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Settling Trade Disputes over Natural Resources:

Limitations of International Trade Law to Tackle Export Restrictions

Stormy-Annika Mildner & Gitta Lauster*

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* Dr. Stormy-Annika Mildner is Coordinator of the research Group Competition for Scarce Resources at the Stiftung Wissenschaft und Politik; Gitta Lauster, M.A., is the research group's research assistant.

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Abstract

In the light of rising competition, scarce natural resources are increasingly perceived as a potential national security risk. Hence, governments are increasingly intervening in primary commodity markets to secure domestic supply at lower prices, for instance, by restricting exports through tariffs and quotas. While limiting exports may be justified in certain cases such as temporary shortages of food supply, they are often a second-best policy tool to address domestic market failures, risking international trade distortions. Some import-dependent countries have therefore lobbied for an update of WTO regulations to curtail the use of export restrictions; others have turned to preferential trade agreements (PTAs) to achieve stricter disciplines. In this paper, the following questions are addressed: What are the current WTO rules regulating export restrictions on natural resources, and what are their limitations? Are PTAs better equipped to prevent trade distortions through export restrictions? To answer these questions, we confine our analysis mostly to Free Trade Agreements (FTAs), not considering the multitude of one-sided preferential agreements.

> "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 into reverse."
>
> *Former EU Trade Commissioner Peter Mandelson*[1]

> "I believe not only that there is room for mutually beneficial negotiating trade-offs that encompass natural resources trade, but also that a failure to address these issues could be a recipe for growing tension in international trade relations".
>
> *WTO Director-General Pascal Lamy*[2]

1 P. Mandelson, '"The Challenge of Raw Materials", Speech before the EU Parliament on September 29, 2008' (29 September 2008) available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/467&type=HTML&aged=0&language=EE&guiLanguage=en (last visited 15 February 2011).

2 Quoted in: WTO, 'WTO Report Calls for More Cooperation among Governments in Natural Resource Trade' (23 July, 2010) available at http://www.wto.org/english/news_e/pres10_e/pr611_e.htm (last visited 15 February 2011) [WTO, Report Calls for More Cooperation].

A. Introduction

The markets for primary products – energy resources and metals, but also agricultural products – have been highly turbulent in recent years: High growth rates of GDP, particularly in emerging economies, and increasing worldwide demand have led to steep price hikes. Between 2002 and 2008, the price of non-fuel commodities rose by 159 percent, metal and mineral prices by 285 percent and agricultural raw material prices by 133 percent.[3] Although primary commodity prices dropped considerably during the financial and economic crisis in 2008/2009, they are, following the global economic recovery, already on the rise again. While one barrel oil was priced at 50 dollars in January 2009, the price has hiked back to 80 dollars in July 2010.[4] Within a year, the price for steel increased by about 40 percent (May 2009 to July 2010).[5] While wheat prices have not quite reached their 2008 peak, they are again standing at around 250 dollars per ton (August 2010).[6] In light of the flood in Pakistan and the drought in Russia, the Food and Agricultural Organization (FAO) warned against a new food crisis.

Growing competition as well as increasing prices and price volatility have raised concerns about future access to key natural resources at sustainable prices in many import-dependent countries. The worries about supply security are fuelled by the highly uneven geographical distributions of many natural resources across the globe. High-tech raw materials such as lithium or rare earth minerals are of particular concern, as they are increasingly the basis of information and innovative green technologies. For many of these materials, the exploitable reserves are generally found in one or a few geographic regions. For example, in the case of rare earths, China

3 EurActiv, 'Raw Materials: Heading for a Global Resource Crunch?' (4 February 2011) available at http://www.euractiv.com/en/sustainability/raw-materials-heading-global-resource-crunch-linksdossier-188526 (last visited 15 February 2011).

4 International Energy Agency, 'Oil Market Report' (10 September 2010) available at http://omrpublic.iea.org/omrarchive/10sep10over.pdf (last visited 15 February 2011).

5 'Up to Date Information on Steel Prices from around the Globe' available at http://www.worldsteelprices.com/ (last visited 15 February 2011).

6 F. Redruello, 'Global Wheat Price Forecast for 2010 and 2011' (19 August 2010) available at http://blog.euromonitor.com/2010/08/global-wheat-price-forceast-for-2010-and-2011.html (last visited 15 February 2011).

alone accounts for about 97 percent of global production. A lack of substitutes and low degrees of recyclability reinforce the problem.[7]

Many import-dependent countries are worried about yet another trend: More and more countries are intervening in the primary commodity markets, restricting commodity exports. According to the OECD, the number of countries applying export duties over the period 2003 to 2009 was noticeably higher than in previous years.[8] Motivations for implementing restrictions are manifold: to nurture infant industries, to underpin social policy and income distribution, to buttress government revenues, to protect the environment and to preserve natural resources. During the food crisis of 2007/2008, dozens of countries imposed various forms of export restrictions to secure domestic supplies of foodstuffs. According to the FAO, around one-quarter of the 60 low-income countries surveyed had some form of export restriction in place on food-related agricultural products in 2008.[9] While countries resorting to these measures consider them a necessary policy tool to address market failures, import-dependent countries criticize unfair price advantages that these measures create for downstream producers in the country instituting them.[10]

Some countries have therefore turned to the World Trade Organization (WTO) to curtail the use of export restrictions. However, the WTO is not optimally equipped to deal with export barriers to trade. Whereas multilateral trade law generally prohibits quantitative export restrictions like quotas, only few constraints concern the application of export taxes, as long as they equally apply to all export markets. Furthermore, there are many exceptions to protect national security or health of human, animal and plant life. This generates legal uncertainties, adding to disaccord between exporters and importers.

7 J. Korinek & J. Kim, 'Export Restrictions on Strategic Raw Materials and their Impact on Trade', *OECD Trade Policy Working Papers* (2010) 95.

8 J. Kim, 'Recent Trends in Export Restrictions', *OECD Trade Policy Working Paper* (2010) 5.

9 S. Mitra & T. Josling, 'Agricultural Export Restrictions: Welfare Implications and Trade Disciplines', *IPC Position Paper Agricultural and Rural Development Policy Series* (2009), 4 available at http://www.agritrade.org/documents/ExportRestrictions_final.pdf (last visited 15 February 2011).

10 B. Karapinar, 'Export Restrictions and the WTO Law: "Regulatory Deficiency" or "Unintended Policy Space"' (21 May 2010) available at http://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_21may10_e.htm (last visited 15 February 2011).

For that reason, an increasing number of importing countries – the EU being at the forefront – have lobbied for an update of the rules and the inclusion of the topic in the current negotiations, the Doha Development Round. The reform proposals include tariffication of all export restrictions, i.e. converting existing export restrictions into tariffs and binding them under the WTO. As these proposals have received a cold response from many developing countries, some economists recommend dealing with the issue on a bilateral and plurilateral level rather than in the context of the WTO. The American economist Claude Barfield, for example, argues that a modification of WTO rules is currently unlikely. Trying to solve disputes over export restrictions through the WTO's dispute settlement procedure, while rules remain weak, promises little to no success Barfield argues. Even worse, this strategy would be highly risky as it could intensify the rift between industrialized and developing countries within the WTO.[11]

We therefore ask two questions:

1. How are export restrictions on natural resources regulated by the WTO?

2. Are PTAs really better equipped to prevent trade distortions through export restrictions? Apart from the introduction and conclusion, the paper is divided into three sections.

