1

Introduction

1.1 The Underlying Logic of the GATT/WTO System

The Punta del Este Declaration that launched the Uruguay Round in 1986 resulted in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, the most important achievement of which was the signing of the Agreement Establishing the World Trade Organization (the WTO Agreement). Compared with its predecessor, the General Agreement on Tariffs and Trade (the GATT), the WTO not only has wider scope because it includes trade in services and trade-related intellectual property rights but also deeper disciplines of positive integration on sanitary and phytosanitary measures, and on technical barriers to trade. The Uruguay Round negotiations resulted in the adoption of a comprehensive and ambitious trade liberalisation package; the resultant WTO rules were most concerned with access to foreign markets and the establishment of disciplines that would ensure regulatory measures were not merely protectionist measures in disguise.

The emphasis on the liberalisation of import barriers can be attributed to the built-in mercantilist tendencies of the GATT/WTO system – an arm of the post–World War II international economic order – and viewed as a direct response to the earlier erection of insurmountable import tariffs, which led to the Great Depression and the accompanying political turmoil. As Douglas Irwin, Petros Mavrodis and Alan Sykes point out, 'to understand the origins of the GATT, one must appreciate the traumatic events of the 1920s and 1930s',[1] a period of political and economic disasters. During this period, 'beggar-thy-neighbour' commercial policies were prevalent, as many countries raised trade barriers with a view to protecting national economies from economic downturn. The 1929 passage of the Hawley-Smoot Act by the United States pushed

[1] Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge University Press 2008) 5.

already high protective tariffs much higher; in response, Canada, Spain, Italy and Switzerland retaliated directly, leading to spiralling tariffs, a contraction of world trade and a severe breakdown of the multilateral trade and payments system.[2] Therefore, in negotiating the GATT system the objectives included establishing a legal framework for commercial policy and reducing import tariffs through bilateral negotiations – benefits to be extended to all contracting parties via the Most-Favoured-Nation principle.[3] In this way, the GATT aims to limit trade restrictions to customs tariffs: taxes imposed by importing countries 'as a condition of importation of goods into its territory'.[4]

The GATT/WTO system, with its built-in export bias, touches only slightly on the export dimension of the international trading system, which stands in stark contrast to voluminous market access commitments and heavy disciplines on domestic regulatory measures. Whether export tariffs fall within the scope of the schedule of concessions as contained in Article II:1(a) of the GATT and are thus subject to the fundamental principle of Most-Favoured-Nation treatment is subject to dispute.

Article II:1(a) of the GATT instructs each Contracting Party to 'accord to the *commerce* of the other contracting parties treatment no less favourable than provided for in the appropriate Part of the appropriate Schedule'.[5] Depending on one's interpretation of 'commerce', views diverge as to whether this Most-Favoured-Nation treatment obligation applies to schedules of concessions and export tariffs. As the late renowned international economic lawyer John Jackson observed, no concession relating to export taxes was made during the GATT negotiations. He further maintained that export taxes do not fall within the scope of the 'commerce' of the other contracting parties. Even if there were such a concession, it would have been treated like any independent bilateral agreement, and Article I of the GATT, rather than Article II, would apply. His arguments rely mainly on the legal text of the GATT, which, in the subsequent paragraphs of Article II, is concerned only with

[2] Ibid. 6–7.
[3] Ibid. 1. See also Frieder Roessler, 'GATT and Access to Supplies' (1975) 9 *Journal of World Trade Law* 25 [noting that 'the principal purpose of the GATT was to provide a legal framework for the removal of these import restrictions of multilateral negotiations and rules to prevent a new breakdown of international trade'].
[4] Andreas F. Lowenfeld, *International Economic Law* (Oxford University Press 2008) 31.
[5] The GATT, Art. II:1(a).

importation.[6] Jackson's reading of Article II is bolstered by textual interpretation, as Article II explicitly limits the effects of the Schedule to imports into the territories of contracting parties.

