1969: clearing for action?

On the subject of the circumstances leading to creation of OPEC, some writers have suggested that it came into being as a result of a "provocation" occurring in the late 1960s – in other words, as a reaction to a unilateral reduction in the share of the price²⁰ of oil passed on to the producing countries by the operating oil companies. These years might be termed a

¹⁶ A reference to Morris A. Adelman's paper entitled "The clumsy cartel. OPEC's uncertain future", *Harvard International Review*, Vol. 23(1), pp. 20-23.

¹⁷ Griffin, James M. (1985), "OPEC behaviour: a test of alternative hypotheses", *The American Economic Review*, Vol. 75(5), pp. 954-963.

¹⁸ Thus Krugman, Paul, wrote in "Crude Awakenings", *Financial Times*, 3 May 2000, "In fact, I haven't been able to find a single economics research paper published after 1991 that even tries to make sense of the era of high oil prices".

¹⁹ Smith, James L. (2003), "Inscrutable OPEC? Behavioral tests of the cartel hypothesis", Department of Finance, Southern Methodist University.

²⁰ Some writers have cast doubts on the reality of those prices in the light of the integrated structure of the foreign companies which allowed the presentation of the price of crude oil as a purely accounting element (transfer pricing of various kinds). In this connection the freezing of the reference price level during the period 1960-1970 should be borne in mind (Annex 5A).

"formative" period during which OPEC adopted a low profile, seeking to uphold its rights in an international market dominated by the Seven Sisters (Exxon, Texaco, BP, Shell, Gulf, Standard Oil, Mobil Oil). Thus during the greater part of this period OPEC concentrated its efforts on obtaining a greater share of the profits earned by the foreign private companies operating on the territory of the OPEC countries. Technically speaking, those countries could be described as having a purely fiscal role, i.e., that of *collecting taxes (royalties) on the reference prices as fixed by the foreign companies*. In particular, no attempt to obtain an increase in the price of crude was observed during that period.

B. The years 1970-1981: the golden age of an illusory cartel?

At the start of this period steps were taken by the OPEC countries (within the framework of agreements of the kind adopted in Teheran) to secure unilaterally a rise in prices. For the first time, an objective of increasing prices (and thus a system of influencing prices) emerged. Next, an attempt was made by the Organization of Arab Oil Exporting Countries (OPAEC) to use oil for political ends in the form of a boycott, decided on in October 1973, of the United States and the Netherlands on account of their attitude towards the conflict between Israel and the Palestinians. Although that embargo had little effect in terms of supplies put on the market, it was nevertheless at the origin of a panic which caused the price of oil to shoot up to US\$ 12 in 1974.

The conflict between Iraq and Iran which broke out in 1979 caused a new panic and, following a period of stagnation, the price rose again, reaching US\$ 34 in 1980.

During this period there were no allocations of production or export quotas; each country was free to export all it wished provided that it did so at the official price fixed by OPEC.

C. The years 1982-1998: the triumph of the market?

This relatively long period was marked by increasing surpluses of oil on the market, mainly on account of the boomerang effect of the high prices of the preceding years.

(a) There was a fall in demand brought about by the appearance of substitutes in end- and intermediate consumption which led to a steady fall in energy use intensity (Annex 6); and

(b) There was an increase in production in non-OPEC countries, facilitated by technical advances which led to a fall in prospection and extraction costs (Annex 7).

A downward trend in prices set in and soon cancelled out the two previous increases. Throughout this period the price of oil in real terms remained constantly below its 1974 level; on two occasions, in 1986 and 1998, it fell below US\$ 10, and the market share fell to below 30%. Thus already at the beginning of this period OPEC was forced to abandon the system of freedom of exports at the official price and to replace it by a system of export quotas. This system proved ineffective, since the effect of the factors unfavourably affecting OPEC mentioned above was compounded by generalized cheating within the new quota system.

At least in relation to these factors, *the behaviour of OPEC during this period appears to have been that generally recognized as most nearly approaching that of an ordinary cartel, i.e., the reduction of supply by the imposition of quotas among members in order to keep prices high.*

D. Since 1999: an agreement to stabilize standard prices?

During this period two sub-periods can be distinguished; during the first a band was established within which prices could fluctuate, and during the second extra-economic factors relating to the conflict in Iraq came into play.

During the first period the most significant developments related to the conditions under which an increase in prices from the particularly low levels of the previous years was obtained; in addition to the prerequisite of its own internal cohesion OPEC had to secure the support of non-OPEC exporters. In addition, in March 2000 a band within which prices could fluctuate was established. This system of regulation made possible the "automatic" adjustment of production without the need for a meeting of the OPEC member countries. When the price of a basket of seven universally recognized types of crude falls below US\$22 per barrel for 10 successive trading days, OPEC may decide to reduce its production; conversely, if the price rises above US\$ 28 per barrel for 20 successive trading days, it can decide to increase production. These measures would apparently have permitted the price to increase rapidly from about US\$ 10 to a level of about US\$ 30.

In practice, on several occasions the price broke out of the band in response to events the nature of which, however, did not imply any particular attitude on the part of OPEC (in particular the events of 11 September 2001 and the attack on and occupation of Iraq by the United States in 2002 and 2003). These price movements occurred even though OPEC was repeatedly affirming its commitment to ensure normal supplies in the market during the conflict.²¹

Thus the present period has been marked by the introduction of a new system consisting of a band within which prices are allowed to fluctuate; the system operates in accordance with a logic *which appears to bring OPEC more closely into line with international agreements on basic commodities (coffee, bauxite, tin, rubber, etc.)*.

Having concluded this inevitably summary description²² of the facts to be kept in mind when considering how to designate the nature and behaviour of OPEC, we must now interpret those facts, explaining how and why they came about. In particular, we must ascertain whether the facts in question result from *concerted* decisions within OPEC to restrict production or, conversely, from *independent* decisions taken by producers faced with similar environmental constraints.

II. INTERPRETATIONS

A. A view of OPEC: an inter-State regulatory agency?

The description given by an official of the oil organization sums up the situation as follows: "OPEC is an example of this slight paradox: an organization made up of competitors who recognize the need for cooperation".²³

²¹ OPEC even went so far as to express the view that the prices reached were too high ; this proves that the propensity to "take advantage of the situation" which is often attributed to it is unfounded.

²² An exhaustive and regularly updated chronology of events relating to OPEC since its inception can be consulted on the website of the United States Energy Department.

²³ Calderon, Alvaro Silva (2002), "OPEC policies and prospects for greater cooperation", an address given at the Oil and Money Conference, London, 5 and 6 November 2002.

This formulation highlights two elements:

(a) An element of competition relating to the market share of each and thus to the profit each country wishes to derive from its oil industry;

(b) A need for cooperation, since the revenue objective cannot be attained solely through the free play of market forces.

Why is this? The reasons must be sought above all in two characteristics of oil; it is a relatively inelastic product (and therefore subject to price volatility) and also a finite natural resource. In such cases the legitimate interests of recovery and conservation may override simple market logic. In addition, an examination of the structure of the exports of a typical OPEC country reveals that its exports consist entirely, or almost entirely, of oil. Subjection of the fixing of those earnings solely to market forces sits ill with political imperatives. Moreover, in such cases the price instability characteristic of oil would make the preparation and implementation of the budgets and investment plans of the OPEC countries impossible.

"Oil markets, left to supply and demand as the only regulating forces, tend to generate sudden and huge variations in prices, from boom to bust, in a way that is unacceptable to natural resource owners, investors and consumers".²⁴

In this line of argument OPEC does not deny that at the outset its action had a political motivation, namely to restore equilibrium between North and South: "... part of the struggle not only for independence from their former colonial masters, but for control over the vast natural resources of these nations".²⁵

However, in operational terms, it recalls the United States tradition of regulating the oil industry. In particular, during the 1930s the United States adopted a prorating system under which each oil well was assigned a maximum efficiency rate of extraction which, to avoid damage, was not to be exceeded. This system, which was also related to a concern with price stability, was initially administered by a commission (the *Texas Railroad Commission*) established at the level of the principal oil-producing State (Texas), which was responsible for forecasting demand month by month and issuing production permits for each well, usually taking the form of a percentage of the maximum efficiency rate. The system was strengthened in 1935 by the creation of the *Interstate Oil Compact Commission* (IOCC), which was responsible for coordinating the quotas allotted to the different oil-producing States in the Union. It is noteworthy that these structures were established in the country which has been the pioneer in the adoption and implementation of competition policies.

Having introduced this historical antecedent, we must now ask whether it is justified by the objectives and behaviour of the two structures, IOCC and OPEC. Although this question has been but little explored by theoretical analysis, the latter does throw an interesting light on certain aspects of the subject, particularly where an attempt is made to study the influence of political factors on State-sponsored cartels. The similarity is pursued so far as to distinguish between IOCC and the *Texas Railroad Commission* on the one hand and OPEC and Saudi

²⁴ Rodriguez-Araque, Ali (2001), "US bill against the OPEC violates most basic legal principles", OPEC press release No. 6/2001.

²⁵ Ibid.

Arabia on the other. The principal finding of this analysis reveals that the essential element in a State cartel – an authority above that of the States –is lacking in OPEC. Such an authority can exist in the United States in the relationship between the Federal government and the States of the Union, but it cannot exist in OPEC in relation to the sovereign member States. Thus we are faced with a behavioural situation resembling rather that of a private cartel.

"Both OPEC and the Interstate Oil Compact Commission are government-sponsored, rather than private, cartels. However ... in the case of Texas and the IOCC, individual states exercised sovereign regulation of production by private firms within their own jurisdictions, but were aided by the superior authority of the federal government to monitor and penalize cheating ... OPEC, although an intergovernmental cartel, lacks a central government authority to monitor and enforce cartel agreements. This places OPEC on a very different footing than the IOCC. Compliance with output restrictions is voluntary and unenforceable, more like the collusive agreements among private firms that act in defiance of antitrust laws".²⁶

Thus the conclusion is more than implied: the form of OPEC appears to resemble more closely that of a private cartel and thus nearer to the direct line of fire of the antitrust laws.

B. Established models

In the context of the rises in the price of oil during the 1970s, many writers have attempted to explain in what sense OPEC is, or is not, a cartel. From the start the responses varied. According to the majority of contributions, OPEC is unquestionably a cartel; but a minority offers explanations of the behaviour of OPEC and trends in the oil market based on specific factors outside the scope of cartel logic.

1. CARTELIST MODELS

In economic writings the cartel logic interpretation is the majority one. There are several reasons for this. First of all, the oil sector is still closely associated with cartel practices and the appearance of the first antitrust laws in the United States.²⁷ Secondly, because OPEC is closely associated with the rises in the price of oil in 1973-74. Those prices were seen as the outcome of typically cartel practices demonstrating the existence of a market power which, according to Morris A. Adelman²⁸, is all the more "*invincible*" in that it is exercised by sovereign States. In his view the situation is clear: in a market the price of a product can vary according to its rarity or the structure of the market. In the case of oil the rarity factor can be discounted, since, contrary to the theory of exhaustible resources, the situation is not one of stocks likely to be exhausted but one of movements in the level of available stocks consumed and in that of new discoveries becoming available. If a rent – i.e., a price exceeding the level

²⁶ Libecap, Gary D. and Smith, James L. (2003), "Political constraints on government cartelization; the case of oil production regulation in Texas and Saudi Arabia", University of Arizona and Southern Methodist University (revised 10 January) in Grossman, Peter (dir.) (2004), *How cartels endure and how they fail: studies of industrial collusion*, Edward Elgar Publishing, Cheltenham (United Kingdom).

²⁷ The American antitrust laws could have been called "anti-tank laws" by reference to the role played by tanks for the transportation of oil in the rise of Standard Oil and the squeezing out of the market of the small producers, who were restricted to using the traditional wooden barrels.

²⁸ Adelman, Morris A. (2002), "World oil production and prices 1947-2000", *The Quarterly Review of Economics and Finance*, 42(2), pp. 169-191.

set by competition – is observed in the absence of rarity, that rent is certainly a monopoly rent. Adelman writes:

"(But) since 1970, every oil price increase has been triggered by the OPEC nations' deliberate action in cutting output or in declining to use current capacity to expand it."

However, there is an element of sophism in the argument that the absence of rarity is established by discoveries exceeding extractions; for account must be taken of the fact that even though that argument is acceptable in a global context, it may prove erroneous at the level of a particular national territory. The case of the United States, which has become an importer, is eloquent in this connection.

