

Export Restrictions on Raw Materials — WTO rules and remedies

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Introduction

Export restrictions may be imposed on raw materials for a number of reasons, including for general revenue and conservation purposes. In many instances, however, the aim of such restrictions is to improve the competitive position of domestic processing industries vis-à-vis their foreign competitors. In June 2009, this issue came to the fore when the United States and the European Union (later joined by Mexico) lodged a complaint against China, claiming that export restraints (including quotas and export taxes) imposed by China on a number of raw materials violate World Trade Organization (WTO) rules.¹

Although it is well-known that WTO rules aim to reduce protectionism on the import side, the rules concerning export restrictions are less known. This article will review the WTO rules concerning export restrictions, as they pertain to non-agricultural raw materials (e.g., minerals, oil and other natural resources) and discuss available remedies.

WTO Rules Applicable to Export Restrictions

Article XI:1 of the 1994 General Agreement on Tariffs and Trade (GATT) is the main WTO rule pertaining to export restrictions. It provides:

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

It is generally understood that Article XI:1 permits the application of export duties, taxes and other charges (hereinafter, export duties), but prohibits all other measures which might restrict the quantity of exports of a product (hereinafter, quantitative export restrictions).

Quantitative export restrictions prohibited by Article XI:1 include measures such as quotas, bans, minimum prices and non-automatic licensing requirements. Quantitative export restrictions made effective through state-trading operations are also covered by Article XI:1.

The scope and type of measures that may restrict the quantity of exports of a product and therefore violate Article XI:1 is potentially very large. Nevertheless, given that there have only been a few cases which have dealt with alleged Article XI:1 export restrictions to date, its scope remains unclear. For example, one interesting issue that has been debated is whether Article XI:1 extends to oil production limitations adhered to by WTO Members which are part of the Organization of the Petroleum Exporting Countries (OPEC). Strictly speaking, Article XI:1 only applies to restrictions on the *exportation* or *sale for export* of products. The *production* quotas imposed by OPEC countries only pertain to the extraction of oil from the ground. Once extracted and rendered into a state fit for export, there is no direct limitation on the quantity of the product that can be exported. Therefore, it seems that Article XI:1 should not apply to quotas imposed by OPEC Members. Nevertheless, such production quotas have substantially the same result as border restrictions on exports. Given that Article XI:1 has been interpreted broadly, it could be argued that WTO law should apply in such circumstances.

Recently, it has also been questioned whether prohibitively high export duties could be contrary to Article XI:1. The plain language of Article XI:1 seems to counsel against such an interpretation. More specifically, it states that it applies to "prohibitions (...) *other than* duties" (emphasis added). Therefore, Article XI:1 seems to recognize that export duties can effectively result in an export ban (without prohibiting such an effect). The view that Article XI:1 can never apply to export restrictions in the form of duties is further supported by GATT jurisprudence, according to which, high import tariffs are not caught by Article XI:1 merely because of their effect.²

In the absence of a general WTO ban on export restrictions in the form of duties, it is important to note that some WTO Members — including China, Ukraine and Vietnam — have made country specific commitments to lower or eliminate certain export duties as part of their accession agreements.

Exceptions to WTO Rules Applicable to Export Restrictions

Export restrictions inconsistent with Article XI:1 of GATT or other WTO rules may still be applied if justified by an exception. Exceptions contained in Articles XI, XX and XXI of the GATT are most relevant to export restrictions on raw materials.

Article XI:2 permits the imposition of quantitative restrictions if they, *inter alia*, (i) are temporarily applied to relieve critical shortages of foodstuffs or other products; or (ii) are necessary for the marketing of commodities. The latter exception has been interpreted to cover export restrictions designed to further the marketing of a commodity by spreading supplies of the restricted product over a longer period of time. Some restrictions imposed on exports of raw materials — most notably, production restrictions imposed by OPEC (if they qualify as an export restriction at all) — could be covered by this provision.

