

**INTERNATIONAL LAWMAKING: EXPORT RESTRICTIONS
ON MINERAL RAW MATERIALS**

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ABSTRACT

INTERNATIONAL LAWMAKING: EXPORT RESTRICTIONS ON MINERAL RAW MATERIALS

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This thesis takes a global approach to analyzing, discussing, and critiquing the effectiveness of international trade law regulating export restrictions, with an emphasis on trade in mineral raw materials. First, it offers a historical and empirical analysis of export restrictions on raw materials. Second, it is based on a legal analysis of the texts, effects, and judicial interpretation of the WTO regulations on export restrictions and on the procedural context in which regional trade agreements are framed. Third, the thesis analyzes the effectiveness of ongoing reforms and proposals tabled both within and outside the WTO. Based on this research, certain constituent elements and alternative implementing options are proposed for creating a robust WTO discipline on export restrictions.

Using a multi-method approach, this thesis contributes to the literature by shifting analysis from the existing rules to the more advanced problem of creating comprehensive trade regulation.

BIOGRAPHICAL SKETCH

Mr. Bayar Purevdorj earned his LL.B in 2004 from National University of Mongolia. Since his graduation, he has had both academic and practical experience, including serving as the Chief of the Human Rights Division of the Ministry of Foreign Affairs of Mongolia, as Second secretary at the Permanent Mission to the United Nations Office at Geneva (UNOG) and WTO in Geneva, Switzerland, and as Third secretary, attaché in the legal department of the Ministry of Foreign Affairs of Mongolia. He also worked as a research fellow at the Ministry of Justice and as a visiting researcher at the Max Planck Institute for Comparative and International Public Law, in Heidelberg, Germany, and at the Korean Legislation Research Institute.

He joined the J.S.D. Program in 2016 immediately after obtaining his LL.M. degree from the Cornell Law School. During his program, he served as a reviewer for the Cornell Graduate Legal Conferences and was an article editor for the *Cornell International Law Journal* for two terms. He has published numerous articles on international law, trade and investment law, human rights, and corporate law and has a good command of the Mongolian, English, Russian, and German languages. He is married and has three children.

**THIS DISSERTATION IS DEDICATED TO MY FAMILY, ESPECIALLY MY WIFE,
ENKHMAA, AND MY DAUGHTER BUBI, AND MY SONS, UJI AND BAMBI.**

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TABLE OF ACRONYMS

CU	Customs Union
EC	European Community
EPA	Economic Partnership Agreement
EU	European Union (including its predecessors)
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
G20	Group of Twenty
IMF	International Monetary Fund
IRP	International Resources Panel
LDC	Least Developed Country
MFN	Most Favored Nation
OECD	Organization of Economic Cooperation and Development
PTA	Preferential Trade Agreement
S&D	Special and Differential Treatment
US	United States
UN	United Nations
UNEP	United Nations Environmental Program
UNCTAD	United Nations Conference on Trade and Development
WB	World Bank
WTO	World Trade Organization

CHAPTER 1

INTRODUCTION

This dissertation studies the disciplines of export restrictions in international trade law as well as relevant jurisprudence by dispute settlement tribunals in general and, specifically, in the context of export restrictions on mineral raw materials. Focusing on the relatively narrow segment of mineral raw materials permits analysis of the most fundamental, immediate elements of the discourse on export restrictions and of broader systemic issues, including sustainable development, the definition of legitimacy and legality in international law, and the stability of the multilateral trading system. It also explores alternative approaches and suggestions for strengthening the regulation of export restrictions, found in regional trade agreements, proposals in World Trade Organization (WTO) negotiations, and academic literature. The objective of this dissertation is to examine whether international economic law, including WTO, regional trade agreements and international investment agreements regulates export restrictions. In particular, it investigates if the proliferation of export restrictions can be attributed to a regulatory deficiency in the international economic law. The dissertation also aims to tests whether modifications to existing regulations would suffice or new regulatory instruments are necessary to regulate export restrictions on mineral raw materials, to promote a more coherent regulatory framework for members of the WTO.

1.1 OVERVIEW

International law shapes the underlying regulatory framework of the international system for allocating resources, by setting norms and standards under which states can

exercise rights of access to and control of resources.¹ In the meantime, international law is made, upheld, and developed through the continuous hard work of participants.² Despite the fact that no single body of doctrine yet has emerged which can be described as an “international law of natural resources”, this thesis presents a conceptual framework to argue that international trade and investment law can help states reach cooperative arrangements for dealing with natural resources trade issues.

Export restrictions on natural resources have been recently identified as a problem in international trade. Specifically, access to supplies is a fundamental challenge of the era. The international community is aware that the unequal distribution of natural resources across countries and frequent volatility in prices can provoke international tension and have harmful effects on global welfare. The scarcity of natural resources, on the one hand, and the geopolitical and geo-economic transformations affecting traditional international trade patterns, on the other hand, call for a reconsideration of the WTO’s role in the regulation of export trade barriers.

Inadequate or non-refined rules risk stoking the fires of natural-resources nationalism, whereby power asymmetries across countries and beggar-thy-neighbor motivations dominate trade policy. However, any efforts in this area cannot succeed without addressing developing countries’ growing concern that further action would irrevocably limit their policy space, ultimately depriving them of the right to use export restrictions to pursue their own economic and sustainable-development needs in

¹ Richard Bilder, *International Law and Natural Resources Policies*, 20(3) NAT.RES.J. 451 (1980).

² See Jutta Brunnee & Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* 219 (Cambridge University Press 2010).

accordance with the principle of sovereignty over natural resources. Competing international and intergenerational interests in natural-resources trade make transparent, predictable, and well-designed trade rules necessary.

Unfortunately, global rules on trade liberalization in the past seventy years have made little impact on this kind of practice. An examination of the current international trade and investment regime reveals it to be structurally deficient concerning raw materials export restraints. In particular, recent disputes concerning export regimes have shown both the sensitivity of these restrictions and the lack of adequate provisions in the General Agreement on Tariffs and Trade (GATT) to address these disputes. The divergent regulation of these restrictions in the WTO accession protocols for mineral exporting countries has exacerbated this weakness, leading to fragmentation of the trade rules, which should reflect uniformity and coherence. These issues and challenges require a thorough analysis and comprehensive solutions.

At a deeper level, trade-policy negotiations have historically concentrated on reducing import barriers that governments use to impede access to national markets and protect domestic producers.³ Measures imposed by exporting countries that restrict exports have never become the subject of any round of multilateral trade negotiations, including the current negotiations of the WTO. Agreement on the topic was rejected at the outset by the apparently insurmountable divide between net-importing countries,

³ Barbara Fliess et al., *Recent Developments in The Use of Export Restrictions in Raw Materials Trade in EXPORT RESTRICTIONS IN RAW MATERIALS TRADE: FACTS, FALLACIES AND BETTER PRACTICES 16* (OECD ed., 2014).

which were interested in securing further trade liberalization, and net-exporting countries, which advocated the principle of sovereignty over natural resources.⁴

The issue of export restrictions on mineral raw materials is as alive as ever in the international trade debate, as these restrictions continue to proliferate.⁵ Currently, international commodity markets face the longest and most pervasive wave of export restrictions since the Second World War.⁶ However, it is difficult to produce a full picture exploring how countries' imposition of export restrictions have evolved over time. Systemic information on the use of export restrictions worldwide is only available since 2009 when the WTO launched the trade monitoring exercise in response to the global economic crisis.⁷ The WTO database shows the main types of measures that governments tend to use to restrict their exports. 33% of these measures took the form of export duties by imposing a tax on the products being exported while 36% took the form of quantitative restrictions where governments prescribed the maximum amount of products allowed to be exported.⁸ Other measures include automatic and non-automatic licensing requirements, export reference price.⁹

In recent decades, especially over the past few years, discussions of natural-resources trade in the WTO have increasingly focused on the concerns of commodity-

⁴GATT Secretariat, *Background Note on Export Restrictions and Charges*, GATT Doc. MTN.GNG/NG2/W/40 (August 8, 1989).

⁵ European Commission, *Eleventh Report in EXPORT RESTRICTIONS IN RAW MATERIALS TRADE: FACTS, FALLACIES AND BETTER PRACTICES 4* (OECD ed., 2014).

⁶ Marian Radetzki & Linda Warell, *A Handbook of Primary Commodities in the Global Economy* in *Export Restrictions on Critical Minerals and Metals* 66-72 (Ilaria Espa ed., 2015).

⁷ WTO, Trade Monitoring Database, <http://tmdb.wto.org/searchmeasures.aspx?lang=en-US> (last visited October 2017).

⁸ See *id.*

⁹ *Id.*

importing countries, which are worried about rising resource prices and signs of increasing restrictions on raw material exports.¹⁰ In addition, emerging case laws in the field of export restrictions have pushed these issues to the forefront of international trade studies.

Growing global demand for mineral raw materials and increasing export restrictions have forced governments and other stakeholders to pay close attention to supply conditions and the adverse effects of government export restrictions in this sector and to seek greater controls on their use.¹¹ For example, the U.S. Department of Energy established the Critical Materials Institute, through a \$120 million grant, in 2013.¹² Likewise, the European Union has established the European Institute of Technology, Knowledge, and Innovation Community on Raw Materials, and launched programs such as the European Innovation Partnership on Raw Materials and the European network of national research funding organizations (ERA-MIN network).¹³ Both institutions have strategic objectives to secure raw material supplies, design solutions, and develop policies.

Since the 1990s, various new technologies have created additional demand for many industrial raw materials, often used in very small quantities not discernible to end consumers. Numerous specificities characterize the industrial raw materials sector:

¹⁰ See Radetzki & Warell, *supra* note 6.

¹¹ OECD, EXPORT RESTRICTIONS IN RAW MATERIALS TRADE: FACTS, FALLACIES AND BETTER PRACTICES 3 (2014).

¹² Department of Energy, Ames Laboratory to Lead New Research Effort to Address Shortages in Rare Earth and Other Critical Materials (Jan.9, 2013), <https://energy.gov/articles/ames-laboratory-lead-new-research-effort-address-shortages-rare-earth-and-other-critical>, (last visited February 21, 2018).

¹³ Dina Carrilho, *Stepping Up the International Cooperation for the Sustainable Supply of Raw Materials*, 42 EU.GEO.J. 33,34 (2016).

production is often geographically concentrated, firms are often large with substantial market power, production processes are highly capital intensive, products are relatively homogenous, and potentially substantial differences in production costs prevail.¹⁴ Thus, economic activity depends on many raw materials that are traded around the world because no country has a domestic supply of all the inputs needed. However, no uniformly agreed definition of criticality exists; country lists vary depending on how the nation and its industries use various materials. For example, as of July 2017, the EU Commission has identified twenty-six raw materials as critical for the EU economy, based on their economic importance for European industries and their strong supply risk.¹⁵ The Geological Surveys of the U.S. and the U.K. produced similar lists. In addition, the U.S. has introduced the following conditions to determine the criticality of raw materials: i) the dominant producer is outside the United States; ii) the United States has appreciable net imports; iii) the dominant producers have shortfalls in their quality of governance, as measured by the Worldwide Governance Indicators published by the World Bank.¹⁶ The National Defense Research Institute of the U.S. concluded in its report that “it is the concentration of supply and, in particular, its concentration among producing countries that either have weak governance or that control production at the governmental level, or both, that can increase the potential for supply disruptions.”¹⁷ Specifically, governance

¹⁴ K.C.Fung & Jane Korinek, *Economics of Export Restrictions as Applied to Industrial Raw Materials* 14 (OECD, Trade Policy Papers No.155, 2013).

¹⁵ Deloitte Sustainability et al., *Study On The Review Of The List Of Critical Raw Materials: Criticality Assessment* 11 (EU Commission Report, 2017).

¹⁶ Richard Silbergliitt et al., *Critical Materials: Present Danger to U.S. Manufacturing* ix (National Defense Research Institute Report, 2013).

¹⁷ *Id.*

issues such as political instability, government control of material production, or restrictions on exports affect the reliability of supply. China is established as the world's largest producer of rare earth elements, accounting for over 95% of the world's output, even though it has only 30% of the world's known reserves.¹⁸ Nonetheless, until recently, China has been viewed as a reliable, low-cost supplier of raw materials.¹⁹ As China has grown wealthier and its domestic manufacturing base has expanded, its policymakers ask, why should China aggressively mine an exhaustible natural resource—and incur the resultant environmental harm—simply to supply the world market, while the rest of the world refuses to do so?²⁰ Why not limit the use of exhaustible natural resources to its home market, as the United States has done with liquefied natural gas?²¹ Is this phenomenon equitable and legitimate? The Chinese view is that offsetting benefits differ greatly depending on whether the mineral is exported for use by a foreign manufacturer or is kept for domestic use.²² When minerals are kept in China, Chinese producers later remit taxes to the Chinese government on profits made from use of the mineral as an input. Although such taxes are not designated for environmental restoration, they increase the government's fiscal ability to cover remediation costs.²³ The same is not true

¹⁸ Of the world's known reserves, China has the largest share (30%), followed by the U.S. (13%), Australia (5%), and India (2.5%). Jane Korinek & Jeonghoi Kim, *Export Restrictions on Strategic Raw Materials and Their Impact on Trade and Global Supply*, 45(2) J. WORLD TRADE 255, 271 (2011); Clara Gillispie & Stephannie Pfeiffer, *Interview on The Debate over Rare Earths: Recent developments in the Industry and WTO case*, Nat. Bureau Asian Res, <http://nbr.org/research/activity.aspx?id=261> (last visited July 11, 2012).

¹⁹ Silberglitt et al., *supra* note 16, at 11.

²⁰ See David Stanway & James Regan, *Pollution the Big Barrier to Freer Trade in Rare Earths* (Reuters, Mar. 19, 2012), <http://www.reuters.com/article/us-china-rareearth-idUSBRE82I08I20120319>.

²¹ Richard McGregor & Ed Crooks, *Obama Backs Rise in US Gas Exports*, Fin. Times, May 6, 2013, at 1.

²² Mark Wu & James Salzman, *The Next Generation of Trade And Environment Conflicts: The Rise of Green Industrial Policy*, 108 (2) NORTHWESTERN UNIV. L.R. 428 (2014).

²³ *Id.*

of an overseas producer who is not required to remit any share of its profits to the Chinese government. Additionally, when the mineral is consumed domestically in China, the inputs presumably increase Chinese capabilities in the relevant sectors and generate positive spillover effects for the rest of the economy.²⁴ In brief, China's stance is that as long as the mineral is consumed within its borders, the positive externalities that emerge from domestic downstream use will more than compensate for the negative externalities that result from upstream extraction.²⁵ Thus, potentially environmentally harmful acts are acceptable if they trigger greater downstream benefits that will more than cover the remediation costs. However, once the mineral is exported, China fails to capture any positive downstream externalities but is left with the cost of upstream environmental harm.²⁶ Consequently, China has instituted a combination of production controls, export restrictions, mine closings, and company consolidation.²⁷ As a result, the combined effect of export restrictions and worldwide demand for those raw materials has contributed to significant price volatility on the global market.

Unfortunately, the existing regulatory institution (WTO) needs "teeth" to address these challenges fully, in part because WTO rules were not drafted specifically to regulate international trade in natural resources.²⁸ Nonetheless, according to the WTO's database, export taxes on natural resources appear twice as likely as export taxes in other sectors,

²⁴ Jane Korinek & Jeonghoi Kim, *Export Restrictions on Strategic Raw Materials and Their Impact on Trade and Global Supply*, 45 J.WORLD TRADE 255, 257-59 (2011).

²⁵ Wu & Salzman, *supra* note 22, at 429.

²⁶ Ming Xu et al., *CO2 Emissions Embodied in China's Exports from 2002 to 2008: A Structural Decomposition Analysis*, 39 ENERGY POL'Y, 7381 (2011).

²⁷ Silbergliitt et al., *supra* note 16, at xiii.

²⁸ WTO SECRETARIAT, TRADE POLICY REPORT: TRADE IN NATURAL RESOURCES, 196 (2010).

and quantitative export restrictions on natural-resource products represent a large share of notified export restrictions.²⁹ Gradually, conventional wisdom has emerged that relevant WTO disciplines do not provide an effective, sufficient, and credible legal framework capable of preventing abuses in the use of export-restrictive measures.³⁰

1.2 SCOPE, THEORETICAL FRAMEWORK AND METHOD

My research focuses on a relatively narrow but highly significant class of natural resources: mineral raw materials and the legal approaches to handling scarcity or insecure supply of these materials.

Throughout history, resource scarcity and competition for natural resources in various forms have influenced the formation of human societies and are still recurring themes in domestic and international policymaking.³¹ In the late eighteenth century, Thomas Malthus foresaw inevitable shortages, despite the controversial and dismal nature of his theory.³² Later, in the twentieth century, the Club of Rome's study "The Limits to Growth" emphasized the problem of resources in terms of raw materials shortages.³³ The issue remains current through the more contemporary discussion of "planetary

²⁹ *Id.* at 116, 119.

³⁰ Robert Howse & Tim Josling, *Agricultural Export Restrictions and International Trade Law: A Way Forward 10* (Int. Food & Agr. Trade Policy Council, Position Paper, 2012).

³¹ David Langlet, *Minerals as Scarce Resources: The Quest for Secure and Sustainable Supply*, in *International Law and Changing Perceptions of Security 202* (Jonas Ebbesson et al., eds., 2014).

³² THOMAS MALTHUS, *AN ESSAY ON THE PRINCIPLE OF POPULATION* 26 (Electronic Scholarly Publishing 1998) (1798).

³³ See DONELLA H MEADOWS ET AL., *THE LIMITS TO GROWTH: A REPORT FOR THE CLUB OF ROME'S PROJECT ON THE PREDICAMENT OF MANKIND* (1972).

boundaries,”³⁴ and a large body of literature discusses the conflict-triggering potential of raw materials scarcity.³⁵

The recent debate over the scarcity of mineral raw materials has two broad strands, which we can identify through the somewhat superficial categories of “security” and “environment.”³⁶ The former typically takes a rather short-term, anthropocentric, and often nationalistic approach to what is needed to support politically defined national or human needs, whereas the latter takes a broader view of resources and their role for the long-term functioning of ecosystems and humans as biological beings.³⁷ To a certain extent, these views have merged in the concept of sustainable development, which embraces ecological as well as social and economic dimensions and their interactions.

The view of the state’s appropriate role in relation to mineral raw materials and sustainable development has shifted repeatedly throughout history. In the last decade, however, states are increasingly resorting to nationalistic approaches based on various public-policy objectives, including export-restrictive practices and state-owned or state-backed companies in the extractive industries. These policies reverse the trade liberalization that persisted during previous decades.

³⁴ JOHAN ROCKSTROM ET AL., A SAFE OPERATING SPACE FOR HUMANITY 461, 472 (2009).

³⁵ See MICHAEL KLARE, RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT (2001); IAN BANNON & PAUL COLLIER, NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS (World Bank 2003); DANIEL MORAN & JAMES RUSSELL, ENERGY SECURITY AND GLOBAL POLITICS: THE MILITARIZATION OF RESOURCE MANAGEMENT (2010).

³⁶ Langlet, *supra* note 31, at 202.

³⁷ *Id.*

In view of the preceding, this thesis focuses on issues related to export restrictions on mineral raw materials. Currently, a few developments beyond the 1994 GATT have emerged.

First, an unprecedented combination of practical and legal considerations conditions the current proliferation of export restrictions on mineral raw materials. Mineral export restrictions are regarded as ambivalent, and a system-wide discipline concerning export restrictions does not exist. In particular, resource-rich countries claim the right to use export restrictions for legitimate public-policy goals, including environmental values and sustainable development.³⁸ However, export restrictions may also serve industrial policy goals that affected countries oppose, such as beggar-thy-neighbor instruments that distort trade and competition.³⁹ Yet, due to fragmented WTO rules on export taxes, WTO members apply export duties with varying degrees of flexibility. As a result of such varied practices, four tiers of WTO members now exist in terms of rights and obligations concerning export restraints.⁴⁰ The first tier, which currently includes more than 140 members, enjoys nearly complete freedom to restrict exports as long as the restriction takes the form of export duty or taxes in accordance with Article XI.1 of the 1994 GATT.⁴¹ The next tier, which includes Australia and Russia, is obliged not to levy export duties on specific products in excess of those set forth in their respective GATT schedules but retains the full range of rights, including exceptions under the GATT, regarding their

³⁸ ILARIA ESPA, EXPORT RESTRICTIONS ON CRITICAL MINERALS AND METALS 32 (2015).

³⁹ *Id.* at 33.

⁴⁰ Julia Ya Qin, *Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection*, 46 (5) J. WORLD TRADE 1147, 1161 (2012).

⁴¹ See *id.*

commitments.⁴² The third tier, comprising Ukraine and Vietnam, is obliged to bind export tariffs under their respective accession protocols but may invoke GATT exceptions to the breach of such obligations.⁴³ The accession documents show that the fourth tier comprises three of twenty-six new members, namely, China, Latvia, Mongolia, Montenegro and Saudi Arabia, and has strict “WTO-plus” commitments that oblige members to eliminate export duties and taxes, but these members may not resort to GATT exceptions to justify their non-compliance of obligations.⁴⁴ None of the third- and fourth-tier members have the right to modify or withdraw their export duty concessions in their accession protocols.⁴⁵ Thus, these four types of membership constitute imbalanced rights and duties among WTO member countries.⁴⁶ However, under the founding principles of the WTO, the rights of members to invoke public-policy exceptions and to modify their commitments according to certain procedures should be consistently observed.

Second, even though export restrictions are mainly used by developing countries, this does not mean that developed countries do not use export restrictions at all. On a deeper level, however, the international trade regime is based on a distorted trade structure regarding mineral raw materials. Developing countries have long exported minerals, while developed countries have imported them, even though the latter countries might have abundant mineral reserves within their own territories. For example, the U.S.,

⁴² See *id.*

⁴³ See *id.*

⁴⁴ Baris Karapinar, *Export Restrictions and the WTO Law: How to Reform the ‘Regulatory Deficiency’*, 45 (6) J.WORLD TRADE 1139, 1143 (2011).

⁴⁵ QIN, *supra* note 40, at 1162.

⁴⁶ See discussion *infra* Section 3.5.2.

as the most abundant mineral-reserve country in the world, has been very cautious in mining many of its minerals.⁴⁷ The present wave of export restrictions on mineral raw materials reflects developing countries' determination to reconsider the traditional trade regime. Using disputes over mineral raw materials export restrictions as a backdrop, this project aims to explore more deeply and broadly institutions' fundamental challenges regarding exports.

Third, the emergence of debate over mineral export restraints has prompted a general sense of urgency and alarm and has substantially fueled the call to reform the current WTO rules in this domain.⁴⁸ Hence, some countries have started using trade remedy measures, including anti-dumping and countervailing duties, in a WTO-inconsistent manner to address their concerns over export restrictions. In other words, major changes affecting the status quo in mineral raw materials trade have intensified the diverging interests between industrialized countries concerned about fair access to primary supplies that sustain their top value-added industries and developing countries aiming to break their dependence on resource-led development. When the product is a raw material it is often the case that the consumers are not households but other firms or producers.⁴⁹ Therefore, a main reason for the use of export taxes and restrictions is that an export tax, by reducing a product's domestic price, may act as a subsidy for the firm that uses the taxed product in a production process.⁵⁰ These emerging preferences and

⁴⁷ Bin Gu, *Mineral Export Restraints and Sustainable Development*, 14 (4) J.INT.ECON.L. 765, 767 (2011).

⁴⁸ ESPA, *supra* note 38, at 188.

⁴⁹ Maximiliano Mendez Parra et al., *Export Taxes and other restrictions on raw materials and their limitation through free trade agreements: impact on developing countries* 9 (EU Parliament, Study paper, 2016).

⁵⁰ *Id.* at 10.

behaviors of WTO members are expected to influence issues concerning export restraints in the next round of multilateral negotiations to form new regulations.

Finally, while all these developments include a mix of WTO-plus and WTO-minus elements, the lack of specific studies on the adequacy of WTO rules concerning export restrictions of mineral resources was a compelling reason for my focus on trade in non-agricultural raw materials.

This project will adapt interdisciplinary theories of international law and international relations to develop a rationale for cooperation, interaction, and regulation in the raw-materials trade. I found that prevailing international law theories do not satisfactorily meet the needs of scholars studying international law, which echoes the findings of Brunnee and Toope (2010).⁵¹ No previous accounts provide a theoretical framework that fully incorporates emerging practices of international lawmaking and deeply explains the strengths and weaknesses of international trade law.⁵² Therefore, I aim to employ a framework to identify the most comprehensive avenues for normative and institutional development. I will build this framework on a pure legal analysis and will supplement it with insights from constructivism. Constructivism is useful for exploring the extent of existing and emerging shared understandings regarding the trade discipline on raw-materials export restrictions. Once shared understandings are established, they become “structures” that shape how members form interests, set priorities, make

⁵¹ JUTTA BRUNNEE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 5 (2010).

⁵² See *id.*

arguments, or evaluate others' arguments.⁵³ Practices that sustain basic shared understandings therefore play a central role in any account of international law. This project must develop shared understandings of a regime's objective and the core principles of the export-restraint discipline through an historical overview of raw-materials export restrictions and analysis of the different types of restrictions and trade and non-trade policies. Specifically, this project will bridge the gulf between radically different perceptions of the issue. This account will draw the right balance between the principle of sovereignty over natural resources, which is claimed by export restraint-imposing countries, and the beggar-thy-neighbor policy, which is supported by raw materials-dependent countries. These existing and emerging shared understandings of the export restrictions on mineral raw materials will be a foundational framework for building objectives and principles of a potential regulatory framework. This project also employs a pure legal analysis to assess the existing WTO discipline and non-WTO laws regarding mineral raw-materials export restrictions and will examine the draft proposals and legal reforms proposed for the raw-materials trade. This exercise will establish the validity of relationship among different sources of international economic law by analyzing the structure and dynamic nature of norms enshrined in WTO agreements and PTAs. On the basis of shared knowledge and understandings generated through constructivism, the deficiencies of existing law, and different aspects of norms examined, this project develops a prospective regulatory framework for raw-materials export restrictions.

⁵³ See Emanuel Adler & Steven Bernstein, Knowledge in Power: The Epistemic Construction of Global Governance, *in* POWER IN GLOBAL GOVERNANCE 295-296 (Michael Barnett & Raymond Duvall ed.,2005).

Until recently, a small body of literature (Piermartini 2004, WTO 2010, Latina et al., 2011, Fung and Korinek 2013, Mendez Parra et al., 2016) reviewed the effects of export restrictions on non-agricultural raw materials trade and highlighted the need for further study. The current legal scholarship (Gu 2011, Matsushita 2011, Karapinar 2011, Howse and Josling 2012, Howse 2014, Chi 2014, Qin 2012, OECD 2009, 2014, Bronckers and Maskus 2014, Trachtman and Bond 2015, Wu 2014, Espa 2015, Switzer 2015) on the issues relevant to export restrictions on mineral raw materials argues that comprehensive reform of multilateral rules on export restrictions is urgent, while unilateral and plurilateral measures against the proliferation of export restrictions have certain limitations. Although most scholars agree that export restrictions on mineral raw materials are clearly under-regulated in WTO law, no scholars have attempted to provide a more refined regulatory framework on export restrictions concerning non-agricultural raw materials trade. Unlike previous scholarship, this thesis studies how and whether the current body of international economic law, including WTO law, regional trade agreements, and international investment agreements, addresses export restrictions, and it assesses and proposes alternatives to a prospective regulatory framework, by evaluating the desirability of new disciplines under the multilateral trading system.

This dissertation aims to determine the adequacy of international rules on export restrictions on mineral raw materials. However, many sources are not accessible. Such as some of WTO official documents are first issued with a restricted status and access to these items is reserved for WTO members only. Those documents include informal restricted documents, communications, and submissions produced and circulated by

WTO bodies, or member countries.⁵⁴ Given the difficulty of accessing ongoing communications on my topic, I have adopted a multi-method approach. Thus, the following methods inform my analysis: interviews with trade experts from the WTO member countries involved in WTO negotiations; case studies; archival research on the drafting histories of WTO documents; extensive review of different export restrictions, their distinctive economic and non-economic implications, and secondary literature on export restrictions; and legal analysis of WTO and non-WTO rules, to identify their scope, gaps, and inconsistencies. Considering the findings of these analysis, I propose potential solutions to bring more coherence to the existing multilateral trade discipline.

1.3 CHAPTER OUTLINE

Chapter 2 will provide a historical overview of the different types of export restrictions instituted and maintained on raw materials since the formation of the GATT in 1947. To assess the debates and practices surrounding raw materials export restrictions and their effect on the creation, upholding, development, and challenge of legal norms, a historical discussion on the evolution of the rules for these restrictions is necessary. In this chapter, I examine all types of export restrictions that countries apply, including export duties, taxes (tariffs), and export quota and licensing (non-tariff or quantitative). Examination of the historical stages of export restrictions allows comparison of the reasons for and characteristics of those measures used, and it reveals the peculiarity and magnitude of the proliferation of export restrictions since the establishment of the WTO in 1995. This

⁵⁴ See WTO, Documents online (2004), https://www.wto.org/english/docs_e/faq_public_e.doc.

account will also elaborate the evolution in perceptions of export restrictions over time, including their role in determining trade and non-trade outcomes. This history, as the source of warnings, lessons, and hints of possibilities, enables us to understand how state preferences move across time. In this account, I will refer to both primary and secondary sources. Primary sources are GATT documents,⁵⁵ namely, multilateral treaties including the GATT, the GATS and Agreement on Agriculture, draft proposals and communications submitted by state parties, minutes of meetings, and *travaux préparatoires*. Secondary sources include reports on trade rules prepared by the WTO, the UNCTAD, the World Bank, the OECD, and other institutions and studies in books, periodicals, law journal articles, newspaper articles, and internet sources.

In the subsections of Chapter 2, I argue that issues of export restrictions are even more important than import barrier issues within the international trade discipline. It might be the best of times to develop a new set of rules on the use of export restrictions which is the issue contemporary important for the entire WTO membership. The tension between the exporting countries and importing countries on the use of export restrictions is heightened especially in times of crisis. Export restrictions were ranked among the most used harmful measures since the crisis began.⁵⁶ At the height of the crisis, the G20 leaders have singled out export restrictions as a protectionist measure and committed not

⁵⁵ In 2006 the WTO General Council decided to make public all official documents issued under the General Agreement on Tariffs and Trade. Many of these documents did not exist electronically and have been scanned to create a digital archive. This is a work in progress; cataloguing is not yet completed, and the data store will continue to be updated progressively.

⁵⁶ SIMON J.EVENETT & JOHANNES FRITZ, *THE TIDE TURNS?, TRADE, PROTECTIONISM, AND SLOWING GLOBAL GROWTH* Figure 10.1 (2015).

to impose new ones.⁵⁷ I establish emerging trends in the use of export restrictions, through an analysis of trade and non-trade-policy implications and rationales. The principles of sustainable development, including the equity principle, the duty of states to ensure sustainable use of natural resources, and the principle of integration and interrelationship, will serve as a foundation for in-depth analysis. I thoroughly review trade-policy review documents and domestic statutes on export restrictions adopted by state parties and in reports, papers, periodicals, and internet sources prepared by institutions such as the WTO, the UNCTAD, the OECD, and the WB.

Chapter 3 takes stock of existing WTO rules on both export duties and quantitative export restrictions and assesses the extent to which the disciplines can enable and foster long-term mineral raw materials trade.

In addition to considering the text of agreements, the chapter offers a more detailed analysis of how the *travaux preparatoires* have reflected the issue and how existing rules on raw materials export restrictions have been interpreted in disputes or subsequent practice among member states, including the evolution of legal norms. I use as primary sources the WTO agreements, including the GATT, GATS, accession documents, including accession protocols and working group reports, and the GATT

⁵⁷ “In November 2008, G20 Leaders committed to keep markets open and to refrain from “raising new barriers to investment or to trade in goods or services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports” (Declaration of the Summit on Financial Markets and the World Economy, 15 November 2008). This “standstill agreement” has since been extended by G20 Leaders - from 2013 to 2014, at the Los Cabos Summit in 2012– and from 2015 to 2016, at the St Petersburg Summit in 2014”. See OECD Website: <https://www.oecd.org/g20/topics/trade-and-investment/> (last visited June 15, 2018).

documents and reports issued by the WTO Dispute Settlement Body. I use as secondary sources books, periodicals, law journal articles, newspaper articles, and internet sources, and I supplement the project with case studies. I investigate the WTO case laws to discover whether new or specific factors explain the inadequacy of the existing WTO regulation of raw materials. The use of case studies allows me to explore previously unnoticed causal factors and historical patterns and, thus, to dig deeper into current challenges facing international trade and to focus on legal and judicial processes within the WTO.⁵⁸

Moreover, by discussing the implications of the current configuration of WTO disciplines in light of case law, the chapter reviews the provisions of relevant exceptions available in the GATT, which can be cited by country, to justify domestic regulations that otherwise violate WTO law. This discussion illustrates the challenges facing countries that resort to the goal of sustainable development to justify restrictive trade barriers. The interplay between the rule and its exceptions contributes to the need for a new regime.

Finally, this chapter concludes with observations on the main strengths and weaknesses of existing WTO rules on mineral raw materials trade and identifies loopholes and inconsistencies in the discipline.

Chapter 4 examines the non-WTO law instruments on trade regulation of mineral raw materials. This chapter allows us to understand variables that could form foundations for desirable global rules on mineral raw materials export restrictions. I argue that bilateral and regional free-trade agreements (PTA) containing provisions on raw materials export

⁵⁸ Christopher Achen & Duncan Snidal, *Rational Deterrence Theory and Comparative Case studies*, 41/2 WORLD POL. 143, 167 (1989).

restrictions will help the WTO to shape regulation of export regimes globally. I analyze the effects of provisions in the PTAs that limit or prohibit the use of export restrictions in policy, ranging from environmental protection to economic and social development. By focusing on different, previous PTAs, the chapter reveals how the stringency of the provisions has changed over time. I claim that limitations on the use of export restrictions may negatively affect countries' different policy objectives. This chapter also discusses the relevance of international investment law to export restrictions in the trade field. I conclude the chapter by highlighting the importance of practices addressing the treatment of export-restrictive measures in the PTAs completed. For instance, the European Union has strictly committed to proposing an energy and raw materials chapter in each trade agreement.⁵⁹ I refer to both primary sources, including international, regional, and bilateral treaties and customary rules, and secondary sources, including books, periodicals, law journal articles, newspaper articles, and internet sources.

Chapter 5 evaluates different proposals and attempts that were tabled in negotiations before and after the WTO, to reform the WTO discipline of exports concerning non-agricultural raw materials trade. This chapter provides sufficient information to discuss the conflicting interests of net-importing versus resource-endowed countries over export-barrier instruments concerning mineral raw materials. A clear perception of the issues at stake serves as a foundation to examine the proposals that have been tabled since the WTO's formation. I demonstrate the pros and cons of each draft proposal tabled during negotiation rounds since the formation of the 1947 GATT.

⁵⁹ Commission Communication, The Raw Materials Initiative-Meeting Our Critical Needs for Growth and Jobs in Europe, at 13, COM (2008) 699 final (Apr.11, 2008) [hereinafter The Raw Materials Initiative].

The second part of this chapter provides an overview of the ongoing dialogues and their outcomes outside of the WTO. The examination of proposals and suggestions, particularly on export restrictions of non-agricultural raw materials, provides insights for framing new proposals for more balanced, coherent norms on export restrictions. Primary sources are WTO and GATT documents, including submissions, minutes of meetings, press releases, draft proposals, and final decisions circulated during the eight negotiation rounds held since the GATT formation in 1947, including the Doha Development Round. I also refer to secondary sources, including periodicals, trade reports, and policy papers prepared by international institutions, including the WTO, the OECD, and other global and regional think tanks.

Based on outcomes from the previous chapters, **Chapter 6** offers possible avenues for introducing a more balanced and equitable regulatory framework for export restrictions of mineral raw materials. What would be the scope and target of a new regulatory framework? The solutions should address the shortcomings of the proliferation of export restrictions since the WTO's establishment, as identified in Chapter 2, and the gaps and inconsistencies of the current WTO regulations on export restrictions, as determined in Chapter 3. The chapter identifies solutions that could help to reform WTO export rules, based on conclusions from the analysis of existing WTO rules, in Chapter 3, and discussions of variables outside the WTO norms, in Chapters 4 and 5. Taking into account the lessons of previous proposals tabled during WTO negotiations, the chapter provides potential options to encourage constructive engagement among WTO members. However, I adapt a pluralistic conception of law in a way that includes the WTO's

decisions, regulations, and administrative acts.⁶⁰ This variety allows exploration of more-flexible and in-depth solutions to address the challenges and shortcomings of the proliferation of raw materials export restrictions.

Chapter 7 concludes the discussions of reforming the WTO trade rules on export restrictions and sheds light on the importance of a more balanced, coherent approach to designing and negotiating a new regulatory framework. The Chapter outlines the dissertation's findings and make recommendations.

⁶⁰ Ian Johnstone, *Law-making by International Organizations: Perspectives from IL/IR theory*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 266-292, 269 (Jeffrey L.Dunoff & Mark A.Pollack eds., 2013).

CHAPTER 2

EXPORT RESTRICTIONS ON NON-AGRICULTURAL RAW MATERIALS

2.1 INTRODUCTION

Export restrictions are not a recent practice. Their use has varied in scale and intensity throughout history. The export sector was the original nucleus of a market economy.⁶¹ Restricted access to raw materials and the fear of future restricted access are a constant source of nervous apprehension in consumer countries and, hence, a threat to international peace.⁶² For instance, in 1972, the Club of Rome issued a report entitled “The Limits to Growth,” which warned the world that, due to the lack of natural resources, world economic growth would be halted within one-hundred years.⁶³ This warning, together with the oil crisis in 1973, which was provoked by the measures of the Organization of the Petroleum Exporting Countries (OPEC) to cut the production and increase the price of crude oil, attracted much attention of government industries, consumers, and the general public in major countries.⁶⁴ Nevertheless, the 1970s and 1980s were a time of worldwide economic growth. The Uruguay Round of the GATT trade negotiation began in the 1980s and ended with the formation of the WTO in 1994. In this optimistic atmosphere, the Club of Rome’s warning and the lessons of the oil crisis were

⁶¹ Richard Goode et al., *Role of Export Taxes in Developing Countries* 453, 454 (IMF, Staff Paper No.13.3, 1966).

⁶² Lynn Ramsay Edminster, *Control of Exports of Raw Materials: An International Problem*, 150 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 89, 94 (1930).

⁶³ MEADOWS ET AL., *supra* note 33, at 79.

⁶⁴ MITSUO MATSUSHITA & THOMAS J.SCHEINBAUM, *EMERGING ISSUES IN SUSTAINABLE DEVELOPMENT: INTERNATIONAL TRADE LAW AND POLICY RELATING TO NATURAL RESOURCES, ENERGY, AND THE ENVIRONMENT* 80 (2016).

forgotten.⁶⁵ However, in the past decade, the potential lack of natural resources has emerged again, and many countries have recently adopted trade measures to restrict the exportation of natural resources and to keep them within their territories.⁶⁶

Section 2.2 explores the features of export restrictions by studying their historical foundations. Section 2.3 provides an overview of the different types of export restrictions. The economic and non-economic policy rationales and implications are discussed in Section 2.4 to elucidate why countries favor export restrictions on mineral raw materials and the concerns of net-importing countries. Overall, this chapter provides a descriptive foundation for further analysis.

2.2 HISTORICAL OVERVIEW OF EXPORT RESTRICTIONS

2.2.1 Pre-WTO

Governments have used export restrictions since at least the eleventh century, mainly as an industrial policy instrument.⁶⁷ The British Empire was, in particular, the first great power to make extensive use of export restrictions on selected agricultural raw materials such as wool, hides, and skins in the early stages of their industrialization, and many analysts agree that these measures contributed significantly to the building of England's industrial greatness.⁶⁸ During the same period, other European territories, such as Venice and Holland, used export restrictions as a tool of industrial and trade strategy to acquire "the same triple rent situation: a strong industrial sector, a raw material monopoly, and

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See EDMINSTER, *supra* note 62, at 89; GOODE ET AL., *supra* note 61, at 453; CHARLES KINDLEBERGER, *HISTORICAL ECONOMICS: ART OF SCIENCE* 127 (1990);

⁶⁸ ERIK REINERT, *HOW RICH COUNTRIES GOT RICH AND WHY POOR COUNTRIES STAY POOR* 80, 81 (2008).

overseas trade.”⁶⁹ Beginning in the nineteenth century, export restrictions were progressively dismantled in Europe, although they were never completely eliminated by countries aiming to accelerate their industrial development.⁷⁰ After their declining use in Europe, export duties were introduced in colonies in Asia and Africa, primarily to raise revenue.⁷¹ They were also used to favor exports to the colonizing countries and shipping in national-flag carriers, through discriminatory rates and rebates.⁷² Other areas of the world, including Canada and several countries of Latin America, introduced restrictive measures on the exportation of various agricultural raw materials in the twentieth century.⁷³ The rationale for such measures was, in most cases, the protection of domestic industries and the promotion of higher value-added activities, along with the generation of government revenues in countries applying export taxes.⁷⁴

In the decade after the First World War, increasing discussion prepared the stage for effective international action.⁷⁵ As a result, in the fall of 1927, the first important multilateral agreement regarding control of raw materials occurred, with the signing, in Geneva, of the Convention for the Abolition of Import and Export Prohibitions and Restrictions.⁷⁶ Nearly all leading countries, including the United States, agreed to this convention. It was a significant achievement. The agreement invites the use of existing international machinery for settling disputes, establishes a procedure to that end, and

⁶⁹ *Id.* at 80-83.

⁷⁰ Jacob Viner, *National Monopolies of Raw Materials*, 4/4 FOREIGN AFFAIRS 585 (1926).

⁷¹ Shantayanan Devarajan & Delfin Go et al., *The Whys and Why Not of Export Taxation* 1 (World Bank, Working Paper No 1684, 1996)1-25.

⁷² *Id.*

⁷³ VINER, *supra* note 70, at 589; ESPA, *supra* note 38, at 3.

⁷⁴ *Id.* 45-8.

⁷⁵ EDMINSTER, *supra* note 62, at 95.

⁷⁶ *Id.*

contains a moral, though not legal, obligation for the signatories to submit their differences to some form of arbitral or judicial procedure.⁷⁷ In Article I, it provides that the “...Convention shall apply to ...prohibitions and restrictions imposed on the exportation of goods...” Furthermore, it introduces ambitious commitments by requiring all contracting parties to abolish, within six months of the Convention’s effective date, all import and export prohibitions and restrictions, and to not thereafter impose any such prohibitions or restrictions.⁷⁸ However, it still provides some exceptions that allow contracting parties to apply export prohibitions and restrictions on reasonable grounds: i) public security; ii) moral or humanitarian grounds; iii) military supplies; iv) protection of public health, animals, or plants; v) protection of national treasures of artistic, historic, or archaeological value; vi) gold, silver, coins, currency notes, banknotes, or securities; vii) national treatment; viii) products subject to state monopoly or state control.⁷⁹ In addition, contracting parties have the freedom to adopt measures prohibiting or restricting ...exportation for the purpose of protecting the vital interests of the country.⁸⁰ Nonetheless, this agreement was a first step and does not go very far toward solving the problem; it is significant largely as a precedent rather than as a far-reaching instrument for addressing particular problems in the field of raw materials.⁸¹ It reveals pressing need for further action. The first need is for an international agreement addressing basic principles of fairness in these matters. Such an agreement would remove the matter’s

⁷⁷ *Id.* at 96.

⁷⁸ Convention on Abolition of Import and Export Prohibitions and Restrictions art.2, November 8, 1927, 46 Stat.2461, TS 811.

⁷⁹ *Id.* Art.4.

⁸⁰ *Id.* Art.5.

⁸¹ *Id.*

legal status as a purely domestic question and would focus the whole discussion in the realm of the international community.⁸² The international community is expected to agree on main principles underlying fair and reasonable controls over the export of raw materials. The Geneva Convention sets an equitable and fair discipline by incorporating the standard of the least possible injury. In other words, as provided in its Article 7, if any contracting parties adopt any measure of prohibition or restriction against products of any foreign country, it shall frame the measure in such a way as to cause the least possible injury to the trade of other contracting parties.⁸³

The resolutions of the World Economic Conference represent a beginning to this process. Unfortunately, the resolutions were ambiguous and without legal effect.⁸⁴ Nevertheless, the resolutions provided a sufficient definition and a useful starting point for further actions and adaptation to a changing economic order, by establishing the requisite machinery to elaborate rules and decisions that would ultimately become a quasi-judicial code of fair practices.⁸⁵ In brief, countries have reached a shared understanding that they will handle an international question through international cooperation.⁸⁶ As Bonn stressed, “the unequal distribution of natural opportunities shall be compensated by the creation of some code of international economic hospitality.”⁸⁷ When the number of nations needed to ratify the Convention for the Abolition of Import

⁸² *Id.*

⁸³ *Id.* Article 7.

⁸⁴ *EDMINSTER*, *supra* note 62, at 97.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Moritz J. Bonn, *League of Nations Economic Tendencies Affecting The Peace Of The World*, 150 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 192, 207 (1930).

and Export Prohibitions and Restrictions was insufficient, the United States was one of only seven countries that committed to adhering to the agreement's terms on their own, in accordance with Article 17 of the Convention.⁸⁸ Eventually, the withdrawal of Great Britain and the US in 1933 sealed the Convention's fate by leaving only Japan, Norway, Denmark, and the Netherlands as the nations bound by the Convention.⁸⁹ The window of opportunity for the international community to establish international law in the field of export restraints had closed, not to open again until many years later.

After World War II, implicit export taxes from the surpluses of export marketing boards became popular in many newly independent developing countries in Africa, Asia, and Latin America.⁹⁰ This means that export taxes include not only explicit custom duties but also implicit taxes from surpluses of state marketing boards, stabilization funds, and profits from multiple exchange-rate systems.⁹¹ Export marketing boards were important at various times in many other countries, including Burma, Cote d'Ivoire, Ghana, Nigeria, Philippines, Thailand, and Uganda, and usually monopolized the export of commodities. Stabilization funds were popular in francophone Africa.⁹² Explicit export taxes were applied to a wide range of commodities.

After a temporary but intense resurgence of export restrictions on primary commodities triggered by the two world conflicts,⁹³ two distinct trends characterized the

⁸⁸ James Grueff, *The United States and the International Convention For The Abolition of Import and Export Prohibitions and Restrictions* 172 (Waseda Univ, Paper, 2016), https://www.waseda.jp/inst/oris/assets/uploads/2015/10/23_20150803184118_vvrjnm6036sj6umgf0lu8q7h50.pdf

⁸⁹ *Id.* at 173.

⁹⁰ DEVARAJAN ET AL., *supra* note 71, at 1.

⁹¹ *Id.*

⁹² *Id.*

⁹³ VINER, *supra* note 73, at 585.

1950s and 1960s: on the one hand, developing countries increasingly restricted the exportation of agricultural commodities, in an attempt to raise government revenues and reduce the volatility of markets, which could significantly undermine their economic development efforts.⁹⁴ On the other hand, to protect their own industries from increased import competition, developed countries began to negotiate export-restraint arrangements⁹⁵ with developing countries expanding their textile sectors.⁹⁶ In these cases, the export restrictions took the form of quotas on textile products but reflected the interests of importing trading partners rather than the national industrial strategies of exporting countries.⁹⁷ The United States was the first country to impose restrictions on Japan's exports of cotton textiles in 1955. Rapidly, however, many developing countries started using export-restraint arrangements and, in particular, voluntary export restraints to cope with the surge of cheap textile products coming from industrializing Asian economies.⁹⁸ When national control breaks down or is seriously compromised, control through international agreement is the next step.⁹⁹

This network of arrangements eventually led to the conclusion of the so-called Short-term Cotton Agreement (1961), the Long-term Arrangements (1962–1973), and, in

⁹⁴ RADETZKI ET AL., *supra* note 6, at 188–206; Roberta Piermartini, *The Role of Export taxes in the Field of Primary Commodities*, 1-2 (WTO Discussion Paper No.VII, 2004), www.wto.org/english/res_e/booksp_e/discussion_papers4_e.pdf (last visited June 20, 2017).