By contrast, Frieder Roessler argues that 'commerce' is not limited to importation but also includes exportation. Whereas the following paragraphs of Article II speak only of importation, the wider scope of the introductory paragraph to Article II:1(a) remains unaffected. This broad interpretation is shared by Mitsuo Matsuhita, who argues that the textual interpretation of 'commerce' can include imports and exports. The exclusion of export tariff concessions from the scope of Article II merely because Article II:1(b) and subsequent provisions do not mention exports is too restrictive an interpretation.[7] According to Roessler, during negotiations, the drafters intended that export taxes be included – a view supported by reference to Article XXVIII *bis*, which instructs contracting parties to enter into negotiations on a reciprocal and mutually advantageous basis with a view to 'substantial reduction of the general level of tariffs and other charges on imports and exports'.[8] The same wording can be found in the *Note* to Article XVII on trading by state enterprises, which aims for 'the reduction of duties and other charges on imports and exports'.[9] Roessler also refers to the schedules of Malaysia and Singapore on export duties on tin ore and tin concentrates as evidence that the Schedules as set out in Article II of the GATT cover export taxes.[10] While one may have different interpretations of the meaning of 'commerce', and make conflicting observations on whether the schedules of concessions of the GATT contracting parties cover export tariffs, it is crystal

[6] John H. Jackson, *World Trade and the Law of GATT* (The Michie Company Law Publishers 1969) 499.

[7] Mitsuo Matsushita, 'Export Controls of Natural Resources and the WTO/GATT Disciplines' (2011) 6 *Asian Journal of WTO and International Health Law and Policy* 281, 291.

[8] The GATT, Art. XXVIII *bis*: 1.

[9] The GATT, *Ad* Art. XVII:3.

[10] Roessler, 'GATT and Access to Supplies' (n. 3) 35. Roessler notes that at first glance there is no difference between GATT concessions and commitments contained in an independent bilateral agreement in the context of the GATT where the Most-Favoured-Nation Treatment applies as set out in Article I. Differences arise in case of the withdrawal of such commitments on export taxes. If the commitment on export taxes is part of the concessions of the Schedules, the withdrawal of such commitments can be made only with appropriate compensation to affected third countries. By contrast, a commitment under an independent bilateral agreement can be withdrawn subject only to agreement between parties.

clear that within the world trading system, trade restrictions on exports have received much less attention than those on imports.

Then how shall we define export restrictions? Like import restrictions, export restrictions cover tariffs and non-tariff measures and may take the form of bans, taxes, quotas, licensing, minimum prices and reductions of value added tax (VAT) rebates.[11] The deciding element of export restrictions is the *limiting* effect on exportation or the *potential to limit*. The most important provision pertaining to such export restrictive measures in the existent WTO framework is the general elimination of quantitative restrictions. This general obligation to eliminate quantitative restrictions applies both to the importation and exportation of goods.[12] Besides, the Agreement on Agriculture (AoA), in response to concerns that the reform programme may threaten food security in net food importing countries and least developed countries, also addresses export restrictions on agricultural products. Additionally, when export restrictions are imposed with a view to ensuring a sufficient supply of inputs to domestic processors, they may constitute subsidies as regulated by the Agreement on Subsidies and Countervailing Duties (ASCM), as export restrictions lead to a comparative advantage for domestic processors due to price differentials.[13] Furthermore, the WTO Agreement has brought so-called grey area measures, such as voluntary export restraints (the VERs), within the purview of the Agreement on Safeguards (the ASG).

Since the signing of the WTO Agreement, export restrictions have gradually caught the attention of WTO members, as is reflected in subsequent accession negotiations and on-going Doha Round negotiations. A large number of newly acceded or acceding countries, in particular natural-resource-rich countries, have been subject to requests to undertake commitments or obligations relating to export restrictions. Under the auspices of Doha Round negotiations, various proposals aiming to discipline export restrictions have been advanced during agriculture negotiations and under non-agricultural market access (NAMA)

[11] Jeonghoi Kim, Recent Trends in Export Restrictions on Raw Materials, in OECD (ed), *The Economic Impact of Export Restrictions on Raw Materials* (OECD Paris 2010) 14.

[12] Export ban, export quota and minimum export price may be thus held WTO-incompatible in terms of Article XI:1. By contrast, export taxes fall outside the realm of the Uruguay Round Agreements. Ibid. 23.

[13] On this point, see e.g., Merit E. Janow and Robert W. Staiger, 'The Treatment of Export Restraints as Subsidies under the Subsidies Agreement of the WTO' in Henrik Horn and Petros C. Mavroidis (eds), *The WTO Case Law of 2001* (Cambridge University Press 2004) 201–235.

negotiations. Export restrictions are also an important element during negotiations on free trade agreements.