First, we give an overview of export restrictions, their global patterns, motivations and economic implications. We find that while limiting exports may be justified in certain cases such as temporary shortages of food supply, they are often a second-best policy tool to address domestic market failures, risking international trade distortions. In the second part of the paper, we analyze multilateral trade rules dealing with export restrictions, also taking a closer look at three dispute settlement procedures on export restriction:

1. WTO – Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather,

2. WTO – United States – Measures Treating Export Restraints as Subsidies, and

3. WTO – China – Measures Related to the Exportation of Various Raw Materials.

[11] C. Barfield, 'Trade and Raw Materials – Looking ahead' (29 September 2009) available at http://www.aei.org/speech/28745 (last visited 15 February 2011).

This section highlights the shortcomings of WTO rules on export restrictions. Last, we turn to preferential trade agreements, evaluating their ability to regulate export restrictions and to settle disputes on this matter. To ensure comparability, we restrict our analysis to Free Trade Agreements (FTAs), not considering the multitude of one-sided preferential agreements. As we are not aware of any bilateral dispute settlement on export restrictions within FTAs, a case by case comparison with multilateral dispute settlement is not possible at this point. Thus, while we question whether FTAs are a viable policy tool to address export restriction, our second question remains partially unanswered.

B. Export Restrictions: Why and Where?

I. Patterns of Export Restrictions

What are export restrictions? According to the WTO Panel Report, "United States – Measures Treating Export Restraints as Subsidies", export restraints are "a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the products calculated to limit the quantity of exports"[12]. Within the WTO's Trade Policy Reviews,[13] export restrictions are dealt with in the section "measures directly affecting exports".

Export restrictions can take many different forms such as taxes, duties and charges, quotas and export bans, mandatory minimum export prices, reductions of value added tax (VAT) rebates on exports, and stringent export licensing requirements. The most frequently used form is export taxes. These can be applied either in form of an ad valorem tax, i.e. specified as a percentage of the value of the product, or as a specific tax, i.e. a fixed amount to pay per unit or per weight of a product. Furthermore, they can be applied in a progressive manner – high, when the price of the product is high and, conversely, low, when the price is low. They can be applied to a particular good or across multiple goods of a certain category. An export

[12] Panel Report, 'United States – Measures Treating Export Restraints as Subsidies', WT/DS194/R, 2001.

[13] All WTO members are reviewed, the frequency of each country's review varying according to its share of world trade.

quota, on the other hand, is a restriction imposed by a government on the amount or quantity of goods that may be exported within a given period. Its most radical form is an export ban, which is an absolute restriction of exports. Export licensing schemes require the exporters to get government approval prior to exporting. Licensing can be automatic or discretionary, based on a quota, a performance requirement, or some other criterion.[14]

There is no comprehensive list of world-wide export restrictions. In principle, Article X of the GATT 1994 (Publication and Administration of Trade Regulations) requires a member to:

1. publish its trade-related laws, regulations, rulings and agreements in prompt and accessible manner;

2. abstain from enforcing measures of general application prior to their publication; and

3. administer the above-mentioned laws, regulations, rulings and agreements in a uniform, impartial and reasonable manner. Notifiable measures include quantitative restrictions, other non-tariff measures (such as licensing), and export taxes. A 1995 decision by the WTO Council for Trade in Goods created a biennial notification of Members' quantitative restrictions. However, as the WTO itself points out, statistics on quantitative restrictions, in particular, are often neither complete nor consistent. The WTO has devoted its most recent annual report, in 2010, to trade in raw materials, also covering export restrictions,[15] and the OECD has recently conducted a series of studies on the effects of export restrictions. We base our summary mainly on these publications.

According to the WTO's Trade Policy Reviews, export taxes cover 11 percent of natural resources trade compared to 5 percent of other merchandise trade.[16] In a 2010 analysis of the WTO's Trade Policy Reviews, the OECD finds that about half of the WTO members reviewed (65 of 128) impose export duties. The OECD study highlights three findings: first, the percentage of countries applying these duties over the period 2003 to 2009 was higher than in the previously analyzed period of

14 Korinek & Kim, *supra* note 7, 11; J. Bonarriva *et al.*, 'Export Controls: An Overview of the Use, Economic Effects, and Treatment in the Global Trading System', *U.S. International Trade Commission – Office of Industries Working Paper* (2009) available at http://www.usitc.gov/publications/332/working_papers/ID-23.pdf (last visited 15 February 2011).

15 WTO, 'World Trade Report. Trade in Natural Resources' (2010).

16 WTO, *supra* note 15, 116 ff.; WTO, 'Report Calls for More Cooperation', *supra* note 2.

1997 to 2002. While only 39 of 100 member countries had imposed export restrictions in the earlier period, the number increased to 65 of 128 countries in the second period of analysis. Second, this particular trade policy instrument is mainly used by developing and least developed countries (LDCs). Of the 31 OECD countries under review, only 4 resorted to export duties. This percentage is considerably higher with regard to LDCs: In 21 of the reviewed 25 countries, the OECD found export duties. While export duties are usually applied to a limited number of products, many LDCs apply a blanket export tax, albeit at a low level. These countries include for example Bangladesh, Cameroon and Pakistan. There is also a clear geographic concentration of such measures: Of 35 African countries, reviewed by the Trade Policy Review Body (TPRB), 30 applied export restrictions; of 31 Asian/Pacific countries, 18 resorted to these measures.[17] The WTO's annual trade report confirms that export restrictions are mostly used by developing countries: The top ten users of export taxes (measured in terms of the share of natural resource exports covered by export taxes) are Argentina, Cameroon and Gabon, Gambia, the Central African Republic, Lesotho, the Solomon Islands, Mali, Dominica, Sri Lanka, the Maldives, and Zambia. China ranks 19th in the list of countries that heavily use export tariffs.[18]

Third, the OECD points out that the items most subjected to export duties were agricultural products (36 of 65 members), mineral and metal products (28 of 65 members), products made from leather, hide and skin (17 of 65 members), forestry (15 of 65 members) and fishery (13 of 65).[19] In a second study (2010) on export restrictions on 21 strategic metals and minerals, the OECD found quantitative restrictions on 13 of the materials in at least one exporting country in at least one year since the late 1990s. Taxes levied on exports range from 3 to 30 percent.[20]

The U.S. International Trade Commission (ITC) made another interesting finding in a 2009 study: The preferred type of controls varies between developing and industrialized countries, and they are used for different purposes. Export taxes appear to be imposed rather for economic reasons. Many lower-middle income and low-income countries employ them to generate government revenues and protect domestic industries.

17 Kim, *supra* note 8, 5.
18 WTO, *supra* note 15, 116 ff.; WTO, 'Report Calls for More Cooperation', *supra* note 2.
19 Kim, *supra* note 8, 5.
20 Korinek & Kim, *supra* note 7, 11.

