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The Regulatory Framework of Export Restrictions in WTO Law and Regional Free Trade Agreements

Jorge Torres Hidalgo

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ABSTRACT

The use of export restrictions has become more and more common in recent years, evidencing the substantial loopholes existing in the WTO regulation on the matter. As a result of this deficient legal framework, the WTO membership experiences important losses of welfare and increasing political tensions. The multilateral negotiations for an updated discipline on export restrictions, in the context of the Doha Development Round, are blocked. Consequently, members have established a set of preferential bilateral and multilateral agreements to relieve the negative effects of these measures. Likewise, some recent WTO members have committed to stricter regulations as part of their Accession Protocols. Nevertheless, these methods have evidenced some important flaws, and the multilateral scene remains the optimum forum to address export restrictions. This Working Paper proposes a number of measures to improve the legal framework of the quantitative export restrictions and export duties, as well as their notification procedures.

ABOUT THE AUTHOR

Jorge Torres Hidalgo holds an LL.M. in International and European Law (IES-VUB) and a degree in law from the Autonomous University of Barcelona. He is also qualified as a lawyer in Spain and is currently part of the international trade team of Hogan Lovells' Brussels office. He was formerly a trainee at the Trade Commission of the Spanish Embassy in Morocco and the Energy Charter Secretariat.

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List of Abbreviations

AoA	Agreement on Agriculture
ASCM	Agreement on Subsidies and Countervailing Measures
DSU	Dispute Settlement Understanding
EU	European Union
FAO	The Food and Agriculture Organisation of the United Nations
GATT	General Agreement on Tariffs and Trade
MERCOSUR	Mercado Común del Sur
NAFTA	North American Free Trade Agreement
US	United States
WTO	World Trade Organisation

1 Introduction

The regulatory framework of export restrictions in the WTO is clearly insufficient and it is not prepared to address the needs of the current international trading system.

Export restrictions have become increasingly important in the recent years as their application has become widespread, and have thus found their way onto the global agenda. Furthermore, the issue has recently received broad public attention due to the China – Raw Materials case, a WTO dispute settlement process concluded in 2012 that examined the complaints brought by the EU, the US and Mexico regarding China's export restriction policies.

The result of the existing lack of regulation is a sub-optimal status quo which causes important losses of efficiency and diminishes global welfare. Furthermore, it distorts international prices, undermining traders' confidence in the world trading system and increasing price volatility.

Without a decided reform of the multilateral legal framework, this situation will continue to deteriorate in the coming years due to the increasing scarcity of basic resources. A group of WTO members, including most developed countries, has supported the establishment of a stricter regulation. This position has been opposed by a number of developing countries, which perceive export restrictions as a valid instrument for development.

This Working Paper analyses the existing WTO legal framework, as well as the different alternatives proposed in preferential trade agreements and the Doha Development Round, in order to suggest a reform proposal that aims to configure a feasible and more efficient framework.

To this end, this paper is organised as follows: part one examines the main forms in which export restrictions are applied, as well as their economic effects. Part two illustrates the more common policy objectives pursued by countries when imposing export restrictions. Part three studies the principal WTO provisions that discipline export restrictions, namely Articles II, XI, XX and XI GATT and the relevant articles of a reduced number of Accession Protocols. Moreover, it reviews the most interesting legislative solutions proposed in preferential trade agreements and the Doha Development Round. The final part offers a reform proposal on the basis of the described background.

2 Main Forms of Export Restrictions

An export restriction is any sort of border measure imposed by a national government that limits or complicates the export of goods. The US - Export Restraints case offers the most complete definition of an export restriction: "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 product calculated to limit the quantity of exports"[1]. From this definition is possible to establish three main categories, which in turn may contain different subcategories and measures with similar effect.

Part one of this Working Paper studies the main characteristics of quantitative restraints, export licenses and export duties.

[1] Report of the Panel. *US - Export Restraints*, p. 95.

2.1. Quantitative Restraints

The Panel in the US – Export Restraints case refers to measures "which expressly limit the quantity of exports". The most rigorous kind of quantitative restraint is the prohibition. Likewise, quantitative limits are frequently imposed through export quotas, which establish ceilings for the total amount traded of a particular product. Quantitative restraints are the most harmful barriers for commerce because they encourage arbitrary and un-transparent behaviour.

In addition, governments can negatively affect trade by means of fixing a threshold price. According to WTO case law[2], a minimum export price has equivalent effect to a quantitative restriction and therefore is prohibited under Article XI:1 GATT. Therefore, minimum export prices may also fall under this category.

2.2. Export Licenses

Export licenses are defined by the Panel as an obstacle which "places explicit conditions on the circumstances under which exports are permitted". They establish the submission of some documentation as a requirement for the export of products. Licensing can be automatic, attending informative purposes exclusively, or non-automatic. The latter group is the most conflictive and can get to be as restrictive and opaque as quantitative restrictions.[3] The Panel in Japan – Semiconductors was categorical in considering that licensing practices by Japan, leading to delays of up to three months, were inconsistent with Article XI:1 GATT. [4]

State owned exportation monopolies are a very restrictive form of licensing. These public companies enjoy total exclusivity over the international sales of a product, controlling thus the export price.[5] The Note Ad Articles XI, XII, XIII, XIV, and XVIII is straightforward when it provides that "the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations"[6].

2.3. Export Duties

Lastly, the Panel describes as an export duty any measure "that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports". These charges modify export prices, setting lower prices for the national market. Measures like the reduction of VAT rebates are considered to produce similar effects.[7]

Export restrictions should not be mistaken for export fees as defined by Article VIII of the GATT, which are paid against a provided service.

In some cases, punitive levels of export duties can have similar effect as a quantitative restriction.[8] In other words, export taxes and export quantitative restrictions are generally substitutable policy tools. As an example, Argentina used high levels of export duties in order to tackle foreign sales of cereal, achieving a de facto ban on exports.[9] Additionally, the WTO case law has explained that, in some specific occasions, quantitative restrictions and export duties can also have supplementary functions.[10]

[2] Reports of the Panel. *China – Raw Materials*, p. 266.
[3] Kim 2010, p. 6.
[4] Report of the Panel. *Japan – Semiconductors*, p. 31.
[5] Korinek and Bartos 2012, p. 7.
[6] Note Ad Articles XI, XII, XIII, XIV, and XVIII. GATT 1947.
[7] Kim 2010, p. 6.
[8] Sharma 2011, p. 21.
[9] Blas 2010.
[10] Kim 2010, p. 15.

3 Overview of the Different Policy Objectives

Export restrictions, either in the form of quantitative limitations or duties, can be an important instrument for the development of commercial policies. However, they can also provoke domestic and global welfare losses by inducing excessive production in less competitive industries. Furthermore, they may generate beggar-thy-neighbour policies, which in turn lead to retaliatory responses by other countries and political instability.[11]

Part two identifies the main motivations for the use of export restrictions and explains their effect on the development of international trade.

3.1. Improve the Terms-of-Trade

The overall effects of export restrictions are a reduction in the volume of international trade and a global loss of efficiency. However, a country that controls a large share of the world supply of a particular good can use export duties to improve its terms-of-trade. That is to say, to increase the value of its exports in front of the value of its imports. The imposition of an export tax on a commodity by a large exporter will increase the world price of the referred product, and will consequently improve the country's terms-of-trade.[12] Nevertheless, this practice has a negative effect on the welfare of importers and is likely to trigger similar behaviour in other countries.[13]

This strategy has proved to be more effective when applied by countries with a certain degree of monopolistic power in the international market of a specific product which has highly inelastic demand. The case of rare earths, produced mainly by China and submitted to export quotas, is an illustrative example.[14]

3.2. Increase Tax Revenue through Export Duties

Traditionally, taxes collected through export duties are an important source of income for developing countries, which usually are very dependent on the production of primary products. In many occasions, developing countries have weak institutions that cannot collect domestic taxes effectively. Therefore, taxing the export of products instead of their production may become an easier way to ensure a source of public income. However, export taxes have the shortcoming of being highly unstable. A strong dependence on this source of income can make developing countries vulnerable to volatile revenue levels, becoming thus a big obstacle for development.[15]

Nevertheless, this pattern is changing and the weight of export taxes over the total revenue is declining in many countries. A notable exception is Argentina, where income from exports grew from levels close to zero before the 2001 economic crisis to 9.9% of the total public revenue in the period 2002-2005.[16]

3.3. Promoting Downstream Industries

Export restrictions on a particular good can drive national prices downwards, conferring thus a benefit to the local industry that uses this product as an input. Consequently, some developing countries consider them useful tools for economic development and have, following the premises of the "infant industry" argument,

[11] Mandelson 2008.
[12] Piermartini 2004, p. 7.
[13] Piermartini 2004, p. 8.
[14] Korinek and Kim 2010, p. 19.
[15] Piermartini 2004, p. 14.
[16] Kim 2010, p. 9.

established export restrictions on unprocessed goods.[17] These restrictions work as an indirect subsidy for the local processing industry, keeping domestic prices lower than the international ones.[18] The final objective of this practice is to increase the added value of the national production.

However, the use of export restrictions to develop "infant industries" also has some drawbacks. The industries developed under this protection may become dependent on the export restriction, remaining less productive than their foreign counterparts and generating efficiency losses.[19]

3.4. Response to Tariff Escalation in Export Markets

Export restrictions in the form of export taxes can be established as a response to tariff escalation in the destination markets. Tariff escalation is the practice of levying higher duties on the import of processed products than on raw materials.[20] The use of tariff escalation strategies in developed countries encourages the import of raw commodities into these countries. Consequently, it may hinder the development of processing industries in developing countries. Imposing differential export rates may thus be a valid response to offset the distortionary effect generated by tariff escalation.[21]

Nevertheless, differential export taxes can also have undesired redistributive effects. An export tax on a primary product can increase income inequality within a country by redistributing welfare from the primary sector, which employs unskilled workers intensively, to the secondary sector, and therefore harming the most vulnerable parts of the population.[22]

3.5. Control of National Prices

A rise in the international prices of an essential product can lead to inflationary pressures in national prices and consequently cause an enormous loss of welfare in a country. As a result, guaranteeing the price stability and the effective supply of foodstuffs and other essential products is one of the most important policy objectives for governments. Local authorities tend to restrain the export of goods when faced with a situation of global or local scarcity, trying to ensure supplies for their domestic markets. In this same vein, Article XI GATT provides in its second paragraph an exception for this sort of situations.

However, such measures, when applied by a large producer, may harm the position of the net-importer countries by reducing the supply to the world market, and can thus trigger further increases in international prices.[23]

3.6. Environmental Protection

The fast and unsustainable depletion of exhaustible resources, e.g. minerals, logs or hydrocarbons, can cause environmental degradation. Thus, national governments may try to curb these economic activities by means of export restrictions. This practice has led to numerous disputes in the WTO and is mainly regulated in Article XX GATT.

However, the use of export restraints does not always conduce to achieve the intended environmental objectives.[24] Without the corresponding measures to limit

[17] Kim 2010, p. 10.
[18] Piermartini 2004, p. 11.
[19] Piermartini 2004, p. 12.
[20] Mitra and Josling 2009, p. 9.
[21] Piermartini 2004, p. 13.
[22] Piermartini 2004, p. 12.
[23] Kim 2010, p. 11.

national consumption, an export restrain may encourage the local demand and result in similar or bigger volumes of production.[25]

On the other hand, countries with weak administrative capacities are more capable of taxing trade outflows, which can be conveniently monitored at the border, than to control domestic production and consumption. In these situations, the implementation of production taxes may encourage local companies to operate in the informal sector and evade taxes. Therefore it is more appropriate to enforce a limitation on the production of a particular product by means of an export restriction.[26]

4 Regulation of Export Restrictions

Export restrictions are regulated in the WTO Agreements and Accession Protocols, which provide the legal framework for the international trading system. Likewise, these measures have been the object of an intense discussion in the context of the Doha Developing Round.

Part three of this Working Paper reviews the relevant norms affecting export restrictions, as well as the different alternatives proposed for their regulation.

4.1. Export Restrictions in WTO Law

Different articles address export restrictions in WTO law, in particular Articles XI and XIII GATT and Article 12 of the Agreement on Agriculture, and arguably Article II GATT.

Despite the fact that the treaties refer to export restrictions, the system evidences a lack of adequate and more specific regulation. In the first place, Article XI establishes a general prohibition of quantitative restrictions to trade, referring both to imports and exports. However, its wording is vague and leaves wide margin for interpretation. Secondly, Article II GATT constrains tariffs to the levels agreed on the schedules. However, there are no substantial commitments for export duties in these schedules.

The regulation of the licensing procedures is another field where the difference between the regulation of imports and exports is evident. While exports only fall under the general provisions of Articles VIII and X GATT, imports licensing rules are extensively disciplined in the Agreement on Import Licensing Procedures.[27]

Pascal Lamy, the Director General of the WTO noted in 2011 that "[i]t is certainly true that there is an imbalance in the WTO rule-book between the stringency of the rules for imports and their laxity for exports"[28].