⁹⁵ See JOHN JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 69–72 (2002).

⁹⁶ A.J.H.Wohn, *Towards GATT Integration: Circumventing Quantitative Restrictions on Textile and Apparel under the Multi-Fibre Agreement*, 22 PENN.J.INT.ECON.L. 375, 388-89 (2001) *in* ESPA, *supra* note 38, at 4.

⁹⁷ See Michael Finger & Ann Harrison, *Import Protection for U.S. Textiles and Apparel: Viewed from the Domestic Perspective*, *in* THE POLITICAL ECONOMY OF TRADE PROTECTION 43-50 (National Bureau of Economic Research ed.,1996).

⁹⁸ Yongzheng Yang & Chuanshui Zhong, *China's Textile and Clothing Exports in a Changing World Economy*, 36 DEVELOPING ECONOMIES 3, 10 (1998).

⁹⁹ EDMINSTER, *supra* note 62, at 93.

1974, the Multi-Fibre Agreement (MFA). The MFA was a four-year agreement that was renewed four times over the decades and gained progressively wider membership. The fourth MFA was eventually replaced by the WTO Agreement on Textiles and Clothing (ATC), adopted at Marrakesh during the Uruguay Round in 1994.¹⁰⁰ The ATC outlawed the introduction of new VERs and required that existing voluntary export restraints be phased out after a ten-year transition period (1995–2004).¹⁰¹

However, during the price spike of 1972–1975, exporting countries used export restrictions systemically to protect their own markets. The first wave of export restrictions developed in response to the commodity boom induced by supply shocks in the cereal grain and vegetable oil international markets,¹⁰² and was exacerbated by the rise in oil prices that followed the embargo imposed by OPEC on the Western countries supporting Israel during the Yom Kippur War.¹⁰³ The U.S. continues to ban the export of crude oil, since the 1973 oil embargo by OPEC members, and one objective of the ban was to reduce U.S. dependence on foreign oil, a policy objective that still resonates in the country.¹⁰⁴

Export restraints played an important role to insulate exporting countries from the price surges in international market.¹⁰⁵ For the first time, world markets experienced the

¹⁰⁰ PETROS MAVROIDIS, *TRADE IN GOODS: THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS* 782, 783 (2012).

¹⁰¹ *Id.* at 671.

¹⁰² Richard Cooper & Robert Lawrence, *The 1972–1975 Commodity Boom*, 6/3 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 671,708-709 (1975).

¹⁰³ WTO, *World Trade Report 2013: Factors Shaping the Future of World Trade* 171, www.wto.org/english/res_e/booksp_e/world_trade_report13_e.pdf.

¹⁰⁴ UNCTAD, *Global Commodities Forum Report 13* (2015).

¹⁰⁵ See Will Martin & Kym Anderson, *Export Restrictions and Price Insulation During Commodity Price Booms 2* (The World Bank, Policy Research Working Paper No. 5645, 2011), www.imf.org/external/np/seminars/eng/2011/trade/pdf/session1-martin-paper.pdf.

domino effect of export restrictions, namely, vulnerability of supply and increased price volatility, while the poorest population segments in imposing countries often suffered negative income-distribution effects.¹⁰⁶ However, it did not result in any effective and timely reaction within the framework of the GATT.¹⁰⁷ The opportunity to improve multilateral disciplines on the export side within a system traditionally centered on market access and, thus, on the removal of import barriers was discussed during the Tokyo Round.¹⁰⁸ However, the continuous divergence between commodity net-exporting and net-importing countries hampered concrete steps forward.¹⁰⁹ Momentum was eventually lost after the normalization of international markets and the subsequent commodity price declines over two decades.¹¹⁰

During the 1980s and 1990s, the issue of export restrictions on raw materials was therefore not prominent on the international trade agenda. The main point of controversy was linked to the surge of voluntary export restraints in manufacturing sectors other than textiles.¹¹¹ In particular, from the late 1970s to the mid-1980s, VERs dominated Japan-U.S. trade relations.¹¹² The two countries enacted several formal and informal export-restraint arrangements to control the importation of various Japanese manufactured goods into the U.S. Among the restricted products were color televisions, machine tools, automobiles, and semiconductors which are reflection of changes in Japan's economic

¹⁰⁶ ESPA, *supra* note 38, at 5.

¹⁰⁷ *Id.*

¹⁰⁸ GATT Doc.BISD 29/S/9, 29 November 1982.

¹⁰⁹ *Id.*

¹¹⁰ Colin Carter et al., *Commodity Booms and Busts*, 3 ANNUAL REVIEW OF RESOURCE ECONOMICS 87, 93 (2011); RADETZKI ET AL., *supra* note 6, at 10.

¹¹¹ JACKSON, *supra* note 95, at 69–74.

¹¹² WILLIAM CLINE, TRADE POLICY IN THE 1980S 70 (1983).

structure.¹¹³ Many European states followed the example of the U.S. to restrain Japan's penetration into their markets.¹¹⁴

The wide diffusion of VERs reflected Western economies' intent to protect domestic manufacturing sectors most affected by the pressure of Japanese imports during a time of macroeconomic downturn. As soon as these sectors recovered, in the second half of the 1980s VERs were progressively phased out, and Western countries again focused on improving access to foreign markets as a way of increasing their own exports.¹¹⁵

In essence, the need for an export tax or some alternative regulatory device arises from divergences between social goals and the natural tendencies of the unregulated economy. Two principal social goals of low-income, primary-producing countries are stabilization of national income in the short run and economic development in the long run.¹¹⁶

A wise application of export taxes in boom times that fosters general development will help to make it possible to eliminate that kind of taxation. This sequence illustrates the complex interrelationships between economic resources and institutional change during the process of development: while cumulative material growth requires social and economic transformation, this transformation often cannot be accomplished voluntarily

¹¹³ Masao Satake, Trade Conflict between Japan and the United States over Market Access: The Case of Automobiles and Automotives Parts, 2 (Asian Pacific School of Economics and Governance, Pacific Economic Papers No.310, 2000), <https://crawford.anu.edu.au/pdf/pep-310.pdf>.

¹¹⁴ CLINE, *supra* note 112, at 529–30.

¹¹⁵ SATAKE, *supra* note 113, at 6.

¹¹⁶ Edwin P. Reubens, *Commodity Trade, Export Taxes and Economic Development*, 71/1 POL.SC.QUARTERLY 42, 48 (1956).

and peacefully until considerable improvement in the quality and real availability of resources has occurred. This is a strategic factor that can help initiate and sustain limited disequilibrium of growth.¹¹⁷

2.2.2 Post-WTO

The “reversed” issue of access to primary supplies was therefore not a priority among WTO negotiators during the Uruguay Round (1986–1994).¹¹⁸ Two decades of low, declining commodity prices had led to a relatively moderate use of export restrictions. Any agreement on the topic, moreover, seemed hampered at the outset by the apparent insurmountable divide between net-importing countries, interested in securing further trade liberalization, and net-exporting countries, advocating the principle of sovereignty over natural resources.¹¹⁹ Thus, while the new WTO Agreement on Safeguards explicitly outlawed the use of VERs,¹²⁰ it did not address the issue of export restrictions, as countries lacked the incentive to find a multilateral solution to the long-standing issue of access to primary commodities.

The unresolved questions driving the stalemate in discussions on export restrictions resurfaced abruptly at the beginning of the 2000s, when renewed use of export restraints reached an alarming rate. The new wave again affected the agricultural sector and exacerbated the food crisis of 2007–2008 and the food-price spike of 2010–

¹¹⁷ *Id.* at 70.

¹¹⁸ ESPA, *supra* note 38, at 7.

¹¹⁹ GATT Secretariat Note, GATT Doc. MTN.GNG/NG2/W/40 (8 August 1989).

¹²⁰ Agreement on Safeguards art. 11.1(b), January 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S.154 [hereinafter Agreement on Safeguards].

2011.¹²¹ Moreover, it rapidly spread to various categories of commodities, including raw materials of mineral origin for use by other sectors of the economy. This multi-directional expansion in the use of export restrictions reflected, on the one hand, the exceptional scope of the 2000s commodity boom¹²² and the role of hard commodities in the 2008 price spike and, on the other hand, the sense of closure that countries developed in a phase of major macroeconomic downturn.

Two main factors explain the commonality of price increases across commodity sectors in the 2000s: first, the existence of common driving forces; second, the existence of links across markets. With regard to the first factor, analysts agree that the exceptional economic performances of developing Asia (and China in particular) played a key role in the 2000s commodity boom, in particular boosting energy and metal prices, for which demand skyrocketed to the highest level recorded in over twenty years.¹²³ The second factor mainly refers to the “contagion” effects that changes in energy (oil) prices produce in other commodity sectors and, particularly, in the agricultural sector.¹²⁴ By the end of the 2000s, export restrictions were the fastest-growing component of the trade-restrictive measures introduced within the framework of the global financial and economic crisis.¹²⁵

Mineral raw materials, including so-called critical minerals, are part of the backbone of any modern economy. Some minerals, such as iron, copper, aluminum, and silicon dioxide (silica), have multiple, visible, or at least well-known uses. Others are

¹²¹ Kim Anderson & Signe Nelgen, *Trade Barrier Volatility and Agricultural Price Stabilization*, 40 WORLD DEVELOPMENT 36 (2012); ESPA, *supra* note 38, at 7.

¹²² RADETZKI, *supra* note 6, at 70-71.

¹²³ *Id.*

¹²⁴ Christopher Gilbert, *How to Understand High Food Prices*, 61 J.AGR.ECON. 398, 401 (2010).

¹²⁵ Trade monitoring report, WTO Doc, WT/TPR/OV/14 (November 21, 2011), at 17.

essential for specific applications, such as manganese to iron and steel production. Several of the lesser-known minerals are indispensable for high-tech industrial products with civilian and military uses. Many, including gallium, tantalum, and the rare earth elements, are also needed for technical applications integral to the transition to more-advanced and more-sustainable global energy, transport, and communications systems. Examples include automotive electronics, batteries in hybrid cars, and solar panels.

Physical shortage in the strict sense is unlikely to become a significant factor for most minerals in the foreseeable future. A common reason for restricting export of raw materials is probably the desire to reserve those materials for domestic industries, thereby providing access to important inputs for below world-market prices.¹²⁶ In addition to making the final products more competitive when exported, this restriction also makes investment in high-value manufacturing more attractive, compared to exporting the unprocessed raw materials. Restricting export of raw materials may be a sound policy for developing countries trying to escape the role of supplying raw materials to manufacturing industries in other regions. In the long run, however, export restrictions are likely to spur the development of new technologies or substitutes for affected materials and to increase production of the raw materials in other countries, when possible.¹²⁷

The world price of the exported product rises, so the terms of trade in the mineral improve for the exporting country but deteriorate for the importing country.¹²⁸ Conversely, producers will be unwilling to export unless they can sell abroad at a price that exceeds

¹²⁶ Langlet, *supra* note 31, at 207.

¹²⁷ *Id.*

¹²⁸ FUNG & KORINEK, *supra* note 14, at 22.

the domestic price. Nevertheless, in any circumstances, a resource-rich country imposes export taxes on raw materials as an indirect subsidy to processing industries, as these taxes reduce the domestic price of the resource relative to its international price. An export tax on raw materials also lowers the supply of the raw material in international markets and increases its world market price.

Several large, developed economies, including the U.S. and the EU, have recently adopted or proposed political strategies to address access to mineral resources, thereby de facto reinforcing the perception that the issue calls for active government intervention.¹²⁹ In 1978, the U.S. relied completely on imports for seven mineral resources; in 2012 the corresponding number was eighteen minerals.¹³⁰ Since the WTO law divides export restricting measures into different categories, a post-WTO overview of the countries that introduced or maintained export taxes and export quantitative restrictions is provided in the sections below.

2.3 CURRENT STATUS AND OVERVIEW OF EXPORT RESTRICTIONS ON MINERAL RAW MATERIALS

This section presents an overview of the most important export taxes and other restrictive measures employed by countries and the main policy aims they serve, based on research and literature on the subject matter. However, systemic information on the use of export

¹²⁹ See The Raw Materials Initiative, *supra* note 59; the US House of Representatives, National Strategic and Critical Minerals Policy Act of 2013, bipartisan bill introduced to the 113th Congress, HR 761 (15 April, 2013).

¹³⁰ U.S. Geological Survey, Mineral Commodities Summaries (2012) 15.

restrictions worldwide is available only from 2009, when the WTO initiated the trade-monitoring practice in response to the global economic crisis.¹³¹

Export restrictions are so-called at-the-border measures imposed on national goods at the point of exportation.¹³² Similar to trade barriers imposed on importation, export restrictions are normally classified into different categories:

1. Price or tax measures, which operate by increasing the prices of exports;
2. Quantity measures, which work by limiting the quantity of a good to be exported;
3. Administrative measures, which are imposed in certain conditions for the exportation of a certain product.¹³³

All types of export restrictions ultimately limit the volume of exports of the targeted products, either explicitly (e.g., through an export quota setting a numerical ceiling) or implicitly (e.g., through export taxes and administrative measures that make exports more burdensome).¹³⁴

2.3.1 Export Taxes and Duties

For the purpose of classification, the category of “export taxes,” or “export duties,” is generally distinguished from that of export quantitative restrictions.¹³⁵ This distinction is drawn from the language of Article XI:1 of the GATT, which refers to “duties, taxes or

¹³¹ See the WTO Trade Monitoring Database, <http://tmdb.wto.org/searchmeasures.aspx?lang=en-US>.

¹³² WTO, *World Trade Report 2012: Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21st Century* 51, www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf.

¹³³ *Id.*

¹³⁴ Robert Staiger, *Non-Tariff Measures and the WTO 2* (WTO Economic Research and Statistics Division, Staff Working Paper No. ERSD-2012-01, 2012), www.wto.org/english/res_e/reser_e/ersd201201_e.pdf.

¹³⁵ ESPA, *supra* note 38, at 72.

other charges.” Similar expressions appear in other GATT provisions. For example, Article 1 of the GATT, on the most-favored-nation treatment, refers to “customs duties and charges of any kind imposed on or in connection with...exportation”; Article VI, on customs valuation, refers to “duties or other charges...on exportation”; and Article VIII, on fees and formalities rendered in connection with exportation, excludes “export duties” from its scope of application.¹³⁶ None of the GATT provisions, however, define these expressions. The GATT Analytical Index and Trade Policy Reviews (TPRs) use the phrases “export taxes” and “export duties” interchangeably, although the former generally prevails.¹³⁷ Based on the definition provided by the OECD, both phrases refer to a “tax collected on goods or commodities when they leave a customs territory.”¹³⁸

Export duties may consist of statutory or applied rates; the latter tend to be lower than the former. They can be *ad valorem* (specified in the form of a percentage of the value of the product), specific (a fixed amount to pay on a per-unit or per-weight basis), or compound (when the two components are combined).¹³⁹ Export taxes can also be progressive or differential, meaning that the tax rate increases in accordance with the

¹³⁶ OECD, Analysis of Non-Tariff Measures: The Case of Export Duties, TD/TC/WP(2002)54/FINAL (January 31, 2003) 6.

¹³⁷ *Id.* at 6-7.

¹³⁸ FLIESS, *supra* note 3, at 40; *Id.* at 7.

¹³⁹ PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 422 (2013).

product's value, and conversely, decreases when the price is low.¹⁴⁰ Finally, export duties may be imposed on specific products or applied horizontally to all exports.¹⁴¹

Export duties or taxes are among the most frequently used types of export restrictions, and their use has grown sharply in the last few years. The OECD initiated a comprehensive survey of the export taxes applied to raw materials in 2009, based on information collected through the TPRs prepared by the WTO Secretariat.¹⁴² The survey concluded that sixty-five WTO members introduced and maintained export duties during the years 2003–2009, of the 128 countries reviewed by the TPRB in that period.¹⁴³ The data showed an ambiguous upward trend, as in the period 1995–2002 the number of WTO members using export duties accounted for only 39% of the members under scrutiny.¹⁴⁴ According to the information available in the TPRs conducted up to December 2014, seventy-nine WTO members applied export taxes on raw materials, accounting for approximately 53% of the total number of countries under review.¹⁴⁵ The use of export taxes predominates in developing countries (forty-seven WTO members in 2014, compared with twenty-six in the period 1995–2002). The least-developed countries (LDCs) have also increasingly resorted to export duties (twenty-seven WTO members in 2014, compared with ten in 2002). Advanced economies, on the other hand, marginally

¹⁴⁰ Siddhartha Mitra & Tim Josling, *Agricultural Export Restrictions: Welfare Implications and Trade Disciplines* 16 (IPC Position Paper 2009); Stormy-Annika Mildner & Gitta Lauster, *Settling Trade Disputes Over Natural Resources: Limitations of International Trade Law to Tackle Export Restrictions*, 3 GOETTINGEN.JINT.L. 251, 257(2011).

¹⁴¹ Jeonghoi Kim, *Recent Trends in Export Restrictions on Raw Materials*, in THE ECONOMIC IMPACT OF EXPORT RESTRICTIONS ON RAW MATERIALS 36–45 (OECD ed., 2010).

¹⁴² *Id.* at 15–16.

¹⁴³ *Id.* at 16.

¹⁴⁴ OECD, *supra* note 136, at 13.

¹⁴⁵ KIM, *supra* note 141, at 15–16.

use these instruments.¹⁴⁶ However, export restrictions that curtail other countries' ability to import could certainly be a concern for any developed or developing country wishing to participate in any global value chain.¹⁴⁷ A significant increase in commodities trade between developing countries could potentially change the conventional North-South perspective on defensive and offensive interests in export restrictions. Although net-importing advanced economies maintain their motivation to encourage raw materials imports in order to export processed goods, resource-exporting countries are attempting to increase their participation in a particular global value chain by developing processing industries. Therefore, developing countries resort to export restrictions more than developed countries do.

The use of export taxes has also increased since the outbreak of the global financial and economic crisis. The WTO trade-monitoring reports have registered WTO members' introduction of new export duties and the upward adjustment of existing export duties in each reporting period. The use of export taxes is particularly high in industrial raw materials, particularly the mineral raw materials sector. Between 2009 and 2012, twenty-three of the seventy-two countries surveyed applied export duties on fifty-five types or groups of minerals and metals.¹⁴⁸ By 2012, the OECD recorded 144 measures at the HS six-digit level of product classification affecting minerals and metals, either in their primary or semi-processed forms, and another 141 affecting metal waste and

¹⁴⁶ See OECD, *supra* note 136; KIM, *supra* note 141, at 15–16;

¹⁴⁷ OECD, WTO and World Bank Group, Report on *Global Value Chains: Challenges, Opportunities and Implications for Policy*, at 94-95 (July 19 2014).

¹⁴⁸ FLIESS, *supra* note 3, at 11.

scrap.¹⁴⁹ The OECD noted that most such measures were introduced after 2009 and that the range of mineral products affected by such restrictions has not significantly changed since 2009.¹⁵⁰

Analysis of the duties introduced and maintained on mineral raw materials, especially since the outbreak of the global financial and economic crisis in 2008, confirms the trend of proliferation of export taxes affecting raw materials, particularly the minerals sector. My survey, on export taxes up to December 31, 2016, collected from the OECD Inventory, the WTO TPRs, the WTO trade-monitoring reports, and the reports of the Directorate-General for Trade of the European Commission, shows very high occurrence of export taxes on mineral raw materials. Of thirty identified raw materials, all have been subject to export duties in at least one form and in at least one country since 2008. Yet, a recent study shows that sixty-two countries (approximately 40% of the WTO membership) do not use any export duties.¹⁵¹

The countries using export duties are almost all developing countries. In particular, 117 out of the 181 developing countries use export taxes and duties.¹⁵² By region, 91% of African countries impose duties on exports, followed by 76% of countries in Asia and 71% in the Americas.¹⁵³ China, Vietnam, Argentina, and the Russian Federation have taxed the highest number of mineral raw materials on exportation. China's regime of

¹⁴⁹ *Id.* at 9.

¹⁵⁰ *Id.* at 7.

¹⁵¹ Olga Solleder, *Trade Effects of Export Taxes* 4 (GIIDS Working Paper No.08/2013, August 2013), http://graduateinstitute.ch/webdav/site/international_economics/shared/international_economics/publications/working%20papers/2013/HEIDWP08-2013.pdf.

¹⁵² *Id.*

¹⁵³ *Id.* at 3,4.

export taxes is particularly pervasive.¹⁵⁴ Among the countries resorting most commonly to export duties on minerals and metals are Argentina, India, Vietnam, and the Russian Federation.¹⁵⁵

The Chinese government reviews and publishes in December of each year a Tariff Implementation Plan, which contains a list of commodities subject to a new or adjusted export-tax rate, in accordance with the Regulations on Import and Export Tariffs.¹⁵⁶ Export taxes are thus systematically applied to a wide range of commodities. Since 2008, the number of HS eight-digit tariff lines subject to statutory export duties has increased, from ninety-five HS eight-digit tariff lines in 2009 to 102 in 2013.¹⁵⁷ Moreover, China also applies interim export duties for a limited period. In 2013, 320 HS eight-digit tariff lines were subject to interim export duties.¹⁵⁸ When imposed on items already subject to a statutory rate, interim export duties prevail and are normally lower.¹⁵⁹ In most cases, however, interim export taxes are applied to additional tariff line items that are not subject to statutory export taxes.¹⁶⁰ Using this system, China still cumulatively applied export duties to 346 HS eight-digit tariff lines in 2014 (including both statutory and interim).¹⁶¹

¹⁵⁴ ESPA, *supra* note 38, at 78.

¹⁵⁵ See FUNG & KORINEK, *supra* note 14; OECD Inventory, Restrictions on Export of Raw Materials, http://qdd.oecd.org/subject.aspx?Subject=ExportRestrictions_IndustrialRawMaterials; European Commission, Eleventh Report, 13-14, 97–106.

¹⁵⁶ WTO Secretariat, Trade Policy Review Report, WTO Doc. WT/TPR/S/300/Rev.1 (October 7, 2014) 79.

¹⁵⁷ WTO Secretariat, Trade Policy Review Report, WTO Doc. WT/TPR/S/264/Rev.1 (July 20, 2012) 58; WTO, *supra* note 156, at 80.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ WTO Secretariat, Trade Policy Review Report, WTO Doc. WT/TPR/S/199/Rev.1 (August 12 2008) 74.

¹⁶¹ Terence Stewart et al., *WTO Rules Against China's Export Restraints on Rare Earths: A Step Forward in Leveling the Playing Field* (March 26, 2014), <http://www.stewartlaw.com/Article/ViewArticle/989>.

China has imposed export taxes on a wide range of critical minerals and metals in their primary state. In several cases, these are materials for which it enjoys a dominant or quasi-monopolistic position in global mine production (e.g., antimony, graphite, magnesite, molybdenum, rare earth elements, tungsten, and vanadium); in others (e.g., copper, manganese, silver, and titanium), China is still among the four top producers, accounting for no less than 10% of global primary production.¹⁶²

The case of Argentina differs in that the country has horizontally taxed all exports since 2002.¹⁶³ The introduction of this instrument followed the devaluation of the peso at the beginning of the 2000s and was established by the former Ministry of the Economy and Infrastructure as a price policy tool to cushion the effect of exchange-rate fluctuations on domestic prices and as a fiscal measure to restore public finances.¹⁶⁴ Currently, a general tax rate of 5% applies to all commodities, while higher export duties apply to specific products or categories of products.¹⁶⁵ Minerals and their concentrates are subject to a 10% or more export duty rate.¹⁶⁶ The Argentinian system is based on the principle of differential taxation, as the export duty rate varies according to the degree of processing and is systematically different for primary and semi-processed forms of each exported material—higher for the former and lower for the latter.¹⁶⁷ Although originally introduced on a declaratorily temporary basis per Resolution No. 11/2002, neither the resolution itself nor its complementary or amendatory regulations have indicated the timetable for the

¹⁶² World Mining Congress, “World Mining Data Report 2014”.

¹⁶³ ESPA, *supra* note 38, at 80.

¹⁶⁴ WTO Secretariat, Trade Policy Review Report, WTO Doc. WT/TPR/S/176 (January 8, 2007) 67.

¹⁶⁵ WTO Secretariat, Trade Policy Review Report, WTO Doc. WT/TPR/S/277 (February 13, 2013) 96.

¹⁶⁶ *Id.* at 68.

¹⁶⁷ FLIESS, *supra* note 3, at 13.

elimination of such instruments.¹⁶⁸ Export duties have thus become a major source of tax revenue for the Argentinean government, accounting for more than 20% of total returns.¹⁶⁹

Vietnam is another example of a relatively well-endowed country resorting to progressive taxation on exports from the mining sector.¹⁷⁰ Ores and concentrates are taxed at a rate ranging from 22% to 30%, which has frequently increased in the last few years.¹⁷¹ Semi-processed materials, in contrast, are generally taxed at 5% to 15%.¹⁷² Among the restricted minerals and metals are titanium and tungsten, for which Vietnam is the fifth-largest mine producer worldwide.¹⁷³

The Russian Federation, by contrast, reportedly imposes export taxes on fewer mineral commodities in their primary and/or semi-processed forms, namely, copper, molybdenum, nickel, PGMs, and tungsten. For copper and nickel, the country applies export taxes to a wide range of compounds, alloys, and semi-processed metal forms but not to ores and concentrates. Yet, the Russian Federation is a top mine producer of all these materials. In fact, it is the world's second-largest primary producer of PGMs and tungsten, the third largest for nickel, the sixth for copper, and the ninth for molybdenum.¹⁷⁴ In some cases, the existing export duty rates were replaced after the creation of the

¹⁶⁸ WTO Doc, *supra* note 165, at 97.

¹⁶⁹ *Id.*

¹⁷⁰ ESPA, *supra* note 38, at 80.

¹⁷¹ European Commission, Eleventh Report, at 106.

¹⁷² FLIESS, *supra* note 3, at 13.

¹⁷³ See World Mining Congress, *supra* note 162.

¹⁷⁴ *Id.*

Customs Union with Belarus and Kazakhstan and are thus common to the three countries.¹⁷⁵

In general, all countries' domestic legislation has envisaged the need to restrict exports in certain circumstances. In this respect, export-control regulation in EU member states is unique. The Treaty On The Functioning of the EU declares that the common commercial policy shall be based on uniform principles, inter alia, concerning export policy.¹⁷⁶ As provided in the EU Regulation on common rules for exports (2015/479), EU exports to third countries are free; in other words, they are not subject to quantitative restrictions, except for a few products for certain member states and petroleum oil and gases for all member states.¹⁷⁷ However, when a member state believes that exceptional market trends causing scarcity of an essential product justify protective measures, that member can set in motion the European information and consultation procedure.¹⁷⁸ Consultations take place within an advisory committee and cover conditions and terms of exports and, if necessary, the measures that should be adopted.¹⁷⁹ If the European market faced a critical situation due to a shortage of essential raw materials and if the EU's interests demanded immediate action, the Commission, at a member state's request or acting on its own initiative, can make exports subject to authorization, which is issued if certain allowable restrictions are met, while the Commission waits for a council decision.

¹⁷⁵ TPR Body, Report on Trade Related Developments, WTO Doc. WT/TPR/OV/W/5/Rev.1 (Sep.7, 2011), 22.

¹⁷⁶ NICHOLAS MOUSSIS, ACCESS TO THE EUROPEAN UNION: LAW, ECONOMICS, POLICIES 687 (2016).

¹⁷⁷ Regulation (EU) 2015/479, of the European Parliament and of the Council of 11 March on the common rules for exports, 2015, Art.1.

¹⁷⁸ *Id.* art 4.

¹⁷⁹ MOUSSIS, *supra* note 176, at 688.

The council may either uphold or invalidate the Commission's decision, given the international commitments of the EU or of all its member states, notably regarding trade in raw materials.¹⁸⁰ Quantitative export restrictions can be limited to specific destinations or to the exports of certain EU regions.

Other countries applying export restrictions to more than one type or group of critical minerals and metals include the Democratic Republic of the Congo (DRC), Malaysia, India, and Indonesia. DRC has traditionally taxed mining exports at a rate of 10%, per its customs code.¹⁸¹ Export duties are therefore horizontally imposed on mineral ores and concentrates, including on critical minerals and metals that are abundant in DRC, such as cobalt, copper, and tantalum.¹⁸²

India taxes exports of chromium and manganese in their ore and concentrate forms, and is a top producer of such materials, ranking fourth (at approximately 11% of world mine production) and seventh (at approximately 5%), respectively, based on the country's mine output.¹⁸³ In contrast, Malaysia applies export duties on copper, nickel, PGMs and silver, and copper and manganese, mainly in semi-processed forms, whereas Indonesia has recently introduced export taxes on ores and concentrates of copper and manganese, among others.¹⁸⁴ Yet, neither Malaysia nor Indonesia enjoys a leading position in global mine production of the critical materials identified.¹⁸⁵

¹⁸⁰ *Id.*

¹⁸¹ WTO Secretariat, Trade Policy Review Report, WTO Doc. WT/TPR/S/240 (October 20, 2010) 42.

¹⁸² See World Mining Congress, *supra* note 162.

¹⁸³ *Id.*

¹⁸⁴ European Commission, Eleventh Report, at 101–2.

¹⁸⁵ See World Mining Congress, *supra* note 162.

Finally, another group of countries imposes export duties on selected minerals. For instance, Gabon taxes solely exports of manganese ores and concentrates, Zambia imposes an export duty on copper ores and concentrates, and Zimbabwe on chromium ores and concentrates. All of these countries are among the top-ten leading mine producers.¹⁸⁶

These facts qualify the proliferation of export taxes on mineral raw materials. The first feature is that each type or group of minerals has been subject to export taxes since 2008 by a total of fourteen countries. While some of these measures pre-date 2008, most were introduced or extended on or after that date. In some cases, the measures were intended to be temporary, but they were often maintained longer than anticipated and sometimes for more than a decade. Moreover, when subject to revision or renewal, whether temporary or not, the export duty rates have tended to increase, especially for rare earth and copper.

Sometimes countries exceed their WTO commitments as they resort to export taxes or duties.¹⁸⁷ The most evident case is China's regime of export duties that violate China's WTO obligations.¹⁸⁸ Among them, the export duties on various forms of rare earth elements, molybdenum, and tungsten were condemned by the Appellate Body in the China-Rare Earths Report, adopted on August 29, 2014, which obligated China to bring its export regime in compliance with the Appellate Body's findings, by May 2, 2015.¹⁸⁹

¹⁸⁶ *Id.*

¹⁸⁷ ESPA, *supra* note 38, at 83.

¹⁸⁸ *Id.*

¹⁸⁹ See discussion *infra* Section 3.5.

In conclusion, the “proliferation” of export duties does not refer to a greater number of countries resorting to such measures, as has occurred on a more general level, but to the multiplication of the number of tariff lines subject to export duties by a limited number of countries that are dominant global mine producers and large exporters.¹⁹⁰

2.3.2 Quantitative Restrictions

Unlike price measures, quantitative restrictions are measures that operate by limiting the quantity that may be exported.¹⁹¹ They are restrictions imposed by governments on the amount or quantity of goods that may be exported within a given period.¹⁹² As provided in Article XI:1 of the GATT, quantitative restraints include export “prohibitions” and “restriction”, where the latter may be made effective through export quotas, licenses and any other measures capable of having a limiting effect on export volumes. Such a broad definition allows the inclusion of different types of classic quantity measures, such as export bans and export quotas, administrative measures such as export licensing schemes, and other measures such as minimum export prices, qualified exporters lists, captive mining, and domestic market obligations that may result in a limitation of exports.¹⁹³

2.3.2.1 Export Prohibitions or Bans

Export prohibitions or bans are an “absolute restriction on exports.”¹⁹⁴ Countries resort to export bans to comply with obligations of multilateral agreements.¹⁹⁵ In such cases, the

¹⁹⁰ WTO Secretariat, *supra* note 156, at 81.

¹⁹¹ ESPA, *supra* note 38, at 86.

¹⁹² Mildner & Lauster, *supra* note 140, at 258.

¹⁹³ *Id.*

¹⁹⁴ FLIESS, *supra* note 3, at 40.

¹⁹⁵ KIM, *supra* note 141, at 16.

prohibition of exports corresponds to non-economic public-policy goals such as security, life, public health, safety, and environmental protection.¹⁹⁶ Among the international instruments most frequently cited to justify export prohibitions are various conventions on the non-proliferation of weapons (e.g., the Convention on Chemical Weapons and the Treaty on Nuclear Non-Proliferation); and multilateral export control arrangements (e.g., the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, and the Wassenaar Arrangement).¹⁹⁷

Data indicate that export prohibitions have increased in the last decade. In particular, countries have extensively used export bans in the agricultural sector to prevent food shortages¹⁹⁸ and severe price volatility of essential foodstuff.¹⁹⁹

In the mineral raw materials trade, export bans are rarely reported.²⁰⁰ Only a few countries actually ban exports of critical minerals. Zimbabwe, the tenth-largest world mine producer of chromium, has prohibited the exportation of ores and concentrates since 2007, with a suspension between 2010 and 2011, when it substituted the measure with an export tax.²⁰¹ The Philippines, moreover, has banned the export of PGM ores and concentrates since the 1970s, while Venezuela has not allowed exports of ash and residues containing antimony, beryllium, chromium, copper, and precious metals since 2005.²⁰² In 2012, the Indonesian Ministry of Energy and Mineral Resources adopted a

¹⁹⁶ *Id.* at 17.

¹⁹⁷ *Id.*; OECD, 'Analysis of Non-Tariff Measures: The Case of Export Restrictions, TD/TC/WP(2003)7/FINAL (April 4, 2003)17.

¹⁹⁸ See WTO Secretariat, Report on Trade Related Developments, WTO Doc, WT/TPR/OV/W/1–8.

¹⁹⁹ See *Id.*

²⁰⁰ Barbara Fliess & Tarja Mard, *Taking Stock of Measures Restricting the Export of Raw Materials* 12 (OECD Trade Policy Paper No.140, 2012).

²⁰¹ See OECD Inventory, *supra* note 155.

²⁰² See *id.*

regulation on Increasing Value-Added Minerals Through Processing and Refining, which introduced an export ban on unprocessed minerals, except coal, beginning January 12, 2014.²⁰³ One group of countries (Azerbaijan, Burundi, Guyana, Jamaica, Kenya, Rwanda, Tanzania, Uganda, and Venezuela) has regularly prohibited the exportation of numerous materials, including antimony, beryllium, chromium, cobalt, copper, gallium, germanium, indium, niobium, rhenium, magnesium, manganese, molybdenum, nickel, tantalum, titanium, tungsten, and vanadium.²⁰⁴ Azerbaijan and Venezuela have also banned the export of precious metals such as PGMs and silver in their waste and scrap forms.²⁰⁵ In the last few years, countries such as Argentina and Uruguay have also applied temporary export bans to copper waste and scrap.²⁰⁶

2.3.2.2 Export Quotas

Export quotas are numerical ceilings imposed by an exporting country, to cap the total volume of exports of a certain product.²⁰⁷ WTO members widely use export quotas, like export bans, to achieve various non-economic goals in multilateral environmental agreements and multilateral export control arrangements.²⁰⁸

Export quotas on raw materials trade are relatively limited, compared to export taxes or other types of quantitative restrictions such as export prohibitions.²⁰⁹ In the agricultural sector only three countries, Argentina, China, and Ukraine, applied export

²⁰³ European Commission, Eleventh Report, at 101.

²⁰⁴ See OECD Inventory, *supra* note 155.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ FLIESS, *supra* note 3, at 40.

²⁰⁸ ESPA, *supra* note 38, at 89.

²⁰⁹ *Id.*

quotas on a total of seven tariff lines related to bulk commodities (HS six-digit) between 2009 and 2015.²¹⁰ Likewise, two countries, Canada and the Russian Federation, imposed quotas on the exportation of various wood products (eight HS six-digit tariff lines) in the same period.²¹¹ For mineral raw materials, three countries have reportedly resorted to export quotas since 2008: China, Ukraine, and Belarus.²¹²

According to the OECD Inventory, China applied export quotas to forty-four types or groups of minerals in the period 2009–2012.²¹³ The OECD has calculated that the share of world exports subject to quantitative restrictions was highest for antimony (50% of world exports), tungsten (45%), magnesite (44%), and rare earth (39%).²¹⁴

In China, raw materials exporters can apply for an export quota until November 15 of each year, and annual quotas are generally allocated by December 15 and, in some cases, twice a year through a “first batch” and a “second batch” in December and July, respectively.²¹⁵ The allocation of quotas occurs either directly or through a quota bidding system.²¹⁶

As the Chinese government has reported, the Chinese Ministry of Commerce determines the total ceiling for quotas based on these factors: a) the need to guarantee the safety of the national economy; b) the need to protect limited domestic resources; c) the state’s development planning, objectives, and policies on the relevant industries; and

²¹⁰ See OECD Inventory, *supra* note 155.

²¹¹ FLIESS & MARD, *supra* note 200, at 9, 14.

²¹² See OECD Inventory, *supra* note 155.

²¹³ FLIESS & MARD, *supra* note 200, at 13.

²¹⁴ *Id.* at 14.

²¹⁵ WTO Doc.WT/TPR/S/300/Rev.1, *supra* note 156, ¶ 81.

²¹⁶ *Id.*

d) demands of the international and domestic markets and the statuses of production and sales.²¹⁷ Upon receipt of applications, the Chinese administration allocates quotas directly or through local administrative authorities guided by the following criteria: a) the export performance of the particular good; b) the use ratio of the export quota; c) the business management/operation capacity of the applicant; d) the production scale and resource status of the applicant enterprise or area during the previous three years.²¹⁸

According to the OECD Inventory, since 2008 China has tightened the ceiling on several mineral raw materials, not only in terms of absolute value but also a percentage of total Chinese production.²¹⁹ An example is the export quotas imposed on rare earth elements; in 2010, the allocated quotas were set at 30,259 metric tons, significantly reduced from 49,990 metric tons in 2008. For the next four years, the total allocated quantity did not vary much, remaining within the range of 30,000–31,000 metric tons until 2014.²²⁰ However, beginning in 2011, the list of products under the quota was updated to include new categories. Hence, although the list was left almost unchanged at a formal level, the EU Commission has estimated that “by including new category of products in the quota, China in fact reduced the 2011 rare earth export quota by as much as 30%, while passing the message that the 2011 quota was not reduced when compared to that of 2010.”²²¹

2.3.2.3 Export Licensing Schemes or Requirements

²¹⁷ Panel Report, *China-Measures Related To The Exportation Of Various Raw Materials*, ¶ 7.177, WTO Doc. WT/DS394/R (adopted July 5, 2011).

²¹⁸ *Id.* ¶ 7.178.

²¹⁹ KORINEK & KIM, *supra* note 24, at 123–30.

²²⁰ Gareth Hatch, The Second Round of Chinese Rare-Earth Export-Quota Allocations for 2014, (Technology Metal Research, July 19, 2014), <http://www.techmetalsresearch.com/2014/07/the-second-round-of-chinese-rare-earth-export-quota-allocations-for-2014/>.

²²¹ EU Commission, Ninth Report, at 119.

An export licensing requirement is “the requirement to obtain prior approval, in the form of a license or permit, to export a good or a commodity.”²²² Interested enterprises must apply for a license before exporting. Governments can monitor export flow by reviewing those applications. Export licensing processes can be automatic or non-automatic. In automatic licensing, approval is granted in all cases, usually immediately through a standardized application.²²³ Automatic processes, therefore, do not impose any significant extra burden or transaction costs on exporters and are mainly implemented for statistical purposes.²²⁴ Non-automatic licenses, in contrast, are granted only upon submission of an application or other documentation to the relevant administrative bodies. In these cases, exporters must fulfill all the necessary requirements in order to be granted approval in the form of a license.²²⁵ Depending on how they operate, export licensing processes may entail significant additional costs for exporting enterprises and, thus, negatively affect export volumes. For instance, excessively long processing times and vague or discretionary application rules could de facto negatively impact export volumes.²²⁶ Excessively stringent export licensing processes may even result in an export ban.²²⁷

According to the OECD Inventory, export licensing requirements have been the most frequent type of export restriction applied to industrial raw materials, by a total of

²²² FLIESS, *supra* note 3, at 40.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ KORINEK & KIM, *supra* note 24, at 109.

²²⁷ European Commission, Tenth Report on Potentially Trade-Restrictive Measures Identified in the Context of the Financial and Economic Crisis, 131-2 (2013), available at http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151703.pdf.

twenty-nine countries since 2008.²²⁸ China, the Dominican Republic, Malaysia, the Philippines, and the Russian Federation use non-automatic export licensing schemes on the highest number of products.²²⁹ The latest trade-policy reviews show that numerous countries have introduced more-stringent procedures and requirements for obtaining an export license in the past few years.²³⁰ South Africa, for instance, introduced a five-year policy directive that exports of non-ferrous waste and scrap metal must first be offered to domestic users for a period determined by the International Trade Administration Commission (ITAC) of South Africa and at a price discount or other formula determined by ITAC, to facilitate local rather than export sale.²³¹ Later, in 2014, South Africa amended the export licensing process for non-ferrous scrap metals, with the condition that scrap metals should have previously and unsuccessfully been offered to domestic consumers at a price 20% below the international spot price.²³² Similarly, Indonesia recently introduced a government regulation concerning the implementation of, among others, mineral mining business activities, which indicates minimum levels of domestic processing and refining for metallic and non-metallic minerals prior to obtaining permission to sell them abroad in specific amounts.²³³ In Mauritius, only Mauritian-owned companies may apply for a license if they wish to export scrap metals, and if they fulfill the eligibility requirements they must pay for the license, which is only valid for six

²²⁸ FLIESS, *supra* note 3, at 9.

²²⁹ *Id.*

²³⁰ European Commission, Tenth Report, at 125-133; European Commission, Eleventh Report, at 97–106.

²³¹ European Commission, Eleventh Report, at 104.

²³² *Id.* at 105.

²³³ *Id.* at 101–102.

months.²³⁴ Moreover, even though it had eliminated export quotas on rare earth elements, China introduced stricter licensing rules for the exportation of these materials, including a lowered number of licensed companies.²³⁵

2.3.2.4 Minimum Export Prices and Other Types of Export Restrictions

A minimum export price (MEP), also known as “administered pricing,” is the minimum permitted price for a good being exported.²³⁶ A MEP may not necessarily be binding but can be used as a reference price.²³⁷

According to the OECD Inventory and the latest WTO trade-monitoring reports, only seven countries have resorted to MEPs since 2008: Argentina, China, India, Indonesia, Pakistan, and Vietnam.²³⁸ Pakistan and Vietnam used MEPs for rice during the period 2008–2010, while India reintroduced MEPs for agricultural commodities such as onions and potatoes in 2014.²³⁹ Indonesia and the Russian Federation still use these measures for wood products and diamonds, respectively.²⁴⁰ Argentina has applied precautionary price references for a wide range of semi-refined and processed copper articles for export since 2010.²⁴¹

Other types of export restriction include the so-called domestic market obligation, which requires producers to allocate a proportion of their annual production output to the

²³⁴ FLIESS, *supra* note 3, at 19.

²³⁵ Sinocast Metals, Mining and Chemical Beat, China cancels 2015 Tungsten, Molybdenum Export Quotas, Kitco News (December 30, 2014), <http://www.kitco.com/news/2014-12-30/China-Cancels-2015-Tungsten-Molybdenum-Export-Quotas.html>, (last visited December 15, 2017).

²³⁶ FLIESS, *supra* note 3, at 40.

²³⁷ *Id.*

²³⁸ ESPA, *supra* note 38, at 97.

²³⁹ WTO, *Annual Report by the Director General, Annex 3*, 157, 158, WTO Doc. WT/TPR/OV/17 (November, 24, 2014).

²⁴⁰ FLIESS, *supra* note 3 at 15.

²⁴¹ See OECD Inventory, *supra* note 155.

domestic market.²⁴² The Russian Federation, for instance, applies this instrument, along with export taxes, to various forms of precious metals.²⁴³ Some countries place restrictions on exports by requiring exporting entities to register with government authorities. For example, Indonesia has “qualified exporters lists”, whereby the government issues the right to export precious metals to firms that have successfully registered.²⁴⁴ Similarly, China’s government formulates and periodically adjusts the list of companies that are allowed to export specific commodities.²⁴⁵ In some cases, state trading itself is considered an implicit form of export restriction inasmuch as such enterprises can control exports and thereby affect domestic supply, demand, and prices.²⁴⁶

Another type of export restriction is known as “captive mining,” which refers to the practice whereby “a processing company is required to own the mine that produces its inputs, or has been awarded mining rights with the intention that the company will mine the commodity for use in its own domestic processes and not trade it.”²⁴⁷ India uses the policy of captive mining concessions on a wide range of mineral products, including various forms of coke and manganese.²⁴⁸ Indonesia has also recently implemented a comprehensive process of mining concessions, to ensure that holders of mining rights process and refine products domestically instead of trading them in concentrate forms.²⁴⁹

²⁴² FLIESS, *supra* note 3, at 41.

²⁴³ See OECD Inventory, *supra* note 155.

²⁴⁴ FLIESS, *supra* note 3, at 14, 40.

²⁴⁵ *Id.* at 14.

²⁴⁶ Director General, *Report On Trade-Related Developments*, WTO Doc.WT/TPR/OV/W/5/Rev.1 (September 7, 2011) ¶ 54.

²⁴⁷ FLIESS, *supra* note 3, at 41.

²⁴⁸ See OECD Inventory, *supra* note 155.

²⁴⁹ European Commission, Eleventh Report, at 101–2.

2.4 ANALYSIS OF INDUSTRIAL AND NON-INDUSTRIAL POLICY IMPLICATIONS AND RATIONALES FOR IMPOSING EXPORT RESTRICTIONS

Governments intervene in non-renewable natural-resource sectors more than in many other sectors, including through the use of export taxes and quotas. In general, all types of export restrictions can achieve similar economic effects. Export restrictions serve important development purposes, including increasing government revenue, expanding domestic value in the raw materials sectors, enhancing environmental sustainability, and slowing resource extraction.²⁵⁰ This section focuses on why countries seek to restrict exports. I consider, among other things, the economic and non-economic effects of export restrictions, by discussing the main concerns in the literature and research.

2.4.1 The Industrial Effects of Export Restrictions

A relatively small body of literature has begun to investigate the economic implications of export restrictions specifically on mineral raw materials.²⁵¹ The literature on the economics of export restrictions on mineral resources has mainly used static models of perfect competition derived from standard economic theory.²⁵² These studies usually assess the effects of an export tax against two different scenarios: in the first, the country imposing the restriction is “small” in the sense that its share of exports is not large enough to influence world prices; in the second, the restricting country is “large,” which means its share of exports can affect world market prices.²⁵³ In both cases, export taxes reduce

²⁵⁰ PARRA ET AL., *supra* note 49, at 7.

²⁵¹ Korinek and Kim, *supra* note 24; Fung & Korinek, *supra* note 14; Joelle Latina et al., Natural Resources and Non-Cooperative Trade Policy, 8 INT.ECONS.ECON.POL. 177 (2012); World Trade Organization, World Trade Report: Trade in Natural Resources (2010).

²⁵² Fung & Korinek, *supra* note 14, at 18.

²⁵³ See PIERMARTINI, *supra* note 94, at 3–4.

exports from the imposing country given that domestic producers will prefer to sell the taxed products at home rather than abroad, to avoid the tax.²⁵⁴ Given the geographical concentration of mineral resources, the model that best describes the effects of export taxes on mineral raw materials is that of the large country.