Quantitative restrictions, on the other hand, are employed to meet a wider range of goals, including national security and environmental goals. High-income countries tend to impose restrictions most frequently for security reasons or in accordance with international agreements and conventions. Low- and lower-middle income countries, on the other hand, impose restrictions most frequently for resource conservation purposes and to ensure public health.[21]

II. Motivations for Export Restrictions

Export restrictions are applied for a number of reasons, which can be divided into economic objectives (such as raising government revenues, promoting downstream industries to diversify exports, controlling price fluctuations) and non-economic objectives (national security, protection of the environment, broader social goals). Whilst in general, income from (import and export) tariffs as percentage of overall government revenues has decreased steadily, least developed countries, in particular, still consider them a reliable source of income. They often find raising government revenues through export tariffs easier than through more complicated and politically difficult forms of taxation such as income or land taxes.[22] Albeit rarely presented explicitly as a policy objective due to its questionable compatibility with international trade law, the promotion of downstream processing industries is another motivation for export restrictions. By providing them with cheap raw materials and inputs, governments hope to incentivize the development of domestic manufacturing, thus also diversifying the country's exports. Further economic objectives include maintaining international commodity prices or orderly marketing, and changing terms of trade in favor of the exporting country – the relative price of a country's exports compared to its imports.

One of the foremost non-economic rationales for export restrictions is national security, peace and stability. Examples of international treaties under which the signatory countries have agreed on a restriction of certain exports are the UN Treaty on the Non-Proliferation of Nuclear Weapons and the UN Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction. Another frequently cited policy objective is the protection and preservation of the environment. For example, several countries restrict the export of

21 Bonarriva *et al.*, *supra* note 14, 13.
22 *Id.*, 3.

endangered species, referring to the UN Convention on International Trade in Endangered Species of Wild Fauna and Flora. In 2007, China eliminated the value-added reseller (VAR) rebates on exports of hundreds of items to restrain the export of products regarded as highly energy- or raw material-intensive and highly polluting. The argument here, again, was the protection of the environment and conservation of natural resources.[23] During the food crisis in 2007/2008, when prices for many agricultural products skyrocketed, many developing countries resorted to export restrictions to protect the local population from shortages of foodstuffs or other essential goods. Just recently (2010), Russia imposed a ban on wheat exports after a severe drought and after fires had destroyed the country's crops.

Some observers consider export restrictions a necessary policy tool to address market failures[24]; others point to their trade-distorting effects. While they are justified in certain cases such as national shortage of food supplies and national security considerations, they often entail net-welfare losses for the domestic economy as well as for the importing countries: An export restriction on raw materials penalizes exporters of the restricted product, redistributing income from the primary to the secondary sector of an economy. The producer of the raw material is taxed; the downstream processing industries are subsidized.[25] This can result in inefficiencies, incentivizing too much production in the exporting country's industry. While export restrictions might help to diversify production and exports, a negative side-effect could be greater economic and social inequalities between rural and urban areas. In addition, less capital is available for much-needed investments in the primary sector. In the long run, domestic producers of raw materials will decrease their supply in response to the lower price, entailing losses to the economy. Revenues from an export tax can neutralize these losses only in part. Thus, while appearing attractive on paper, the OECD finds that they rarely achieve their economic, social or environmental objectives. From an economic standpoint, imposing trade restrictions as a means of addressing market failures is merely a "second-best" policy. A particularly risky strategy is applying export restrictions to shift a country's terms of trade. Not only are most exporting countries not large enough to influence world prices by reducing the supply of a product.

23 Kim, *supra* note 8, 5.

24 See for example Karapinar, *supra* note 10.

25 R. Piermartini, 'The Role of Export Taxes in the Field of Primary Commodities' (2004) available at http://www.wto.org/english/res_e/booksp_e/discussion_papers4_e.pdf (last visited 15 February 2011).

They also encourage counter-strategies in the importing countries, at best incentivizing the development of substitutes, at worst the application of retaliatory measures.

Export restrictions risk aggregate economic welfare losses in the rest of the world as they reduce the global supply of the restricted product: International prices will increase and consumer welfare will decline. By pushing a wedge between the price available to domestic processors and the price charged to foreign processors, export restrictions are often trade diverting. It is for this reason that many countries have turned to the WTO to curtail the use of export restrictions.

C. The WTO and Export Restrictions

I. Multilateral Rules on Export Restrictions

The WTO is based on "a benign mercantilist political economy (exports are good; imports are bad)".[26] Therefore, the organization concentrates on imports and import restrictions rather than on exports and export barriers to trade.[27] Export taxes are not prohibited by the WTO, though such taxes must be non-discriminatory and transparent under Articles I and X of the 1994 GATT. Thus, Article I (Most Favoured Nation Clause) states: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges […] any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." According to Article X, 3(a), "each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article", these measures being "laws, regulations, judicial decisions and administrative rulings of general application". While they are to be applied indiscriminately, export tariffs are – unlike import barriers – not bound, i.e. once reduced, export

[26] Barfield, *supra* note 11.

[27] P. Collier & A. J. Venables, 'International Rules for Trade in Natural Resources' (2010) available at http://www.wto.org/english/res_e/reser_e/ersd201006_e.pdf (last visited 15 February 2011).

duties can be increased again without violating a country's obligations under WTO rules. There is no legal framework for members to schedule commitments with respect to exports. GATT Article II (Schedules of Concession) only concerns import duties and charges in connection with importation. Accordingly, the application of export taxes has not, so far, been found to violate WTO rules.[28]

Although general WTO rules thus do not discipline members' application of export taxes, members can agree to legally binding commitments through their accession agreements. While these commitments vary in scope and economic effect, some of them go quite a bit beyond the general WTO rules, not only prohibiting export quotas but also restricting the application of certain export duties. One country submitting itself to stricter rules was Bulgaria. While the country applied a range of export taxes mainly to prevent and relieve critical shortages of foodstuffs before its accession in 1996, it agreed on minimizing these measures upon accession. The TPRB found in 2003 that the country no longer imposed any export duties. Other countries agreeing to such rules include the Ukraine and Vietnam, but the commitments undertaken by China are by far the most comprehensive. China committed not to apply export duties other than on 84 items listed in the Annex of the Accession Agreement.[29] Export restrictions are also an important issue in the accession negotiations with Russia. Contentious issues include export barriers on minerals, ferrous and non-ferrous metals and scraps, petrochemicals, natural gas, and raw hides and skins. For example, Russia has implemented high trade barriers for the export of many raw materials, the export tax on copper scrap from Russia amounts to 50 percent. Also India has implemented an export tax of 15 percent on iron ore. The Ukraine also inhibits the trade of raw materials like aluminum scrap of up to 24 percent, while Venezuela even forbids the export of some materials like copper, lead and cobalt scrap.[30]

[28] D. Crosby, 'WTO Legal Status and Evolving Practice of Export Taxes', 12 *Bridges Review* (2008) 5 available at http://ictsd.org/i/news/bridges/32741/ (last visited 15 February 2011).

[29] 'China's Accession to the WTO and its Relationship to the Chinese Taipei accession and to Hong Kong and Macau, China' (2010) available at www.wto.org/english/thewto_e/acc_e/chinabknot_feb01.doc (last visited 15 February 2011).