Nonetheless, it should be noted that export tariffs are governed by the principle of Most Favoured Nation formulated in Article I GATT, and subjected to the National Treatment obligation of Article III GATT and to the non-discrimination obligation of Article XIII GATT.[29] Moreover, the General Exceptions contained in Article XX GATT are applicable to export restraints.

[24] Karapinar 2011, p. 1142.
[25] Kim 2010, p. 10.
[26] Karapinar 2011, p. 1152.
[27] Agreement on Import Licensing Procedures 1994.
[28] Lamy 2011.
[29] World Trade Report 2010, p. 170.

4.1.1. XI GATT

Article XI GATT is the main provision regulating quantitative export restrictions. It states, in relevant part:

"XI. General Elimination of Quantitative Restrictions

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

2. 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 trade;"

4.1.1.1. Paragraph 1

Article XI GATT is divided in two paragraphs. The first part proposes a general prohibition on quantitative restrictions. The wording of the article's title indicates that it covers restrictions having a limiting effect on the quantity of a traded product.

The purpose of this ban is to encourage the substitution of all the quantitative restrictions by tariffs. Price based barriers are considered to have a less harmful effect on trade and a more transparent application. [30]

In order to understand which measures can be considered as quantitative restrictions it is necessary to understand the concepts of "prohibition or restriction". Article XI:1 GATT contains a negative definition of "prohibition or restriction", banning any constraint other than "duties, taxes or other charges". Undoubtedly, the wording leaves wide margin for interpretation.

By studying the WTO case law, it is possible to deduce that the main criterion for evaluating the restrictiveness of a measure is the actual restrictive impact, obtained by examining the evidence of verifiable consequences for trade.[31] In the case India – Quantitative Restrictions, the Panel identified the concept of "restriction" with the notion of "limiting condition"[32]. Furthermore, the case India – Autos established that "a "restriction" need not be a blanket prohibition or a precise numerical limit"[33]. In line with this resolution, in the Colombia – Ports of Entry case it was found that measures that are not per se addressed at the quantities traded, like those affecting the ports authorised to trade, can be considered quantitative restraints.[34] In this case, which referred to restrictions to imports, the Panel recognised the "applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an

[30] Report of the Panel. *Turkey — Textiles*, 117: "In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade-distorting effect, their allocation can be problematic and their administration may not be transparent."
[31] Karapinar 2012, p. 5.
[32] Report of the Panel. *India – Quantitative Restrictions*, p. 166.
[33] Report of the Panel. *India – Autos*, p. 159.
[34] Report of the Panel. *Colombia – Ports of Entry*, p. 131.

importer"[35]. Following this interpretation, Article XI GATT could also be applied to internal measures that restrict exports.[36]

WTO case law also considers the de facto border restrictions. In the case Japan – Semiconductors the Panel recognised that non-legally binding measures, like monitoring prices, can have similar effects to quantitative restrictions.[37] On the other hand, the case Argentina – Hides and Leather gave a different approach to the de facto restraints. In this case, the Panel considered that the participation of members of the local leather industry in the export control tasks did not constitute a de facto restriction per se.[38]

4.1.1.2. Paragraph 2

The second paragraph of Article XI GATT establishes an exception from the general ban provided in the first paragraph. While paragraph 1 covers both export and import restrictions, the exception of paragraph 2 refers only to exports. Article XI:2(a) GATT allows quantitative restrictions on exports if they are aimed at preventing or eliminating situations of scarcity.

However, the wording of the provision is vague, adding an element of uncertainty. The actual meaning of the terms used has been defined in the case law, particularly in the China - Raw Materials case[39]. Nevertheless, the Appellate Body failed to successfully define some of the concepts, i.e. "essential" and "temporary applied", and the scope of this exception remains somewhat unclear.

Likewise, it should be taken into account that the Appellate Body in this case stated that "these different concepts impart meaning to each other and thus define the concept of Article XI:2(a)"[40].

XI:2(a): Temporarily applied

The panel in the China – Raw Materials case interpreted the "temporal" element as referring to a limited duration.[41] This reasoning evolved from applying Article XI:2(a) GATT provision in relation with Article XX(g) GATT. The panel argued that not considering the exception provided in Article XI GATT as limited in time would undermine the application of Article XX(g) GATT since both articles refer to similar situations, allowing the parties to use indistinguishably one or the other. It also noted that the Chapeau requirement, applied to the general exceptions provided in Article XX GATT, does not cover the Article XI GATT exception, granting less protection in front of disguised illegal restrictions. Consequently, the scope of Article XI:2(a) GATT is considered more reduced and the measures covered by this provision have to be delimited with an expiry date. As a result, the Panel found that the exception could not apply to "long-term" measures.[42] Furthermore, the panel considered that a schedule of revisions does not satisfy this condition, interpreting that

[35] Report of the Panel. *Colombia – Ports of Entry*, p. 131.
[36] This thesis focuses on "border" restrictions to exports. Internal measures that restrict exports are not being dealt with as they are beyond the scope of this research. For further reference, please see: Ehring and Chianale 2011, p. 132.
[37] Report of the Panel. *Japan – Semiconductors*, p. 34.
[38] Report of the Panel. *Argentina - Hides and Leather*, p. 179.
[39] Reports of the Appellate Body. *China – Raw Materials*.
[40] Reports of the Appellate Body. *China – Raw Materials*, p. 130.
[41] Reports of the Panel. *China – Raw Materials*, p. 85.
[42] Reports of the Panel. *China – Raw Materials*, p. 96.

the term "limited time" refers to a "fixed time-limit" for the application of the measure.[43]

On the other hand, the Appellate Body offered a different interpretation of the term "limited time". It stated that the length of the measure is not a decisive element, and that the long-term actions can be considered as valid as the short-term ones. Hence, the Appellate Body failed to tighten the requirements of this exception, limiting its application to "critical" situations.

Furthermore, the Appellate Body explained that the two provisions, i.e. paragraphs XI:2(a) and XX(g) GATT, are not mutually exclusive and that they have different functions and entail different obligations. While the former applies to measures addressed to prevent or relieve critical shortages, the later refers to measures concerning the conservation of exhaustible natural resources. Therefore, the Appellate Body considered that, because of their different reach, they might be applied simultaneously.[44]

XI:2(a): Prevent or relieve

The use of the verb "prevent" in the wording of this article indicates that the parties are allowed to use Article XI:2(a) GATT even before the actual shortage takes place. Based on the preparatory work of the treaty, the purpose of this provision was to "enable a member to take remedial action before a critical shortage has actually arisen"[45].

XI:2(a):Essential products

The range of products that can be subjected to the exception is defined in broad terms. Firstly, the article makes explicit reference to foodstuffs. Next, it completes the definition of the subject with any "other products essential to the exporting contracting party". As a consequence, clarifying the concept of "essential product" becomes crucial.

The Panel in China – Raw Materials case associated the concept of essentialness with products which are "important", "necessary" or "indispensable".[46] Nevertheless, the Panel did not leave this issue open for the members to decide which products are considered essential to them. It compared Article XI GATT with Article XXI GATT, concluding that if a self-determination system was desired, the contracting parties would have used a wording similar to the one employed in Article XXI GATT. However, the Panel missed the occasion to provide some clear benchmarks which could define the concept of essentialness.

Finally, the Panel asserted that the concept of essential product should take into account "the particular circumstances faced by that Member at the time when a Member applies a restriction or prohibition under Article XI:2(a)"[47]. Thus, the Panel chose a case-by-case approach.

[43] Reports of the Panel. *China – Raw Materials*, p. 84.
[44] Reports of the Appellate Body. China – Raw Materials, p. 134.
[45] World Trade Report 2010, p. 169.
[46] Karapinar 2012, p. 8.
[47] Reports of the Panel. *China – Raw Materials*, p. 90.

XI:2(a):Critical shortage

The Panel linked the idea of "critical shortage" to the concepts of "decisive importance", "crisis" or "catastrophe".[48] Once again, the Panel applied the exception of Article XI GATT within the context provided by Article XX(g). Therefore, the Panel considered that a "critical shortage" should be understood as referring to a situation which may "be relieved or prevented through the application of measures on a temporary, and not indefinite or permanent, basis"[49]. In addition, the Appellate Body determined that "whether a shortage is "critical" may be informed by how "essential" a particular product is."[50]

This interpretation offers an important nuance, in the sense that it impedes the application of Article XI:2(a) GATT to permanently limit the exploitation of an exhaustible natural resource. The Panel agreed with the EU position, which argued that when the shortage is permanent, it cannot be relieved or prevented by a temporary action.[51] Therefore, members cannot establish restrictive measures with the intention of maintaining them until the end of the natural resource's lifespan.

XI:2(b)

Article XI:2(b) GATT provides a second exception to the first paragraph. It refers to the restrictions which are necessary to apply regulations for the classification, grading or marketing of commodities.

This provision was interpreted in 1988, before the creation of the WTO. The GATT Panel analysed it in the *Canada – Herring and Salmon* case, pointing out that, according to the wording of the GATT, the exception refers to regulations dealing with "the marketing of commodities in the international markets". Consequently, it could be applied to "restrictions designed to further the marketing of a commodity by spreading supplies of the restricted product over a longer period of time"[52]. Furthermore, it found that measures intended to favour the production of local downstream industry are not covered by this exception.

4.1.2. Article 12 of the Agreement on Agriculture

After the widespread use of export restrictions and the volatility in agricultural prices of the 1970s, the parties to the Uruguay Round attempted a modest reform of the regulation of export restrictions.

In Article 12, the AoA extends the scope of Article XI GATT. It establishes norms for the notification of restrictive measures applied under the Article XI:2(a) GATT exception. In addition, it proposes a system of consultations between importer and exporter countries.

> "Article 12: Disciplines on Export Prohibitions and Restrictions
>
> 1. Where any Member institutes any new export prohibition or restriction on foodstuffs in accordance with paragraph 2(a) of Article XI of GATT 1994, the Member shall observe the following provisions:

[48] Karapinar 2012, p. 10.
[49] Reports of the Panel. *China – Raw Materials*, p. 96.
[50] Reports of the Appellate Body. *China – Raw Materials*, p. 130.
[51] Karapinar 2012, p. 10
[52] Report of the Panel. *Canada – Herring and Salmon*, p. 11.

> (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.
>
> 2. The provisions of this Article shall 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."

Firstly, Article 12.1 (a) AoA introduces the concept of "food security" of the importers, a long debated concept in the WTO.[53] In this sense, it compels the exporting members to consider the foodstuff needs of the importing members. Secondly, Article 12.1(b) AoA establishes the obligation of giving writing notice to the Committee on Agriculture of any new prohibition or restriction on the export of foodstuffs. In this vein, a list of the restrictions applied from 1995 can be found in the WTO website.[54] Furthermore, this paragraph requires the exporting part to conduct consultations and to provide the necessary information to the concerned importing parties. Nevertheless, the obligations of written notice and consultations are widely ignored by some member states, as discussed in Section 4.1.5, harming the established transparency mechanisms.[55]

Finally, paragraph 12.2 AoA provides with an exception to the first part. According to this paragraph, developing countries are not bounded by paragraph 12.1 unless they are net-exporters of the foodstuff affected by the restriction. The concept of net-exporter is not defined in the treaty, so it can be understood in very broad terms.[56]

The result of these provisions is a system with relaxed obligations. Even though Article 12 AoA requires the members of the WTO, excluding developing countries that are net importers of foodstuff, to notify the institution any export restriction on food exports and conduct consultations, there are no penalties for disregarding these obligations.[57]

The consequence of this normative framework is a continuation of the situation existing before the signature of the Agreement on Agriculture. The food crisis of 2007-2010 proved that the obligations set out in Article 12 are not more effective in limiting export restrictions than the prior set of rules.[58] A recent FAO paper studying the role of trade restrictive measures in this crisis concluded that "the current state of information provision and consultation is very poor. This is one area for improvement"[59].

[53] The concept of "food security" goes beyond the scope of this thesis. For further reference, please see: Howse and Rosling 2012 and Sharma 2011.
[54] http://www.wto.org/english/tratop_e/agric_e/transparency_toolkit_e.htm
[55] Blas 2010.
[56] Sharma 2011, p. 21.
[57] Mitra and Josling 2009, p. 15.
[58] Mitra and Josling 2009, p. 15.
[59] Sharma 2011, p. 20.

4.1.3. XX GATT

Article XX GATT establishes a number of General Exceptions that may apply to measures imposing export restrictions. Its application consists in a two tiered procedure. First, the restrictive measure must come under one or another of the sub-paragraphs listed under the letters (a) to (j). Secondly, the measure must also satisfy the requirement defined in the preamble of Article XX GATT, the Chapeau Clause.

> "Article XX: General exceptions
>
> Subject to the requirement that such measures are not 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (…)
>
> (b) necessary to protect human, animal or plant life or health;
>
> (…)
>
> (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 quantities 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. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960."

The scope of these exceptions is quite broad, including the protection of public morals; human and animal health; the trade of gold and silver; intellectual and industrial property; prison labour; national treasures; exhaustive natural resources; intergovernmental commodity agreements; local access to products that are an essential input for the national industry or that are in short supply.