2.4.1.1 Beggar-Thy-Neighbor Policy

An export tax always unambiguously reduces global welfare. In other words, an export tax is a “beggar-thy-neighbor” policy in the sense that it benefits the imposing country by making other countries worse off.²⁵⁵ For example, China’s export restrictions on rare earth minerals promoted the competitive position of domestic high-tech producers by penalizing foreign competitors.²⁵⁶

As a limited number of large countries often produce and export mineral raw materials, export restrictions are likely to significantly affect world prices and, thus, have greater welfare implications for the global economy. As a result, export taxes have redistributive effects in both exporting and importing countries. When the producer of the raw material is taxed, the downstream processing industries are subsidized.²⁵⁷ This could result in inefficiencies by causing overproduction in the exporting country’s industry. In the exporting country, raw material producers will suffer from the negative consequences, including a decline in domestic prices, whereas downstream consumers

²⁵⁴ ESPA, *supra* note 38, at 104.

²⁵⁵ PAUL KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY*, 544 (2015).

²⁵⁶ Stefania Massari & Marcello Ruberti, *Rare Earth Elements As Critical Raw Materials: Focus on International Markets and Future Strategies*, 38 *RESOURCES.POL.* 36, 40 (2013).

²⁵⁷ PIERMARTINI, *supra* note 94, at 4–5.

will benefit from cheaper inputs as if they were indirectly subsidized.²⁵⁸ In brief, export taxes actually transfer welfare from the sector producing the raw commodity to the processing industry that uses it.²⁵⁹ Raw material production is discouraged, and employment and wages may fall in the sector.²⁶⁰ In the importing countries, consumers lose since they must pay higher prices for the good, whereas producers will gain from higher prices due to lower levels of supply by their competitors.²⁶¹

2.4.1.2 Redistributive Effects

The OECD has developed the Cournot-Nash oligopoly model to elaborate the redistributive effects of export taxes in the mineral raw materials sector. Fung and Korinek adapted this model to fit the distinctive features of international mineral producers. According to their analysis, if a raw materials firm and a downstream firm exist in both the exporting and importing countries, an export tax will create two distinct effects: a profit-shifting, or rent-shifting, effect and a job-shifting, or employment-shifting, effect.²⁶² The profit-shifting effect means that, by imposing an export tax, the government shifts rent away from its own upstream firm to the foreign raw materials producer.²⁶³ This occurs because the domestic firm reduces its output due to the decline in the domestic price of the taxed good, while the foreign firm increases its production as prices go up.²⁶⁴ An export tax at the level of downstream firms generates the job-shifting effect. In the

²⁵⁸ *Id.*

²⁵⁹ Fung & Korinek, *supra* note 14, at 17.

²⁶⁰ *Id.*

²⁶¹ Piermartini, *supra* note 94, at 7.

²⁶² Fung & Korinek, *supra* note 14, at 22–4.

²⁶³ *Id.* at 22.

²⁶⁴ *Id.*

exporting country, the downstream sector consuming the product subject to an export tax will benefit from cheaper inputs and, accordingly, expand its output, employment, and profits that rely on a lower marginal cost of production. In the importing country, the downstream firm will reduce its output, employment, and profits due to the higher marginal cost induced by the higher world price of the taxed materials.²⁶⁵ Overall, an export tax will thus benefit foreign firms operating in the upstream mineral sector of the importing country and domestic downstream firms in the exporting country.

The winners and losers in both the exporting and the importing countries are not different in the case of export quotas. However, for the reasons mentioned above, export quotas lead to greater welfare losses than does the corresponding level of export taxes.²⁶⁶

2.4.1.3 The Welfare of the Global Economy

As a limited number of large countries often produce and export mineral raw materials, export restrictions are likely to significantly affect world prices and, thus, have greater welfare implications for the global economy. High geographical concentration also influences the elasticity of supply in the mineral sector, which, in turn, is an important factor in the magnitude of effects attributable to export restrictions. Supply elasticity is defined as “the percentage increase in the quantity of a good produced following a one percent increase in its price.”²⁶⁷ Similarly, demand elasticity indicates “the percentage fall in the demanded quantity of a good as its price increases by one percent.”²⁶⁸ The higher

²⁶⁵ *Id.* at 23–24

²⁶⁶ *Id.* at 24–26.

²⁶⁷ PIERMARTINI, *supra* note 94, at 6.

²⁶⁸ *Id.*

the elasticity, the higher the responsiveness of supply and demand to price variations.²⁶⁹ In the mineral sector, elasticity tends to be low in the short run when mineral raw materials are difficult to substitute, especially if they are used in trace amounts or in the manufacture of strategic products.²⁷⁰ In the short to medium term, the structural characteristics of the mineral sector may amplify the welfare losses induced by export restrictions.²⁷¹

In the mineral sector, the upstream firm is frequently foreign owned and often a multinational affiliate.²⁷² In this situation, the multinational raw material producers may shift investment from the country imposing the restrictions to their mining operations elsewhere, to benefit from higher world prices and avoid the restrictive measures.²⁷³ Under this scenario, the government would prefer to impose export taxes rather than quantitative restrictions in order to collect revenue from foreign-owned companies that would have employed their profits abroad.²⁷⁴ Yet, the welfare gain produced by government revenues will decline over time, as companies decrease investment in mining and exploration activities in the exporting country.²⁷⁵ In contrast, when mineral raw material producers are state-owned enterprises, the government may gain from imposing an export quota, while the level of production may not shrink to allow domestic downstream firms to benefit from access to cheaper inputs.²⁷⁶ The incentive to reallocate profits from the upstream mineral sector to the downstream sector through an export

²⁶⁹ *Id.*

²⁷⁰ Korinek & Kim, *supra* note 24, at 104.

²⁷¹ PIERMARTINI, *supra* note 95, at 47.

²⁷² Fung & Korinek, *supra* note 14, at 23.

²⁷³ *Id.* at 29.

²⁷⁴ *Id.* at 23.

²⁷⁵ *Id.* at 33.

²⁷⁶ *Id.* at 29.

restriction may be particularly strong in developing countries whose mineral exports make up a large proportion of gross domestic product (GDP).²⁷⁷ This is because of the job-shifting effect induced by these measures, which leads to lower employment in the upstream mineral sector but generates jobs in more labor-intensive downstream sectors.²⁷⁸ Yet, in certain low-income countries, the downstream sector may not be developed enough or have the necessary technology to initiate or expand production and generate the higher profits associated with higher value-added mining production. In these cases, the governments imposing export restrictions may match these instruments with policies to create a favorable climate for investment in their downstream industry. The potential benefits of export restriction for the domestic downstream industry will, however, diminish if other countries, especially large ones, react by introducing similar measures. In this scenario, world prices will further increase, potentially encouraging escalation in export-restrictive measures and, in any case, creating greater uncertainty for the global economy and trading partners.²⁷⁹

2.4.2 Non-Industrial Policy Goals

Governments introduce export measures for various public-policy reasons.²⁸⁰ These reasons include conservation of natural resources, promotion of domestic processing or value added, control of illegal export activities, and public health and/or environmental protection.²⁸¹

²⁷⁷ ESPA, *supra* note 38, at 110.

²⁷⁸ Fung & Korinek, *supra* note 14, at 27.

²⁷⁹ FLIESS, *supra* note 3, at 31.

²⁸⁰ Fliess & Mard, *supra* note 200, at 17.

²⁸¹ *Id.*

2.4.2.1 Export Restrictions as Development Instrument

Promoting the competitiveness of downstream industries is one objective that imposing countries use to justify their export restrictions. Export taxes and restrictions raise the price of raw materials for foreign importers and reduce the supply of mined raw materials by exportation. They result in greater availability of raw materials for local processors and industries at below-world-market prices. By providing domestic industries with cheap raw materials, governments expect to incentivize the development of domestic manufacturing. The general goal is to encourage economic diversification through the exportation of greater volumes of higher value-added products.²⁸²

In addition to promoting infant industries, developing countries use export restrictions to retaliate against tariff escalations in their main overseas markets. Tariff escalation is the practice of charging low duties on imported raw materials and much higher tariffs on finished products.²⁸³ When this practice occurs, developing countries cannot find easy access to their processed products for developed countries. By maintaining export restrictions on raw materials, producers of processed products in exporting countries may benefit from cheaper raw materials and thus better overcome the protection afforded by import tariff escalations in importing countries.

It is not surprising that the use of mineral export restraints by countries such as China, the Russian Federation, India, Argentina, and, more recently, South Africa and Indonesia has caused the greatest alarm among net-importing industrialized countries.²⁸⁴

²⁸² ESPA, *supra* note 38, at 112.

²⁸³ WTO glossary, https://www.wto.org/english/thewto_e/glossary_e/tariff_escalation_e.htm (last visited February 15, 2018).

²⁸⁴ *Id.* at 114.

Advanced economies have not only objected to the proliferation of export restrictions in these countries but have also noted with concern that such measures were adopted within the context of comprehensive industrialization plans.²⁸⁵ According to the European Commission, the unprecedented increase in the use of restrictions on exports of mineral raw materials represents a great danger to the effective functioning of value chains and can eventually harm its initiators, as no country is self-sufficient in terms of resources.²⁸⁶ Thus, export restrictions have become a major point of contention between countries of the North and the South. Emerging economies have strongly defended these measures as legitimate development tools,²⁸⁷ while net-importing countries have firmly contested mineral export restraints as beggar-thy-neighbor instruments.

2.4.2.2 The Sovereign Right to Use Natural Resources for Economic Development

The concept of “permanent sovereignty over natural resources” evolved within the United Nations as a new principle of international law in the post-war era.²⁸⁸ Initially, the claims were motivated by the efforts of newly independent and other developing nations to secure economic benefits from the exploitation of natural resources in their territories. In the decolonization period, the principle became associated with human rights and the right of colonial peoples to self-determination. Subsequently, the principle’s purpose was emphasized as promoting national economic development. As declared by the UN

²⁸⁵ *Id.*

²⁸⁶ European Commission, *Ninth Report on Potentially Trade-Restrictive Measures Identified in the Context of the Financial and Economic Crisis*, 38 (June 6, 2012), http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149526.pdf.

²⁸⁷ WTO Secretariat, *Trade Policy Review Report*, WTO Doc.WT/TPR/S/277 (February 13, 2013) 96; TPR Body, *Record of the Meeting*, WTO Doc.WT/TPR/M/249/Add.2 (October 28, 2011) 45.

²⁸⁸ See NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES* (1997).

Declaration on Permanent Sovereignty Over Natural Resources, “The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”²⁸⁹ A nation’s right to use and exploit its natural resources for economic development is implicit in its sovereignty over natural resources. As acknowledged by the panel report *China-Raw Materials*, state sovereignty over natural resources is a principle of international law that allows states to “freely use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development.”²⁹⁰

In exercising its sovereign right to natural resources, a nation may wish to reserve a larger share of such resources for use by its domestic industries, rather than to sell them to foreign users. Because manufactured products are typically more valuable than primary commodities, developing downstream industries can help to decrease reliance on exports of resources and develop high-value-added sectors as an anchor in the economy. History has shown that export restraints on raw materials are an effective way to promote economic development. A well-known historical example is the export ban imposed by Henry VII on English wool in the late fifteenth century, which induced a shift in wool textile production from Flanders and Burgundy to England, thus enabling the start of the Industrial Revolution.²⁹¹

²⁸⁹ G.A. Res.1803 (XVII), ¶1 (Dec. 14, 1962).

²⁹⁰ Panel Report, *China Raw Materials*, ¶ 7.380.

²⁹¹ Clyde Prestowitz, *Export Restraints: The Key to Getting Rich*, Foreign Policy Magazine (July 7, 2011, 2:43 PM, <https://foreignpolicy.com/2011/07/07/export-restraints-the-key-to-getting-rich/>); HA-JOON CHANG, KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE 19–21 (2002) in Julia Qin, *Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic*

Today, such a policy would be condemned for its “beggar-thy-neighbor” effect. There is, however, an significant dissimilarity between restrictions imposed for purpose of “beggar thy neighbors” and export restraints on mineral resources: the latter is a policy designed to take advantage of one’s natural endowment through the exercise of one’s ownership rights.²⁹² Since natural resources are unevenly distributed geographically, the notion of permanent sovereignty solidifies the unequal situations between nations that are rich in natural endowment and those that are not. Although in modern international law, states have a duty to cooperate with each other and to promote international development, so far “it has proven to be impossible to share the benefits of natural-resources exploitation on an international basis.”²⁹³

2.4.2.3 Export Restrictions as Environmental Protection

Among the non-economic public-policy goals used to justify export restrictions on mineral raw materials, the most frequently cited rationales relate to the environment. Because mineral resources are non-renewable, countries often announce that they apply export restrictions to either conserve exhaustible mineral resources or to protect public health or the environment. In other words, export restrictions would serve to correct the negative environmental externalities associated with mining activities.²⁹⁴

Since markets normally fail to reflect the true cost of externalities in these areas, government intervention in the form of restrictions, bans, or taxes are ways to address

Development and Environmental Protection 155 in MITSUO MATSUSHITA & THOMAS J.SCHOENBAUM, *supra* note 64.

²⁹² Qin, *supra* note 291, at 156.

²⁹³ SCHRIJVER, *supra* note 288, at 386.

²⁹⁴ WTO, World Trade Report 2010: Trade in Natural Resources, at 88.

such market failures and to bring output closer to what is publicly acceptable.²⁹⁵ The same holds true for export taxes of equivalent levels inasmuch as they are expected to lead to the same reduction in domestic production.²⁹⁶ A slower pace of extraction would, in turn, mitigate the environmentally harmful effects of mining products, including air, water, and land pollution, energy and water consumption, land alteration, and deforestation and consequent damage to public health and ecosystems.²⁹⁷ Overall, the use of export restraints as environmental tools purportedly ensures the achievement of sustainable development.

The countries that apply mineral export restrictions on environmental grounds are China, India, Indonesia, South Africa, and Malaysia.²⁹⁸ For instance, China has been increasingly adopting a set of measures to sustainably manage the supply and use of its minerals and other commodities.²⁹⁹ Accordingly, it has consistently reiterated the centrality of environmental concerns in its export regime on mineral raw materials and has placed environment-related goals, such as resource conservation and public health protection, at the heart of its defensive strategy before WTO dispute settlement bodies in three disputes: *China-Raw Materials I*, *China-Rare Earths*, and *China-Raw Materials II*.

However, the use of export restrictions as genuine environmental tools has been subject to increasing controversy. Opposing parties have argued that the supposed

²⁹⁵ PARRA ET AL., *supra* note 49, at 29.

²⁹⁶ Fung & Korinek, *supra* note 14, at 16.

²⁹⁷ OECD, NATURAL RESOURCES AND PRO-POOR GROWTH: THE ECONOMICS AND POLITICS, 138–139 (DAC Guidelines and Reference Series, 2008).

²⁹⁸ FLIESS, *supra* note 3, at 26.

²⁹⁹ Wayne Morrison & Rachel Tang, CONG. RESEARCH SERV., R42510, CHINA'S RARE EARTH INDUSTRY AND EXPORT REGIME: ECONOMIC AND TRADE IMPLICATIONS FOR THE UNITED STATES, 16 (2012); Bin Gu, *Mineral Export Restraints and Sustainable Development – Are Rare Earths Testing the WTO's Loopholes?*, 14(4) J.INT.ECON.L. 765, 774 (2011).

contraction in domestic production predicted by economic models may not materialize in practice if the restricted mining products are sold to expanding downstream industries in the domestic market.³⁰⁰ This scenario is likely to occur when the imposing country has a fast-developing manufacturing sector with large raw material-using downstream firms and more so in countries that implement comprehensive industrialization programs to expand industries that use restricted minerals and metals.³⁰¹

2.4.2.4 Other Policy Objectives Associated with Export Restrictions

One of the most frequently cited rationales for governments' use of export taxes is the generation of government revenues.³⁰² Statistics from the World Bank show that government income from export taxes accounts for 9.76% of the total tax revenue for Argentina (2015), 23.48% for Belarus (2015), 14.17% for Cote d'Ivoire (2014), 3.23% for Ethiopia (2011), 31.59% for Russia (2015), and 1.15% for Malaysia (2014).³⁰³ However, countries applying export taxes to generate public finances are developing countries with relatively underdeveloped tax-administration systems.³⁰⁴ Due to a lack of qualified personnel in tax administration, under-developed institutional capacity, and/or wider governance shortcomings, countries that have difficulty collecting taxes, such as property taxes, income taxes, and corporate-profit taxes, resort to export taxes to generate revenue for the government.

³⁰⁰ Fung & Korinek, *supra* note 14, at 34.

³⁰¹ ESPA, *supra* note 38, at 117.

³⁰² FLIESS, *supra* note 3, at 26.

³⁰³ World Bank, *TCdata360, Taxes on exports*,

https://tcdata360.worldbank.org/indicators/GC.TAX.EXPT.ZS?country=BRA&indicator=1998&viz=line_chart&years=1972,2015.

³⁰⁴ Fung & Korinek, *supra* note 14, at 34.

At the same time, the pricing of transfers of goods, services, or other assets within a multinational enterprise (MNE) group creates considerable management and accounting problems. A significant volume of global trade currently consists of “intra-group transactions,” which account for more than 30 percent of all international transactions.³⁰⁵ In particular, multinational mining companies rely on complex webs of interrelated subsidiaries.³⁰⁶ These associated enterprises can sell minerals to each other at a discount or purchase goods, services, and assets from each other at inflated prices, to “transfer” profits from higher-tax to lower-tax jurisdictions.³⁰⁷ The practice of setting prices for cross-border, intra-firm transactions between related parties is called “transfer pricing.”³⁰⁸ One difficulty in monitoring and taxing such transactions is that they do not take place on an open market.³⁰⁹ While a commercial transaction between two independent companies in a competitive market should reflect the best option for both companies, two affiliated companies are more likely to make transactions in the best interest of their global parent corporation. The parent corporation can make higher profits in lower-taxed jurisdictions and lower profits in higher-taxed ones, as a means of reducing its overall tax bill. Nevertheless, transfer pricing does not necessarily involve tax avoidance, as the need to set such prices is a normal part of how MNEs operate.³¹⁰

³⁰⁵ U.N. Dep’t of ECON’& SOC.AFFAIRS, PRACTICABLE MANUAL ON TRANSFER PRICING FOR DEVELOPING COUNTRIES, at 1 (2013).

³⁰⁶ NATURAL RESOURCE GOVERNANCE INSTITUTE, EXTRACTING TRENDS AND TRUTHS FROM OIL, GAS AND MINING CONTRACTS: TEXT ANALYTICS 1 (June 7, 2016), <https://resourcegovernance.org/blog/extracting-trends-and-truths-oil-gas-and-mining-contracts-text-analytics-and>

³⁰⁷ *Id.*

³⁰⁸ U.N., *supra* note 305, at 2.

³⁰⁹ *See id.*

³¹⁰ *Id.*

However, where the pricing does not comply with international norms or the arm’s-length principle under domestic law, the tax administration may consider this to be “mispricing,” and issues of tax avoidance and evasion may potentially arise. To address transfer mispricing, governments are advised to apply the “arm’s-length” principle in dealing with transactions between affiliated companies. The “arm’s-length” principle means that the transaction should reflect the market value of the goods or services exchanged; in other words, affiliated companies should trade with each other as if they were not affiliated.³¹¹ If the relevant transaction does not conform to the arm’s-length principle, transfer-pricing rules give the government authority to adjust the price in the company’s reported profits. However, many developing countries still have not yet introduced such measures.³¹² Where these measures have been introduced, it is a challenge for developing economies to implement and administer them, mostly due to inadequate resources and lack of specialist expertise.³¹³ Yet, in some developing countries, the existence of tax incentives, such as tax holidays and tax credits, has postponed the need for transfer pricing legislation.³¹⁴ In general, due to their limited resources and lack of specialist expertise, developing countries prefer customs valuations instead of transfer pricing valuations, to generate revenue. Other economic goals that low-income, mineral-based economies frequently cite include control of flow exchange and inflation.³¹⁵

³¹¹ *Id.* at 4.

³¹² UNCTAD, *World Investment Report 2015, Annex on Investment and Enterprise Division, Policy Action Against Tax Avoidance by MNEs: Existing Measures and Ongoing Discussions*, at 3 (2015).

³¹³ *Id.*

³¹⁴ UNCTAD, IIA ISSUES PAPER SERIES No.11(1), *TRANSFER PRICING* 30 (1999).

³¹⁵ Hannah Bargawi et al., *Low-Income Countries and Commodity Price Volatility*, in *THE PROSPECTS OF INTERNATIONAL TRADE REGULATION: FROM FRAGMENTATION TO COHERENCE* 468–471 (Thomas Cottier & Delimatsis Panagiotis ed.,2011).

Lastly, the most commonly cited non-economic policy goal is the need to control illegal exports. Many developing countries applying export licensing schemes and/or export bans have cited the need to monitor the export of metals, particularly waste and scrap, to prevent theft and smuggling induced by high scrap prices or to check shipments and verify the origin or purity of the materials.³¹⁶

2.4.3 Empirical Study of the Impacts of Export Restrictions

The precise effects of export restrictions may not always reflect those predicted by static economic models, and case-by-case assessments may also contradict stated rationales. A growing body of economic literature has attempted to assess the precise impacts of specific export restrictions, either in multi-country and multi-product settings or by focusing on single case studies.³¹⁷ Specifically, empirical studies focus on the link between the intended policy objectives of export control measures and actual outcomes at the country or product level.

The OECD has specifically assessed the impact of various types of export restrictions applied by China to mineral raw materials. In the case of coke, China's export restrictions created a substantial contraction of Chinese exports and a corresponding price differential of 241 USD (more than 45%) per metric ton between world prices and Chinese domestic prices.³¹⁸ By 2008, Chinese steel producers had a cost advantage of almost 145 USD per metric ton over foreign companies, equal to more than 20% of the

³¹⁶ ESPA, *supra* note 38, at 119.

³¹⁷ See PIERMARTINI, *supra* note 94; Michele Ruta & Anthony J.Venables, *International Trade in Natural Resources: Practice and Policy* (WTO Staff Working Paper, No.ERSD-2012-07, 2012); Solleder, *supra* note 153.

³¹⁸ Alan Price & Scott Nance, *Export Barriers and the Steel Industry*, in THE ECONOMIC IMPACT OF EXPORT RESTRICTIONS ON RAW MATERIALS 91 (OECD ed., 2010).

international market price for carbon steel.³¹⁹ China's export regime on certain unprocessed and semi-processed molybdenum products also induced a significant decline in Chinese exports. However, the drop in export of the restricted materials was accompanied by a sharp increase (120%) of exports in molybdenum articles further down the value chain.³²⁰ The rise in Chinese exports of intermediate molybdenum products was possible through the use of domestic below-the-world-price inputs by Chinese downstream firms—an effect that appears to contradict the goals of environmental protection and resource conservation reiterated by the Chinese government, in pursuance of which domestic production of molybdenum would have had to decline.³²¹

China's export restrictions on rare earth elements have also created great distortions in the world market. The use of export taxes and other tax measures such as the withdrawal of value-added tax (VAT) rebates resulted in Chinese companies paying 31% less for rare earth raw materials than their foreign competitors paid in 2008.³²² At the same time, access to supply was compromised for foreign consumers after China tightened annual quotas to below global demand levels in 2009.³²³ The Chinese government justified the measures by stating that if the exploitation is not controlled, rare earth elements could be exhausted in twenty to thirty years.³²⁴ Yet, China's export regime

³¹⁹ *Id.*

³²⁰ Korinek & Kim, *supra* note 24, at 112.

³²¹ Fung & Korinek, *supra* note 14, at 19.

³²² *Id.* 19–22.

³²³ ESPA, *supra* note 38, at 121.

³²⁴ NABEEL MANCHERI & TOMOO MARUKAWA, RARE EARTH ELEMENTS: CHINA AND JAPAN IN INDUSTRY, TRADE AND VALUE CHAIN 23 (2016).

on rare earth elements de facto created a dual pricing regime, leaving Chinese rare earth processors with a competitive advantage.³²⁵

Korinek and Kim have also studied the impact of India's export tax on chromium ore between 2007–2008. Total chromite production in India did not significantly decrease but was diverted to the domestic market, thereby helping India's ferro-chrome producers who had been penalized until then by high chromite prices. Indian chromite exports decreased from 1,432,740 tons in 2006 to 550,532 tons in 2008.³²⁶

China, the largest importer of chromite, reacted by changing its source of imports from India to South Africa. As a result, South African exports of chromite increased by 200% between 2006 and 2008, almost causing the South African government to introduce an export tax of its own to stop the Chinese import surge and to continue exporting higher value-added chromium articles.³²⁷ According to the OECD, had South Africa applied an export tax, it would have offset the impact of the Indian measure by reducing the price gap in the chromite exports of India and South Africa. Moreover, such measures, by further reducing international supply, would have led to an even higher international price for chromite.³²⁸

The OECD has recently issued a report on the use of export restrictions by four mineral-rich African countries and the effects on activities downstream from the extractive sector that may be attributed to those export control measures.³²⁹ The industries studied

³²⁵ European Commission, *supra* note 286, at 209.

³²⁶ Korinek & Kim, *supra* note 24, at 114,115.

³²⁷ *Id.* at 115, 116.

³²⁸ *Id.*

³²⁹ Barbara Fliess & Ernst Idsardi, *Export Controls and Competitiveness in African Mining and Minerals Processing Industries 2* (OECD Trade Policy Paper No.204, 2017).

are manganese in Gabon, lead in South Africa, copper in Zambia, and chromite in Zimbabwe.³³⁰ The report shows developments in these countries' industries from 1992 to 2013 by using the Revealed Comparative Advantage index and a structural break analysis. The study concludes that export restrictions as a tool to stimulate local mineral processing does not pay off, by revealing no improvement in the comparative advantage of processed products presumed to benefit from export controls on the raw material.³³¹ On the contrary, those measures have undermined the overall performance of the mining and processing industries in some of the cases studied.

In all four countries, the minerals sector has been the dominant sector; hence, national strategic programs highlight the need and determination to diversify the economic base. Accordingly, Gabon, Zambia, and Zimbabwe have employed *ad valorem* export taxes that ranged from 3.5% to 20%; Zimbabwe banned chromite exports in 2007, switched to an export tax in 2010, and then returned to the ban in 2011; in South Africa, firms have had to obtain export licenses.³³²

The study finds that the export control measures may have affected the mining industries, the effects have been adverse overall, and the processing industries have not benefited.³³³ For example, Gabon's and Zambia's export taxes did not help the development of any new downstream activity; the number of these countries' activities in the copper industry before the introduction of export taxes in 2008 was higher than those in 2013. Similarly, when the government of Zimbabwe introduced an export ban on

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 9.

³³³ *Id.* at 31.

chromite, producers of chromite ore had difficulty finding local processors. The Government of Zimbabwe banned the export of chromite ore in an attempt to force companies to process more metal locally and to build new smelters domestically.³³⁴ As a result, the ban lowered domestic prices for chromite, but there was insufficient local smelting capacity to process the rising stock of material. Eventually, the mining companies suspended their operations, and some went bankrupt.³³⁵ Unable to sell abroad and locally, some mining operations closed down completely.³³⁶ This result is not in the interest of the economy, which depends on the mining sector for foreign exchange, and is not an outcome that the government appears to have considered when it imposed the export ban. Instead, the government had hoped to attract investment in the country's smelting capacity and further up the value chain. The South African lead industry is the only country in which producers must obtain a license to export lead and a wide range of other minerals. While the export license requirement applied to mined output and to some semi-processed products, the requirement was implemented in 2008, followed by a structural decline in the comparative advantage of lead ores in subsequent years.

South Africa, Zambia, and Zimbabwe all have developed smelting and refining competencies and have positioned themselves as exporters of certain semi-processed products, but these achievements cannot be solely attributed to the export restrictions studied, which did not improve these products' export performance. On the contrary, the export restrictions may have hampered the industries' overall performance in Zambia and

³³⁴ Fliess & Idsardi, *supra* note 329, at 22.

³³⁵ *Id.*

³³⁶ *Id.* at 32.

Zimbabwe because the relative export performance of their mining sectors is weakened.³³⁷ The availability and price of raw materials are key determinants of the cost and levels of production at subsequent stages of finished or semi-finished products. However, the empirical study demonstrates that aside from the abundance of raw materials, more important domestic factors, individually or in combination, affect the countries' export performance. These factors include the availability of energy, water, capital, and specialized knowledge, the proximity of markets, the state of infrastructure, political stability, and good governance. When these and other capacities are limited, it is difficult to see how export restrictions would help to promote domestic processing industries. However, whereas this study has investigated the effect of export control measures, no attempt has been made to analyze how other domestic factors individually or in combination have impacted the export performance of the countries studied. Apparently, a systemic stocktaking and comparative analysis of the industries enabling factors are necessary in the future research.

Some countries have successfully regulated their mining sectors without using any kind of export restrictions.³³⁸ One example is Botswana, which has risen from a least-developed country to an upper-middle-income country, in large part due to its proper management of revenue from the minerals sector.³³⁹ Botswana produces (in addition to diamonds) coal, copper, gold, and soda ash and has rich deposits of uranium, zinc, and

³³⁷ *Id.*

³³⁸ Jane Korinek, *Export Restrictions on Raw Materials: Experience with Alternative Policies in Botswana*, 7 (OECD Trade Policy Papers, No.162 (2014)).

³³⁹ *Id.* at 36.

coal-bed methane.³⁴⁰ Minerals, including diamonds, copper, and nickel, constitute over 80% of its total exports.³⁴¹ Its abundant mineral resources, coupled with stable, good governance and a successful history of sustainable management, have increased its desirability to investors globally. Botswana was ranked the eighth most-attractive place for mining investment after Canada, Australia, the United States, Chile, Mexico, Peru, and Namibia.³⁴² Rather than using distortive trade-policy instruments such as export restrictions, Botswana followed its development path in a sustained, step-by-step way.

Botswana has avoided the use of distortive policy instruments, including trade policy instruments such as export restrictions.³⁴³ Instead, the country instituted reforms over time to build up both human and physical capacity. These reforms include the following:

- “The government of Botswana has managed the extraction of its main mineral resource, diamonds, through a joint venture with De Beers, the largest private firm in the industry. The government of Botswana receives 80–82% of the revenue minus costs from its joint venture. It has managed its relationship with De Beers strategically. In the early days of Botswana’s diamond production, in the 1970s and 1980s, negotiations concentrated on obtaining a greater share of the revenue from its natural resource. In the late 1980s and 1990s, the government took advantage of its leverage in the joint venture to increase its management capacity, including by obtaining a share in De Beers and two seats on the global firm’s board of directors. It thereby

³⁴⁰ See U.S. Geological survey (2017), <https://minerals.usgs.gov/minerals/pubs/mcs/2017/mcs2017.pdf>.

³⁴¹ Korinek, *supra* note 338, at 9.

³⁴² BEHRE DOLBEAR, WHERE TO INVEST IN MINING 2 (2015), http://www.mining.com/wp-content/uploads/2015/08/WHERE_TO_INVEST_2015_08.pdf.

³⁴³ Korinek, *supra* note 338, at 46.

obtained access to the highest levels of experience and strategic business acumen in the industry.

- The government of Botswana established the Pula Fund in the mid-1990s. The Pula Fund has been described as both an intergenerational fund and a stabilization mechanism. The Pula Fund is invested offshore in foreign currencies, which also avoids putting pressure on the national currency.
- To retain diamond activity in the country, and cognizant of the non-renewability of its main mineral resource, Botswana has begun to engage at other stages in the diamond value chain. The first step was to sort and value the country's diamonds in Botswana, creating jobs and increasing the level of expertise. Further down the value chain, the government has leveraged its relationship with potential rough diamond purchasers to encourage a diamond-cutting and -processing industry, which has created jobs.
- Cognizant of obtaining as much value from its natural resource as possible while retaining incentives for investment and leaving space for competing enterprises, the government of Botswana now sells a share of its diamonds on an alternative auction-based platform. This initiative will provide additional information about the value of its diamonds in the future and may provide information about the trade-off between volatility and price levels in diamond revenue. Additionally, correctly valuing diamonds is of primary importance to the government, not least to calculate the royalties due from diamond extraction.

- Last but not least, Botswana's tax system can be qualified as very stable. The tax code in Botswana has remained stable, and changes have been instituted in stages.³⁴⁴ Mining firms are subject to a specialized tax regime. The mining-profits tax is calculated according to a formula: $70-1500/x$, where x is the ratio of taxable income to gross income. This formula effectively leads to a variable rate income tax, whereby the tax rate increases with the profitability of the mining company. It is well designed to capture mineral rents. It is also transparent and provides a degree of certainty to investors.

The following results provide evidence³⁴⁵:

- Political and regulatory stability. The promotion of good governance and the relative absence of corruption have been the backdrop to all successful policies implemented so far.
- Clear, stable regulation through commercial negotiations. In the early years of mining production, the 1970s and 1980s, negotiations concentrated on obtaining a greater share of the revenue from the country's natural resources. In the late 1980s and 1990s, the country took advantage of its leverage in a joint venture to increase its management capacity, including obtaining a share in a foreign investor's global company (parent). This grants Botswana access to the highest level of experience and strategic business practice in the mining industry.

³⁴⁴ Korinek, *supra* note 338, at 25.

³⁴⁵ *Id.* at 38–46.

- Inclusive process of developing national strategy and public spending. This includes a consultative process that touches all levels of state and local government, interest groups, and business owners.
- Discriminated financing. Revenues from mineral resources have been invested in other assets: education (42%) health (18%), and infrastructure (44%). Recurrent expenses have been financed entirely from non-mineral revenue.
- Updated geological information. Good quality, detailed geological information is of prime importance for mineral-abundant countries willing to develop an efficient, sustainable mining industry.
- Beneficiation, or increasing stake in a value chain. The first step was to sort and value the country's diamonds in Botswana, creating jobs and increasing the level of expertise. As long as it engages in value chains, Botswana has leveraged its relationship with potential mineral purchasers, to encourage a domestic processing industry that has created 3500 jobs. The country provides a clear understanding and good use of market mechanisms to receive maximum gain from its natural resources.

Review of these empirical results can promote discussion of the potential uncertainties and negative effects that countries should consider before resorting to export restricting measures. Even though export restrictions may be beneficial for the exporting country in some cases, as empirical studies show, the benefit comes with costs and may not generally favor the exporting country at all times. The success of export restrictions may depend on the following factors:

- From a purely theoretical perspective, the net gain of an export restriction for an exporting country depends on the global market power of the country in the world market and the demand elasticity of the restricted product.³⁴⁶ Even if, in theory, the restriction can bring a net gain, the rate of the optimal export duty is difficult to set.
- Export restrictions may discourage the healthy development of the restricted sector. As noted in the Indian and Zimbabwe cases, despite the build-up of the government revenue, the long-term use of export duties discouraged the production of the taxed products and made their exports less competitive in the world market.
- As a matter of fact, the restriction itself can be difficult to maintain. Adam Smith wrote, “The difference between the price in the home and that in the foreign market presents such a temptation to smuggling that all the rigor of the law cannot prevent it.”³⁴⁷ The tightening of export quotas in the China rare earth case had directly resulted in mass smuggling and dramatic disturbances in both the home and international rare earth markets. Restrictions require the government to spend public resources to make the restrictions effective.
- The use of export restrictions may provoke tit-for-tat retaliation from importing countries on the exported downstream product that is anticipated to benefit from the exports-restrictive measures.

2.5 CONCLUSION

This chapter introduced the subject matter of this thesis and provided an overview of its historical evolution, followed by a discussion of the rationales for and effects of export

³⁴⁶ See above in section 2.4.1.3.

³⁴⁷ ADAM SMITH, THE WEALTH OF NATIONS: BOOKS IV-V, 239 (Penguin Books 1999) (1776).

restrictions. As the preceding sections show, the most common types of export restrictions are export licensing schemes, export taxes, export prohibitions, and export quotas. Among primary products, mineral raw materials have been severely affected by the wave of export restrictions that started with the commodity boom of the 2000s.

In most cases, countries controlling a large share of world exports have applied export restrictions. China, in particular, maintains the most comprehensive export regime on mineral raw materials for which it enjoys a dominant position in world markets. Other leading countries widely using export restrictions on mineral raw materials are the Russian Federation, Argentina, Indonesia, India, and Ukraine.³⁴⁸ Most of these countries often use more than one type of export restriction. Nevertheless, as shown in section 2.4.1.3, not in all cases do exporting countries impose export restrictions and not all kind of export restrictions bother importing countries. Insofar as countries using export restrictions control large shares of world exports, the proliferation of export restrictions on mineral raw materials may influence world prices and negatively affect access to such resources. At the same time, importing countries may find themselves in two situations with different concerns: first, there is no domestic processing industry in the exporting country; second, then the exporting country has or wants to develop the downstream industries using restricted products. When the exporting country has little or no domestic processing capacity to produce downstream products of the restricted goods, the imposition of export restrictions equals a restriction on domestic production. However, when the restricted product is also used domestically to produce higher value-added

³⁴⁸ ESPA, *supra* note 38, at 99.

downstream products in the exporting country, this may easily place a burden on importing countries, regardless of the exporting country's capacity to influence the world price of the restricted product. In this scenario, the resource-importing country may face competition in three markets: the exporting country's market, the importing country's market, and markets in other countries. The impact would be higher if the restricted product has no substitutes. These impacts may trigger major transformations in the composition of international trade patterns.³⁴⁹

Emerging economies claim the right to apply export restrictions as development tools to promote domestic sustainable industrialization, which could help them to avoid the resource curse or resource-led development. However, empirical studies show that even though many countries have frequently invoked non-economic goals to justify these measures, including resource conservation and public health or environmental protection, export restrictions often work against the declared environmental objectives. For instance, the Chinese government placed restrictive measures on exports of molybdenum in 2007. The rationale given by the Chinese government, after a case was subsequently brought to WTO, for the use of export regime on unprocessed raw materials was the goals of environmental protection and resource conservation (pollution from the mining industry and excessive use of energy to process molybdenum products).³⁵⁰ As a result, although China's export restrictions on certain unprocessed molybdenum induced a significant decline in Chinese exports, they brought a rise in Chinese exports of intermediate molybdenum products which was possible through the use of domestic below-the world-

³⁴⁹ ESPA, *supra* note 38, at 100.

³⁵⁰ Fung & Korinek, *supra* note 14, at 19.

price inputs on the part of Chinese downstream firms. In order to fulfil the stated policy goals of environmental protections and conservation of mineral resources, the export restrictions would have had to have resulted in a decrease in the production of molybdenum in China. Therefore, it shows that the measures that were introduced did not achieve their stated goals.

Nevertheless, there are, indeed, occasions when exporting countries and importing countries go head-to-head in the fight for their own interests. These and other dynamics generate a certain degree of rhetoric in the debate over mineral export restrictions.

CHAPTER 3

THE WORLD TRADE ORGANIZATION REGULATORY FRAMEWORK ON EXPORT RESTRICTIONS

3.1 INTRODUCTION

Together with international investment law, international trade law forms the “hard core” of international economic law.³⁵¹ This field of law comprises bilateral trade agreements, regional trade agreements, multilateral trade agreements, and transnational laws including international commercial terms (INCOTERMS)³⁵².

The most important and broadest of all multilateral trade agreements is the Marrakesh Agreement Establishing the World Trade Organization of 1994 (known as the WTO Agreement). Through the WTO Agreement, the WTO was established on January 1, 1995. The WTO now covers approximately 98% of global trade.³⁵³ As scholars emphasize, the multilateral trading system has been fighting against protectionism prompted by “a benign mercantilist political economy”.³⁵⁴ The most important feature of the mercantilism is the encouragement of exportation and discouragement of importation. Therefore, WTO rules have been designed mainly to address import restrictions rather than export restrictions to trade. A thorough analysis of applicable rules, regulations, and case laws is required to discern the status of WTO law regarding export restrictions. This

³⁵¹ PETER VAN DEN BOSSCHE & DENISE PREVOST, *ESSENTIALS OF WTO LAW*, 3 (2016).

³⁵² See International Chamber of Commerce Inventory, “The Incoterms rules are an internationally recognized standard and are used worldwide in international and domestic contracts for the sale of goods. Incoterms rules are recognized by UNCITRAL as the global standard for the interpretation of the most common terms in foreign trade.”, <https://iccwbo.org/resources-for-business/incoterms-rules/>.

³⁵³ World Trade Organization, Ministerial Conference Statement by WTO Director General of 10 December 2017, WTO Doc, WT/MIN(17)/45 (2017).

³⁵⁴ Claude Barfield, *Trade and Raw Materials – Looking Ahead* (September 29, 2008) <http://www.aei.org/speech/28745> (last visited February 25, 2017).

chapter focuses on the disciplines on export restrictions found in the WTO agreements and on relevant jurisprudence by WTO panels and the Appellate Body in general and particularly regarding export restrictions on mineral raw materials.

Although the WTO Agreement consists of only sixteen articles, attached to this short agreement are eighteen international agreements that form an integral part of the WTO Agreement. The WTO Agreement comprises more than 25,000 pages, including its annexes. Of this, 95% consists of the Schedules of Concessions (concerning trade in goods) and of Schedules of Specific Commitments (concerning trade in services). In addition, the Protocols of Accession of each new WTO member are an integral part of the WTO agreement. There are other sources, but they are not of the same nature or legal status as that of the WTO Agreement. They do, however, help to clarify or define the law that applies between WTO members on WTO matters. Most important among the other sources of WTO law is the WTO case law. Rulings of the WTO dispute settlement panels and the WTO Appellate Body are, in principle, only legally binding on the parties to the dispute in question. However, the clarifications of WTO law contained in dispute settlement reports have legal relevance beyond the disputes at issue. Specifically, the Appellate Body's rulings have significant authority and are, in practice, followed in later disputes on similar matters.³⁵⁵

Sections 3.2–3.4 examine the existing WTO rules on export restrictions and identify loopholes and inconsistencies of regulatory instruments on both export duties and quantitative export restrictions. In addition to considering the text of agreements, Section

³⁵⁵ *Id.* at 7.

3.5 offers a more detailed analysis of how member states have interpreted existing rules on raw materials export restrictions in disputes or in subsequent practice. The WTO case laws helps to reveal whether there were new or specific factors explaining the inadequacy of the existing WTO regulation of raw materials.

3.2 THE WTO DISCIPLINE APPLICABLE TO EXPORT TAXES AND DUTIES

This section reviews the WTO regulations on export taxes and duties and discusses their validity and consistency.

The most common tariff barriers to trade are customs duties, at least for goods. Tariff barriers to trade can also take the form of other duties and charges on export. Article XI:1 of the GATT differentiates export duties or taxes from export prohibitions or quantitative restrictions. This subsection accounts for the WTO regulations governing the use of export taxes and duties.

Article XI:1 of the GATT

If WTO members have not negotiated export duty concessions in their GATT schedules, they remain free to introduce and/or maintain export duties, per Article XI:1 of the GATT. Article XI:1, titled “General Elimination of Quantitative Restrictions,” states,

*No prohibitions or restrictions **other than duties, taxes or other charges**, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on **the exportation** or sale for export of any product destined for the territory of any other contracting party.*³⁵⁶

³⁵⁶General Agreement on Tariffs and Trade art. XI:1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

The exclusion of export duties, taxes, or other charges from the general elimination of obligation on the use of quantitative restrictions reflects the preference for tariffs over quantitative restrictions that is at the heart of the GATT architecture.³⁵⁷ Yet, WTO members can only use export duties on unbound tariff lines. In other words, a WTO member that has scheduled and bound export duties for a certain number of tariff lines cannot apply to such products export duties that exceed the levels indicated in its GATT schedule.³⁵⁸ Article XI:1 of the GATT allows WTO members to introduce or maintain export duties on any product, provided that for such product they have either not negotiated any export duty concessions in their GATT schedules, or if they have, the applied export duty rate does not exceed the level indicated in their GATT schedules.³⁵⁹

Article II and Article XXVIII in the GATT

WTO law does not prohibit customs duties on either importation or exportation per se, but WTO members are encouraged to negotiate their progressive reduction.³⁶⁰ Article XXVIII:1 in the GATT, labeled “Tariff Negotiation,” posits,

*The Contracting parties recognize that custom duties often constitute serious obstacles to trade: thus, negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and **exports**...are of great importance to the expansion of international trade. The contracting parties may therefore sponsor negotiations from time to time.*

³⁵⁷ ESPA, *supra* note 38, at 414.

³⁵⁸ *Id.* at 141

³⁵⁹ *Id.* at 142.

³⁶⁰ JACKSON, *supra* note 95, at 201–48.

According to Article XXVIII:2(a), furthermore, “such negotiations may be directed towards the reduction of duties, the binding of duties at then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels.”

Article II of the GATT, titled “Schedules of Concessions,” gives legal effect to the tariff concessions negotiated by WTO members. Tariff binding commitments are set forth in so-called schedules of concessions, which are annexed to the GATT and incorporated into the GATT legal framework through Article II:7. Per Article II:1 (b), in particular, WTO members shall refrain from imposing ordinary custom duties in excess of scheduled tariff bindings. Yet, some scholars argue that this article applies to duties imposed on only importation, not exportation.³⁶¹ Others³⁶² argue that export duty concessions are enforceable through Article II:1 (b) itself, despite the absence of an express reference to export.³⁶³ Consequently, the language of Article II:1(b) “is merely indicative of the fact that the negotiators of the GATT 1947 were preoccupied with the elimination and reduction of import tariffs, and ...cannot be interpreted to necessarily imply that their intention was to exclude export duties altogether from the scope of Article II:1 (b).”³⁶⁴ Article II:1 (a) posits that “each contracting party shall accord to the **commerce** of the other contracting parties treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.” The use of the word “commerce” has

³⁶¹ *Id.* at 499;

³⁶² Frieder Roessler, *The GATT and Access to Supplies*, 9(12) J.W.TRADE 25–39 (1975); UNCTAD, TRADE AGREEMENTS, PETROLEUM AND SUPPLY POLICIES 2 (2000).

³⁶³ Mitsuo Matsushita, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources*, 3 TRADE LAW AND DEVELOPMENT 267, 273–4 (2011).

³⁶⁴ *Id.* at 273–4.

been interpreted to allow members to negotiate both import and export commitments in their GATT schedules.³⁶⁵ Therefore, WTO members exclusively bound by GATT obligations remain free to negotiate export duty commitments and list them in their GATT schedules of concessions.

As export duties proliferate, however, the issue is likely to gain prominence on the international trade agenda, and countries may want to seek clarity before deciding to schedule and bind export duties. Once listed in GATT schedules, such concessions are incorporated into the GATT framework, per Article II:7, and are therefore binding and legally enforceable through Article II:I(a).

Other GATT Provisions Applicable to Export Duties

Several GATT provisions have a symmetrical structure in that they apply equally to both imported and exported products. Some of these provisions are also applicable and relevant to export duties. According to the most-favored-nation clause (MFN) embodied in Article I:1 of the GATT, WTO members shall apply export duties on a non-discriminatory basis. The relevant part of Article I:1 reads,

*With respect to customs duties and charges of any kind imposed on or in connection with...**exportation**...and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with...**exportation**, any advantage... granted by any contracting party to any product ... destined for any other country shall be accorded immediately and*

³⁶⁵ ESPA, *supra* note 38, at 133.

unconditionally to the like product ... destined for the territories of all other contracting parties.