[30] Bundesverband der Deutschen Industrie (BDI), *Übersicht über bestehende Handels- und Wettbewerbsverzerrungen auf den Rohstoffmärkten* (January 2011), unpublished overview.

The main rule pertaining to quantitative export restrictions is Article XI:1 of the 1994 GATT (General Elimination of Quantitative Restrictions): "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". Hence, the application of export duties, taxes and other charges is permitted, while all other measures which might restrict the quantity of exports of a product are prohibited. Quantitative measures include for example quotas, bans, minimum prices and non-automatic licensing requirements. To date, there have been only a few dispute cases which have dealt with alleged Article XI:1 export restrictions; its scope therefore remains unclear. Another relevant Article is Article VIII of the GATT, which applies to measures imposed in the context of customs formalities. Thus, for example, it prohibits excessive customs fees and requires that fees do not represent (i) a taxation of export for fiscal purposes; or (ii) an indirect protection to domestic products.[31]

But there are also exceptions to these rules, allowing export prohibitions and restrictions for certain public policy purposes. These can be found in GATT Articles XI, XX and XXI. Article XI:2 (critical shortage) permits the imposition of quantitative restrictions if they (i) are temporarily applied to relieve critical shortages of foodstuffs or other products; or (ii) are necessary for the marketing of commodities. Article XX of the GATT may also be applicable: The article exempts certain measures from WTO obligations if (b) they are "…necessary to protect human, animal, or plant life and health…" or (g) they relate "…to the conservation of exhaustible natural resources". The exception, however, does not apply for export restrictions designed to protect or promote a domestic processing industry. In addition, Article XX(i) permits export restrictions for price stabilization purposes, and Article XX(c) contains an exception related to gold and silver. Export restrictions to safeguard national security can be justified under Article XXI. Article XXI(b) concerns nuclear and military-related goods as well as actions "taken in time of war or other emergency in international relations." As many of the other articles, this rule leaves ample space for interpretation. Thus, it is not clear whether "other emergency in

[31] WTO, 'General Agreement on Tariffs and Trade' (1994) available at http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf (last visited 5 February 2011) [=GATT 1994].

international relations" applies only to political emergencies or also extends to social and economic emergencies.[32]

Additional treatment of export restrictions can be found in Article 12 in the WTO Agreement on Agriculture, which stipulates that any member, instituting "any new export prohibition or restriction on foodstuff in accordance with paragraph 2(a) of Article XI of GATT 1994" shall (a) "give due consideration to the effects of such prohibition or restriction on importing Members' food security"; (b) "give notice in writing, as far in advance as practicable, to the Committee on Agriculture" and "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", before imposing such a measure.[33] However, these obligations do not apply "to any developing country Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned." While Article 12 requires members to notify the WTO when they restrict food exports, there are no penalties for ignoring the rule.[34]

Certain export restrictions can be challenged under the WTO Agreement on Subsidies and Countervailing Measures (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. Accordingly, some observers argue that lower prices for the domestic industry resulting from the imposition of export taxes could be considered a 'financial contribution' under the SCM Agreement. However, the Panel in the dispute 'United States – Measures Treating Export Restraints as Subsidies' explicitly found that an export restraint, defined as including export taxes, "cannot constitute government-entrusted or government-directed provision of goods […] and hence does not constitute a financial contribution" under the SCM Agreement.[35]

In the light of the illustrated limitations of WTO rules, the EU strongly supports including the issue in the current negotiations, the Doha Development Agenda, asking for substantive commitments by all WTO

32 *Id.*

33 WTO, *Agreement on Agriculture* available at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf (last visited 5 February 2011), Article 12.

34 Mitra & Josling, *supra* note 9, 4.

35 Panel Report, 'United States – Measures Treating Export Restraints as Subsidies', WT/DS194/R (29 June 2001) available at http://www.worldtradelaw.net/reports/wtopanels/us-exportrestraints%28panel%29.pdf (last visited 5 February 2011), 94.

Members to bind and eliminate or reduce export taxes. The EU tabled three main arguments for limiting export restrictions:

1. export taxes can have serious trade distorting effects, in particular when applied by major suppliers;

2. export taxes can serve as indirect subsidization of processing industries, creating unfair trade advantages; and

3. export taxes can serve to displace imports on the market of the exporting country.[36]

To get the issue on board despite strong opposition from the developing countries, the EU resorted to quite a creative approach: It dealt with export tariffs in its NAMA proposal (non-agricultural market access negotiations) on non-tariff barriers (NTBs) to trade, declaring the issue a 'tax' matter – albeit with little success. The most recent draft modalities for NAMA do not refer to the EU's proposal. Slightly more promising was an initiative by the U.S., Japan and Korea on transparency, focusing on export licensing. In addition, export restrictions were also discussed during the agriculture negotiations. While most participants agreed that some disciplines were needed to ensure stable supplies for importing countries, there was no agreement on the scope of these disciplines.

II. Settling Disputes on Export Restrictions

In accordance with the above-mentioned rules, countries negatively affected by export restrictions can file an official complaint with the WTO and, if bilateral consultations do not resolve the disagreement, request the establishment of a dispute settlement panel. In general, the WTO's quasi-adjudicative dispute settlement procedure is a well-functioning mechanism to solve trade disputes. While there are some elements of political dispute settlement, it has a strong legal base: It provides for clear procedural rules, and sets timeframes for each clearly defined stage of the dispute settlement process (consultations, panel review and appellate stage). If a member brings a dispute against another member, the responding country cannot refuse to be judged. An independent dispute panel, usually chosen in consultation with the countries in dispute, reviews the case. While either side can appeal a panel's ruling, they have to be based on points of law such as legal interpretation. The panel's and the Appellate Body's rulings are automatically adopted unless there is a consensus to reject a ruling (negative

[36] Kim, *supra* note 8, 20.

consensus).[37] The most important element of the dispute settlement procedure is that the decisions, once they are adopted, are legally binding upon the parties to the dispute, and failure to comply with the ruling can be sanctioned by the plaintiff. Multilateral dispute settlement offers further clear advantages: All WTO Members have equal access, and decisions are made on the basis of rules rather than on the basis of economic power. The system offers another advantage, in particular for small countries, which might not have the capacity to make sufficient use of the dispute settlement mechanism: Members who have a substantial interest in the matter can participate as third-party countries in the consultations. In fact, the system works quite well: About two-thirds of the disputes brought to the WTO for adjudication are resolved to the satisfaction of the complainant.[38]

Quantitative export restrictions in violation of Article XI:1 of the GATT, or export duties and other restrictions contrary to WTO accession agreements, can be challenged directly before the WTO. However, it is relatively easy to justify restrictions under the many exemptions, in particular because these leave ample space for interpretation. There are, for example, no definitions of what is “temporary,” “critical” or what constitutes a “shortage” under Article XI:2. As a consequence, there has yet to be any successful challenge to the export restrictions implemented by an exporter of foodstuffs.[39] Other exceptions for quantitative restrictions such as Article XX[40] and XXI leave equal room for interpretation. Trying to resolve disputes over export restrictions through the WTO’s dispute settlement procedure, while rules remain weak, thus promises little to no success. Moreover, this strategy is politically risky since these duties are introduced primarily by developing and least developed countries. As the economist Claude Barfield argues, pushing the issue into dispute settlement

[37] E. Ramirez Robles, ‘Political and Quasi-Adjudicative Models in European Union Free Trade Agreements. Is the Quasi-adjudicative Model a Trend or is it Just Another Model?’ *WTO Staff Working Paper ERSD-2006-09* (2006) available at http://www.wto.org/english/res_e/reser_e/ersd200609_e.pdf (last visited 27 February 2011).