Article XX contains a number of general exceptions that could potentially apply to export restrictions imposed on raw materials. For example, Article XX(i) permits

export restrictions for price stabilization purposes, Article XX(c) contains an exception related to gold and silver, and Article XX(g) permits export restrictions relating to conservation of natural resources. This latter exception is of particular importance, as it is often referenced by WTO Members in the context of raw materials.

Article XX(g) applies to measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." According to WTO case law, restrictions "reasonably related to" or "primarily aimed at" the conservation of natural resources will generally satisfy the "relating to" requirement.³ However, if there is evidence that an export restriction is designed to protect or promote a domestic processing industry, then Article XX(g) cannot be used as a justification.⁴

Article XXI contains a number of security-related exceptions. Most pertinent to export restrictions on raw materials are those contained in Article XXI(b) concerning nuclear and military-related goods as well as actions "taken in time of war or other emergency in international relations." There is some debate about the scope of the wording "other emergency in international relations," in particular whether this exception applies only to political emergencies or also extends to social and economic emergencies (such as, arguably, the ongoing global financial crisis).

WTO Remedies

The main remedy against perceived violations of WTO law is WTO dispute settlement. Quantitative export restrictions contrary to Article XI:1 of the GATT or export duties and other restrictions contrary to WTO accession agreements may be challenged directly before the WTO. Furthermore, export restrictions that do not, as such, violate WTO law (for example, because they are in the form of an export duty) could be indirectly addressed using other WTO rules. For example, certain export restrictions could constitute subsidies, as defined by the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). If they do, then a direct WTO challenge or the application of countervailing duties may be possible. Alternatively, WTO challenges to certain export restrictions could be based on a GATT Article XXIII non-violation nullification or impairment complaint. Finally, the effects of export restrictions can also potentially be taken into account in anti-dumping investigations, the governing rules for which are set out in the WTO Anti-Dumping Agreement.

Export restrictions as subsidies

Under the SCM Agreement, a subsidy exists if there is (i) a financial contribution by a government or public body; and (ii) the financial contribution confers a benefit.⁵ Notably, the provision of goods is included in the concept of a financial contribution under the SCM Agreement. Moreover, goods directly supplied by a private body will be considered to be provided by a government if a government has entrusted or directed the private body to provide the goods. Under SCM Agreement rules, a

benefit is usually conferred where the financial contribution is provided on terms more favorable than those generally available on the market.

If an export restriction causes the price of a raw material for a domestic processing industry to be lower than it otherwise would be, a subsidy could be found to exist. In terms of the SCM Agreement, the provision of the raw material would amount to a financial contribution in the form of a good while the low price would confer a benefit. Therefore, the only remaining question would be whether a government entrusted or directed a private body to provide the low-priced raw material. In *US — Countervailing Duty Investigation on DRAMS*, the Appellate Body determined that "entrustment" occurs where a government gives responsibility to a private body, and "direction" refers to situations where the government exercises its authority over a private body.⁶ While the Appellate Body acknowledged that a command is one way to direct, it also noted that "governments are likely to have other means at their disposal to exercise authority over a private body" and that "[s]ome of these means may be more subtle than a 'command' or may not involve the same degree of compulsion."⁷ When considering the notions of delegation or command, the Appellate Body also remarked: "In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction."⁸

Arguably, certain export restrictions could be interpreted as a kind of inducement and therefore provide evidence of entrustment or direction. In circumstances where, for instance, export restrictions are sufficiently burdensome or accompanied by other measures designed to deter exports (e.g., no refunds on internal taxes at the time of export), domestic producers will be indirectly persuaded or motivated to sell their raw material to a domestic processing industry at a price lower than otherwise would be available. Even though not a command, it seems possible this could be a more subtle exercise of authority over a private body and therefore, at least in some cases, evidence of direction (and therefore also a subsidy) under SCM Agreement rules.

