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WTO and Export Restrictions

Gabrielle MARCEAU^{*}

This article focuses on the disciplines on export restrictions found in the World Trade Organization (WTO) agreements as well as relevant jurisprudence by WTO panels and the Appellate Body, both in general and in particular in the context of export restrictions on natural resources. The article also explores alternative approaches for increasing the regulation of export restrictions, found in the accession protocols of some recently acceded WTO Members. In addition, the wider impact of export restrictions is examined in the areas of sustainable development, food security, and environmental protection.

1 INTRODUCTION

The focus of this article is on the World Trade Organization's (WTO) disciplines on export restrictions and the wider systemic role in sustainable development, food security, and environmental protection regulation. The terms quantitative export restrictions, export duties and export taxes, and export quotas are often used interchangeably. In this regard, we first need to clarify these terms.

The WTO's Trade Policy Review (TPR) articles deal with export restrictions in the section on 'measures directly affecting exports'. The TPRs cover export-restrictive measures: typically export prohibitions, export quotas, export licensing, export duties or export tariffs,¹ and minimum export prices. As further developed below, the WTO includes different rules for export duties and export quotas and export licenses, so the distinction is important. As noted earlier, this

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¹ Several authors use the term 'export taxes' to refer to what would legally be characterized as 'export duties' or 'export tariffs' since they are imposed at the border and traditionally the term 'taxes' refers to amounts paid after imported goods have passed the frontiers and their import tariff or import duties have been paid. Throughout this article, the term 'export restrictions' include both export duties/tariffs and export quotas and other quantitative export restrictions. The term 'export taxes' will not be used in this text, except in quoting another author or a text where such term is used.

article will generally not use the term ‘export taxes’ for export border measures – rather the terms used will be ‘export duties’ or ‘export tariffs’.

Export restrictions are imposed for a number of reasons. Sometimes they are put in place to provide support or protection to certain consumer or producer groups to gain political support. In the agricultural and food sectors, the primary objective of export restrictions is often to maintain domestic food supplies and thereby achieve food security, especially in so-called ‘thin’ international markets where prices are more volatile.²

Export restrictions can also be used to address market failures, especially in the field of environmental protection. For example, countries may restrict exportation of minerals, forest products or other natural resources to prevent or slow down resource depletion.³ Since these restrictions constitute a form of market distortion they can affect the distribution of welfare.⁴ They can also lead to trade diversion or retaliation where other countries impose their own export restrictions on products in response to the export restrictions originally imposed, which, in turn, can impede the effectiveness of the original measure in achieving the intended objective.⁵

Section 2 will set out the WTO disciplines on export restrictions in the covered agreements and focus on recent WTO jurisprudence, drawing, *inter alia*, on the decisions of the Panels and Appellate Body in two recent disputes, *China – Raw Materials* and *China – Rare Earths*. Section 3 will present commitments on export restrictions undertaken by certain recently acceded Members in their accession protocols as well as WTO jurisprudence on the relationship between such commitments and the WTO agreements. Section 4 will address the role of export restrictions in food security, sustainable development, and environmental protection. And Section 5 will offer some conclusions.

² Karapinar B, *Export Restrictions and the WTO Law: How to Reform the Regulatory Deficiency*, (hereinafter Karapinar [2011]), Journal of World Trade 45(6), 2011: 1139-1155, 1141.

³ *Ibid.*, 1142.

⁴ For a full discussion of the economic and welfare impact of these measures, see Mitra S and Josling T, *Agricultural Export Restrictions: Welfare Implications and Trade Disciplines*, (hereinafter Mitra and Josling [2009]), IPC Position Paper, 2009. http://agritrade.org/documents/ExportRestrictions_final.pdf. Accessed 6 October 2015.

⁵ As an example of this, Korinek and Kim point to the export duty imposed by India on chromite in 2007. This export duty led to reduced exports to China, which had been the biggest importer of Indian chromite and instead diverted its chromite imports to other countries, most notably South Africa. Since South African manufacturers and downstream industries were now competing with China’s downstream industries, South Africa considered imposing its own export restriction on the mineral to offset this increased competition. Korinek and Kim point out that such ‘retaliatory’ export restrictions by South Africa would have led to a higher international price of chromite which would entail that India would have to raise its export duty further to achieve the policy objective of reducing exports of chromite. (Korinek J and Kim J, *Export Restrictions on Strategic Raw Materials and Their Impact on Trade and Global Supply*, (hereinafter Korinek and Kim [2009]) OECD Policy Paper No. 95, 2009, pp. 16 – 19. http://www.oecd-ilibrary.org/trade/export-restrictions-on-strategic-raw-materials-and-their-impact-on-trade_5kmh8pk441g8-en%3Fcrawler%3Dtrue. Accessed 14 October 2015.)

2 WTO LAW ON EXPORT RESTRICTIONS ON NATURAL RESOURCES: LEGAL PROVISIONS AND JURISPRUDENCE

The WTO agreements include a number of provisions dealing with export restrictions, either by disciplining the use of such restrictions or by justifying their use, in spite of the disciplines. WTO panels and the Appellate Body have interpreted and applied these provisions in the context of export restrictions on natural resources. Below, the relevant provisions and jurisprudence are examined.

2.1 LEGAL PROVISIONS IN THE WTO AGREEMENTS

The WTO disciplines on export quotas and other quantitative restrictions are contained in Article XI of the General Agreement on Tariffs and Trade (GATT 1994) and Article 12 of the Agreement on Agriculture (AoA).

2.1[a] *Quantitative Export Restrictions*

Article XI of the GATT 1994

The key WTO disciplines on export restrictions are contained in Article XI of the GATT 1994, which is titled ‘General Elimination of Quantitative Restrictions’. Paragraph 1 of Article XI stipulates a general prohibition on quantitative export (and import) restrictions:

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.⁶

Paragraph 2 of Article XI provides some limited exceptions or deviations to this general prohibition on quantitative export (and import) restrictions. It states in relevant parts:

The provisions of paragraph 1 of this Article shall not extend to the following:

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade⁷;

⁶ For full text and interpretative notes, see WTO website, https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art11_e.pdf.

⁷ *Ibid.*

Article 12 of the Agreement on Agriculture

The AoA elaborates on the matter of disciplines on export prohibitions and restrictions applied on agricultural products. Article 12 stipulates that when a Member institutes new export restrictions on foodstuffs in accordance with subparagraph 2(a) of Article XI of the GATT 1994:

(a) the Member instituting the export prohibition or restriction shall give due consideration to the effects of such prohibition or restriction on importing Members' food security;

(b) before any Member institutes an export prohibition or restriction, it shall give notice in writing, as far in advance as practicable, to the Committee on Agriculture comprising such information as the nature and the duration of such measure, and shall consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the measure in question. The Member instituting such export prohibition or restriction shall provide, upon request, such a Member with necessary information.⁸

2.1[b] *Export Duties/Tariffs*

Article XI of the GATT 1994 prohibits export quotas and other quantitative restrictions, but exempts from its coverage export restrictions in the form of 'duties, taxes, or other charges'. In principle, then, export duties or export tariffs are permitted under WTO law and their level is not regulated unless a Member schedules commitments on export duties.⁹ Some Members that acceded to the WTO in or after 1996 have accepted limitations on their right to impose export duties in their accession protocols. The precise nature and scope of these limitations vary between Members and are described in more detail in Section 3 below. Finally, most experts believe that export measures such as export duties are nonetheless covered by relevant rules of the GATT legal system and that export duties should, for example, respect the Most Favoured Nation (MFN) principle of Article I, the prescriptions of Article XXIV:8(a)(ii), and could thus benefit from the flexibilities in Article XX for justifying GATT violations.