[38] M. Busch & E. Reinhardt, ‘The WTO Dispute Settlement’, *SIDA Trade Brief* (April 2004), 3 available at http://userwww.service.emory.edu/~erein/research/SIDA.pdf (last visited 5 February 2011).

[39] Mitra & Josling, *supra* note 9, 4.

[40] There are already many cases on the interpretation of Art. XX b) and g) pertaining to import barriers. These include the 1998 ruling “United States – Import Prohibition of Certain Shrimp and Shrimp Products”. By contrast, there has not yet been a case on Art. XX i) on the exceptions for gold and silver.

(in the hope to set precedents) could intensify the rift between industrialized and developing countries within the WTO.[41]

In the following section, we will take a closer look at three dispute settlements procedures on export restriction:

1. WTO – Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather,

2. WTO – United States – Measures Treating Export Restraints as Subsidies, and

3. WTO – China – Measures Related to the Exportation of Various Raw Materials.

1. The EU against Argentina: Export Restrictions on Hides and Bovine Leather

Our first case deals with the question in how far administrative procedures are export restraints, violating WTO rules. The relevant article is therefore GATT Article XI:1.

In 1998, the EC requested consultations with Argentina regarding bovine hides and calf skins, semi-finished and finished leather. The EC alleged that Argentine's export regulations violated GATT provisions. The complaint addressed two points, the first being of relevance to our study: (1) the mandatory presence of representatives of the Argentine leather tanning industry during customs procedures for exports and the disclosure of information about slaughterhouses for hides and bovine leather (violation of GATT Article XI:1; export restrictions); and (2) advance tax payments that allegedly imposed a higher tax burden on imports.

The WTO dispute settlement panel found, with regard to the first part of the complaint, that the claim concerning Article XI by the EC was not valid. The Argentinean regulations on export procedures were not an export restricting measure under the provisions of Article XI. The EC won on another point, however, concerning Article X:3(a). After the panel had established that Article X:3(a) applied to the measure at issue, as (1) the substance of the measure at issue was "administrative in nature" and (2) the measure was a law of "general application", it found that the measure was

[41] Barfield, *supra* note 11.

not administered in a reasonable and impartial manner and was consequently inconsistent with the respective article. What rendered the measure an "unreasonable administration" was that the confidentiality of information was not guaranteed and that the procedure allowed persons with adverse commercial interest to obtain confidential information to which they had no right (partial administration).[42] The dispute settlement body (DSB) recommended that Argentina adjusted its trade policies in this regard. Argentina consented to do so within a "reasonable period of time", which was set to February 2002. In March 2002, the dispute parties finally notified the DSB of their agreement.

2. Canada against the U.S.: Measures Treating Exports Restraints as Subsidies

Our second case study concerns the question whether export restraints can be considered a subsidy; the relevant agreement is therefore the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

Under U.S. trade law, export restraints are treated like an export subsidy, in which case the government can apply countervailing measures. Accordingly, the U.S. contended that Canada's log export restrictions provided a subsidy to lumber producers. Canada, on the other hand, alleged that the treatment of export restraints under U.S. countervailing duty law and practice obliged the government to treat export restraints as a "financial contribution" under Article 1.1 of the SCM Agreement, which was an interpretation inconsistent with the subsidies agreement.[43] In May 2000, Canada requested consultations with the U.S. concerning this matter. After bilateral consultations failed to forge an agreement, a dispute settlement panel was established in the same year. The key issue, the panel dealt with,

[42] WTO, 'Argentina – Hides and Leather', DS 155 available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds155sum_e.pdf (last visited 5 February 2011).

[43] M. E. Janow & R. W. Staiger, 'The Treatment of Export Restraints as Subsidies under the Subsidies Agreement of the WTO', *American Law Institute* (March 2003) available at http://www.ali.org/doc/wto/wto2001/exportrestraints.pdf (last visited 5 February 2011), 18; Panel Report, 'United States – Measures Treating Export Restraints as Subsidies', WT/DS194/R (29 June 2001) available at http://www.worldtradelaw.net/reports/wtopanels/us-exportrestraints%28panel%29.pdf (last visited 5 February 2011), 3.

was whether export restraints constituted a "financial contribution" (or income or price support) under Article 1.1 under the SCM Agreement.

The dispute parties agreed that export restraints, in principle, could confer a benefit. However, they had diverging views on what exactly constituted an export restraint. According to Canada, an export restraint was "a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted. Such measures could also take the form of a government imposed fee or tax on exports of the product calculated to limit the quantity of exports". The U.S., on the other hand, interpreted export restrictions more broadly as "any action or an act that holds back or prevents exports". The SCM Agreement, on the other hand, does not define exports restraints. The two parties also had diverging views on the subsidy character of export restrictions. The U.S. believed that exports restrains could, indeed, be considered a financial contribution within the meaning of SCM Agreement 1.1 (a) (1), while Canada took the opposite position.

The panel concluded that an export restraint did not constitute a financial contribution in the sense of Article 1.1 (a) (1) of the SCM Agreement as it does not have clear legal language on the matter. Subsequently, the panel found that the U.S. regulations did not violate the SCM Agreement. As both claims by Canada had been rejected, the case was dissolved and no recommendations were made by the DSB panel.[44] Some economists interpret the dispute foremost as a challenge to the WTO and its consistency with existing legal measures on trade, in this case, on the proper definition of subsidies.[45]

3. The United States, the EU and Mexico against China: Export Restrictions on Metals

The third case concerns obligations on export restriction under accession agreements and the importance of Article XX when dealing with export restrictions. The case, however, is still pending (October 2010).

On 23 June 2009 the United States and the European Union (later joined by Mexico) presented a formal Request of Consultation to deal with the dispute existing with China, claiming that export restraints (including

[44] *Id*., 108-109.
[45] Janow & Staiger, *supra* note 43, 1.

quotas and export taxes) imposed by China on a number of raw materials violated WTO rules on export restrictions.[46] In response to the filed Requests of Consultation, three dispute cases were established (U.S. versus China DS394; EU versus China DS395 and Mexico versus China DS398). After consultation with China on multiple occasions did not lead to a settlement, the complainants proceeded to require a Panel establishment by the WTO on November 4, 2009. On 21 December 2009, the DSB established a single panel, pursuant to Article 9.1 of the DSU, to examine the disputes DS394, DS395 and DS398. Several countries including Argentina, Brazil, Canada, Chile, Colombia, Ecuador, India, Japan, Korea, Norway, and Turkey joined the case as third-parties.