On the other hand, the cartel explanation was reassuring, since economic analysis predicts that the cartel will break up at some time in the not-too-distant future. Henry Kissinger thought of forming a consumers' cartel which would offer a floor price for oil in exchange for respect by OPEC for the free play of market forces; Milton Freedman criticized his "lack of economic culture", stating that that proposal was the surest way of saving the cartel from its inevitable break-up.²⁹ Thus the demonstration of the cartel behaviour of OPEC raises the immediate corollary; the question of whether it can last. Moreover, there are a number of distinctive features of cartels which are missing in OPEC. For example, there were no production quotas allotted to members at the time of the rise in the power of OPEC; they only appeared much later, when the organization was losing control of the market. Likewise, the apparently easy emergence of competitors negates the possibility that OPEC could draw up exclusion strategies which could contain successive generations of entrants such as Angola, Brazil, China, Colombia, Egypt, Malaysia, Mexico, Norway and the United Kingdom.³⁰

Doubts on these matters will soon appear in comparative models designed to detect the presence of cartel characteristics in the behaviour of OPEC:

(a) In relation to economic analysis³¹; recognition of the lasting character of OPEC, doubts over whether the maximization of profit is its objective, the absence of market-sharing schemes, etc., and, since the 1980s, a manifest inability to check the fall in prices and to prevent the forcible entry of new competitors who have secured substantial market shares;

(b) In relation to the rigid and absolute oil cartel operated by the Seven Sisters as illustrated in, for instance, the Achnacarry agreement,³²

²⁹ Friedman, Milton (1975), "Henry, stick to politics", *Newsweek*, 31 March 1975. ("*We have centuries of experience with cartels ... Sooner or later, the cartel breaks ... so it will be with the oil cartel unless Kissinger manages to save it by his floor-price scheme ... But in reality, that will not happen. Consumer cartels are just as certain to collapse under pressure as are producer cartels.*")

³⁰ Angelier, Jean-Pierre, and Saadi, Hadj (2002), "The role of consumer countries in determining international oil prices", *Russian Economic Trends*, Vol. 11(1), pp. 26-32.

³¹ Osborne, Dale K. (1976), "Cartel Problems", *The American Economic Review*, Vol. 66, pp. 835-844.

³² See Annex 8. This result may seem surprising, seeing that the commodity agreements sometimes contain a consumer clause; such is not the case with OPEC.

(c) In relation to international commodity agreements, with the observation that, on the basis of an examination of a representative sample of the principal commodity agreements, there are fewer features characteristic of cartels in OPEC than in any of the other organizations examined.³³

The weakness of the cartel models leads us to seek alternative explanations, all of which assume that the price increases were due to factors other than cartelisation and were not engineered by OPEC.

2. THE COMPETITIVE MODEL

According to this model, movements in the price of oil are principally determined by the market, i.e., by reference to supply and demand rather than by cartel behaviour. Increases in prices are attributed to disruptive factors affecting these parameters. This was true of the price rise of 1973, which followed an increase in speculative demand on account of the oil embargo against the United States and the Netherlands decided on by the Gulf States. Similarly, the price rise in 1979-80 was due to a fall in production related to the Iranian revolution and the conflict between Iran and Iraq. The members of OPEC thus consider the price as being determined by supply and demand, the fundamental market elements; thus the price cannot be influenced by the individual production of the countries concerned. In the same way, the subsequent falls in prices could be attributed to a fall in demand. Thus the member countries of OPEC fix their prices in terms of a reaction to changes in demand; there is no attempt to impose a price strategy on sovereign countries. In these circumstances there is no reason to consider that OPEC possesses any monopoly or cartel power

3. THE TARGET INCOME (OR PREDETERMINED RECEIPTS) MODEL

This model also offers a non-cartelist explanation in which the need for income from oil is determined by the need to finance investments at home. The amount of that income depends on the capacity to absorb investments and thus determines the amount of oil produced at a given price. In particular, this explanation covers the situation of a reduction in output in response to a rise in prices; thus once their needs have been met, the OPEC countries would have no interest in producing more. According to this approach, the rises in the price of oil which occurred at the beginning of the 1970s (in 1973 and 1979) were due to a series of events outside the control of OPEC. Supply would respond to a sudden rise in prices in a "perverse" fashion, since it would diminish in order to maintain receipts at the required level. We would thus have a backward-bending supply curve requiring no coordination among OPEC members.

4. THE OWNERSHIP RIGHTS MODEL

This model also offers a non-cartelist explanation of the price rise, namely that the causal link is to be found in the transfer of ownership from the international companies to the producer countries (nationalizations) during the 1970s. According to this theory, the transfer of ownership from the oil companies, which discounted the future at a high rate, to the producer countries, which tended to discount the future at a lower rate, led to a drop in production and thus to a rise in prices. This hypothesis then rests on a "one shot" (or "pump it now or lose it later") logic; this may explain changes in production levels before

³³ Epstein, Edward J. (1983), "The cartel that never was", *The Atlantic*, Vol. 251, p. 68.

nationalization but not afterwards. Moreover, that logic does not explain the falls in prices during the 1980s. Finally, the property ownership model should remain equally valid in the opposite situation (privatization).³⁴

Evaluation of Part I

Is OPEC an archetypical cartel, responsible for manipulations of the market, and openly so? Is it a pseudo-cartel unable to maintain discipline? a non-typical, or possibly involuntary, cartel? a cartel with a difference or merely a structure for the defence of sovereign interests? Each theory offers an element of explanation, and in the end "all's well that ends well".³⁵

However, a competition authority might prove more sceptical of these explanations in view of the severity of the limitations affecting all of them.

The first set of limitations consists of denials of reality. The cartel thesis supports the hypothesis of cartel behaviour notwithstanding the absence of cartel features and the presence of manifest political determinations. Likewise, the non-cartel theses go so far as to refuse to recognize the objective of price stabilization which OPEC states it is pursuing: what purpose would it then serve?³⁶

The second set of limitations resides in the indeterminate character of the explanatory models. This is the case with behaviour patterns: do they demonstrate that measures are being taken by firms acting in concert – and are therefore cartel – or do they prove that the firms in question are reacting independently to an external event – and are therefore behaving competitively?

If the same facts lead indifferently to diametrically opposite results, how can a competition authority draw *conclusions from such inconclusive models*?

³⁴ Adelman envisaged the reversibility of the ownership rights model as an element explaining subsequent privatization periods. See Adelman, Morris A. (2001), "The clumsy cartel...", loc. cit., (*"But an OPEC cartel raises prices faster and farther than a group of private profit-maximizers ever would. Private investors are diversified, receiving income from various sources. Because they can diversify away some risks, they discount the future at a lower rate ... By contrast, the OPEC nations are not diversified and cannot wait. They have short time horizons and high discount rates because they live on nothing but oil exports".*)

³⁵ Carleton, Dennis W. and Perloff, Jeffrey M. (2001), *Modern Industrial Organization*, Scott, Foresman/Little, Glenview, Illinois.

³⁶ This conception of OPEC, detached from its declared objective of price stabilization, apparently leads to its being attributed other objectives which have no influence on prices. See Alhaji, A.F. and Huettner, David (2000), "OPEC and other commodity cartels: a comparison", *Energy Policy*, Vol. 28 (15), pp. 1151-1164. The authors describe OPEC as a diplomatic forum in which pairs of partners in a state of mutual enmity (Iran and Iraq, Iraq and Kuwait, Libya and Saudi Arabia, etc.) can meet or as an institute for research and information designed to optimize the capacities of its individual members in these fields, or even a channel through which countries which are too small to influence world politics can do so collectively.

PART II

DOES THE STATUS QUO PROTECT OPEC FROM ANTITRUST PROCEEDINGS?

In theory, proceedings could be envisaged at two levels: within the dispute settlement body in WTO, since cartels influence international trade; and before a national competition authority under the effects doctrine.

I. HYPOTHESIS OF PROCEEDINGS WITHIN WTO

In principle a suit at this level would be impossible, even if OPEC was recognized as being guilty of cartel practices.³⁷ WTO has in fact no provision for the sanctioning of such practices, which are presumed to be followed by private enterprises alone. The reasons date back to the failure of the Havana Charter, which sought at the end of the war to establish an international trade organization with competence to take cognizance of such practices, whether committed by either States or enterprises.

However, certain analysts argue that the existing provisions governing WTO are sufficient to enable it to take action to abolish cartels.³⁸ They assert that Article XI of the General Agreement, which relates to the elimination of quantitative restrictions on both imports and exports, would permit proceedings against cartels on both counts.³⁹ This article had already allowed GATT to sanction the semi-conductor cartel in respect of which there had been a dispute between the European Union and Japan concerning restrictions on access to the Japanese market.⁴⁰

Referring to these provisions, the United States⁴¹ and the European Union⁴² appear to have recently envisaged referring the price-setting practices and production quota allocations of OPEC to the Disputes Settlement Body of WTO, but refrained from doing so for at least two reasons:

³⁷ Naturally, this reasoning applies to members of both OPEC and WTO,

³⁸ Mavroidis, Petros C. (1998), "International competition rules : the existing framework", a paper presented to the international "Trade and competition in the WTO and beyond" conference, Enrico Mattei Foundation, Venice, 4 and 5 December 1998.

³⁹ Article XI (General Elimination of Quantitative Restrictions) : 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

⁴⁰ GATT (1998), Panel Report on Japan – Trade in semi-conductors (*"this wording (in article XI) was comprehensive; it applied to all measures instituted or maintained by a contracting party prohibiting or restricting the importation, exportation or sale for export of products other than measures which take the form of duties, taxes or other charges ... This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export was covered by this provision,, irrespective of the legal status of the measure"*).

⁴¹ DeFazio, Peter (2001), "Letter to President Bush on WTO-OPEC", 31 January 2001.

⁴² People's Daily Online (2001), "EU not to join in OPEC price dispute", April 2001.

(a) First of all, by reference to the cartel principle; to assert that the existing provisions of GATT/WTO are applicable to this form of organization requires an explanation of why these provisions are not invoked in the case of private cartels. Then the argument can be advanced that, after all, cartels could well have been victims of the liberalization of markets and thus no longer exist today.⁴³ This argument has long been advanced to avert the need for competition rules at international level but is contradicted by the now common occurrence of condemnations of cartels by national competition authorities.

(b) Secondly, by reference to the prohibition of quantitative restrictions: this prohibition could be rescinded in the case of the member countries of OPEC, since those countries could themselves invoke the exceptions provided for in the GATT/WTO texts and the interpretation adopted by a special group of the disputes settlement body

In the first instance, Article XI:2 (b) itself permits such exceptions in cases of "restrictions "necessary to the ... marketing of commodities in international trade". A special panel within GATT was called upon to interpret this provision and provided pointers which the member countries of OPEC could invoke:

"The drafters of Article XI:2(b) agreed that this question would cover export restrictions designed to further the marketing of a commodity by spreading supplies of the restricted product over a longer period of time".⁴⁴

Other provisions can be found relating to general exemptions under Article 20, particularly those relating to restrictions based on security considerations, the existence of an intergovernmental commodity agreement or the conservation of finite natural resources.⁴⁵

II. HYPOTHESIS OF PROSECUTION BEFORE A NATIONAL COMPETITION AUTHORITY

A. Principles

National competition laws are subject to two limitations. The first is territorial; the laws can only apply to domestic markets. However, they can in that context sanction the conduct of foreign enterprises which has an impact within the country.⁴⁶ This is the first meaning of extraterritoriality; it is also known as the "effects doctrine". All national competition laws admit this principle. It is also a way of "making up for" the absence of an international agreement on competition.

The second limitation arises from the fact that national competition laws apply to the conduct of enterprises, but not to that of States.⁴⁷

⁴³ Mavroidis, Petros C. (1998), loc. cit.

⁴⁴ GATT (1998), "Canada – Measures Affecting Exports of Unprocessed Herring and Salmon", report of the Panel (L/6268, para. 4,3, 22 March.

⁴⁵ UNCTAD (2000), *Trade agreements, petroleum and energy policies* (UNCTAD/ITCD/TSB/9, United Nations, New York and Geneva.

⁴⁶ The legislation of the United States (and of that country alone) admits a different type of extraterritoriality ; it applies to conduct having an effect outside United States territory if that conduct affects United States commerce.