2.1[c] *Exceptions in Article XX of the GATT 1994*

Article XX of the GATT 1994 contains exceptions that may enable a WTO Member to deviate from GATT Article XI:1's prohibition against quantitative

⁸ For full text and interpretative notes, see WTO website, https://www.wto.org/english/res_e/booksp_e/analytic_index_e/agriculture_02_e.htm#article12.

⁹ The Appellate Body confirmed this interpretation in *China – Raw Materials*. (Appellate Body Report, *China – Raw Materials*, para. 321).

export restrictions, allowing it to restrict exports in certain circumstances. Export restricting measures that may be covered by Article XX include those:

- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- ...
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- ...
- (i) involving restrictions on exports of domestic materials necessary to ensure essential qualities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *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.
- (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, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.^{10,11}

It is worth noting that Article XX may also be invoked to justify the imposition of export duties, when such duties are *a priori* WTO inconsistent for the reasons outlined above or when such duties are inconsistent with stricter disciplines on export duties undertaken by a particular Member. The precise nature and applicability of these exceptions, however, vary between accession protocols and are described in more detail below.

2.2 WTO JURISPRUDENCE RELATING TO EXPORT RESTRICTIONS ON NATURAL RESOURCES

The WTO has not been asked to adjudicate many disputes concerning export restrictions. Nevertheless, the few cases that have been brought have provided panels and the Appellate Body with opportunities to clarify some important principles.

¹⁰ This chapter will not address the GATT Article XXI security exception. As acknowledged by the Appellate Body in *Argentina – Import Measures*, ‘certain provisions of the GATT 1994, such as Articles XII, XIV, XV, XVIII, XX, and XXI permit a Member, in certain specified circumstances, to be excused from its obligations under Article XI:1 of the GATT 1994.’ (Appellate Body Report, *Argentina – Import Measures*, para. 5.220) (footnote omitted). See also Appellate Body Report, *Argentina – Textiles and Apparel*, para. 73.

¹¹ For full text and interpretative notes, see WTO website, https://www.wto.org/English/res_e/booksp_e/gatt_ai_e/art20_e.pdf.

2.2[a] *Article XI of the GATT 1994*

Article XI:1: Meaning of ‘Prohibition’ and ‘Restriction’

Recall that Article XI:1 of the GATT 1994 prohibits ‘prohibitions or restrictions’ on exports (and imports). What is the meaning of the terms ‘prohibition’ or ‘restriction’? In *China – Raw Materials*, the Appellate Body explained that:

The term ‘prohibition’ is defined as a ‘legal ban on the trade or importation of a specified commodity’. The second component of the phrase ‘[e]xport prohibitions or restrictions’ is the noun ‘restriction’, which is defined as ‘[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation’, and thus refers generally to something that has a limiting effect.

In addition, we note that Article XI of the GATT 1994 is entitled ‘General Elimination of Quantitative Restrictions’ ... In the present case, we consider that the use of the word ‘quantitative’ in the title of the provision informs the interpretation of the words ‘restriction’ and ‘prohibition’ in Article XI:1 and XI:2. It suggests that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.¹²

In *Argentina – Import Measures*, the Appellate Body found that:

Article XI:1 refers to prohibitions or restrictions ‘on the importation ... or on the exportation or sale for export’. Thus, in our view, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products. Moreover, this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.¹³

Article XI:2(a): Meaning of ‘Temporarily’, ‘Applied to Prevent or Relieve’ and ‘Critical Shortages’

As noted earlier, Article XI:2(a) of the GATT 1994 allows export restrictions to be ‘temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting country’. In *China – Raw Materials*, the Appellate Body clarified the meaning of the term ‘temporarily’ in Article XI:2(a) of the GATT as follows:

[T]he term ‘temporarily’ in Article XI:2(a) of the GATT 1994 is employed as an adverb to qualify the term ‘applied’. The word ‘temporary’ is defined as ‘[l]asting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need’. Thus,

¹² Appellate Body Report, *China – Raw Materials*, paras 319–320. (emphasis added; footnote omitted)

¹³ Appellate Body Report, *Argentina – Import Measures*, para. 5.217. (footnote omitted)

when employed in connection with the word ‘applied’, it describes a measure applied for a limited time, a measure taken to bridge a ‘passing need’. As we see it, the definitional element of ‘supply[ing] a passing need’ suggests that *Article XI:2(a) refers to measures that are applied in the interim*.¹⁴

The Appellate Body also clarified that a measure may be characterized as ‘temporarily applied’ even if its duration is not definitively known in advance. Thus, the Appellate Body found that ‘temporary’ need not always ‘connote a time limit fixed in advance. Instead, we consider that Article XI:2(a) describes measures applied for a limited duration, which was adopted in order to bridge a passing need, irrespective of whether or not the temporal scope of the measure is fixed in advance’.¹⁵

According to the Appellate Body, the term ‘applied to prevent or relieve’ indicates that measures may be adopted under Article XI:2(a) ‘to alleviate or reduce an existing critical shortage, as well as for preventive or anticipatory measures adopted to pre-empt an imminent critical shortage’.¹⁶ In this context, recall the Appellate Body’s finding, discussed above, which stipulates that a measure may be adopted under Article XI:2(a) even if its temporal scope is not known in advance. This allows Members to respond to a critical shortage even if they do not precisely know how long it will be before the critical shortage is alleviated or prevented.

According to the Appellate Body, a ‘critical shortage’ ‘refers to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point’.¹⁷

The Appellate Body has further explained that ‘whether a shortage is “critical” may be informed by how “essential” a particular product is’.¹⁸ The Appellate Body did not provide an exhaustive definition of the term ‘essential’. Rather, it pointed out that ‘[t]he term “essential” is defined as “[a]bsolutely indispensable or necessary”’.¹⁹ On the basis of this definition, it held that:

Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products. By including, in particular, the word ‘foodstuffs’, Article XI:2(a) provides a measure of what might be considered a product ‘essential to the exporting Member’ but it does not limit the scope of other essential products only to foodstuffs.²⁰

¹⁴ Appellate Body Report, *China – Raw Materials*, para. 323. (emphasis added; footnote omitted)

¹⁵ *Ibid.*, para. 331.

¹⁶ *Ibid.*, para. 327.

¹⁷ *Ibid.*, para. 324.

¹⁸ *Ibid.*, para. 328.

¹⁹ *Ibid.*, para. 326. (footnote omitted)

²⁰ *Ibid.*

2.2[b] *Export Duties/Tariffs*

Export duties have not often been challenged in WTO disputes but the administration of such export duties was challenged in one dispute, namely *Argentina – Hides and Leather*. The European Communities (EC) challenged the authorization granted by the Argentinean authorities to the domestic tanning industry to participate in customs control procedures of hides as being inconsistent with Articles XI:1 and X:3(a) of the GATT 1994. The latter requires Members to administer their trade regulations in a uniform, impartial, and reasonable manner.²¹ While Argentina's export duties were not brought up in the context of the EC's challenge under Article XI:1, the Panel did find that the authorization to involve private persons to assist customs officials in the application and enforcement of substantive rules, namely the rules on classification and export duties, was an unreasonable and partial administration of such substantive rules and thus inconsistent with Article X:3(a).²² It is thus clear that export duties are subject to, at least, some of the disciplines in the GATT 1994, here Article X:3(a) regarding the administration of export duties.

