

## LAW AND POLITICS ON EXPORT RESTRICTIONS

Delving into export restrictive measures this book links the key areas of WTO law, public international law, investment and competition law to expose how and why WTO rules on export dimension are insufficient due to export bias; how public international law helps to justify their adoption or maintenance; and how investment and competition laws contribute to their regulation. Built on works on accession protocols and national security exceptions, this book goes beyond international trade law and looks into international political economy, competition and investment law. It contributes to debates in conceptualising public and private forms of export restrictions, appreciating the complementary nature of trade and competition law in disciplining them; capturing the dynamic between trade and investment policies for their effectuation and circumvention; and bridging trade law and public international law to better understand their impositions for political and diplomatic purposes with the invocation of the national security justification.

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Processes of economic regionalisation and globalisation have intensified over the last decades, accompanied by increases in the regulation of international trade and economics at the levels of international, regional and national laws. At the same time, significant challenges have arisen with respect to economic liberalisation, rule-based systems of trade and investment, and their political and social impacts. The subject matter of this series is international economic law, in this contemporary context. Its core is the regulation of international trade, investment, finance and cognate areas such as intellectual property and competition policy. The series publishes books on related regulatory areas, in particular human rights, labour, environment and culture, as well as sustainable development. These areas are horizontally interconnected and vertically linked at the international, regional and national levels. The series also includes works on governance, dealing with the structure and operation of international organisations related to the field of international economic law, and the way they interact with other subjects of international and national law. The series aims to include excellent legal doctrinal treatises, as well as cutting-edge interdisciplinary works that engage law and the social sciences and humanities.

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# LAW AND POLITICS ON EXPORT RESTRICTIONS

WTO and Beyond

CHIEN-HUEI WU  
*Academia Sinica, Taipei, Taiwan*



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To *Chia-Hua*,  
for her warm companionship in the past three decades



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## PREFACE

The genesis of this work dates back to 2012 and the publication of my first book based on my doctoral dissertation and the Panel Report on *China – Raw Materials*. Intrigued by the complexities surrounding the accession protocols, general exception and the limited regulation of export restrictions in the GATT/WTO system, I wished to explore the rationale responsible for the lack of disciplines under international trade law, which had resulted in only limited scholarly work and a general lack of attention to the subject matter. Eight years later, export restrictions proliferate – often, in the name of national security. Importantly, the Trump Administration has relied on export restrictions and controls in its trade war and technological race with China. The subsequent Clean Network Initiative and Economic Prosperity Network remind us of the East–West divide of the Cold War era when the Coordinating Committee for Multilateral Export Control played a critical role in governing trade flows.

The international economic relations we now face differ in important ways from those of the Cold War era. Crucially, international economic relations in the past few years have seen a process of securitisation – a reaction against the means employed by architects of the post-war economic order, de-politicisation and constitutionalisation, to prevent another catastrophe. Today, both China and Russia are members of the WTO, and GATT/WTO rules, originally designed for market economies, have been extended to these (formerly) communist countries. Besides, given economic globalisation, the economic interdependence between the United States and China is far closer than that between the United States and the Soviet Union. Moreover, due to technological advances, the line between civilian trade and controlled trade on strategic and military items is blurred. Thus, it is not entirely clear whether decoupling between the US and Chinese economies may be realised, and if so, in what way.

This work spans a good deal of time, both in terms of its production and what is covered. It was finalised on 10 October 2020 and all information and websites and links were up to date then. I have benefited from funding from the Ministry of Science and Technology in Taiwan, and research visits to the World Trade Institute in Bern, the Law School of Georgetown University in Washington, DC, and the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. I am also grateful to Ms Esther Liao for her research assistance, Jeffrey Cuvilier for proofreading the manuscript, and Joe Ng and Gemma Smith from Cambridge University Press for editorial help and bringing this book into being.