⁴⁷ With the exception of State aids under European law.

OPEC as a foreign entity is normally subject to national legislation with regard to its conduct which has an effect in the country concerned; but OPEC, as a cartel of States, is normally outside the scope of national competition law. The question then arises: *can the doctrine of effect apply to sovereign States?*

B. Specific cases

The response of the United States courts to the above question, in two cases brought before them in 1978 and 2001, was "no" in the first case and "yes" in the second.⁴⁸

1. CASE-LAW AS ESTABLISHED BY THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (IAM) *v.* OPEC

In this case, which dates back to December 1978, the *member countries* of OPEC were sued by the International Association of Machinists and Aerospace Workers (IAM), which claimed that its members had suffered "damage" as a result of the price-fixing activity of that organization.

(a) At first instance:

Judge Hauk confirmed that OPEC was a cartel, but dismissed the case, principally on three grounds.

The first two grounds, which generally relate to special circumstances, deserve brief mention;

- (i) IAM was not a direct purchaser from OPEC and therefore could not bring an action for damages;
- (ii) Not being "persons" within the meaning of United States antitrust law, foreign governments could not be sued under those laws.

The heart of the judge's ruling lies in the third argument, in which he gave an interpretation of the price-fixing activities of OPEC. As commercial acts, they fell within the scope of the antitrust laws; as government acts, they were immune. To reach a conclusion in favour of immunity the judge considered the entire range of activities comprised in the production and marketing of oil. By their nature the conditions and rates of exploitation of natural resources were sovereign acts:

"It is clear that the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource, to wit, crude oil, from its country's territory." (*extract*)

⁴⁸ For an analysis of the cases outlined below, the reader is advised to consult an old reference source and a new one: Grossack, Irvin M. (1986), "OPEC and the anti-trust laws", *Journal of Economic Issues*, Vol. XX(3): 725-741; and Waller, Spencer Weber (2002), "Suing OPEC", a working paper, Institute for Consumer Antitrust Studies, Loyola University, Chicago School of Law.

The fixing of the price of those resources was only one of several modalities of determining the rate and conditions of exploitation and itself derived from a prerogative of a sovereign State, or a "sovereign component".

Moreover, once it had been established that the members of OPEC had the right to control the production and conditions of sale of their natural resources, the fact that that right was exercised *jointly* did not cause it to lapse; the act was a government act, and that classification alone was sufficient to bring it within the scope of the *Foreign Sovereign Immunity Act* and thus to be immune from any antitrust suit.

(b) *On appeal*

The decision of Judge Choy given in 1981 confirmed the dismissal of the suit, but on different grounds: that of the Act of State Doctrine. The principle underlying this doctrine is that of separation of powers, under which the courts refrain from intervening in the "sensitive affairs" of the Executive. In this particular case the formulation of United States foreign policy includes OPEC in the "petro-political" interests of the United States in the Middle East.

"While the case is formed as an *antitrust* action, the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources. On the other hand, should the court hold that OPEC's actions are legal, this would greatly strengthen the bargaining hand of the OPEC nations in the event that Congress or the executive chooses to condemn OPEC's actions." (*extract*).

An appeal to the Supreme Court was dismissed without examination, and the position of OPEC vis-à-vis United States antitrust law remained unchanged for the next 20 years; at the same time, case-law steadily moved away from the bases on which the decisions in the IAM case rested. Was there to be a reversal of case-law?

2. A REVERSAL OF CASE-LAW? PREWITT ENTERPRISE INC. *v.* OPEC

If one considers the second case implicating OPEC, the answer to the above question would appear to be affirmative. In this more recent case – begun in 2001 and concluded in August 2002 – OPEC (as such, and not its members, as in the first case) was sued by a service station operator for illegal price fixing and quota allocation.

(a) *At first instance*

Judge Weiner rejected point by point the arguments underlying the previous decisions and condemned OPEC for "conspiracy" to manipulate the price of oil. A central prerequisite for the rejection of the case-law established in the IAM case was the elimination of the defences of the Sovereign Immunity Act and the Act of State Doctrine. This prerequisite was satisfied in any situation where States – the only beneficiaries of those defences – are not involved. At the same time, however, it would eventually be necessary to condemn States. How did Judge Weiner proceed to formulate his conclusions?

Essentially, the reasoning was conducted in two stages.

- (i) The case did not involve States or, generally speaking, any category in a position to benefit from the Foreign Sovereign Immunity Act or the Act of State Doctrine.

"OPEC is an unincorporated institution ... and may thus be sued ... the Court concludes that OPEC is not itself a foreign State or an agency or instrumentality of a foreign State; rather, by its own description, OPEC is a voluntary intergovernmental organization based in Vienna, Austria ... Therefore, neither the Foreign Sovereign Immunities Act ... nor the act of state doctrine, is implicated in this action." (*extract*)

Price manipulations by restricting the supply of oil, which that unincorporated association appeared to have officially stated that it was doing⁴⁹, was prohibited *per se* by United States antitrust laws and was therefore not susceptible of being offset by arguments of efficiency or public interest.

- (ii) The condemnation applied to any State – including non-members of OPEC – which associated itself with the activities of OPEC, since in doing so it would engage in activities which were by their very nature commercial and conducted outside its own territory. It would thus lose the protection of the Foreign Sovereign Immunity Act and the Act of State Doctrine.

"Neither OPEC's members nor the relevant non-OPEC producers, Mexico, the Russian Federation, Norway and Oman enjoy any form of immunity from the consequences of such a finding" (*extract*).

On that basis Judge Weiner considered that there was nothing to prevent him from ordering OPEC and the countries associated with its activities to cease and desist from the activities mentioned in the suit concerning manipulation of quantities to force prices up.

(b) On appeal

In August 2002 Judge Clermon reversed the decision, but on purely technical grounds (irregularity in the procedure of transmission of the service of the ruling on OPEC).⁵⁰

The question then remains of determining if at bottom there has been a genuine reversal of case-law.⁵¹ It is difficult to frame a reply, as many of the elements emerging from doctrine

⁴⁹ In particular by the declarations of its officers and the introduction of the system of price fluctuation bands.

⁵⁰ Bird, David (2002), "Anti-trust suit against OPEC dismissed on technicality", *Petroleumworld*, Caracas, 9 August 2002 (extract from the judgement: "*The Austrian Government, as a sovereign, has declared expressly - through both its legislative and treaty-making powers – that certified mail service directly on OPEC is prohibited*").

⁵¹ On the sequel to this case the information available suggests a measure of confusion in the legal sphere. See Fletcher, Heather (2002), "How does OPEC get away with it?" ("*Ten days later, lawyers for Prewitt sent the court alternative strategies for notifying the cartel of the suit. In part, the request read, "If the courts are able to fashion adequate service of a complaint against the al-Qaeda organization for redress of a relative's loss of life in the World Trade Center attack, then surely this court may direct service against OPEC as to claims arising out of economic activities that admittedly affect the daily lives of most Americans", the filing by Prewitt Enterprises said, quoting the court. The court has not yet taken action on the Prewitt Enterprises request.*")

needed to measure the incidences of the Prewitt case have, generally speaking, remained confidential.⁵²

Why such discretion? At least three reasons can be found. The first reason derives from two imbalances in Judge Weiner's ruling. As regards the first, the ruling did not take into account elements *unfavourable* to Prewitt, on the one hand, and elements *favourable* to OPEC, on the other. The second imbalance resided in the fact that the ruling stigmatized the reduction of output by OPEC but ignored similar behaviour by the United States.

"The court had not taken into account some things that are against Prewitt Enterprises. The matter is that OPEC does not fix oil prices, it just regulates the volume of its extraction ... Another factor, not taken into account by the Americans, is the steady reduction of oil extraction by USA companies (in 1997-2000 it made up 3-4% according to analysts)".⁵³

In brief, the decision was unbalanced, resulting from, on the one hand, what must be assumed to be a preliminary examination slanted towards the prosecution, based on the pleadings of Prewitt's counsel and a non-adversarial expert examination⁵⁴, and on the other the application of a double standard to the measures to restrict the supply of crude oil. In these circumstances it is difficult to find in this decision the equilibrium which would offer a safe foundation for new case-law.

The second reason consists of the view that as regards the substance the decision by Judge Weiner was insufficient to reverse the IAM case-law. Jonathan Berck, who develops this view, carries the logic of the concept of the unincorporated association to such a degree that it can be turned on its head and used to prove the contrary: "OPEC is the clubhouse in which the members meet ... So suing OPEC is like suing the conference room".⁵⁵

Thus the reality of States is not screened by the artifice of the "unincorporated association"; that fact alone would restrict Prewitt's claim to alter, however little, the case-law as established by the IAM case. Under both the Foreign Sovereign Immunity Act and the Act of State Doctrine each State has the right to regulate the rate of extraction of its natural resources, and the exercise of that right takes place, not in Austria, but on its national territory. It would thus be absurd to presume that that rate can be fixed by a judge; this would be tantamount to refusing to foreign States the prerogatives of sovereignty accorded to the federated States of the Union.⁵⁶

⁵² Little or no comment in the press, even the specialist press.

⁵³ Reznikov, Konstantin (2001), "Economic Press Review", *Segodnya*, Moscow, 6 April 2001 (ed. note: original article in Russian by Nicolai Manvelof).

⁵⁴ Philip K. Verleger, Jr., the court-appointed expert, is well known as an oil specialist but also for his opinion that OPEC, without being a cartel, is nonetheless an "agreement of a restrictive nature" and consequently subject to United States anti-trust laws. See Verleger, Philip K. Jr. (1998), "Prepared statement before the Subcommittee on anti-trust, business rights and competition of the Senate Judiciary Committee, 22 September 1998", (*"OPEC is commonly referred to as a cartel. However, the description is technically incorrect. The correct term is a restrictive commodity agreement."*)

⁵⁵ Berck, Jonathan, quoted in Fletcher, Heather (2002), "How does OPEC get away with it!", 26 November 2002.

⁵⁶ See the following extract from the judgement: "...enjoined and restrained from entering into any agreements amongst themselves or with third parties to raise, lower or otherwise determine the volumes of production and export of crude oil by any person or entity, and from crafting, developing, coordinating, entering

According to this thesis, the irregularity invoked by the Court of Appeals was a "diplomatic means" of invalidating the decision.⁵⁷ It remains to be explained why the appeal judge did not simply declare the decision invalid on purely legal grounds. After all, appellate courts are not there to create escape routes for judges of first instance.

A reply to this question may be found in the third reason, supplied by the (authorized) commentary of Spencer Weber Waller.⁵⁸ In that commentary the somewhat cursory treatment of Judge Weiner's decision is followed by an analysis of the manner in which the instruments at the origin of the case-law established by the IAM case are applied in fields less sensitive than that of oil. This analysis appears to reveal unquestionable restrictions on the utilization of those instruments which, when transposed into the antitrust field, would render any verdict in a case involving OPEC less certain.

Thus, as regards the Foreign Sovereign Immunity Act,

"The appellate court obviously thought that there was a significant commercial component to the government's activities, but concluded that such a component posted no difficulties for the application of the act of state doctrine. While this was probably an accurate interpretation of the law the time of the decision, subsequent events strongly suggest that this defence would no longer be available to shield OPEC or its member states from liability today."

And in the case of the Act of State Doctrine,

"What is equally significant is that the Supreme Court in its most recent pronouncement on the act of state doctrine has cut back the scope of the doctrine dramatically in precisely the way that undermines the earlier act of state holding in the 9th Circuit's OPEC decision."

If there has been a reversal of case-law, it would thus seem to be the product, not of Judge Weiner's decision, but of this trend. However, in this particular case we find ourselves in a situation where the trend in case-law is in fact bringing OPEC within the scope of United States antitrust legislation, whereas political considerations seem to continue to protect OPEC from that legislation; and the reason that Judge Clermon preferred to invoke the irregularity of form to invalidate the decision in the Prewitt case would have been to avoid giving a judgement which would have run counter to that trend. The purpose of having recourse to that artifice was to avoid giving an objective basis to the strains existing between the *conclusions* of the IAM decision – which there was a desire not to challenge – and the arguments on which it was based, which would have given the opposite result if applied on a purely technical basis.

into, implementing and/or enforcing the performance of any such agreements." See also J.Berck on this point in the *Taipei Times* (2001), "US couple wins price fixing lawsuit filed against OPEC", 5 April ("*a judge can levy contempt fines when court orders are ignored (but) a US court doesn't have the power to tell OPEC what to do.*")

⁵⁷ Fletcher, Heather, (2002), *loc. cit.*, 26 November 2002 ("*the court took the diplomatic way out of the case by citing improper service of the lawsuit.*")

⁵⁸ Waller, Spencer Weber, *loc. cit.*, The next three quotations are taken from this contribution.