The MFN obligation covers any export duty applied by WTO members, whether scheduled and bound or admissible within the scope of Article XI:1 of the GATT. Moreover, its broad formulation suggests that other types of tax measures imposed on exports, such as export surtaxes (charges of any kind imposed on... exportation), shall also be applied on an MFN basis.³⁶⁶

Article VIII of the GATT, titled “Fees and Formalities Connected with Importation and Exportation,” is also symmetrically structured and, to a certain extent, relevant to export duties. According to Article VIII:1 (a),

*All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by Contracting parties on or in connection with importation or **exportation** shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.*

Article VIII distinguishes export duties from fees and charges related to exportation levied at the border. While the former are excluded from its scope of application (and therefore remain permitted under the conditions set forth in Articles II and XI of the GATT), the latter shall not exceed the approximate cost of the “service” rendered to the exporter. According to WTO jurisprudence, a service within the meaning of Article VIII refers to any

³⁶⁶Lothar Ehring & Gian Chianale, *Export Restrictions in the Field of Energy*, in REGULATION OF ENERGY IN INTERNATIONAL TRADE LAW: WTO, NAFTA AND ENERGY CHARTER 110 (Yulia Selivanova ed.,2012).

government activity connected closely enough to the processes of customs entry that it might, with no more than the customary artistic license accorded to taxing authorities, be called a “service” to the importer in question.³⁶⁷ In other words, Article VIII applies independently of whether the product in question is subject to tariff binding.³⁶⁸ Moreover, the use of fees and charges in connection with exportation is permitted under Article VIII of the GATT to the extent that it does not “represent ... a taxation of imports or exports for fiscal purposes.” Such fees are considered unlawful if disproportionate to the cost of the service rendered; that is, they cannot be used for purposes other than repaying the costs of such services. WTO members are required to review the operation of their laws and regulations upon request (Article VIII:2) and to abstain from imposing “substantial penalties for minor breaches of customs regulations or procedural requirements” (Article VIII:3).³⁶⁹

Finally, Article X of the GATT, labeled the “Publication and Administration of Trade Regulations,” contains several provisions relevant to export duties. The relevant part of Article X:1 states,

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to ... rates of duty, taxes or other charges ... shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

³⁶⁷ Panel Report, US-Customs Users Fee, BISD 35S/245, para.77.

³⁶⁸ Ehling & Chianale, *supra* note 366, at 118.

³⁶⁹ World Trade Organization, Ministerial Decision of 7 December 2013, Agreement on Trade Facilitation art.6, WTO Doc. WT/MIN(13)/36, WT/L/911 (2013).

The requirement to refrain from enforcing measures of general application prior to their publication in Article X:2 of the GATT complements the requirement to publish all trade-related regulations in a prompt and accessible manner. Apparently, this provision is not structured symmetrically and refers only to “measures ... effecting an advance in a rate of duty or other charge on imports.”³⁷⁰ However, Article X:3(a) of the GATT also applies to duties on exports, inasmuch as it requires WTO members to “administer in a uniform, impartial and reasonable manner measures of the kind described in paragraph 1 of this Article,” No obligation of notification, however, exists under this Article.³⁷¹

Export Duty Commitments in Post-1994 Accession Protocols: The Emergence of WTO-plus Obligations

Certain WTO members that acceded to the WTO after its entry into force have assumed country-specific obligations limiting their use of export duties in their accession protocols and the related working party reports.³⁷² The so-called “WTO-plus obligations” are based on Article XII:1 of the Marrakesh Agreement, according to which any country may accede to the WTO Agreement “on terms to be agreed between it and the WTO”. In general, commitments made by WTO members are categorized into two groups: (i) commitments made under the GATT/WTO; and (ii) commitments made under the WTO accession protocols.

Without a clear boundary defining the “terms” subject to negotiation, WTO members have systematically requested that countries in the accession process

³⁷⁰ ESPA, *supra* note 38, at 145.

³⁷¹ *Id.*

³⁷² *Id.*

undertake commitments that either exceed obligations arising from WTO agreements (so-called WTO-plus obligations) or that do not otherwise exist for WTO members, because they concern issues outside the WTO mandate (so-called WTO-extra obligations),³⁷³ as a way to counterbalance the benefits of access to other WTO members' already liberalized markets.³⁷⁴

After the increase of export duties in the last decade, the post-1994 accession protocols specifically addressing the issue have also increased. Among the thirty-six countries that have acceded to the WTO after 1994 (as of December 2017), eleven agreed on specific export duty commitments under their accession protocols: Mongolia, Latvia, Croatia, China, Saudi Arabia, Vietnam, Ukraine, Montenegro, the Russian Federation, Lao People's Democratic Republic, and Tajikistan (in order of accession).³⁷⁵ However, the accession commitments on export duties undertaken by newly acceded WTO members to date varies in terms of scope and coverage. While some agreed to eliminate export duties, others have committed to phase down and apply export duty rates on a predetermined list of products. To date, WTO-plus obligations have generally been established in individual accession protocol provisions or in specific provisions of the working party reports that are incorporated, by reference, into the related accession protocols.³⁷⁶ In either case, they are legally binding. Since accession protocols are

³⁷³ *Id.* at 146.

³⁷⁴ Qin, *supra* note 40, at 1153–4.

³⁷⁵ WTO website, available at https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#kaz (last visited October 2, 2017).

³⁷⁶ ESPA, *supra* note 38, at 147.

regarded as an integral part of the WTO Agreement, any violation of their provisions can be challenged before the WTO Dispute Settlement Body.³⁷⁷

Thus, the WTO law on export duties can be defined as irrational and ad hoc. This state of affairs creates unfairness in the treatment of WTO members. Worse, there is little possibility to correct the present irrational system because there is typically no provision for revising accession protocols.³⁷⁸ Many exceptions to Article XI:1 that permit export measures in many situations compound this issue.³⁷⁹ Those exceptions, which are not clearly conceptualized, create obscurity and challenges to the current WTO system. I describe these exceptions in detail later in this chapter.

3.3 THE WTO DISCIPLINE APPLICABLE TO QUANTITATIVE RESTRICTIONS

This section addresses the existing WTO discipline regulating the use of export restrictions other than export taxes and duties.

The General Elimination Obligation under Article XI:1 of the GATT

Article XI of the GATT, titled “General Elimination of Quantitative Restrictions,” is the main provision regulating quantitative export restrictions. It states,

*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or **on the***

³⁷⁷ Qin, supra note 40, at 1154.

³⁷⁸ MITSUO MATSUSHITA & THOMAS J.SCHOENBAUM & PETROS C.MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY 543 (2015).

³⁷⁹ *Id.*

exportation or sale for export of any product destined for the territory of any other contracting party.

Article XI:1 appears to eliminate both prohibitions and restrictions on exports and permit the application of export taxes, duties, and charges. The term “prohibitions” unambiguously applies to measures that totally impede the export of a product, namely, complete bans.³⁸⁰ In addition, Article XI does not expressly mention the whole range of “restrictions” falling within its remit. The phrase “whether made effective through quotas, import or export licenses or other measures” indicates that the forms of restriction explicitly evoked are only illustrative and that other types of restrictive measures potentially fall within the scope of Article XI:1 as “other measures.”

A consistent body of WTO case law has broadly interpreted the term “restrictions” to cover a wide range of measures, not solely measures that may be considered formal quantitative restrictions, such as quotas, but also a whole variety of measures that can have a limiting effect on trade, namely, reducing the volume of exports. In *India-Quantitative Restrictions*, the panel posited that “the scope of the term ‘restriction’ is broad, as seen in its ordinary meaning, which is ‘a limitation on action, a limiting condition or regulation.’”³⁸¹ In the *India-Autos* case, the panel endorsed this interpretation and further elaborated the meaning of “restrictions”:

On a plain reading, it is clear that a ‘restriction’ need not be a blanket prohibition or a precise numerical limit. Indeed, the term ‘restriction’ cannot mean merely

³⁸⁰ ESPA, *supra* note 38, at 170.

³⁸¹ Panel Report, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 5.128, WTO Doc. WT/DS90/R (adopted Apr. 6, 1999) [hereinafter *India-Quantitative Restrictions*].

*‘prohibition’ on importation, since Article XI:1 expressly covers both ‘prohibition and restriction’. Furthermore, the Panel considers that the expression ‘limiting condition’ used in India– Quantitative Restrictions to define the term ‘restriction’ and which this Panel endorses, is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e. that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself.*³⁸²

The panel inferred that “any form of limitation imposed on, or in relation to importation constitutes a restriction on exportation within the meaning of Article XI:1.”³⁸³ In *China-Raw Materials*, the panel added that any measure having “the very potential to limit trade ... constitutes a ‘restriction’ within the meaning of Article XI:1 of the GATT 1994.”³⁸⁴

WTO case law suggests it is possible to deduce that Article XI:1 of the GATT has consistently been interpreted in a broad manner, to cover a wide range of measures having, either de jure or de facto, restricting or limiting effects on exports, either actual or potential. Accordingly, any types of quantitative restrictions discussed in 2.3.2 of this dissertation may fall within the scope of Article XI:1 of the GATT as long as they have actual or potential limiting or restricting effects on exports.

³⁸² Panel Report, *India- Measures Affecting The Automotive Sector*, ¶ 7.534, WTO Doc. WT/DS146/R, WT/DS175/R (adopted Dec.21, 2001) [hereinafter *India-Autos*].

³⁸³ *Id.* ¶ 7.529, 7.545.

³⁸⁴ Panel Reports, *China- Measures Related To The Exportation Of Various Raw Materials*, ¶ 7.1081, WTO Doc. WT/DS394/R (adopted Jul.5, 2011) [hereinafter *China-Raw Materials*].

Yet, exceptions to Article XI:1 also allow export bans and restrictions for certain public-policy purposes. These are discussed separately in Section 3.4 below.

Other GATT Provisions Relevant to Quantitative Restrictions on Exports

While Article XI:1 of the GATT prohibits the use of quantitative restrictions, several exceptions are allowed to WTO members under the GATT to justify the inconsistent use of Article XI:1, allowing them to restrict exports in certain circumstances under certain conditions. Any export quantitative restrictions imposed lawfully under the GATT must, however, be applied in a non-discriminatory manner, because the MFN obligation embodied in Article I:1 of the GATT applies “with respect to all rules and formalities in connection with both importation and exportation.”

The MFN principle, however, appears in Article XIII of the GATT on “Non-discriminatory Administration of Quantitative Restrictions” as follows:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

The language of Article XIII:1 requires that import or export restrictions lawfully applied under the GATT be administered in a non-discriminatory manner, thus imposing an MFN-like obligation.³⁸⁵ Therefore, any export restrictions breaching Article I:1 would also violate Article XIII:1.

³⁸⁵ VAN DEN BOSSCHE & ZDOUC, *supra* note 139, at 492.

Moreover, various sub-paragraphs of Article XIII of the GATT contain specific requirements for WTO members imposing a lawful quantitative restriction. Under Article XIII:2(a)-(b), a quota limiting the total amount of imports (or exports), whether allocated among supplying (or, in the case of export restrictions, importing countries) countries or globally, should be preferred over export licenses or permits without a quota.³⁸⁶ Moreover, when allocating a quota among supplying/importing countries, WTO members may seek agreement regarding the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying (or importing) the product concerned, according to Article XIII:2 (d) of the GATT. If this method is not reasonably practicable, however, the WTO member shall allocate the quota shares among supplying/importing countries in accordance with historical market shares:

The Contracting party shall allot to contracting parties having a substantial interest in supplying (or importing) the product shares based upon the proportions, supplied (or imported) by such contracting parties during a previous representative period, of the total quantity or value of imports (or exports) of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

The “representative period” is normally considered as three years preceding the imposition of the quota.³⁸⁷ WTO members are required to allocate a part of the quota to all members having an interest in supplying/importing but are not obliged to allot quota

³⁸⁶ ESPA, *supra* note 38, at 177.

³⁸⁷ GATT Panel Report, *EEC-Restrictions on Imports of Dessert Apples*, ¶¶ 4.16, 12.22, L/6491-36S/93 (adopted Apr. 18, 1989) [hereinafter *EEC-Dessert Apples*].

shares to members without a substantial interest. Yet, when a member wishes to allocate quota shares to suppliers with minor market shares, then such shares must be allocated to all such suppliers.³⁸⁸

Moreover, Article XIII of the GATT applies to otherwise GATT-consistent export and import restrictions. In other words, otherwise GATT-consistent export restrictions become unlawful if they do not also comply with Article XIII:1 of the GATT. However, an export restriction that cannot be justified under any of the GATT exceptions is then automatically in breach of Article XI:1 of the GATT, whether applied in a non-discriminatory manner or not.³⁸⁹

Finally, Article XVII of the GATT is also relevant to export restrictions in that it covers the conduct of state trading enterprises (STEs). As shown above, in certain countries, exports of specific products are subject to state trading. According to Article XVII:1 (a), STEs are defined as either “state enterprises” established or maintained by a WTO member or “any enterprises” to which governments “grant formally or in effect, exclusive or special privileges.” As indicated in the case law, these enterprises shall act “in accordance with the general principles of non-discriminatory treatment.”³⁹⁰

Inasmuch as STEs responsible for exporting raw materials act in accordance with commercial considerations, their conduct cannot be challenged as discriminatory within the meaning of Article XVII of the GATT. Yet, WTO members cannot implement export

³⁸⁸ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas III*, ¶ 7.73, WT/DS27/R/USA (adopted May 22, 1997) [hereinafter EX-Bananas III].

³⁸⁹ PETROS MAVROIDIS, *TRADE IN GOODS: THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS* 86 (2007).

³⁹⁰ GATT Panel Report, *Canada - Administration of the Foreign Investment Review Act*, L/5504-30s/140 (adopted Feb.7, 1984);

restrictions through STEs. The Ad Note to Articles XI, XII, XIII, XIV and XVIII explicitly precludes this possibility: throughout those articles, the terms “import restrictions” and “export restrictions” include restrictions made effective through state trading operations.

3.4 ANALYSIS OF THE GATT EXCEPTIONS

Governments frequently adopt legislation or take measures that restrict trade of goods or services in order to protect, for example, public health, public morals, employment, national security, or the environment. WTO law provides rules to reconcile trade liberalization with other important societal values and interests.³⁹¹ These rules take the form of wide-ranging exceptions to the basic WTO disciplines. There are six main categories of exceptions:

- The “general exceptions” in Article XX of the GATT 1994 and Article XIV of the GATS;
- The exceptions for national and international security in Article XXI of the GATT 1994 and Article XIV of the GATS;
- The exceptions for safeguard measures in Article XIX of the GATT 1994 and the Agreement on Safeguards;
- The exceptions for measures for balance of payments reasons in Articles XI, XII, and XVIII:B of the GATT 1994 and Article XII of the GATS;
- The exceptions for preferential trade agreements in Article XXIV of the GATT 1994 and Article V of the GATS;

³⁹¹ VAN DEN BOSSCHE & PREVOST, *supra* note 139, at 83.

- The exceptions for economic development set out in “special and differential treatment” provisions and the “Enabling Clause.”

Yet, these exceptions are not always symmetrical on the import and export sides. In most cases, they are import-specific. The GATT contains a few exceptions that allow WTO members to lawfully resort to quantitative restrictions in exports.

I will start with Article XI:2, which is a specific exception to justify any GATT-inconsistent measure.

3.4.1 The Specific Exceptions

Article XI:2 of the GATT provides for several Article XI:1-specific exceptions. WTO members may thus lawfully adopt Article XI:1-inconsistent measures under the circumstances laid out in Article XI:2 of the GATT. As allowed in Article XI:2(a), the general prohibition contained in Article XI:1 shall not apply to “Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.” Article XI:2 (a) applies to export prohibitions or restrictions that WTO members use to cope with supply shortages. This provision appears particularly important for dealing with export restrictions on mineral resources, as they are often applied to ensure adequate domestic supply.³⁹² However, no definitions exist regarding the meaning of “temporarily” and “critical” and what constitutes “shortages.”

Eventually, the WTO panel and Appellate body interpreted each of the requirements in Article XI:2 (a) of the GATT.³⁹³

³⁹² ESPA, *supra* note 38, at 180.

³⁹³ See discussion *infra* Section 3.5.

3.4.2 The General Exceptions

This section gives an account of the GATT general exceptions applicable to export restrictions on mineral raw materials. Article XX of the GATT 1994 contains exceptions that may enable WTO members to deviate from the GATT provisions regulating the use of export duties and quantitative restrictions, allowing them to restrict exports in certain circumstances. Much of the wording of Article XX, indeed, emerges not in the negotiations of the Havana Charter but two decades earlier, in history's first multilateral trade round, the International Convention for the Abolishing of Import and Export Prohibitions and Restrictions, held under the purview of the League of Nations in 1927.³⁹⁴ The convention was ambitious, vowing to "abolish within a period of six months from the date of coming into force of the present convention...all import and export prohibitions and restrictions."³⁹⁵

GATT-inconsistent export duties or quantitative restrictions that may be covered by Article XX include the following:

XX(b) necessary to protect human, animal or plant life, or health;

XX(c) relating to the importations or exportations of gold or silver;

XX(f) imposed for the protection of national treasures of artistic, historic, or archaeological value;

³⁹⁴ KRZYSZTOF PELC, MAKING AND BENDING INTERNATIONAL RULES: THE DESIGN OF EXCEPTIONS AND ESCAPE CLAUSES IN TRADE LAW 124 (2016).

³⁹⁵ Convention on Abolition of Import and Export Prohibitions and Restrictions art.2, November 8, 1927, 46 Stat.2461, TS 811.

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

XX(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry when the domestic price of the material is held below the world price as part of a governmental stabilization plan.³⁹⁶ Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry and shall not depart from the provisions of this Agreement relating to non-discrimination.

XX(j) essential to the acquisition or distribution of products in general or local short supply, provided that any such measures shall be consistent with the principle that “all contracting parties are entitled to an equitable share of the international supply” of such products and that any such measures inconsistent with the agreement’s other provisions shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

As the Appellate Body explained in *US-Shrimp*, Article XX sets forth “limited and conditional exceptions from the obligations of the substantive provisions of the GATT,”³⁹⁷ in the sense that justification is granted only to the extent that a measure fulfills the conditions imposed by Article XX of the GATT.³⁹⁸ Specifically, Article XX imposes a so-

³⁹⁶ Matsushita, *supra* note 363, at 545.

³⁹⁷ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 157, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [hereinafter *US-Shrimp*].

³⁹⁸ *ESPA*, *supra* note 38, at 208.

called two-tiered test. For a measure to be justified under Article XX, the regulating member must demonstrate (i) that the measure falls within one or more of the paragraphs of Article XX and (ii) that the measure is applied consistently with the provisions of the chapeau. The chapeau of Article XX explicitly states that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures coming under one of the particular grounds listed under paragraphs (a) to (j).”

The exceptions listed under paragraphs (a) to (j) of Article XX of the GATT may be categorized into two groups: non-industrial and industrial. WTO members may justify their non-industrial concerns under paragraph (b), “necessary to protect human, animal or plant life or health” and paragraph (g), “related to the conservation of exhaustible natural resources.” Other Article XX exceptions protect industrial policy concerns and interests.

Whereas the “industrial” exceptions under Article XX of the GATT were not a main topic of debate in a WTO dispute concerning the use of export restrictions, Article XX (b) and (g) have been the subject of WTO cases on export restrictions, including *China-Raw Materials I*, *China-Rare Earths*, and *China-Raw Materials II* in the last decade. These disputes are of particular interest for this study because the measures at issue were applied to mineral raw materials. I discuss those cases in a later section. Now I focus on the requirements in Article XX (b) and (g), including their interpretation in the aforementioned cases.

Article XX(b) of the GATT 1994 allows WTO members to adopt GATT-inconsistent measures “necessary to protect human, animal or plant life or health.” The WTO Panels and the Appellate Body have often followed two analytical steps when considering

whether a measure falls within the exception in Article XX(b): first, whether the “objective” of the measure is to protect human, animal or plant life, or health; second, whether the measure is “necessary” to fulfill this policy objective.

Article XX (b): Objective of the Measure. First, when considering whether a measure’s objective is to protect human, animal or plant life, or health, panels and the Appellate Body have examined the measure’s design and structure and have generally showed deference to members’ policies.³⁹⁹ The degree of deference, however, is limited. The panel in the *China-Raw Materials* case found that a member seeking to justify a measure under XX (b) “must do more than simply produce a list of measures referring, *inter alia*, to environmental protection and polluting products.”⁴⁰⁰ Rather, members must demonstrate a connection between environmental protection standards and the measure they seek to justify.⁴⁰¹ They must provide proof of how export restrictions would operate to reduce pollution caused by their production.⁴⁰² However, in recent cases, states failed to do so. For instance, both in the *China-Raw Materials I* and the *China-Rare Earths* cases, the panels observed that some evidence and assertions of the Government of China “show that the export duties at issue are designed and structured to promote increased domestic production of high-value-added downstream products that use the raw materials at issue in this dispute as inputs.”⁴⁰³ Hence, the panels concluded that

³⁹⁹ Panel Report, *China-Raw Materials*, ¶¶ 7.479.

⁴⁰⁰ *Id.* ¶¶ 7.511.

⁴⁰¹ *Id.* ¶¶ 7.507; Panel Report, *China-Measures Related To The Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶¶ 7.160, WTO Doc. WT/DS431/R, WT/DS432/R, WT/DS433/R (adopted Mar.26, 2014) [hereinafter *China-Rare Earths*].

⁴⁰² Panel Report, *China-Raw Materials*, ¶¶ 7.508; Panel Report, *China-Rare Earths*, ¶¶ 7.166.

⁴⁰³ Panel Report, *China-Rare Earths*, ¶¶ 7.169.

“simply producing a list of measures referring to environmental protection and polluting products without showing how these measures fulfil the objective it claims to address” cannot meet the Article XX(b) objective requirement.⁴⁰⁴

Article XX (b): “Necessary.” In the next stage of the analysis to be conducted under Article XX(b) of the GATT 1994, panels must first consider the relevant factors, in particular i) the importance of the interests or values at stake; ii) the extent of the measure’s contribution to the achievement of the listed objective; and iii) the measure’s trade restrictiveness.⁴⁰⁵ The Appellate Body has recognized that “certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures,”⁴⁰⁶ which prompted the panel in the *China-Rare Earths* case to state that “with respect to such complex problems, the Appellate Body has left open the possibility that a ‘necessary’ measure could contribute to one of the objectives protected under Article XX(b) as part of a policy framework comprising different measures, resulting in possible synergies between those measures.”⁴⁰⁷

Furthermore, the Appellate Body found that a measure cannot be considered necessary if it is shown only to “brings about or be apt to produce a material contribution to the achievement of its objective.”⁴⁰⁸ Regarding the latter, the Appellate Body found that such a demonstration could consist of “quantitative projections in the future, or qualitative

⁴⁰⁴ Panel Report, *China-Raw Materials*, ¶ 7.511; Panel Report, *China-Rare Earths*, ¶ 7.171.

⁴⁰⁵ Appellate Body Report, *Brazil-Measures Affecting Imports Of Retreaded Tyres*, ¶178, WTO Doc. WT/DS332/AB/R (adopted Dec.3, 2007) [hereinafter *Brazil-Retreaded Tyres*].

⁴⁰⁶ *Id.* ¶151.

⁴⁰⁷ Panel Report, *China-Rare Earths*, ¶ 7.146.

⁴⁰⁸ Appellate Body Report, *Brazil-Retreaded Tyres*, ¶ 151.

reasoning based on a set of hypotheses that are tested and supported by sufficient proof of evidence.”⁴⁰⁹ The panel further interpreted the article in the *China-Raw Materials* case as suggesting that a measure’s contribution should be assessed both currently and in the future.⁴¹⁰

If a measure is initially deemed necessary for achieving an objective listed in Article XX(b), panels must next compare that measure with alternative measures identified by the complainant that would be technically and financially available to the respondent.⁴¹¹ Such alternative measures must be less trade-restrictive while providing an equivalent contribution to the achievement of the listed objectives and must not impose an undue burden on the members imposing the measure.⁴¹² While the burden of proof initially lies with the complainant to identify possible alternatives, the burden then shifts to the respondent to demonstrate that the proposed alternative is not a genuine alternative or is not reasonably available.⁴¹³

Article XX(g) of the GATT 1994. This provision allows WTO members not to conform to their GATT obligations when using measures “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” The Appellate Body in the *China-Rare Earths* case emphasized that Article XX(g) presents a “holistic” test, in that a member wishing to justify a measure through the provision “must show that it satisfies all

⁴⁰⁹ *Id.*

⁴¹⁰ Panel Report, *China-Raw Materials*, ¶ 7.518.

⁴¹¹ Appellate Body Report, *China-Rare Earths*, ¶ 5.94.

⁴¹² *Id.*

⁴¹³ *Id.*

the requirements set out in that provision.”⁴¹⁴ Nevertheless, panels and the Appellate Body have often divided their analysis into two steps, looking first at whether the measure “relates to the conservation of exhaustible natural resources” and, second, at whether the measure is “made effective in conjunction with restrictions on domestic production or consumption.”⁴¹⁵

Article XX(g): “Relating to the Conservation of Exhaustible Natural Resources.” Both in the *China-Raw Materials* and the *China-Rare Earths* cases, the Appellate Body interpreted this phrase as follows:

For a measure to “relate to” conservation in the sense of Article XX(g), there must be “a close and genuine relationship of ends and means” between that measure and the conservation objective of the Member maintaining the measure to be established on a case-by-case basis. Hence, a GATT-inconsistent measure that is merely incidentally or inadvertently aimed at a conservation objective would not satisfy the “relating to” requirement of Article XX(g).

The Appellate Body also posited that the assessment of whether a measure relates to conservation must focus on “the design and structure” of the measure concerned.⁴¹⁶ The analysis of the design and structure of the challenged measures, however, must not be taken “in isolation” but must consider such measures “in their policy and regulatory

⁴¹⁴ Appellate Body Report, *China-Rare Earths*, ¶ 5.94.

⁴¹⁵ Gabrielle Marceau, *The World Trade Organization and Export Restrictions*, in EMERGING ISSUES IN SUSTAINABLE DEVELOPMENT: INTERNATIONAL TRADE LAW AND POLICY RELATING TO NATURAL RESOURCES, ENERGY, AND THE ENVIRONMENT 109 (Mitsuo Matsushita & Thomas J. Schoenbaum eds., 2016).

⁴¹⁶ Appellate Body Report, *China-Rare Earths* ¶ 5.96, 5.111–14; Appellate Body Report, *US-Shrimp*, ¶ 137; Appellate Body Report, *US- Gasoline*, ¶ 17, 20; Appellate Body Report, *China-Raw Materials*, ¶ 355.

context.”⁴¹⁷ In this respect, the mere existence of a comprehensive conservation policy incorporating the challenged measures does not per se fulfill the “relating to” requirement.⁴¹⁸ A measure adopted as part of a policy framework comprising a multiplicity of interacting measures may satisfy the “relating to” criterion even if the measure reflects different policy objectives.⁴¹⁹

According to the Appellate Body’s interpretation provided in the *China-Rare Earths* case,

For the purpose of Article XX(g), the precise contours of the word “conservation” can only be fully understood in the context of the exhaustible natural resource at issue in a given dispute. For example, “conservation” in the context of an exhaustible mineral resource may entail preservation through a reduction in the pace of its extraction, or by stopping its extraction altogether. In respect of the “conservation” of a living natural resource, such as a species facing the threat of extinction, the word may encompass not only limiting or halting the activities creating the danger of extinction, but also facilitating the replenishment of that endangered species.

The panel also clarified the relationship among “conservation” within the meaning of Article XX(g), sustainable development, and permanent sovereignty over natural resources.⁴²⁰ It stated that existence of sovereignty over national resources cannot enable Article XX(g) to allow WTO members to allocate the available stock of a product

⁴¹⁷ Appellate Body Report, *China-Rare Earths*, ¶ 5.108; Panel Reports, *China-Rare Earths*, ¶ 7.289.

⁴¹⁸ ESPA, *supra* note 38, at 216.

⁴¹⁹ Panel Reports, *China-Rare Earths*, ¶ 7.288-9; Panel Reports, *China-Raw Materials*, ¶ 7.375-6.

⁴²⁰ ESPA, *supra* note 38, at 219.

between foreign and domestic consumers because, once extracted and in commerce, natural resources are subject to WTO law.⁴²¹ In other words, the Panel opined, “once the mineral resource is exploited, the allocation of such resource should be left to the functioning of the world market.” As the Appellate Body recognized in the *US-Softwood Lumber IV*, natural resource products that will necessarily enter the market and are available for sale are subject to GATT disciplines in the same way that any other product is subject to such rules. Therefore, no other WTO member has, under WTO law, the right to dictate or control the allocation or distribution of rare earth resources to achieve an economic objective. A WTO member’s right to adopt conservation programs is not a right to control the international market in which extracted products are bought and sold.⁴²²

Article XX(g): “Made Effective in Conjunction with Restrictions on Domestic Production or Consumption.” As the Appellate Body explained in the *China-Raw Materials* case, the terms “made effective” and “in conjunction with” require that conservation-related measures work with limitations on domestic production or consumption.⁴²³ However, the Appellate Body emphasized that “Article XX(g) does not contain an additional requirement that the conservation measure be primarily aimed at making effective the restrictions on domestic production or consumption.”⁴²⁴ Moreover, it offers an interpretation in the *China-Rare Earths* case as follows:

Taking both of these elements “made effective” and “in conjunction with” together, the second clause of Article XX(g) refers to governmental measures that are

⁴²¹ Panel Report, *China-Rare Earths*, ¶ 7.462.

⁴²² *Id.* ¶ 7.268.

⁴²³ Appellate Body Report, *China-Raw Materials*, ¶ 356.

⁴²⁴ *Id.*

promulgated or brought into effect, and that operate together with restrictions on domestic production or consumption of exhaustible natural resources. Thus, the requirement that restrictions be made effective “in conjunction” suggests that, in their joint operation toward a conservation objective, such restrictions limit not only international trade, but must also limit domestic production or consumption. Moreover, in order to comply with the “made effective” element of the second clause of Article XX(g), it would not be sufficient for domestic production or consumption to be subject to a possible limitation at some undefined point in the future. Rather, a Member must impose a “real” restriction on domestic production or consumption that reinforces and complements the restriction on international trade.⁴²⁵

For the purposes of Article XX(g), “restriction” is a measure that restricts someone or something, a limitation on action, a limiting condition or regulation.⁴²⁶ Accordingly, the second prong of Article XX(g) requires that “a Member seeking to rely upon Article XX(g) in its pursuit of a conservation objective must demonstrate that it imposes restrictions, not only in respect of international trade, but also in respect of domestic productions or consumption.” In other words, it requires “even-handedness” in the imposition of restrictions, in the pursuit of conservation, upon the production or consumption of exhaustible natural resources.⁴²⁷ The notion of even-handedness in the second clause of Article XX(g) demands that a member impose “real” restrictions on domestic production

⁴²⁵ Appellate Body Report, *China-Rare Earths*, ¶ 5.92.

⁴²⁶ Appellate Body Report, *China-Rare Earths*, ¶ 5.91.

⁴²⁷ *Id.* ¶ 5.93.

or consumption that reinforce and complement the restrictions on international trade, particularly when domestic consumption accounts for a major part of the exhaustible natural resource to be conserved.⁴²⁸

In conclusion, an export restriction may be defended on the basis that it either meets the criteria in Article XI:2(a) or that it is justified by one or more paragraphs of Article XX. If a member seeks to defend an export restriction under one of the paragraphs of Article XX, the export restriction must also meet the requirements of the chapeau of Article XX, which requires that measures “not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” In either case, the management of these restrictions need to follow the general principle of non-discrimination prescribed in Article XIII of GATT 1994.

In the *China-Raw Materials* case, the Appellate Body noted that the reach of Article XI:2(a) is not the same as that of Article XX (g):

Articles XI:2(a) and Article XX(g) have different functions and contain different obligations. Article XI:2(a) addresses measures taken to prevent or relieve “critical shortages” of foodstuffs or other essential products. Article XX(g), on the other hand, addresses measures relating to the conservation of exhaustible natural resources.⁴²⁹

⁴²⁸ Appellate Body Report, *China-Rare Earths*, ¶ 5.132.

⁴²⁹ Appellate Body Report, *China-Raw Materials*, ¶ 337.

However, it is important to be aware that a measure to prevent or relieve a critical shortage may overlap with a measure relating to exhaustible natural resources. These issues are discussed in Section 3.4.3.

3.4.3 The Security Exceptions

As Mavroidis states, “absent inclusions of the security exception, few if any would have agreed to join the GATT.”⁴³⁰ Adam Smith stated in *The Wealth of Nations* that the main exception to trade should be security considerations. Article XXI reflects these beliefs.

Certain WTO members have created voluntary associations to coordinate export controls for security reasons.⁴³¹ The following groups are regarded as important⁴³²:

- 1) The Wassenaar Arrangement, with forty-five state parties, places export controls on eight categories of weapons systems and nine categories of dual-use technologies;
- 2) The Missile Technology Control Group, comprising thirty-four states, uses export controls on missile technologies capable of delivering weapons of mass destruction;
- 3) The Australia Group, comprising forty-eight countries, enforces export controls on technologies and materials used to manufacture chemical and biological weapons;

⁴³⁰ MAVROIDIS, *supra* note 389, at 368.

⁴³¹ MATSUSHITA ET AL., *supra* note 378, at 544.

⁴³² *Id.*

- 4) The Nuclear Suppliers Group, which comprises forty-six nations, imposes export controls over nuclear materials and technologies.

Among developed countries, the United States controls exports of sensitive equipment, software, and technology, to promote the country's national security interests and foreign policy objectives.⁴³³ The U.S. government controls exports of products that provide a significant military or intelligence advantage to the U.S.⁴³⁴ At the time of writing, twenty-nine nations are subject to U.S. economic sanctions.⁴³⁵

GATT Article XXI contains "security exceptions" to the GATT rules affecting export restraints.⁴³⁶ Article XXI reads as follows:

Export Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking action which it considers necessary for the protection of its essential security interests:

⁴³³ See RESOURCE ON STRATEGIC TRADE MANAGEMENT AND EXPORT CONTROLS, OVERVIEW OF THE US EXPORT CONTROL SYSTEM, <https://www.state.gov/strategictrade/overview/> (last visited February 19, 2018).

⁴³⁴ John W. Boscaroli et al., *Export Control and Economic Sanctions*, 48 ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW 23 (2014).

⁴³⁵ See U.S. DEPARTMENT OF TREASURY, SANCTIONS PROGRAMS AND COUNTRY INFORMATION (2018), <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last visited February, 25 2018).

⁴³⁶ See Michael J.Hahn, *Vital Interests and The Law of GATT: An Analysis of GATT's Security Exception*, 12 (3) MICH.J.INT.L. 558,559(1991).

- i) relating to fissionable materials or the materials from which they are derived;
 - ii) relating to the traffic in arms, ammunition or implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article XXI has been invoked several times, but its scope has never been clearly defined.⁴³⁷ The first invocation of Article XXI explored ambiguity in the texts. In 1949, the United States cited Article XXI to justify its export restrictions against Czechoslovakia.⁴³⁸ The United States firmly expressed its position that Article XXI could be invoked unilaterally as a *carte blanche* exception.⁴³⁹ The counterparty disagreed by arguing that Article XXI must be interpreted narrowly. The GATT contracting parties rejected the Czechoslovakian complaint;⁴⁴⁰ nonetheless, the U.K. delegate expanded the U.S. assertion that “since the question clearly concerned Art XXI, the United States action would seem to be justified because every country must have the last resort relating to its own security.”⁴⁴¹

⁴³⁷ MATSUSHITA ET AL., *supra* note 378, at 549.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ GATT B.I.S.D (2nd Supp.), at 28 (1952) in *Id.*

⁴⁴¹ *Id.*

Subsequently, Article XXI was invoked by Ghana to restrict its trade with Portugal,⁴⁴² by the United States to boycott trade with Cuba,⁴⁴³ by the European community to restrict trade with Argentina during the Falklands/Malvinas War,⁴⁴⁴ by Germany against Iceland,⁴⁴⁵ by the United States against Nicaragua,⁴⁴⁶ and by Sweden to justify its import quotas for certain footwear.⁴⁴⁷

The scope of Article XXI (a) is limited to withhold information only if it contains essential security implications. In contrast, under Article XXI(b), a WTO member must consider action “necessary” for the protection of its essential security interests.⁴⁴⁸ However, the three subsections of Article XXI define objective circumstances. Article XXI (b) (i) is precise enough to mean that the export of fissionable materials or uranium, whether for civilian or military purposes, may be subject to a ban. This provision is designed to prevent nuclear proliferation and protect health and safety. Unlike the preceding subsection, the scope of Article XXI(b)(ii) has not been defined. Consequently, it is not clear whether the subsection would include sophisticated tech equipment suitable for both civilian and military use. As a result, export controls on arms and dual-use goods are left to the discretion of each WTO member.⁴⁴⁹

⁴⁴² GATT B.I.S.D. (5th Supp.) at 196 (1961) *in Id.*

⁴⁴³ Committee on Industrial Products, Inventory of Non-Tariff Barriers, Dec.12,1968, GATT Doc. COM.IND/6/Add.4, at 53 (1968).

⁴⁴⁴ GATT Council, Minutes of Meeting Held on 7 May 1982, GATT Doc. C/B/157 (June 22, 1982).

⁴⁴⁵ GATT Council, GATT Doc. C/B/103 (February 18 1975) in MATSUSHITA ET AL., *supra* note 378, at 550.

⁴⁴⁶ GATT Panel Report, *United-States – Trade Measures Affecting Nicaragua*, at 8, GATT Doc. L/6053 (adopted Oct.13, 1986).

⁴⁴⁷ GATT Panel Report, *Sweden-Import Restriction on Certain Footwear*, at 3, GATT Doc. L/4250 (adopted Nov.9,1975).

⁴⁴⁸ MATSUSHITA ET AL., *supra* note 378, at 550.

⁴⁴⁹ *Id.*

Article XXI (b)(iii) is the most problematic provision. It allows export controls in two circumstances: in time of war or other emergencies in international relations. International law and relations define the term “war” to some extent. The phrase “other emergency in international relations” creates more difficulty and requires two major questions to be answered: the first is whether the provision is self-judging in the discretion of the state that invokes it; the second is whether the term has objective content.⁴⁵⁰ The legislative history of the provision indicates that the article was not excluded from GATT dispute settlement mechanisms,⁴⁵¹ so it was not defined as self-judging. The term “emergency” may apply not only to international situations posing a threat of future armed conflict but also to economic, social, or political situations. However, the “emergency” requires a certain degree of seriousness, as distinguished from routine tensions or disagreements. This distinction implies a case-by-case judgment by a WTO Dispute Settlement Body.⁴⁵²

Finally, Article XXI(c) ties the GATT to the UN Charter by providing that a WTO member may take any action to fulfill its obligations under the charter so that trade sanctions, authorized by the UN Security Council under Chapter VII of the charter to maintain international peace and security, are justified.⁴⁵³

3.5 CASE STUDIES OF GATT/WTO DISPUTES OVER RAW MATERIALS

In addition to WTO agreements, including the GATT, GATS, TRIPS, and accession protocols, the panels and the Appellate Body reports as well as dispute settlement body decisions have now developed into a large body of jurisprudence regarding both

⁴⁵⁰ *Id.*

⁴⁵¹ HAHN, *supra* note 436, at 556-67.

⁴⁵² MATSUSHITA ET AL., *supra* note 378, at 550.

⁴⁵³ *Id.*

procedural and substantive rules. In the absence of clarity in the legal texts, analyzing the case law in this field substantially helps to define the legal boundaries of export restrictions under WTO law.⁴⁵⁴ Through examination of the substantive legal issues addressed at the panel and appellate body levels, this section explores the loopholes and inconsistencies in the existing WTO discipline governing export restrictions.

Thus far, seven disputes have arisen from the use of GATT-inconsistent “restrictions” on the export side. There have been two cases arisen out of the use of restrictions on the export side, addressed in the GATT era. They are the *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*⁴⁵⁵ and the *Japan – Trade in Semi-Conductors*⁴⁵⁶. *Argentina–Hides and Leather* (December 19, 2000)⁴⁵⁷, *United States-Measures Treating Export Restraints as Subsidies* (June 29, 2001)⁴⁵⁸, *China-Raw Materials I* (2009), *China-Rare Earths* (2012), and *China-Raw Materials II* (2016) were brought before the WTO adjudicators.

In the *Canada-Herring and Salmon* case, Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon. The U.S. complained that the export restrictions maintained by Canada were inconsistent with the obligations of Canada under Article XI of the GATT 1994.⁴⁵⁹ Canada argued that those

⁴⁵⁴ Baris Karapinar, *Defining the Legal Boundaries of Export Restrictions: A Case Law Analysis*, 15 J.INT.ECON.L. 443, 444 (2012).

⁴⁵⁵ See GATT Panel Report, *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc. L/6268-35S/98 (adopted Nov.20, 1987) [hereinafter *Canada-Herring and Salmon*].

⁴⁵⁶ See GATT Panel Report, *Japan-Trade In Semi-Conductors*, GATT Doc. L/6309-35S/116 (adopted Mar.24, 1988) [hereinafter *Japan-Semiconductors*].

⁴⁵⁷ Panel Report, *Argentina-Measures Affecting The Export Of Bovine Hides And The Import Of Finished Leather*, WTO Doc. WT/DS155/R (adopted Dec.19, 2000) [*Argentina-Hides and Leather*].

⁴⁵⁸ Panel Report, *United States–Measures Treating Exports Restraints As Subsidies*, WTO Doc. WT/DS194/R (adopted Jun.29, 2001) [*US-Export Restraints*].

⁴⁵⁹ GATT Panel Report, *Canada-Herring and Salmon*, ¶ 3.1.

export restrictions were part of a system of fisheries conservation and management and therefore they were justified under Article XX(g).⁴⁶⁰ In addition, Canada claimed that its regulation was consistent with Article XI:2(b), because these measures were ‘necessary’ to maintain Canada’s reputation for high-quality fish products and also ‘necessary’ for the international marketing of processed salmon.⁴⁶¹ The Panel examined the two legal benchmarks for the consistency of a measure with Article XX (g):⁴⁶² (i) whether the export restrictions on these products ‘related to’ the conservation of an exhaustible natural resource; (ii) whether they were applied ‘in conjunction with’ domestic restrictions on production or consumption. As the Panel noted, any trade restricting measure to be considered as ‘relating to’ to the conservation of exhaustible natural resources, it had to be aimed primarily at conservation of these resources. It also interpreted that a trade measure could only be considered to be ‘in conjunction with’ production or consumption restrictions if ‘it was primarily aimed at rendering effective these restrictions’.⁴⁶³ After it examined whether the Canadian regulation could satisfy these criteria, the Panel found that the export prohibitions only applied to supplies in unprocessed form and did not cover exports of the same varieties in general. In addition, the measures in question only restricted purchases of these commodities by foreign processors and consumers and not those made by domestic processors and consumers. Based on its findings which stated that ‘these prohibitions could not be deemed to be primarily aimed at the conservation of salmon and herring stocks and at rendering effective the restrictions on the harvesting of

⁴⁶⁰ *Id.* ¶ 3.3.

⁴⁶¹ GATT Dispute Settlement Report, *Canada – Herring and Salmon*, ¶ 3.4.

⁴⁶² Karapinar, *supra* note 454, at 465.

⁴⁶³ GATT Dispute Settlement Report, *Canada – Herring and Salmon*, ¶ 4.6.

these fish', the Panel determined that the export prohibitions imposed by Canada violated Article XI and could not be justified under Article XX(g).⁴⁶⁴

In the *Japan-Semiconductors* case, the GATT Panel clarified that Article XI:1 GATT not only covers legally binding instruments but also applies more broadly to non-mandatory measures such as voluntary guidelines insofar as they result in a de facto restriction on exportation.⁴⁶⁵ A case was brought by EC to request the Panel to examine the agreement between the U.S. and Japan on semiconductors. Under the agreement between the U.S. and Japan, Japanese government undertook to try and increase imports while monitoring the price of most exports not only to the U.S. but to other countries as well, including EC. The export approval system for semi-conductors was introduced and all exporters of semi-conductors were required to submit license applications which were screened according to pre-defined considerations before export licenses were approved or rejected.⁴⁶⁶ The EC considered such measures to amount to *de facto* restrictions inasmuch as they could induce Japanese semiconductor producers to reduce their exports to the European market.⁴⁶⁷ Japan, on the other hand, argued that it was merely monitoring export prices and offering its 'administrative guidance' to the manufacturers and traders of semi-conductors. It claimed that its measures were voluntary guidelines and none of them was legally binding. The Panel found that Japanese export licensing practices leading to delays of up to three months in the issuing licenses for semi-conductors destined for countries other than the U.S., had been non-automatic and

⁴⁶⁴ *Id.* ¶ 4.7.

⁴⁶⁵ GATT Panel Report, *Japan- Semiconductors*, ¶ 104-17, in ESPA, supra note 38, at 172.

⁴⁶⁶ *Id.* ¶ 21.

⁴⁶⁷ *Id.* ¶ 71.

constituted restrictions on the exportation of such products inconsistent with Article XI:1.⁴⁶⁸ This case is significant in relation to the relevant jurisprudence – as the goods at dispute was a processed commodities while all the other disputes concerning export restrictions involved primary products.

The *Argentina-Hides and Leather dispute* investigated the European Communities' complaint about measures taken by Argentina on the export of bovine hides.⁴⁶⁹ The EC alleged that Argentina had imposed a *de facto* export prohibition on raw and semi-tanned bovine hides which allegedly violated GATT Article XI:1 and X:3(a) of the GATT 1994.⁴⁷⁰ The complainant argued that Argentinian regulation which allowed for the representatives of the processing industry to be part of customs control on bovine hides might discourage exporters of raw material by delaying customs procedures.⁴⁷¹ The panel concluded that the EC had not been able to offer satisfactory evidence to illustrate how the Argentinian regulation in question would violate Article XI. The Panel in this dispute seemed to hold a different threshold for the burden of proof with regard to export restrictions. Thus, the complainant was found to have failed to meet its burden to prove that the presence of tanners' representatives during the export clearance process constituted an export restriction. The Panel opined that evidence regarding trade effects should carry a greater weight in a *de facto* restriction determination, and that the complaining party needs to demonstrate how the measure at issue causes or contributes

⁴⁶⁸ *Id.* ¶ 118.

⁴⁶⁹ Panel Report, *Argentina-Hides and Leather*, ¶ 1.2.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* ¶ 2.1.

to a low level of exports.⁴⁷² This is a different approach from the other Panels, who refrained from requiring the complainants to prove actual trade effects.⁴⁷³ This differentiation makes sense. While Article XI:1 was interpreted to protect market access for imports, no similar market access concern exists in the case of exports. In this context, it is important to note the rulings in this case were based on the examination of the actual restrictive impact of the measures in question on trade rather than their mere legal status.⁴⁷⁴ This case is highly relevant in the context of recent tensions in the commodity markets, as countries resort to a range of *de facto* measures in restricting their exports. For instance, in *Argentina – Hides and Leather*, the Panel noted that “there is no obligation under Article XI for a Member ... to assume a full ‘due diligence’ burden to investigate and prevent cartels from functioning as private export restrictions.”⁴⁷⁵ It gives effect to understanding that export restrictions imposed purely by private sectors fall outside the ambit of Article XI:1.

In *United States-Measures Treating Export Restraints as Subsidies*, Canada requested the establishment of a panel regarding certain U.S measures that treated export restrictions on certain commodities as a subsidy to other products made using or incorporating the restricted product if the domestic price of the restricted product is affected by the restraint.⁴⁷⁶ Canada argued that these measures were inconsistent with the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) in a

⁴⁷² Id. ¶¶ 11.20-11.21.

⁴⁷³ Id. ¶¶ 11.20.

⁴⁷⁴ Karapinar, *supra* note 454, at 448.

⁴⁷⁵ Panel Report, *Argentina-Hides and Leather*, ¶¶ 11.52.