2.2[c] *Exceptions in Article XX of the GATT 1994 Relating to Natural Resources*

Panels and the Appellate Body have also clarified the scope, meaning, and applicability of the exceptions in Article XX of the GATT 1994 as a justification for otherwise WTO-inconsistent export restrictions (or other inconsistencies with any of the GATT obligations). If a measure is 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. Of the paragraphs noted above, only Article XX(g) and (b) have been the subject of WTO dispute settlement reports regarding export restrictions. This author will therefore concentrate on the requirements of these provisions.

Article XX(b) of the GATT 1994

Article XX(b) of the GATT 1994 allows Members to adopt measures 'necessary to protect human, animal or plant life or health'. Panels and the Appellate Body have often followed two analytical steps when considering whether a measure falls within the exception in Article XX(b) of the GATT 1994: (i) whether the

²¹ For full text and interpretative notes, see WTO website, https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art10_e.pdf.

²² Panel Report, *Argentina – Hides and Leather*, paras 11.91–11.101.

objective of the measure is to protect human, animal or plant life or health and (ii) whether the measure is ‘necessary’ to fulfil this policy objective. These two steps are considered separately below.

Article XX(b): Objective of the Measure

Under the first step, when considering whether a measure’s objective is the protection of human, animal or plant life or health, panels and the Appellate Body have examined both the design and structure of the measure, and have generally showed a degree of deference to Members’ policies.²³ The degree of deference is, however, not unlimited. The Panel in *China – Raw Materials* thus found that a Member seeking to justify a measure under Article XX(b) ‘must do more than simply produce a list of measures referring, *inter alia*, to environmental protection and polluting products’.²⁴ Rather, the Member must demonstrate a connection between environmental protection standards and the measure it seeks to justify.²⁵

Article XX(b): ‘Necessary’

Under the second step 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.²⁶

Importantly, 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’,²⁷ which prompted the Panel in *China – Rare Earths* to state that:

[w]ith 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.²⁸

Furthermore, the Appellate Body has found that a measure cannot only be considered necessary if it is shown to ‘bring[] about a material contribution to

²³ Panel Report, *China – Raw Materials*, para. 7.479.

²⁴ *Ibid.*, para. 7.511.

²⁵ *Ibid.*, para. 7.507. See also Panel Report, *China – Rare Earths*, paras 7.159–7.160.

²⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178 (referring to Appellate Body Report, *US – Gambling*, para. 307).

²⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

²⁸ Panel Report, *China – Rare Earths*, para. 7.146. (footnote omitted)

the achievement of its objective' but also if it is demonstrated to be 'apt to produce a material contribution to the achievement of its objective'.²⁹ In respect of the latter, the Appellate Body found that such a demonstration could consist of 'quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence',³⁰ interpreted by the Panel in *China – Raw Materials* as suggesting that the contribution of a measure should be assessed both currently and in the future.³¹

In the context of export restrictions, the Panel in *China – Rare Earths* accepted that the objective of reducing pollution could be achieved indirectly by reducing demand of a product through increasing prices.³² The Panels in both *China – Raw Materials* and *China – Rare Earths*, however, placed the burden on the Member imposing the measure to account for the increased domestic consumption of the good subject to the export restriction that may be generated through additional production in the domestic downstream sectors following the imposition of the export restriction,³³ which, in the words of the Panel in *China – Raw Materials*, may 'offset the production-reducing effects of export restrictions ... and, consequently, their alleged positive effects on the environment'.³⁴ In addition, the Panel in *China – Raw Materials* rejected the argument that export restrictions on certain raw materials would necessarily foster economic growth which would, in turn, lead to increased environmental protection.³⁵

If a measure is preliminarily deemed necessary for achieving one of the objectives 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 for the respondent.³⁶ Such alternative measures must be less trade restrictive while providing an equivalent contribution to the achievement of the listed objective and must not impose an undue burden on the Members imposing the measure.³⁷ While the burden of proof initially lies upon 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 reasonable available.³⁸

²⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

³⁰ *Ibid.*, para. 151.

³¹ Panel Report, *China – Raw Materials*, para. 7.518.

³² Panel Report, *China – Rare Earths*, para. 7.173.

³³ Panel Reports, *China – Raw Materials*, para. 7.536; and *China – Rare Earths*, paras 7.174–7.178.

³⁴ Panel Report, *China – Raw Materials*, para. 7.536.

³⁵ *Ibid.*, paras 7.544–7.550 and 7.553–7.554.

³⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

³⁷ *Ibid.*, para. 156 (referring to Appellate Body Report, *US – Gambling*, paras 308 and 311).

³⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156 (referring to Appellate Body Report, *US – Gambling*, para. 311).

Article XX(g) of the GATT 1994

As noted above, Article XX(g) allows Members to adopt 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 *China – Rare Earths* emphasized that Article XX(g) presents a ‘holistic’ test.³⁹ Nevertheless, panels and the Appellate Body have often divided their analysis into two sections, 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’. These two ‘limbs’ of Article XX(g) are considered separately below.

Article XX(g): ‘Relating to the Conservation of Exhaustible Natural Resources’

In *China – Rare Earths*, the Appellate Body reaffirmed existing jurisprudence (specifically, its decision in *China – Raw Materials*) on the meaning of this term. It thus held, once again, that:

[F]or 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. 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).⁴⁰

The Appellate Body also stated that the question of whether a measure ‘relates to’ conservation may be answered by looking primarily at its ‘design and structure’.⁴¹ However, ‘panels are not precluded from considering evidence relating to the actual operation or the impact of the measure at issue in an assessment under subparagraph (g)’.⁴²

In accordance with the principle that Article XX(g) imposes a ‘holistic’ test, the Appellate Body explained that ‘the absence of a domestic restriction, or the way in which a challenged measure applies to domestic production or consumption, may be relevant to an assessment of whether the challenged measure “relates to” conservation’.⁴³

According to the Appellate Body in *China – Rare Earths*:

[F]or the purposes 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

³⁹ Appellate Body Report, *China – Rare Earths*, para. 5.94.

⁴⁰ Appellate Body Report, *China – Rare Earths*, para. 5.90. (footnotes omitted)

⁴¹ *Ibid.*, paras 5.111–5.112.

⁴² *Ibid.*, para. 5.114.

⁴³ *Ibid.*, para. 5.90. (footnote omitted)

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.⁴⁴

The Appellate Body in *China – Rare Earths* confirmed that the meaning of the term ‘exhaustible natural resources’ is not static or fixed. Rather, it is ‘by definition, evolutionary’.⁴⁵ Accordingly, it may encompass both non-living (for example minerals, clean air) and living (for example turtles) resources.

Article XX(g): ‘Made Effective in Conjunction with Restrictions on Domestic Production or Consumption’

In *China – Raw Materials*, the Appellate Body explained that the terms ‘made effective’ and ‘in conjunction with’ require that trade-disruptive conservation-related measures ‘work together’ with limitations on domestic production or consumption.⁴⁶ However, the Appellate Body was also careful to emphasize 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.’⁴⁷ In other words, while the trade-disruptive and domestic measures are expected to ‘work together’ for the purposes of conservation, there is no requirement that the trade-disruptive measure itself function only or primarily to enforce a domestic restriction.