"In the initial OPEC case ... (the Court) distorted accepted doctrine ... If Prewitt continues to be litigated, or additional actions are brought, the same thing undoubtedly would happen again."

The three reasons given point to the same motivation, although on different grounds; by dismissing the case on grounds of a formal irregularity the judge, in a sense, purposely "kicked the case into touch" to provide an escape route from a decision which could have no result.

What, then, were the *political considerations* underlying the decisions concerning OPEC?

III. OFFICIAL ATTITUDES

During the course of the two cases both officials of OPEC and the United States sedulously carefully avoided making any appearance, for reasons which were similar in nature. Recently, however, some explanations have emerged, from OPEC in reaction to the Prewitt decision and from the Federal Trade Commission during a hearing before the Committee on the Judiciary of the House of Representatives.

A. The attitude of OPEC

Read in a certain way the documents issued by OPEC (statutes, analyses, declarations, etc.) provide a number of pointers to its attitude on the subject of competition questions. However, as the decision in the Prewitt case condemning OPEC occurred in the context of a violent anti-OPEC campaign being conducted by certain elements in the United States Congress⁵⁹, the organization felt it necessary to formulate a more explicit line of argument covering the points of law and appreciating the facts.⁶⁰

1. THE POINTS OF LAW

The case-law as established in the IAM case is recalled, not so much in connection with its technical references (conditions of application of the Foreign Sovereign Immunity Act and the Act of State Doctrine) as in the context of its political connotations. Thus when OPEC states that:

"To judge an Organization – whose members are sovereign states and act to defend their common interests – as a simple commercial entity is an absurdity that violates the most basic legal principles".⁶¹

⁵⁹ Udin, Andrew C. (2001), "Slaying Goliath: the extraterritorial application of U.S. anti-trust law to OPEC", *American University Law Review*, Vol. 50, pp. 1321-1374. This paper describes in detail the series of concerted attacks specifically directed at OPEC in the form of draft bills which would, among other things, permitted the amendment of the Sherman Act specifically to render the activities of OPEC illegal.

⁶⁰ Rodriguez-Araque, Ali (2001), *loc. cit.* (see footnote 24)

⁶¹ *Ibid*, The reference is to the resolutions of the United Nations General Assembly, and particularly those concerning the permanent sovereignty of nations over their natural resources and the United Nations Charter of Economic Rights and Duties of States, article 5 of which states: "*All States have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their development and, in pursuance of their aims, to assist in the sustained growth of the world economy, in particular accelerating the development of developing countries. Correspondingly, all States have*

it is to point out that one of those principles is the United Nations declaration recognizing the permanent right of nations over their natural resources. It is not the business of any national court of justice, or even the Parliament of a UN member State, to speculate on that right. The case-law emerging from the IAM case relates not so much to the conditions of application of domestic legislation as with the manner in which the court *declined competence to hear a case which fell within the province of international law*. In any case, the Constitution of the United States itself recognizes the principle of sovereignty over the country's natural resources. Thus in the light of these principles, and reciprocally, OPEC could not consider an increase in United States production as a conspiracy against its interests.

Could this line of defence discourage possible antitrust suits? According to certain specialist commentators⁶² this may be doubted, whatever the particular circumstances:

- The United Nations resolutions must be taken for what they are, namely non-binding instruments which do not in themselves constitute provisions of international law;
- Even if that were not so, nothing would prevent the United States Congress from adopting laws applicable within the country which would be in violation of international law.

Against these objections – which OPEC might consider as reflecting legal unilateralism and even imperialism – OPEC could argue that its line of defence is still valid inasmuch as it would be for the member States of the United Nations, and not a national authority, to raise such objections.

2. APPRECIATION OF THE FACTS

In these particular circumstances the task facing OPEC was to decline *its own* responsibility in the principal charge levelled at it in the suit against it, namely *the rise in pump prices*. To that end it compared price movements with movements in the supply of crude oil, concluding that "the spikes in fuel prices occurred, paradoxically, at a time when there was an oversupply of crude oil in the US",⁶³

What then could the explanation for the increases in pump prices be?

the duty to respect that right by refraining from applying economic and political measures which would limit it." In the same context it should be remembered that OPEC is registered with the United Nations as an intergovernmental organization.

⁶² In particular Waller, Spencer Webber (2002), *loc. cit.*, (see footnote 48). (*The most frequently asserted defenses under international law depend on principles of public international law embodied in the alleged approval of OPEC by the United Nations General Assembly in its Resolution on Permanent Sovereignty Over Natural Resources and the Charter of Economic Rights and Duties of States. Despite language in these instruments arguably ratifying the activities of OPEC, these instruments must be viewed as traditional United Nations instruments which are nonbinding and do not by themselves constitute international law ... While international law is part of the law of the United States, Congress can enact a statute in violation of international law that must be enforced within the United States if it chooses to do so.*)

⁶³ Rodriguez-Araque (2001), *loc. cit.*

The OPEC statement mentions three factors characteristic of bottlenecks in the supply of refined products – not the supply of crude – linked to essentially domestic circumstances reflecting the influence of United States energy policy, namely;

- (a) New and stricter regulations concerning the environment; only refineries which could meet the new standards were allowed to continue refining;
- (b) In addition, refining capacity had been declining for a number of years; and
- (c) The situation was worsened by an inadequate distribution network.

There was a reversal in the order of causalities underlying this reasoning, namely that the explanation of the price rise was to be sought rather in manipulations of demand and processes further down the line than in a restriction of the supply of crude oil.⁶⁴ Evidence for this is to be found in the dissociation over a long period of the price of crude oil, which was moving downwards, from the prices of derived products, which were moving upwards – a dissociation which could not be explained by processing costs. It was argued that fundamentally these two factors were at the origin of the price movements observed;

(a) The downward trend in the price of oil did not make for new investment in research or permit adequate maintenance of existing infrastructures. In addition, the compression of margins had brought about an enforced movement towards concentration at every stage of processing in the petroleum industry;⁶⁵

(b) The upward trend in the prices of refined products highlights the weight of petroleum taxation in these prices. Their tripartite structure reveals the preponderant share of taxes in them; even at peak prices – in 2000, the year of the Prewitt case, they represented 50% of the total in the United States and up to 80% in Europe. (Annex 9)

B. The United States antitrust authorities

A priori the reserved attitude of the official United States authorities may be understood as a determination to "keep their distance" from the parties in dispute, not wishing to offend either OPEC by taking sides with the plaintiffs or national public opinion by taking sides with OPEC.⁶⁶ At a more technical level this attitude would also have been a legal requirement;

⁶⁴ For a theoretical development of this reversal of causalities see Angelier, Jean-Pierre, and Saadi, Hadj (2003), *op. cit.*

⁶⁵ This directly involves the anti-trust policy of the United States on the subject of mergers. On this subject see Verleger, Philip K. Jr. (2001), "Competition in the petroleum industry: the situation in 2001. A summary", *The Petroleum Economics Monthly*, July 2001. ("... findings of no anti-trust violations do not absolve competition authorities of all responsibility for the upsurge in price volatility ... Rather than mandating divestitures of refining assets, the FTC should require merging firms to operate and expand refining capacity as a condition for the merger. Rather than mandating the sale of terminal facilities, the FTC should require merging firms to expand existing terminal facilities, as well as open them to third parties".)

⁶⁶ In this regard see *The Economist* (1979), "Go easy, Opec, Hudge Hauk is", 30 June 1979. ("Sigh of relief in Washington, where administration officials were sharply divided between those who thought that the government should intervene to avoid putting up OPEC backs and those who feared even more the wrath of the consumer if it tried,").

since it was for the judges to determine the nature of the incriminated acts in the cases brought before them, what need for an appearance by the official authorities?⁶⁷

Faced with these speculations, more elaborate elements concerning the official attitude of the United States authorities can be found in the hearings organized by the Committee on the Judiciary of the House of Representatives in 2000. Since then those elements have been taken as indicating the official reference position regarding the use of the antitrust laws against OPEC. In the words used by the Federal Trade Commission, that position would appear to be the following:

"A decision to bring an antitrust case against OPEC would involve not only, and perhaps not even primarily, competition policy, but also defence policy, energy policy, foreign policy, and natural resource issues. In particular, any action taken to weaken a sovereign nation's defences against judicial oversight of competition lawsuits, for example, would have profound implications for the United States, which places buying and selling restrictions on myriad products. Consequently, any decision to undertake such a challenge should be made at the highest levels of the executive branch, based on careful consideration by the Department of Justice and other relevant agencies".⁶⁸

Evaluation of Part II

Two apparently contradictory observations emerge from Part II:

1. *The risks of antitrust suits against OPEC are, in the last resort, minimal.* Only two suits have been brought against the organization since its creation, in a single country and with 20 years elapsing between them; the risk is therefore "manageable".⁶⁹ In support of this optimism it can be added that neither of these suits proved successful and that neither implicated either of the two official United States competition bodies (Department of Justice and Federal Trade Commission). Lastly, the two suits were brought at a time of upward pressure on the prices of petroleum products; thus they rather represented a reaction to a particular event.
2. *Conversely, the same considerations may prove to give rise to uncertainty;* if prices were to follow an upward trend, the pressures to use the antitrust weapon might increase. The fact that the suits were brought by private parties rather than official agencies means that by definition their success was less likely.⁷⁰

⁶⁷ See Grossack, Irvin M. (1986), *op. cit.* For a contrary view see Joelson, Mark(1985), "Jurisdictional conflicts arising from extraterritorial enforcement. Part I: Anti-trust and competition laws: panel discussion", *Antitrust Law Journal*, Vol. 54(2), p.. 729. ("*The Executive never did make an appearance to state its views, despite the entreaties of the district judge that it do so ... So we are left with the dilemma that (a) the executive branch by all rights should be the entity that makes the determination of whether a private suit should be dismissed for foreign policy reasons, but (b) the Executive would be a very reluctant dragon in playing this role.*")

⁶⁸ Parker, Richard G. (2000), "Solutions to competitive problems in the oil industry", a statement prepared by the Federal Trade Commission before the Committee on the Judiciary, United States House of Representatives, 29 March 2000.

⁶⁹ Even though other current cases have been reported, for example *Melnitchenko v. OPEC*; see Fletcher, Heather (2002), *loc. cit.*.

⁷⁰ On the subject of the risk of failure of suits brought by private parties see the OECD analysis (2000a), "Remedies available to private parties under competition law", Joint Group on Trade and Competition [COM/DAFFE/CLP/td(2000)24/FINAL, 25 September 2000]

Moreover, mention should be made in particular of the reorientation in the priorities of the competition authorities as indicative of a change in the level of risk:

(a) In the United States, where a major effort to prosecute cartels has been under way for almost 10 years; during the last few years it has been intensified, and the number of investigating grand juries has been trebled, from 30 in 1997 to some 100 today⁷¹;

(b) In the European Union, more recently; the specialized anti-cartel unit set up in 1988 was reinforced by an additional unit in 2002.⁷²

These reinforcements have been reflected in progress reports announcing major results in the suppression of cartels – such as the cartels in vitamins and citric acid, among others – and increasingly heavy fines. Can OPEC, by virtue of its status, remain isolated from the pressures for its inclusion in the next imminent targets of the competition authorities? Already alternative approaches designed to circumvent that status by distinguishing between the members of OPEC, to which the principle of sovereignty applies, and the petroleum enterprises, to which the competition laws should apply.⁷³ This distinction is "validated" by the fact that in a number of OPEC countries privatization is affecting – or could affect - these companies. Would it then still be possible to invoke the links of these companies with the sovereign policy of OPEC to make them immune from anti-cartel prosecution? The issue in a WTO agreement on competition could thus prove ambivalent: will it remove the threat of application of national competition laws against OPEC, or will it instead, where that organization is recognized to be a hardcore cartel, strengthen the legitimacy of measures taken against it?

⁷¹ James, Charles (2002), "Antitrust enforcement oversight", Capitol Hill Hearing Testimony, September 2002. (*"The division now has 99 grand jury investigations open, 39 of which have international implications"*.)