Due to the slow progress of the Doha Development Agenda (the DDA), and in view of a series of export restrictions on agricultural products introduced between 2007 and 2009, some WTO members have advanced proposals addressing export restrictions outside the framework of the DDA. With the aim of extending application of the commitment in accordance with paragraph 40 of the *Action Plan on Food Price Volatility and Agriculture*, under the auspice of the World Food Program to all WTO members, the EU, along with other members, submitted a draft declaration for consideration and acceptance at the 2011 Ministerial Conference.[14] This Ministerial declaration would transcribe the pertinent paragraph of the Action Plan

> We recognize that the first responsibility of each WTO Member is to ensure the food security of its own population. We also recognize that food export barriers restricting humanitarian aid penalize the most needy. We agree to remove food export restrictions or extraordinary taxes for food purchased for non-commercial humanitarian purposes by the World Food Programme (WFP) and we agree not to impose them in the future.[15]

While recognising the utmost responsibility of members to secure food supplies for their own population, the draft declaration also cautions against the danger of penalising the most needy by imposing food export barriers restricting humanitarian aid. Therefore, the draft declaration urges WTO members to eliminate food export restrictions or extraordinary taxes from food purchases for non-commercial purposes by the WFP.

Similarly, for developing countries that are net food importers, African and Arab groups proposed a draft declaration entitled *WTO Work Programme to Mitigate the Impact of the Food Market Prices and Volatility on WTO Least-Developed and Net-Food Importing Developing Members*.[16] This Work Programme has two arms: trade and finance. The trade arm of the Work Programme aims to develop rules to exempt purchases of least developed countries (LDCs) and net food importing

[14] Food Export Barriers and Humanitarian Food Aid by the WFP (World Food Programme), Communication from the European Union (18 November 2011) WT/GC/138, 2.
[15] Ibid. 3.
[16] The WTO Response to the Impact of the Food Crisis on LDCs and NFIDCs, Communication from NFIDCS, African and Arab Groups (25 November 2011) WT/GC/140/Rev.1.

developing countries (NFIDCs) from export restrictions adopted by foodstuff-exporting members based on Article XI:2(a) of the GATT 1994. In other words, while food-exporting members may invoke Article XI:2(a) of the GATT 1994 as a justification for the imposition of export quantitative restrictions, LDCs and NFIDCs may seek exemptions from these export restrictions and thus secure their food supplies. These exemptions would shield food-exporting members imposing export quantitative restrictions from discipline due to this breach of their MFN obligations.

Unfortunately, neither the EU's proposal to extend the commitment under paragraph 40 the *Action Plan on Food Price Volatility and Agriculture* to all WTO members nor the African and Arab groups' draft declaration on *WTO Work Programme to Mitigate the Impact of the Food Market Prices and Volatility on WTO Least-Developed and Net-Food Importing Developing Members* was adopted at the 2011 Geneva Ministerial Conference. Export restrictions by food exporting countries may continue to adversely impact LDCs and NFIDCs in the years to come. Whereas the Bali Package adopts a decision on Public Stockholding for Food Security Purposes, it seems that most WTO members are not ready to accept WTO rules on export restrictions beyond the present weak rules, even though 'export prohibitions as well as export taxes and quotas [are] a major cause of the food crisis and of price volatility'[17] and twice victimize NFIDCs.

In parallel with food insecurity exacerbated by export restrictions on agricultural products, the race to secure access to rare earths has been heating up since 2010. Due to a dispute over the Diayu (Senkoku) Islands, China reportedly imposed an export embargo on rare earths to Japan. Although this export embargo was soon lifted, the incident aroused concern in Japan and other major trading powers.[18] Eventually, the United States, Japan and the European Union (EU), brought the dispute before the WTO dispute settlement mechanism.[19] Before that, in *China – Measures Related to the Exportation of Various*

[17] Christian Häberli, 'After Bali: WTO Rules Applying to Public Food Reserves' (2014) FAO Commodity and Trade Policy Research Working Paper No 46, 12.

[18] Yuko Inoue, 'China Lifts Rare Earth Export Ban to Japan: Trader', *Reuters*, 29 September 2010, available at www.reuters.com/article/us-japan-china-export-idUSTRE68S0BT20100929.

[19] Appellate Body Reports on *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805.

Raw Materials (China – Raw Materials), a complaint brought by the United States, EU and Mexico, China was found to have violated its WTO obligations and accession commitments by imposing export restrictions on various raw materials.[20] Although *China – Raw Materials* was not the first dispute wherein the WTO Panel/Appellate Body was called on to examine the WTO-consistency of a member's export restrictive measures,[21] it has attracted the most attention and debate, by far, among both academics and practitioners.