Some of the exceptions from Article XX GATT apply more frequently to the use of export restrictions. This section analyses the ones that are more relevant for the understanding of the WTO's export restrictions regime.

4.1.3.1. XX(b)

Sub-paragraph XX(b) allows restrictive measures as a means to protect "human, animal or plant life or health" and it has been regularly applied to justify export restrictions.

The scope of this exception in relation to the regulation of export restrictions was defined by the Panel in the case China – Raw Materials. In order to determine the applicability of sub-paragraph XX(b) to a restrictive measure, the Panel examined five different criteria, i.e. if the measure was necessary to protect human, animal or plant life or health; the importance of the interests or values at issue; the contribution of the measure to the objective pursued; the trade restrictiveness of the measure; and the availability of WTO-consistent or less trade restrictive alternative measures. In addition, the Panel added that the evaluation of the appropriateness of a measure should be conducted as a holistic process.[60]

Firstly, according to the wording of sub-paragraph XX(b), for a measure to be justified under this exception it has to be "necessary" to protect life or health. In the Korea – Various Measures on Beef case, the Appellate Body examined the concept of "necessary" in relation to the application of sub-paragraph XX(d), suggesting that the term "necessary" refers to the concept of "indispensable". Therefore, for a measure to be considered "necessary", it has to be absolutely or nearly "indispensable" to achieve the pursued policy objectives of protection of life or health. The method proposed to evaluate the indispensability of an action is to conduct a balance of the different elements of the measure together with the consequences of its application. The Appellate Body established that an assessment of indispensability involves a "process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports"[61].

Secondly, the Panel considered the importance of the values that are meant to be protected, applying the findings of previous cases. The Appellate Body in Korea – Various Measures on Beef determined that the "more vital or important those common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument"[62]. In a more recent case, the Brazil – Retreated Tyres Appellate Body reaffirmed the importance of considering the "interests or values underlying the objective"[63].

The third criterion examined by the Panel is the existence of a "genuine relationship" between the restrictive measures applied and the objective pursued. In order to evaluate the extent of the measure's contribution to the accomplishment of the final objective, the Appellate Body in the Brazil – Retreated Tyres interpreted that the measure has to be "apt to make a material contribution to the achievement of its objective"[64]. Furthermore, the Appellate Body in the case China – Audiovisual Products indicated that "[t]he greater the contribution a measure makes

[60] Reports of the Panel. *China – Raw Materials*, p. 137.
[61] Report of the Appellate Body. *Korea – Various Measures on Beef*, p. 50.
[62] Report of the Appellate Body. *Korea – Various Measures on Beef*, p. 49.
[63] Report of the Appellate Body. *Brazil – Retreated Tyres*, p. 83.
[64] Report of the Appellate Body. *Brazil – Retreated Tyres*, p. 59.

to the objective pursued, the more likely it is to be characterised as "necessary""[65].

Fourthly, the Panel examined the actual restrictive effects on international trade of the considered measure. The relationship between the "necessity" and the "restrictiveness" of a measure was defined by the Appellate Body in the China – Audiovisual Products case. It explained that the "less restrictive the effects of the measure, the more likely it is to be characterised as "necessary""[66]. Furthermore, it suggested that the respondent party must try to minimise the restrictive effects of the employed measures. It observed that "if a Member chooses to adopt a very restrictive measure, it will have to ensure that the measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the "necessity" of the measure will "outweigh" such restrictive effect"[67].

Finally, the Panel stated that it is necessary to consider the existence of a less harmful alternative having similar effects. The responding party has to demonstrate that the alternative measures proposed by the complainants are not "reasonably available" or do not provide a similar contribution to the fulfillment of its objective. It is part of the "weighing and balancing" process to determine if an alternative measure, which is consistent with the WTO obligations or less trade restrictive, could "reasonably be expected to employ"[68]. For a measure to be "reasonably available", it must not suppose a disproportionate burden for the responding party, e.g., imposing prohibitive costs or relevant technical difficulties. In the China – Raw Materials case, the Panel stated that a "reasonably available" alternative measure must be "both practically and financially feasible for the Member seeking to justify a WTO-inconsistent measure under Article XX(b)" and must provide "an equivalent contribution to the achievement of the objective pursued"[69].

Therefore, the members of the WTO imposing a restrictive measure have to "weigh" and "balance" the effects and the expediency of the alternative measures by using this necessity test.

4.1.3.2. XX(g)

Article XX(g) allows restrictions related to the conservation of exhaustible natural resources when applied together with restrictions on domestic production or consumption. This exception has been consistently used to justify export restrictions. In contrast with the exception contained in Article XI:2(a) GATT, XX(g) GATT allows long-term exclusions to the general ban of quantitative export restraints.

The application of Article XX(g) GATT to measures prohibiting or restraining export has been defined in the WTO case law, notably by the Panel in the China – Raw Materials case.

In this case, the Panel considered that, in order to be covered by Article XX(g) GATT exception, a measure has to fulfill two conditions. Firstly, it has to be related to the conservation of an exhaustible resource.

[65] Report of the Appellate Body. *China Audiovisual Products*, p. 111.
[66] Report of the Appellate Body. *China Audiovisual Products*, p. 132.
[67] Report of the Appellate Body. *China Audiovisual Products*, p. 132.
[68] Report of the Appellate Body. *Korea – Various Measures on Beef*, p. 50.
[69] Reports of the Panel. *China – Raw Materials*, p. 138.

Secondly, it has to be made effective in conjunction with restrictions on domestic production or consumption.

"*Relating to the conservation of exhaustible natural resources*"

The GATT Panel in the 1987 Canada – Herring and Salmon case, before the establishment of the WTO, defined the notion "related to the conservation". The Panel noted that the concept "relating to" used to define the purpose of the measure was particularly wide as opposed to "necessary" or "essential", employed in other sub-paragraphs of Article XX of the GATT. However, the Panel studied it in conjunction with the Preamble of Article XX, the Chapeau Clause, and the second condition of "restrictions on domestic production or consumption", and concluded that "relating to" refers to measures "primarily aimed at" the conservation of natural resources. After the constitution of the WTO, the Appellate Body in the US – Gasoline case followed this interpretation.[70] In US – Shrimp, the Appellate Body confirmed the "primarily aimed at" definition and added that the relationship between the restrictive measure and the conservation of natural resources should be "a close and genuine relationship of ends and means"[71].

The concept of "conservation" was discussed in the Panel Report of the China – Raw Materials case. In China's view, the wording of sub-paragraph XX(g) conferred on the term "conservation" the meaning that the Member's sovereign rights over its natural resources included "preserving" its natural resources. Furthermore, China considered that these sovereign rights could be exercised in the interest of the Member's social and economic development. The Panel interpreted sub-paragraph XX(g) in the light of the fundamental principles of international law, concluding that abiding by the WTO obligations could not be considered a breach of China's sovereign rights[72]. Moreover, the Panel noted that sub-paragraph XX(i), which refers to the use of export restrictions to support a domestic industry, also includes the interests of the foreign producers as a conditioning factor. Hence, the Panel concluded that sub-paragraph XX(g) could not be interpreted in a way that could circumvent the provisions of sub-paragraph XX(i).[73]

As for the concept "exhaustible natural resources", the different Panels have proposed a broad interpretation of the provision. The Panel in the US – Gasoline case confirmed the abstract concept of "clean air" as a valid natural resource that could fall under the scope of sub-paragraph XX(g). In the US – Shrimps case, the Appellate Body updated the concept of "exhaustible resources", adding living creatures to the list of protected commodities. Even if living resources can be considered as "renewables", the fact that they can become extinguished motivated the dynamic approach of the Panel. These interpretations were in line with the objective of "sustainable development" stated in the WTO Agreement Preamble.[74]

"*If such measures are made effective in conjunction with restrictions on domestic production or consumption*"

[70] Report of the Appellate Body. *US – Gasoline*, p. 18.
[71] Report of the Appellate Body. *US – Shrimps*, p. 52.
[72] Reports of the Panel. *China – Raw Materials*, p. 114.
[73] Reports of the Panel. *China – Raw Materials*, p. 114.
[74] Preamble to the Agreement Establishing the WTO: "use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so".

Secondly, the restrictive measure has to be made effective in conjunction with restrictions on domestic producers or consumers. The Appellate Body in the US – Gasoline case established the condition of "even-handedness" application. This concept implies that the country has to extend the restrictions to domestic products, even though the Panel found no grounds to demand entirely equal restraints.[75] In the China – Raw Materials case, the Panel interpreted that a restriction on domestic consumption "must not only be applied jointly with the challenged export restrictions but, in addition, the purpose of those export restrictions must be to ensure the effectiveness of those domestic restrictions"[76]. However, the Appellate Body, in a following stage, reversed this interpretation. It considered that, in order to fall under the scope of sub-paragraph XX(g), a measure do not need to be "primarily aimed at" rendering effective a restriction in national consumption or production of an exhaustive national resource. The Appellate Body suggested that the application of the restrictive measures on exports in combination with restrictions on local consumption is enough to fulfill the second condition.

4.1.3.3. XX(i)

Sub-paragraph XX(i) provides an exception for the establishment of export restrictions in order "to ensure essential quantities 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 stabilisation plan".

This exception was proposed to give more flexibility to countries implementing programmes of general prize stabilisation.[77] However, sub-paragraph XX(i) adds two conditions to its application. In the first place, the exception cannot constitute a disguised support to exportation or protection to the local industry. In the second place, the subparagraph indicates that it "shall not depart from the provisions of this Agreement relating to nondiscrimination".

It is not clear in which conditions the XX(i) exception could be applied nowadays since it remains widely unused. Furthermore, a recent study suggests that a considerable proportion of the preferential agreements signed nowadays limits the application of this exception.[78]

4.1.3.4. XX(j)

Sub-paragraph XX(j) allows the use of restrictive measures when they are "essential to the acquisition or distribution of products in general or local short supply". This provision was intended to grant the possibility of applying quantitative restrictions in the post-war context. Its objective was to supplement the different policies dealing with shortages in the aftermath of the war.[79] Consequently, the exception was created with an expiration date. However, this expiration date has been repeatedly

[75] Report of the Appellate Body. *US – Gasoline*, p. 21.
[76] Reports of the Panel. *China – Raw Materials*, p. 116.
[77] Guide to GATT Law and Practice: Analytical Index 1995, p. 591.
[78] Korinek and Bartos 2012, p. 30.
[79] Guide to GATT Law and Practice: Analytical Index 1995, p. 594.

postponed until 1970, when it was "retained with no provision for further review"[80].

It is hard to foresee how sub-paragraph XX(j) would apply nowadays. The exception refers to "general or local short supply" of a particular product. This formulation intended to give flexibility to members in its application, allowing restrictions even when the situation of short supply does not affect other markets around the world.[81] The subparagraph establishes two conditions to its application. Firstly, it requires that the enacted measures "shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products". Secondly, it provides that these measures "shall be discontinued as soon as the conditions giving rise to them have ceased to exist". The provision has only been interpreted in 1949 in a conflict between the United States and Czechoslovakia that did not result in an extensive legal analysis. Furthermore, essential elements of the XX(j) exception, such as the concept of "short supply", remain unclear[82] and its application is limited by a considerable number of preferential agreements.[83]

Nevertheless, as described above, sub-paragraph XX(j) has served to define the scope of the exception contained in Article XI:2(a). The Appellate Body in the *China – Raw Materials* case compared the term "critical shortage" of Article XI:2(a) GATT with the words "general or local short supply". The Appellate Body concluded that, in the absence of the adjective "critical" in the latter, the "the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j)"[84].

4.1.3.5. XX Chapeau Clause

The Preamble of Article XX was inserted as fears rose during the drafting process that the general exceptions would be used as an umbrella for protectionist behaviour. The delegates noted that "[i]ndirect protection is an undesirable and dangerous phenomenon"[85].

The preamble constitutes the "Chapeau Clause", that provides for a second-step examination of a restrictive measure. If a country wants to apply one of the general exceptions, it must first prove that it falls under one of the subparagraphs of Article XX. Where that is the case, the subject has also to determine that the measure fulfills the requirement of the "Chapeau".[86]

The "Chapeau" focuses on the discriminatory character, the possible application of reasonable alternatives and the disguised protectionist purposes. Therefore, according to its Preamble any action will be excluded from Article XX when it is "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".

[80] Report on Work since the Twenty-sixth session of the Council of Representatives 1970, p. 22.
[81] World Trade Report 2010, p. 168.
[82] Korinek and Bartos 2012, p. 13.
[83] Korinek and Bartos 2012, p. 30.
[84] Reports of the Appellate Body. *China – Raw Materials*, p. 130.
[85] Guide to GATT Law and Practice: Analytical Index 1995, p. 563.
[86] Report of the Appellate Body. *US – Gasoline*, p. 22.

In spite of the crucial character of the Chapeau Clause as an unavoidable second step in the application of Article XX, it has not played a relevant role in the settlement of disputes concerning the use of export restrictive measures.