⁷² European Commission, "XXXIst Report on Competition Policy 2001" [SEC(2002) 462/Final]. (*"We have shifted the focus of the other antitrust operational units of the Directorate-General for Competition towards the fight against cartels, both as regards the detection and as regards the prosecution and punishment of cartels."*)

⁷³ See for example the recent statement by Mario Monti, the EU competition commissioner, during European Competition Day, 17 October 2002. A similar view is expressed in European Communities, Economic and Social Council (2001), "Opinion on the XXXth REPORT ON Competition Policy 2000" [SEC(2001)694/Final], Brussels. (*"There is a need to tackle certain international cartels which govern the world economy, such as the hydrocarbons and methane cartels. The cartel policy of OPEC, but also that of the oil companies, is in clear opposition to the competition policy and demands to be addressed with the appropriate instruments and political determination. In a global economy economic measures directly conducted by States must also comply with the rules of economic correctness and respect competition policies."*) For an expression of principle of the position of the European Union on the use of the competition rules against OPEC, see Commission of the European Communities (2000), "EC competition policy and the motor fuel sector", 20 September 2000, MEMO/00/55.

PART III

A WTO AGREEMENT ON COMPETITION: WOULD IT TRANSFORM THE THREAT INTO A TRUMP CARD?

The preceding conclusions do not highlight the prior link necessary to reply to the question of the impact of a WTO agreement on competition (if one is concluded) on OPEC. There were two principal conclusions:

(a) Antitrust suits against OPEC have been rare, and in addition have not at any time implicated the official competition authorities;

(b) There has been a reorientation of priorities in the activities of the competition authorities in the direction of greater severity towards cartels.

Neither of these conclusions permits the deduction of the relationship sought. The time has come to establish that relationship.

1. LINKAGE BETWEEN A POSSIBLE WTO AGREEMENT ON COMPETITION AND ANTITRUST SUITS AGAINST OPEC

Reduced to the essentials, the question is very clear: why would suits which have not been brought when there is no WTO agreement be brought if there was one? In particular, why would States which do not sue OPEC under their own laws do so if there was a WTO agreement on competition? The question appears even more paradoxical if it recalled that in the version of the project currently being discussed at the level of the Working Group the agreement covers only private cartels; the agreement does not concern OPEC, which is a group of States. The response lies in the *antitrust dynamic* to which such an agreement would give rise, principally along the three lines described below.

A. The "lifting effect" of competition laws

As a preliminary remark, it should be noted that any general prohibition of cartels will in one way or another affect all cartels, since it will reduce *de facto* the margin of protection enjoyed by the categories not concerned (in this case cartels of States); these margins will be difficult to protect once a certain degree of implementation of the prohibition has been reached.

These margins are first of all spatial; once the agreement has been concluded all the member States of WTO will have to adopt a competition law including anti-cartel provisions; but this simple fact will certainly have dissuasive effects, all the more so as cooperation machinery to strengthen the anti-cartel net is foreseen.⁷⁴ Secondly, the margins under threat

⁷⁴ Clarke, Julian L. and Evenett, Simon J. (2002), "The deterrent effects of national anti-cartel laws: evidence from the international vitamins cartel", 28 November 2002. ("*Exports from countries where the cartel conspirators' headquarters were located to those nations in Asia, Western Europe and Latin America that did not have active cartel enforcement regimes tended to rise in value more than in those nations that had such regimes*").

are those provided by exemptions; an international regime to combat cartels would not be credible if it left exemptions with unchanged scope and conceded under unchanged concession criteria.

From both these standpoints experience with the implementation of the OECD recommendation on cartels reveals a substantial measure of "lifting effect" on the national competition laws of member States. An implementation report refers to "impressive" reforms and suits in pursuance of the recommendation and in particular the adoption of new and stricter competition laws; the tightening up of existing competition laws; the introduction of new investigation tools, including electronic monitoring; the more widespread adoption of a system of criminalization of penalties; and the abrogation of a number of exemptions provided for in earlier versions of competition laws. The OECD study also mentions a number of "first-time" cases of condemnations of cartels, of suits against international cartels, infliction of fines of record levels, etc. – in a word, a genuine shift into a higher gear in the struggle against cartels in the OECD countries.⁷⁵

B. Legitimization of a consensus in favour of a binding anti-cartel agreement

By comparison with the level of condemnation of cartels reached previously, in particular in the United Nations Set of principles and rules on competition,⁷⁶ the WTO agreement would introduce an additional element, namely the *binding character* of the campaign against cartels, which does not exist in the Set. The study suggests that a strong initial impulse to this end lies in the establishment of an anti-cartel consensus which would not exist without this agreement. It will be remembered in this connection that one of the considerations invoked by the United States judge in support of his decision in the IAM case was precisely the lack of such a consensus.⁷⁷ However, it may be observed that since then, in 1980, the United Nations General Assembly adopted a set of principles and rules establishing such a consensus, and that consequently there was little need for a consensus in the case of the WTO agreement. In fact, voices are sometimes raised – and not only in developing countries – questioning the desirability of additional work on the subject. The reply – as is known – is that the Set of principles and rules, like the OECD recommendation, is of a voluntary nature which does not permit enforcement of compliance with it.

On the other hand, the aim of a WTO agreement would be to become binding, and it would thus legitimize *a further advance on the consensus reached at the level of the Set of principles and rules, namely the establishment of binding rules which would be obligatory in the sphere of competition for signatory States.*⁷⁸ Significantly, and precisely on account of

⁷⁵ OECD (2000b), *Hard Core Cartels*: meeting of the OECD Council at ministerial level, Paris.

⁷⁶ UNCTAD (2000), *United Nations Set of Multilateral Agreed Principles and Rules for the Control of Restrictive Business Practices TD/RBP/CONF/10/Rev.2*. United Nations, Geneva. (The Set is also available on the UNCTAD website (www.unctad.org/competition)).

⁷⁷ Extract from Judge Choy's decision: *"While conspiracies in restraint of trade are clearly illegal under domestic law, the record reveals no international consensus condemning cartels, royalties, and production agreements. An injunction against OPEC's alleged price-fixing activity would require condemnation of a cartel system which the community of nations has so far been unwilling to denounce"*. Conversely, one of the arguments in the senatorial campaign against OPEC in the United States was based on the then existence of such a consensus.

⁷⁸ On the hypothesis that the Set of principles and rules would not have been signed by the United States if it had contained binding provisions see Wood, Diane P. (1995), "The internationalization of antitrust law; options for the future", an address to the DePaul Law Review Symposium, 3 February 1995.

that character, some provisions, which are controversial at WTO level, such as national treatment, were recently accepted with less difficulty within the International Competition Network (ICN).⁷⁹

C. Additional possibilities of anti-cartel lawsuits

In principle a WTO agreement is not designed to provide a remedy for a workers' association or a service-station operator – the parties at the origin of the only two antitrust suits brought in the United States. In actual fact it would be a tool available primarily – but not exclusively – to operators engaging in trade or production on the international plane. In this context, the WTO agreement would open up the possibility of bringing suit against a member State of OPEC, for example, for failure to adopt a competition law; for discriminatory provisions in the law; for lack of transparency in procedural guarantees or their inadequacy; etc. Generally speaking, all these situations are designed to preserve the space necessary for the implementation of industrial policies. In the absence of an agreement no such possibilities exist; they are thus *additional* in two ways: (i) in terms of jurisdiction and actors; and (ii) because of their availability both before the competition authority of the member country of OPEC (by the operator concerned) and before WTO (by the State to which the operator may refer the case).

In view of these risks, what could the WTO agreement provide?

II. EXEMPTION SEEN IN PERSPECTIVE

The idea that certain items of agricultural and mineral products had features which made a specific framework for trade in them necessary was advanced during the 1920s. The principal feature is the high volatility of the prices of these products in international markets; another feature common to all of them is that they provide the major part of the revenues of the least developed countries. Consequently an international agreement on competition could not fail to take account of these characteristics.⁸⁰ However, the problem is that of how to take account of them. Clearly the responses are highly *contextual*.

A. Historical antecedents

1. THE HAVANA CHARTER (1948)

The Havana Charter is the reference document for the establishment of an international trade organization shortly after the Second World War. The preparatory work on this Charter reveals a context marked by two emphatic tendencies:

⁷⁹ See the record of proceedings of the first ICN conference, held in Naples (Italy) in 2002 (available on the ICN website).

⁸⁰ Scherer, Frederic M. (1996), "International competition policy and economic development", Harvard University. (*"It is reasonable to believe that the leading oil exporting nations would refuse to ratify a competition policy accord if they were deprived of the ability to participate in OPEC, however poorly adhered to OPEC's price and quota agreements have been in recent years. Similar opt-out decisions could be expected from Malaysia if it could not participate in a tin cartel, Jamaica to maintain bauxite cartel possibilities, Brazil to preserve coffee cartel arrangements, Ghana to obtain a cocoa-bean cartel, Russia and South Africa to cooperate with the De Beers syndicate, and perhaps even Canada to maintain the possibility of uranium and potash cartels."*)

(a) The recognition of the inadequacy of market mechanisms alone to regulate basic commodities and observation of the rigidity of supply and demand in the markets for those commodities calling for the establishment of *specific agreements* to overcome the difficulties experienced during the inter-war period on account of over-production and price variations; and

(b) The fear⁸¹ that such recognition might prove the vector of a large-scale return of the producer cartels which would not guarantee the preservation of the interests of the consumer countries.

These two considerations are reflected in Article 62 of the Havana Charter, which defines the necessary conditions for a claim for exemption under intergovernmental supervisory agreements designed to stabilize the prices of basic commodities. Such agreements could be concluded only after recognition by the International Trade Organization that the situation was such that: (i) producers would suffer prejudice; (ii) there would be consequences for employment; and (iii) those consequences could not be corrected by the normal play of market forces "in the absence of specific governmental action".⁸²

Moreover, one essential characteristic of these commodity agreements is that they associate producers *and* consumers; this excludes agreements involving only producers.⁸³ An exemption along the lines of the Havana Charter model would thus require for OPEC an exemption within the exemption.⁸⁴

2. THE UNITED NATIONS SET OF RULES AND PRINCIPLES ON COMPETITION (1980)

In many respects the United Nations Set represents the climax – and the final stage – in the formulation of the philosophy of a new international economic order conceived by developing countries in the wake of the decolonization movements and the emergence of what was then termed the "Third World". In a sense it legitimizes a collective move by the

⁸¹ Especially in the United States; this is easily understandable, since that country was practically the only one to possess anti-cartel disciplines applied to a significant degree.

⁸² Article 62 of the Havana Charter: "(a) a burdensome surplus...has developed or is expected to develop, which... would cause serious prejudice to producers among whom are small producers who account for a substantial proportion of the total market, and that these conditions could not be corrected by normal market forces in time to prevent such hardship, because, characteristically in the case of the primary product concerned, a substantial reduction in prices does not readily lead to a significant increases in consumption or to a significant decrease in production; or (b) widespread unemployment or under-employment ... arising out of difficulties ...has developed or is expected to develop, which, in the absence of specific governmental action, would not be corrected by normal market forces in time to prevent widespread and undue hardship to workers..."

⁸³ Joelson, Mark R. and Griffin, Joseph P. (1975), "The legal status of nation-state cartels under United States antitrust and public international law", *International Lawyer*, Vol. 9(4), pp. 617-645. (*"It should be noted that there is no intergovernmental commodity agreement for oil as there is for other commodities, and that traditional commodity agreements, i.e., multilateral agreements that provide for special arrangements beyond normal market mechanisms, can be distinguished from producer cartels. In the former, producer and consumer governments agree – often on the basis of political rather than business considerations –to manage the supply and price of a particular commodity for their mutual advantage. On the other hand, a producer cartel is an agreement among members of one side of the producer-consumer population to fix prices or control production for its own advantage regardless of the effect on consumers."*)

⁸⁴ On this subject see article 7 of the statutes of OPEC, which makes membership subject to two conditions: to be a net exporter of crude petroleum, and to have fundamentally similar interests to those of the other member countries (Annex 4).

governments of the developing countries faced with multinational companies. From the competition policy standpoint this is somewhat ambiguous, according to whether the practices to be prohibited are those having a negative impact on competition or those having a negative impact on economic development.