⁴⁷⁶ Panel Report, *US-Restraints*, ¶¶ 1.1.

belief that these export measures could not be considered as subsidies within the meaning of Article I.1 of the SCM Agreement.⁴⁷⁷ The U.S. argued that to the extent that an export restraint causes an increased domestic supply of the restrained good, it is the same as if a government had expressly entrusted or directed a private body to provide the good domestically as prescribed by paragraph iv of Article 1.1(a)(1) of the SCM Agreement.⁴⁷⁸ The Panel dismissed this argument. The Panel found that the words “entrusts or directs” in paragraph (iv) requires an “explicit and affirmative action of delegation or command”.⁴⁷⁹ In particular, the Panel opined that “not every government intervention that might in economic theory be deemed a subsidy with the potential to distort trade is a subsidy within the meaning of the SCM Agreement.”⁴⁸⁰ The panel decided that export restrictions as defined in this case would not constitute ‘government-entrusted or government –directed provision of goods’ and thereby would not constitute a financial contribution as defined under Article I.1(a) of the SCM Agreement.⁴⁸¹ This dispute results in clarification that export restrictions imposed on raw materials could not be treated as subsidies to the downstream processing industries.

The latter three disputes are of particular interest for this study because the measures at issue involved mineral raw materials. These are landmark cases in what may become numerous natural-resources export disputes.⁴⁸² The *China-Raw Materials* case, the *China-Rare Earths* case, and the subsequent ongoing disputes over certain Chinese raw

⁴⁷⁷ *Id.* ¶ 3.3.

⁴⁷⁸ *Id.* ¶ 5.45.

⁴⁷⁹ Panel Report, *US – Export Restraints*, ¶ 8.30.

⁴⁸⁰ *Id.* ¶ 8.62.

⁴⁸¹ *Id.* ¶ 8.75.

⁴⁸² MATSUSHITA ET AL., *supra* note 378, at 544.

materials (*China-Raw Materials II*) have pushed these issues to the forefront of WTO law development. In all three cases, the complainants (the U.S., EU, Japan, and other importing countries) claimed that some of China's export restrictions on various types of raw materials and rare earths violated provisions of the GATT 1994 and China's WTO Accession Protocol.

The panel in *the China-Raw Materials* case examined whether the quantitative restrictions allegedly imposed by China on selective minerals had violated Article XI of the GATT 1994 and its Accession Protocol.⁴⁸³ The government of China has imposed taxes on its raw materials and rare earths, limited exports through quotas, imposed export licensing requirements, and maintained a minimum export price system for certain raw materials and rare earth.⁴⁸⁴ In this case, China invoked Article XI:2(a) to justify its export quotas on refractory-grade bauxite. According to XI:2(a), export restrictions must be 'temporarily applied', with a view to 'prevent or relieve critical shortages' of products essential to the exporting country. China claimed refractory-grade bauxite is 'essential', 'necessary', and 'critical' to its economy. On the other hand, the U.S., the EU and Mexico argued that the quotas in question were not temporarily applied, and that mineral in question was not a product essential to China. The complainants also claimed that the quota was not imposed to prevent or relieve a 'critical shortage' of the mineral in question.⁴⁸⁵ The Panel and the Appellate Body took the opportunity to provide some clarification on meaning of terms and legal standards enshrined in Article XI:2(a).

⁴⁸³ Panel Report, *China-Raw Materials*, ¶ 3.2.

⁴⁸⁴ Request for Consultations by the United States, *China-Raw Materials*, at 1,2, WTO Doc. WT/DS394/1 G/L/888, (June 25,2009).

⁴⁸⁵ Panel Report, *China-Raw Materials*, ¶ 7.243.

First, the restrictions must be temporary. In *China-Raw Materials*, the Panel tried to draw a distinction between the situations covered by Article XI:2(a) vis-à-vis those covered under Article XX(g). In this regard, the Panel decided that Article XI:2(a) should not be used to justify long-term measures imposed in view to addressing an inevitable depletion of a finite resource.⁴⁸⁶ The Panel did not agree that China's export restriction on refractory-grade bauxite was "temporarily applied" because the measure was in place for a decade with no intention to withdraw.⁴⁸⁷ On appeal, the Appellate Body slightly modified the Panel's interpretation. It interpreted that as long as the measure is adopted in order to bridge a "passing need", it can be considered "temporary" irrespective of whether or not the temporal scope of the measure is fixed in advance.⁴⁸⁸ Therefore, in view of the Appellate Body, the nature of the "critical shortage" could inform the time-frame of the measure in place.⁴⁸⁹ This again confirms that the exhaustibility of a natural resource cannot be the cause of "critical shortage" covered under the meaning of Article XI:2(a), because it is a permanent shortage that cannot be relieved.

Second, in order to be justified under Article XI:2(a), the product must be "essential" to the exporting country. The Panel in *China-Raw Materials* agreed that the essentialness of the product at issue should be self-judging. The Panel's view was that any input material could not be automatically qualified as essential for its contribution to the economy, nor should there be any a priori exclusion of any type of product to be

⁴⁸⁶ *Id.* ¶¶ 7.298 - 7.305.

⁴⁸⁷ *Id.* ¶ 7.348.

⁴⁸⁸ Appellate Body Reports, *China – Raw Materials*, ¶¶ 323, 331.

⁴⁸⁹ *Id.* ¶ 328.

regarded essential.⁴⁹⁰ To the Panel, whether a product is “essential” to the Member calls for a “case-by-case analysis” and one should take into consideration the particular circumstances faced by that Member at the time when the restriction was applied.⁴⁹¹ In this case, the Panel decided the product at issue, the refractory-grade bauxite, was essential for China because it was an important intermediary product to the production of steel, which served as a key driver for the Chinese economy.⁴⁹² The Panel’s interpretation of “essentialness” was not appealed.

Third, there must be a “critical shortage”. The Panel agreed with parties’ view that “shortage” means a deficiency in the quantity of goods, but held a high threshold as to what situation could be deemed a “critical shortage”. It opined that it must be a situation “of decisive importance” or “grave”, rising to the level of a “crisis” or “catastrophe”.⁴⁹³ The Panel also opined that the requirement that the measure being “temporarily applied” informed the notion of “critical shortage”. Namely, persistent shortages that cannot be “relieved” or “prevented” by the measure at issue would not be a “critical shortage” under the meaning of Article XI:2(a).⁴⁹⁴ In other words, for measures relating to exhaustible resources to be justified, the shortage must be more than the one arising from the exhaustible nature of the resource at issue, i.e. there need to be other special circumstances pertaining to a critical shortage situation.

⁴⁹⁰ Panel Reports, *China – Raw Materials*, ¶¶ 7.282.

⁴⁹¹ *Id.* ¶¶ 7.276, 7.279, 7.282.

⁴⁹² *Id.* ¶¶ 7.344.

⁴⁹³ *Id.* ¶¶ 7.297.

⁴⁹⁴ *Id.* ¶¶ 7.297.

The Panel in *China-Raw Materials* also interpreted the relationship between China's Accession Protocol and GATT, which is highly relevant to the issue of export restrictions. China defended its measures by arguing that its export restrictions aimed to conserve exhaustible natural resources (Article XX (g) of the GATT 1994) and to protect human, animal or plant life, or health (Article XX(b) of the GATT 1994). By discussing the conditions under which China could have successfully fulfilled the requirements of Article XX(b) and (g) of the GATT, the WTO dispute settlement bodies shed light on the policy that WTO members can apply export restrictions to address environmental concerns. The Panel examined the question of whether Article XX defense was actually available to a claim under 11.3 of China's Accession Protocol.

China argued that 11.3 of its Accession Protocol and the specific reference made to "exceptional circumstances" in a note in Annex 6 supported its right to resort to Article XX.

Paragraph 11.3 of China's Accession Protocol, reads:

"China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994."

Thus, Annex 6 provides the list of 84 products for which maximum duty rates are specified.⁴⁹⁵ It provides that "China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances.

⁴⁹⁵ Protocol on the Accession of the People's Republic of China, at 92-95, Nov.23, 2001, WTO Doc. WT/L/432 [hereinafter China's Accession Protocol].

If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution”. Whereas China did not dispute that it had imposed export duties on products not listed in Annex 6 of the Protocol, it argued that these duties must be justified under Article XX of the GATT 1994.

On the other side, the complainants argued that the China’s Protocol-inconsistent duties could not be justified through Article XX of the GATT 1994.⁴⁹⁶ They claimed that Article XX is applicable only to GATT violations, or when its justifications are exclusively incorporated into the relevant part of another WTO agreement. The Panel concluded that there is no basis in China’s Accession Protocol to allow the application of Article XX of the GATT 1994 to China’s obligations in 11.3 of the Accession Protocol.⁴⁹⁷ The Appellate Body upheld the Panel’s finding that Article XX of the GATT 1994 is not available to justify China’s Accession Protocol-inconsistent export duties. This is mainly because Article 11.3 of the Accession Protocol, which provides for the obligation to eliminate export duties, made no reference to the GATT 1994 and such export duty obligation “arises exclusively from China’s Accession Protocol, and not from the GATT 1994”.⁴⁹⁸ The Panel confirmed that “excluding the applicability of Article XX justifications from the obligations contained in Paragraph 11.3 means that China is in a position unlike that of most other WTO Members who are not prohibited from using export duties, either via the terms of their respective accession protocols.”⁴⁹⁹ It results in potential implications of the WTO-

⁴⁹⁶ Panel Reports, *China – Raw Materials*, ¶¶ 7.111.

⁴⁹⁷ *Id.* ¶ 7.159.

⁴⁹⁸ Appellate Body Report, *China – Raw Materials*, ¶¶ 293 – 307.

⁴⁹⁹ Panel Reports, *China – Raw Materials*, ¶ 7.160.

Plus commitments on China and other newly acceded members which might face a constrained policy space in the field.⁵⁰⁰

In the *China-Rare Earths* case, complainants the U.S, the EU, and Japan requested the Panel to find that the relevant export duties were inconsistent with paragraph 11.3 of China's Accession Protocol and Article XI:1 of the GATT 1994. In this dispute, China conceded and the Panel found that China's export restrictions violated these provisions, but China sought to defend them under Article XX(b) and XX(g) of the GATT 1994.⁵⁰¹ The Panel and the Appellate Body addressed two main issues: (i) whether paragraph 11.3 of the Accession Protocol imposes an overall ban on China from invoking the general exception under the GATT Article XX, to justify its export duties; (ii) the scope of the exception for China's export quota measures relating to conservation under Article XX(g) of GATT 1994.⁵⁰² The first substantive legal issue addressed at the Panel level was the question of whether paragraph 11.3 of the China's Accession Protocol, the provision prohibiting the relevant export duties, is subject to defenses under Article XX of GATT. In *China-Raw Materials* analyzed above, the EU, Mexico, and the US successfully challenged China's restrictions on exports of certain raw materials. While there is no formal doctrine of binding precedent in WTO jurisprudence, the Appellate Body tends to insist on Panels following its earlier decisions, and Panels prefer to do so.⁵⁰³ In addition, the Appellate Body seeks to maintain consistency among its decisions.⁵⁰⁴ Both the panel

⁵⁰⁰ Karapinar, *supra* note 467, at 461.

⁵⁰¹ Panel Report, *China – Rare Earths*, ¶ 7.172–179.

⁵⁰² Eric W. Bond & Joel Trachtman, *China-Rare Earths: Export Restrictions and the Limits of Textual Interpretation*, 15:2 WORLD TRADE.REV. 189 (2016).

⁵⁰³ *Id.* at 191.

⁵⁰⁴ *Id.*

and appellate body reports on the *China-Raw Materials* and the *China-Rare Earths* cases chose a very restrictive approach, ruling that “Article XX defenses are *per se* available only for violations of GATT 1994 provisions, whereas the legal basis to resort to such defenses for violations of non-GATT obligations is the text of incorporation by cross-reference.”⁵⁰⁵ The absence of a direct reference to Article XX of the GATT in Paragraph 11.3 of the Accession Protocol denies China the right to justify its export duties on that basis.⁵⁰⁶ However, China introduced an argument that had not been raised in *China-Raw Materials*. China identified two textual bases for its view that provisions of an accession protocol can be deemed as integral parts of one or more of the GATT 1994.⁵⁰⁷ First, China argued that Article 1.2 makes different parts of the China’s Accession Protocol integral parts of the substantively related WTO agreement. China's second textual basis in support of its overall argument is Article XII:1 of the Marrakesh Agreement, which provides that a State “may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.”⁵⁰⁸ The majority of the Panel found that while the China’s Accession Protocol is an integral part of the WTO Agreement, no particular provision of the Accession Protocol is an integral part of any particular WTO sub-agreement, such as the GATT 1994.⁵⁰⁹ Unlike the *China-Raw Materials* case, in *China-Rare Earths* a

⁵⁰⁵ Ilaria Espa, *The Appellate Body Approach to the Applicability of Article XX GATT in the Light of China-Raw Materials: A Missed Opportunity?*, 46 *Journal of World Trade* 1422 (2012).

⁵⁰⁶ Matthieu Burnay & Jan Wouter, *The EU and China in the WTO: What Contribution to the International Rule of Law? Reflections in Light Of The Raw Materials and Rare Earths Disputes in CHINA, THE EU AND THE INTERNATIONAL POLITICS OF GLOBAL GOVERNANCE*, 117, 124 (Jianwei Wang et al., eds., 2016).

⁵⁰⁷ Panel Report, *China-Rare Earths*, ¶ 7.75.

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.* ¶ 7.82.

dissenting panelist agreed with China to the effect that Article 11.3 of the China's Accession Protocol is an integral part of GATT 1994, and therefore eligible for exceptions under Article XX.⁵¹⁰ On appeal, the Appellate Body rejected the China's argument of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement as meaning that a specific provision in China's Accession Protocol is an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements.⁵¹¹ In this regard, the Appellate Body highlighted the importance of a comprehensive analysis that “questions of whether a particular protocol provision at issue has an objective link to specific obligations under the GATT 1994, and of whether the exceptions under those agreements may be invoked to justify a breach of such protocol provision, must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute”.⁵¹²

In both China-Raw Materials and China–Rare Earths cases, China defended its rare earth and tungsten export quotas under Article XX(g). Neither was successful. The case law developed in these two cases shed lights on the concept of “conservation” under the WTO and on whether quantitative export restrictions are considered as appropriate means to conserve natural resources under the WTO. As a general matter, in order to be justified under Article XX exceptions, the respondent need to pass a two-tier test: firstly, the challenged measure must be provisionally justified under one of the subparagraphs of Article XX, in this case subparagraph (g); and secondly, the measure must be

⁵¹⁰ *Id.* ¶¶ 7.3.2.1.8–7.138

⁵¹¹ Appellate Body Report, *China-Rare Earths*, ¶ 5.73.

⁵¹² *Id.* ¶ 5.62.

consistent with the conditions set out in the chapeau.⁵¹³ In order to be provisionally justified under subparagraph (g), the respondent must demonstrate the GATT-inconsistent measure “relate to” the “conservation of natural resources”; and the measures is “made effective in conjunction with restrictions on domestic production or consumption”.⁵¹⁴The legitimate policy goal that Article XX(g) tried to cover is the conservation of natural resources. In *China-Rare Earths*, China argued that “conservation” is not limited to preserving exhaustible natural resources in their current state; it should also cover the use and management of those resources in line with a member’s sustainable economic development goal.⁵¹⁵This argument was dismissed by the Panel. While recognizing the Permanent Sovereignty over Natural Resources is a relevant rule of international law to be considered,⁵¹⁶the Panel only recognized the natural resource-endowed country’s right to allocate the resource between current and future use.⁵¹⁷ In particular, the Panel opined that once the resource is exploited, the allocation of such resource should be left to the functioning of the world market.⁵¹⁸ The Panel made it clear that “no WTO Member has, under WTO law, the right to dictate or control the allocation or distribution of rare earth resources to achieve an economic objective.”⁵¹⁹

⁵¹³ Appellate Body Reports, *US-Gasoline*, ¶ 22; *US-Shrimp*, ¶ 119,120; *EC-Seal Products*, ¶ 5.169.

⁵¹⁴ Appellate Body Report, *China-Rare Earths*, ¶ 5.88.

⁵¹⁵ Panel Reports, *China – Rare Earths*, ¶ 7.252.

⁵¹⁶ Panel Reports, *China – Rare Earths*, ¶ 7.263, 7.266. The Panel recognized that the international law principles of sovereignty over natural resources and sustainable development allow States to “freely use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development”.

⁵¹⁷ Panel Reports, *China – Rare Earths*, ¶ 7.267.

⁵¹⁸ *Id.* ¶ 7.268.

⁵¹⁹ *Id.*

The China-Rare Earth case provided some clarification on the nexus between quantitative export restrictions and the conservation objective. Article XX(g) does not offer much guidance on what specific relationship between the non-conforming measure and the conservation objective is required. The Appellate Body only stated there must be “a close and genuine relationship of ends and means” between the challenged measure and the conservation objective.⁵²⁰ In *China-Rare Earths*, China claimed that the conservation policy should not only be limited to preserve the resources underground but also be permitted to allocate the resources between domestic and foreign consumers. However, the Panel dismissed China’s proposition.

Article XX(g) also requires that the GATT-inconsistent measure be “made effective in conjunction with restrictions on domestic production or consumption”. The Appellate Body in *China – Rare Earths* explained “such restrictions must place effective limitations on domestic production or consumption and thus operate so as to reinforce and complement the restrictions imposed on international trade”.⁵²¹ China argued that it had imposed domestic restrictions on the production and consumption of rare earth products by proffering evidence including the enforcement of the extraction and production quotas, the actual level of production and consumption each year, and the correlation between the enforcement and reduced consumption.⁵²² Nevertheless, the Panel was not convinced. The essential question here is how restrictive the domestic restrictions should be to be considered to be working “in conjunction with” export quotas, to make the

⁵²⁰ Appellate Body Reports, *China-Rare Earths*, ¶¶ 5.90.

⁵²¹ *Id.* ¶¶ 5.92, 5.93.

⁵²² Panel Reports, *China – Rare Earths*, ¶¶ 7.490.

conservation objective effective. The Appellate Body clarified that in the context of export quota, there is no requirement that the burden of conservation be evenly distributed between foreign and domestic consumers.⁵²³ However, the Appellate Body raised a concern that in a situation where domestic consumption accounts for the major part of the overall production, restrictions on the domestic consumption must be “real” rather than existing merely “on the books”.⁵²⁴ Therefore the restrictiveness of the domestic restrictions required by Article XX(g) might vary depending on the market situation at issue. In a situation where the domestic consumption is minimal, the restrictiveness required on the domestic side could be less onerous. Export quotas would be more likely to “relate to” conservation if the domestic consumption is minimal compared to foreign consumption. In this case, while China’s export quota on rare earths could not meet the requirements of the Article XX chapeau, the Appellate Body upheld the Panel’s finding that the structure and design of China’s quota does not relate to conservation and China’s export restrictions were not made effective in conjunction with restrictions on domestic production or consumption.⁵²⁵

On November 8, 2016, The WTO Dispute settlement body, at the request by the U.S and the EU, has established a new panel to investigate the conformity of China’s export duties imposed on certain mineral raw materials.⁵²⁶ The complaints are similar to those submitted in the China – Raw Materials and the China-Rare Earths disputes, namely,

⁵²³ Appellate Body Reports, *China – Rare Earths*, ¶ 5.134.

⁵²⁴ *Id.* ¶ 5.136.

⁵²⁵ *Id.* ¶ 6.2.

⁵²⁶ WTO, Summary on Dispute, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds508_e.htm.

examination of whether China's measures are consistent with its commitments included in the China's Accession Protocol and Article XI:1 of the GATT 1994.

These cases have prompted widespread concern and heated discussion not only because they target various types of important and sensitive minerals but also because they involve fundamental legal issues pertinent to the WTO regime.⁵²⁷ Specifically, analysis of the findings of the panels and the Appellate Body in these cases helps to identify the following concerns the prospective regulatory framework should deal with.

3.5.1 Inconsistent Practice of Trade Remedies

As raised in the United States- Export Restraints case, countries tried to resort to trade remedy measures including imposing anti-dumping or countervailing duties against imports of downstream industry products from the export restriction imposing countries.

A WTO Member may only legally impose countervailing duties or to pursue a subsidies case under the WTO if the measure at issue constitutes a "subsidy" as defined under SCM Agreement. The SCM Agreement defines the conditions under which Members may not employ subsidies. Where subsidies are permitted, the SCM Agreement sets out remedies available to Members whose trading interests are harmed by these subsidization practices. Under Article 1.1 of the SCM Agreement, a subsidy is deemed to exist if there is "a financial contribution by a government or any public body within the territory of a Member"⁵²⁸ or "any form of income or price support"⁵²⁹; and a

⁵²⁷ Manjiao Chi, *Resource Sovereignty in the WTO Dispute Settlement: Implications in China-Raw Materials and China-Rare Earths*, 12 *Manchester J.INT'L ECON.L.* 2, 3 (2015).

⁵²⁸ Agreement on Subsidies and Countervailing Measures art.1.1.(a) (1), Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.[hereinafter SCM Agreement].

⁵²⁹ *Id.*art.1.1.(a) (2).

“benefit” is conferred.⁵³⁰ Thus, in order for an export restriction to fall under the ambit of the SCM Agreement, it must be established that the export restriction constitute a “financial contribution” under the meaning of Article 1.1(a)(1); or a form of “income or price support” under the meaning of Article 1.1(a)(2). Furthermore, it must be established that a “benefit” is thereby conferred as provided for by Article 1.1(b).

The Panel, in *US – Export Restraints*, concluded that export restrictions cannot be considered as a “financial contribution” under the meaning of subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement. The export duty measures can also fall under the SCM Agreement if it is a form of “income or price support in the sense of Article XVI of the GATT 1994”. So far there is no case law interpreting the meaning of “income or price support” under subparagraph (2) of Article 1.1(a). Producers of downstream products may benefit from the lower input price and thus may maintain price advantage vis-à-vis producers of like products from other countries. Nevertheless, whether this price advantage, indirectly derived from lower cost, can qualify as “income or price support” under the meaning of subparagraph (2) of Article 1.1(a) is uncertain. As the Appellate Body in the *Canada – Renewable Energy* case⁵³¹ reaffirmed, in the case of government provision of goods or services, Article 14(d) of the SCM Agreements is a relevant context in the assessment of “benefit” under Article 1.1(b). Article 14(d) states that “the provision of goods” ... “shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration”. It is difficult to argue the price paid by an arm’s

⁵³⁰ *Id.* art. 1.1 (b).

⁵³¹ See Panel Report, *Canada-Certain Measures Affecting The Renewable Energy Generation Sector*, WTO Doc. WT/DS412/R (adopted December 19, 2012) [Canada-Renewable Energy].

length producer of downstream products for a product purchased in a competitive domestic market should not be considered “adequate remuneration” for the producer of that product. First, export restrictions may not necessarily have an impact on domestic price of the restricted product; Second, even if the domestic price of the restricted product is lowered by virtue of the export restriction, the lowered price is merely a reflection of the “prevailing market conditions” in the country of provision. In sum, the case law under the WTO has made it clear that the mere existence of export restrictions cannot be considered a subsidy as defined under SCM Agreement. The evolving practice in the use of unilateral measures against export restrictions reflects importing countries’ growing concern over the negative effect that an export restriction can have on the competitiveness of downstream products in other countries. Nevertheless, as has been decided by the WTO Panels, such practices are not consistent with the SCM Agreement.

3.5.2 A Challenge to the International Rule of Law

The case laws may challenge the international rule of law as developed and protected in the context of the WTO law. Such as the conclusions in the *China-Raw Materials* and the *China-Rare Earths* cases reinforce a dual regime that does not place original WTO members and acceding countries on equal footing.⁵³² A notable example of this dual regime is that original members are not obliged to abolish export duties, whereas new members must, under their terms of accession, stop applying export duties.⁵³³ This constitutes a “deplorable” precedent that reinforces the non-reciprocity between original

⁵³² *Id.* at 126.

⁵³³ Elisa Baroncini, *The Applicability of GATT Article XX to China’s WTO Accession Protocol in the Appellate Body Report of the China-Raw Materials Case: suggestions for a different interpretative approach*, 1/3-4 CHINA-EU L.J. 1, 30 (2013).

members and new members that have committed not to use export duties.⁵³⁴ It is true that the scope of trade-liberalization commitments may vary among countries depending on their contribution made to the global MFN treatment. However, the rights of WTO members to invoke public policy exceptions and to modify their commitments according to certain procedures should be kept uniform as a matter of principle.⁵³⁵ Legally, the lack of right to modify or withdraw export duty commitments is at odds with the international law principle of permanent sovereignty over natural resources, and WTO principles cannot support the unavailability of public-policy exceptions to the export duty commitments.⁵³⁶

A dual regime engendered by the inclusion of many WTO-plus and WTO-minus obligations within accession protocols challenges fundamental aspects of the international rule of law. First, the negotiation of accession protocols that go far beyond the general obligations included in the WTO Agreement challenges the principle of equality of all WTO members in the application of WTO law. The principle of equality is at the core of the WTO, as best emphasized by the Single Undertaking Rule introduced in the Uruguay Round.⁵³⁷ In accordance with this rule, membership in the WTO is an “all-or-nothing” proposition: members must sign on to all WTO treaty regimes, and as a general rule no reservations or exceptions are permitted.⁵³⁸ The package to which new WTO members must subscribe is therefore “applied simultaneously and inseparably,”

⁵³⁴ Burnay et al., *supra* note 506, at 126.

⁵³⁵ Qin, *supra* note 291, at 154.

⁵³⁶ *Id.* at 173.

⁵³⁷ *Id.*

⁵³⁸ Michael Trebilcock & Michael Fishbein, *International Trade: Barriers to Trade*, in RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW 57 (Andrew T. Guzman & Alan O. Sykes eds., 2007).

which should grant equality to all WTO members in the realm of WTO law.⁵³⁹ The conclusions reached in the *China-Raw Materials* and the *China-Rare Earths* cases therefore challenge Single Undertaking and the equality of all WTO members before WTO laws in two ways. The reliance on non-reciprocal obligations foreseen by accession protocols “undermines the aspiration of the WTO to be a truly multilateral, rules-based organization.”⁵⁴⁰ Moreover, the availability of general exceptions detailed in Article XX of the GATT 1994 appears to be contested or at least not crystal clear for non-original members who wish to justify breaches of obligations in the accession protocol.⁵⁴¹ In these two cases, China’s “less-than-equal status,” produced by a stringent accession protocol, is reinforced such that it may challenge some main principles underpinning the WTO system, namely, reciprocity and equal treatment.⁵⁴²

Second, WTO-plus and WTO-minus obligations negotiated in the accession process are often “informally, or even haphazardly” created and therefore strongly complicate the role of the DSB.⁵⁴³ They challenge, to a certain extent, the clarity of WTO law because they allow a large scope of interpretation. While the clarity of legal texts should not be achieved at all costs, it provides for legal predictability and, in that sense, helps to assure justice.⁵⁴⁴ While there is no question that WTO panels must rely on the

⁵³⁹ Mitali Tyagi, *Flesh on a Legal Fiction: Early Practice in the WTO on Accession Protocols*, 15 J.INT.ECON.L. 393 (2012).

⁵⁴⁰ Lisa Toohey, *Accession as Dialogue: Epistemic Communities and the World Trade Organization*, 27 LEIDEN J.INT.L. 400 (2014).

⁵⁴¹ Burnay et al., *supra* note 506, at 126.

⁵⁴² Xiaohui Wu, *No Longer Outside, Not Yet Equal: Rethinking China’s Membership in the World Trade Organization*, 10 Chinese J.INT.L. 270 (2011).

⁵⁴³ Marco Bronckers & Keith Maskus, *China-Raw Materials: A Controversial Step Towards Evenhanded Exploitation Of Natural Resources*, 13 (2) WORLD TRADE REVIEW 393, 401 (2014).

⁵⁴⁴ Murray Gleeson, *The Value of Clarity*, in TOM BINGHAM AND THE TRANSFORMATION OF THE LAW: A LIBER AMICORUM 108 (Mads Andenas and Duncan Fairgrieve eds., 2009).

accession protocol texts and working party reports and not on the possible intentions of the drafters of these texts, the two disputes demonstrate that China's accession protocol can be questioned for the overall coherence and clarity of its provisions. Overall, the result reveals a highly imbalanced and inequitable state of affairs, especially regarding trade in natural resources.

3.5.3 Fragmentation and Disproportionality: Unequal Rights and Obligations

While the scope of trade-liberalization commitments may vary from country to country, the rights of WTO members to invoke public-policy exceptions and to modify their obligations according to certain procedures should remain uniform as a matter of principle. However, the lack of a general framework for binding export duties and the interpretations of the WTO judiciary in the *China-Raw Materials* and the *China-Rare Earths* cases on the relationship between the GATT and the accession protocols have effectively resulted in four tiers of WTO members in terms of rights and obligations regarding export restraints. The first tier, which currently includes more than 140 WTO members, enjoys nearly complete freedom to restrict exports as long as the restriction takes the form of export duty or taxes.⁵⁴⁵ The second tier, consisting of Australia and Russia, is obliged not to levy export duties on specific products in excess of those set forth in their respective GATT schedules but retains the full range of rights under the GATT with respect to their commitments.⁵⁴⁶ The third tier comprises Ukraine and Vietnam, which are obliged to bind export tariffs under their respective accession

⁵⁴⁵ Qin, *supra* note 291, at 153.

⁵⁴⁶ *Id.*

protocols but may invoke GATT exceptions to justify a breach of such obligation.⁵⁴⁷ The fourth tier consists of China, Mongolia, Latvia, Montenegro, and Saudi Arabia.⁵⁴⁸ These countries are obliged to eliminate the use of export tariffs under their respective accession protocols but may not invoke GATT exceptions to justify a departure from this obligation.⁵⁴⁹ Neither third- nor fourth-tier members have the right to modify or withdraw their export duty concessions.

The four-tier membership creates unequal rights and obligations among WTO members. This irrational state of affairs threatens the stability and security of the WTO system. The absence of a unified discipline on export duties leaves global production chains vulnerable to the instability and unpredictability of resource supply.⁵⁵⁰ In turn, lack of secure access to critical resources creates tension and can provoke retaliation in international relations.⁵⁵¹

3.5.4 Violation of Fundamental Principles of International Law

WTO members are entitled to justify their export quotas or any other type of measure through the conservation of exhaustible natural resources. However, those measures must satisfy all the requirements imposed by Article XX(g). Accordingly, the panels clarified that the conservation exception should be interpreted harmoniously with the principle of sovereignty over natural resources, to allow WTO members to “manage the supply and use of non-renewable resources through conservation-related measures that

⁵⁴⁷ *Id.*

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.*

⁵⁵⁰ Qin, *supra* note 291, at 177.

⁵⁵¹ *Id.*

foster sustainable development of their domestic economies.”⁵⁵² History has shown that reserving exhaustible resources for domestic use helps developing economies to climb up the value chain. Despite criticism that such a policy has a “beggar-thy-neighbor” effect, the principle of state sovereignty includes the notion of permanent sovereignty over natural resources and thus justifies the policy.⁵⁵³

Unlike other sovereign prerogatives, the sovereign right over natural resources, which includes the right to dispose of such resources freely for development purposes, has been recognized as a basic human right under international law.⁵⁵⁴ The levy of export duties allows a resource-producing country to claim a larger share of its natural resources for domestic use. Although the exercise of this right is without prejudice to the treaty obligations that a nation voluntarily undertakes, the WTO should design its trade disciplines to respect this fundamental principle of international law.⁵⁵⁵ Since the GATT already prohibits the use of non-tariff measures to restrict exports for development purposes, export duties are the only legitimate means a WTO member may employ to claim a larger share of its natural resources. Thus, when the WTO obligates a member to eliminate export duties on resource products, as it has done with several acceding members, it strips the member’s right to dispose freely of its natural resources for development purposes. When such obligations are not subject to modifications or revisions, as is the case for several acceding members, it amounts to permanent alienation of a member’s ownership right to claim a larger share of its natural resources

⁵⁵² Panel Reports, *China–Raw Materials*, ¶ 7.404.

⁵⁵³ Panel Report, *China-Raw Materials*, ¶ 7.380, 7.382.

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

for domestic use. Such an arrangement is inconsistent with the concept of permanent sovereignty over natural resources. The right to regulate exports through export restrictions is considered part of states' police power. However, by signing international trade agreements such as the WTO, countries signed over a part of their sovereignty when they commit to economic measures-related matters.⁵⁵⁶ Nevertheless, the rights and obligations arising from these trade agreements are bestowed on governments, and only governments can bring disputes under these trade agreements in order to claim these rights.

China invoked the principle of sovereignty over natural resources to defend its Article XI:1 of the GATT-inconsistent export quotas under Article XX(g) of the GATT in the *China-Raw Materials* and the *China-Rare Earths* cases, due to the principle's strong developmental and environmental connotations and its link to the principle of sustainable development.⁵⁵⁷ China argued that Article XX(g)'s conservation exception had to be interpreted in light of the principle of permanent sovereignty over natural resources, as a relevant rule of international law applicable to the parties, per Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT), and with the principle of sustainable development in the Preamble to the Marrakesh Agreement as relevant context.⁵⁵⁸ The panel, however, dismissed that argument with a brief statement that "Members must exercise their sovereignty over natural resources consistently with their WTO

⁵⁵⁶ JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 109, 263 (2006).

⁵⁵⁷ ESPA, *supra* note 38, at 239.

⁵⁵⁸ *Id.*

obligations.”⁵⁵⁹ As a result, the broad implications for WTO law concerning the sovereign right over natural resources remain unaddressed. Analysis of these case laws reveals that the current WTO discipline on export restrictions fails to address the complications arising from the WTO-plus commitments of newly acceded members and demonstrates weakness and inconsistencies that urgently require comprehensive reform of multilateral rules on export restrictions.

3.6 CONCLUSION

The WTO disciplines on export restrictions are weak and not effective, as they neither restrict export duties nor define the circumstances that could justify quantitative restrictions. Because of the historical marginality of export duties at the time of the GATT’s creation, not all GATT adjustment procedures and exceptions envisaged for import tariff concessions seem to apply to export duty concessions. Examples include Article XVIII of the GATT, which allows low-income countries to deviate from import duty concessions in order to promote economic development. Article XIX of the GATT permits WTO members to withdraw or modify tariff concessions if, as a result of unforeseen developments, a sudden, sharp, and substantial surge of imports of a product significantly impairs a domestic industry.

Because of this rigidity of the export duty concessions, most WTO members have refrained from negotiating export duty commitments on a specific set of products in the form of concessions inscribed in the members’ schedule as admitted by virtue of the GATT provisions. Thus, members can apply export duties on any products as per Article

⁵⁵⁹ Panel Report, *China-Raw Materials*, ¶ 7.381.

XI of the GATT as long as duties are applied on MFN basis (Art I GATT), not be prohibitive (Art XI:1), be published in a prompt and accessible manner (Art X:1), and be administered in a uniform, impartial, and reasonable manner (Art X:3 GATT).

Some WTO members have undertaken country-specific export duty commitments in their accession protocol. The systemic imbalances have resulted from the fragmentation of existing WTO disciplines on export duties, as disclosed through the Appellate Body's approach in the *China-Raw Materials* and the *China-Rare Earths* cases. The growing awareness that the WTO accession regime on export duties has de facto generated substantial inequalities has deepened the divide among different categories of WTO members.⁵⁶⁰ Accordingly, developing countries have contended that the current WTO accession regime on export duties is fundamentally iniquitous and contradicts not only "constitutional" WTO principles such as non-discrimination and reciprocity but also general international law principles such as sovereignty over natural resources.

In the case of export quantitative restrictions, the applicable GATT rules capture the full range of restrictions applied to exports of mineral raw materials. Article XI:1 of the GATT clearly bans any types of quantitative restriction on exports, from prohibitions to quotas, from licensing schemes to minimum export prices, from ports of exit restrictions to any other measures that have a limiting effect on export volumes.

In addition, inasmuch as Article XI:1 inconsistent export restrictions are not subject to the whole range of GATT exceptions, WTO members may refrain from negotiating the inclusion of export duty concessions in their GATT schedules. The reduced policy space

⁵⁶⁰ ESPA, *supra* note 39, at 255.

allowing WTO members to use export quantitative restrictions, in other words, could have restrained them from raising the level of their commitments regarding export duties—the only area where they still maintain ample margins of flexibility on the export side. In general, the asymmetry in the treatment of import and export restrictions may relate to the paucity of commitments on export duties by WTO members exclusively bound by GATT obligations concerning their use of these instruments. Therefore, if WTO members are seriously concerned about the use of export restrictions, they should start talks on export duties, which will naturally lead to discussions of the use of quantitative restrictions.

An overview of the GATT exceptions relevant to export restrictions on mineral raw materials reveals little policy space available to WTO members to justify export restrictions, under Articles XI and XX of the GATT. The Appellate Body made clear in the *China-Rare Earths* case that measures imposed in breach of an accession protocol provision may be subject to Article XX of the GATT defenses insofar as such provision has an objective link to the GATT or Article XX itself, to be established on a case-by-case basis.

With this approach, newly acceded WTO members that have undertaken export duty commitments through individual provisions of their accession protocols may not have the option to invoke Article XX GATT, depending on interpretation of the language of such commitments in their relevant contexts and in light of the architecture of the WTO Agreement and each case's circumstances. This obscure applicability of Article XX introduces further asymmetry in the already varied network of rights and obligations of WTO members regarding export duties. The fragmentation of WTO disciplines on export

duties, and its implications, that emerges from the Appellate Body's approach to the certain case laws does not just create a "four-tiered" WTO membership that undermines the core WTO principles of non-discrimination and reciprocity; it also creates systemic imbalances that contradict the cornerstones of the GATT architecture.

In conclusion, the WTO needs to regulate the levy of export duties. The trend of export restrictions on natural resources is likely to continue.⁵⁶¹ The absence of a general regulatory framework on the use of export duties leaves global production chains vulnerable to the instability and unpredictability in the supply of raw materials. An effective system-wide WTO discipline on export restraints should provide greater security and transparency for all concerning access to the world's resources, while respecting the right of sovereignty over natural resources and developing countries' need to use export duties for their legitimate purposes, including managing environmental externalities.

⁵⁶¹ Matsushita, *supra* note 363, at 267, 276.

CHAPTER 4

NON-WTO REGULATION OF EXPORT RESTRICTIONS ON MINERAL RAW MATERIALS

4.1 INTRODUCTION

Preferential trade agreements (PTAs) have risen in number and scope over the years, including a notable increase in negotiated large plurilateral agreements. Following the notification of the PTA between Mongolia and Japan in June 2016, all WTO members have PTAs in force.⁵⁶² Over 524 PTAs have been submitted to the WTO or its predecessor, the GATT, and 279 of those agreements are in force.⁵⁶³

Because the global trade regime represented by the WTO does not provide a strong discipline on export restrictions, large trading powers, including the U.S. and the EU, have attempted to extract more far-reaching commitments in the context of PTAs. PTAs are treaties allowing the liberalization of trade in goods and services and, despite their name, do not have to be regional in geographic terms. PTAs can be bilateral as well as multilateral.

WTO members continue to expand their networks of PTAs. In addition to bilateral negotiations, plurilateral negotiations are a focus of members' attention. These include agreements such as the recently concluded but not yet effective Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Agreement; ongoing

⁵⁶² WTO, REGIONAL TRADE AGREEMENTS INFORMATION SYSTEM, https://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited October 09, 2017).

⁵⁶³ *Id.*

negotiations such as the Regional Comprehensive Economic Partnership (RCEP) Agreement, involving the Association of South East Asian Nations (ASEAN) and six other nations; the Trans-Atlantic Trade and Investment Partnership (T-TIP) between the EU and the U.S; the Tripartite FTA among twenty-six African countries that are already members of three regional economic communities; African Continental Free Trade Agreement (AfCFTA), the biggest deal ever made since the WTO, has been signed by 44 member states of the African Union in March 21, 2018;⁵⁶⁴ the enlarging Eurasian Economic Union (EAEU) agreement; and the Trade in Services Agreement (TiSA) and the African Growth and Opportunity Act⁵⁶⁵ (AGOA).⁵⁶⁶ These reciprocal preferential agreements aim to consolidate existing bilateral and plurilateral relationships between the parties. However, this study focuses exclusively on completed PTAs, not on those still under negotiation.

PTAs allow countries to develop and strengthen trade disciplines beyond what is possible⁵⁶⁷ at the multilateral level. In most cases, PTAs may explore more policy areas and provide lessons and good practices that could be used in global discussions. As

⁵⁶⁴ AFRICAN UNION, AGREEMENT ESTABLISHING THE CFTA, <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> (last visited August 22, 2018).

⁵⁶⁵ Brock Williams, CONG. RESEARCH SERV., R43173, AFRICAN GROWTH AND OPPORTUNITY ACT: BACKGROUND AND REAUTHORIZATION (2015), “AGOA was originally enacted as Pub.L.No.106-200, May 18, 2000. Since its enactment, AGOA has been amended three times through sep.30, 2015. It was reauthorized for another ten years on June 25, 2015. Initially, AGAO was a U.S. trade preference program intended to stimulate economic development through export-led growth and help integrate Africa into the global economy and it allows eligible Sub-Saharan African 40 countries to export qualifying goods to the United States without import duties and quotas”; John Campbell, What is the African Growth and Opportunity Act?, COUNCIL ON FOREIGN RELATIONS (Feb.17, 2017), <https://www.cfr.org/blog/what-african-growth-and-opportunity-act>, “It is now considered as a preferential trade agreement. While certain African goods are given preferential deals that reduce tariffs, the deal provides the U.S. with access to African goods and commodities that help to drive the U.S. economy”

⁵⁶⁶ REGIONAL TRADE AGREEMENTS INFORMATION SYSTEM, *supra* note 562.

⁵⁶⁷ Jane Korinek & Jessica Bartos, *Multilateralising Regionalism: Disciplines on Export Restrictions in Regional Trade Agreements*, 1 (OECD, Trade Policy Paper No.139, 2012).

Korinek and Bartos highlighted in an OECD policy paper, one such policy area is export restrictions. Export quantitative restrictions and duties have not received the same degree of attention in multilateral trade agreements and negotiations as the elimination of import tariffs and quantitative restrictions has received. This chapter suggests numerous ways in which WTO disciplines could benefit from the approaches of some PTAs concerning export restrictions.

While Sections 4.2 and 4.3 focus on PTAs, Section 4.4 analyzes the extent to which international investment agreements (BITs) can cover export restrictions.

4.2 AN OVERVIEW OF EXISTING PREFERENTIAL TRADE AGREEMENTS

The evolution of PTAs over time shows that agreements are cross-regional and occur between developed and developing countries, although numerous agreements today occur between developing countries as well.⁵⁶⁸ While the U.S. and the EU originally drove PTAs, current PTAs and their negotiations tend to occur in Asia and in Europe.⁵⁶⁹ Overall, notifications indicate that PTA activity is strongest in Europe (21% of PTAs in force), followed by East Asia (16%), the Commonwealth of Independent States regions (11%), and South America (11%).⁵⁷⁰

As the number of PTAs has grown over time, the structure and coverage of PTAs have also changed by covering more issues to a deeper extent. This section analyzes the convergence and divergence between PTAs and the existing WTO regime concerning export restrictions over raw materials. The section also sheds light on whether PTAs have

⁵⁶⁸ ROHINI ACHARYA, REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL TRADING SYSTEM, 5 (2016).

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

developed disciplines that go beyond the WTO provisions on export taxes and restrictions.

A recent OECD study examined provisions in ninety-three PTAs.⁵⁷¹ Those PTAs include all major agreements, such as the North American Free Trade Agreement (NAFTA), ASEAN, the Southern Common Market (MERCOSUR), the Commonwealth of Independent States (CIS), the Caribbean Common Market (CARICOM), and the European Union (EU). Furthermore, the survey covers all of the United States' PTAs, all of the European Communities' PTAs, most of Canada's PTAs, and most of the European Free Trade Area's (EFTA) agreements. Seven of China's PTAs are included, as are six of Japan's. Five intra-African PTAs are covered, including the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), the Southern Africa Customs Union (SACU), and the African Economic Community. PTAs were chosen for this study if they contain some provision on export restrictions, if they are large or important, or if they include a country that has recently imposed a major export restriction.

This chapter uses survey methods and approaches to review disciplines on export restrictions included in major PTAs by narrowing agreements into the context of exports for mineral raw materials. Therefore, the list of major PTAs under examination includes five PTAs of the EU, four PTAs of Canada, four PTAs of China, and two of Japan, which have been established since the aforementioned OECD survey. This chapter surveys 108 PTAs, effective as of the end of 2017, to assess the rules that countries have developed.

⁵⁷¹ Korinek & Bartos, *supra* note 567, at 15.

This section begins by examining how countries approach two types of export restrictions in their PTAs: provisions on quantitative export restrictions and provisions on export duties and taxes frequently included in PTAs.

4.2.1 PROVISIONS ON QUANTITATIVE EXPORT RESTRICTIONS

The disciplines on export restrictions in PTAs can be analyzed through comparison to the WTO disciplines considered in the preceding chapter. PTAs that include provisions on export restrictions are categorized into three groups: WTO-plus, WTO-equal, or WTO-minus. The purpose of the classification is to reveal ways in which PTA disciplines innovate over those of the WTO. As the OECD defines it, a WTO-plus PTA forbids export restrictions, whereas the WTO allows them.⁵⁷² A WTO-minus PTA allows export restrictions, whereas the WTO does not. A WTO-equal PTA is an agreement that neither improves nor worsens the WTO disciplines.

Analysis reveals that of 108 PTAs, nineteen contain stronger provisions on quantitative export restrictions, compared to the WTO discipline (so-called WTO-plus). Twenty-two PTAs introduce weaker disciplines than are currently found under the WTO agreements (so-called WTO-minus), while 50 PTAs are WTO-equal. The remaining agreements fail to include export restrictions at all.

4.2.1.1 WTO-Plus PTAs

WTO-plus PTAs can be divided into two subgroups: agreements that impose conditions on the use of the exceptions allowed in Articles XI:(a) and XX of the GATT 1994 and agreements that allow fewer exceptions than the WTO agreements allow.

⁵⁷² *Id.* at 16.

The first group of WTO-plus agreements include five PTAs, namely, the Canada-Chile, China-Korea, Japan-Australia, and Canada-Costa Rica PTAs, and NAFTA. These agreements are considered WTO-plus because they place additional conditions on the exception clauses of the WTO agreements. While all PTAs incorporate GATT Articles XI:2(a) and XX, their application is limited to instances in which the party imposing a quantitative export restriction justified under GATT Article XI:2(a) or XX shows that this restriction meets two conditions⁵⁷³: first, the party imposing the export restriction must not reduce the proportion of total exports made available to the other parties to the PTA, in comparison to the total supply of the good during the last thirty-six months. Second, the export restriction must not require disruption of normal supply channels or normal proportions among specific goods supplied to the other PTA parties.⁵⁷⁴ For example, the China-Korea and Japan-Australia PTAs involve energy and mineral resources. However, there is an exemption for copper from this provision in the Canada-Chile PTA.

The second subgroup of WTO-plus agreements covers fourteen PTAs. These PTAs allow fewer exceptions to the ban on quantitative export restrictions than those allowed by WTO agreements. Most of those PTAs were concluded by the EU, because the EU pays particular attention to securing stable and predictable supply sources for industrial raw materials. The EU's Global Europe Strategy reflects the EU's approach:

“More than ever, Europe needs to import to export. Tackling restrictions on access to resources such as energy, metals and scrap ... must be a high priority. Measures taken by some of our biggest trading partners to restrict access to their

⁵⁷³ *Id.* at 23.

⁵⁷⁴ *Id.*

supplies of these inputs are causing some EU industries major problems. Unless justified for security or environmental reasons, restrictions on access to resources should be removed.”⁵⁷⁵

The new EU trade strategy also reflects the issue, specifically that “in view of the EU’s dependence on imported resources, access to energy and raw materials is critical for the EU’s competitiveness.”⁵⁷⁶ Therefore, the EU policy is to eliminate export taxes as a general policy with no exceptions for developed countries.⁵⁷⁷ The EU pursues its policy in the PTAs it negotiates.