China – Raw Materials involves several thorny issues. First, the Panel and Appellate Body had to adjudicate whether the pertinent raw materials fell within the scope of 'other products essential to the exporting contracting party' as set forth in Article XI:(a) of the GATT 1994. If so, what is the relationship between the specific exceptions put forward in Article XI:(a) and the general exception of Article XX? The Panel and Appellate Body had to clarify the relationship between obligations contained in the accession protocols and the WTO Agreement – more specifically, the applicability of the general exception of Article XX of the GATT 1994. If the general exception is applicable, then the Panel and Appellate Body have to ascertain whether it justifies China's export restrictions. As commitments and obligations relating to export restrictions are largely assumed by newly acceded members during accession negotiations, the ruling of the Panel and Appellate Body in *China – Raw Materials* has had a great impact on the interpretation of these 'WTO-plus' commitments or obligations, in particular with regards to the applicability of general exception.

In the wake of the Ukraine Crisis in 2013, the EU, the United States and other Western countries adopted a number of sanction measures, taking mostly the form of import and export restrictions, against Russia. In response, Russia during the 10th Ministerial Conference held in

[20] Appellate Body Reports on *China – Measures Related to the Exportation of Various Raw Materials* (*China – Raw Materials*), WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012.

[21] For example, in a complaint against Argentina, the EU argued that Argentinean export procedures which allowed the presence of representatives of the ADICMA constituted a *de facto* export prohibition. The EU asserted that given the ADICMA's access to confidential information and its concentrated market power, the participation of the representatives of the ADICMA in export procedures effectively prevented exporters from exporting bovine hides. Panel Report on *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather* (*Argentina – Hides and Leather*), WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779, para. 11.8.

Nairobi, proposed an agenda focusing on the interpretation of security exception to be adopted. It reads as follows

> With reference to the "Decision Concerning Article XXI of the General Agreement" adopted by the CONTRACTING PARTIES on November 30, 1982 and with the view to ensure clarity and predictability of implementation of Security Exceptions Provisions of the WTO Agreements Members shall develop a General Council decision on joint understanding on the interpretation of the scope of the rights and obligations of the WTO Members under these Provisions. With this in mind the Members shall engage in negotiations and the General Council shall take the decision on interpretation of the said Provisions pursuant to Article IX:2 of the Marrakesh Agreement by 1 June 2016. To this end, the negotiations shall focus on identification of circumstances when application of the measures pursuant to Security Exceptions is justified, as well as provision of specific transparency requirements and possible retaliatory measures.[22]

This proposal was an attempt to clarify the meaning of security exception through legislative approach,[23] either by authoritative interpretation or 'subsequent agreement between the parties'. However, Russia's proposal did not obtain sufficient support to be adopted at the 10th Ministerial Conference and thus died away.

Nonetheless, export restrictions with potential invocation of national security for justification do not fade away but rather turn out to be a preferred instrument for trade nations to wield in the pursuit of geopolitical and geostrategic purpose. In the wake of the US–China trade war since the start of the Trump presidency in 2017, export restrictions have been adopted by the Trump Administration, first against Zhongxing Telecommunications Equipment Corporation (ZTE)[24] and subsequently

[22] WTO, Proposal on the MC10 Ministerial Declaration – Part III, para. 1.5, WT/MIN(15)/W/14, dated 11 November 2015.

[23] On the legislative approach in clarifying the meaning of WTO agreements and resolving disputes, see Chien-Huei Wu, 'From Fragmentation to Coherence: A Constitutionalist Take on the Trade and Public Health Debates' in Andrzej Jakubowski and Karolina Wierczyńska (eds), *Constitutionalisation of International Law Re-Visited: Between Pluralism and Unity* (Routledge 2016) 232–236.