The outcome was an article 9 which granted a general exemption to intergovernmental agreements on basic commodities and the restrictive commercial practices directly caused by those agreements. However, this "concession" to the New International Economic Order would probably not have been adopted if the Set of principles and rules was to be binding.⁸⁵ It is significant that article 9 of the Set was not referred to either by the United States judges or by specialists such as Waller, or even in the OPEC submission in the Prewitt case.

Could it be imagined that a provision modelled on article 9 might nevertheless be included in a WTO agreement on competition?

3. THE OECD RECOMMENDATION (1998)

This recommendation appears to offer a reference outline for a WTO agreement on competition; it contains basic definitions of: (i) the target ("hard core cartels", (ii) the system of implementation (voluntary cooperation) and (iii) the mechanisms for exemption (granted on grounds of efficiency or authorized by national competition laws).

Underlying this model is an inspiration which could be useful in a WTO agreement, namely the promotion of mechanisms for cooperation between member States in order to avoid conflicts in the implementation of their national competition laws.

However, a number of difficulties could arise;

(a) Not so much in the actual content of the notion of a hard core cartel (price fixing, collusive tenders, restrictions or quotas on production and allocation of markets):

(b) As in the rule for decision-making (per se or rule-of-reason) and above all in the level at which implementation is to take place; in the OECD recommendation it is referred to the level of national competition laws.

Thus, supposing that a WTO agreement on competition, if adopted, contained provision for machinery similar to that contained in the OECD recommendation, what would be the situation of the OPEC countries which are members of WTO? Each member country could incorporate (or not incorporate) into its own legislation the text which would exclude agreements in the petroleum sector from the scope of prohibition. But will that suffice? What, then, would happen if two countries disagreed on the designation of a practice? Normally the provisions of the agreement concerning consultations (compulsory) and cooperation (voluntary) would become applicable. But when these courses of action are exhausted there would be a return to the starting-point, namely a divergence of interests indicating that there is

⁸⁵ Wood, Diane P. (1995), *loc. cit.*, (see note 78). ("That code was negotiated under the auspices of the U.N. Conference on Trade and Development, or UNCTAD, and it therefore is oriented towards the interests of the developing countries. Importantly, it is nonbinding, and was understood throughout the negotiating process as a nonbinding document. It would therefore be a serious mistake to think that it represents the kind of language to which the United States would be willing to adhere if, at the stroke of a pen, it were to be made binding.")

no agreement.⁸⁶ In other words, the central mechanism in the operative part of the agreement – designed to permit a more effective campaign against hard core cartels through the introduction and implementation of "common protocols in the field of analysis of operations"⁸⁷ – would be liable to prove ineffective in the event of a divergence of interests. The mechanism for derogations, exemptions and authorizations must therefore of necessity *be spelt out in the agreement*.

B. A variant within WTO?

1. PRELIMINARY DRAFTS PRODUCED WITHIN THE WORKING GROUP

As mentioned early in this study, within WTO the Working Group on the Interaction of Trade and Competition Policy has always been careful to make it clear that its field of investigation covered only the conduct of private enterprises with particular emphasis on international private cartels. At no time was the idea advanced that the competition rules it was studying might concern OPEC. However, a question to that effect was raised by UNCTAD, and replies of principle were given relating, in an indicative manner, to:

- (a) The pattern of intergovernmental commodity agreements;
- (b) The rule, in customary use within the GATT/WTO system, that the conduct of States complies with trade policy;
- (c) The Act of State Doctrine on the United States model (Annex 3, section II).

Clearly these responses are outlines, the limitations of which have been demonstrated by the study. Consequently what is proposed here is an outline of the parameters which might influence the negotiation of an exemption for OPEC within the framework of a possible WTO agreement on competition. This outline derives from a hypothesis based on the contents of exemptions already present in GATT/WTO agreements. These provisions are recalled here before their context is developed.

2. THE RELEVANT PROVISIONS

The idea is to introduce the general exemptions admitted by WTO in trade policy into the agreement on competition. The effectiveness of these exemptions will have been sufficiently dissuasive in the field of trade to permit the hope that they will be equally so in the field of competition. In particular one should keep in mind the provisions exempting from the disciplines of competition measures relating to: (i) security measures (art. XXI), (ii) an intergovernmental commodity agreement (art. XXII-h), and (iii) the conservation of finite natural resources (art. XX-g).

These exemptions offer the advantage of emanating from a classical pattern and thus maintaining the coherence of the WTO system. However, there are restrictive conditions attached to them which might give rise to problems if they had to be renegotiated within the

⁸⁶ It should be noted that even if a mechanism of the positive courtesy type exists, the difficulties arising from the divergence of interests would not be removed.

⁸⁷ Quoted in D'Erceville, Béatrice (2002), "Frédéric Jenny – arbitre international", *La Tribune*, 23 May 2002.

framework of an agreement on competition, mainly on account of the new context in which the renegotiation would take place.

3. THE CONTEXT

The context of the negotiations to come is indeed likely to be highly contentious with:

(a) The aspects deriving from the phenomena of globalization, deregulation and privatization which will raise the question of whether the intergovernmental agreements are adapted to the present time; and

(b) Recent developments in the international petroleum sphere which suggest a need for concertation between producers and consumers, i.e., something resembling intergovernmental agreements.

An intergovernmental price stabilization agreement in times of globalization: an anachronism? ...

The notion that prices can form the subject of "stabilization" measures has always been disputed on grounds of the cost, in terms of benefit to the collectivity, to which that distortion of prices gives rise. As early as the end of the 1980s it was thought that the death-knell had been sounded for the mindset which had led to the establishment of commodity price stabilization agreements.⁸⁸ Ten years later the promoters of the stabilization agreements themselves were forced to ask themselves, at the margin of the tenth session, held in Bangkok, of the Trade and Development Conference, whether the stabilization agreements had not fallen into disuse in the context of globalization and the withdrawal of States from the regulatory sphere.⁸⁹ The Atomic Energy Agency (IEA) has advanced these arguments in support of its view that functioning pattern of the OPEC cartel type is in contradiction with those of the importing countries, which are engaged in a process of opening all their energy markets to competition.⁹⁰ Moreover, in the case of OPEC the arguments relating to globalization, deregulation and privatization might prove difficult to reconcile with a level of

⁸⁸ Behrmann, Neil (1987), "Market forces and discord stymie cartels", *The Wall Street Journal*, 1 June 1987; ("*Commodity agreements are an endangered species. Such accords were fashionable in the 1970s ... but policymakers today believe in free markets and privatization. The spirit behind the international planning of 10 years ago is dead ...*").

⁸⁹ Baron, Peter (2000), "The role of the international commodity agreements in a changing political and economic environment", a paper presented to the UNCTAD symposium on "Commodities and Development at the Turn of the Millennium", Bangkok, 13 February, ("*...privatization, globalization and liberalization ... what impact does this have on international commodity agreements? Are they fossils of the "good old days" or do they have a future? ... In all probability international commodity agreements with economic clauses designed to curb extreme price volatility are not on the political agenda anymore. Over the past ten years a continuing trend became very clear: privatization and globalization are leading increasingly to a gradual or total withdrawal of governments from formulating and administrating national commodity policies ... modern commodity agreement of the new generation which is flexible and perfectly suited to the requirements of its members in the year 2000 and beyond*").

⁹⁰ Priddle, Robert (2002), "Keynote Speech", Institute of Energy Economics, Japan, November 2002. ("*But those countries of the IEA are for example busy opening their internal gas and electricity markets to competition in the confident belief that competition will achieve greater economic efficiency in the supply of energy services. In their own economies they prohibit collusive arrangements by the producers of any commodity in order to determine prices or collectively manage production. They impose heavy fines on violators.*")

taxation on derived products amounting to as much as 80% of their prices. In any case, these arguments do not obviate the need to stabilize prices.

...Although at the same time, as recent events have shown, there is a recurrent need for a mechanism resembling a price stabilization agreement ?

(a) First of all, through the fluctuation-within-a-band measures introduced by OPEC to keep fluctuations within the US\$ 24-28 range;

(b) Secondly, through recognition that excessively low prices could also be harmful to the interests of the importing countries⁹¹;

(c) Finally, through the commitment by the United States to accept a floor price for oil and the mobilization of their stocks to keep the price below a certain ceiling.⁹²

... with the consequence that, if there is an exemption, it is likely to be made subject to highly restrictive criteria:

(a) The principles of limited duration, suspension and periodic review;

(b) A competitive balance-sheet to be established during reviews of exemptions on a basis of the criteria of economic efficiency and consumer welfare;

(c) The subjection of the exemption to a process of public hearings in which the interested parties and the affected parties would participate;

(d) Preference to be given to the exemptions which impose the least possible restrictions on competition; and lastly,

(e) The generic nature of exemptions with regard to the branch concerned.⁹³

These trends, as seen at the level of national competition laws, would be applied in a similar manner at international level and would impose on OPEC the necessity of complying with at least one requirement, namely that of demonstrating that the advantages of a cartel outweigh the disadvantages ("cartel necessity test").⁹⁴

⁹¹ Ibid. (*"There was no doubt that the net recent experience of 1998-2000 had been uncomfortable to both sides, to say the least ; so uncomfortable as to generate a good deal of readiness to consider each situation from the point of view of the other party, and to understand the damage done to the other side when one got to far to the extreme."*)

⁹² In fact, certain analysts have even think that they have observed a lasting rapprochement between the United States and OPEC. See Rutledge, Ian (2003), "Profitability and supply price in the US domestic oil industry; implications for the political economy of oil in the twenty-first century", *Cambridge Journal of Economics*, Vol. 27(1), pp. 1-23 (*"... the consensus between the US and OPEC as to the desired range within which the world oil price should move is likely to survive any temporary political disturbance."*)

⁹³ UNCTAD (2002), *Application of Competition Law: Exemptions and Exceptions*, a paper prepared by R. Shyam Khemani at the request of UNCTAD *UNCTAD/DITC/CLP/Misc. 25, p. 36., United Nations, New York and Geneva. The conclusion of the author is: "With such principles, the number, nature and scope of the exemptions and exceptions will tend to be more limited, and the procedures more accountable and transparent. There will also tend to be greater policy and economic coherence."

⁹⁴ UNCTAD (2003), *Can developing countries benefit from WTO negotiations on binding disciplines for hard core cartels ?*, a paper prepared by Simon J. Evenett at the request of UNCTAD (UNCTAD/DITC/CLP2002/3, United Nations, New York and Geneva.

... *Would producer-consumer cooperation be an alternative?*

Since the subjection of prices to market forces is rejected by the producer countries and price-fixing by the State is rejected by the consumer countries – although both recognize the need for "stable prices" – the time has possibly come for a return to the proposals for a formal dialogue between the two protagonists.

In fact, ideas of this kind were put forward, particularly by France, immediately after the 1973 price rise. Instead, the context of the time trended towards the establishment in 1974, under the influence of the United States, of the International Energy Agency (IEA) to counterbalance OPEC.

The holding in 1991 of the first International Energy Forum bears witness to the interest in this approach; the Forum has now held its eighth session, which took place in Japan in 2002; it was attended by 65 countries, accounting for 95% of world trade in oil.⁹⁵

Although the possibility of establishing a permanent secretariat based in Riyadh was raised, it is doubtful whether the Forum could in the near future reach the point where it could take specific action to stabilize international markets by a resolution to ensure implementation. However, that Forum did confirm that an attempt was being made at world-wide management of energy by a process yet to be determined.⁹⁶

Evaluation of Part III and conclusion

Having accepted that there exists a risk that OPEC will have anti-cartel suits brought against it following a WTO agreement on competition, a number of different forms of exemption have been proposed, each one set in a context which gives it a specific rationality. One central conclusion of this study is that these exemptions, set in their respective contexts, marked the legitimacy of anti-competitive *deviations*; whereas the forthcoming meeting in Cancun, if it were to ratify an agreement on competition, would confirm the legitimacy of the competitive *norm*, even if the content of that norm is referred to national legislation.

Can OPEC, some of whose members have (still) not adopted the competition rules or acceded to WTO, remain apart from this movement?⁹⁷ Even if it did, the threat of antitrust suits brought by national competition authorities, either under the doctrine of effect or under the new multilateral standard on competition, could not be discounted.

In any case, if negotiations on competition are begun in Cancun, the member countries of OPEC have a considerable interest in ensuring that any agreement reached contains a clause clearly stating that the agreement does not apply to intergovernmental agreements or to anti-competitive practices directly arising out of those practices, without prejudice to the inclusion in the agreement of the relevant general exemptions existing in the multilateral trading system, and particularly those relating to security matters and the conservation of finite natural resources.