4.1.4. XXI GATT

Article XXI GATT constitutes a general exception for reasons of security. Paragraph XXI(b) GATT states that nothing in the WTO agreements should be disposed in a manner such that forbids a country to take any action that considers necessary for the protection of its security. The formulation of the article leaves a wide margin of discretion to the parties in the application of this exception, establishing a system based on nearly total self-determination.

4.1.5. Notifications Obligations

The notification procedure for export restrictions is based on the Ministerial Decision on Notification Procedures adopted in 1993. The decision requires the members of the WTO to notify "to the maximum extent possible, their adoption of trade measures affecting the operation of GATT 1994"[87]. In addition, the Ministerial Declaration states that the introduction or modification of such measures is subjected to the commitments of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance of 1979[88].

The Decision provides in its Annex with an "indicative" list of the "notifiable" measures, which explicitly mentions "quantitative restrictions", "export taxes" and "Export restrictions, including voluntary export restraints and orderly marketing arrangements".

However, these agreements do not establish any sort of sanctions or enforcement procedure. Article III of the Decision entrusts the review of the notification obligations of the members to the Council for Trade in Goods. Nevertheless, the provision is drafted in vague terms and does not entail any serious commitment. Likewise, Article II of the Declaration, which refers to the establishment of a Central Registry of Notifications, asserts that the Registry "shall draw the attention of individual Members to regular notification requirements which remain unfulfilled"[89]. However, this control mechanism does not result in further obligations for the members of the agreement.

After the Uruguay Round, the Council for Trade in Goods established a set of biennial notification procedures.[90] However, the format of the notification focuses on the quantitative restrictions and does not include export taxes. The Council also established a "reverse" notification procedure[91], by which the member could indicate specific non-tariff measures applied by other members, whenever they are not subject to other notification system. Nevertheless, this system has rarely been used.[92]

In its 2008 Revised Submission on Export Taxes, the European Union stated that the current notifications system "has had little, if any, practical effect on Members' level of transparency"[93]. In addition, the communication proposes the establishment of a new legal framework that ensures the enforcement of the

[87] Ministerial Decision on Notification Procedures 1993, p. 389.
[88] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance 1979.
[89] Ministerial Decision on Notification Procedures 1993, p. 389.
[90] Decision G/L/59 of the CTG of 10 January 1996 on notification procedures for quantitative restrictions.
[91] Decision G/L/60 of the CTG of 10 January 1996 on reverse notification of non-tariff measures.
[92] Kim 2010, p. 16.
[93] Communication from the European Communities on a Revised Submission on Export Taxes 2008, p. 3.

existing obligations. In this regard, it suggests using as a model the Uruguay Round Understanding on the Interpretation of Article XVII of GATT 1994, which refers to the notification requirements of the members' state trading enterprises.[94]

Finally, the WTO regime has two complementary information procedures. On the one hand, Article X of the GATT proposes the publication of any information concerning the restriction or prohibition of exports. On the other hand, the Trade Policy Reports of the WTO Secretariat provide in-depth analysis of the restrictive measures applied by the members. However, these reviews are not regularly published and are thus frequently outdated.[95]

4.1.6. The Regulation of Export Duties

The WTO framework evidences an important loophole in its regulation of export restrictions. While Article XI GATT provides a general prohibition of quantitative export restrictions, disciplines for export duties are practically non-existent.

The reason for this loophole is arguably a lack of foresight during the negotiations. The GATT agreements of 1947, based on a mercantilist approach, focused largely on the control of import restrictions.[96] The incorporation of Article 12 of the Agreement on Agriculture in 1994 did not effectively address the problem.

4.1.6.1. Article II GATT

Article II gives legal effect to the tariff concessions agreed upon in the schedules. While most of the paragraphs of this article refer exclusively to imports, paragraph II:1(a) makes use of the ambiguous term "commerce".

> "Article II: Schedules of Concessions
>
> 1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement (...)"

The debate over the binding effect of this provision when referring to exports is an old one.[97] Nevertheless, a recent article by Ehring and Chianale offered compelling arguments for the existence of a binding element for exports.[98] Firstly, the authors pointed out that the term "commerce" encompasses both imports and exports. Second, they indicated that in the case Argentina – Textiles and Apparel, which referred to import duties, the Appellate Body found that "Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule"[99]. Third, they established that, even though the agreed schedules refer primarily to import duties, the 1947 schedules from the

[94] Uruguay Round Understanding on the Interpretation of Article XVII of GATT 1994.
[95] Kim 2010, p. 23.
[96] Barfield 2008.
[97] Roessler 1975, p. 34; Rom 1984, p. 128; Matsushita, Schoenbaum and Mavroidis 2003, p. 220.
[98] Ehring and Chianale 2011, p. 112.
[99] Report of the Appellate Body. *Argentina – Textiles and Apparel*, p. 17.

Malayan Union and Australia contained export duty commitments that were arguably based on the binding effect of Article II:1(a). Finally, the article claims that the paragraph provides a sufficiently precise, unconditional and independent obligation, and is thus of a self-standing normative nature. Nevertheless, as the authors pointed out, the issue will not be completely clear until the DSU of the WTO rules on it. This clarification would not be very relevant in the short term since the commitments agreed upon in the schedules referring to exports are exceptional. However, this legal nuance may be of great importance in the future, as it would provide legal effect to hypothetical export duty commitments inscribed in schedules.[100] In any case, the lack of commitments in the agreed schedules leaves export duties widely unregulated.

4.1.6.2. Alternative Disciplines

Export tariffs remain a conflictive issue and can generate considerable harm to international trade. Consequently, some governments and practitioners have proposed imaginative techniques to limit the application of these measures.

The use of the ASCM to address the use of export duties is an illustrative example. In the *US –Export Restraints* case, Canada brought actions before the WTO regarding the US Statement of Administrative Action[101], which amended the Tariff Act of 1930 by interpreting the Uruguay Round Agreements. According to its own terms, the Statement of Administrative Action "represents an authoritative expression by the Administration regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law."[102] The Statement of Administrative Action advocated for an extensive application of the countervailing measures defined by Article VI of the GATT. It provided a broad interpretation of the concepts "entrusts or directs" as referred to the procedure by which a government can grant a subsidy, including any measure that could create a discernable benefit for the local industry. It furthermore asserted that the "Administration plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a U.S. industry"[103].

As for the export duties, the Statement of Administrative Action named some examples, e.g. soft lumber products from Canada or leather from Argentina, which involved export restrictions "that led directly to a discernible lowering of input costs" for the local producers[104]. As a result, the US Department of Commerce considered export restraints equivalent to financial contributions. On the other hand, Canada considered this approach inconsistent with the US obligations under Articles 1.1 and 35.1 of the ASCM.

The Panel resolved that export restraints do not constitute a "government-entrusted" or "government-directed" support that qualifies

[100] Ehring and Chianale 2011, p. 117.
[101] Statement of Administrative Action 1994.
[102] Report of the Panel. *US –Export Restraints*, p. 2.
[103] Report of the Panel. *US –Export Restraint*, p. 3.
[104] Report of the Panel. *US –Export Restraint*, p. 3.

as a "financial contribution", which is one of the two mandatory requirements for a measure to be classified as a subsidy. Hence, the Panel determined that countervailing measures adopted by the US in order to address Canada's exports restraints were inconsistent with Article 1.1 of the ASCM[105].

Nevertheless, some practitioners suggest that the application of the ASCM to export restrictions remains an option, particularly in the case of the selective reduction or elimination of tax rebates[106]. The problem arises from the fact that some members of the WTO apply VAT rebates as an instrument of industrial policy. By means of having higher tax rates for primary products than for manufactured products, countries promote their downstream industries. During the 2008 EU Conference in Raw Materials, Mathew Nicely argued that countervailing measures can be successfully applied on differential VAT rebates based on two recent developments[107]. Firstly, in the 2006 Trade Policy Review of China, the WTO Secretariat pointed out that the Chinese "export taxes may implicitly subsidise domestic downstream processing"[108]. Secondly, in 2005, the Appellate Body Report in the *US – DRAMS* case applied Article 1.1(a)(1) ASCM to a scheme of "indirect" support.[109] On the other hand, Claude Barfield pointed out that the application of the *US – DRAMS* rationale to the VAT rebates is a "stretch" and that defined the legal precedent as "murky".[110]

The European Commission joined the debate in 2012 by initiating an anti-subsidy investigation on imports of biodiesel originating in Argentina and Indonesia in parallel to an anti-dumping investigation on the same products[111]. Since it was alleged in the complaint that these export tax schemes are subsidies on which countervailing measures can be imposed[112], the investigation should determine whether they represent subsidies in the sense of Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures.

> "Article 1 Definition of a Subsidy
>
> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

[105] Report of the Panel. *US –Export Restraint*, p. 94.
[106] Nicely 2008.
[107] Nicely 2008.
[108] Trade Policy Review of China 2006, p. 99.
[109] Report of the Appellate Body. *US – DRAMS*, p. 43.
[110] Barfield 2008.
[111] Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia 2012.
[112] Notice of initiation of an anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia 2012: "*It is alleged that the above schemes are subsidies since they involve a financial contribution from the Government of Argentina and Indonesia (in the form of the entrustment and/or direction of the input producers to provide goods to the domestic biodiesel industry, or through income or price support) and confer a benefit to the recipients because the goods are provided for less than adequate remuneration. They are alleged to be limited to certain enterprises producing a subset of products in the agricultural sector, and are therefore specific and countervailable.*"

> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
>
> or
>
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
>
> and
>
> (b) a benefit is thereby conferred."

It is clear that the mentioned policies confer a benefit to the biodiesel industry in Argentina and Indonesia. Therefore, the central question is whether differential export duties can be considered a financial contribution from the government as defined in paragraph 1.1(a)(1)(iv) ASCM, which applies to the cases where a government provides indirect support.

The interpretation of the term "private body" given by the case law is quite far-reaching, so the input producers could easily fit that definition.[113] Moreover, the phrase "which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments" has also been defined broadly, and the export duties schemes could arguably fit that criterion.[114] Nevertheless, the actions of the Argentinian and Indonesian governments could unlikely be considered an "entrustment" to a private party as interpreted in the case law. As mentioned above, the *US – DRAMS* case defined the scope of paragraph 1.1(a)(1)(iv) ASCM. This case extended the concept of "entrust" to situations where "a government gives responsibility to a private body"[115] from the more restrictive approach of the *US –Export Restraints* case, which limited it to acts of delegation. Nevertheless, the Appellate Body in the same case stated that the concepts of "entrustment and direction do not cover 'the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market'"[116], confirming the interpretation given by the *US – Export Restrains* Panel. Following this line of reasoning, it is highly unlikely that

[113] Report of the Panel. *US - Export Restraints*, p. 86.
[114] Report of the Panel. *US - Export Restraints*, p. 89.
[115] Report of the Appellate Body. *US – DRAMS*, p. 43.
[116] Report of the Appellate Body. *US – DRAMS*, p. 41.

the Appellate Body will support the use of anti-subsidy countervailing measures to tackle the harmful effects of export duties. Ultimately, it is clear that the Members harmed by export restrictions in the form of export duties have little chance to address them by means of the ASCM.

Moreover, it is important to remember that export duties are explicitly excluded from the scope of Articles XI and VIII GATT. Thus, arguably, the Contracting Parties intended to establish a loose regime for export duties and addressing them by means of the ASCM would defeat the purpose of the GATT. Furthermore, as Claude Barfield pointed out, the imposition of export duties is a common practice for many Members of the WTO, particularly developing countries, and therefore a restriction of their use would be highly controversial and would widen the division between developed and developing countries at a multilateral level.[117] Finally, a broader interpretation of paragraph 1.1(a)(1)(iv) ASCM would reach any government measure that increased the domestic supply of a good, overreaching the object and purpose of the ASCM.[118]

Howse and Josling proposed a different approach to address export duties.[119] They argued in a recent article that the concept of "export restrictions" could be extended to include a number of export taxes, which would be thus covered by the general prohibition of Article XI GATT. The discussion is not a new one. Matsushita, Schoenbaum and Mavroidis proposed already in 2003 that Article XI can be applied when an export duty has the effect of an export ban.[120]

In order to determine which export tax could be included, Howse and Josling suggested a "purposive interpretation" of the concept of "export restrictions". According to them, Article XI GATT needs to be put into the context of Article VIII GATT[121], which "suggests that what was understood by an export tax was a measure imposed for fiscal (e.g. revenue-raising) purposes not trade restricting ones"[122]. Therefore, they considered that an export duty designed with protectionist purposes should fall under the scope of Article XI GATT. In addition, they argued that this interpretation is consistent with the general jurisprudence on Article XI GATT. To this end, they cited two cases, i.e. *India – Autos* and *US – Tobacco*, that suggest that "not only the form but also the purpose and

[117] Barfield 2008.
[118] Report of the Panel. *US - Export Restraints*, p. 89.
[119] Howse and Rosling 2012, p. 17.
[120] Matsushita, Schoenbaum and Mavroidis 2003, p. 220.
[121] Article VIII of the GATT: "Fees and Formalities connected with Importation and Exportation

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

[…]

4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

(a) consular transactions, such as consular invoices and certificates;
(b) quantitative restrictions;
(c) licensing;
(d) exchange control;
(e) statistical services;
(f) documents, documentation and certification;
(g) analysis and inspection; and
(h) quarantine, sanitation and fumigation."