The Appellate Body developed this interpretation further in *China – Rare Earths*. In that case, it stated:

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 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 towards 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.⁴⁸

⁴⁴ *Ibid.*, para. 5.89. (footnote omitted)

⁴⁵ *Ibid.*, para. 5.89.

⁴⁶ Appellate Body Report, *China – Raw Materials*, para. 356.

⁴⁷ *Ibid.*, para. 356.

⁴⁸ Appellate Body Report, *China – Rare Earths*, para. 5.92.

Recall the definition of ‘restriction’ provided by the Appellate Body in *China – Raw Materials* and *Argentina – Import Measures* in the context of interpreting Article XI:1 of the GATT 1994. In *China – Rare Earths*, the Appellate Body made it clear that ‘restriction’ has the same meaning in Article XX(g) as it does in Article XI:1. Thus, for the purposes of Article XX(g), a ‘restriction’ is ‘[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation’.⁴⁹

According to the Appellate Body in *China – Rare Earths*, the ‘second limb’ 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 production or consumption’.⁵⁰ According to the Appellate Body, ‘[s]uch 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’.⁵¹ Thus, in the Appellate Body’s view, the second ‘limb’ of Article XX(g) ‘is a requirement of *even-handedness* in the imposition of restrictions, in the pursuit of conservation, upon the production or consumption of exhaustible natural resources’.⁵²

Note, however, that the Appellate Body made it clear that the notion of ‘even-handedness’ does not impose an *additional* or *separate* test.

According to the Appellate Body, the notion of ‘even-handedness’:

[D]oes not suggest that Article XX(g) contains a requirement that the burden of conservation be evenly distributed, for instance, in the case of export quotas, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand. Having said that, we note that it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers and that could still be shown to satisfy all of the requirements of Article XX(g).⁵³

2.2[d] *Difference Between Export Restrictions Covered by GATT Article XI:2(a) and Those Justified under GATT Article XX*

Measures that fall within Article XI:2(a) do not constitute violations of the GATT 1994. Accordingly, they do not need to be justified under the provisions of GATT Article XX.⁵⁴ 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 of the paragraphs of Article XX. Of course, if a Member seeks to defend an export

⁴⁹ *Ibid.*, para. 5.91. (footnote omitted)

⁵⁰ *Ibid.*, para. 5.93.

⁵¹ *Ibid.*.

⁵² *Ibid.* (emphasis original; footnote omitted)

⁵³ Appellate Body Report, *China – Rare Earths*, para. 5.134.

⁵⁴ This interpretation was confirmed by the Appellate Body in *China – Raw Materials*. (Appellate Body Report, *China – Raw Materials*, para. 334).

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’.

Indeed, in *China – Raw Materials*, the Appellate Body was careful to note that the reach of Article XI:2(a) is not the same as that of Article XX(g):

The Appellate Body thus accepted the Panel’s conclusion that the two provisions are ‘intended to address different situations and thus must mean different things’.⁵⁵ It is important to be aware that although measures taken pursuant to Article XI:2(a) are, as the Appellate Body stated in *China – Raw Materials*, beyond the ‘scope for the application of Article XX’,⁵⁶ ‘a measure falling within the ambit of Article XI:2(a) could relate to the same product as a measure relating to the conservation of an exhaustible natural resource’.⁵⁷ Thus, a measure taken to prevent or relieve a critical shortage may overlap with a measure relating to exhaustible natural resources.

3 DISCIPLINES AND JURISPRUDENCE ON EXPORT DUTIES IN ACCESSION PROTOCOLS

In addition to the disciplines contained in the WTO agreements, some recently acceded Members have taken on further commitments with respect to export restrictions. The Panel in *China – Raw Materials*, in a finding not appealed by any party to the dispute, explained that the terms of China’s Accession Protocol are an integral part of the WTO Agreement and are enforceable in dispute settlement proceedings.⁵⁸ There is no reason why this conclusion would not apply generally to other Members’ accession protocols. This section will therefore proceed to examine the special and additional commitments on export restrictions included in some accession protocols. As explained above, the GATT 1994 does not include any prohibition on the use of export duties (parallel to the general prohibition on the use of export quotas and other quantitative export restrictions) or any disciplines on the level or on the scheduling of export duties. While many Members

⁵⁵ Appellate Body Report, *China – Raw Materials*, para. 337. (footnote omitted)

⁵⁶ Appellate Body Report, *China – Raw Materials*, para. 334.

⁵⁷ *Ibid.*, para. 337.

⁵⁸ The Panel in *China – Raw Materials* thus stated that ‘[t]he second sentence of Para. 1.2 of China’s Accession Protocol states that provisions of the Protocol are “an integral part of the WTO Agreement”. Thus, the provisions of the Accession Protocol are enforceable in WTO dispute settlement proceedings pursuant to Article 1.1 of the DSU. This is consistent with the approach taken by panels and the Appellate Body.’ (Panel Report, *China – Raw Materials*, para. 7.64 (referring to Panel and Appellate Body reports, *China – Auto Parts*; and *China – Publications and Audiovisual Products*)).

have also undertaken commitments with respect to quantitative export restrictions, most often reiterating or clarifying the existing provisions in the WTO agreements,⁵⁹ this section therefore focuses solely on commitments undertaken with respect to export duties. In total, 16 Members have made commitments on export duties in their accession protocols.⁶⁰

Bulgaria agreed that, after its accession, it would ‘minimize its use of such [export] taxes’⁶¹ and that export taxes ‘would be applied in accordance with the provisions of the WTO Agreement’.⁶²

Mongolia made a commitment to transform its export prohibition on raw cashmere into an *ad valorem* export duty of maximum 30% which would be phased out and eliminated within 10 years of Mongolia’s accession.⁶³ Mongolia, however, later applied for and received a temporary waiver, allowing it five additional years to phase out the export duty, in order to protect its domestic cashmere industry.⁶⁴

Latvia undertook to abolish all existing export duties with the exception of the duty on exports of antiques.⁶⁵

Like Bulgaria, Estonia agreed to ‘minimize the use of export taxes’, and that ‘any such taxes applied would be in accordance with the provisions of the WTO

⁵⁹ See, e.g. WTO, Report of the Working Party on the Accession of the Republic of Seychelles to the World Trade Organization, WT/ACC/SYC/64, 5 Nov. 2014, para. 240, which requires the Seychelles to ‘apply its laws and regulations governing export measures, including prohibitions, export licensing requirements and other export control requirements, in conformity with WTO provisions including those contained in Articles XI, XVII, XX and XXI of the GATT 1994’.

⁶⁰ Bulgaria, Mongolia, Latvia, Estonia, Georgia, Croatia, China, Saudi Arabia, Viet Nam, Ukraine, Montenegro, Russia, Lao People’s Democratic Republic, Tajikistan, Kazakhstan, and Afghanistan. It should be noted that while Afghanistan’s membership terms were adopted at the WTO’s Tenth Ministerial Conference on 17 Dec. 2015, they have yet to be ratified domestically by Afghanistan, by 30 June 2016, and Afghanistan does not become a Member until 30 days after it has deposited its instrument of accession. The commitments on export restrictions contained in Afghanistan’s Accession Protocol are nonetheless included in this section for the sake of completeness.