⁹⁵ Fujime, Kazuya (2002), *Significance of the 8th international energy forum (producer-consumer dialogue)*, Quick Report, The Institute of Energy Economics, Japan.

⁹⁶ Including apparently a move towards a stabilization agreement; Fujime, Kazuya, *ibid.* ("*The IEF ... even enshrines a possibility to yield an international commodity agreement.*")

⁹⁷ In itself this constitutes a problem. WTO decisions are not the outcome of consultations between well-disposed parties, but the result of a process of bargaining between coalitions exchanging concessions. The fact that a number of OPEC countries are not members of WTO makes it more difficult to create a coalition of a nature to carry weight in negotiations within the organization. See UNCTAD (2000), *Trade agreements, petroleum and energy policies* (UNCTAD/ITCD/TSB/9), United Nations, New York and Geneva.

ANNEXES

Annex 1

Paragraphs 23-25 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1)

(Adopted on 14 November 2001)

23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

Annex 2

Recommendation of the OECD Council concerning Effective Action against Hard Core Cartels (C(98)35/FINAL)

(adopted on 25 March 1998)

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to previous Council Recommendations' recognition that "effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports" [C(86)65(Final)]; and that "anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries" [C(95)130/FINAL];

Having regard to the Council Recommendation that exemptions from competition laws should be no broader than necessary [C(79)155(Final)] and to the agreement in the Communiqué of the May 1997 meeting of the Council at Ministerial level to "work towards eliminating gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways" [C/MIN(97)10];

Having regard to the Council's long-standing position that closer co-operation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international trade, and its recommendation that when permitted by their laws and interests, Member countries should co-ordinate investigations of mutual concern and should comply with each other's requests to share information from their files and to obtain and share information obtained from third parties [C(95)130/FINAL];

Recognising that benefits have resulted from the ability of competition authorities of some Member countries to share confidential investigatory information with a foreign competition authority in cases of mutual interest, pursuant to multilateral and bilateral treaties and agreements, and considering that most competition authorities are currently not authorised to share investigatory information with foreign competition authorities;

Recognising also that co-operation through the sharing of confidential information presupposes satisfactory protection against improper disclosure or use of shared information and may require resolution of other issues, including potential difficulties relating to differences in the territorial scope of competition law and in the nature of sanctions for competition law violations;

Considering that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others; and

Considering that effective action against hard core cartels is particularly important from an international perspective -- because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive -- and particularly dependent upon co-operation -- because they generally operate in secret, and relevant evidence may be located in many different countries;

I. RECOMMENDS as follows to Governments of Member countries:

A. CONVERGENCE AND EFFECTIVENESS OF LAWS PROHIBITING HARD CORE CARTELS

1. Member countries should ensure that their competition laws effectively halt and deter hard core cartels. In particular, their laws should provide for:

(a) Effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and

(b) Enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:

(a) A “hard core cartel” is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce ;

(b) The hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

B. INTERNATIONAL CO-OPERATION AND COMITY IN ENFORCING LAWS PROHIBITING HARD CORE CARTELS

1. Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries’ important interests.

2. Co-operation between or among Member countries in dealing with hard core cartels should take into account the following principles:

(a) The common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country’s laws, regulations, and important interests;

(b) To the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries’ mutual interest in preventing hard core cartels warrants co- operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;

(c) A Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question ;

(d) Member countries should agree to engage in consultations over issues relating to cooperation. In order to establish a framework for their co-operation in dealing with hard core cartels, Member countries are encouraged to consider entering into bilateral or multilateral agreements or other instruments consistent with these principles.

3. Member countries are encouraged to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

4. The co-operation contemplated by this Recommendation is without prejudice to any other cooperation that may occur in accordance with prior Recommendations of the Council, pursuant to any applicable bilateral or multilateral agreements to which Member countries may be parties, or otherwise.

II. INSTRUCTS the Competition Law and Policy Committee:

1. To maintain a record of such exclusions and authorisations as are notified to the Organisation pursuant to Paragraph I. A 2b);

2. To serve, at the request of the Member countries involved, as a forum for consultations on the application of the Recommendation; and

3. To review Member countries' experience in implementing this Recommendation and report to the Council within two years on any further action needed to improve co-operation in the enforcement of competition law prohibitions of hard core cartels.

III. INVITES non-Member countries to associate themselves with this Recommendation and to implement it.

Annex 3

Recommendation of the UNCTAD Working group on the Interaction between Trade and Competition Policy

I. Communication from UNCTAD (*Extract*)

The following is the final text of a paper received from UNCTAD which was circulated as an advance copy for the Working Group's meeting of 1-2 July 2002.

CLOSER MULTILATERAL COOPERATION ON COMPETITION POLICY: THE DEVELOPMENT DIMENSION

*Consolidated Report on issues discussed during the Panama, Tunis, Hong Kong
and Odessa Regional Post-Doha Seminars on Competition Policy
held between 21 March and 26 April 2002*

"56. In principle, so far, the prohibition against cartels has been on agreements among firms to fix prices and eliminate competition. This prohibition does not exist with respect to price undertakings made by sovereign states (Sovereign Acts of State) with respect to a basic commodity such as oil, for example. Hence, as indicated in the United Nations Set of Principle and Rules on Competition (Article 9, Section B), "intergovernmental agreements, (or) restrictive business practices directly caused by such agreements", such as OPEC would be exempted. This question should still be clarified and a specific exemption for developing countries reaffirmed in case of negotiation of a MCF."

II. Report on the meeting of 1-2 July 2002

(WT/WGTCP/M/18, 20 September 2002)

(Extract)

"33. ... The representative of India said [concerning the OECD Recommendation]... The focus here was on enterprise practices, and not on governmental measures having an impact on trade which were already covered under existing WTO Agreements."

"41. The representative of the United States noted ... concerns regarding the implications of a WTO commitment with respect to hard core cartels for the ability of developing countries to promote their domestic industries. In the United States, this issue had been dealt with, in part, through the doctrine of state action. Under this doctrine, each State was free to enact legislation that would authorize activity that would otherwise be prohibited by the antitrust laws. The doctrine required that the conduct in question be the subject of a clearly articulated state policy adopted by the legislature, and that there be active supervision of the conduct by the State. Something of this nature might be considered in the context of discussions on a possible prohibition on hard core cartels in the framework of the WTO."

"42. ... The representative of the European Community said...Another point which was worth further clarification concerned the question of intergovernmental activities, and the question of whether these were subject to competition laws or not. On this point, his delegation did not have particular concerns, and in any event agreed with India that there were many other provisions in the WTO rulebook that disciplined governmental activity."

"46. The observer from UNCTAD... noted that many developing countries had price-stabilization mechanisms or agreements relating to commodities and/or energy (i.e., oil). In this regard, concerns sometimes arose about the status of such agreements under a possible WTO agreement on competition policy. In fact, he had been asked this question several times in various seminars and had given the reply that intergovernmental or state-to-state arrangements would not likely be covered by a WTO agreement on competition policy, which would be aimed at anti-competitive practices of enterprises. In support of this, he drew attention to the fact that in the UN Set there was a specific provision (Paragraph B.9) which made it clear that the Set did not apply to intergovernmental agreements nor to restrictive business practices directly resulting from such agreements. This clause ensured that intergovernmental agreements were not covered by the Set."

**III. Report (2002) of the Working Group on the Interaction
between Trade and Competition Policy to the General Council**

(WT/WGTCP/6, 9 December 2002)

(Extract)

"57. A related issue involved export cartels, and ways of dealing with cartels that might not be formally exempted, but that were either not covered by a country's cartel laws, or were sanctioned by a government. In particular, the question was posed as to whether export cartels could be justified by efficiency considerations? In response, the point was made that export cartels, despite their pejorative name, included a variety of possible arrangements the competitive effects of which were uncertain. For example, the origin of export cartels in the United States had simply been to facilitate the ability of firms that might not otherwise have had the ability to engage in export activity to do so. In these cases, such arrangements clearly had pro-competitive effects. Care was therefore required in discussing arrangements characterized as export cartels which did not, in fact, necessarily have the same effects as hard core cartels.

"58. The view was expressed that intergovernmental or state-to-state arrangements would not likely be covered by a WTO agreement on competition policy, which would be aimed at anti-competitive practices of enterprises. In support of this, it was worth noting that, in the UN Set, there was a specific provision (Paragraph B.9) which made it clear that the Set did not apply to intergovernmental agreements nor to restrictive business practices directly resulting from such agreements.

Annex 4

Extract from the Statutes of OPEC

CHAPTER I

Organization and Objectives

Article 1

The Organization of the Petroleum Exporting Countries (OPEC), hereinafter referred to as «the Organization», created as a permanent intergovernmental organization in conformity with the Resolutions of the Conference of the Representatives of the Governments of Iran, Iraq, Kuwait, Saudi Arabia and Venezuela, held in Baghdad from September 10 to 14, 1960, shall carry out its functions in accordance with the provisions set forth hereunder.

Article 2

A. The principal aim of the Organization shall be the co-ordination and unification of the petroleum policies of Member Countries and the determination of the best means for safeguarding their interests, individually and collectively.

B. The Organization shall devise ways and means of ensuring the stabilization of prices in international oil markets with a view to eliminating harmful and unnecessary fluctuations.

C. 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.

Article 3

The Organization shall be guided by the principle of the sovereign equality of its Member Countries. Member Countries shall fulfil, in good faith, the obligations assumed by them in accordance with this Statute.

Article 4

If, as a result of the application of any decision of the Organization, sanctions are employed, directly or indirectly, by any interested company or companies against one or more Member Countries, no other Member shall accept any offer of a beneficial treatment, whether in the form of an increase in oil exports or in an improvement in prices, which may be made to it by such interested company or companies with the intention of discouraging the application of the decision of the Organization.

CHAPTER II

Membership

Article 7

A. Founder Members of the Organization are those countries which were represented at the First Conference, held in Baghdad, and which signed the original agreement of the establishment of the Organization.

B. Full Members shall be the Founder Members as well as those countries whose application for membership has been accepted by the Conference.

C. Any other country with a substantial net export of crude petroleum, which has fundamentally similar interests to those of Member Countries, may become a Full Member of the Organization, if accepted by a majority of three-fourths of Full Members, including the concurrent vote of all Founder Members.

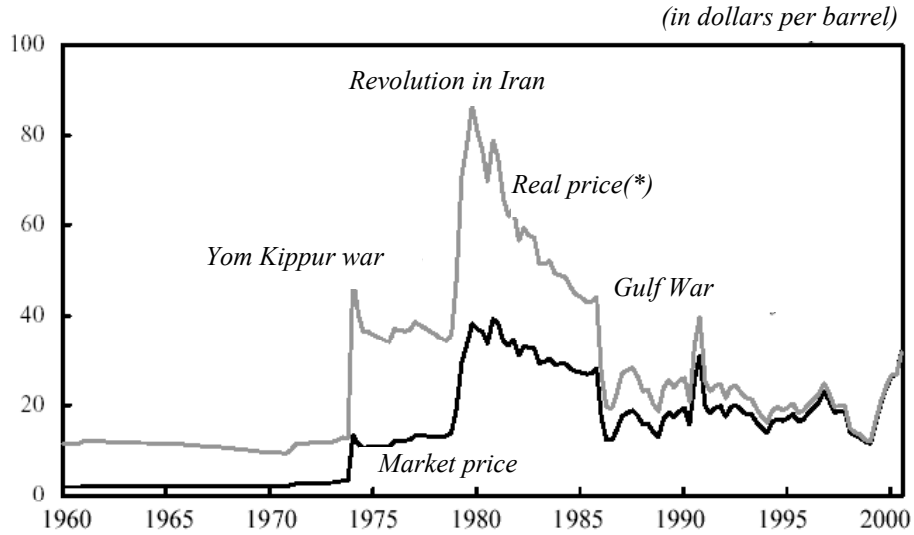
D. A net petroleum-exporting country, which does not qualify for membership under paragraph C above, may nevertheless be admitted as an Associate Member by the Conference under such special conditions as may be prescribed by the Conference, if accepted by a majority of three-fourths, including the concurrent vote of all Founder Members.

No country may be admitted to Associate Membership which does not fundamentally have interests and aims similar to those of Member Countries.