[122] Howse and Rosling 2012, p. 17.

effect of a measure should be taken into account in determining whether it is covered by Article XI disciplines"[123].

Nevertheless, the interpretation of Article XI GATT proposed by Howles and Josling has some important flaws. In addition to the above-mentioned arguments, e.g. the explicit exclusion of export duties from Article XI GAT, it is clear that their interpretation of Article VIII is highly deductive. The authors assumed that the article suggests a "fiscal purpose" for export duties simply because it uses the phrase "a taxation of imports or exports for fiscal purposes". Furthermore, Article VIII GATT also mentions the purpose of "indirect protection to domestic products" together with the "fiscal purpose" of a measure, which is a particular aspect that is disregarded by the authors. Following the authors' argumentation, it is thus possible to conclude that Article VIII GATT suggests a second interpretation for the notion of "export tax", namely the measures which provide "indirect protection to domestic products".

Finally, even if the Appellate Body would adopt one of these interpretations, a new regulation of export duties will be necessary in the long-term. The alternative approaches focus on the use of export duties in a protectionist manner. However, export taxes imposed with fiscal purposes are likewise damaging and generate similar levels of welfare loss. Therefore, the parties should aim at eliminating them in the long run.

4.2. WTO Plus

The membership of the WTO has experienced a notable evolution after the Agreement Establishing the World Trade Organisation. Since 1994, 30 new countries have signed Protocols of Accession with the organisation, increasing the number of members to 158.

The range of the norms related to export restrictions contained in these Accession Protocols presents remarkable disparities. In the great majority of the cases they only establish a soft commitment, namely applying national norms in conformity with the WTO regulations. In some other cases, the Protocol provides a list of the restrictions used by the accessing members, including occasionally a justification for their application. However, in a reduced number of cases, the Accession Protocols lead to a stricter regime, which is commonly referred to as WTO Plus. In the cases of Vietnam, China, Mongolia, Ukraine, Tajikistan or Russia the Protocols provide an extensively detailed list of the allowed and forbidden export restrictions. The acceding members are thus required to make specific commitments in order to eliminate or reduce the more trade-distorting measures.[124] However, the establishment of stricter commitments for the acceding countries is generating an asymmetric framework between the recently acceding members and the rest of the membership.

The case of China is particularly illustrative of the limitation of export restrictions by means of an accession protocol, both because its deep economic implications and because it has been the subject of a WTO case. Article 7.1 of the Accession Protocol on non-tariff measures compels China to follow the Annex 3 schedule of "Non-tariff measures subject to phased elimination". Furthermore, the 7.2 provides

[123] Howse and Rosling 2012, p. 17.
[124] Karapinar 2012, p. 14.

that China "shall eliminate and shall not introduce, re-introduce or apply non-tariff measures that cannot be justified under the provisions of the WTO Agreement"[125].

Additionally, Article 11 of the same Protocol establishes a regime for export duties that is considerably stricter than the generic WTO framework. The 11.3 dictates that the accessing country "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"[126].

It is thus evident that the construction resulting of the Chinese accession goes beyond the original commitments of the WTO agreements. In addition, the interpretation proposed in the *China – Raw Materials* case of the application of Article XX of the GATT limits even more the Chinese position. The applicability of Article XX GATT to justify the breach of the clauses of the Chinese Accession Protocol arose for the first time during the *China – Publications and Audiovisual Products* case. In this case, the Appellate Body decided to clarify the issue in order to avoid uncertainty around China's implementation obligations[127]. It analysed the phrase "right to regulate trade in a manner consistent with the WTO Agreement" contained in Article 5.1 of the Accession Protocol and concluded that this formulation implied China's capacity to apply "certain rights to take regulatory action that derogates from obligations under the WTO Agreement—that is, to relevant exceptions"[128]. In other words, the Appellate Body asserted the Chinese capacity of employing the General Exceptions of Article XX GATT to the *China – Publications and Audiovisual Products* case. However, the Appellate Body did not expressly state whether China could apply these exceptions to the rest of the Accession Protocol.

In 2012, the Panel in the *China – Raw Materials* case, then upheld by the Appellate Body, found that the General Exceptions of the GATT were not applicable to Article 11.3 of the Accession Protocol. The Panel pointed out the different formulations of Articles 11.3 and 5.1. Whereas Article 5.1 makes an explicit reference to the WTO Agreement, Article 11.3 does not mention the totality of it, but only Article VIII of the GATT.[129] Therefore, the Panel understood that China could not invoke Article XX GATT to justify a behaviour contrary to the commitments contained in Article 11 of its Accession Protocol.

The conclusions on the applicability of Article XX were hardly relevant for the result of the *China – Raw Materials* case. The Appellate Body clearly stated that the challenged Chinese policies did not fulfill the requirements of Article XX(b) or XX(g) GATT. It did not even consider necessary to proceed with a second-step examination of the Chapeau Clause. However, this restrictive interpretation has important consequences for the future implementation of the Chinese obligations. Furthermore, it is highly relevant for the position of other WTO members that have signed similar Accession Protocols like Russia.

Since Russia has traditionally used export restrictions as part of its trade policy, the regulation of export restrictions has been one of the key issues in the negotiations of its accession to the WTO.[130]

[125] Protocol of Accession of the People's Republic of China, p. 5.
[126] Protocol of Accession of the People's Republic of China, p. 7.
[127] Report of the Appellate Body. *China – Publications and Audiovisual Products*, p. 96.
[128] Report of the Appellate Body. *China – Publications and Audiovisual Products*, p. 99.
[129] Article 11.3 Protocol of Accession of the People's Republic of China: 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.
[130] Intracen 2012, p. 2.

The final commitments agreed upon at the Russian accession included the establishment of schedules for the export duties on over 700 tariff lines. The products included in these schedules are divers, including raw materials and industrial products. In some cases, a transition period that goes from one to five years is stipulated for certain lines. The method used for the calculation of the duty also depends on the product observed, i.e. ad valor, specific or alternative method. The alternative methods are primarily used for the calculation of the export taxes of hydrocarbons and consist in a formula which takes into account the world price for crude oil.[131]

The Russian export duties regime was a sensible issue for the European Union, particularly after the establishment of export duties on raw lumber in 2007, for which the Finish lumber processing industry is highly dependent.[132] The Russian commitments on export restrictions were further developed in a bilateral agreement with the European Union, which is discussed in Section 4.3.

4.3. The Doha Development Round

When the Doha Round was opened in 2001, export restrictions were not part of the main points in the agenda. Some countries like Japan and Switzerland made some proposals on the issue, trying to increase the regulation on export tariffs and prohibitions.[133] However, when referring to the conditions of trade in commodities, the major priorities of the Round were reducing the high import rates and curving subsidies in the developed world.[134] Nevertheless, the situation has experienced a remarkable evolution. The proliferation in the use of export restrictions and the global shortage in some particular products have set these measures as an important part of the Doha discussions.

The different proposals on export restrictions regulation have been submitted in the context of the Non-Agricultural Market Access negotiations and the Agriculture Negotiations.

4.4. Agricultural Negotiations

The discussion of the regulation of export restriction started in 2000 under the mandate of the Uruguay Round Agreement on Agriculture, one year before the official opening of the Doha Development Round.[135] In this context, a number of WTO members submitted proposals regarding the export restriction disciplines.

The United States comprehensive proposal centered the issue on disciplining export restrictions that could affect food security or privilege national industries. However, it did not propose specific measures to tackle these problems.[136] Likewise, the Cairns Group proposal, which represents the position of some of the biggest producers of agricultural products, suggested an improved discipline of export restrictions and taxes. Nevertheless, its proposal took a conservative approach and recommended to preserve the provision 12(2) AoA, which establishes an exception for the developing countries.[137]

Some importing countries, more dependent on the international markets to guarantee their supply of foodstuff, took a more determined position.[138] Japan, in

[131] Intracen 2012, p. 2.
[132] Cooper 2012, p. 9.
[133] Sharma 2011, p. 21.
[134] Blas 2010.
[135] Mitra and Josling 2009, p. 16.
[136] United States: Comprehensive Long-Term Agricultural Trade Reform – 23 June 2000.
[137] Cairns Group: Export restrictions and taxes — 21 December 2000.
[138] Mitra and Josling 2009, p. 16.

an ambitious proposal, suggested replacing all quantitative export restriction with export taxes. Furthermore, it proposed to create quotas in which a certain amount of exports would be exempt from the application of export taxes, and to bind the remaining taxes to scheduled rates. As for the application of emergency restrictive measures like the ones covered by Article XI:2(a) GATT, Japan proposed a stricter discipline. First, it argued for the introduction of a consultation procedure as a prerequisite for the establishment of emergency measures. Second, it proposed to require the members to maintain the proportion of exports at the level of the preceding years when establishing quantitative export restrictions. Finally, it invited the members to limit the duration of emergency measures.[139]

The Korean proposal suggested prohibiting the exporting countries from imposing export restrictions arbitrarily or from applying export taxes with a restrictive purpose.[140] Switzerland went further by supporting the elimination of all export restrictions on agricultural products and the binding at zero of all export tariffs, with the exception of a "flexibility clause" for the least developed countries.

With the inclusion of the Agriculture Negotiations in the Doha Development Round in 2001, the topic stayed out of the debate and did not play a relevant part in the agenda. However, in 2008 Switzerland and Japan submitted an informal paper that advocated for the limitation of exporters' ability to restrict the export of foodstuffs.[141] The proposal left the previous demands of prohibition of export restrictions and argued instead for the "due consideration" of the food security of the importing countries. Following this system, countries would be required to notify restrictive measures and to open consultations with the affected countries. Moreover, Switzerland and Japan proposed the creation of a "standing committee of experts", which would act as an arbitrator when the differences could not be resolved within a particular period[142]. However, the proposal was opposed by some developing countries and was therefore not included in the text-based negotiations[143].

Additionally, a proposal backed by the United States, Japan, Japan, Ukraine and the Chinese Taipei argued for new norms increasing transparency in the use of export licenses. This proposal suggested a notification procedure within the 60 days after the application of a measure. Furthermore, the proposal designated the Committee on market access as the responsible authority to ensure and monitor the implementation of this notification system.[144]

On the other hand, the last revised draft negotiating text advocates for policy solution more focused in strengthening Articles XI:2(a) GATT and Article 12 of the Agreement on Agriculture. Paragraph 172 of the text requires the members applying an export restriction in conformity with Article XI:2(a) GATT to notify it to the WTO within the 90 days following its imposition. Moreover, the paragraph 176 entrusts the Committee on Agriculture with the surveillance of this system. Likewise, the paragraph 179 calls for export restrictions to last no longer than 12 months and forbids the ones lasting for more than 18 months without the consent of the importers. Nevertheless, the draft text maintains paragraph 12.2 of the Agreement on Agriculture, which excludes food-importing developing countries.[145]

[139] Japan: Negotiating proposal — 21 December 2000.
[140] Rep of Korea: Negotiating proposal — 9 January 2001.
[141] Mitra and Josling 2009, p. 18.
[142] Mitra and Josling 2009, p. 18.
[143] Karapinar 2011, p. 1150.
[144] Kim 2010, p. 21.
[145] Revised Draft Modalities for Agriculture 2008.

4.4.1. Non-Agricultural Market Access

The discussion of new disciplines for export restrictions has also taken place in the Non-Agricultural Market Access negotiations.

In this forum, the European Union has been the most active actor and has urged the contracting parties for a more modern exports tax regime. The EU proposals have focused on controlling the use of export restrictions as a way to provide unfair advantages to domestic industries.

In its 2006 Communication on a Negotiation Proposal on Export Taxes[146], the European Union set the restraint of *beggar thy neighbour* policies as its main objective. Likewise, it underlined the crucial importance of increasing transparency and predictability in the use of export restraints.

The proposal comprised a three way approach in order to respond to the different necessities of the negotiating parties. It built on a general prohibition of export duties for developed and developing countries, allowing no exceptions for the former and a limited number for the latter. In a third category, the proposal suggested to bind the existing levels of export taxes for least developed countries. The proposal also allowed this last group to define a list of products for which they wanted to retain the option of applying export duties. Article 3 of the annex detailed the criteria by which export taxes could have been maintained, i.e. they needed to been listed in schedules and to fulfill two conditions. Firstly, their validity was subject to their necessity, "in conjunction with domestic measures, to maintain financial stability, to satisfy fiscal needs, or to facilitate economic diversification and avoid excessive dependence on the export of primary products"[147]. Secondly, they had to avoid adversely affecting "international trade by limiting the availability of goods to WTO Members in general or by raising world market prices of any goods beyond the prices that would prevail in the absence of such measures, or otherwise cause serious prejudice to the interests of developing country Members." Additionally, Article 7 of the annex stressed the importance of the existing obligations on transparency and notification.