The complainants basically claim three types of violations:[47] (1) The first violation is related to export quotas imposed by China. According to the complainants, China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quantitative restrictions such as quotas. The rules that are infringed by these measures are Article XI:1 of the GATT 1994 as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Protocol on the Accession of the People's Republic of China (WT/L/432) (Accession Protocol), which incorporates commitments in paragraphs 162 and 165 of the Working Party Report on the Accession of China (WT/MIN(01)/3). (2) Furthermore, the complainants criticize the fact that China imposes "temporary" export duty rates, and/or "special" export duty rates of various magnitudes on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc. This conflicts with China's obligations under paragraph 11.3 of Part I of the Accession Protocol, which require the country to refrain from export duties on products that are not listed in Annex 6 of the Accession Protocol. These obligations also require China to limit any export duties imposed on products that are listed in Annex 6 to the rates provided therein. Most of the 84 exceptions, listed in annex 6, concern metals, providing for export levies

46 L. Van Den Hende & J. Paterson, 'Export Restrictions on Raw Materials – WTO Rules and Remedies' (2009) available at http://www.herbertsmith.com/NR/rdonlyres/393EFC20-DB64-4FC1-8C0C-8BA85768092E/16346/Exportrestrictions onrawmaterialsWTOrulesandremedie.pdf (last visited 27 February 2011).

47 European Commission, 'EU Requests WTO Panel on Chinese Export Restrictions on Raw Materials' (4 November 2011) available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=481 (last visited 27 February 2011); EurActiv, 'EU, U.S. Act against China on Raw Material Exports' (24 June 2009) available at http://www.euractiv.com/en/trade/eu-us-act-china-raw-material-exports/article-183436 (last visited 27 February 2011).

of 20 to 40 percent on products ranging from lead and zinc ores to scrap iron.[48] The third complaint concerns additional restraints imposed on exportation. The complainants claim that China administers its measures in a manner that is not uniform, impartial, and reasonable by imposing excessive fees and formalities on exportation, and not publishing certain measures pertaining to requirements, restrictions, or prohibitions on exports (in violation of Article VIII, VIII:1, VIII:4, Article X).[49] The three complaining states submitted their first written statements in June 2010. The U.S. submission finds that China now subjects over 600 items to non-automatic licensing and over 350 items to export duties. These export restraints have become increasingly restrictive over time; export quota amounts have decreased while export duty rates have increased.[50]

China has submitted its first written statement in August 2010.[51] Some of China's previous officially stated rationales for these restrictions included 1. the conservation of natural resources, using prohibitions, export quotas, licensing and taxes, 2. environmental protection and energy saving, using quotas, taxes, and only partial VAT rebates; 3. ensuring stable domestic supply, and therefore avoiding large price fluctuations, in certain products, using quotas, export taxes, only partial VAT rebates, and state trading; and 4. management of trade so as to, for example, reduce China's current account surplus.[52] China alleges that these export barriers are necessary for the sake of natural resource and energy conservation. "The goal of export administrative measures on some raw materials is to protect the environment and our limited resources", the Ministry of Commerce

48 'U.S. Mulls WTO Case over Chinese Export Restrictions', 12 *Bridges Weekly Trade News Digest*, (2008) 29, 2.

49 'EU Requests WTO Consultations on Chinese Export Restrictions on Raw Materials' (23 June 2009) available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/287&format=HTML&aged=0&language=EN&guiLanguage=en (last visited 27 February 2011).

50 'Executive Summary of U.S. First Written Submission' (6 June 2010) available at http://www.ustr.gov/webfm_send/2078 (last visited 27 February 2011).

51 EU, 'General Overview of Active WTO Dispute Settlement Cases Involving the EU as Complainant or Defendant and of Active Cases under the Trade Barriers Regulation' available at http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf (last visited 18 April 2011), 10.

52 WTO, 'Trade Policy Review, China, 2010' (31 May and 2 June 2010) available at http://www.wto.org/english/tratop_e/tpr_e/s230-03_e.doc (last visited 27 February 2011), 44.

argued.[53] This is, however, not the only reason for the export restrictions. A Chinese Ministry of Commerce statement emphasized: "The regulations conform to the needs of China's own [sustainable] development, while also advancing China's efforts towards the sustainable development of the global economy"[54]. Two consecutive hearings were held in September and November 2010, and on April 1 2011, the panel circulated the confidential final report to the dispute parties.[55]

On 7 May 2010, the dispute settlement panel issued a ruling on certain preliminary objections raised by China; the panel decided in favor of China only on minor procedural points that do not affect the main legal challenge.[56] As the complainants have just recently submitted their written statements, a panel ruling is still quite a long way down the road. However, there are some indicators for a possible verdict. In 2007, the WTO's Trade Policy Review found that China applied statutory export duties on 88 items and interim export duties on 174 products, 64 of which were also subject to statutory export duties. In January 2008, the coverage of interim export duties increased to 334 lines at the HS 8-digit level;[57] these include key raw materials, such as yellow phosphorous, bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide and zinc. In its biennial review of China's trade policies in June 2010, the WTO alleged China may be giving its manufacturers an unfair advantage by restricting exports of some raw materials. It found that export restrictions, explicit or implicit, were a major feature of China's trade regime. The main explicit restrictions involved: export prohibitions, export quotas, export licensing requirements, and export taxes. Implicit restrictions included less-than-full

53 Quoted in: 'China Defends Export Restrictions on Raw Materials' (11 May 2009) available at http://business.inquirer.net/money/breakingnews/view/20091105-234406/China-defends-export-restrictions-on-raw-materials (last visited 27 February 2011).

54 Quoted in: BBC News, 'China Defends Export Restrictions' (5 November 2009) available at http://news.bbc.co.uk/2/hi/business/8344053.stm (last visited 27 February 2011).

55 EU, 'General Overview of Active WTO Dispute Settlement Cases Involving the EU as Complainant or Defendant and of Active Cases under the Trade Barriers Regulation' available at http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134652.pdf (last visited 18 April 2011), 10.

56 WTO, 'China – Measures Related to the Exportation of Various Raw Materials – Communication from the Panel' (18 May 2010) available at http://www.worldtradelaw.net/prelims/china-rawmaterials-prelim.pdf (last visited 27 February 2011).

57 Korinek & Kim, *supra* note 7, 13.

rebate of VAT on exports, and state trading arrangements. This Trade Policy Review, however, has no legally binding effect, as it is not a verdict. The next procedural step is the presentation of the dispute settlement panel's report to the parties to the dispute, and until then it cannot be definitively stated that the measures adopted by China violate WTO rules.

D. PTAs – A Better Way to Deal with Export Restrictions?

While the scope and ambition of rules on export restrictions vary among the bilateral and plurilateral PTAs, some FTAs go well beyond the WTO, including stricter rules on export tariffs. For example, export taxes are prohibited among the member countries of several regional FTAs such as the EU, the North American Free Trade Agreement (NAFTA), and the Mercado Comun del Cono Sur (Mercosur). They are also prohibited in some bilateral FTAs, including, among others, the FTAs between Canada and Chile, between Canada and Costa Rica, between Japan and Singapore, Australia and New Zealand as well as between the EU and Mexico.[58] Given the multitude of FTAs currently in force, we concentrate on U.S. and EU FTAs as representatives for FTAs concluded by industrialized countries. Representatives for South-South FTAs in our paper are Mercosur, the Southern African Development Community, the South African Customs Union, and ASEAN (Association of Southeast Asian Nations).