[24] Bureau of Industry and Security, Commerce. In the Matter of: Zhongxing Telecommunications Equipment Corporation ZTE Plaza, Keji Road South Hi-Tech Industrial Park Nanshan District, Shenzhen China; ZTE Kangxun Telecommunications Ltd. 2/3 Floor, Suite A, Zte Communication Mansion Keji (S) Road Hi-New Shenzhen, 518057 China Respondent; Order Activating Suspended Denial Order Relating to Zhongxing Telecommunications Equipment Corporation and Zte Kangxun Telecommunications Ltd., 15 April 2018, 83 Federal Register 17644.

against Huawei and its affiliates.[25] In the midst of the Japan–Korea dispute over wartime labour compensation, Japan removed South Korea from its whitelist of preferred trading partners on 2 August 2019,[26] which may cause significant delay to the export of critical components of semiconductors to South Korea. In response, South Korea did the same against Japan and launched a WTO complaint. It is reported that Japan would invoke Article XXI of the GATT 1994 as a justification.[27] Similar geopolitics-induced trade measures are apparent in Gulf countries. In the context of Qatar's diplomatic crisis, Saudi Arabia, in conjunction with other Gulf countries, imposed a scheme of diplomatic, political and economic measures against Qatar. Qatar referred these measures to the WTO dispute settlement mechanism and Saudi Arabia invokes the national security exception as a justification.[28] The link between export restrictions under the trade regime and sanctions (or export control) under the public international law context poses a thorny issue of the justifiability of national security exception. Does the WTO adjudicator have the jurisdiction to hear a case relating to national security? Is national security self-judging?

In the midst of the Coronavirus (COVID-19) pandemic, sovereign nations imposed export restrictions on a number of goods to secure domestic supply, ranging from medical devices to food. This led to a joint statement by the WTO and IMF, expressing their concerns about the pervasive use of export restrictions threatening disruption of global supply. Whereas the IMF and WTO recognise that WTO rules allow for export restrictions 'applied to prevent or relieve critical shortages', they urge sovereign nations to refer to these measures cautiously.

[25] Bureau of Industry and Security, Commerce. Addition of Entities to the Entity List, 16 May 2019, 84 Federal Register 22961.

[26] Junichi Sugihara, Japan Officially Ousts South Korea from Export Whitelist, *Nikkei Asian Review*, 28 August 2019, available at https://asia.nikkei.com/Spotlight/Japan-South-Korea-rift/Japan-officially-ousts-South-Korea-from-export-whitelist.

[27] Edward White, Robin Harding and Kang Buseong, 'South Korea Files WTO Complaint over Japan Trade Restrictions', *Financial Times*, 11 September 2019, available at www.ft.com/content/ea993216-d42d-11e9-8367-807ebd53ab77.

[28] *Saudi Arabia – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS528 (consultation requested, panel not yet established); *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (panel established, panel report not yet released), WT/DS567.

> [Export restrictions being] Taken collectively, export restrictions can be dangerously counterproductive. What makes sense in an isolated emergency can be severely damaging in a global crisis. Such measures disrupt supply chains, depress production, and misdirect scarce, critical products and workers away from where they are most needed. Other governments counter with their own restrictions. The result is to prolong and exacerbate the health and economic crisis – with the most serious effects likely on the poorer and more vulnerable countries.[29]

Beyond the trading system, there are some legal instruments which may have a bearing on export restrictions: international investment law and competition law. First, investment policies may be used as instruments to circumvent export trade restrictions and secure access to raw materials. Prior to the entry phase, export restrictions might enhance incentives for foreign investors to invest in local industries and lead to investment diversion. An export restriction, when imposed after an investment is made, may constitute indirect expropriation, and thus should result in compensation. Therefore, to assess the impact of export restrictions, it is essential to further explore the linkages and boundaries between trade and investment regimes.

Another vehicle outside of WTO law for tackling export restrictions is competition law. Here, two issues are most pertinent. The first is so-called grey-area measures, such as voluntary export restraints. Whereas the ASG lays down some regulations on grey-area measures, it does not guarantee the absence of such measures. Further, whether all grey-area measures are incompatible with WTO law is still subject to debate. Private export agreements taking the form of export cartels may be subject to the scrutiny of domestic competition law. The second issue relates to the practices of the Organization of the Petroleum Exporting Countries (OPEC). Is domestic competition law sufficient to tackle the practices of OPEC, or is new international competition law necessary? If the latter, what would be the relationship between trade rules and competition law?

Finally, such trade, investment and competition law and policy linkage has to be appreciated in the context of the global supply chain, where production processes have been distributed to different parts of the world and the imposition of export restrictions, regardless of economic or

[29] WTO and IMF Heads Call for Lifting Trade Restrictions on Medical Supplies and Food, 24 May 2020, available at www.imf.org/en/News/Articles/2020/04/24/pr20187-wto-and-imf-joint-statement-on-trade-and-the-covid-19-response.