The European Union proposed a more flexible approach in its 2008 Revised Submission on Export Taxes[148]. The communication maintained the stress in limiting *beggar thy neighbour* policies and increasing transparency and predictability. However, it eliminated the general ban on export duties and introduced a system based on notification and the development of schedules for export taxes.

Even though these proposals had wide support in the developed world, they also faced strong opposition from developing countries such as Argentina, Brazil or Indonesia. In 2004, some developing countries produced an unofficial document which argued that the regulation of export restrictions did not fall under the scope of the Doha agenda and that negotiations of such a sensitive issue would need an explicit mandate by the parties.[149] Indeed, the 2001 Doha Ministerial Declaration[150] does not explicitly mention export restrictions. Nevertheless, it makes numerous references to the reduction of tariffs and the elimination of trade distorting measures. Therefore, it is possible to conclude

[146] Communication from the European Communities on a Negotiation Proposal on Export Taxes 2006.
[147] Communication from the European Communities on a Negotiation Proposal on Export Taxes 2006, p. 4.
[148] Communication from the European Communities on a Revised Submission on Export Taxes 2008.
[149] Summary Report on the Thirtieth Meeting of the Committee on Agriculture 2005, p. 4.
[150] Doha Ministerial Declaration 2001.

that there are sufficient legal arguments to believe that the negotiation of new disciplines on export restrictions is part of the Doha agenda.

4.5. Regional Free Trade Agreements

The WTO constituency has grown to 158 members from the 23 original signatories of the GATT agreement back in 1947. Although this expansion has had a very positive effect in the integration of global trade, it has also made negotiations much harder.

Consequently, the world has seen a huge increase in the number of Regional Trade and Preferential Trading Agreements. From the low levels of the 80's, the number of agreements has soared six fold in two decades overpassing the 200.[151]

Preferential Trade Agreements usually regulate export restrictions, proposing norms that suit their members better than the common WTO framework. Moreover, the reduced number of signatories eases the process of negotiation, making possible stronger commitments and originating alternative approaches to export restrictions regulation. Likewise, the more recent Free Trade Agreements are more up-to-date and reflect better the current challenges of international trade than the WTO regulation, which dates from 1994.

A 2012 study conducted by researchers of the OECD[152] analysed a sample of 93 different free trade agreements. When comparing their provisions with the WTO discipline, the study found that 15 agreements contained tougher commitments when dealing quantitative export restrictions and 66 were stricter on their regulation of export taxes.

4.5.1. The North American Free Trade Agreement

The NAFTA framework includes norms that go further than the WTO commitments. On the one hand, the treaty incorporates Articles XI and XX GATT, but adds two complementary conditions to the application of the exceptions formulated in provisions XI:2(a), XX(g), XX(i) and XX(j) GATT to the general ban on quantitative export restrictions. Article 315 of the NAFTA's final text[153] details these complementary conditions. In the first place, it provides that the imposition of a quantitative restriction on a product would be valid "only if" it does not reduce de proportion made available to the other signatory parts over the total export shipments of that same product. The pre-existent proportion would be thus determined by analysing a sample of the trade flows in the previous 36 months. Secondly, Article requires that quantitative restrictions do not disrupt the "normal channels of supply" or the "normal proportions" in a list of specific product provided to the other parties.

The regulation of the exceptions applicable to quantitative export restrains offered by NAFTA certainly proposes an interesting approach and is also used in other Free Trade Agreements such as Canada-Chile or Canada-Costa Rica.[154]

On the other hand, Article 314 or the NAFTA allows the application of export tariffs only in a very restrictive way. In order to apply an export duty, the parties have to make sure that the same charge is imposed not only to other NAFTA members but also to their internal consumption. Furthermore, Article 315.1(b)

[151] The World Bank 2005, xi.
[152] Korinek and Bartos 2012.
[153] North American Free Trade Agreement 1994.
[154] Korinek and Bartos 2012, p. 23.

extends the control to licenses, fees, taxation, minimum prices or any other measures that may discriminate exports against internal consumption.

Additionally, the Annex 314 of the agreement provides with an exception for Mexico to the general prohibition on export tariffs. Paragraph 4 of the provision establishes a list of "basic foodstuffs" that can be taxed. The annex defines as well a number of supplementary conditions to the applicability of the exception. Firstly, the export duties have to be applied to all the other parties. Secondly, it requires its application in the context of a domestic food assistance programme for national consumers, a stabilisation programme for the national industry or to relieve critical shortages of any foodstuff. In the last case, the provision limits the use of the exception to a period of one year, which can be extended by an agreement between the parties.

As in the case of quantitative restrictions, the NAFTA regulation proposes a flexible approach for export duties. Instead of prohibiting tariffs, it creates a legal framework that offsets the risk of using the export taxes as a protective measure by imposing similar tariffs to exports and national consumption.[155] This flexibility is moreover evident in the exception granted to Mexico, which is a consequence of the divergent necessities of the developing and developed countries.

4.5.2. The MERCOSUR

The MERCOSUR funding text, the Asuncion agreement, contains provisions that propose a more complete regime than the WTO framework. Article 1 of the agreement establishes "the free movement of goods, services and factors of production between countries through, inter alia, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures"[156]. Furthermore, Article 1 of the Annex 1 of the same treaty provides that the parts shall eliminate any restriction once the common market is fully effective. However, the application of export tariffs in the intra-MERCOSUR trade remains controversial. On the one hand, Argentina is a frequent user of export duties and argues that they do not distort the trade intra-MERCOSUR. On the other hand, Uruguay is opposed to these measures and advocates for a tighter control.[157]

Furthermore, the vague language of the treaty complicates its application. The Ad Hoc Tribunal of the MERCOSUR has resolved in different cases that the principle of common market is effective from 1999 and that the provisions of the Asuncion agreement are directly applicable.[158] However, export duties are still applied in intra-MERCOSUR trade by some of the signatories to the agreement.[159]

Article 157.4 of the common Customs Code approved in 2010[160] will place the national policies on export tariffs out of the reach of the MERCOSUR system, leaving the application of tariffs to the discretion of the member states. The code will enter into force once all the member states have ratified it.

In treaties between the MERCOSUR block and its neighbour countries it is possible to appreciate the use of a standstill clause. Article 6 of the MERCOSUR-

[155] Korniek and Bartos 2012, p. 27.
[156] Asunción Agreement 1991.
[157] Mitra and Josling 2009, p. 20.
[158] Laudo III 10 March 2000; Laudo IV, 21 May 2001; Laudo VI, 9 January 2002.
[159] Barreira 2006, p. 118.
[160] MERCOSUR Customs Code 2010.

Chile[161] agreement allows the existing export duties[162] but prohibits the establishment of new taxes to exports or the increase of the existing ones. Article 6 of the MERCOSUR-Bolivia[163] agreement and Article 6 of the MERCOSUR-Peru[164] agreement establish similar frameworks. As for the regime of quantitative restrictions, these agreements define a general elimination, but provide some exceptions adapted to the needs of the signatories. In the case of the MERCOSUR-Chile agreement, the text excludes the application of some of the General Exceptions of Article XX GATT, namely the XX(g), XX(i) and XX(j).[165]

4.5.3. The European Union Free Trade Agreements

The European Commission considers the regulation of the export restriction policies as a main concern of its trade policy, particularly in relation with the raw materials initiative[166]. The "Trade, Growth and World Affairs - Trade Policy as a core component of the EU's 2020 strategy"[167] 2010 communication defined the negotiation of more rigid disciplines of export restrictions in the trade agreements of the Union as one of the three initiatives that the European Union may pursue in order to fight the escalation of export restrictions.

Therefore, the bilateral agreements signed by the European Union usually include provisions that limit to some extent the applicability of export restrictions. Analysing the more recent agreements of the Union it is possible to identify a group of treaties destined to neighbour countries.

The Stabilisation and Association Agreement with Croatia is a clear example of this category. Its Article 20.2 imposes the elimination of "quantitative restrictions on exports and measures having equivalent effect"[168]. Likewise, it provides with a standstill clause for export tariffs in Article 33. However, Article 42, named "Restrictions Authorised", allows some exceptions to the general rule. The events considered in this article are similar to the ones listed in Articles XX and XI GATT. It justifies measures for reason of "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver"[169]. Likewise, the last phrase of Article 42 of the Agreement proposes a "Chapeau Clause" similar to the one defined in the preamble of Article XX GATT.

However, the 42 of the Stabilisation and Association Agreement leaves out exceptions XX(d), XX(e), XX(g), XX(h), XX(i) and XX(j) GATT. It is particularly relevant the inapplicability of the conflictive subparagraph XX(g) GATT, which deals with the preservation of exhaustive natural resources.

Similar provisions can be found in the Stabilisation and Association Agreement with Macedonia[170], the Interim Agreement with Serbia[171], Interim Agreement on

[161] Acuerdo de Complementación Económica Mercosur – Chile 1996.
[162] In both agreements Argentina is allowed to maintain up to a 3.5% export duty on soya beans and a 15% in hides and leader. Furthermore, the MERCOSUR-Bolivia agreement reserves Brazil the right to impose export taxes up to a 9% in hides and leather and a 40% in the case of cane molasses an inverted sugars.
[163] Acuerdo de Complementación Económica MERCOSUR – Bolivia 1995.
[164] Acuerdo de Complementación Económica MERCOSUR – Perú 2005.
[165] Korniek and Bartos 2012, p. 20.
[166] Commission Communication on the Raw Materials Initiative 2008.
[167] Commission Communication on Trade, Growth and World Affairs - Trade Policy as a core component of the EU's 2020 strategy 2010.
[168] Stabilisation and Association Agreement between the EU and Croatia 2005, L26/7.
[169] Stabilisation and Association Agreement between the EU and Croatia 2005, L26/11.
[170] Stabilisation and Association Agreement between the EU and Macedonia 2004, L84/13.

Trade and Trade-Related Matters with Bosnia and Herzegovina[172], the Stabilisation and Association Agreement with Montenegro[173], the Euro-Mediterranean Agreement with Algeria[174], the Euro-Mediterranean Agreement with Egypt[175], the Euro-Mediterranean Agreement with Morocco[176], the Euro-Mediterranean Agreement with Jordan[177] or the Interim Agreement on Trade and Trade-Related Matters with Lebanon[178].

It is possible to infer that this regime on quantitative export restrictions is used as a standard by the European Union to consolidate its trade relations with its neighbour partners. Therefore, the list includes mainly states acceding to the Union, candidates to admission or associates involved in the Union for the Mediterranean process.[179]

Nevertheless, it is necessary to remark that some of the free trade agreements signed with the countries of the former Yugoslavia[180] exclude the products listed in HS Chapters 1-24 together with the ones catalogued in the Annex 1 of the AoA. Moreover, the EC-Turkey agreement also leaves a number of agricultural products out of the quantitative export prohibition.[181] Furthermore, these free trade agreements often contain an express ban on export duties. However, this ban is sometimes only applied to industrial goods, like is the case in the free trade agreements between the EU and Bosnia, Croatia, Macedonia or Montenegro.[182] In other occasions, the treaty excludes a list of agricultural products, like the agreements with Israel, Albania or Turkey.[183]

Likewise, the European Union has concluded a wide range of bilateral agreements out of its neighbourhood policy.

Firstly, the Free Trade Agreement with the Republic of South Korea[184], which entered into force in 2011, establishes in its Article 2.9 a general prohibition of quantitative restrictions to exports. Moreover, Article 2.11 of the Free Trade Agreement provides a general ban on export duties as well.

The treaty incorporates the exceptions of Article XI and XX GATT. However, it proposes a different regime for the application of exceptions XX(i) and XX(j) GATT. As a result, the parties "shall supply the other Party with all relevant information, with a view to seeking a solution" before applying these exceptions. Only after 30 days without a satisfactory resolution, the party will be allowed to apply the exception. Additionally, this treaty admits precautionary measures before the period of 30 days in case of "exceptional and critical" situations.

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[171] Interim Agreement between the EU and Serbia 2010, L 28/2.
[172] Interim Agreement on Trade and Trade-Related Matters between the EU and Bosnia and Herzegovina 2008 L 169/13.
[173] Stabilisation and Association Agreement between the EU and Montenegro 2010, L 169/13.
[174] Euro-Mediterranean Agreement establishing an Association between the EU and Algeria 2005, L 265/2.
[175] Euro-Mediterranean Agreement establishing an Association between the EU and Egypt 2004, L 304/39.
[176] Euro-Mediterranean Agreement establishing an Association between the EU and Morocco 2000, L 70/2.
[177] Euro-Mediterranean Agreement establishing an Association between the EU and Jordan 2002, L 117/2.
[178] Interim Agreement on Trade and Trade-Related Matters between the EU and Lebanon 2002, L 262/2.
[179] Final Statement of the Marseille Meeting of the Euro-Mediterranean Ministers of Foreign Affairs 2008.
[180] Albania, Bosnia, Croatia, Macedonia and Montenegro (Korinek and Bartos 2012, p. 22).
[181] The article 1 of the Decision 1/98 of the EC-Turkey Association Council on the trade regime for agricultural products sets a prohibition of quantitative restrictions in its first paragraph. However, the second paragraph specifies that this prohibition cannot restrain the respective agricultural policies of the signatories.
[182] Korinek and Bartos 2012, p. 25.
[183] Korinek and Bartos 2012, p. 26.
[184] Free Trade Agreement between the EU and Korea 2011, L 127/1.