In my first book, I cited the words of Lord Alfred Tennyson in *Ulysses*. I would like to repeat in this book and hope my academic career will continue

*To strive, to seek, to find, and not to yield*

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ACRONYMS AND ABBREVIATIONS

1956 FCN	1956 Treaty of Friendship, Commerce and Navigation between the US and Nicaragua
ADA	Anti-Dumping Agreement
AoA	Agreement on Agriculture
ASCM	Agreement on Subsidies and Countervailing Duties
ASG	Agreement on Safeguards
ATT	Arm Trade Treaty
BIS	Bureau of Industrial Security
CCL	Commerce Control List
CFI	Court of First Instance
CFIUS	Committee on Foreign Investment in the United States
CHINCOM	China Committee
CJEU	Court of Justice of European Union
CNOOC	China National Offshore Oil Corporation
CNPC	China National Petroleum Corporation
COCOM	Coordinating Committee for Multilateral Export Controls
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DDA	Doha Development Agenda
DDTC	Directorate of Defence Trade Control
DoS	Department of State
DPA	Defense Production Act
DSU	Dispute Settlement Understanding
EAA	Export Administration Act
EAR	Export Administration Regulation
ECA	Export Control Act
ECJ	European Court of Justice
ECRA	Export Control Reform Act of 2018
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEC	European Economic Community
FDA	Food and Drug Administration

ACRONYMS AND ABBREVIATIONS

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FDI	Foreign Direct Investment
FINSA	Foreign Investment and National Security Act
FIRRMA	Foreign Investment Risk Review Modernization Act of 2018
FOCAC	Forum on China-Africa Cooperation
FTA	Free Trade Agreement
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
ICJ	International Court of Justice
ICT	Information and Communication Technologies
IEEPA	International Emergency Economic Powers Act
ILC	International Law Commission
IMF	International Monetary Fund
ISIL	Islamic State of Iraq and the Levant
ISIS	Islamic State of Iraq and Syria
ITAR	International Traffic in Arms Regulation
KEXIM	Export-Import Bank of Korea
LDC	Least Developed Countries
LIBERTAD	Cuban Liberty and Democratic Solidarity
MAI	Multilateral Agreement on Investments
MNC	Multinational Corporation
MTCR	Missile Technology Control Regime
NAAEC	North American Agreement on Environmental Co-operation
NAFTA	North American Free Trade Area
NAMA	Non-Agriculture Market Access
NATO	North Atlantic Treaty Organization
NFIDC	Net Food Importing Developing Country
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NSG	Nuclear Supplier's Group
NZDB	New Zealand Dairy Board
OECD	Organisation for Economic Cooperation and Development
OFAC	Department of Treasury's Office of Foreign Assets Control
OMA	Orderly Marketing Arrangement
OPEC	Organization of the Petroleum Exporting Countries
RTA	Regional Trade Agreement
SCRM	Supply Chain Risk Management
SFRY	Socialist Federal Republic of Yugoslavia
Sinopec	China Petroleum and Chemical Corporation
SLA	Softwood Lumber Agreement
TFEU	Treaty on the Functioning of the European Union
THAAD	Terminal High Altitude Area Defence
TPP	Trans-Pacific Partnership Agreement

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TRIMs	Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TSCA	Toxic Controlled Substances Act
TSMC	Taiwan Semiconductor Manufacturing Company
Unocol	Union Oil Company of California
UNSC	United Nations Security Council
URAA	Uruguay Round Agreements Act
USDOC	Department of Commerce of the US
USDOD	Department of Defence
USEPA	US Environment Protection Agency
USITA	US International Trade Administration
USMCA	United States-Mexico-Canada Agreement
USML	Munition List
USSR	Union of Soviet Socialist Republics
VAT	Value Added Tax
VCLT	Vienna Convention on Law of Treaties
VERs	Voluntary Export Restraints
VRA	Voluntary Restraint Arrangement
WFP	World Food Program
WGTC	Working Group on Trade and Competition Policy
WTO	World Trade Organization
WTO	Agreement Establishing the World Trade Organization
ZTE	Zhongxing Telecommunications Equipment Corporation