For example, of those fourteen PTAs, those containing the fewest exceptions are the EC-South Africa, EFTA-Israel, the EC-Israel, the EU-Cameroon, and the EU-Ghana PTAs, the EU, and Central European Free Trade Agreement (CEFTA).⁵⁷⁸ In other words, those exceptions are eliminated in these fourteen PTAs. Of these, eleven PTAs eliminated the exception for restrictions “essential to the acquisition or distribution of products in general or in local short supply.” Five of the fourteen PTAs eliminated the exception for exhaustible natural resources. Nine PTAs eliminated the exception for domestic stabilization plans.⁵⁷⁹ The EC-South Africa PTA, CEFTA, EFTA, the EFTA-Israel PTA, the EU, and the EFTA-Chile PTA all eliminated the exception for critical shortages of foodstuff or other essential products entirely, while the EC-CARFORUM and EC-Côte

⁵⁷⁵ See ECC, GLOBAL EUROPE: COMPETING IN THE WORLD (2006), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52006DC0567> (last visited November 7, 2017).

⁵⁷⁶ EUC, TRADE FOR ALL-TOWARDS A MORE RESPONSIBLE TRADE AND INVESTMENT POLICY, ¶ 2.1.6, (2015), http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (last visited No.7, 2017).

⁵⁷⁷ Parra et al., *supra* note 49, at 22.

⁵⁷⁸ *Id.*

⁵⁷⁹ *Id.*

d'Ivoire PTAs limit the scope of this exception to apply to foodstuff only and not other essential products.⁵⁸⁰ For example, the PTA between the EU and South Africa does not have a provision corresponding to GATT Article XX(g) on trade measures relating to the conservation of exhaustible natural resources. It also excludes the GATT Article XI (2)(a) exception on export restrictions temporarily applied to prevent or relieve critical shortages of foodstuff or other essential products. The EU-Ghana⁵⁸¹ and EU-Cameroon⁵⁸² PTAs fully eliminate all export prohibitions and restrictions, with no exception. However, they can still introduce customs duties on exports in the event of a serious public finance problem or to protect an infant industry or for greater environmental protection.

Likewise, NAFTA Article 314 prohibits any party from maintaining any tax, duty, or other charge on exports, with few exceptions. While NAFTA Article 604 prohibits export charges on energy supplies or products, Article 315 specifies the conditions for the application of GATT Articles XI:2(a) and XX(g) (i) and (j).⁵⁸³

4.2.1.2 WTO-Minus PTAs

In total, twenty-two PTAs were found to be WTO-minus. These agreements are considered WTO-minus since they allow for the use of quantitative export restrictions, whereas the WTO does not, by allowing parties to the PTA to impose export restrictions on specific products.⁵⁸⁴ The existence of a WTO-minus category suggests that some

⁵⁸⁰ *Id.*

⁵⁸¹ Decision 2016/1850 of the European Council of 21 October 2016 on the Economic Partnership Agreement between Ghana and the EC, art. 16, O.J.(L 28), 1,2.

⁵⁸² Decision 2009/152/EC, of the European Council of 28 February 2009 on the EPA between Cameroon and EC, art. 22, O.J.(L 57),1–360.

⁵⁸³ Matsushita et al., *supra* note 378, at 553.

⁵⁸⁴ Korinek & Bartos, *supra* note 567, at 18.

agreements allow trade measures that violate provisions of the WTO. This incongruity between PTA and WTO disciplines is one of the challenges that the proliferation of preferential trade agreements poses to the multilateral trading system.⁵⁸⁵

WTO-minus agreements tend to allow countries to impose export restrictions on non-agricultural raw materials such as metals, stones, or fuel-related products. A distinction has been made between agreements that do not apply to all products. For example, many of the EC and EFTA bilateral agreements exclude agriculture from their agreements' provisions. However, those EC and EFTA PTAs continue to discipline non-agricultural raw materials exports.

These restrictions do not require the context of a domestic stabilization plan or a shortage of foodstuff; rather, their applicability is at the PTA party's discretion. For example, the US-CAFTA-Dominican Republic PTA allows several parties to maintain export restrictions on specific goods: Nicaragua can thus impose restrictions for up to one year on a positive list of foodstuff at its own discretion.⁵⁸⁶ The MERCOSUR agreements with Bolivia and Chile include, as in the WTO, a general prohibition of quantitative export restrictions. However, the MERCOSUR-Chile agreement eliminates the GATT Article XX exceptions for restrictions on natural resources in case of shortage or for domestic stabilization plans.

Another group of WTO-minus PTAs, including the SADC, Russia-Ukraine, Belarus-Ukraine, the CIS, and the African Economic Community, makes exceptions to the general prohibitions of quantitative export restrictions for precious metals and stones.

⁵⁸⁵ *Id.* at 17.

⁵⁸⁶ *Id.* at 19.

These PTAs allow members to impose quantitative export restrictions on some metals and stones. It is a very broad exception because it does not define “precious” and offers no universally acknowledged definition of what qualifies a metal or stone as “precious.” For example, SADC member Tanzania has maintained export bans on the waste and scrap of antimony, cobalt, copper, chromium, indium, manganese, and nickel.⁵⁸⁷ Depending on whether waste and scrap minerals are included in the category of “precious metal,” many of those restrictions may be undisciplined within the SADC.⁵⁸⁸

More controversial from a systemic point of view is whether WTO-minus agreements are compatible with GATT Article XXIV, which allows for the formation of PTAs.⁵⁸⁹ Article XXIV allows agreements that “facilitate trade” and do not “raise barriers” to trade. Article XXIV:8(b) defines a free-trade area as one in which duties and other restrictive regulations are “eliminated on substantially all the trade between the constituent territories in products originating in such territories.”⁵⁹⁰

The role of Article XXIV of the GATT 1994 was highlighted in *Brazil-Retreaded Tyres*, whereby Brazil attempted to justify certain GATT violations with references to MERCOSUR provisions. The Appellate Body was clear that justifications for a violation of a WTO provision must be found in the WTO agreements by interpreting and applying WTO provisions consistently with international law. In that dispute, Brazil did not invoke GATT Article XXIV, only Article XX(b). The Appellate Body concluded that the MERCOSUR exemption to Brazil’s import ban, introducing discrimination between parties

⁵⁸⁷ See Korinek & Kim, *supra* note 24.

⁵⁸⁸ Korinek & Bartos, *supra* note 567, at 19.

⁵⁸⁹ Marceau, *supra* note 415, at 124.

⁵⁹⁰ GATT 1994, art. XXIV.

to MERCOSUR and other WTO members, could not be justified under GATT Article XX(b), as it constituted a means of arbitrary and unjustifiable discrimination, contrary to the chapeau of GATT Article XX.⁵⁹¹

4.2.1.3 WTO-Equal PTAs

PTAs are classified as WTO-equal when they neither improve nor worsen WTO obligations. Fifty PTAs were found to contain WTO-equal provisions on quantitative restrictions. Many of these PTAs follow the approach in the GATT 1994 by incorporating a general ban on quantitative export restrictions and adding a list of general and specific exceptions. For instance, the U.S. trade agreements with Peru, Chile, Morocco, Korea, Singapore, Bahrain, Oman, and Panama; the EU PTAs with Colombia, Peru, Ecuador, Central America, and Canada; and the Canadian PTAs with Honduras, Ukraine, Korea, and Panama incorporate completely GATT Articles XI and XX.⁵⁹²

At the same time, some PTAs, including those of the European Union, eliminate the exceptions for restrictions on exhaustible natural resources, domestic stabilization plans, and products in general or local short supply found in GATT Articles XX(g), XX(i), and XX(j). Even though these PTAs contain non-identical provisions to those in the WTO agreements, they are nevertheless considered WTO-equal, based on consideration of the elements stronger than the WTO disciplines and those that are weaker than the WTO disciplines.⁵⁹³

⁵⁹¹ Appellate Body Report, *Brazil – Retreaded Tyres*, ¶¶ 228–234.

⁵⁹² Korinek & Bartos, *supra* note 567, at 20.

⁵⁹³ *Id.* at 22.

4.2.2 DISCIPLINES ON EXPORT DUTIES

With regard to export taxes and duties, most PTAs surveyed contain stricter requirements than those of the WTO, which does not have any direct discipline on export taxes and duties.⁵⁹⁴ As explained in the preceding chapter, the GATT 1994 does not include any direct disciplines regulating use of export duties. Thus, except for a few newly acceded WTO members, all other countries have not made any binding commitments on export duties under the WTO. Therefore, a PTA is considered WTO-equal if it contains no language on export duties or explicitly allows such duties.⁵⁹⁵ Thirty of the 108 PTAs surveyed include no language on export duties and can thus be considered WTO-equal. The remaining seventy-eight agreements are considered WTO-plus because they go beyond the WTO by disciplining the use of export duties.

4.2.2.1 WTO-Plus PTAs

This subsection discusses the agreements prohibiting new export taxes and duties or increasing existing taxes and duties. This first group of PTAs categorized as WTO-plus includes PTAs that allow their parties to maintain existing export duties but prohibit both the introduction of new duties and increase of existing ones. However, many of these PTAs include exceptions. For example, the EC-Côte d'Ivoire and the EU-Cameroon PTAs allow Côte d'Ivoire and Cameroon to introduce new and increased temporary export duties, respectively, on a limited number of goods if the need for income, infant-industry protection, or environmental protection justifies such duties. This approach is particularly common in PTAs involving Argentina, where export duties are used on an extensive list

⁵⁹⁴ *Id.* at 24.

⁵⁹⁵ *Id.*

of goods.⁵⁹⁶ In the MERCOSUR-Chile and MERCOSUR-Bolivia PTAs, Argentina has allowed various export duties on products.

Although these PTAs are considered WTO-plus, Korinek and Bartos find that disciplines on export duties in these PTAs are light and that the inclusion of broad exceptions can further decrease them.⁵⁹⁷

Agreements Imposing a Prohibition on Export Taxes and Duties. Sixty-three of the seventy-eight WTO-plus PTAs prevent parties from instituting export taxes and duties.⁵⁹⁸ Most of these PTAs use disciplines similar to that in the GATT 1994, particularly a general ban on export restrictions, with certain exceptions (usually some or all of the exceptions found in Articles XI:2(a) and XX of the GATT 1994). Some PTAs also contain additional exceptions to the ban on export taxes and duties. NAFTA, the Canada-Chile, Canada-Costa Rica, and the EU-Colombia PTAs include the exceptions in GATT Articles XI:2(a) and XX and extend further by introducing additional conditions to these exceptions. Parties to these PTAs can thus invoke these exceptions as justifications for export duties only if the export price charged to other parties to the PTA is not higher than the price charged domestically.⁵⁹⁹

Agreements Whose Only Product-Specific Exception Is for Exhaustible Natural Resources. A group of twenty-two PTAs incorporates only “exhaustible natural resources” (GATT Art XX(g)) as a specific goods exception. Most of these agreements include the U.S., Canada, the EC, the EU, Ghana, and EFTA among their signatories. All of the U.S.

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.* at 25.

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.* at 28.

agreements include GATT Article XX exceptions as a whole but do not incorporate the Article XI:2(a) style exception for shortages of foodstuff or essential products. Some agreements in this group allow for phase-out periods for export taxes on sensitive goods, particularly for developing-country partners. For instance, the U.S.-Morocco PTA allows Morocco five years to phase out its export tax on unprocessed phosphates, and stipulates that the tax during that period may not exceed an agreed amount per ton. Similarly, the EU-Ghana and the EC-CARIFORUM agreements give Ghana and Guyana, respectively, three years to phase out their taxes on precious stones, bauxite, sugar, molasses, and greenheart, and the EC-CARIFORUM gives Suriname three years to eliminate its taxes on wood products. In this way, these agreements allow special, differential treatment by according longer phase-out periods for developing partners.

Some PTAs only include product-specific exceptions to the general ban on export duties, not situational exceptions such as those in Articles XI:2(a), XX(i), and XX(j) or those applied in cases involving threat of re-export to a country not party to the PTA.⁶⁰⁰ On the other hand, some PTAs contain only such situational exceptions, not product-specific ones, to the general ban on export duties.⁶⁰¹ The PTA between the EU and Algeria provides a pertinent example as it proscribes any new customs duties on exports or charges having an equivalent effect. Increasing existing duties or charges is also prohibited.⁶⁰² The PTA provides several legitimate grounds for exceptions, but these do not include measures relating to the conservation of exhaustible natural resources.⁶⁰³

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.* at 29.

⁶⁰² Agreement Establishing an Association, EC.- Algeria, art.17, Apr.22, 2002, [2005] OJ L 265. 1.

⁶⁰³ *Id.* art. 27.

The strongest disciplines on export taxes in PTAs are Japan-Mexico, the EU, EC-Jordan, EFTA, EFTA-Israel, CEFTE, NAFTA, Canada-Costa Rica, and Canada-Chile. Especially the EU, in PTAs with middle-income countries, prefers tighter disciplines than those existing in the GATT, on the one hand.⁶⁰⁴ These agreements take different approaches to strengthening the WTO disciplines. On the other hand, PTAs with small developing countries, particularly with LDCs, should not include tighter disciplines on export taxes and restrictions than those in the existing WTO rules, even when the EU is negatively affected. NAFTA, Canada-Chile, Canada-Costa Rica, Canada-EU, Canada-Korea, Canada-Honduras, and Japan-Australia innovate with respect to practices used in the WTO, by requiring that parties meet certain conditions if they want to make exceptions and levy export taxes.

4.2.2.2 WTO-Minus PTAs

Since the GATT 1994 does not include any direct disciplines on export duties, none of the surveyed PTAs can be considered as maintaining weaker discipline. Consequently, WTO-minus PTA does not exist.

4.2.2.3 WTO-Equal PTAs

As stated above, thirty of the surveyed PTAs either did not contain language on export duties or explicitly allowed such duties. These thirty PTAs are therefore categorized as WTO-equal.

4.3 LESSONS LEARNED FROM THE STUDY OF PTAs

⁶⁰⁴ Parra et al., *supra* note 49, at 40.

Analysis of PTAs can be a good test for a new trade rule. In general, PTAs may offer many considerations for improving the multilateral export discipline. They include the following points:

- PTAs establish a precedent for covering an issue that has not been previously on the table in multilateral negotiations, by demonstrating how one might deal with the issue;
- PTAs fill the gap left by either the absence of multilateral negotiations or the failure to achieve rapid progress in them;
- Due to political or cultural reasons, certain sectors may be considered off limits in any trade negotiations.⁶⁰⁵

This study discerns three approaches in PTAs that improve this structure and render agreements WTO-plus. First, some PTAs refine the WTO exceptions by making them more transparent, more precise, or by limiting their scope. Different practices exist for improving situational and product-specific exceptions. Second, some PTAs strengthen the discipline by eliminating some WTO exceptions altogether, although many PTAs also add new exceptions for certain products. Third, seven PTAs—NAFTA, Canada-Chile, Canada-Costa Rica, Canada-EU, Canada-Korea, Canada-Honduras, and Japan-Australia—demand that countries meet certain conditions if they wish to impose an export restriction or tax justified under one of the major WTO exceptions. The section below explains these three approaches.

⁶⁰⁵ OECD, *Regional Trade Agreements and Agriculture*, 9 (OECD Food, Agriculture and Fisheries Papers No.79, 2015).

Refining Exceptions to the General Prohibition of Export Restrictions. This will add more transparency or precision. PTA practices for refining situational exceptions include defining specific time periods for the duration of the restriction, narrowing the scope of exception, and establishing procedures in the restriction for consulting with other parties.⁶⁰⁶

Defining fixed time periods for restrictions or taxes imposed during a shortage or other particular situation is one way that some PTAs have brought greater discipline to their implementation. Among the export-tax provisions studied, NAFTA specifies time limits for its situational exceptions. Under NAFTA, if a party wishes to impose a tax justified by the shortage exception, the tax can last for a maximum of one year.

Some PTAs include a positive list of products rather than a general situational exception, thereby specifying which products may be restricted. NAFTA, for example, includes a positive list of products to which some situational exceptions may apply. The agreement's annex stipulates a positive list of products, with product codes, that may be subject to export taxes. The use of a positive list, rather than making situational exceptions that are more open to interpretation, implies a sharper, more precise discipline that may reduce future misunderstandings or disputes.

Some other PTAs refine the situational exceptions by limiting their scope. For instance, some PTAs narrow the GATT XI:2(a) exception for "shortages of foodstuffs or other products essential to the exporting contracting party" so that only "shortages of foodstuffs" justifies an exception. This makes for a more precise discipline because the

⁶⁰⁶ Korinek & Bartos, *supra* note 567, at 27.

phrase “other products essential” is ambiguous. The following PTAs restrict the shortage-exception clause to only foodstuffs: EC-Côte d’Ivoire, NAFTA, CARICOM, SADC, EC-CARIFORUM.

A third way that PTAs refine the situational exception clauses is by requiring parties to follow a certain procedure in requesting to use them. Some EC agreements stipulate that before a member imposes a quantitative export restriction in the context of a stipulated exceptional situation, the member must apply to the PTA’s governing committee and allow thirty days for the committee to find a solution that is acceptable to all parties.⁶⁰⁷ If thirty days pass with no solution through the committee, the member may implement the necessary measures. If there are “exceptional and critical circumstances requiring immediate action prior to information or examination,” the member may apply precautionary measures to exports necessary to address the situation, before going to the committee. However, the member must immediately inform the other PTA parties. Any export-restrictive measures imposed under the shortage or re-export exceptions are subject to periodic consultation between the parties within the PTA’s governing committee, with a view to “establishing a timetable for their elimination as soon as circumstances permit.”⁶⁰⁸

In addition, some agreements allow members extra time to phase out the use of export taxes or restrictions on key products. This practice helps developing countries, in particular, to adjust to the complete elimination of export restraints. These measures can be regarded as special and differential treatment (SDT).

⁶⁰⁷ *Id.* at 28.

⁶⁰⁸ *Id.*

Another way to improve specific goods exceptions involves specifying positive lists of exempt products with classification codes rather than general categories of goods. For instance, some PTAs incorporate broad exceptions to the general prohibitions on export restrictions for precious or strategic metals. In such cases, either definitions of “strategic” or “precious” or an exhaustive list of specific products should be provided.

Fewer Exceptions to General Prohibitions of Export Restrictions. A second PTA approach to strengthen the GATT formula is to eliminate some of the key exceptions to the general ban on export restrictions. These exceptions include GATT XI:2(a) for shortages of foodstuff and other essential products, XX(g) for exhaustible natural resources, XX(i) for domestic stabilization plans in which the price of materials necessary to domestic processing industries is held below world prices, and XX(j) for restrictions necessary to ensure acquisition or distribution of products in general or local short supply. Forty-two of the 108 PTAs that have some language on export taxes or restrictions eliminate at least one of these exceptions. Of those forty-two, thirty-four agreements eliminate GATT XX(j), indicating that this exception may be the most easily dispensable. Twenty-nine agreements eliminate exception XX(i) for domestic stabilization plans. Only twenty-one PTAs eliminate exception XI:2(a) for shortages, and another nineteen eliminate the exception for exhaustible natural resources.⁶⁰⁹

Imposing Conditions on the Use of Exceptions to the General Prohibition of Export Restrictions. A third way to strengthen the WTO discipline on export quantitative restrictions and taxes is to stipulate that parties meet certain conditions if they implement

⁶⁰⁹ *Id.* at 30.

a restriction justified under one of the key exceptions. Some agreements, all involving Canada, take this approach: Canada-Chile (1997), Canada-Costa Rica (2002), Canada-Honduras (2014), Canada-Korea (2015), Canada-EU (2017), and NAFTA (1994). This strategy creates a strong discipline on export controls by requiring an PTA member to meet conditions outlined in the agreement if it wishes to use exceptions such as GATT XI:2(a) or GATT XX(g, i, j). In all these agreements, imposition of the restriction must not reduce the total proportion of export shipments made available to the PTA parties that the exporting country usually supplies, compared to the previous thirty-six months. Moreover, the restriction must not disrupt normal supply channels or normal proportions of specific goods supplied to the other PTA parties. The exporting party is thus responsible for implementing the restriction so that the party continues providing similar proportions of total supply to the PTA members as in the past. These conditions ensure that if one member imposes export restrictions, they will not negatively affect the share of other PTA parties' imported supplies. Rather than forbidding the use of restrictions completely, requiring that countries continue to supply the same proportion of export shipments if they want to use a restriction mitigates the negative effects of restrictions on importers.

On the surface, the developmental status of the countries seems to be a good predictor of whether a country imposes export duties.⁶¹⁰ Major OECD countries are less frequent users of export duties, while nearly every LDC surveyed (40 out of 43) imposes them. The countries that use export duties are almost all developing countries. However, the heterogeneity of developmental status may in fact be driven by differences in the

⁶¹⁰ Solleder, *supra* note 151, at 6.

export baskets of developing countries from those of developed countries, not by their income level. LDCs export primary natural resources, which is the most taxed group of products. Because developing countries and LDCs do not prohibit the use of quantitative export restrictions by not including any provision in their PTAs, the practice itself indicates the desirable role of quantitative restrictions for developing countries. This practice leads developing countries to prefer WTO-equal or WTO-minus rules regarding export restrictions. Their rich export baskets and strong demand for raw materials encourage developed countries to prefer WTO-plus rules. This issue will be revisited in Chapter 6.

4.4 CONCLUSION

To some extent, I share the view of some scholars who prefer to address the issue through PTAs. Many PTAs provide rules on export restrictions that go beyond the scope of the WTO. Nonetheless, this strategy has shortcomings that severely reduce its attractiveness. Those shortcomings include but are not limited to the following:

- i) Since raw materials are traded globally, the scope of most PTAs does not reach far enough.⁶¹¹ Differences in PTA rules may distort the operation of a genuinely international raw materials market. The increasing number of agreements and their great variation in substance also make it hard to establish which rules actually govern flows of raw materials on a wider scale;
- ii) Mechanisms for dispute settlement under many PTAs remain weak and lack transparency.⁶¹² Dispute settlement under PTAs is often governed by a simple

⁶¹¹ Mildner & Lauster, *supra* note 140, at 279.

⁶¹² *Id.*

- provision in which the parties agree to consult on any issues of implementation and interpretation of the obligations in the agreement. Also unlike the WTO, PTAs do not allow non-PTA members to join as third parties. Nonetheless, we must wait until disputes on export restrictions are settled through the PTA dispute settlement arrangements, to discover further implications.
- iii) PTAs often provide broader exceptions to sensitive products. Although the rules on export restriction may appear to be stricter than those in the WTO texts, certain critical products are exempted from these rules.
 - iv) In terms of transparency and inclusiveness, PTAs offer much less than WTO law does.

Although some skepticism exists regarding the proliferation of PTAs, this chapter explores different approaches in the PTAs that could help to improve the WTO discipline for export restrictions on mineral raw materials. In general, PTAs introduce the following strategies to strengthen disciplines:

- More-precise definitions of products on which export restrictions and taxes can be placed or on the duration for which they can be applied;
- Elimination of some exceptions to the general ban on export restrictions or limit of the scope of ambiguous situational exceptions;
- Conditions on the use of exceptions so that export restrictions and taxes do not endanger existing supply chains;
- Greater transparency and accountability regarding measures to be established;

- Definitions of procedures for consultation with affected parties before implementation of quantitative restrictions and taxes.

In particular, one important step toward making international trade rules “more predictable and balanced” is to make the WTO exception for “exhaustible natural resources” more precise by defining exactly what qualifies as goods in this category. Korinek and Bartos even recommended finding agreement on a list of products to be considered “exhaustible natural resources.”⁶¹³ In addition, special and differential treatment can be used for exports in the WTO, as many PTAs include provisions for SDT.

In conclusion, WTO members’ approaches to export duties and quantitative restrictions in PTAs also suggest an opportunity to create similar disciplines at the multilateral level. Chapter 6 will consider this.

⁶¹³ Korinek & Bartos, *supra* note 567, at 31.

CHAPTER 5

REVIEW OF ONGOING REFORMS

5.1 INTRODUCTION

“We have spent six decades creating an open trading order by pushing down import duties for goods—only to have export restrictions putting those gains in reverse.”
Former EU Trade Commissioner Peter Mandelson⁶¹⁴

The foregoing chapters have explored the current international trade law applicable to export restrictions on mineral raw materials. These chapters indicate certain shortcomings of the regulatory framework on export restrictions, including but not limited to the following:

a) The most evident deficiency of the WTO legal framework on export restrictions is the absence of a system-wide discipline on export duties. The fragmentation of WTO rules on export duties has systemic relevance for the WTO legal system, ranging from substantial disparities in the scope and coverage of obligations between original and newly acceded WTO members as well as among newly acceded WTO members themselves, to the varying degrees of flexibility enjoyed by such members in the use of export duties regarding revocation and/or derogation of such obligations, including when the obligations are intended for legitimate public-policy objectives;⁶¹⁵

⁶¹⁴ Peter Mandelson, *The Challenge of Raw Materials*, Speech Before the Trade and Raw Materials Conference 3 (Sep. 29, 2008) (transcript available at EC Website).

⁶¹⁵ ESPA, *supra* note 38, at 229.

Uneven treatment of quantitative import and export restrictions in the GATT, specifically the unavailability of economic development and emergency exceptions to Article XI:1 of the GATT-inconsistent export quantitative restrictions;

b) Limited policy space in Article XX of the GATT for WTO members to use export restrictions for sustainable-development purposes. This limitation may, apparently, cause WTO members to avoid engaging in the negotiation of export duty commitments in their GATT schedules.

c) The overall inadequacy of commitments in this area is, indeed, the main weakness in the WTO treatment of export restrictions. The combination of the lack of transparency and the loose formulation of applicable notification requirements contributes also to this inadequacy.

Despite the inconsistencies identified, the international community still struggles to find shared understanding of export restrictions, particularly regarding mineral raw materials. Although attempts have been made to include greater discipline in the current WTO negotiations, there has been no change in the recent WTO Ministerial Conferences.⁶¹⁶

Conflicting interests still exist in export restrictions between import-dependent and resource-rich countries regarding the legitimate policy space to resort to export restrictions. The debate on the use of export restrictions stems from two fundamental

⁶¹⁶ Parra et al., *supra* note 49, at 39; World Trade Organization, Ministerial Declaration of 7 December 2013, ¶ 1.11, WTO document WT/MIN(13)/DEC (2013) [Bali Ministerial Declaration]; Ministerial Declaration of 19 December 2015, ¶ 30, WTO document WT/MIN(15)/DEC (2015) [Nairobi Ministerial Declaration]; Roberto Azevedo, Director-General, World Trade Organization, Address at the Ministerial Conference 1 WTO document WT/MIN(17)/74 (Dec.13, 2017).

stances of exporting and importing countries. First, from importing countries' perspective, export restrictions should be regulated to avoid their abuse as beggar-thy-neighbor policies or industrial policy instruments that create an unfair advantage for domestic industries of exporting countries. Second, from exporting countries' perspective, the developmental function of export restrictions should be acknowledged in the WTO legal framework and reflected in the availability of specific flexibilities. This tension has been shown to be greatest concerning export restrictions on mineral raw materials.⁶¹⁷ As long as the export restriction is in place, it ensures supply and a price advantage to the domestic industries of exporting countries that use the restricted products as input or to produce higher-value-added products, whereas importing countries' domestic industries may face more competition and limitations on the available raw material if the restricted mineral raw material has no substitutes. Since establishment of the GATT, those tensions have prevented any constructive discussion on export restrictions in the multilateral trading system.

Accordingly, this chapter examines proposals suggested in various forums to reform the current disciplines on export restrictions. Section 5.2 reviews the proposals discussed and tabled both before and after the WTO's establishment. Section 5.3 provides an overview of ongoing attempts at forums other than the WTO. Overall, this chapter identifies the scope and targets that a proposal to reform multilateral trade rules on export restrictions would need to embrace to find realistic consensus among parties.

⁶¹⁷ ESPA, *supra* note 38, at 254.

5.2 ANALYSIS OF PROPOSALS TABLED IN THE WTO NEGOTIATIONS

5.2.1 GATT Negotiations

The issue of export restrictions on raw materials was first addressed during the GATT era in the 1970s.⁶¹⁸ The first wave of export restrictions following the 1973 oil crisis triggered the issue.⁶¹⁹ However, discussions on the need to improve access to supplies have faced strong resistance by raw materials-exporting countries.⁶²⁰ These countries have expressed that any reassessment of GATT provisions on export restrictions would be unbalanced if it did not concurrently address the question of access to markets and that the principle of permanent sovereignty over natural resources must be preserved in any GATT effort in this field.⁶²¹ At the same time, these countries strongly assert that elimination or reduction of export restrictions must be matched by parallel reductions of barriers imposed by trading partners on imports of goods produced using the raw materials affected by export restrictions.⁶²²

During the Tokyo Round Negotiation (1973–1979), the Framework Group drafted an Understanding Regarding Export Restrictions and Charges,⁶²³ which the Trade Negotiating Committee adopted.⁶²⁴ Unfortunately, no concrete progress occurred, while the participants asked contracting parties “to reassess, as one of their priority tasks after the conclusion of the Tokyo Round, the provisions relating to export restrictions and

⁶¹⁸ *Id.* at 232.

⁶¹⁹ *Id.*

⁶²⁰ QIN, *supra* note 40, at 1147, 1180.

⁶²¹ GATT Secretariat, *Background Note on Export Restrictions and Charges*, GATT Doc. MTN.GNG/NG2/W/40, (Aug. 8, 1989).

⁶²² *Id.* ¶ 13.

⁶²³ GATT Secretariat, *Texts Prepared by Group Framework*, 5/1, GATT Doc. MTN/FR/6 (July 16 1979),.

⁶²⁴ Trade Negotiations Committee, *Proces-Verbal 3* GATT Doc. MTN/28 (April 11, 1979).

charges, in the context of the international system as a whole, taking into account the development, financial and trade needs of the developing countries.”⁶²⁵ The developing countries’ delegations advocated that any further actions in this field would have to comply with the principle of sovereignty over natural resources and consider “the need for developing countries to utilize their resources for their development in the most optimal manner as considered appropriate for them, including processing of their raw materials, setting up industries to diversify their economies and ensuring supplies to domestic industries.”⁶²⁶

The Group on the Sector Approach of the Tokyo Round negotiations also held discussions on export restrictions on mineral resources, and the contracting parties agreed on the need to elaborate provisions establishing the “purposes and conditions under which export restrictions might or might not be used as well as relating to the binding of export taxes and the inconsistencies surrounding their use.”⁶²⁷ Yet, the failure to provide concrete solutions to both sides’ most immediate concerns left the issue of export restrictions unresolved, and the topic was eventually removed from the declaration adopted at the end of the ministerial meeting in 1982.⁶²⁸

During the Uruguay Round, which started in 1986, the issue was still on the negotiation table. The GATT Secretariat produced a document that offered examples of rationales mentioned for imposing export restrictions, including protection of processing

⁶²⁵ GATT Secretariat, *Understanding Regarding Export Restrictions and Charges*, 15, GATT Doc. MTN/FR/W/20/Rev. 2 (Mar. 30, 1979).

⁶²⁶ *Id.*

⁶²⁷ *Id.* ¶ 14, citing Statement by Canadian Delegation, *Proposed Basis for Negotiations in Certain resource-based Sectors*, GATT Doc. MTN/SEC/W/21 (Jan. 24, 1978).

⁶²⁸ GATT, Ministerial Declaration of 29 November 1982, GATT Doc. BISD 29/S/9 (1982).

industries, domestic price stabilization, improving terms of trade, raising revenue, and conservation of exhaustible natural resources.⁶²⁹ Sovereignty concerns linked to national minerals and monopoly power in the global market for minerals provided GATT members with an incentive to restrict exports.⁶³⁰ After the discussion, nothing much happened, and the Uruguay Round did not include an agreement on export restrictions.⁶³¹ Members concluded that “the Uruguay Round was not successful in ascertaining a balanced manner of interests for both countries, including the exporting and importing countries.”⁶³²

As a consequence, the same fundamental tensions continue to thwart attempts to find consensus on how to reform WTO export disciplines. Accordingly, as in the 1970s and as the Doha Round negotiations currently show, the success of any attempt to reassess WTO disciplines on export restrictions lies in achieving a balance between the need for net-importing WTO members to secure fair access to supplies against beggar-thy-neighbor export restrictions, and the legitimate development concerns of resource-endowed WTO members.⁶³³

5.2.2 Proposals for Reform in the Doha Round Negotiations

The Doha Round is the latest round of trade negotiations among the WTO membership, and it aims to achieve major reform of the international trading system through the

⁶²⁹ See Background Note on Export Restrictions and Charges, *supra* note 638.

⁶³⁰ MAVROIDIS, *supra* note 389, at 388,389.

⁶³¹ *Id.* at 389.

⁶³² See Bashayer Hassan Al Ahbabi et al., *An Analysis of Export Restriction Rules and Proposals under the WTO* (Tradelabe Memo, March 6, 2017), <https://tradelab.legal.io/guide/58bd22643ebecb04d9000001/An-analysis-of-Export-Restriction-Rules-and-Proposals-under-the-WTO>.

⁶³³ ESPA, *supra* note 38, at 234.

introduction of lower trade barriers and revised trade rules.⁶³⁴ This round was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001. The work program covers approximately twenty areas of trade.⁶³⁵ The Doha Ministerial Declaration provides the mandate for the negotiations.

Paragraph 16, on Market Access for Non-Agricultural Products, of the Doha Ministerial Declaration states,

We agree to negotiations which shall aim, by modalities to be agreed, to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Product coverage shall be comprehensive and without a priori exclusions.

The issue of export restrictions was included in the Non-agricultural Market Access (NAMA) Negotiating Group after WTO members submitted proposals on export restrictions, in the course of the Doha negotiations. Thus far, three proposals have been submitted to the NAMA Negotiating Group within the Doha mandate. The EU submitted a proposal on a WTO Agreement on Export Taxes⁶³⁶ and the Revised Submission on Export Taxes,⁶³⁷ whereas the United States and Japan introduced a Protocol on Transparency in Export Licensing⁶³⁸ to the GATT.

⁶³⁴ See WTO, *the Doha Round*, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Dec. 8, 2017).

⁶³⁵ *Id.*

⁶³⁶ Communication from the European Communities, *Negotiating Proposal on Export Taxes*, WTO Doc. TN/MA/W/11/Add.6 (April 27, 2006).

⁶³⁷ Communication from the European Communities, *Revised Submission on Export Taxes*, WTO Doc. TN/MA/W/101 (January 17, 2008).

⁶³⁸ Communication from group of countries, *Enhanced Transparency on Export Licensing*, WTO Doc. TN/MA/W/15/Add.4/Rev.5 (Feb.5, 2010).

a) WTO Agreement on Export Taxes

In 2003, the European Union was the first WTO member to submit a comprehensive proposal for reforming WTO disciplines on export taxes to the NAMA Negotiating Group.⁶³⁹ As part of its trade strategy, the EU has attempted to include disciplines on the use of export taxes and restrictions in the PTAs it negotiates. However, the scope of those disciplines varies among PTAs. Nevertheless, the EU proposal for reforming WTO disciplines contains similar texts borrowed in whole or part from the EU's PTAs. The language of the proposal and of the PTAs will be compared below.

In general, the EU justified its desire to establish new disciplines for export taxes as follows⁶⁴⁰:

Because of GATT's traditional focus on import policies, export taxes remain a policy instrument still not subject to specific disciplines, hence the significance of the effects such policies have. Export taxes, whenever used to protect industries that process primary commodities, tend to be the flip-side to tariff escalation thus causing adverse effects on commodity producers, who tend to receive a price which is below the price prevailing on world markets. The commitments on export taxes made by newly acceded Members have set a valuable example that should be followed by all Members.

Later, the EU's specific proposal on export taxes was first tabled in April 2006, and it was to conclude a new WTO Agreement on Export Taxes on non-agricultural goods.⁶⁴¹

⁶³⁹ Communication from the EC, *Negotiation Proposal on Export Taxes*, WTO Doc. TN/MA/W/11/Add.3 (April 27, 2006).

⁶⁴⁰ *Id.* ¶ 13.

⁶⁴¹ *Revised Submission on Export Taxes*, *supra* note 637, Annex 1, art 1.

The draft proposal states that the underlying aim of the agreement is to address distortions to international trade caused by those export taxes used for the purpose of (or otherwise having the effect of):

- artificially transferring gains from trade between WTO Members (beggar thy neighbour);
- creating unfair advantages to domestic industries involved in international trade at the expense of other WTO Members' producers, including infant industries in developing countries; or
- evading existing WTO disciplines on export restrictions by shifting to more or less prohibitive taxes on the exportation of goods.

The proposed agreement introduced a complete elimination of all export taxes and duties on non-agricultural products:

No duties, taxes and other charges imposed on or in connection with the exportation of non-agricultural goods destined for the territory of any other Member, as well as internal taxes and other charges on products exported to any other Member that are in excess of those imposed on like products destined for internal sale, shall be instituted or maintained by any WTO Member.

The above provision is identical to the strictest discipline included in the EU-CARIFORUM EPA which provides that "Signatory States shall eliminate the customs duties on exports".⁶⁴²

⁶⁴² Economic Partnership Agreement, the CARIFORUM States - the EC., art.14.2, October 30, 2008, Official Journal of European Union [OJEU], L 298/I/3.

Notwithstanding the above provision, Articles 2 and 3 would allow developing countries, especially least-developed countries, to maintain export taxes listed in their schedules of commitments for a limited number of products, at low levels, and only in so far as

- a) they are necessary, in conjunction with domestic measures, to maintain financial stability, to satisfy fiscal needs, or to facilitate economic diversification and avoid excessive dependence on the export of primary products; and
- b) they do not adversely affect international trade by limiting the availability of goods to WTO Members in general or by raising world-market prices of any goods beyond the prices that would prevail in the absence of such measures, or otherwise cause serious prejudice to the interests of developing-country Members.

These provisions, therefore, set numerous preconditions on developing and least-developed members for scheduling and binding export duties: first, the export taxes must be “necessary” to address situations considered legitimate and applied “in conjunction with domestic measures”; second, they must not affect the price and the availability of particular non-agricultural products.

The EPAs with the EAC and with West Africa provide exceptions identical to above listed provisions that appear quite close to the WTO provision on export taxes:

“the EAC Partner States can impose, after notifying the EU, a temporary duty or tax in connection with the exportation of a limited number of goods for a limited period of time under the following circumstances:

- a) to foster the development of domestic industry;
- b) to maintain currency stability, when the increase in the world price creates the risk of a currency overvaluation;
- c) to protect revenue, food security and environment.”⁶⁴³

Article 4 of the draft agreement requires that, for developed WTO members, the prohibition and (when applicable) reduction of export taxes take effect upon the agreement’s entry into force, whereas developing countries and least-developed countries enjoy a transition period of three and five years, respectively.⁶⁴⁴ During the transition period, those countries must gradually implement their commitments through equal annual reductions for all relevant non-agricultural goods and may not introduce any new export taxes.⁶⁴⁵

Article 5 of the draft agreement formally confirms the applicability of several GATT exceptions to export taxes adopted in breach of the agreement by any member country, namely, the general exceptions and security exceptions under Articles XX and XXI, the economic exceptions under Article XII and Article XVIII, and Article XV:9 on Exchange Arrangements.⁶⁴⁶

Likewise, the EPA made between the EU and SADC provides similar exceptions as follows:

⁶⁴³ Economic Partnership Agreement, the East African Community Partner States –the EU., art.14, February 28, 2014, OJEU L57; Economic Partnership Agreement the West African States and the Economic Community of West African States and the West African Economic and Monetary Union - the EU., art.13, June 30, 2014, OJ EU L317.

⁶⁴⁴ *Id.* art. 4.1.

⁶⁴⁵ *Id.* art. 4.2, 4.3.

⁶⁴⁶ *Id.* art. 5 (b) and (c).

“in exceptional circumstances, where justified for specific revenue needs, or where necessary for the protection of infant industry or the environment, or where essential for the prevention or relief of critical general or local shortages of products essential to domestic production..., States may introduce duties or taxes on exportation of goods...”⁶⁴⁷

Article 7 of the draft agreement, furthermore, attempts to strengthen the transparency and notification requirements applicable to export taxes as follows:

Members reaffirm, with respect to export taxes, their commitment to obligations on transparency and notification in Article X of GATT 1994 and in the Ministerial Decision on Notification Procedures adopted on 15 April 1994. Any new export taxes and any increase in existing export taxes must be notified to the WTO Secretariat 60 days before their entry into force. The notification shall contain a detailed description of the export taxes in question, their product and trade coverage, and their applied levels. Upon request, the Member seeking to institute new or raise existing export taxes shall afford adequate and prompt opportunity for consultations and provide information on the reasons for the export taxes, on their potential effects and on other matters of interest or concern to any other Member. The Member shall also allow a reasonable interval between the adoption of the measure instituting new or raising existing export taxes and its entry into force.

⁶⁴⁷ Economic Partnership Agreement, the South African Development Community - the EU., art.26, June 10, 2016, OJEU L 250.

The EU EPAs include also early warning mechanism.⁶⁴⁸ It provides that “State shall be informed in advance of new measures ...that may affect exports”.

In case of any dispute arising with respect to the use of export taxes under the agreement, Article 8 confirms that any violation of its provisions can be challenged before the WTO dispute settlement bodies.⁶⁴⁹

While Article 9 of the draft agreement indicates the applicability of Article XXVIII of the GATT, export taxes are nevertheless to be gradually phased out according to Article 10 of the Agreement. Article 10 states,

No later than 5 years after the entry into force of this Agreement, Members shall begin negotiations with the aim of gradually phasing out all remaining export taxes listed in Members’ schedules. Priority should be given to those export taxes of concern to developing countries and particularly least developed countries.

The EU intended this solution to “establish a workable compromise in the area of export taxes between those many countries affected by ‘beggar thy neighbor’ measures adopted by a few major supplier and other large economies, and the use of export taxes by small economies, which includes the majority of developing countries.”⁶⁵⁰ However, this proposal, which was motivated by the concern that export taxes can be used to restrict access to critical raw materials and input goods and can thereby impede other WTO

⁶⁴⁸ EPA, SADC- the EU, art.55; EPA, West African States-the EU, art.101.

⁶⁴⁹ *Id.* art.8.

⁶⁵⁰ Negotiating Group on Market Access, *Textual Report by the Chairman*, 68, WTO Doc.TN/MA/W/1-3/Rev.3/Add.1 (Apr. 21, 2011).

members' growth and development, met critical reactions from several other members, who argued that export duties are legitimate tools of economic development.⁶⁵¹ Accordingly, the proposal was subsequently revised and included in the latter draft modalities for NAMA. The revised approach represents a shift from a general prohibitions of export taxes, with exceptions based on GATT rules, to the establishment of rules on transparency and predictability. In the proponents' view, these rules could be ensured by scheduling commitments and the binding of members' export taxes, such as by setting maximum limits.⁶⁵²

b) The Revised Submission on Export Taxes

The EU submitted, on January 16, 2008, a revised, more balanced, and proportionate proposal on export taxes, which aimed to consider the requests of developing-country members while still providing "appropriate remedies to the specific problems related to the use of export taxes as 'beggar thy neighbor' instruments."⁶⁵³ The EU explicitly reiterated the urgency of addressing the "distortive effects on global commodity trade" generated by export taxes, especially when applied by large suppliers and "when used for industrial or trade policy purposes."⁶⁵⁴ The EU finds, among other reasons, that the weaker WTO rules on export taxes compared to those on import restrictions or other forms of non-tariff barriers should be addressed.⁶⁵⁵ Furthermore, the EU highlighted that any revised proposals on export taxes should consider crucial factors, including the recent

⁶⁵¹ WTO, WORLD TRADE REPORT 2010: TRADE IN NATURAL RESOURCES 184, https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report10_e.pdf.

⁶⁵² *Id.* at 185.

⁶⁵³ Revised Submission on Export Taxes, *supra* note 637, ¶ 6.

⁶⁵⁴ ESPA, *supra* note 39, at 263.

⁶⁵⁵ Revised Submission on Export Taxes, *supra* note 637, ¶ 2.

proliferation of these instruments and the short global supply of some commodities despite their abundance in a few countries—a situation aggravated by export taxes in key supplying countries.⁶⁵⁶ Upon considering various factors, the EU believes that “any negotiated solutions for export taxes would have to be built upon existing GATT concepts and rules,” and proposed that “any revised approach should ensure, as a minimum, increased transparency and predictability.”⁶⁵⁷

Concerning transparency, a core objective of the WTO is to ensure that members are fully informed of measures taken by any other member that may influence trade.⁶⁵⁸ Accordingly, all WTO members have already agreed to communicate any export taxes and restrictions. The Ministerial Decision on Notification Procedures, adopted on December 15, 1993, establishes that the introduction or modification of such measures is subject to the notification undertakings of the Understanding Regarding the Notification, Consultation, Dispute Settlement and Surveillance adopted on November 28, 1979 (BISD 26S/210).⁶⁵⁹ WTO members, including the EU, agreed that the 1993 Ministerial Decision on Notification Procedures has had little, if any, practical effects on members’ level of transparency.⁶⁶⁰ Hence, the EU proposed a stricter transparency discipline on export duties in view of “ensuring that existing obligations are made operational and enforced in a satisfactory manner.”⁶⁶¹

⁶⁵⁶ *Id.*

⁶⁵⁷ *Id.* ¶ 6.

⁶⁵⁸ *Id.*

⁶⁵⁹ *Id.* ¶ 7.

⁶⁶⁰ *Id.*

⁶⁶¹ *Id.*

Accordingly, the EU called on WTO members to agree on basic transparency commitments consistent with the Uruguay Round Understanding on the Interpretation of Article XVII of the GATT.⁶⁶² This understanding sets out detailed notification requirements for WTO members on state trade enterprises that influence the level or direction of imports and exports. It requires each WTO member to “conduct a review of its policy with regard to the submission of notifications on state trading enterprises to the Council for Trade in Goods, taking account of the provisions of this Understanding,” and further states that “in carrying out such a review, each members should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.”⁶⁶³ Moreover, the understanding considers the possibility that members who believe another member has not adequately met notification obligations can raise the matter and, under certain conditions, make a counter-notification to the Council for Trade in Goods.⁶⁶⁴ Both notifications and counter-notifications are to be reviewed, on behalf of the Council for Trade in Goods, by a working party that may make recommendations regarding the adequacy of notifications and the need for further information.⁶⁶⁵

The choice of the Uruguay Round Understanding on the Interpretation of Article XVII of GATT 1994 as a model for new transparency provisions on export taxes indicates

⁶⁶² *Id.*

⁶⁶³ GATT 1994, *Understanding on the Interpretation of Article XVII of the GATT 1994*, ¶ 2, https://www.wto.org/english/docs_e/legal_e/08-17_e.htm.

⁶⁶⁴ *Id.* ¶ 4.

⁶⁶⁵ *Id.* ¶ 5.

increased ambition, compared to Article 7 of the former proposed Agreement on Export Taxes.⁶⁶⁶ However, the EU advocates special and differential treatment for developing-country and least-developed-country members.⁶⁶⁷ In terms of predictability, a core objective of the WTO is to ensure that members can reasonably expect the trade measures that any other member may impose.⁶⁶⁸ Therefore, the EU believes that scheduling and binding members' export taxes could offer an appropriate route to ensure adequate predictability.⁶⁶⁹ Overall, this revised submission represents a shift from a general prohibition of export taxes to the establishment of rules on transparency and predictability based on WTO objectives, concepts, and principles.⁶⁷⁰

As provided in the submission, WTO members should schedule export taxes on non-agricultural products in their schedules of concessions and bind export taxes at a level to be negotiated, with the following exceptions:

- a) Least-developed countries would schedule export taxes on non-agricultural products but may maintain these export taxes unbound; and
- b) Small and vulnerable countries would schedule export taxes but may maintain these export taxes unbound for a certain number of tariff lines (the number is to be negotiated), to reflect their specific developmental interests and concerns.⁶⁷¹

⁶⁶⁶ ESPA, *supra* note 39, at 264.