Annex 5

Movements in the price of a the barrel of oil

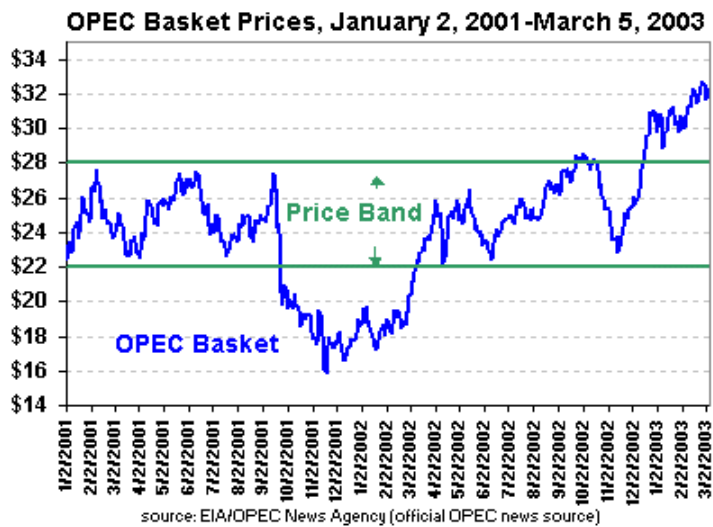
A. Period 1960-2002



Note: (*) Market price deflated by the United States consumer price index (base 2000).
Sources: IMF and calculations by the Forecasting Division.

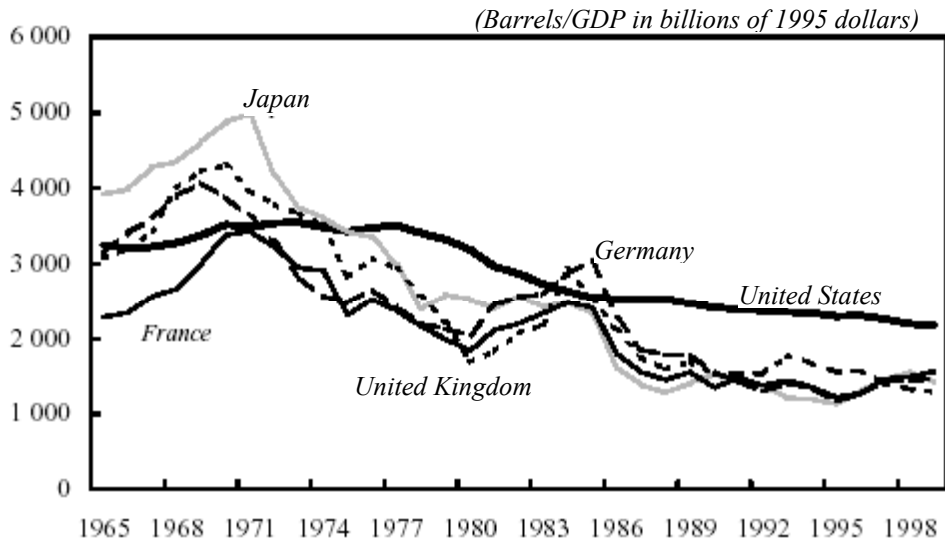
French Economic Analysis Council, *prix du pétrole*, La documentation française, Paris.

B. Band of price fluctuations since 2001



Annex 6

Dependence of real GDP on oil

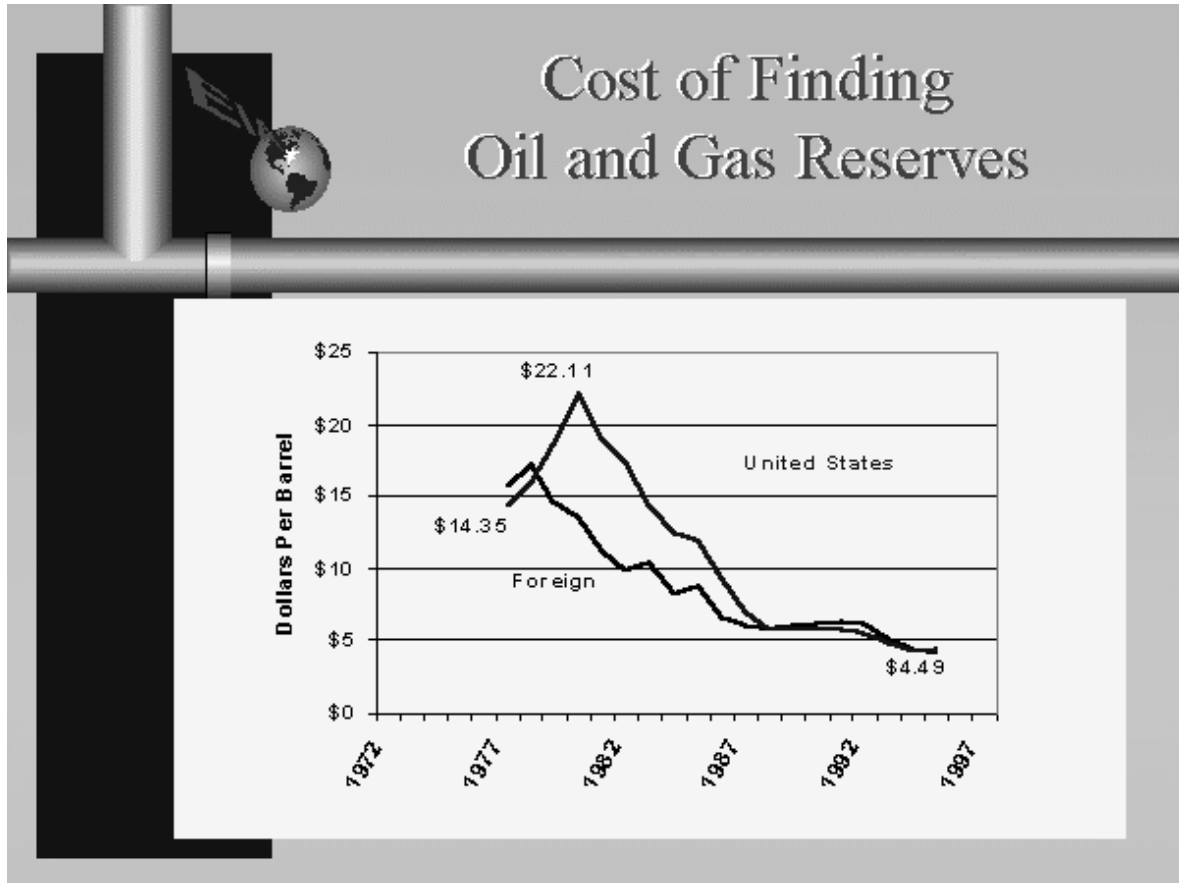


Sources: BP, national accounts and calculations by the Forecasting Division.

French Economic Analysis Council, *prix du pétrole*, La documentation française, Paris.

Annex 7

Cost of finding oil reserves



Source: Form EIA-28, «Financial Reporting System». Note(s): Costs are calculated as the ratio of total exploration and development expenditures to total oil and gas reserve additions (barrels of oil equivalent), for the major energy producers reporting to the Energy Information Administration. All costs are expressed in 1996 dollars, excluding the purchases and sales of reserves, and are 3-year weighted averages centring on the year shown (EIA website).

Annex 8

Comparison of international cartels in natural resources

Commodity	Quota	Minimum price	Buffer stock	Action to defend prices	Voting is based on shares	Punishment mechanism	Auditing system	Minimum market share (%)	Maximum market share (%)	Price increase
Diamond	Yes	Yes	Yes	Yes	Yes	Yes	Yes	78.0	90.0	10 Fold
Coffee	Yes	Yes	Yes	Yes	Yes	Yes	Yes	90.0	95.0	6 Fold
Bauxite	Yes	Yes	Yes	Yes	Yes	Yes	Yes	73.0	81.0	2 Fold
Tin	Yes	Yes	Yes	Yes	Yes	Yes	Yes	72.0	86.0	2.5 Fold
Rubber	Yes	Yes	Yes	Yes	Yes	Yes	Yes	80.0	80.0	5 Fold
OPEC	No	No	No	No	No	No	No	31.0	56.0	4 Fold

*OPEC did not have a quota system until 1983 while all other cartels have had a quota system since their establishment. OPEC's voting system is the same for all countries regardless of reserves, production or exports. In all other cartels, the vote is based on the amount of production or exports. OPEC established the Ministerial Monitoring committee in the late 1980s.

Source: Alhajji, A.F. et Huettner, D. (2000), «OPEC and other commodity cartels: a comparison», *Energy Policy*, 28(15):1151-1164.

Annex 9

Measurement of "indiscipline" in the ranks of OPEC

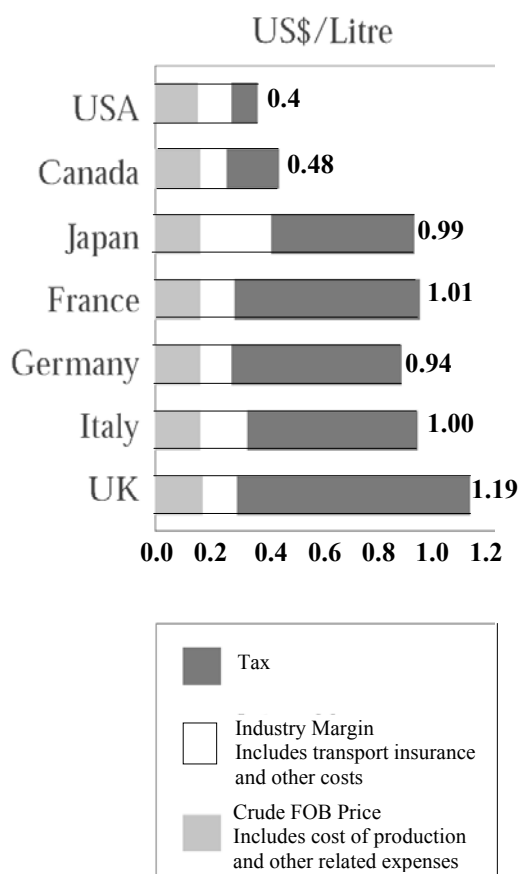
Country	Oil production (000 barrels/day)								
	1993			1994			1995		
	Secondary source	Cmc	Diff	Secondary source	Cmc	Diff	Secondary source	Cmc	Diff
Algeria	751.4	745.0	6.4	746.3	751.4	-5.1	767.0	752.0	15.0
Gabon	296.6	289.6	7.0	327.0	296.9	30.1	346.0	302.0	44.0
Indonesia	1326.7	1327.3	-0.6	1327.8	1332.8	-5.0	1348.0	1328.0	20.0
Iran	3647.8	3425.2	222.6	3594.7	3595.2	-0.5	3602.0	3595.0	7.0
Iraq	495.5	659.5	-164.0	569.9	748.7	-178.8	588.0	737.0	-149.0
Kuwait	1852.7	1880.8	-28.1	2010.7	2006.6	4.1	2034.0	2007.0	27.0
Libya	1374.6	1361.0	13.6	1381.8	1389.8	-8.0	3093.0	1399.0	1694.0
Nigeria	1907.5	1878.7	28.8	1874.4	1820.9	53.5	1884.0	1843.0	41.0
Qatar	416.4	390.3	26.1	403.8	378.7	25.1	436.0	390.0	46.0
Saudi Arabia	8431.7	8047.8	383.9	8044.2	8049.0	-4.8	8061.0	8023.0	38.0
UAE	2491.7	2159.3	332.4	2183.8	2166.5	17.3	2194.0	2149.0	45.0
Venezuela	2323.6	2305.7	17.9	2459.5	2368.0	91.5	2641.0	2378.0	263.0
OPEC	24716.2	24470.0	246.2	24923.6	24904.5	19.1	25293.0	24903.0	390.0

Source: OPEC Annual Report 1994 and 1995. Secondary source, oil production according to secondary sources; Cmc, oil production as communicated by member countries; Diff, the potential amount of over production equals the difference between secondary source and Cmc.

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Annex 10

Who gains what from a litre of petrol (gasoline) in the G7?



Notes:

1. Figures are estimated prices in US dollars per litre for the year 2000.
2. Unleaded premium (95 RON) gasoline for France, Germany, Italy, UK; regular unleaded gasoline for Canada, Japan and USA.

Source: Research Division, OPEC, Vienna, Austria, 2001

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