I. The United States' FTAs

Prohibitions of export restrictions have been a common scheme in U.S. Free Trade Agreements. Often, the obligation on export tariffs reads: "Neither Party may adopt or maintain any duty, tax, or other charge on the export of any good to the territory of the other Party, unless such duty, tax, or charge is adopted or maintained on any such good when destined for domestic consumption"[59]. Rules on quantitative export restrictions are in

[58] Piermartini, *supra* note 25, 2.

[59] 'Free Trade Agreement United States-Chile' (6 June 2003), Art. 3.11 available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file837_3992.pdf (last visited 27 February 2011), 3-9; 'Free Trade Agreement United States-South Korea' (30 June 2007) available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file904_12701.pdf (last visited 27 February 2011).

general modeled in accordance with WTO rules: "Except as otherwise provided in this Agreement, neither Party may adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994, including its interpretative notes, and to this end Article XI of GATT 1994, including its interpretative notes, is incorporated into and made a part of this Agreement"[60]. Often, however, the agreements feature exceptions with regard to quantitative restrictions on sensitive products which vary within the different FTAs.

NAFTA, for example, has quite stringent rules regarding export restrictions. Article 314 imposes a prohibition on export taxes. It prohibits a party from adopting or maintaining any duty, tax or other charge on the export of any good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on: a) exports of any such good to the territory of all other Parties; and b) any such good when destined for domestic consumption. An exception is granted to Mexico for basic foods set out in Annex 314. In line with Article XI of the GATT 1994, NAFTA also provides general rules on quantitative restrictions. But here again, there are exemptions: Article 315 specifies the conditions of exceptions in Articles XI 2(a) or XX(g), (i) or (j) of the GATT 1994. Furthermore, NAFTA exempts controls by Canada on the export of log species, as well as controls on the export of unprocessed fish, from the rules on quantitative export restrictions.

There are many more examples of exceptions: For example, the FTA with Chile stipulates that the rules on export restrictions, listed under Article 3.11, shall not apply to controls by the United States on the export of logs of all species.[61] A similar exception is made in the FTA between the U.S. and South Korea as well as the U.S. and Australia. CAFTA, the agreement with the Central American Countries, while restricting both the use of export duties as well as quantitative export restrictions, features a multitude of exceptions on quantitative restrictions: restrictions on the export of wood, coffee, ethanol and crude rums, as well as controls to establish a minimum export price for bananas.

60 See for example the 'Free Trade Agreement United States-Australia' (18 May 2004) available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf (last visited 27 February 2011), Art. 2.9 s. 1.

61 *Free Trade Agreement United States-Chile*, *supra* note 59, Annex 3.2 Section A lit. a.

II. EU FTAs

The EU prohibits both export taxes and quantitative restrictions on intra-EU trade. Within its FTAs with third countries, rules and exceptions on quantitative export restrictions are, by and large, modeled according to WTO rules. Some agreements specifically refer to the WTO rules (the EU-Korea FTA, for example), while others use their own language on rules and exceptions (EU-South Africa). In many of the EU's FTAs these read along the following lines (for example the EU-South Korea FTA): "Neither Party may adopt or maintain any prohibition or restriction other than duties, taxes or other charges on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, in accordance with Article XI of GATT 1994 and its interpretative notes. To this end, Article XI of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, mutatis mutandis"[62]. Some of the EU's (in particular more recent) bilateral FTAs also include additional disciplines on the use of export taxes. These are formulated along the following lines (EU-South Korea FTA; the agreement is not implemented yet): "Neither Party may maintain or institute any duties, taxes or other fees and charges imposed on, or in connection with, the exportation of goods to the other Party, or any internal taxes, fees and charges on goods exported to the other Party that are in excess of those imposed on like goods destined for internal sale".[63] The FTA with Algeria, for example, features the following obligation in Article 17(1): "[n]o new customs duties on imports or exports or charges having equivalent effect shall be introduced in trade between the Community and Algeria, nor shall those already applied upon entry into force of this Agreement be increased". The obligations are similar within the EU's 1999 Agreement on Trade, Development and Co-operation with South Africa, where no quantitative measures that inhibit exports or imports shall be implemented and existing ones shall be abolished. Further, no new customs duties shall be applied and existing ones shall not be increased from the implementation of the agreement onwards.[64] An agreement with Croatia calls for the abolition of

[62] See for example 'Free Trade Agreement EU-South Korea' (6 October 2010) available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=443&serie=273&langId=en (last visited 27 February 2011), Section C, Art. 2.9.

[63] See for example *id*.

[64] See 'Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa,

"any customs duties on exports and charges having equivalent effect" upon its entry into force.[65] Within Europe, the European Community – Croatia Interim Agreement on trade and trade-related matters calls for the abolishment of export restrictions and of customs duties for many products, calling for Croatia to make its legislations compatible.[66]

However, as in the case of U.S. FTAs, the EU's FTAs feature many exceptions. The FTA with South Africa declares in Article 27: "The Agreement shall not preclude prohibitions or restrictions on imports, exports, goods in transit or trade in used goods justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of intellectual, industrial and commercial property or rules relating to gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail or a disguised restriction on trade between the Parties".[67]

III. South-South FTAs

While Mercosur, for example, includes rules on export tariffs, the issue is anything but resolved within this regional FTA. With reference to Annex 1, containing the so-called *Trade Liberalization Programme*, the parties to Mercosur agreed to eliminate all duties, charges and any non-tariff restrictions on the movement of traded goods applied to reciprocal trade (Article 1). The larger countries set the date of December 31st 1994 for this removal; Paraguay and Uruguay got an extended deadline until the end of 1995. Duties and charges imply customs duties and any measures of similar effect; "restrictions" are termed as all administrative, financial, foreign exchange and other means by which reciprocal trade would be inhibited.

of the other part', OJ 1999 L 311/3, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:311:0003:0297:EN:PDF (last visited on 26 April 2011).

65 WTO, *World Trade Report. Trade in Natural Resources* (2010), 180.

66 See 'European Community – Croatia Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Croatia, of the other part' available at http://www.worldtradelaw.net/fta/agreements/eccrofta.pdf (last visited on 26 April 2011).

67 'Free Trade Agreement EU-South Africa', 11 October 1999, available at http://www.worldtradelaw.net/fta/agreements/ecsafrfta.pdf (last visited 27 February 2011).

However, Argentina – a frequent user of export restrictions - argues that export taxes are in fact not a trade distorting measure.[68]

The Southern African Development Community (SADC) provides, in its contract, that all export duties should be eliminated and that duties on goods for export to other members are prohibited. The clause on the elimination of export duties further states that no less favorable treatment should be granted to member states than it is to third party countries. Article 8 of the agreement contains a general interdiction of any quantitative restrictions on exports to any other SADC member, although exceptions apply. These are listed in Article 9, stating that exports of goods within the SADC may be regulated if they are necessary for public moral or order, for human, animal or plant life or health, if they are necessary to abide by laws and regulations of the WTO, or if they are necessary to protect intellectual property rights. Further, exceptions apply if critical shortages of foodstuffs occur, or the stocks of natural resources and the environment may be threatened. Last, metals and precious stones are excluded from the export restriction prohibitions.