Non-violation nullification or impairment complaint

Article XXIII:1(b) of the GATT permits WTO Members to directly challenge a measure applied by another Member, even if it does not conflict with the GATT, provided that the measure results in "nullification or impairment of a benefit." The relevant benefit for Article XXIII:1(b) purposes is generally the legitimate expectation of improved market access resulting from the tariff concessions of another Member.⁹ Nullification or impairment of that benefit results when the WTO Member which has given the concession later acts in a way that upsets the competitive position of an imported product.¹⁰ Thus, Article XXIII:1(b) provides a remedy when bargained-for tariff concessions are eroded by the subsequent action of another Member.

If the effect of an export restriction is to promote a downstream domestic processing industry, a non-violation nullification or impairment complaint may be possible. First, there would have to be a relevant tariff concession. This would normally be a tariff concession related to a product produced by the downstream processing industry.

Thus, for example, if export restrictions on aluminum benefit downstream aluminum foil makers, a tariff concession falling under Harmonized System heading 7607 concerning aluminum foil would be most relevant. Second, there would need to be a legitimate expectation of improved market access resulting from the tariff concession. A legitimate expectation will exist if a challenged measure (e.g. an export restriction) could not have been reasonably foreseen at the time of the negotiation of a relevant tariff concession. This determination must be made on a case-by-case basis. In general, however, there will be a presumption in favor of a legitimate expectation if a challenged measure was only contemplated and applied after the negotiation of a relevant tariff concession. Third, the export restriction would also have to adversely affect the competitive position of an imported product. This could happen, for example, if an export restriction enables a domestic processing industry to sell lower-priced finished goods on the domestic market to the detriment of competing imported goods.

Anti-dumping and export restrictions

According to the WTO Anti-Dumping Agreement (ADA), anti-dumping duties may be imposed on imported products if they are dumped and cause injury to a domestic industry. Dumping occurs when the export price of a product is less than its normal value. The normal value is usually the price of the exported product on the market where the allegedly dumped product is produced. However, the WTO ADA also permits Members to construct normal value based on costs of production. When prices are constructed, the WTO ADA generally requires costs to be calculated on the basis of records kept by the party under investigation. However, if the records of the party do not reasonably reflect the costs associated with production, then a different basis for costs may be used.

In several anti-dumping cases, the EU has determined that Russian producer records did not reasonably reflect the costs associated with production and distribution of gas based on the consideration that the prices paid by Russian producers were much lower than Russian export prices for gas and gas prices in unregulated markets.¹¹ Consequently, when calculating the costs of production, upward adjustments were made for costs associated with gas consumption. These adjustments increased the normal values and therefore also the dumping amount, as the resulting difference between the export price and the normal value was greater. If allegedly dumped products are benefitting from a raw material price advantage caused by export restrictions, it may be possible for adjustments to be made in much the same way.

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¹ WT/DS394/1 (US); WT/DS395/1 (EU); WT/DS398/1 (Mexico).

² See GATT Panel Report, *EEC — Bananas II*, DS38/R, unadopted, 11 February 1994, para. 139.

³ See Appellate Body Report, *US-Shrimp*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, paras. 135-142.

⁴ See GATT Panel Report, *Canada — Herring and Salmon*, L/6268, adopted 22 March 1988, BISD 35S/98, para. 5.1.

⁵ In order to be actionable under the SCM Agreement, a subsidy must also be specific (e.g. the financial contribution is only provided to certain enterprises or industries).

⁶ WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131, para. 116.

⁷ *Id.*, para. 111.

⁸ *Id.*, para. 116.

⁹ See, e.g., Panel Report, *Japan — Film*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para. 10.61.

¹⁰ See, e.g. *id.*, para. 10.82.

¹¹ See, e.g., Council Regulation No. 661/2008, O.J. L 185/1 (2008) (concerning ammonium nitrate); Council Regulation No. 1256/2008, O.J. L 343/1 (2008) (concerning certain welded tubes and pipes of iron or non-alloy steel).