The trade agreement with Central America, concluded as a part of the negotiations of an Association Agreement, proposes a similar framework for export restrictions. However, the Treaty grants a transitional period of 10 years for Guatemala's and Costa Rica's current export duties on bananas, beef and coffee[185].

In the same vein, the Trade Agreement with Colombia and Peru[186] contains a general prohibition of quantitative restrictions and export duties. Nonetheless, it lists a limited number of exceptions for products sensitive for Colombia such as emeralds and coffee[187].

For its part, the Agreement on Trade, Development and Cooperation with South Africa is one of the most developed out of the neighbourhood policy of the European Union. It bans the use of export duties and excludes the application of exceptions XX(d), XX(e), XX(h), XX(i) and XX(j) GATT.[188]

Finally, the negotiations of the Free Trade Agreement with Singapore, which were concluded in December 2012, proposed a tight regulation of export restrictions. The treaty, which is currently being drafted, is likely to propose a similar framework to the one applied in the treaty with South Korea.

In addition, the regulation of export restrictions has also been a key issue in the ongoing negotiations of free trade agreements with Canada, India, Malaysia or MERCOSUR. Throughout these negotiations, the European Union has pursued the objective of full elimination of export duties on industrial raw materials.[189] In fact, export restrictions are the main obstacle for the conclusion of the negotiations, which were suspended in 2010, between the European Union and the Gulf Cooperation Council[190], composed by Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

Furthermore, the European Union has addressed the issue of export restrictions in some of its non-preferential agreements, like the Partnership and Cooperation Agreement with Iraq[191] or the Partnership and Cooperation Agreement with Mongolia[192].

The Union has moreover concluded an *ad hoc* agreement with Russia to set a legal framework for the tariff-rate quotas applied to wood traded from Russia into the European Union[193]. Likewise, in the context of the Russian accession to the WTO, the European Union concluded with Russia a bilateral set of rules which extended the commitments stipulated in the Accession Protocol[194]. According to Russia's interpretation, the WTO Accession Protocol does not forbid the establishment of new export duties in products other than the ones listed in the schedule. Consequently, the European Union concluded a bilateral agreement to prevent the establishment of new export duties by scheduling a number of products which are not listed in Russia's WTO Schedule on Goods. The list of products contained in the Agreement is rather extent and covers raw

[185] Commission Second Activity Report on EU Trade Policy for Raw Materials 2012, p. 10.
[186] Trade Agreement between the EU and Colombia and Peru 2012, L 354/1.
[187] Commission Second Activity Report on EU Trade Policy for Raw Materials 2012, p. 10.
[188] Agreement on Trade, Development and Cooperation between the EU and South Africa 1999, L 311/3.
[189] Commission Second Activity Report on EU Trade Policy for Raw Materials 2012, p. 11.
[190] Commission Staff Working Document on the Report on progress achieved on the Global Europe strategy, 2006-2010, p. 10.
[191] Partnership and Cooperation Agreement between the EU and Iraq 2011, L 204/20.
[192] Partnership and Cooperation Agreement with Mongolia 2012, L 134/4.
[193] Agreement in the form of an Exchange of Letters between the European Union and the Russian Federation relating to the administration of tariff-rate quotas applying to exports of wood from the Russian Federation to the European Union 2011, L 57/3.
[194] Council decision on the conclusion of the Agreement between the European Union and the Russian Federation relating to the introduction or increase of export duties on raw materials 2012.

materials for which the EU has a major import interest, for which there is a risk of tension in global supplies or for which Russia controls a significant part of the global supply or production.[195]

Nevertheless the language used to define the commitments undertaken by Russia is ambiguous and does not define strict obligations. By this agreement, Russia only commits to "make its best efforts" to avoid the introduction of new taxes on exports or increase the existing ones. In addition, the agreement establishes a consultation mechanism, binding Russia to consult with the European Union at least two months prior to the implementation of restrictive measures.[196]

4.5.4. Other Preferential Trade Agreements

There are numerous examples of free trade agreements that impose a general prohibition on export duties, with the exception of the cases where Article XX GATT applies, and establish punctual exceptions for specific products. That is the case of the US-Central America Free Trade Agreement-Dominican Republic agreement[197] that allows Costa Rica to impose export duties in a list of products or the US-Colombia[198] agreement, which permits Colombia to maintain export taxes on bananas and coffee.[199] Likewise, the free trade agreement between the EFTA and Ukraine[200] proposes a general ban on export duties, but details a list of exhaustible products that are excluded from the prohibition.[201]

Other preferential trade agreements determine a general prohibition on export duties, but introducing situational exceptions instead of the product specific ones[202]. This is the case of the Common Economic Zone between Russia, Ukraine, Belarus and Kazakhstan. This customs union presents a general ban to export taxes within the member states. However, the implementation of this provision has been intermittent.[203]

The Japan-Mexico free trade agreement defines a strong regulation of export duties.[204] Article 6 of the treaty sets a general prohibition on export taxes. Furthermore, the agreement limits the number of exceptions applicable to four of the General Exceptions of Article XX GATT, i.e. the protection of public morals, the protection of human, animal, or plant life or health, the protection of intellectual property and the restrictions to prison labour. The agreement does not allow the use of export duties in the case of shortages or conservation of natural resources. In contrast, Article 7 and annex 2, which prohibit the adoption of quantitative export restrictions, provide an exception for a list of fuel related products.

Finally, it is important to note that the ASEAN agreement, together with the ASEAN-China and ASEAN-India agreements, only makes a reference to the existing commitments under the WTO system.[205]

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[195] European Parliament Explanatory Statement 2012
[196] Council decision on the conclusion of the Agreement between the European Union and the Russian Federation relating to the introduction or increase of export duties on raw materials 2012.
[197]The Dominican Republic – Central America – United States Free Trade Agreement. 2009.
[198] US- Colombia Free Trade Agreement 2006.
[199] Korniek and Bartos 2012, p. 26.
[200] Free Trade Agreement Between the EFTA States and Ukraine 2010.
[201] Korniek and Bartos 2012, p. 27.
[202] Korniek and Bartos 2012, p. 29.
[203] Referring to the escalade in export duties in 2008, Korinek and Bartos state that "in the end, Russia levied the tax even on exports within the CEZ, even though the text of the agreement does not provide an exception for the threat of re-export. These breaches of the RTA suggest that implementation and enforcement of the agreement's provisions is challenging".
[204] Agreement Between Japan and the United Mexican States for the Strenghtening of the Econonomic 2004.
[205] ASEAN Trade in Goods Agreement 2009.

5 Policy Proposal

It is obvious that the existing export restrictions regime does not satisfy the necessities of the current international trading system. On the one hand, the WTO norms, while binding the level import duties, do not provide a substantial regulation for export taxes. This imbalance constitutes an important loophole that undermines international trade. On the other hand, the exceptions affecting the prohibition of quantitative export restrictions and the notification procedures are drafted in ambiguous terms and generate a situation of legal uncertainty. Therefore, it is clear that the members of the WTO need to consider the development of a more effective framework.

The lack of reform of the multilateral legal regime leads countries to the implementation of measures that undermine the efficiency of the world trading system and reverses the global trade liberalisation process. This situation encourages protectionist attitudes, which are often counterproductive from a global welfare perspective.[206]

Additionally, as indicated above, export taxes and quantitative export restrictions are substitutable policy tools. Therefore, it is inappropriate to strengthen the regulation on quantitative export restrictions without taking a decided action to discipline export taxes.[207]

The Doha Development Round is jammed after 12 years of negotiations, so it is not reasonable to expect any big step at a multilateral stage in coming years. Furthermore, the proposals on the export restrictions regulation presented in the 2011 Ministers Conference received a cool response by a group of developing countries.[208] As a result of this situation, most countries have turned to the negotiation of Regional or Bilateral agreements, which are easier to conclude and allow countries to further develop trade disciplines. In the last years, these preferential trade agreements have increasingly included provisions on export restrictions in order to complete or to define more precisely the WTO norms.[209] The experience resulting of these agreements can have a positive influence in the development of a more effective export restrictions regime, since it may pave the way for a subsequent compromise at a multilateral level.[210]

However, the proliferation of Regional and Bilateral trade agreements is in itself a challenge for the multilateral trading system. The complexity of these entrenched preferential practices increases the transaction costs for the businesses and complicates the enforcement of the acquired obligations.[211] In addition, the conclusion of preferential trade agreements, by lowering trade barriers between the members, also causes a relative increase of the barriers for non-members.[212] The conclusion of Regional and Bilateral trade agreements provokes thus that the excluded countries have to bear more instability and uncertainty in their local markets.[213]

Hence, addressing the under-regulation of export restrictions by means of Regional and Bilateral agreements generates a sub-optimal situation from a global welfare point of view. The multilateral stage is thus the optimum forum for the discipline of export restrictions, even considering its limitations.[214]

[206] Karapinar 2011, p. 1154.
[207] Sharma 2011, p. 22.
[208] Karapinar 2011, p. 1150.
[209] Korinek and Bartos2012, p. 34.
[210] Barfield 2008.
[211] Korinkek and Bartos 2012, p. 6.
[212] Bhagwati 1995, p. 2.
[213] Mitra and Josling 2009, p. 20.
[214] Hoffmeister 2010.

In order to be effective, the design of the future regulation of export restrictions must provide flexibility in order to attend the legitimate concerns of the developing countries.[215] Nevertheless, it must also aspire to completeness, providing homogeneous solutions insofar as reasonable. Considering the effects of export restrictions on international exchanges, the ultimate objective of this regulation should be a progressive reduction of the export rates and a noticeable limitation of quantitative restrictions to exports.

It is unlikely that the developing countries will accept a drastic move in the multilateral scene, moving from a situation of wide discretion to a highly restrictive regime.[216] Thus, the countries supporting stricter norms should focus their efforts in the short-term on containing the damaging consequences of export restrictions, while raising awareness over the negative consequences of these measures in order to achieve an effective regulation in the long-term.[217]

Part 5 describes the solutions that this thesis proposes for the improvement of the notification processes, the application of quantitative export restrictions and the use of export duties.

5.1. Notification Procedure

As it was described above, the notification procedure established by Article 12 of the Agreement on Agriculture is strictly limited to a number of situations resulting from the application of the exception contained in Article XI:2(a) GATT. The more general notification regime of the 1993 Ministerial Decision on Notification Procedures covers a wider range of export restrictions. Both regulations are however broadly disregarded, offering little predictability of the implementation of export restrictions. Other information mechanisms like the Trade Policy Review reports of the WTO are likewise ineffective. The review process takes place every two to four years, and thus do not provide updated information.[218]

As pointed out in the EU's Doha Development Round proposals, the lack of transparency is extremely harmful for the confidence in the international trading system. Hence, it is necessary to ensure the respect of the existing notification regulations and to establish a more effective mechanism in a next stage. The improvement of the notification procedures, since does not entail an increase of the existing export restrictions disciplines, is less likely to generate a strong opposition from the group of developing countries.

In its 2008 Revised Submission on Export Taxes, the European Union proposed a new system based on the existing Uruguay Round Understanding on the Interpretation of Article XVII of GATT 1994, which establishes a working party that monitors in behalf of the Council for Trade of Goods. The Understanding also suggests a peer-review procedure, which allows the members to make a "counter-notification" to the Council for Trade of Goods concerning the lack on notification of other members. In the same vein, a recent paper by Karapinar proposed the establishment of a Monitoring Committee composed by experts, which would regularly monitor and scrutinise the notification of the members.

Even though these proposals improve the review mechanisms of the existing notification system, they fail to resolve the problem of enforcement in case of a repeated disregard of the norms. The issue does not have an easy solution. On the one hand, the Dispute Settlement Understanding seems somewhat inadequate to

[215] Karapinar 2011, p. 1151.
[216] Sharma 2011, p. 24.
[217] Barfield 2008.
[218] Kim 2010, p. 23.

deal with this sort of problems due to its long and costly proceedings. On the other hand, the WTO is not equipped with an alternative forum to address this sort of situations.

The establishment of a standing monitoring body, in the form of a working party or a committee of experts, is certainly is a good first step. In order to overcome the problem of the notification obligations' disrespect, the parties could enhance the participation of the members in the monitoring proceedings through "counter-notifications". This measure could be complemented with the loss of the right to appear in front of the standing body in case of persistent contempt. By doing so, the parties could increase transparency and predictability and, at the same time, introduce a soft enforcement mechanism in the form of peer-pressure. The OECD has extensively used peer-review mechanisms for more than 40 years, proving them to be notably effective in compelling poor performers to bring their policies to the agreed levels.[219] Following the current draft Doha texts, a new notification regulation should be built over Article 12 of the Agreement on Agriculture, de-linking it from Article XI GATT and thus covering all forms of export restrictive measures.[220]

5.2. Quantitative Export Restrictions

As defined in Chapter 5, quantitative export restrictions are prohibited by Article XI GATT. However, the second paragraph of the same article provides a broad exception that limits its application. Likewise, the general prohibition is also limited by the general exceptions of Article XX GATT.