⁶¹ WTO, Report of the Working Party on the Accession of Bulgaria to the World Trade Organization, WT/ACC/BGR/5, 20 Sept. 1996, para. 39. Para. 2 of Bulgaria’s Accession Protocol incorporates the paragraphs referred to in para. 92 of the Working Party Report, including para. 39. (WTO, Protocol for the Accession of Bulgaria to the World Trade Organization, WT/ACC/BGR/7, 11 Oct. 1996, para. 2).

⁶² WTO, Report of the Working Party on the Accession of Bulgaria to the World Trade Organization, WT/ACC/BGR/5, 20 Sept. 1996, para. 39.

⁶³ WTO, Report of the Working Party on the Accession of Mongolia to the World Trade Organization, WT/ACC/MNG/9, 27 June 1996, para. 24. Para. 2 of Mongolia’s Accession Protocol incorporates the paragraphs referred to in paragraph 61 of the Working Party Report, including para. 24. (WTO, Protocol for the Accession of Mongolia to the World Trade Organization, WT/ACC/MNG/11, 25 July 1996, para. 2).

⁶⁴ WTO, General Council Decision of 27 July 2007, WT/L/695, 1 Aug. 2007. See also Crosby (2008).

⁶⁵ WTO, Report of the Working Party on the Accession of Latvia to the World Trade Organization, WT/ACC/LVA/32, 30 Sept. 1998, para. 69. The export duties listed in Annex 3 were confirmed by the representative of Latvia to be the only export duties applied. Para. 2 of Latvia’s Accession Protocol incorporates the paragraphs referred to in para. 131 of the Working Party Report, including para. 69. (WTO, Protocol for the Accession of Latvia to the World Trade Organization, WT/ACC/LVA/35, 23 Oct. 1998, para. 2).

Agreement'.⁶⁶ Georgia's accession commitments are similar to those undertaken by Bulgaria and Estonia.⁶⁷

Croatia made a commitment to 'apply export duties only in accordance with the provisions of the WTO Agreement'.⁶⁸

According to China's Accession Protocol, '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'.⁶⁹ This commitment was the most far-reaching at the time of China's accession and has been the subject of dispute settlement proceedings. The Appellate Body in *China – Raw Materials* found that China had restricted its regulatory autonomy to impose export duties, except with respect to the products listed in Annex 6, and was not permitted to justify such export duties under the general exceptions in Article XX of the GATT 1994 in the absence of a cross reference incorporating this provision or a general cross reference to the WTO Agreement.⁷⁰

Saudi Arabia committed 'not [to] impose export duties on iron and steel scrap'.⁷¹

Viet Nam undertook an obligation to apply 'export duties, export fees and charges, as well as internal regulations and taxes applied on or in connection with exportation in conformity with the GATT 1994'.⁷² With regard to export duties on ferrous and non-ferrous scrap, Viet Nam confirmed that it 'would reduce export duties in accordance with Table 17' of its Working Party Report.⁷³

⁶⁶ WTO, *Report of the Working Party on the Accession of Estonia to the World Trade Organization*, WT/ACC/EST/28, 9 Apr. 1999, para. 80. Para. 2 of Estonia's Accession Protocol incorporates the paragraphs referred to in para. 141 of Estonia's Working Party Report, including para. 80. (WTO, *Protocol on the Accession of Estonia to the World Trade Organization*, WT/ACC/EST/30, 5 July 1999, para. 2).

⁶⁷ WTO, *Report of the Working Party on the Accession of Georgia to the World Trade Organization*, WT/ACC/GEO/31, 31 Aug. 1999, para. 82. Para. 2 of Georgia's Accession Protocol incorporates the paragraphs referred to in para. 180 of Georgia's Working Party Report, including para. 82. (WTO, *Protocol on the Accession of Georgia to the World Trade Organization*, WT/ACC/GEO/33, 28 Oct. 1999, para. 2).

⁶⁸ WTO, *Report of the Working Party on the Accession of Croatia to the World Trade Organization*, WT/ACC/HRV/59, 29 June 2000, para. 101. Para. 2 of Croatia's Accession Protocol incorporates the paragraphs referred to in para. 225 of Croatia's Working Party Report, including para. 101. (WTO, *Protocol on the Accession of Croatia to the World Trade Organization*, WT/ACC/HRV/61, 19 Sept. 2000, para. 2).

⁶⁹ WTO, *Protocol on the Accession of the People's Republic of China to the World Trade Organization*, WT/L/432, 23 Nov. 2001, para. 11.3.

⁷⁰ Appellate Body Report, *China – Raw Materials*, paras 303–307 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, paras 215, 221, and 226).

⁷¹ WTO, *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, WT/ACC/SAU/61, 1 Nov. 2005, para. 184. Para. 2 of Saudi Arabia's Accession Protocol incorporates the paragraphs referred to in para. 315 of Saudi Arabia's Working Party Report, including para. 184. (WTO, *Protocol on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, WT/L/627, 11 Nov. 2005, para. 2).

⁷² WTO, *Report of the Working Party on the Accession of Viet Nam to the World Trade Organization*, WT/ACC/VNM/48, 27 Oct. 2006, para. 260. Para. 2 of Viet Nam's Accession Protocol incorporates the paragraphs referred to in para. 527 of Viet Nam's Working Party Report, including para. 260. (WTO, *Protocol on the Accession of Viet Nam to the World Trade Organization*, WT/L/662, 15 Nov. 2006, para. 2).

⁷³ WTO, *Report of the Working Party on the Accession of Viet Nam to the World Trade Organization*, WT/ACC/VNM/48, 27 Oct. 2006, para. 260.

Ukraine committed to reduce its existing export duties in accordance with Table 20(b) of its Working Party Report, and agreed not to ‘apply other measures having an equivalent effect, unless justified under the exceptions of the GATT 1994’.⁷⁴ The Working Party Report includes a statement that ‘[t]he Working Party agreed that these commitments do not constitute a reinterpretation of GATT 1994, nor affect the rights and obligations of other members in respect of provisions on the application of export duties, that are measures in accordance with GATT 1994’.⁷⁵

The commitment undertaken by Montenegro regarding export duties is the most extensive commitment undertaken by an acceding Member, namely that Montenegro ‘would not apply or reintroduce any export duty’.⁷⁶ There is no reference to the WTO Agreement or to the GATT 1994.

Part V of the Russia’s Goods Schedule, which contains a list of more than 700 products, stipulates that:

The Russian Federation undertakes not to increase export duties, or to reduce or to eliminate them, in accordance with the following schedule, and not to reintroduce or increase them beyond the levels indicated in this schedule, except in accordance with the provisions with GATT 1994.⁷⁷

The Working Party Report also stipulates that ‘the Russian Federation would apply export duties in conformity with the WTO Agreement, in particular with Article I of the GATT 1994’.⁷⁸ Recall that in *China – Publications and Audiovisual Products* and *China – Raw Materials*, the Appellate Body recognized the

⁷⁴ WTO, *Report of the Working Party on the Accession of Ukraine to the World Trade Organization*, WT/ACC/UKR/152, 25 Jan. 2008, para. 240. Para. 2 of Ukraine’s Accession Protocol incorporates the paragraphs referred to in para. 512 of Ukraine’s Working Party Report, including para. 240. (WTO, *Protocol on the Accession of Ukraine to the World Trade Organization*, WT/L/718, 13 Feb. 2008, para. 2).