⁶⁶⁷ Revised Submission on Export Taxes, *supra* note 637, ¶ 7.

⁶⁶⁸ *Id.* ¶ 8.

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.* ¶ 9.

⁶⁷¹ *Id.*

In the EU's view, the revised submission would ensure the balanced interests and concerns of WTO members:

- Members “can reasonably expect what measures any other members may impose that influence trade.”⁶⁷²
- The draft text would provide a negotiated solution in the direction of greater comparability between GATT rules on import and export duties, de facto seeking the implementation of Article XXVIII(bis) GATT⁶⁷³ on the export side as admitted through Article II:2(a) GATT.
- No prejudice to “the right of WTO members to apply export taxes when exceptional circumstances under GATT rules are invoked.”⁶⁷⁴ However, the draft text has not specified whether the phrase “exceptional circumstances under GATT rules” includes the whole range of flexibilities expressly mentioned in the proposed Agreement on Export Taxes or only those GATT exceptions conceived of as applying to both imports and exports (e.g. Art XX), and does not include import-specific exceptions (e.g., Article XVIII).

⁶⁷² *Id.*

⁶⁷³ GATT 1994, art.XXVIII(bis): “The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The contracting parties may therefore sponsor such negotiations from time to time”.

⁶⁷⁴ Revised Submission on Export Taxes, *supra* note 637, ¶ 9.

The fourth revision of draft modalities for non-agricultural market access⁶⁷⁵ and the report on the State of Play of the NAMA Negotiations listed the revised proposal on the EU's export taxes.⁶⁷⁶ Within the general stalemate of the Doha negotiations and the limited progress in the NAMA negotiations, there has been no consensus around the proposal.

c) The Proposed Protocol on Transparency in Export Licensing to the GATT

On April 18, 2006, Japan submitted a communication on enhanced transparency in export licensing to the NAMA Negotiating Group. The communication aimed to introduce a textual proposal for a new agreement to enhance transparency on export restrictions. This proposed agreement, modeled on the WTO Agreement on Import Licensing, would contain procedures for publishing relevant rules and administrative measures on export restrictions, notification procedures to a relevant committee, and statistics, such as those on domestic production.⁶⁷⁷

In subsequent negotiations, Japan's original proposal was developed with input from other members and was resubmitted jointly with the United States, Chinese Taipei, Korea, Ukraine, Chile, and Costa Rica as a proposal entitled "Protocol on Transparency in Export Licensing" on June 11, 2008.⁶⁷⁸ The last version of the text includes detailed

⁶⁷⁵Negotiating Group on Market Access, *Fourth Revision of Draft Modalities For Non-Agricultural Market Access*, 45–47, WTO Doc. TN/MA/W/103/Rev.3 (Dec. 6, 2008).

⁶⁷⁶Textual Report on the State of Play of the NAMA Negotiations, 75-77, WTO Doc. TN/MA/W/103/Rev.3/Add.1 (April 21, 2011).

⁶⁷⁷Communication from Japan, *Text-Based Proposal for Negotiation on Enhanced Transparency on Export Restrictions*, WTO Doc. TN/MA/W/15/Add.4, April 18, 2006.

⁶⁷⁸Communication from Japan, the U.S., *Enhanced Transparency on Export Licensing* WTO Doc. TN/MA/W/15/Add.4/Rev.1 (April 11, 2008).

notification requirements, the possibility for members to request information regarding, *inter alia*, the administration of measures on export licensing, the export licenses granted, and measures taken in conjunction with export licensing.⁶⁷⁹

The co-sponsors believe that the “Protocol is designed to fill up a gap by providing a set of procedural rules for Members to follow in order to achieve greater transparency in running their respective export licensing regimes in conformity with WTO obligations.”⁶⁸⁰ In this respect, the protocol does not diminish the rights of WTO members to adopt export licensing schemes in accordance with GATT provisions, but it would instruct members on how to meet the transparency requirements established in the GATT provisions, to “secure the effectiveness of the provisions mentioned and give substance to the ideal of transparency.”⁶⁸¹ The language of the Preamble to the proposed Agreement reflects this goal. Similar to the Preamble to the WTO Agreement on Import Licensing Procedures, this agreement’s preamble affirms the desire to “ensure that export licensing procedures are not utilized in a manner contrary to the principles and obligations of the GATT 1994” and to “bring transparency to the procedures and practices related to export licensing so as to inform traders and members and facilitate trade in these products.”⁶⁸²

⁶⁷⁹Communication from Chile, Costa Rica, Japan, Republic of Korea, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Ukraine and the United States, *Enhanced Transparency on Export Licensing*, WTO Doc. TN/MA/W/15/Add.4/Rev.7 (November 23, 2010).

⁶⁸⁰Communication from Taiwan, Penghu, Kinmen and Matsu, Japan, Republic of Korea and the U.S., WTO Doc. TN/MA/W/130 (Dec. 11, 2009).

⁶⁸¹ *Id.* at 2.

⁶⁸² *Id.* at 1.

The proposed agreement comprises five articles. Article 1 proposes the following definition of export licensing: “any administrative procedures involving the submission of an application or other documentation (i.e. other than that required for customs purposes) to the relevant administrative bodies as a prior condition for exportation from the customs territory of the exporting Member.”

In contrast to the Agreement on Import Licensing, the proposed Protocol on Transparency in Export Licensing does not distinguish between automatic and non-automatic licensing.⁶⁸³ Accordingly, it is neutral regarding permitted and not permitted forms of export licensing.⁶⁸⁴

Article 2.1 poses a general obligation whereby WTO members are required, within sixty days after the protocol’s entry into force, to notify in writing to the Committee on Market Access all existing measures and, subsequently, any new measures or modification of measures on export licensing, within sixty days after the entry into force of such measures.⁶⁸⁵ In both cases, a WTO member must provide a copy of the relevant measure.⁶⁸⁶ The notification shall indicate, similar to what the relevant provision in the WTO Agreement on Import Licensing requires, all relevant information for importing WTO members, including the list of products subject to the measure, a description of the procedures and eligibility criteria, the measure’s expected duration, whether the measure

⁶⁸³ ESPA, *supra* note 38, at 267.

⁶⁸⁴ Communication from Japan, the U.S., *Enhanced Transparency on Export Licensing*, *supra* note 677, at 2.

⁶⁸⁵ *Id.* art. 2.1.

⁶⁸⁶ *Id.* art 2.3.

is implemented with other export restrictions, its rationale, and the contact details of the pertinent administrative bodies.⁶⁸⁷

Furthermore, according to Article 3 of the proposed protocol, each WTO member must provide all relevant information concerning the administration of its export licensing scheme, the export licenses granted, and any restrictions implemented in conjunction with the export licensing measure to any other WTO members who may request it; moreover, WTO members must also provide information on the distribution of the export licenses among importing countries and statistics concerning the expected and/or actual exports of the product subject to the export licensing scheme, when such information is available. Article 4, however, clarifies that members should not be required per the protocol to disclose “confidential information” when such disclosure would “impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.” Finally, Article 5 provides that the Committee on Market Access should establish a registry of notifications submitted in accordance with the protocol, which should be available to the public, and periodically review (at least once every two years) the implementation and operation of the protocol, with due regard to its objectives and the rights and obligations established therein.

⁶⁸⁷ *Id.* art 2.2.

The proposed Protocol on Transparency in Export Licensing was included in the fourth draft modalities for non-agricultural market access.⁶⁸⁸ It is also listed among the non-tariff barrier (NTB) textual proposals annexed to the latest report of the Negotiating Group on Market Access (NGMA) Chairman on the State of Play of the NAMA Negotiations.⁶⁸⁹

d) Recent Communications

In July 2016,⁶⁹⁰ May 2017,⁶⁹¹ and July 2017,⁶⁹² the delegation of Singapore communicated the following questions to WTO members:

- i) Would a thirty-day advance notification constitute a “practicable” period for both exporters and importers?
- ii) Should the notification contain the reasons for and period of the export restrictions?
- iii) Should there be any exceptions to the obligation to submit advance notifications?
- iv) Is the term “critical shortages” clear in the context of GATT Article XI:2(a)?

⁶⁸⁸ Negotiating Group on Market Access, *Fourth Revision of Draft Modalities For Non-Agricultural Market Access*, *supra* note 675, at 75–77.

⁶⁸⁹ Textual Report on the State of Play of the NAMA Negotiations, *supra* note 693, at 67–69.

⁶⁹⁰ See Communication from Singapore, *Export Restrictions*, WTO Doc. Job/AG/77 (July 13, 2016).

⁶⁹¹ See Communication from Singapore, *Export Restrictions*, WTO Doc. Job/AG/94 (May 13, 2017).

⁶⁹² See Communication from Singapore, *Export Restrictions*, WTO Doc. Job/AG/101 (July 17, 2017).

In June 2015⁶⁹³ and October 2017,⁶⁹⁴ Japan, Korea, Switzerland, Israel, and others submitted another proposal on effective discipline on export restrictions. Once again, the core group highlighted the need for effective discipline on export restrictions. The proposal aims to enhance transparency by ensuring the implementation of notifications and an adequate consultation process with members that have a substantial interest as importers.⁶⁹⁵ The proposal lists the following elements to be included in a strengthened discipline on export restrictions⁶⁹⁶:

- Transparency obligations;
 - A member imposing export restrictions shall give a thirty-day advance notice of the reasons for instituting such measures.
 - A member that intends to institute export restrictions shall consult, upon request, with any other member having a substantial interest as an importer with respect to any matter related to the proposed measure.
 - The member instituting the measure shall report the progress made in the consultations to the respective committee.

- Duration of new measures;

⁶⁹³ See Communication from Japan, Korea, Switzerland, *Export Prohibitions and Restrictions*, WTO Doc. Job/AG/41 (June 19, 2015).

⁶⁹⁴ See Communication from Japan, Korea, Switzerland, *Export Prohibitions and Restrictions*, WTO Doc. Job/AG/115 (October 8, 2017).

⁶⁹⁵ *Id.* ¶ 3.

⁶⁹⁶ See *id.*

- Article XI.2(a) of the GATT 1994 states that export restrictions should be “temporarily” applied to prevent or relieve critical shortages. Securing this principle of “temporary” duration of the restrictions should be disciplined. Members proposed a general limit of twelve months. An extension is allowed when certain obligations are met. Moreover, the member shall not continue the measure beyond eighteen months from the date it is imposed unless other members that are net-food importers subject to the measure have agreed to the extension.
- Transitional provisions;
 - Existing export prohibitions or restrictions under Article XI.2(a) of the GATT 1994 in members’ territories shall be communicated to the relevant committee within ninety days of these provisions coming into force.
- Special and differential treatment;
 - To the extent that the above provisions on consultations apply any obligations beyond existing WTO regulation, they shall not apply to least-developed countries and net food-importing developing countries.

These proposals still remain on the negotiating table. Given that these initiatives to advance disciplines on export restrictions were largely frustrated because the topic was not included in the Doha Mandate, in December 2015 WTO members openly acknowledged that “members have different views on how to address the negotiations”

and that some members do not reaffirm the Doha mandates, “as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations.”⁶⁹⁷

5.3 ATTEMPTS FOR REFORM OUTSIDE THE WTO

As WTO negotiations are not going well, there is a need to discipline export restrictions of raw materials through different instruments between resource-exporting and resource-importing countries. This subsection reviews ongoing lawmaking processes occurring outside the WTO. This exercise allows us to become familiar with different countries’ views and to understand export restrictions on raw materials. Through international organizations, member countries exchange information quickly and regularly communicate existing laws and policies to other states.⁶⁹⁸ These shared understandings among actors in different forums contribute to the formulation of potential solutions, which are proposed in Chapter 6.

Absent sufficient progress at the WTO, countries and regional blocs have turned to plurilateral arrangements. Existing mechanisms and possibly new multilateral forums dedicated to raw materials can help to comprehensively and decisively address export restrictions and perhaps other trade-policy issues in the raw materials sector.⁶⁹⁹ Specifically, international organizations comprising resource-producing countries promote international standards by a) collecting and analyzing the legal systems and laws

⁶⁹⁷ Nairobi Ministerial Declaration, *supra* note 633, ¶ 30.

⁶⁹⁸ JUNJI NAKAGAWA, NATIONALIZATION, NATURAL RESOURCES AND INTERNATIONAL INVESTMENT Law 160 (2018).

⁶⁹⁹ OECD, *supra* note 11, at 15.

of countries; b) identifying desirable principles for like-minded countries and standardizing those principles; c) promoting adjustment and integration of international standards into legal systems.⁷⁰⁰ In other ways, the process of lawmaking has dramatically increased the importance of strengthening shared understanding across countries. While various international institutions are able to define this shared understanding, the following institutions are progressively becoming advanced mechanisms of international economic cooperation and decision-making.

UNCTAD

With respect to international trade and commodities, UNCTAD offers “analysis and advice and seeks to build consensus, strengthen capacity and promote partnerships for trade policy, trade negotiations, trade in goods and services..., and managing issues arising at the intersection of trade, the environment....”⁷⁰¹

The 2030 Agenda for Sustainable Development states that by 2030, the world community shall achieve the sustainable management and efficient use of natural resources.⁷⁰² UN members agreed to promote a universal, rule-based, open, non-discriminatory and equitable multilateral trading system under the WTO, including through the conclusion of negotiations under its Doha Development Agenda.⁷⁰³ At the same time, UN member states declared that “every State has, and shall freely exercise, full permanent sovereignty over all its wealth, natural resources and economic activity for the

⁷⁰⁰ NAKAGAWA, *supra* note 698, at 160.

⁷⁰¹ UNCTAD Website, <http://unctad.org/en/pages/DITC/DITC.aspx>, (last visited January 4, 2017).

⁷⁰² G.A. Res. A/Res/71/313, Goal 12, Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development (Jul. 6, 2017).

⁷⁰³ *Id.* Goal 17.

full benefit of all, for today's generation and for future generations."⁷⁰⁴ UNCTAD firmly believes that increasing transparency and better understanding of export restrictions can help policymakers, trade negotiators, and researchers to strike a delicate balance between reducing export restrictions and preserving public objectives.⁷⁰⁵

Within the UN system, the International Lead and Zinc Study Group (ILZSG), the International Copper Study Group (ICSG), and the International Nickel Study Group (INSG). The ICSG has twenty-four members, including Australia, China, the European Union, and the United States. The INSG has fifteen, including Brazil, Australia, Japan, and Russia (but not the United States or China). The ILZSG has thirty members, including China and the United States. These study groups aim to create market transparency by providing data on production, consumption, trade, and prices, as well as national policy approaches such as environmental legislation.⁷⁰⁶ However, these initiatives do not go far enough. Concentrating on a certain raw material makes sense, but the remit of the study groups is generally too narrow.⁷⁰⁷

Group of Twenty

The Group of 20 (G20) process has the opportunity to significantly help resolve global challenges.⁷⁰⁸ Among those challenges, trade of mineral raw materials is crucial. The G20

⁷⁰⁴ *Id.* ¶ 18.

⁷⁰⁵ UNCTAD Website, <http://unctad.org/en/Pages/DITC/Trade-Analysis/Non-Tariff-Measures.aspx>, (last visited January 9, 2018).

⁷⁰⁶ International Lead and Zinc Study Group, <http://www.ilzsg.org/static/home.aspx>; International Copper Study Group, <http://www.icsg.org>; International Nickel Study Group, <http://www.insg.org> (last visited October 11, 2012).

⁷⁰⁷ Stormy-Annika Mildner & Hanns Guenther Hilpert, *Fragmentation or Cooperation in Global Resource Governance? A Comparative Analysis of the Raw Materials Strategies of the G20*, 13 (SWP Research Paper 1/2013), <http://nbn-resolving.de/urn:nbn:de:0168-ssoar-363586>.

⁷⁰⁸ Mike Callaghan, *G20 and Development*, 3(2) SOUTH ASIAN.J.MACROECONOMICS.PUBLIC FIN. 155, 156(2014).

unites the most important producers and consumers of mineral raw materials.⁷⁰⁹ Given its economic policy coordinating function, the forum of the G20 offers an opportunity to address global questions on raw material production, consumption, and trade.⁷¹⁰ Collectively, G20 members represent all inhabited continents, 85% of global economic output, two-thirds of the world's population, 75% of international trade, and 80% of global investment.⁷¹¹ In addition, G20 members make up a critical proportion of the international raw materials market. This applies to both production (72% of global mining production) and consumption (84% of global consumption of refined minerals) of mineral raw materials.⁷¹² Whereas G20 countries with high global raw materials consumption are the United States, Japan, Germany, South Korea, India, and China, the largest producers of mineral raw materials are China, Australia, Brazil, and Canada.⁷¹³ With the world's largest consumer and producer countries among its members, the G20 offers a promising forum to set an agenda that could eventually improve international raw materials governance.⁷¹⁴ Members of the G20 reaffirmed their commitment to refrain from raising new barriers to investment and trade, from imposing new export restrictions, or implementing inconsistent WTO measures to stimulate exports.⁷¹⁵ They further agreed to minimize any negative

⁷⁰⁹ Mildner & Hilpert, *supra* note 707, at 5.

⁷¹⁰ *Id.*

⁷¹¹ G20, Statistics, <https://www.g20.org/en/g20/what-is-the-g20> (last visited January 15, 2018).

⁷¹² Manfred Dalheimer, *Entwicklungsfaktor Rohstoff [development-inducing raw materials]*, in workshop Ziele und Instrumente der Deutschen Rohstoffpolitik: Die Versorgung der deutschen Wirtschaft mit Roh- und Werkstoffen für Hochtechnologie – Präzisierung und Weiterentwicklung der deutschen Rohstoffstrategie, Büro fuer Technil-Abschätzung beim Deutschen Bundestag und Fraunhoferinstitut fuer System-und Innovationsforschung ISI (Berlin, 2011).

⁷¹³ Mildner & Hilpert, *supra* note 707, at 17.

⁷¹⁴ *Id.*

⁷¹⁵ U.N. Secretary-General, *International Trade and Development*, U.N.Doc.A/64/11 (July 27, 2009); OECD, WTO and UNCTAD, *Reports on G20: Trade and Investment Measures 3* (May to Mid- October 2011); OECD, WTO and UNCTAD, *Reports on G20: Trade and Investment Measures 3* (May to Mid-October 2012).

impact on trade and investment of domestic policy actions, including those taken to support their financial sectors, and to refrain from financial protectionism that might constrain global flows of capital, especially to developing countries. In particular, the G20 recognizes that export restrictions are increasingly a problem in international trade⁷¹⁶ and underscores the need to discipline export restrictions for which no agreements currently exist.⁷¹⁷ With regard to the international raw materials market, the G20 called for “enhanced transparency... and...appropriate regulation and supervision of participants in these markets.”⁷¹⁸

Because the global trade regime represented by the WTO does not provide a strong discipline on export restrictions, large trading powers such as the EU, the U.S., Japan, and Turkey have attempted to extract more far-reaching commitments in the context of PTA.⁷¹⁹ Unfortunately, one or a few countries acting alone cannot solve these challenges, because policy measures that may initially seem rational at the national level can, in the worst case, lead to collectively adverse outcomes at the global level.⁷²⁰ The G20 states’ different interests, objectives, and instruments of choice interfere, to a certain extent, with effective international raw materials governance.⁷²¹ Nevertheless, the G20 agreed that improved transparency on strategies and policies, strengthened

⁷¹⁶ Mildner & Hilpert, *supra* note 707, at 8.

⁷¹⁷ Callaghan, *supra* note 708, at 169.

⁷¹⁸ G20, Cannes Summit Final Declaration, section 32 (Nov.4, 2011), <http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html> (last visited January 15, 2018).

⁷¹⁹ Langlet, *supra* note 31, at 218.

⁷²⁰ Mildner & Hilpert, *supra* note 707, at 7.

⁷²¹ *Id.* at 8,15.

communication, and well-established mutual trust will be preconditions for a global raw materials discipline that can effectively tackle the challenges facing the global market.

OECD

The OECD was established in 1960 when eight European countries, the United States, and Canada joined forces to create an organization dedicated to economic development.⁷²² Today, it has thirty-five members from North and South America, Europe, and the Asia-Pacific region, including the world's most advanced countries and emerging countries.⁷²³ The OECD's recommendations provide governments with guidance on principles, mechanisms, and institutions to improve their respective regulatory frameworks.⁷²⁴

Since 2009, the OECD has undertaken a research program on the use of export restrictions on industrial raw materials.⁷²⁵ In general, the OECD's research finds that countries employing restrictions on raw material exports have had mixed success in achieving their policy objectives, with some countries suffering net negative effects, especially over time.⁷²⁶ The research also shows that export restrictions have negative consequences for trading partners and international markets, resulting in a net reduction in global welfare.

⁷²² See OECD Website, <http://www.oecd.org/about/membersandpartners/>, (last visited January 9, 2018).

⁷²³ *Id.*

⁷²⁴ Martin Lampe et al., *Trade-Related International Regulatory Co-operation: A Theoretical Framework*, 7 (OECD Trade Policy Papers No.195, 2016).

⁷²⁵ UNCTAD, GLOBAL COMMODITIES FORUM REPORT 10 (2015).

⁷²⁶ *Id.*

The OECD stresses the importance of better control and more transparent use of export restrictions.⁷²⁷ It further encourages transparency norms in the WTO that can help to form legal requirements that governments must use when they develop and implement export restrictions.⁷²⁸ Overall, the OECD member countries agree that a multilateral collaboration would be the most effective way to make lasting progress on disciplining export restrictions, as the current discipline on import-restricting trade instruments has done.⁷²⁹

Other Intergovernmental Forums

Even though international trade law does not impose any obligation to protect non-trade values, it should foster a sustainable supply of mineral resources by not thwarting individual states' efforts or through international cooperation to protect environmental and social values affected by extraction, trade, and use of mineral resources.⁷³⁰ One attempt at cooperation focused on sustainability is the Intergovernmental Forum on Mining, Minerals, Metals, and Sustainable Development (IGF) established in 2005.⁷³¹ It is the only intergovernmental forum that permits mining ministries from all over the world to exchange views on the challenges facing mining⁷³² and has a membership of more than sixty countries, dominated by developing countries and a few resource-rich industrial countries such as Canada, Russia, and the U.K. The forum, which aims to enhance and

⁷²⁷ OECD, *supra* note 11, at 14.

⁷²⁸ *Id.*

⁷²⁹ *Id.* at 15.

⁷³⁰ Langlet, *supra* note 31, at 202, 222.

⁷³¹ See the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development web site, <http://www.globaldialogue.info/> (last visited 30 December 2017).

⁷³² Mildner & Hilpert, *supra* note 707, at 13.

promote the contribution of the mining, minerals, and metals sector to sustainable development, traces its roots to paragraph 46 on mining, minerals, and metals in the Johannesburg World Summit Plan of Implementation.⁷³³ It focuses largely on the social and ecological impacts of mining operations and the ways in which mining can make a greater contribution to local development.

The International Resources Panel (IRP) of the United Nations Environmental Program (UNEP) is a first step toward a comprehensive approach to global management of natural resources.⁷³⁴ It produces scientific information on the sustainable use of natural resources and provides information on environmentally compatible economic growth. Minerals recycling is one important topic. However, the IRP is not designed to develop regulation.

This and other international organizations fulfill a similar function: to become relevant to the formulation of compromised solutions among import-dependent industrialized countries and net-exporting countries. Apparently, the issues of secure supply and sustainable supply are intertwined and cannot be effectively addressed in isolation. Unfortunately, as the above-mentioned bodies do not have a task to develop binding standards, their efficacy remains limited. Epistemic communities or norm entrepreneurs initiate and shape debates, but only a community of practice can instantiate and sustain the concepts, norms, and practices that foster a regime.⁷³⁵ Thus, the WTO

⁷³³ World Summit on Sustainable Development, A/CONF.199/20 *Johannesburg Declaration on Sustainable Development*, 20 (Sep 4, 2002).

⁷³⁴ Mildner & Hilpert, *supra* note 707, at 14.

⁷³⁵ BRUNNEE & TOOPE, *supra* note 51, at 144.

remains the most effective forum for countries to address their business concerns over export restrictions in a systemic manner.

5.4 CONCLUSION

Analysis of the proposals on export restrictions tabled in the course of the Doha negotiations has shown that discussions within the WTO have focused on three main issues: i) the question of transparency; ii) the question of establishing a standard discipline that shall govern the use of export taxes on a system-wide level as a way to ensure predictability; iii) the question of establishing the purposes for and conditions under which export restrictions might be used to preserve flexibility. With regard to transparency, the revised EU submission on export taxes proposes stronger notification requirements, which could ensure that existing transparency obligations are “made operational and enforced in a satisfactory manner.”⁷³⁶ Likewise, the proposed Protocol on Transparency in Export Licensing introduces procedural rules aimed at ensuring effective, substantial GATT rules on transparency in employing export licensing measures.⁷³⁷ Both proposals address the problem of transparency in the use of export restrictions on mineral raw materials.

As to the reform of WTO disciplines on export taxes, the EU proposals attempted to find an approach that could ensure an optimal trade-off between increased predictability in the use of such instruments and political feasibility. In the initial proposal, the EU advocated a “radical” solution, namely, a new WTO Agreement on Export Taxes

⁷³⁶ *Revised Submission on Export Taxes*, *supra* note 637, ¶ 7.

⁷³⁷ Communication from Japan, the U.S., *Enhanced Transparency on Export Licensing*, *supra* note 677, ¶ 2.

that forbids export taxes. However, because of the need to garner developing countries' support, the EU shifted to a less ambitious proposal. The revised submission on export taxes advocates a system-wide scheduling and binding of export taxes at a level to be negotiated, as already contemplated in the GATT. Through the negotiation of export duty concessions in WTO members' GATT schedules, the proposal provides a greater comparability between WTO rules on export taxes and import tariffs. As a result, it takes a step toward correcting the inconsistencies linked to the fragmentation of current WTO rules on export duties.

There is no doubt that the export-restriction proposals described will remain an important reference point for future attempts to reform WTO rules on export restrictions. The proposals identified the weak elements in the WTO disciplines that need to be addressed most urgently, and shed light on the orientation of both import-dependent and net-exporting developing-country members in terms of "how far" new (or strengthened) rules could go to improve transparency and predictability. Thus, the analysis of the Doha proposals, particularly those on export taxes, offers useful insights for designing new proposals to achieve balanced and equitable rules on export restrictions.

The latter section of this chapter has provided a simple conceptual framework for understanding the foundational paradigms of the different conceptions of export restrictions that have placed import-dependent and resource-endowed WTO members in opposition. It also explained how these paradigms have evolved outside the WTO, alongside structural changes affecting the world economy and the consolidation of international law principles relevant for global mineral resources management. The

objective was to identify the scope and targets that a proposal for reformed WTO rules on export restrictions should include, to respond to the legitimate but divergent concerns of both sides.

While plurilateralism has its place, it is insufficient to address the outstanding issues on raw materials trade and development, which are of central interest to mineral resource-dependent countries. Accordingly, both import-dependent and resource-endowed countries largely agree that a robust multilateralism is vital to maintaining an efficient, equitable global trading system.⁷³⁸ The discourse outside the WTO shows that specific issues to be addressed by any reform stem from two fundamental stances: first, that export restrictions, including export taxes, should be strictly disciplined to avoid abuse as beggar-thy-neighbor policies and industrial policy instruments that create an unfair advantage for domestic industries; second, that the WTO legal framework should acknowledge the developmental function of export restrictions and specific flexibilities should be available.

On the basis of this framework, the next chapter proposes different options to shape the conceptual design for a prospective regulatory framework on raw materials trade restrictions in the WTO legal system.

⁷³⁸ UNCTAD, Global Commodities Forum Report 4 (2015).

CHAPTER 6

PROSPECTIVE REGULATORY FRAMEWORK

6.1 INTRODUCTION

This chapter attempts to identify the “constituent elements” of a reform that could constitute a workable solution for the legitimate concerns of mineral-dependent countries and resource-endowed developing countries’ policy justifications. The chapter builds on the conclusions drawn from the analysis of existing WTO disciplines and PTA governance. Although some scholars argue that future export rules should be addressed in bilateral and/or plurilateral preferential trade agreements,⁷³⁹ this thesis highlights the importance of the multilateral trade rules and proposes solutions for the reform of the WTO export discipline.

Section 6.2 discusses numerous constituting elements that could be used to reform relevant international trade disciplines. It helps to shape a conceptual design for a regulatory framework on raw materials trade restrictions in the WTO legal system. Section 6.3 discusses possible contributions of PTA practices to WTO law. Section 6.4 assesses different predictions and alternatives for renewing engagements to improve WTO governance over export restrictions. Conclusions and recommendations follow.

6.2 CONSTITUTING ELEMENTS

This section identifies specific elements that could be incorporated, either selectively or comprehensively, in a reform of relevant WTO rules. Specifically, it identifies the building

⁷³⁹ Mildner & Lauster, *supra* note 140, at 251; MATSUSHITA ET AL., *supra* note 378, at 544.

blocks of any solution that could negotiate the legitimate concerns of import-dependent WTO members and resource-endowed developing countries' policy assertions.

6.2.1 Enhanced Transparency

Lack of transparency is a main shortcoming of the WTO legal regime on export restrictions and is responsible for uncertainty in international commodity markets.⁷⁴⁰ It is not surprising that the notion of transparency is prominent in the discourse on export restrictions on mineral raw materials in the WTO and is a core objective in all of the relevant Doha proposals.⁷⁴¹ Increasing transparency is therefore essential for any WTO reform in the area of export restrictions. As shown in Chapter 5, ongoing proposals have all focused on strengthening notification requirements as a way of enhancing transparency in the implementation of export taxes and other forms of export restrictions.

To date, “export duties” are subject to the general notification regime established in the Uruguay Round Ministerial Decision on Notification Procedures, whereas “export restrictions” fall within the scope of the Decision on Notification Procedures for Quantitative Restrictions, adopted by the Council for Trade in Goods in 1995 and recently revised in 2012.⁷⁴² However, the former has had little, if any, practical effect on members' level of transparency.⁷⁴³ Even though research⁷⁴⁴ reveals that countries have imposed quantitative restrictions in recent years, only eight members have communicated for the introduction of fourteen export prohibitions and restrictions since 1995, and only one

⁷⁴⁰ ESPA, *supra* note 38, at 274.

⁷⁴¹ See above, Chapter 5, Section 5.2.

⁷⁴² See above, Chapter 3, Section 3.2.

⁷⁴³ Revised Submission on Export Taxes, *supra* note 637, ¶ 7.

⁷⁴⁴ Giovanni Anania, *Agricultural Export Restrictions and the WTO* 17 (ICTSD Issue paper No.50, Nov 2013).

country, Kyrgyz Republic, notified of its export restrictions from 2005 to 2012.⁷⁴⁵ Thus, WTO members believe that future transparency provisions on export restrictions would need to ensure that existing obligations are enacted and enforced in a satisfactory manner.

Against this backdrop, action on transparency could aim to establish a centralized regime for communicating export restrictions, ideally encompassing both export taxes and any type of quantitative restrictions that limit exports.⁷⁴⁶ This regime could build on the model established by the 2012 revision of the Decision on Notification Procedures for Quantitative Restrictions and introduce stricter time limits and content requirements for WTO member countries, drawing from WTO members' existing proposals.⁷⁴⁷ For example, Article 7 of the proposed WTO Agreement on Export Taxes requires WTO members to provide notification of any new export taxes or similar measures within sixty days of the measures' entry into force, indicating all relevant information for importing WTO members.⁷⁴⁸ Moreover, in the revised submission on export taxes, the EU referred to the Understanding on the Interpretation of Article XVII of the GATT 1994, according to which each WTO member shall "ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the effect...on international trade."⁷⁴⁹

⁷⁴⁵ WTO Secretariat, *Background Paper on Export Prohibitions and Restrictions*, WTO Doc. TN/AG/S/28, (March 20, 2013).

⁷⁴⁶ ESPA, *supra* note 39, at 276.

⁷⁴⁷ See above, Chapter 5, Section 5.2.

⁷⁴⁸ *Id.*

⁷⁴⁹ Communication from Japan, the U.S., on Enhanced Transparency on Export Licensing, *supra* note 677, ¶ 2.

WTO members could thus be required to make complete notifications of any export restrictions in force every year and to notify any new measures or modifications thereof within a reasonable period of time before the date of entry into force. Counter-notification could also be allowed. The WTO Council for Trade in Goods or a working party, per the Understanding on Article XVII of the GATT, could then regularly review the notifications and counter-notifications on behalf of the council and evaluate the adequacy of the notifications and the need for further information, including the effects of the notified measures on trade. Alternatively, a Committee on Export Restrictions could also be established to this end.⁷⁵⁰ Article IV:7 of the Marrakesh Agreement allows the Ministerial Conference to establish additional committees “with such function as it may deem appropriate.”

The introduction of consultation requirements, also to be administered by the committee, could also strengthen the notification regime. All information provided by members could then be made available to the public. A report could also be circulated every year based on such information.⁷⁵¹

6.2.2 Export Duty Concessions

Another major shortcoming of the WTO discipline is the lack of a system-wide regulatory framework on export taxes.⁷⁵² Any attempts at reform should thus address the inconsistencies arising from the current fragmentation of relevant WTO rules, particularly the WTO accession regime on export duties, and create a general principle to regulate

⁷⁵⁰ ESPA, *supra* note 39, at 277.

⁷⁵¹ Council for Trade in Goods, *Decision on Notification Procedures for Quantitative Restrictions*, ¶ 4.7, WTO Doc. G/L/59/Rev.1 (July 3, 2012).

⁷⁵² See above, Chapter 3, Section 3.1 and Chapter 5, section 5.2.

such measures in order to create balance among WTO members. Any such discipline would need to ensure a reasonable balance between preventing export-tax abuses and ensuring sufficient flexibility, to keep all four tiers of members interested in endorsing a proposal that increases the level of commitments, albeit for different reasons. In this regard, the history of the Tokyo and Doha Rounds negotiations show that most WTO members are not ready to accept a blanket prohibition on export taxes, even if mitigated by extended flexibilities.⁷⁵³

However, member states could agree to negotiate export duty commitments on a product-by-product basis in the form of concessions to be listed in their GATT schedules, as long as they can agree on adequate flexibilities.⁷⁵⁴ Such a “negotiated solution” is not original. As explained above, the GATT already contains a set of provisions that allow WTO members to negotiate export duty concessions in the same way as they do for import duty concessions. Those provisions are Article XXVIII (bis) and Article II:1 (a) of the GATT. The former encourages WTO members to engage in such negotiations, while Article II:1(a) guarantees the legal enforceability of export duty concessions once they are included in the GATT schedules of WTO members.⁷⁵⁵

The Russian Federation’s choice to create a new part in its Schedule of Concessions specifically devoted to “Export Duties” (Part V) *de facto* represents the first

⁷⁵³ See above, Chapter 5, Section 5.2.

⁷⁵⁴ Korinek & Bartos, *supra* note 567, at 149, 155.

⁷⁵⁵ See above, Chapter 3, Section 3.2.

example of systemic incorporation of export duty concessions into a member's GATT schedule, in accordance with what the GATT provisions explicitly allow.⁷⁵⁶

Although WTO members have, thus far, no incentive to schedule and bind export duties, the proliferation of export taxes, on the one hand, and the consolidation of the Appellate Body approach to the relationship between export duty commitments assumed under accession protocol provisions and the GATT 1994, on the other hand, may induce members to reconsider a "negotiated solution." This would bring positive outcomes for different categories of WTO members and the multilateral trading system in general.

These outcomes include the following points:

- 1) A negotiated solution would be in keeping with the spirit of the GATT, which fundamentally opts for "tariffs" as "the preferred and acceptable form of protection."⁷⁵⁷
- 2) It would represent a step forward in the WTO regulation of export duties in that, as the European Union also admitted in its revised submission on export taxes, the "scheduling and binding of members' export taxes" could provide an appropriate basis to ensure adequate predictability.⁷⁵⁸
- 3) By bringing all export duty commitments assumed by WTO members into the GATT framework as per Article II:7 of the GATT, a negotiated solution would harmonize the procedure used to assume obligations in the area of export

⁷⁵⁶ Working Party on the Accession of Russian Federation, *Schedule CLXV-the Russian Federation, the Schedule of Concessions and Commitments on Goods*, Part V, WTO Doc. WT/ACC/RUS/70/Add.1 (Nov. 17, 2011).

⁷⁵⁷ Panel Report, *Turkey-Restrictions on Imports of Textiles and Clothing Products*, ¶ 9.63, WTO Doc. WT/DS34/R (adopted May.31, 1999) [hereinafter *Turkey-Textile Panel Report*].

⁷⁵⁸ Revised Submission on Export Taxes, *supra* note 637, para. 8.

duties by all WTO members and, thus, make available the relevant GATT adjustment procedures and exceptions across the board.

- 4) In addition, this solution would allow specific flexibilities envisaged for least-developed countries and vulnerable developing countries, pursuant to the 1979 Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (The Enabling Clause).⁷⁵⁹ Various approaches are possible: one possibility is to allow these members to maintain scheduled export taxes unbound for a number of tariff lines, to be negotiated based on their specific development needs, as the EU proposed in its revised submission on export taxes.⁷⁶⁰ Another option might be to accord special, differential treatment depending on whether the member in question is a significant exporter (supplying more than 5% of global exports) of a specific product.

The modification or withdrawal of export duty concessions would still have to occur in accordance with the conditions in Article XXVIII, which guarantee predictability and ensure that the overall level of concessions remains balanced.⁷⁶¹ Likewise, GATT exceptions also set forth detailed conditions to prevent any abuses by WTO members.

⁷⁵⁹ Decision on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, ¶ 5, Nov. 28, 1979, GATT Doc. L/4901, BISD 26s/203, “The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter’s development, financial and trade needs.”

⁷⁶⁰ See above, Chapter 5, Section 5.2.

⁷⁶¹ GATT 1994, *Article XXVIII-Modification of Schedules*, The principle of Article XXVIII of the GATT is that the renegotiation of concessions shall be accompanied by compensatory adjustments. Without those,

Therefore, scheduling and binding export duties on a product-by-product basis may constitute a win-win solution for all four tiers of WTO members.

- a) The first tier of members would see its margin of maneuver restricted but would profit from increased predictability in trade partners' use of export duties. This outcome is clearly a priority for import-dependent industrialized countries that, over the years, have advocated a stronger approach toward beggar-thy-neighbor and subsidy-equivalent export duties. Large, emerging economies belonging to the first tier, such as India, would also gain from such negotiations inasmuch as their participation would stimulate other members to join, as in a virtuous cycle. Aside from their immediate interests in defending the legitimacy of export duties, such countries need to consider their long-term interests as countries whose intensive industrialization requires, and will increasingly depend on, imports of a wide range of raw materials. Finally, LDCs and small, developing countries would have no practical reasons to object to such an approach, as long as they have adequate flexibilities while enjoying greater levels of predictability resulting from other WTO members' commitments.
- b) The second tier of WTO members could also, in principle, experience erosion of their margin for maneuver if they are asked to assume commitments beyond those already inscribed in their GATT schedules, depending on the coverage

affected members maintain the right to withdraw substantially equivalent concessions in order to "maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than before."

of the negotiations. Yet, these members have already scheduled and bound the export duty rates on those products of interest to trade partners.⁷⁶²

- c) The third and fourth tiers of WTO members would also gain from a negotiated solution. In addition to the advantages of increased overall predictability, this solution would allow them to incorporate their WTO-plus obligations on export duties into their GATT schedules, thus “fixing” the systemic imbalances of the current WTO accession regime on export duties. The integration of existing WTO-plus obligations on export duties in an appropriate part of newly acceded members’ schedules would not diminish their scope and coverage of the obligations. According to Qin, the incorporation of WTO-plus obligations on export duties into newly acceded members’ GATT schedules would not require amending the respective accession protocol provisions. In her view, “adding Part V to a GATT schedule is a matter of amending the GATT schedule.”⁷⁶³ She further suggests that Part V of such schedules would not need to reproduce the whole list of products subject to a 0% binding but could refer to relevant accession protocol provisions.⁷⁶⁴ Eventually, the General Council could adopt “a decision to approve the incorporation ...following the same procedures for approving the terms of accession...under the Decision-Making Procedures Under Article IX and XII of the WTO Agreement.”⁷⁶⁵

⁷⁶² See above, Chapter 2, Section 2.3.1.

⁷⁶³ QIN, *supra* note 40, at 1183.

⁷⁶⁴ *Id.* at 1182.

⁷⁶⁵ *Id.* at 1184.

In conclusion, the negotiation of export duty concessions among WTO members on a system-wide basis allows all members to enhance the predictability of export taxes while not necessarily depriving developing countries of the policy space to use such measures in legitimate circumstances. Since a negotiated solution allows system-wide rules governing the scheduling and binding of such measures in GATT schedules, this option could receive broad support among WTO members.

6.2.3 Refining GATT Flexibilities

Previous chapters show that the prospect of reform could be realistic if a proposal included flexibilities that acknowledged the legitimate developmental function of export duties under certain circumstances. In this respect, the first EU submission on export taxes circulated within the NAMA Negotiating Group during the Doha negotiations not only clarified the applicability of GATT adjustment procedures to tariff concessions and GATT exceptions for both import and exports; the EU submission also confirmed that “WTO members, and in particular developing countries, may resort to export taxes by reference to GATT Article XVIII on governmental assistance to economic development and GATT Article XII on safeguarding the balance of payment.”⁷⁶⁶ In other words, the proposal recognized the legitimacy of export duties for addressing balance of payments disequilibria and infant industry-protection purposes, that is, situations that the GATT already acknowledges on the import side.⁷⁶⁷

The extension of relevant import-specific exceptions in the GATT was contemplated as part of a more comprehensive agreement on export taxes whose

⁷⁶⁶ Negotiating Proposal on Export Taxes, *supra* note 636, ¶ 1,2.

⁷⁶⁷ See above, Chapter 2, Section 2.3.2.

underlying principle was the general elimination of such measures.⁷⁶⁸ In this regard, the European Union might have perceived it as a necessary compromise to garner support for such an ambitious approach among developing-country members; indeed, the revised submission on export taxes advocating for a negotiated solution did not reiterate it. Yet, as shown above, the unavailability of economic development exceptions may have fueled WTO members' lack of engagement in the negotiation of export duty concessions, as admitted in the GATT.

In light of the conflicting interests in the debate over export restrictions in the multilateral trading system, confirming the availability of relevant GATT economic exceptions may develop a climate of trust for developing countries and increase motivations in the negotiation of export duty concessions.⁷⁶⁹ In principle, depending on the scope of the reform, relevant import-specific GATT exceptions may not necessarily be confined to violations of WTO rules on export taxes but could be extended to Article XI:1 GATT-inconsistent export restrictions, as already envisaged in the GATT on imports.⁷⁷⁰ Yet, providing the availability of Article XII, Article XV:9, and Article XVIII of the GATT on the negotiation of export duty concessions would encourage WTO members to prefer export taxes over export restrictions, in keeping with the spirit of the multilateral trading system.⁷⁷¹

⁷⁶⁸ See above, Chapter 5, Section 5.2.

⁷⁶⁹ ESPA, *supra* note 38, at 283.

⁷⁷⁰ See above, Chapter 2, Section 2.2.

⁷⁷¹ GATT 1994, art. XII, art. XV:9, art. XVIII. Under these exceptions, WTO members are thus encouraged to use tariff-like measures as the preferred tools to respond to balance of payments, exchange arrangements and economic development needs.

Finally, Articles XII, Article XV:9, and XVIII of the GATT established specific conditions, rules, and procedures that aim to ensure that recourse to import tariffs in excess of those set forth in a member's GATT schedule (or import restrictions in derogation of Article XI:1 GATT) occurs only after the WTO member has begun negotiations or notified and consulted affected WTO members. In the case of BoP provisions, in particular, the Committee on Balance of Payment Restrictions specifically presides over the administration of Articles XII and XVIII (b) of the GATT to ensure that WTO members are transparent in the use of such exceptions.⁷⁷²

The specific exception enshrined in Article XI:2(a) could be elaborated by borrowing PTA provisions regarding shortage concerns. The exception needs to list the circumstances that constitute a critical shortage of products essential to the exporting countries. This list could document shortages in essential quantities of domestic materials for a domestic processing industry when the domestic price of such materials is below the world price as part of a governmental stabilization plan. The list could also document difficulties in the acquisition or distribution of products in general, local shortages, and when the situations above cause or are likely to cause major difficulties for the exporting member. For any of the above-mentioned situations, members could be required to take appropriate measures in accordance with the established conditions and procedures. Moreover, such measures would not be applied in a manner that would constitute arbitrary or unjustifiable discrimination where the same conditions prevail or a disguised

⁷⁷² MAVROIDIS, *supra* note 389, at 75–80.

restriction on trade, and would be eliminated when the conditions no longer justify their maintenance.

6.2.4 Export Safeguard Mechanism

As explained above, WTO members may use export restrictions, in principle, as safety valves to relieve export surges, caused either by world price increases or speculative behavior in international markets that could disrupt domestic supply or increase price volatility in the domestic market. These effects would harm downstream processing industries and, therefore, economic diversification.⁷⁷³

The question is whether and to what extent exporting countries should be entitled to protect domestic processing sectors from competitors in importing countries. In this regard, a safeguard clause exists in Article XIX of the GATT but applies to imports only.⁷⁷⁴ Moreover, this exception only allows WTO members to use safeguards when a surge of imports causes or threatens serious injury to domestic producers of like or directly competitive products.⁷⁷⁵ This condition could not apply identically to export safeguards as the domestic producers would be downstream industry using a raw material at issue.

In principle, an export safeguard mechanism modeled on the so-called special agricultural safeguards (SSGs) envisaged in Article 5 of the WTO Agreement on Agriculture (AoA) could be more useful for exports. SSGs consist of import tariff increases based on price and quantity triggers; such increases follow automatically after imports increase above or domestic prices fall below certain levels. For exports, this logic could

⁷⁷³ See above, Chapter 2, Section 2.3.2.

⁷⁷⁴ See above, Chapter 3, Section 3.4.2.

⁷⁷⁵ ESPA, *supra* note 38, at 284.

offer WTO members leeway to shield domestic producers from export surges or price spikes of mineral raw materials caused by external upward shifts in world demand.⁷⁷⁶

Amongst different concerns, the question of whether large suppliers of raw materials, should be entitled to such mechanisms under the same price and/or quantity triggers as LDCs and small developing economies may arise.⁷⁷⁷ Thresholds could vary to reflect differences in the imposing country's development stage or in the share of global exports.⁷⁷⁸ For instance, thresholds could vary between developing countries extremely dependent on commodity exports and unable to influence world prices of the taxed products and emerging economies holding large shares of world exports of the taxed materials.⁷⁷⁹

Similar to the case of SSGs, export safeguards could be made available only to those products for which export duty rates were scheduled and bound in members' GATT schedules, and could take the form of export tariff increases. Countries resorting to export safeguards could also be required to notify either the Council for Trade in Goods or a specific committee, depending on the transparency component of the WTO reform.⁷⁸⁰ Members scheduling and binding export duties into Part V of their GATT schedules could then reserve therein the right to use export safeguards.⁷⁸¹ Accordingly, members would,

⁷⁷⁶ ESPA, *supra* note 39, at 285.

⁷⁷⁷ *Id.*

⁷⁷⁸ *Id.*

⁷⁷⁹ *Id.*

⁷⁸⁰ Agreement on Agriculture, art.5.7, Apr.15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 [hereinafter AoA]: WTO members implementing SSGs shall give notice "in writing, including relevant data" to the Committee on Agriculture "as far in advance as may be practicable and in any event within 10 days of the implementation of such action."

⁷⁸¹ See AoA, art. 5.1.

in principle, be further encouraged to negotiate export duty concessions on a wider range of products.