The second Southern African trade agreement, the South African Customs Union (SACU), has developed a complex framework for internal trade and prevention of unwanted trade distortions. Article 25 (Import and Export Prohibitions and Restrictions) recognizes "the right of each Member State to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons as may be agreed upon by the Council"[69]. This is to be decided by a council. Further, SACU members may not use the instrument of export restrictions to enhance domestic industrial production. Article 18 of the SACU agreement provides that restrictions in imports or exports can be imposed by members, if this serves the protection of health of humans, plants and animals, if the environment or treasures of the country are threatened by trade, or if public morals, intellectual property rights, natural security or resource stocks are at risk. Any regulations within the SACU are valid indiscriminately for the other members as well.[70]

In the Southern Asian Free Trade Area (ASEAN), non-tariff restrictions like quantitative restrictions are to be eradicated according to

[68] Bonarriva *et al.*, *supra* note 14, 3.

[69] 'Southern African Custom Union Agreement' (2002) available at http://www.sacu.int/main.php?include=docs/legislation/2002-agreement/part5.html (last visited 27 February 2011), Art. 25 s. 1 [=SACU Agreement].

[70] *Id.,* Art. 29 s. 1.

Articles 5 and 41. Further, the States are obliged to abide by the provisions in Article XI of GATT 1994. General exceptions from this are included in the agreement, though, which are similar to the exceptions in the GATT/ WTO provisions on export restrictions. Members of the ASEAN may restrict exports of goods, if they are domestic materials, which are necessary to ensure the country's industry and maintenance.

IV. Shortcomings of FTAs

Even though rules on export restrictions in PTAs often go beyond WTO rules, there are several shortcomings which reduce their attractiveness as a viable policy tool. First, as many raw materials are traded globally, the scope of most PTAs does not reach far enough. Second, to date, no FTAs exist between the big importers (the EU and the U.S.) and some of the most frequent users of export restrictions, above all China – and while both countries have extensively negotiated bilateral trade deals in the past years, any such agreements are nowhere in sight. Third, PTAs often feature exceptions with regard to sensitive products. Even though the rules on export restrictions may in general be stricter than in the WTO context, certain products are exempted from these rules. Fourth, there is the issue of transparency and inclusiveness, of which FTAs offer much less than the WTO.

The fifth shortcoming merits some more space: There are many disadvantages of dispute settlement within FTAs. Most FTAs typically contain a chapter on dispute settlement that establishes committees and procedures for handling disputes between the parties of an agreement.[71] However, dispute settlement procedures vary considerably, with models ranging from political to quasi-adjudicative. Dispute resolution under these agreements is often governed by a simple clause in which the parties agree to consult on matters of implementation and enforcement of the obligations contained in the agreement. In particular, older FTAs tend to be based on a diplomatic dispute settlement mechanism. While in some of these FTAs legal adjudication is generally possible, the procedure has several weaknesses: It lacks defined legal stages, and there are no detailed procedural rules and timeframes for each stage of the process. In many FTAs, members can block the establishment of a panel; decisions made on the basis of the panel are not legally binding. Compliance measures are not

[71] P. Drahos, 'The Bilateral Web of Trade Dispute' available at http://www.twnside.org.sg/ (last visited 27 February 2011), 2.

specified, and there is often no retaliation procedure. Before the turn of the century, the EU's FTAs were, with the single exception of the EEA, all based on a diplomatic approach to dispute settlement. The EU-South Africa FTA served as a turning point, representing the first modest steps towards legalization. Newer FTAs such as the EU-Mexico FTA (2000) and the EU-Chile FTA (2002) have stronger adjudicative characteristics. Like many of the U.S. FTAs such as NAFTA, they include detailed procedural rules for arbitration, time frames for each step of the dispute settlement process, automatic procedures for the establishment of the arbitration panel and compliance proceedings.[72] Despite these more legalistic characteristics, the EU often prefers diplomatic approaches to settle trade disagreements. U.S. FTAs generally incorporate a formal dispute settlement mechanism, through which the U.S. government can seek to resolve disputes by presenting the case to a tribunal. Generally, if a tribunal finds that a trading partner's measure is not in compliance with the FTA and the trading partner does not bring the measure into compliance, the complainant can request authorization to suspend "equivalent" benefits to the defendant, or in some cases, the defendant can provide monetary compensation as set out in the FTA.[73] Dispute settlement in many South-South FTAs, however, is also based rather on a diplomatic than a legal basis. Thus, the South African Customs Union (SACU) Agreement provides for the development of "policies and instruments to address unfair trade practices between Member states", but these policies and instruments have yet to be finalized.[74]

In addition, FTAs unlike the DSU of the WTO, do not offer non-FTA members the possibility to join as third parties. There is yet another argument in favor of WTO dispute settlement: When conflicting parties resolve a dispute within the context of the WTO, which requires a determination of obligations, they deliver a public good to other WTO members as this results in a greater certainty of the interpretation of WTO rules. WTO members profit in another way as well: When the infringing

72 G. Bercero, 'Dispute Settlement in EU FTAs: Lessons learned?', in L. Bartels & F. Ortino (eds), *Regional Trade Agreements and the WTO System* (2006), 383.

73 International Trade Administration, 'Free Trade Agreement Compliance' (7 November 2006) available at http://www.ita.doc.gov/fta/compliance.asp (last visited 27 February 2011).

74 *SACU Agreement*, Art. 41, "The Council shall, on the advice of the Commission, develop policies and instruments to address unfair trade practices between Member States. These policies and measures shall be annexed to this Agreement". See also G. Brink, 'International Trade Dispute Resolution: Lessons from South Africa' available at http://ictsd.org/i/publications/31682/ (last visited 27 February 2011).

State implements the panel's finding by bringing a measure in conformity with its WTO obligation, all other members will, by virtue of the Most Favoured Nation Treatment (MFN), benefit.[75]

E. Tentative Results

In the light of increasing scarcities and rising prices of many raw materials, more and more countries restrict exports of certain raw materials through export taxes and quantitative restrictions. While temporary restrictions are justified in national crises such as food shortages, these restrictions are often trade distorting, entailing welfare losses not only for importing countries but also for the country imposing the measure. As a consequence, several importing countries such as the EU and the U.S. have turned to the WTO, lobbying for stricter rules on export restrictions, which would give the WTO "sharper teeth" to deal with the issue. Due to the strong opposition by many developing countries, which view the WTO's lack in precise rules as much needed policy space to address market failures, an update of WTO regulations is unlikely. At the same time, trying to solve the problem through WTO dispute settlement promises little success as long as rules on export restrictions remain weak. Some economists therefore recommend addressing the issue through FTAs. We agree that many FTAs provide for rules which go beyond the scope of the WTO. But we also caution that this strategy has severe shortcomings, which can be found in the many exceptions to the rules, the limited reach of FTAs as well as in limitations of their dispute settlement. In the end, however, we cannot fully answer the second question we posed in this paper. With regard to the multilateral level, the WTO panel's decision on Chinese export restrictions on metals will cast more light on the issue. With regard to the bilateral and regional level, we will have to wait until disputes on export restrictions are actually settled by FTAs' dispute settlement procedures.

[75] Drahos, *supra* note 71.