⁷⁵ WTO, *Report of the Working Party on the Accession of Ukraine to the World Trade Organization*, WT/ACC/UKR/152, 25 Jan. 2008, para. 240.

⁷⁶ WTO, *Report of the Working Party on the Accession of Montenegro to the World Trade Organization*, WT/ACC/CGR/38, 5 Dec. 2011, para. 132. Para. 2 of Montenegro’s Accession Protocol incorporates the paragraphs referred to in para. 281 of Montenegro’s Working Party Report, including para. 132. (WTO, *Protocol on the Accession of Montenegro to the World Trade Organization*, WT/L/841, 17 Dec. 2011, para. 2).

⁷⁷ WTO, *Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization*, Schedule CLXV, WT/ACC/RUS/70/Add.1, 17 Nov. 2011, Part V. Furthermore, Russia undertook to ‘administer export tariff rate quotas (TRQs) in a manner that is consistent with the WTO Agreement and in particular the GATT 1994 and the WTO Agreement on Import Licensing Procedures’. (WTO, *Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization*, WT/ACC/RUS/70, 17 Nov. 2011, para. 638. Para. 2 of Russia’s Accession Protocol incorporates the paragraphs referred to in para. 1450 of Russia’s Working Party Report, including para. 638. (WTO, *Protocol on the Accession of the Russian Federation to the World Trade Organization*, WT/L/839, 17 Dec. 2011, para. 2)).

⁷⁸ WTO, *Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization*, WT/ACC/RUS/70, 17 Nov. 2011, para. 638.

importance of a cross reference to the WTO Agreement or to articles in the WTO agreements.⁷⁹

Lao People's Democratic Republic undertook to 'comply with GATT 1994 and WTO provisions with regard to export duties'.⁸⁰

Tajikistan's commitments on export duties are similar to those in China's Accession Protocol. Tajikistan thus agreed that it 'shall not introduce and shall eliminate all duties, taxes, fees and charges applied to exports, unless specifically provided for in Table 9 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994'.⁸¹

Kazakhstan undertook commitments similar to those undertaken by Russia, namely not to apply export duties to the products listed in Part V of its Goods Schedule in excess of the duties provided for therein.⁸² Kazakhstan furthermore undertook not to apply 'other measures having an equivalent effect to export duties on those products' and to 'apply export duties in conformity with the WTO Agreement, in particular with Article I of the GATT 1994'.⁸³

Afghanistan made a commitment that it 'would not introduce and would eliminate all duties, taxes, fees and charges applied to exports ... unless specifically provided for in Annex 12 to this Report or applied in conformity with the provisions of Article VIII of the General Agreement on Tariffs and Trade

⁷⁹ See Appellate Body Reports, *China – Publications and Audiovisual Products*, para. 222; and *China – Raw Materials*, paras 303–307.

⁸⁰ WTO, *Report of the Working Party on the Accession of Lao People's Democratic Republic to the World Trade Organization*, WT/ACC/LAO/45, 1 Oct. 2012, para. 101. Para. 101 is not one of the paragraphs referred to in para. 248 of Lao People's Democratic Republic's Working Party Report and incorporated through para. 2 of Lao People's Democratic Republic Accession Protocol. (See WTO, *Protocol of Accession of Lao People's Democratic Republic to the World Trade Organization*, WT/L/865, 29 Oct. 2012, para. 2; and *Report of the Working Party on the Accession of Lao People's Democratic Republic to the World Trade Organization*, WT/ACC/LAO/45, 1 Oct. 2012, para. 248). This, presumable due to the fact that Lao People's Democratic Republic did not undertake commitments with respect to export duties in addition to those contained in the WTO agreements.

⁸¹ WTO, *Report of the Working Party on the Accession of the Republic of Tajikistan to the World Trade Organization*, WT/ACC/TJK/30, 6 Nov. 2012, para. 169. Para. 2 of Tajikistan's Accession Protocol incorporates the paragraphs referred to in para. 351 of Tajikistan's Working Party Report, including para. 169. (WTO, *Protocol on the Accession of the Republic of Tajikistan to the World Trade Organization*, WT/L/872, 11 Dec. 2012, para. 2).

⁸² WTO, *Report of the Working Party on the Accession of the Republic of Kazakhstan to the World Trade Organization*, Schedule CLXXII, WT/ACC/KAZ/93/Add.1, 23 June 2015, Part V.

⁸³ WTO, *Report of the Working Party on the Accession of the Republic of Kazakhstan to the World Trade Organization*, WT/ACC/KAZ/93, 23 June 2015, para. 540. Like Russia, Kazakhstan furthermore undertook to 'administer export tariff rate quotas (TRQs) in a manner that is consistent with the WTO Agreement and in particular the WTO General Agreement on Tariffs and Trade 1994 and the WTO Agreement on Import Licensing Procedures'. (WTO, *Report of the Working Party on the Accession of the Republic of Kazakhstan to the World Trade Organization*, WT/ACC/KAZ/93, 23 June 2015, para. 540). Para. 2 of Kazakhstan's Accession Protocol incorporates the paragraphs referred to in para. 1175 of Kazakhstan's Working Party Report, including para. 540. (WTO, *Protocol on the Accession of the Republic of Kazakhstan to the World Trade Organization*, WT/L/957, 30 July 2015, para. 2).

1994'.⁸⁴ The obligation to eliminate all duties, taxes, fees and charges applied to export does, however, not apply to Afghanistan's 2% fixed tax on exports until January 2021.⁸⁵

4 SOME MULTILATERAL SYSTEMIC ISSUES RAISED IN THE RECENT YEARS

Export restrictions can have impacts in a number of broader, systemic areas. Below, the impacts of export restrictions on food security, sustainable development, and environmental protection are considered.

4.1 FOOD SECURITY AND EXPORT RESTRICTIONS ON AGRICULTURAL PRODUCTS

Export restrictions on agricultural products can be used for purposes of achieving food security. This tendency was especially obvious during the 2007–2008 food crisis.

4.1[a] *The Use of Export Restrictions During the 2007–2008 Food Crisis*

In the recent food crisis in 2007–2008, export restrictions were utilized widely by countries. A study by the Food and Agriculture Organization (FAO) in 2011 found that 31% of countries had used export restrictions.⁸⁶ The study found that countries typically used, sequentially or at the same time, more than one export restriction such as duties, quotas, and minimum export prices.⁸⁷ In East Asia and South Asia, 40% of countries implemented export restrictions, and in Europe and Central Asia, 35% of countries implemented these measures.⁸⁸ The statistics for

⁸⁴ WTO, *Report of the Working Party on the Accession of the Islamic Republic of Afghanistan to the World Trade Organization*, WT/ACC/AFG/36, 13 Nov. 2015, para. 145. Para. 2 of Afghanistan's Accession Protocol incorporates the paragraphs referred to in para. 301 of Afghanistan's Working Party Report, including para. 145. (WTO, *Protocol on the Accession of the Islamic Republic of Afghanistan to the World Trade Organization*, WT/L/974, 21 Dec. 2015, para. 2). Part V of Afghanistan's Goods Schedule lists the bound rates for Afghanistan's export duties. (WTO, *Report of the Working Party on the Accession of the Islamic Republic of Afghanistan to the World Trade Organization*, Schedule CLXX, WT/ACC/AFG/36/Add.1, 13 Nov. 2015, Part V).