In addition, as Japan, Korea, and Switzerland stated in their proposal on export prohibitions and restrictions for the Post-Bali work program,⁷⁸² any new export prohibitions or restrictions under Article XI.2(a) of the GATT 1994 should not normally occur for longer than twelve months and shall only be longer than eighteen months if the affected importing member states agree.

6.3 REFORMS BASED ON EXPERIENCES IN PREFERENTIAL TRADE AGREEMENTS

As Chapter 4 emphasized, many PTAs go beyond the WTO agreements in disciplining the use of export restrictions. It is therefore relevant to use such PTAs as inspiration for multilateral system reforms. We should regard such PTA provisions as examples of standard-setting for formulating rules at the multilateral level.⁷⁸³

Trade rules under the PTAs help to secure a more predictable and transparent trade environment, although they may not necessarily secure a stable supply of raw materials. For instance, Chapter 8 of the Japan-Australia EPA titled “Energy and Mineral Resources” solely addresses export restrictions. It provides that where a party intends to adopt an export prohibition or restriction on ... mineral resource good , it shall 1) seek to limit such prohibition or restriction to the extent necessary, giving due consideration to its possible negative effects on the other Party’s energy and mineral resources security⁷⁸⁴,

⁷⁸² Background Paper Export Prohibitions and Restrictions, *supra* note 745, ¶ 2.7.

⁷⁸³ Junji Nakagawa, *Free Trade Agreements and Natural Resources*, in EMERGING ISSUES IN SUSTAINABLE DEVELOPMENT 210 (Mitsuo Matsushita & Thomas J.Scheonbaum eds., 2016).

⁷⁸⁴ Economic Partnership Agreement, Jap.-Australia., art. 8.4.2 (a), Jan.15, 2015, [2015] ATS 2.

and 2) notify, as far in advance as practicable, to the other Party of such measure and its reasons together with its nature and expected duration⁷⁸⁵, and 3) provide the other Party with a reasonable opportunity for consultation with respect to any matter related to such measure.”⁷⁸⁶ Likewise, on export licensing, Article 8.5 of the Japan-Australia EPA establishes detailed rules to ensure that implementation of export licensing procedures be undertaken in a transparent and predictable manner. It requires that export licensing procedures be published as soon as possible to allow the other party and traders of the other party to become acquainted with them; all relevant information concerning the administration of the export licensing procedures must be provided to the other party, and consultations on the rules must be held; if a license application is not approved, an applicant of the other party must be given the reasons and the right of appeal or review.

The article also points out that investment rules must accompany trade rules to ensure that enterprises effectively engage not only in trade but also in upstream development projects. Due to the incomplete WTO discipline, the U.S., the EU, Japan, and Canada shifted their negotiating forum to discipline export restrictions from the stalled Doha negotiation on rules to the PTAs. However, at the same time, major powers intend to include their negotiating position at the stalled WTO negotiations on export restrictions in the provision of their PTAs. Import and export policies are asymmetrically regulated under the GATT/WTO. While import tariffs are multilaterally negotiated and strictly disciplined, export duties are generally not. This asymmetry allows for more bargaining

⁷⁸⁵ *Id.* art.8.4.2 (b).

⁷⁸⁶ *Id.* art.8.4.2 (c).

between exporters and importers of mineral raw materials⁷⁸⁷ and remains the same in the context of the Doha negotiations. On the import side, countries have moved towards the possible application of a Swiss formula to cut tariffs, which, as discussed above, implies a reduction in tariff escalation.⁷⁸⁸ On the export side, export restrictions are not under negotiation.

Some PTA provisions have the potential to inform future rulemaking in this area at the multilateral or plurilateral level.⁷⁸⁹ Analysis of the PTA export-restriction disciplines raises numerous concerns that may be included in a strengthened WTO discipline. These are provided below:

Procedural Rules for the Use of Export Restrictions. Several PTAs already include procedural rules for the use of export restrictions. Such procedures could require consultations between countries to determine whether conditions justify the use of such restrictions, before export restrictions can be applied.⁷⁹⁰

Controlling Market Share. In a 2010 International Centre for Trade and Sustainable Development (ICTSD) issue paper, Anania proposed that in order to implement export restrictions, countries must maintain a share of domestic production of the specific product exported in the recent past, or, alternatively, guarantee that a given proportion of this share is exported, for instance by having to export a share of domestic production no less than 80% of that observed in a given reference period.⁷⁹¹ This

⁷⁸⁷ Joelle Latina, Roberta Piermartini & Michele Ruta, *Natural Resources and Non-Cooperative Trade Policy* 26 (WTO Working Paper No. 2011/02, 2011).

⁷⁸⁸ *Id.*

⁷⁸⁹ OECD, *supra* note 11, at 14.

⁷⁹⁰ Korinek & Bartos, *supra* note 567, at 31.

⁷⁹¹ Anania, *supra* note 744, at 30.

approach would limit the effect of export restrictions on the world market by guaranteeing a proportionally similar supply of the product in question, and was included in proposals by Canada in 1999 and Japan in 2000.⁷⁹² Anania suggests that with this option, the exporting country can restrain increases in domestic prices while allowing domestic producers to benefit from higher international prices.⁷⁹³

Greater Precision, Transparency, and Accountability. The WTO discipline could more precisely define products on which export restrictions and taxes can be placed or on the time limits for application. Moreover, WTO regulations must require member states to provide greater transparency and accountability about measures to be established.

Refining Exceptions. Exceptions to the general ban on export restrictions in the GATT may be eliminated, or the scope of ambiguous situational exceptions should be narrowed. Moreover, to ensure existing supply chains, WTO regulations shall introduce conditions on the use of exceptions so that when export restrictions or taxes are implemented, they do not negatively affect other WTO members.

Agreement on list of products subject to exceptions. It is necessary to define exactly what qualifies as a good in the category of “exhaustible natural resources,” to make the WTO exception for this category more precise. Some scholars⁷⁹⁴ suggest that it may even be possible to agree on a list of products considered “exhaustible natural

⁷⁹² *Id.* at 30–31.

⁷⁹³ *Id.*

⁷⁹⁴ Korinek & Bartos, *supra* note 567, at 35.

resources.” This would specify which exports can be restricted. NAFTA, for instance, includes a positive list of products to which some situational exceptions may apply.

Political economy. Why do some countries sign different commitments with different partners, which include exceptions in some cases and not in others? The reasons probably lie in the domain of political economy. The political economy of export restrictions is a complex topic. For some exhaustible natural resources, resource-rich governments may face pressure from downstream industries to protect them indirectly by restricting exports of primary products, or they may try to foster investment in higher value-added products rather than exporting raw materials. These are important concerns for future discussions on export restrictions.

The undeniable trend since the Uruguay Round, reflected in WTO accession protocols and particularly in most PTAs, has been to impose stricter rules not only on export restrictions but also on export duties. The question of whether preferential consensus can translate into a multilateral agreement and reform on this issue remains to be seen.

6.4 ASSESSMENT OF PREDICTIONS AND ALTERNATIVES FOR REGULATORY FRAMEWORK

Strengthening the existing disciplines on export prohibitions and restrictions is a top priority for WTO members in the ongoing negotiations and beyond.⁷⁹⁵

Mining is a necessary evil and has been one of humankind’s earliest vocations, which is emphasized by the saying in the mining world: “If it can’t be grown, it has to be

⁷⁹⁵ Committee on Agriculture, Submission on Effective Disciplines on Export Prohibitions and Restrictions, ¶ 11, WTO.Doc. JOB/AG/115 (October 18, 2017).

mined.”⁷⁹⁶ Trade in mineral raw materials is often conducted through long-term supply contracts. Likewise, investment in extractive industry spans many years or even decades, from exploration through the termination of commercial production.⁷⁹⁷ It is, therefore, important for private firms engaging in trade and investment in these sectors to be able to anticipate a transparent and stable regulatory framework during their business operations. In brief, on one hand, international trade law plays an important role for any state lacking important mineral resources.⁷⁹⁸ On the other hand, developing countries are currently the main users of export restrictions and, thus, would lose the most from any new WTO discipline on the issue. These countries note that their governments employ export restrictions not because they are ideal but because they are one of the few tools available after trade agreements eliminated other tools such as import controls and producer subsidies. As a result, reform proposals submitted to the WTO received a cool response from developing countries. Countries claim to use export restrictions to return extraction and pollution to acceptable levels. If these tools are not available, is there an alternative solution?⁷⁹⁹ This is a logical question when the lack of multilateral regulatory reform in this area leaves countries with policy options that are suboptimal in terms of global welfare.

In the non-agricultural raw materials sector, countries and firms facing export restrictions may opt to build stockpiles and engage in bilateral supply deals that place

⁷⁹⁶ MIHIR DEB & SANJIB CHANDRA SARKAR, MINERALS AND ALLIED NATURAL RESOURCES AND THEIR SUSTAINABLE DEVELOPMENT 479 (2017).

⁷⁹⁷ Nakagawa, *supra* note 783, at 196.

⁷⁹⁸ Langlet, *supra* note 31, at 210.

⁷⁹⁹ Parra et al., *supra* note 49, at 38.

additional pressure on global supplies. Similarly, taking unilateral action against export restriction is not legally feasible. As the *US- Export Subsidies* case clarified,⁸⁰⁰ WTO law does not justify imposing countervailing duties on products manufactured by downstream sectors benefiting from the restriction of raw materials. Hence, consideration of the limitations of unilateral and bilateral measures against export restrictions reveals that the most optimal and welfare-enhancing solution would be the reform of the WTO rules.

Although different WTO negotiating groups have discussed export restrictions, unfortunately these discussions have made little headway.⁸⁰¹ Lack of consensus on a mandate on export restrictions under Paragraph 16 of the Doha Declaration has fundamentally compromised progress on the topic since the negotiations' launch.⁸⁰² These negotiations would thus have to be resumed, independent of the Doha Round's outcome, in the context of a new, post-Doha agenda. Since the rise of global value chains is considered one of the most significant trends of international trade today,⁸⁰³ it could potentially change the conventional North-South perspective on defensive and offensive interests on export restrictions.

Alternatively, those negotiations on export restrictions could be dissociated from the current and next round of WTO negotiations and form the basis for a critical mass agreement between different groups of WTO members or a plurilateral agreement, depending on the scope of the reform and the level of its ambition.

⁸⁰⁰ See Panel Report, U.S.-Export Subsidies.

⁸⁰¹ See Communication from Singapore on Export restrictions, *supra* note 692.

⁸⁰² ESPA, *supra* note 38, at 286.

⁸⁰³ See WTO, *WORLD TRADE REPORT: TRADE AND DEVELOPMENT: RECENT TRENDS AND THE ROLE OF THE WTO* 121,122 (2014).

Based on Section 6.2 of mapping out the elements or building blocks to be included in a possible reform of relevant WTO rules, this section proposes implementing options which endeavor to deliver a balanced result for all WTO members. The following options are examined below. These reform proposals attempt to optimize the trade-off between members' need to maintain policy space to address legitimate concerns and the need for more-stringent discipline to secure predictability and stability in the multilateral trading system. To the extent that transparency, predictability, and flexibility inform reform efforts regarding WTO disciplines on export restrictions, all WTO member states would gain from supporting such efforts.

6.4.1 New Regulation on Notification of Export Restrictions

The arbitrary nature of export restrictions undermines traders and investors' confidence in the international trading system. As a consequence, improving the transparency and predictability of these measures in an operational and enforceable manner is necessary more than ever. Not only states but also the global business community supports enhancing transparency and the reporting requirements on export restrictions.⁸⁰⁴

Strengthened notification requirements could be established in a decision adopted by the Ministerial Conference of the WTO. According to Article IV:1 of the Marrakesh Agreement, the Ministerial Conference has the authority to make decisions on all matters under any of the Multilateral Trade Agreements, if a member so requests. Likewise, the General Council may conduct the functions of the Ministerial Conference in intervals between the conference's biennial meetings, pursuant to Article IV:2 of the same

⁸⁰⁴ International Chamber of Commerce, World Business Priorities for the WTO Agenda: MC11 and Beyond, Statement at the WTO Ministerial Conference (December 12, 2017).

agreement. A decision on the transparency of export restrictions would fall within the scope of these provisions under the GATT. This decision could establish notification and documentation requirements and consultation procedures.

Accordingly, notifications should include the reasons for the imposition of the export prohibition/restrictions and the anticipated period during which the prohibition/restriction would remain. WTO members must also find agreement on the following questions:

- Would a thirty-day advance notification period constitute a “practicable” period for both exporters and importers?⁸⁰⁵
- Should there be any exceptions regarding the obligation to submit advance notifications?
- Is the term “critical shortage” clear in the context of GATT 1994 Article XI:2(a)?

Moreover, any member intending to institute temporary export restrictions shall consult, upon request, with any other member having a substantial interest as an importer, regarding any matter related to the proposed measure. The member instituting such export prohibitions or restrictions shall provide, upon request, such a member with necessary information, including relevant economic indicators. The member instituting the measure shall report the progress of consultations to the relevant WTO committee.

Nonetheless, certain exceptions or exemptions shall apply to net-importing countries. This means that developing countries that are net importers of specific mineral raw materials are exempt from the notification requirement for that specific mineral. To

⁸⁰⁵Communication from Singapore on Export Restrictions, *supra* note 692, at ¶ 4.1.

clarify the scope of this exemption, it is suggested that an eligibility criteria should be introduced to define a net-importing country for a specific mineral raw material. A group of countries, including Israel, Japan, Republic of Korea, Switzerland and others, suggests that the developing-country member claiming the right to use the exemption should provide the relevant WTO committee with data demonstrating that it is a net importer of the specific minerals concerned.⁸⁰⁶ Those countries suggest are also in a position that this justification should be based on data on average imports and exports of the mineral raw material for the preceding three years.⁸⁰⁷

6.4.2 Negotiations on Export Duty Concessions

An export duty is considered a legitimate means of protection in the same way as an import tariff is. As I will establish below, to negotiate and bind export duties is not only legally solid but also a pragmatic step forward.

Given that Article XXVIII (bis) explicitly encourages tariff negotiations for both imports and exports, negotiations on export duty concessions could, in principle, be launched in the next multilateral round without the need to amend the GATT or conclude a new WTO agreement, provided that members are willing to do so. The GATT Article XXVIII (bis) provides that:

“The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus **negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction** of the general level

⁸⁰⁶Communication from Japan, Korea, Switzerland, Export Prohibitions and Restrictions, *supra* note 693, ¶

8.

⁸⁰⁷ *Id.*

of tariffs and other charges **on imports and exports** and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time". (emphasis added)

The multilateral negotiation of export duty concessions, moreover, should follow or give effect to the incorporation of WTO-plus commitments on export duties assumed under accession protocol provisions by newly acceded WTO members.⁸⁰⁸ The agenda of negotiations would also need to reflect specific flexibilities for LDCs and small developing countries, along the texts of those the EU envisaged in its revised submission on export taxes.

The Director-General of the WTO, who oversees progress in any multilateral round, usually heads the Trade Negotiating Committee, in which representatives of all WTO members participate. In the meantime, WTO members could agree on specific modalities governing the negotiation of export duty concessions to be included in GATT schedules. Currently, the following modalities have been put into practice⁸⁰⁹:

- i) Request-Offer: two WTO members will negotiate tariff cuts (and the identity of the negotiating pair can change) until a mutually advantageous solution has been reached and the WTO has been notified;

⁸⁰⁸ See above, section 6.2.2.

⁸⁰⁹ MAVROIDIS, *supra* note 389, at 99–100.

- ii) Linear reduction: all bound duties are reduced by the same agreed method;
- iii) Harmonized formula: this method leads to more substantial reduction of higher rather than of lower tariffs. Sometimes it is called the “Swiss formula”;
- iv) Tiered cuts: this is reminiscent of but not identical to the Swiss Formula. Duties are divided into tiers, and the duties of higher tiers are cut more drastically than those of lower tiers.
- v) Sectoral approach: duties are lowered in a particular sector. This approach was used in the negotiation of the Information Technology Agreement.

Given that a relatively limited number of WTO members is currently responsible for a large share of the export taxes in the NAMA sector, with some of them already bound by specific obligations, modalities based on linear or tiered cuts would not necessarily provide such members with the necessary incentive to negotiate, whereas the “request-offer” modalities appear more appropriate.⁸¹⁰ This method may follow these steps:

- Interested countries present lists of requests to the countries with which they wish to negotiate;
- Countries receiving requests make an offer;
- Countries conduct bilateral/collective meetings and strike balance with each of their negotiating parties.

Given that exports from developing countries are often subject to import tariffs or tariff escalations, it will make sense to exchange protection afforded by export duties with protection afforded by import tariffs.

⁸¹⁰ *Id.*

Another viable solution could be to opt for a “sector approach” modality, with the product coverage limited to a specific list of mineral raw materials.⁸¹¹ Given that most countries do not impose export taxes in their PTAs or impose taxes on a small portion of tariff lines, it is more practical to use a negative-listing approach in which export duties are prohibited unless they have been scheduled. However, for LDCs and countries that depend significantly on government revenues, they may be permitted to schedule commitments through a positive-list approach.

Should consensus on the reduction of export taxes fail multilaterally, a subset of WTO members representing a “critical mass”⁸¹² could, in principle, still commit to schedule and bind export taxes on an agreed list of mineral raw materials, in a manner similar to the case of the Information Technology Agreement (ITA).⁸¹³ In this case, it would suffice for a group of WTO members to sign a ministerial declaration, whose provisions would come into effect upon members’ collective acceptance. This would account for a sufficiently large percentage of world trade in raw materials, as agreed upon in the declaration itself.⁸¹⁴ After the signing of this declaration, participants would have to modify their GATT schedules by creating a Part V, as in the case of Russia, for “Export Duties” and by incorporating all agreed concessions to give legal effect to the agreement.⁸¹⁵ The

⁸¹¹ Negotiating Group on Market Access, *Sector Specific Discussions and Negotiations on Goods in the GATT and the WTO*, 3–4, WTO Doc. TN/MA/S/13 (January 25, 2005); Negotiating Group on Market Access, *Draft Modalities for the Sectoral Tariff Elimination in the Raw Material Sector*, ¶ 2, WTO Doc. TN/MA/W/37/Add.5 (July 25, 2008).

⁸¹² Patrick Low, WTO Decision-Making for the Future 6 (Staff Working Paper No. ERSD-2011-05, May 2, 2011), https://www.wto.org/english/res_e/reser_e/ersd201105_e.pdf.

⁸¹³ See WTO, *Ministerial Declaration on Trade in Information Technology Products*, WTO Doc. WT/MIN(96)16 (Dec. 13, 1996).

⁸¹⁴ *Id.* ¶ 4, “In the case of the ITA, the original signatories of the Ministerial Declaration had agreed that the participants would have to represent around 90 per cent of world trade in information technology products”.

⁸¹⁵ Qin, *supra* note 291, at 138, 173.

export tariff concessions would then have to be applied on a non-discriminatory basis in accordance with the MFN clause.⁸¹⁶ However, the incorporation would not change the scope of the existing export duty commitments. What would change is the commitments' rigidity.⁸¹⁷ As described, acceding countries' lack of rights to invoke GATT policy exceptions and to adjust their commitments is problematic in terms of fundamental WTO principles and may be challenged as inconsistent with the principle of permanent sovereignty over natural resources. Hence, the purpose of incorporating the export duty commitments into the GATT is to cure this inconsistency.⁸¹⁸ Bringing the stand-alone commitments into the GATT framework would be an important step toward establishing a system-wide discipline on export duties that would strike an appropriate balance between the importing countries' demand to secure access to resources and the exporting countries' will to preserve the legitimate functions of export duties.

Finally, to the extent that WTO members include export duty concessions in their GATT schedules, which are integral to the GATT, they would remain free to modify or withdraw such concessions in accordance with the procedures in Article XXVIII of the GATT and could invoke Article XX general exceptions to justify export tariff increases. Such a negotiated solution, however, would not permit flexibilities beyond those envisaged under the GATT for imports and exports.

Even though the prospect of better market access in importing countries' markets may motivate exporting countries to compromise the right to use export duties, an

⁸¹⁶ Low, *supra* note 812, at 9.

⁸¹⁷ Qin, *supra* note 291, at 175.

⁸¹⁸ *Id.*

additional mechanism is needed to address exporting countries' other concerns. First, LDCs and countries that depend significantly on government revenues may be permitted to schedule commitments on a positive-listing approach. In addition, countries that have made commitments on export duties upon their WTO accession can be exempted from making offers. Second, as in the case of import tariff concessions, in order to induce higher-level binding commitments, countries should be allowed to resort to contingency measures to deal with unexpected situations such as external shocks. Thus, a safeguard mechanism needs to be included as an element in the overall bargaining basket.

6.4.3 Differentiated Tariffication of All Export Restrictions

As some scholars⁸¹⁹ have proposed, all forms of quantitative restrictions should be subject to tariffication without any exceptions. Tariffs are considered a legitimate means of protection; thus, their use should not be prohibited, but the maximum applicable duty rate is subject to negotiations and binding. The bound rates and schedules can be differentiated by tariff lines and can be differentiated for each country based on certain objective criteria. For tariff lines, indicators of trade concentration and intensity could be used to set bound rates. For instance, commodity groups whose trade volumes are low compared to global production and whose supply is concentrated in a few countries could be subject to lower bound rates than are commodity groups that are traded intensely and supplied by many countries. The objective would be to have low bound rates for commodities supplied by small number of WTO members. Similarly, countries that are

⁸¹⁹ Karapinar, *supra* note 44, at 1139, 1152; Stephanie Switzer et al., *Access to Minerals: WTO Export Restrictions and Climate Change Considerations*, 4 LAWS 617, 625 (2015).

monopoly suppliers of certain commodities could be subject to lower bound rates than are smaller suppliers of those commodities. Market share could be used as an additional objective criterion to inform a country's schedules.

Such a differentiated approach would allow countries with small market shares to have a larger policy space in this field, as the impact of their export taxes on global welfare would be lower than the impact of those with higher market shares. This would also decrease price volatility in commodity groups that are traded at low intensity and, hence, are more exposed to the impacts of export restrictions imposed by major suppliers. As a result, this differentiated approach could reduce global-welfare disruption created by export restrictions while being more acceptable to members that could use export taxes within certain limits.

6.4.4 WTO Agreement on Export Restrictions

The foregoing sections have argued that the current disciplines in international trade law are not sufficient to address concerns from either importing or exporting countries, that new disciplines are necessary, and the current impasse in the Doha Round negotiation coupled with the rise of the global value chain offer a great opportunity for WTO members to embrace new regulation under the WTO. Specifically, WTO members could conclude a consolidated agreement on export restrictions. The agreement could enter into force only upon acceptance by a majority of two-thirds of WTO members, in accordance with Article X:3 of the Marrakesh Agreement. Alternatively, a subset of WTO members could, in principle, conclude a plurilateral agreement on export restrictions, to be added to Annex

4 of the WTO Agreement by the Ministerial Conference, by consensus.⁸²⁰ Such an agreement would bind only participating members, and third parties would remain excluded from any benefits accruing from it.⁸²¹

A new agreement on export restrictions remains the preferable option.⁸²² For the reasons explained above, an agreement of this kind could represent a workable compromise for different groups of WTO members; it would correct the inconsistencies in the current WTO regime and ensure that greater predictability and transparency match confidence-building flexibilities currently not envisaged under the GATT provisions. In that sense, the whole WTO membership would benefit from this Agreement.

A new agreement may include the following issues:

a) Export Duties. A description of duties shall be provided. To be acceptable to current users of export restrictions, the new tax scheme must include combinations of ordinary taxes, MEPs, quotas, and variable taxes. The plan should clarify the applicability of any GATT provisions relevant to export duty concessions, confirm the availability of GATT import-specific exceptions, such as Articles XII and XVIII of the GATT, and establish the procedures and conditions for resorting to export safeguards.

The agreement could incorporate member's commitment schedules. Each member shall establish in their schedule the export duties they would maintain and their maximum levels. Provisions on export duties in the Protocols of Accession to the WTO shall be incorporated into the annex to the agreement.

⁸²⁰ Marrakesh Agreement, art. X:9.

⁸²¹ *Id.*

⁸²² ESPA, *supra note 38*, at 290.

The agreement should also contain provisions to exempt low-income, developing countries from stricter regulation as long as they do not damage other low-income countries by abusing a de facto monopoly of a specific resource. Export taxes are often a major source of government revenue, and low-income countries often consider them an important policy tool to promote processing industries that could be effective once certain conditions are met. Hence, the agreement should envisage special and differentiated treatment for resource-rich, low-income, developing countries and LDCs.

b) Quantitative Export Restrictions. Members shall not adopt or maintain quantitative export restrictions inconsistent with paragraph 1 of Article XI of the GATT 1994; by limiting the availability of such additional flexibilities to products scheduled and bound in members' GATT schedules, such an agreement could grant members the right incentives to privilege export taxes over more trade-restrictive types of export restrictions, in keeping with the spirit of the multilateral trading system.⁸²³ This agreement can contain provisions to forbid members from imposing export prohibitions or restrictions on raw materials purchased for non-commercial humanitarian purposes.

c) Transparency on Export Licensing. After the entry into force of this agreement, each member shall communicate in writing its existing measures on export licensing, if any. Thereafter, each member shall communicate in writing any new measures on export licensing or modification to an existing such measure. It shall list all information to be provided in a notification, such as products covered, expected duration,

⁸²³ ESPA, *supra* note 38, at 290.

exceptions, or derogations, if any. It may also list additional information to be provided upon request.

d) Exceptions. A consistent procedure for resorting to specific exceptions under Article XI:2(a) must be established. Specifically, the clause “critical shortage, or threat thereof, of foodstuffs or other products essential to exporting member” could be clarified regarding what constitutes “shortage,” “essentialness,” and what measures members shall resort to through this exception. The agreement will not prevent members from applying export restrictions in accordance with the rules under Article XX (General Exceptions) and Article XXI (Security Exceptions) of the GATT 1994. Developing countries and LDCs should be able to adopt measures in accordance with the procedure in the GATT exceptions, including restrictions to safeguard the balance of payments, exchange arrangements, and government assistance to economic development.

e) Consultation and Dispute Settlement. Each member shall afford adequate opportunity for consultation regarding any representation made by another member on any matter affecting interpretation and application of the agreement. When any member considers that any benefit accruing to it under the agreement is being nullified and impaired as a result of another member’s failure to implement its obligations under the agreement, that member will have recourse to the provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes. These provisions must explicitly dictate that no unilateral measures may counteract any adverse effect caused by the use of export restrictions.

f) Annexes. WTO members may attach their provisions on export duties of the Protocols of Accession to the Agreement.

6.5 CONCLUSION

Access to supplies is a fundamental challenge of international commerce. However, the absence of a general discipline on the use of export restraints leaves global production chains vulnerable to the instability and unpredictability of resource supplies. The lack of security in access to critical resources creates tension and can provoke tit for tat measures in international relations.

The scarcity of natural resources, on the one hand, and the political and economic transformations affecting traditional international trade patterns, on the other hand, call for a reconsideration of the role that the WTO should play in the regulation of export trade barriers. However, efforts in this area cannot succeed without addressing the ultimate concerns of developing countries that further action will irrevocably limit their policy space, ultimately depriving them of the right to use export restrictions to pursue their economic and sustainable-development needs in accordance with the principle of sovereignty over natural resources. I argue that a workable compromise is possible under the auspices of the WTO, to the extent that greater transparency and predictability are combined with greater flexibility for members. Such a system-wide approach would be consistent with the spirit of the multilateral trading system while delivering a significant achievement in the WTO regulation of export taxes.

In conclusion, as Roberto Azevedo, Director-General of the WTO highlighted in his speech, multilateralism does not mean that we get what we want; it means we get what

is possible.⁸²⁴ Given this reality, the discussion over export restrictions should be resumed in the post-Doha agenda of the WTO, and developing-country members should lead the action. This could mark the start of a new phase in the negotiations, where the bias for access to supplies would be substituted with a more balanced approach that considers the development concerns of resource-endowed and resource-dependent WTO members. To this point, a new agreement on export restrictions can be a starting point for discussions on the multilateral trading system.

⁸²⁴World Trade Organization, Ministerial Conference Statement by WTO Director General of 10 December 2017, WTO Doc, WT/MIN(17)/45 (2017).

CHAPTER 7

CONCLUSION

7.1 SUMMARY

In Chapter 2, I argued that issues of export restrictions are even more important than import-barrier issues within the international trade discipline. Examination of the history of export restrictions, including comparison of the measures' characteristics and reasons for their use, revealed the peculiarity and magnitude of the proliferation of export restrictions since the establishment of the WTO. On the basis of these findings, I studied trade and non-trade-policy implications and rationales to identify emerging trends in export restrictions.

Emerging economies refer to the right to apply export restrictions as development tools to promote domestic sustainable industrialization, which could help them to avoid the resource curse or resource-led development. At the same time, net-importing industrialized countries do not want to lose their dominant positions in international markets. These and other dynamics generate a certain degree of rhetoric in the debate over mineral export restrictions. History has shown that reserving scarce resources for domestic production is an effective means for developing economies to climb up the value chain. Despite criticism that this policy has a “beggar-thy-neighbor” effect, it is nonetheless justifiable by the principle of permanent sovereignty over natural resources. Unlike other sovereign prerogatives, the sovereign right over natural resources, which includes the right to freely use such resources for development, has been recognized as a basic human right under international law. Although the exercise of such right is without

prejudice to the treaty obligations a nation voluntarily undertakes, the WTO, in the design of its trade disciplines, should respect this fundamental principle of international law. These findings create a foundation for further discussions on export restrictions on mineral raw materials.

In Chapter 3, I performed a thorough legal analysis of applicable rules, regulations, and case laws in order to reflect the status of WTO law on export restrictions. I am convinced that our generation is really fortunate to have a global institution and discipline (WTO) that now covers approximately 98% of global trade. However, it is our responsibility to maintain, develop, and inherit our organization for future generations.

Accordingly, I reviewed WTO rules on export restrictions and identified loopholes and inconsistencies in regulatory instruments on both export duties and quantitative export restrictions. In addition to considering the text of agreements, I examined whether case law reflects new or specific factors that explain the inadequacy of WTO regulation of raw materials. Since the GATT prohibits the use of non-tariff measures to restrict exports for developmental purposes, export duties are the only legitimate means a WTO member has to claim a larger share in the distribution of its natural resources. Specifically, the levy of export duties allows a resource-producing country to claim a larger share of its natural resources for domestic use. The levy requires the WTO to acknowledge the role of export duties in promoting the economic development of resource-producing countries. Thus, when the WTO obligates a member to eliminate export duties on resource products, as it has done with several acceding members, it denies that member the right to freely use its natural resources for development. This arrangement is arguably

inconsistent with the concept of permanent sovereignty over natural resources. Among various deficiencies, the chapter concludes that the WTO disciplines on export restrictions are weak and ineffective, as they neither restrict export duties nor define the circumstances that could justify quantitative restrictions. Although the trend of enacting export restrictions on natural resources is likely to continue, an effective system-wide WTO discipline on export restraints should provide greater security and transparency in access to global resources for all, while respecting the right of sovereignty over natural resources and developing countries' need to use export duties for legitimate purposes, including managing environmental externalities.

In Chapter 4, I reviewed why the U.S. and the EU are attempting to extract more far-reaching commitments in the context of PTAs and how PTAs regulate export restrictions on mineral raw materials. PTAs allow countries to develop and strengthen trade disciplines beyond what is possible at the multilateral level. In most cases, PTAs may explore more policy areas and provide lessons and good practices that could be used in global discussions. In this regard, this chapter explored different approaches in the PTAs that could help to improve the WTO discipline for export restrictions on mineral raw materials.

This study finds three PTA approaches that could improve this structure and render agreements WTO-plus. First, some PTAs refine the WTO exceptions by making them more transparent, more precise, or limiting their scope. Different practices exist for improving situational and product-specific exceptions. Second, some PTAs strengthen the discipline by eliminating some WTO exceptions altogether, although in many PTAs

this is coupled with new exceptions for certain specific products. Third, seven PTAs—NAFTA, Canada-Chile, Canada-Costa Rica, Canada-EU, Canada-Korea, Canada-Honduras, and Japan-Australia—demand that countries meet certain conditions if they wish to impose an export restriction or tax justified under one of the major WTO exceptions. Although many PTAs provide rules on export restrictions that go beyond the scope of the WTO, this strategy also has shortcomings.

In Chapter 5, I analyzed proposals on export restrictions tabled during ongoing negotiations both inside and outside the WTO. All proposals focus on three main issues: i) transparency; ii) establishing a standard discipline to govern the use of export taxes on a system-wide level as a way to ensure predictability; iii) establishing the purposes for and the conditions under which export restrictions might be used as a way to preserve flexibility. These are the weaknesses in the existing WTO disciplines that need to be addressed most urgently. These elements could shed light on the orientation of both import-dependent and net-exporting developing-country members as to how far new (or strengthened) rules could go to improve the existing WTO discipline.

Analysis of the Doha proposals, particularly those on export taxes, offers useful insights for designing new proposals to achieve balanced, equitable rules on export restrictions. At the same time, the discourse outside the WTO showed that specific issues to be addressed stem from two fundamental stances: first, that export restrictions-export taxes included should be strictly disciplined to avoid abuse as beggar-thy-neighbor policies and industrial policy instruments creating an unfair advantage for domestic industries; and second, that the WTO legal framework should acknowledge the

developmental function of export restrictions, and specific flexibilities should reflect this function. Overall, this chapter identified the scope and targets that a proposal for reform of WTO rules on export restrictions should include to respond to both sides' legitimate but divergent concerns.

In Chapter 6, I identified the “constituent elements” of a reform that could negotiate the legitimate concerns of mineral-dependent countries and resource-endowed developing countries' policy justifications. In general, these constituent elements constitute building blocks for future research to imagine solutions for reforming WTO rules. The key to initiating reform of the current regime lies in recognizing the legitimate functions of export duties. The systemic lack of such recognition is the fundamental reason that rigid obligations on export duties have been imposed on several acceding members. This also explains why calls for a system-wide discipline on export duties have failed to garner wide support from developing-country members. Only when the legitimate roles of export duties are acknowledged can developing countries be expected to take an interest in negotiating a general export duty discipline.

In sum, the world needs a sensible discipline on export restraints that can ensure secure, predictable access to resources for all, while respecting sovereign nations' right to reserve a larger share of their natural resources for domestic industries and developing countries' need to use export duties for other legitimate purposes such as managing environmental externalities. The world trade system can provide this discipline by regulating export duties in the same way it has regulated import duties for the past six

decades. That is, it can establish the binding of export duties according to the same principles and rules as those applied to import tariffs.

In light of the different proposals submitted to the WTO, this dissertation has proposed a differentiated reform framework based on optional but complementing variables: (i) strengthened regulation of notification of export restrictions should improve the transparency and predictability of these measures; (ii) through tariffication of all forms of quantitative export restrictions and differentiated bound rates, the global-welfare losses created by export restrictions would be optimized; (iii) WTO members could agree on specific modalities governing the negotiation of export duty concessions to be included in GATT schedules. Should negotiation on the reduction of export taxes fail multilaterally, a subset of WTO members representing a “critical mass” could, in principle, still commit to schedule and bind export taxes on an agreed list of mineral raw materials; (iv) a new Agreement on Export Taxes remains the preferable option. This agreement could represent a workable compromise for different groups of WTO members, inasmuch as it would correct the inconsistencies in the current WTO regime and ensure that greater predictability and transparency match confidence-building flexibilities currently not envisaged under the GATT provisions.

7.2 NOTES FOR FUTURE RESEARCH

While existing international raw materials governance may have been adequate in the last century, in times of frequently falling prices it cannot address the new conditions emerging in this century. As stated in the introduction to this dissertation, it is necessary to establish international law for cases where it does not exist. That is this study’s basic

position. However, when we consider models for new international rules, it is necessary to select socially beneficial systems, based on an accurate view of the alternative rules and mechanisms' implications for the economic welfare of each state.

The WTO should also acknowledge the role of export duties in managing environmental externalities. Because the issue of environmental protection has never been successfully incorporated into the WTO law, the relation between the WTO and international environmental agreements has always been a controversial issue in WTO law. GATT Article XX(g) was originally proposed in the U.S. suggested Charter in 1946 to exempt measures “relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements [on environment] or are made effective in conjunction with restrictions on domestic production or consumption”.⁸²⁵ This text provided for another exception in which conservation measures can be exempted: if the measures are taken pursuant to international agreements on environment. In a meeting of a working party on technical articles, Brazil proposed that the words “are taken pursuant to international agreements” be deleted.⁸²⁶ In light of a revised exception clause under Chapter VII (Intergovernmental Commodity Arrangements) covering agreements for the conservation of fisheries, wildlife, or other exhaustible resources, the sub-committee recommended the deletion.⁸²⁷ It was agreed during the discussions at the

⁸²⁵ U.S. Department of State, “Suggested Charter for an International Trade Organization of the United Nations: An elaboration of the United States Proposals for Expansion of World Trade and Employment by a technical staff within the government of the United States and presented as a basis for public discussion”, September 1946, Article 32 (j).

⁸²⁶ Working Party on Technical Articles, *Record of the Work Performed*, 47, GATT Doc. E/PC/T.103 (Jul.19, 1947).

⁸²⁷ *Report of Sub-Committee on Chapter VII*, 8, GATT Doc. E/PC/T/W/228 (Jun.27,1947).

Geneva Session of the Preparatory Committee that the exceptions under commodity agreements should apply to all provisions of the GATT chapter, and thus Article XX(h) was inserted into the GATT to exempt measures relating to those agreements on environment.⁸²⁸ Against this background, the parties agreed to the recommendation to delete the wording of international agreements on environment in XX(g).⁸²⁹ However, the chapter on Inter-Governmental Commodity Arrangements was aborted, and the ill-fated ITO left ambiguous relationship between the WTO and other international agreements on the conservation of natural resources. Despite the divided view, most WTO members do not consider that restriction on domestic production to be inconsistent with WTO Agreements.⁸³⁰ They argue that the exploitation of natural resources is reserved permanently and exclusively for a nation's internal sovereignty and remains outside the scope of the WTO agreements.⁸³¹ Nevertheless, regulation of natural resource production could constitute "export restrictions" under Article XI of the GATT, which prohibits quantitative export restrictions. Hence, when the prices of resource products do not fully reflect their environmental costs, the resource-producing country is effectively subsidizing importing countries with mispriced resources at the expense of its own environment. In this situation, export duties set at proper levels can offset negative externalities generated by the production of resource products sold abroad.

⁸²⁸ GATT Secretariat, *Analytical Index of the GATT (pre-1995)*, art.XX 588,

https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_gatt47.pdf.

⁸²⁹ United Nations Conference on Trade and Employment, *Verbatim Report-Thirtieth Meeting of Commission A*, 6, GATT Doc. E/PC/T/A/PV/30 (Jul.16, 1947).

⁸³⁰ Daniel Crosby, *Background to WTO Rules and Production/Trade Restrictions, in the FIELD OF ENERGY GLOBAL CHALLENGES AT THE INTERSECTION OF TRADE, ENERGY AND THE ENVIRONMENT* 83 (Joost Pauwelyn ed.,2010).

⁸³¹ *Id.*

All these issues should be resolved through active and dynamic discussion in academia and in the field. I leave them for my next research project in the hope that by pursuing these questions in the future, I can fill important gaps between the successful creation and the effective operation of a new rule, especially by enhancing our understanding of the role, capacity, and potential of developing countries and their arrangements in the WTO.

In response to the emerging issues on access to mineral raw materials, the most advanced net-importing countries have begun to make strategic decisions to reform the current structure of the commodities market. Future researchers must focus on this development as well.

I end my dissertation with the most important slogan of this age: “We humans have a common future.”

APPENDIX I

PREFERENTIAL TRADE AGREEMENTS INCLUDED IN THE SURVEY

(108 PTAS)

PTA name and Date of Entry into Force

AFRICA

African Economic Community – 1991 (Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic , Comoros, Congo, Cote d'Ivoire, Djibouti, Egypt, Ethiopia, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Chad, Togo, Tunisia, Uganda, Zaire, Zambia, Zimbabwe)

ECOWAS - 1993 (Benin; Burkina Faso; Cape Verde; Côte d'Ivoire; Gambia; Ghana; Guinea; Guinea Bissau; Liberia; Mali; Niger; Nigeria; Senegal; Sierra Leone; Togo)

COMESA - 1994 (Angola, Burundi, Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe)

SADC - 2000 (Angola, Botswana, Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe) SACU - 2004 (Botswana, Lesotho, Namibia, South Africa, Swaziland)

ASIA PACIFIC

PATCRA-1977 (Australia, Papua New Guinea)

SPARTECA-1982 (Australia, Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Western Samoa)

ANZCERTA-1983 (Australia, New Zealand)

ASEAN-1992 (Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore, Thailand)

Thailand- India-2003

India- ASEAN-2004

Australia – Thailand-2005

India-Singapore-2005

New Zealand – Thailand-2005

India-Bangladesh -2006
India-Chile -2007
India-Korea-2009

CANADA

NAFTA-1994 (US, Canada, Mexico)
Chile-1997
Israel-1997
Costa Rica-2002
Peru-2009
EFTA-2009
Panama-2013
Honduras-2014
Korea, Republic of-2015
EU-2017
Ukraine-2017

CHINA

Chile-1997
ASEAN-2003
Hong Kong-2004
Pakistan-2007
New Zealand-2008
Singapore-2009
Peru-2010
Switzerland-2014
Iceland-2014
Korea-2015
Australia-2015

JAPAN

India-1958, 2011
Mexico-2005
Chile-2007
Indonesia-2008
Switzerland-2009
Vietnam-2009
Australia-2015
Mongolia-2016

EASTERN EUROPE-CENTRAL ASIA

Commonwealth of Independent States-1994 (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Ukraine, Uzbekistan)

Common Economic Zone-2004 (Russia, Belarus, Ukraine, Kazakhstan)

Russia – Ukraine-1994

Belarus-Ukraine-2006 CEFTA 2006 (Albania, Bosnia and Herzegovina, Croatia, Macedonia, Moldova, Montenegro, Serbia, UNMIK/Kosovo)

EUROPEAN COMMUNITIES

EU Convention-2010 treaty update

Turkey – 1996

Israel – 2000

Morocco - 2000

Mexico – 2000

South Africa – 2000

FYROM – 2001

Croatia – 2002

Jordan – 2002

Chile – 2003

Lebanon – 2003

Albania - 2006

Bosnia – 2008

CARIFORUM – 2008

Montenegro – 2008

Cote d'Ivoire – 2009

Central America-2013

Cameroon-2014

SADC-2016

Ghana-2016

Colombia and Peru and Accession of Ecuador-2013,2017

Canada-2017

EUROPEAN FREE TRADE AREA-2001 consolidated convention (Norway, Switzerland, Lichtenstein, Iceland):

Israel-1993

Morocco-1999

Mexico-2000

FYROM-2001

Jordan-2002
Singapore-2003
Chile-2004
Tunisia-2005
Korea-2006
SACU-2006
Egypt-2007
Colombia-2008
Canada-2009
Ukraine-2010

UNITED STATES

Israel-1985
NAFTA-1994 (US, Canada, Mexico)
Jordan-2001
Chile - 2004
Morocco-2004
Singapore-2004
Australia-2005
CAFTA (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua)-Dominican Republic
-2005
Bahrain-2006
Peru-2006
Colombia-2007
Korea-2007
Panama-2007
Oman-2009

LATIN AMERICA

CACM-1961 (El Salvador, Guatemala, Honduras, Nicaragua)
CARICOM-1973, Revised treaty in 1999 (Antigua, Barbados, Bahamas, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent, Suriname, Trinidad and Tobago)
MERCOSUR-1991 (Argentina, Brazil, Paraguay, Uruguay)
MERCOSUR-Bolivia-1997
Andean Community-2003 (Bolivia, Colombia, Ecuador, Peru, Venezuela)
MECOSUR-Chile-2004
MERCOSUR-Peru-2005
Taiwan-Nicaragua-2006
MERCOSUR – India-2009

APPENDIX II COMPARISON BETWEEN PTAs AND WTO DISCIPLINES

Note that an equal (=) sign means the PTA is WTO equal with regard to export taxes or quantitative restrictions, a minus (-) sign suggests the PTA is WTO minus and a plus (+) sign implies the PTA is WTO plus.

A WTO-equal PTA is an agreement that neither improves upon nor regresses from the WTO disciplines. A WTO-minus PTA allows export restrictions where the WTO does not. A WTO-plus PTA forbids export restrictions where the WTO allows them. NA indicates that the agreement does not contain any language on quantitative export restrictions.

Name of PTAs	Export Taxes Clause	Quantitative Export Restrictions Clause
ASEAN	=	-
African Economic Community	=	-
Andean Community	=	NA
ANZCEPTA	=	=
ASEAN-China	=	NA
Australia-Thailand	=	=
Belarus-Ukraine	+	-
CACM	=	NA
Canada-Chile	+	+
Canada-Costa Rica	+	+
Canada-EU	+	=
Canada-Honduras	+	=

Canada-Korea, Republic of	+	=
Canada-Panama	+	=
Canada-Ukraine	=	=
Canada-Israel	+	-
Canada-Peru	+	=
CARICOM	+	-
CEFTA 2006	+	+
China-Pakistan	+	NA
China-Chile	+	NA
China-Hong Kong	=	NA
China-New Zealand	+	=
China-Peru	+	=
China-Singapore	=	=
China-Switzerland	=	NA
China-Iceland	=	NA
China-Korea, Republic of	+	+
China-Australia	+	=
CIS	+	-
COMESA	=	NA
Common Economic Zone	+	+
EC-Jordan	+	NA

EC-South Africa	+	+
EC-Albania	+	=
EC-Bosnia	+	=
EC-CARIFORUM	+	+
EC-Cote d'Ivoire	+	+
EC-Croatia	+	=
EC-FYROM	+	=
EC-Israel	+	+
EC-Lebanon	+	+
EC-Mexico	+	-
EC-Montenegro	+	=
EC-Morocco	=	NA
EC-Turkey	+	=
EC-Central America	=	+
EC-Colombia, Peru and Ecuador	=	+
EC-Ghana	+	+
ECOWAS	=	NA
EFTA Convention	+	+
EFTA-Canada	+	=
EFTA-Chile	+	+

EFTA-Colombia	+	-
EFTA-Egypt	+	+
EFTA-FYROM	+	=
EFTA-Israel	+	+
EFTA-Jordan	+	=
EFTA-Korea	+	=
EFTA-Mexico	+	-
EFTA-Morocco	+	=
EFTA-SACU	+	-
EFTA-Singapore	+	=
EFTA-Tunisia	+	=
EFTA-Ukraine	+	-
India-ASEAN	=	NA
India-Bangladesh	=	NA
India-Chile	=	=
India-Korea	=	=
India-Singapore	=	=
Japan-Switzerland	+	=
Japan-Vietnam	=	=
Japan-Chile	+	=
Japan-Indonesia	=	=

Japan-Mexico	+	-
Japan-Thailand	=	=
Japan-Australia	=	=
Japan-Mongolia	+	NA
MERCOSUR	=	=
MERCOSUR-Bolivia	+	-
MERCOSUR-Chile	+	-
MERCOSUR-India	=	NA
MERCOSUR-Peru	+	-
NAFTA	+	+
New Zealand-Thailand	=	+
PATCRA	+	=
Russia-Ukraine	+	-
SACU	=	-
SADC	+	-
SPARTECA	=	NA
Taiwan-Nicaragua	+	-
Thailand-India	=	NA
Treaty on the EU	+	+
US-Singapore	+	=
US-Australia	+	-

US-Bahrain	+	=
US-CAFTA-DR	+	-
US-Chile	=	=
US-Colombia	+	-
US-Israel	=	-
US-Jordan	=	NA
US-Korea	+	=
US-Morocco	+	=
US-Oman	+	=
US-Panama	+	=
US-Peru	+	=

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