In order to determine the appropriateness of these exceptions it is necessary to find a balance between the negative effects of export restrictions and the protection of the different social values that they protect, e.g. security, environment or public health. On the one hand, the provision of general exceptions is necessary. Even highly integrated trade blocks like the European Union establish some general exceptions. Nevertheless, the list of general exceptions of Article XX GATT was drafted more than 60 years ago and does not respond to the current needs of the international trading system. On the other hand, the existence of the exception of XI:2(a) GATT is also justified by the critical nature of food shortages. Countries need an instrument that allows them to protect the public interest in the case of emergency. Nevertheless, the ambiguous wording of this exception allows too much discretion, generating negative outcomes.[221] The objective of the WTO parties should therefore be to limit the use of this exception. When a particular restriction does not respond to a "critical" situation, it should be thus covered by Article XX, which offers the complementary protection of the Chapeau Clause.

In order to improve the effectiveness of the general prohibition of quantitative export restrictions it thus is necessary to refine the requirements for the application of these exceptions.

The recent *China – Raw Materials* case, presumably the highest profile case in the field, provided some helpful clarifications on the use of Articles XI:2(a) and XX GATT. It successfully defined the dividing line between the application of the Articles XX(g) and XI:2(a) GATT exceptions to environmental problems. Likewise, it determined the inapplicability of Article XX GATT to the export duties schedules in China's Accession Protocol. However, some of the defining terms of these exceptions remain unclear. In a recent article, Karapinar pointed out that the

[219] OECD 2007, p. 2.
[220] Sharma 2011, p. 23.
[221] Mitra and Josling 2009, p. 13.

Appellate Body failed to define the concepts of "essential" product and "temporarily applied", and that this situation causes legal uncertainty[222]. Evidently, it is possible that the WTO case law will develop these concepts in future resolutions. In fact, the Panel in the *China – Raw Materials* case required a "fixed time-limit" of the measures, but this interpretation was reversed by the Appellate Body.

Notwithstanding the interpretation chosen by the Appellate Body, the WTO members should work for a more adequate regulation in the long-term. In the first place, it is necessary to provide a clear temporal limitation to the use of Article XI:2(a) GATT. Previous studies, i.e. Karapinar 2012; Korinek and Bartos 2012, have proposed to require fixed time periods for the implementation of restrictions. Moreover, as noted above, the last revised draft negotiating text in the Agriculture Negotiations of the Doha Development Round suggested a temporal limit of 12 months. Certainly, the confinement of the export restrictions to a fixed time limit would likely bring a greater discipline to their implementation, limiting their application to "critical" situations.

An alternative solution to the amendment of the WTO Agreements could be the adoption of an authoritative interpretation in the sense of Article IX.2 of the Marrakesh Agreement[223]. This legal instrument, which requires a three-fourths majority for its approval, would enable the Ministerial Conference and the General Council to define the concept of "temporarily applied" in a more restrictive way. In this same vein, a ministerial decision in the form of a declaration was used in 2001 to provide an agreed understanding on certain aspects of the TRIPS agreement, having similar effect to an authoritative interpretation.[224]

In the second place, the members should agree on a more precise definition of "essential". To this end, Korinek and Bartos suggested the establishment of a positive list of products in order to reduce the legal uncertainty. However, this approach does not take into account that, as Karapinar pointed out, the definition of "essential" products may evolve with time and economic development. Therefore, it is more adequate to propose specific benchmarks to define the essentialness of a given good.

The proposals of the members during the Doha negotiations, as well as the provisions of the different preferential trade agreements signed in the last years, suggest limiting the use of export restrictions by establishing conditions to its implementation. The proposal submitted by Switzerland and Japan in the context the Agriculture Negotiations of the Doha Development Round advised the establishment of a consultation procedure supervised by a standing committee of experts. However, it is unlikely that this proposal will gain the support of the developing countries. The "proportionality" model formulated in the context of the NAFTA agreement is particularly relevant in this regard because it regulates a trade block that includes members with different levels of development, and should therefore provide better results. A similar scheme based on proportionality was proposed by Japan in the context of the Agriculture Negotiations of the Doha Development Round.[225] This model allows similar exceptions to the ones contained in the GATT, but it also provides a "proportionality" condition that focus on the protection of the importers.[226] As a result, the framework remains flexible but offers better protection to the parts depending on the imports, eliminating to some extent the moral hazard of using restrictions to prioritise national production.

[222] Karapinar 2012, p. 6.
[223] Marrakesh Agreement Establishing the World Trade Organisation 1994.
[224] Correa 2002, p. 44.
[225] Sharma 2011, p. 21.
[226] Korniek and Bartos 2012, p. 23.

With regard to Article XX GATT, the study of the different Bilateral and Regional Free Trade agreements has indicated that some of the exceptions may not be appropriate nowadays. Korinek and Bartos indicated in a 2012 paper for the OECD that 32 over a sample of 76 Regional Free Trade Agreements limited the application of exception XX(j) GATT, and 29 restrained the use of the provision XX(i) GATT.[227] Therefore, it is possible to conclude that the list of exceptions proposed by Article XX GATT needs to be updated, and that some of these provisions may be easily dispensable, particularly the XX(j) and XX(i) GATT.

The situation of sub-paragraph XX(g) GATT, which refers to environmental protection, is particularly complex. On the one hand, this exception has been repeatedly used to justify anticompetitive behaviors. On the other hand, it responds to a legitimate concern of many developing countries, which consider export restrictive measures the only feasible way to effectively control environmentally harmful activities. As mentioned in Chapter 4, the WTO case law studies, in case by case basis, two criteria when determining the applicability of Article XX(g) GATT to a particular measure, i.e. its relation to conservation and that it is made effective in conjunction with restrictions on domestic consumption. Karapinar proposed in its 2011 paper to complete these requirements. First, he suggested including an examination of the availability of less restrictive alternatives to the first criterion. Second, he recommended supplementing the "even-handedness" principle of the second criterion with an examination of the "feasibility" of the measure. However, a major weakness of this approach is that the assessment of the "feasibility" of a measure is already one of the examined elements in the "alternative measure" test applied to paragraph XX(b) GATT. Therefore, it is not necessary to include it in the "even-handedness" step. Nevertheless, the final intention of the proposal remains useful and makes the evaluation procedure more effective. Determining the "feasibility" of the alternative measures would help the Least Developed Countries, which often suffer from weak administrative capacities, to justify the protection of their environment by means of export restrictions. At the same time, it would complicate the use of exception XX(g) GATT to provide an unfair advantage to the domestic industry.

5.3. Export Duties

The under-regulation of export duties is probably the biggest shortcoming in the international discipline of export restrictions. Leaving aside their submission to the principles of Most Favoured Nation and Non-Discrimination, export duties can be freely applied by the members of the WTO.

The use of countervailing measures to tackle this problem has already been rejected by a WTO Panel. Moreover, as explained in Section 4.1.6.2, the legal base for the use of these instruments is reduced.

Quantitative export restrictions and export duties have a complementary character. Therefore, any discipline on export restrictions must tackle both sorts of measures to be meaningful.[228] The different initiatives in the Doha Developing Round proposing a stricter regulation for export duties are not likely to be successful due to the strong opposition of some developing countries. However, the Members of the WTO should aspire to bind export taxes in the long term in order to guarantee the principle of liberal trade. In the recent years, some the developments have evidenced the need of a new regime that guarantees a more efficient framework of international trade. On the one hand, Accession Protocols and Regional Free Trade Agreements are progressively including export duties schedules. On the other

[227] Korinek and Bartos 2012, p. 30.
[228] Mitra and Josling 2009, p. 28.

hand, the WTO Secretariat in its 2006 Trade Policy Review on China criticised the use of export tax rebates for industrial policy purposes and suggested that they could be considered as an implicit subsidy.

The countries proposing a stricter regime should therefore continue raising awareness on the negative effects of these measures and including provisions on this regard in their bilateral trade relations with a view to build consensus for next WTO rounds. In the long term, the WTO should pursue a negotiated phase out of export duties following the example of import duties scheduling. The negotiation of asymmetric schedules would guarantee the necessary flexibility to the system, ensuring fair conditions for developing countries. Moreover, the agreement could include longer transitional periods for least developed countries so they have more time to adapt their institutional structures as suggested in the EU Revised Submission on Export Taxes.

In its 2011 paper, Karapinar proposed to take into account the composition of the international markets when defining these schedules. According to Karapinar, the negotiating parties should propose lower tariffs in markets which are oligopolistic in their supply. Likewise, he suggests imposing lower tariffs on countries which are monopoly suppliers of certain commodities than on smaller producers.[229] This approach successfully points out that markets controlled by a short number of suppliers are more likely to develop unfair trade practices. However, the author fails to take into account that setting lower tariffs exclusively on monopoly suppliers would consistently disfavour big countries. Therefore, the optimal solution would be to impose the lower tariffs across the market in oligopolistic supply situations.

Defining the adequate levels of export duties for agricultural products can be particularly conflictive. Export taxes have been traditionally used to offset the negative effects of international high prices in critical situations. Therefore, it is likely that countries will attempt to schedule high export rates for these products. However, the existence of pikes in the duties of agricultural products would allow the application of high export taxes beyond emergency situations, leading thus to protectionist behaviour. In order to offset the resistance to low rates of the developing countries two solutions can be proposed. On the one hand, the parties can refine the exception of Article XI:2(a) GATT to obtain an effective alternative to address emergency situations through quantitative restrictions. On the other hand, the parties can establish a variable export tax scheme as the one proposed by Sharma in a recent paper, which would link the permitted rates to the prices in the international markets.[230] This model is the one used in the alternative calculation methods of the Russian WTO Accession Protocol. This system does not thwart the harmful effects of price escalation in international markets, but improves predictability and domestic price stability, and can thus be seen as a pragmatic transitional scheme.

Additionally, Mitra and Josling proposed the creation of an “Exports Code” which would link an agreement on export taxes to concessions on export subsidies from the developed countries.[231] However, an analysis of the appropriateness of this code falls out of the scope of this paper.

Finally, it is important also to remember that a hypothetical regulation of export duties would be covered by the general exceptions of the WTO regime, which would provide further flexibility for developing countries.

[229] Karapinar 2011, p. 1151.
[230] Sharma 2011, p. 24.
[231] Mitra and Josling 2009, p. 28.

6 Conclusions

Export restrictions to international trade are clearly under-regulated in WTO law. This is particularly pertinent if we consider that, as a form of market distortion, they lead to domestic and global welfare losses.

At the same time, export restrictions are considered in some developing countries as a necessary instrument to pursue a number of public policy objectives: increasing tax revenue; promoting downstream industries; controlling local prices or enforcing environmental protection.

In most cases, these measures take the form of quantitative export restrictions, export licences or export duties.

In this regard, the WTO treaty evidences a lack of effective norms. In the first place, Article XI GATT establishes a general prohibition of quantitative export restrictions to trade. However, the wording of the applicable exceptions is unclear and the Appellate Body has not managed to fully clarify the legal uncertainty. Moreover, the existing notification obligations are widely disregarded by the WTO members.

Some of the negotiating parties in the Doha Development Round have supported the establishment of a stricter legal framework. Nonetheless, an agreement has not been met and export restrictions have been pulled out of the negotiating process.

As a result, countries have turned to the establishment of improved regimes in the context of bilateral and regional preferential agreements. Likewise, more rigid provisions have been imposed upon some of the most recent members in their Accession Protocols.

Nevertheless, these approaches have proved to have their own shortcomings, and the multilateral stage continues to be the most appropriate forum for the achievement of an effective solution. To this end, the negotiating parties should agree on a homogeneous framework that also provides the flexibility required by the developing countries.

A new legal framework should start by increasing transparency in the application of export restrictions, enforcing the existing obligations and improving the monitoring mechanisms by establishing a responsible standing body. This should be completed by enhancing the role of the peer-review mechanisms. Moreover, an appropriate discipline for export restrictions should clearly define the scope of the exception contained in Article XI:2(a) GATT, requiring certain temporal limits and defining benchmarks for the concept of “essential”. Furthermore, it should also include the examination of alternative feasible measures to the determination of the applicability of the environmental exception of Article XX(g) GATT. Finally, an effective framework should propose a phasing-out of export duties following the example of import duties. In order to provide the necessary flexibility, the system should furthermore consider the application of asymmetric schedules and transitional periods.

Multilateral consensus in these fields will not be reached easily and it will certainly not be attained in the short-term. Nevertheless, the rest of the alternatives do not provide a better solution. Without a decisive reform, the number of trade conflicts related to export restrictions will increase and the subsequent political tensions will be aggravated.

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