⁸⁵ WTO, *Report of the Working Party on the Accession of the Islamic Republic of Afghanistan to the World Trade Organization*, WT/ACC/AFG/36, 13 Nov. 2015, para. 145.

⁸⁶ Sharma R, *Food Export Restrictions: Review of the 2007-2010 Experience and Considerations for Disciplining Restrictive Measures*, (hereinafter Sharma [2011]). FAO Commodity and Trade Policy Research Working Paper No. 32, 2011, 8. http://www.fao.org/fileadmin/templates/est/PUBLICATIONS/Comm_Working_Papers/EST-WP32.pdf. Accessed 6 October 2015.

⁸⁷ *Ibid.*

⁸⁸ Howse R and Josling T, *Agricultural Export Restrictions and International Trade Law: A Way Forward*, (hereinafter Howse and Josling [2012]), International Food and Agriculture Trade Policy Council, 2012, p.6. <http://www.agritrade.org/Publications/ExportRestrictionsandTradeLaw.html>. Accessed 6 October 2015.

Africa, Latin America, the Caribbean, the Middle East, and North Africa were lower, where around 20% of the countries implemented export restrictions.⁸⁹

Many countries, including China, India, and Viet Nam, imposed restrictions on grain exports in 2007 and 2008, claiming that conservation of local food production would reduce food prices. Other countries reacted by introducing their own export restrictions on food products, arguing that such action was necessary since the originally imposed export restrictions would reduce their access to imports of food. These restrictions exacerbated existing supply constraints by globally driving up prices even more.⁹⁰

The relationship between food security and the use of export restrictions has sparked a vigorous debate among policy makers and economists in the aftermath of the 2007–2008 food crisis. Martin and Andersen attribute 45% of the price increase in rice during the crisis to the attempts by countries to insulate their domestic markets, including through the use of export restrictions.⁹¹ Howse and Josling critically note that despite the increasingly obvious link established by studies between food price increases and the use of export restrictions, much of the discourse around the United Nations (UN) enshrined Right to Food seems to increasingly imply a right to self-sufficiency regardless of competitiveness, trade distortions, and domestic consumer prices.⁹²

Indeed the food crisis intensified the debate for stricter disciplines on the use of export restrictions. One could question the efficacy of strengthening current disciplines on quantitative export restrictions when, as noted above, the WTO agreements do not provide for any disciplines on the use of export duties.⁹³

⁸⁹ *Ibid.*

⁹⁰ See generally Headey D, *Rethinking the Global Food Crisis – The Role of Trade Shocks*, (hereinafter Headey [2010]), International Food Policy Research Institute, 2010.<http://cdm15738.contentdm.oclc.org/utis/getfile/collection/p15738coll2/id/831/filename/832.pdf>. Accessed 6 October 2015. Headey examines the role of trade-related factors on the price increases in important international grain markets, namely the rice, wheat, maize, and soybean markets.

⁹¹ Martin W and Andersen K, *Export Restrictions and Price Insulations during Commodity Price Booms*, (hereinafter Martin and Andersen [2010]), World Bank Policy Research Working Paper 5645, 2010, 10. <https://www.imf.org/external/np/seminars/eng/2011/trade/pdf/session1-martin-paper.pdf>. Accessed 6 October 2015, (referenced in Howse and Josling [2012], 5).

⁹² Howse and Josling (2012), 10–11. See also Karapinar B and Häberli C (eds.), *Food Crises and the WTO*, 1st edn. Cambridge University Press, 2010.

⁹³ Howse and Josling (2012), 17. Howse and Josling question whether export duties that are designed to have the same economic impact, and the same protectionist intent, as the kinds of measures disciplined under Article XI:1 of the GATT 1994 should be viewed as exempt duties. For these authors, the broad scope of Article XI:1 identified by the Panel in *India – Autos* provides a basis for interpreting the meaning of exempted export duties narrowly, excluding those with predominantly trade restricting effects, as opposed to those implemented for revenue-raising purposes. According to Howse and Josling, the fact that disciplines in Article VIII on fees and charges do not prevent the use of export taxes and duties as permitted by Article XI, also indicates that export duties exempted from the ban in Article XI:1 should be understood as measures imposed for fiscal revenue-raising purposes, not trade restricting ones. (Howse and Josling [2012], 17–18).

4.1[b] *The Agreement on Agriculture and 'Due Consideration' to Food Importing Countries*

As noted, the AoA contains additional rules on export restrictions for food shortage in Article 12. Howse and Josling contend that the notion of Article 12 of the AoA as 'soft law' should be reconsidered in light of the restrictive approach adopted by the Appellate Body to Article XI:2(a) of the GATT 1994.⁹⁴ Howse and Josling contend that this shows that there is a 'hard law' effect to Article 12 and that a determinative legal meaning should be given to the requirements under Article 12.1(a) and (b).⁹⁵

Article 12.1(a) provides that 'due consideration' should be given to the food security of importing WTO Members, when a Member is imposing an export restriction. A 'weak' reading of this provision would simply attribute a purely procedural meaning to the provision that the needs of importing WTO Members should be taken into account when making decisions as to the imposition of new export restrictions. Under this reading there is no substantive requirement on the actual export restricting measure that its design must reflect due consideration of importing Members' food security.⁹⁶

4.2 EXPORT RESTRICTIONS AND SUSTAINABLE DEVELOPMENT

It has been suggested that exceptions should be introduced so that in certain circumstances, some Members should be entitled to maintain export restrictions. For example, a study of the use of export restrictions and duties across nine low income countries in Africa, using data gathered from Trade Policy Reviews (TPRs), found that the most commonly cited objectives for the implementation of export restrictions include promoting value addition in the supply chains, environmental protection, and food security.⁹⁷ Export duties provide an important source of revenue for low income countries,⁹⁸ and can provide incentives to promote economic diversification and higher value added activities. Their use could, in some circumstances, be justified for the benefit of sustainable development.⁹⁹

⁹⁴ Howse and Josling (2012), 15–16 (referring to Appellate Body Report, *China – Raw Materials*).

⁹⁵ Howse and Josling (2012), 15–16.

⁹⁶ Howse and Josling (2012), 15.

⁹⁷ See Karapinar, *Export Restrictions on Natural Resources: Policy Options and Opportunities for Africa*, (hereinafter Karapinar), 7–10. [http://www.nccr-trade.org/fileadmin/user_upload/nccr-trade.ch/news/TRAPCA%20Paper%20\(Submitted1711\)_BK.pdf](http://www.nccr-trade.org/fileadmin/user_upload/nccr-trade.ch/news/TRAPCA%20Paper%20(Submitted1711)_BK.pdf). Accessed 6 October 20. Karapinar includes a full review of the export restrictions and duties in place on hydrocarbons and minerals in nine low income countries, namely Cameroon, the Republic of Chad, the Democratic Republic of the Congo, Ghana, the Republic of Guinea, the Islamic Republic of Mauritania, Nigeria, the Republic of Sierra Leone, and the Republic of Zambia.

⁹⁸ For example, 10% of government income in Côte d'Ivoire comes from export duties on cocoa. (Mitra and Josling [2009], 4).

⁹⁹ Karapinar, 3.

It is also argued that the implementation of restrictions on the export of inputs entails that a country can lower the price of these inputs for domestic downstream manufacturers, who will in turn gain a price advantage in the export markets. Such restrictions help grow infant manufacturing industries, while the increase in exports of the downstream manufacturers' goods will generate higher export and tax revenue as well as sustaining and creating domestic jobs.¹⁰⁰

However, the implementation of these measures often promotes industries which are inefficient or do not have a comparative advantage. In addition, the benefits of these policies could be offset if other countries impose export restrictions in response to the original export restrictions imposed.¹⁰¹

4.3 EXPORT RESTRICTIONS AND ENVIRONMENTAL PROTECTION

Environmental protection or the conservation of exhaustible natural resources such as fresh water, fisheries, forestry or minerals could also be the objective behind the implementation of export restrictions. Countries may want to prevent or slow down the depletion of their natural resources, or may simply choose to keep them for the benefit of future generations.¹⁰²

There has been much debate around the potential use of border carbon adjustment measures by countries as a way to drive momentum on the climate change agenda, and to incentivize countries with large manufacturing and carbon-intensive industries to join a multilateral agreement on climate change.¹⁰³

In the climate change context, two types of border carbon adjustments may be implemented: price-based and non-price-based measures. Under the latter type, market access is limited to products that comply with specific standards, for instance, the level of greenhouse gas (GHG) emissions ensuing from the production of a product. Price-based border adjustments can be applied on imports in two different manners: (i) border tax adjustments on imports and (ii) mandatory carbon offset purchases of either GHG emission permits or allowances by importers.¹⁰⁴

Border carbon adjustments can also be applied with respect to exports, for instance in the form of carbon export duties. Such export duties would create an incentive for producers to invest in low carbon emission production and processing methods, which

¹⁰⁰ *Ibid.*

¹⁰¹ Karapinar (2011), 1141.

¹⁰² *Ibid.*

¹⁰³ Guardian, *Oil Nations Asked to Consider Carbon Tax on Exports*, 2012. <http://www.theguardian.com/environment/2012/nov/21/oil-nations-carbon-tax-climate-talks?CMP=EMCENVEM1631>. Accessed 6 October 2015.

¹⁰⁴ Low P, Marceau G and Reinaud J, *The Interface Between the Trade and Climate Change Regimes: Scoping the Issues*, *Journal of World Trade* 46(3), 2012: 485-544, 488.

would result in reduced carbon emissions ensuing from this production.¹⁰⁵ Holzer and Karapinar argue that such export duties are likely to counteract and even compete with border adjustment measures imposed by importing countries which could have an impact on GHG emissions and competitiveness.¹⁰⁶ As pointed out by Holzer and Karapinar, exporting countries are likely to prefer imposing their own carbon export duties rather than facing import carbon border adjustment measures since the revenue generated through a carbon export duty stays in the exporting country. Such export price measures must nonetheless respect WTO rules such as the MFN principle in Article I of the GATT 1994.¹⁰⁷

5 CONCLUSION

The undeniable trend since the Uruguay round, reflected in, among others, WTO accession protocols, has been to impose stricter disciplines on the use of export restrictions. The question of whether this trend can turn into multilateral consensus and reform on this issue remains to be seen.

In this regard, it is worth noting that there has been no shortage of proposals for reform. In the context of the Doha Round, some Members have proposed constraining Members' ability to restrict food exports, either generally¹⁰⁸ or only with respect to purchases for non-commercial humanitarian purposes by the World Food Programme¹⁰⁹ or purchases by least-developed country Members or net-food importing developing country Members.¹¹⁰ Others have proposed stricter notification requirements,¹¹¹ procedural requirements such as mandatory consultations and the possibility of binding arbitration,¹¹² and prohibiting the use of export taxes for competitive advantage or supply managements purposes.¹¹³ Furthermore, based on experiences in regional trade agreements, some academics

¹⁰⁵ Holzer K and Karapinar B, *Legal Implications of the Use of Export Taxes in Addressing Carbon Leakage: Competing Border Adjustment Measures*, (hereinafter Holzer K and Karapinar [2012]), New Zealand Journal of Public and International Law 10(1), 2012: 15–35, 26.

¹⁰⁶ *Ibid.*, 17.

¹⁰⁷ *Ibid.*, 26.

¹⁰⁸ See WTO, *Proposal on Export Prohibitions and Restrictions, Communication from Japan and Switzerland*, JOB (08)/34, 30 Apr. 2008, 1.

¹⁰⁹ See WTO, *Food Export Barriers and Humanitarian Food Aid by the WFP (World Food Programme), Communication from the European Union*, WT/GC/138, 18 Nov. 2011, 2.

¹¹⁰ See WTO, *The WTO Response to the Impact of the Food Crisis on LDCs and NFIDCs, Communication from the NFIDCs, African and Arab Groups*, WT/GC/140/Rev.1, 25 Nov. 2011, 1.

¹¹¹ See WTO, *Revised Submission on Export Taxes, Communication from the European Communities*, TN/MA/W/101, 17 Jan. 2008, 2; and Protocol on Enhanced Transparency on Export Licensing, Communication from Japan and the United States, TN/MA/W/15/Add.4/Rev.1, 11 Apr. 2008, 2.

¹¹² WTO, *Proposal on Export Prohibitions and Restrictions, Communication from Japan and Switzerland*, JOB (08)/34, 30 Apr. 2008, 1.

¹¹³ See WTO, *Proposal for Comprehensive Long-Term Agricultural Trade Reform, Submission from the United States*, G/AG/NG/W/15, 23 June 2000, 3.

have suggested narrowing the GATT Article XI:2(a) exception to include only food products,¹¹⁴ limiting the use of export restrictions to a positive list of products,¹¹⁵ and requiring countries that impose export restrictions to continue to export a specific percentage of the share of domestic production of the specific product previously exported.¹¹⁶

However, the momentum towards an international consensus on the use of export restrictions appears to have stalled in recent years. The 2007–2008 food crisis shows the systemic implications of these measures for sustainable development and food security, but action, in the form of actual reforms, remains to be seen.

¹¹⁴ See Korinek J and Bartos J, *Multilateralising Regionalism: Disciplines on Export Restrictions in RTAs*, (hereinafter Korinek J and Bartos J [2012]), OECD Trade Policy Paper No. 139, 2012, 31. <http://dx.doi.org/10.1787/5k962hf7hfnr-en>. Accessed 16 October 2015. See also Anania G, *Agricultural Export Restrictions and the WTO: What Options do Policy-Makers Have for Promoting Food Security?*, (hereinafter Anania [2013]), ICTSD Issue Paper No. 50, 2013, 32–33. <http://www.ictsd.org/sites/default/files/research/2013/11/agricultural-export-restrictions-and-the-wto-what-options-do-policy-makers.pdf>. Accessed 6 October 2015. Anania (2013), 32–33.

¹¹⁵ See Korinek and Bartos (2012), 31.

¹¹⁶ See Anania (2013), 30–31 (referring to Meilke K, *Does the WTO Have a Role in Food Crises?*, (hereinafter Mellike [2008]), *The Estey Centre Journal of International Law and Trade Policy* 9(2), 2008: 146–155, 151; and WTO, *Negotiating Proposal by Japan on WTO Agricultural Negotiations*, G/AG/NG/W/91, 21 Dec. 2000).