'You Don't Miss Your Water 'Til Your River Runs Dry': Regulating Industrial Supply Shortages after 'China-Raw Materials'

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Global industrial production depends on stable access to raw inputs. Food price volatility has emerged as a major concern for Group of Twenty Finance Ministers and Central Bank Governors (G20), while we are hearing new calls for bringing global disciplines to resource cartels like the Organization of the Petroleum Exporting Countries (OPEC). Supply chains that make up globalized production recently demonstrated their potential fragility when Chinese sovereign intervention threatened to bring Japan’s high-tech manufacturing to its knees by cutting off its supplies. These wide-ranging issues are now being addressed under the umbrella of trade regulation. As a result, we are witnessing a shift from the old trade regulatory model of the past six decades – where trade negotiators focused on import barriers and reciprocal concessions and export restrictions were justified typically on grounds of national security and foreign policy – towards the realization of an increasing need to tighten global rules on export restrictions. Although commodity and resource prices are at least partly market-driven, sovereign intervention has finally emerged as a clear concern. The Obama Administration’s first suit brought before the World Trade Organization (WTO) concerned Chinese export restrictions on nine commodities, including magnesium, coke, yellow phosphorus, and zinc, and resulted in victory. Yet real General Agreement on Tariffs and Trade (GATT) disciplines on export price measures, quotas and other conditions have been sparse.

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We argue in this Article that, aside from clear disciplines and a fairly developed body of jurisprudence on export quotas, trade lawyers would be hard pressed to show any “real” form of global regulation. At the same time, a new global regulatory pattern is emerging in place of the old. This regulatory pattern is being driven by global events, WTO litigation behavior, as well as new diplomatic and treaty initiatives. One of the more important shifts, as the recent “China Raw Materials” litigation referred to earlier shows, is the shift away from framing export restrictions as a national security issue, a characterization which had ensured that disciplines remained relatively underdeveloped during the Cold War era. During the litigation, China refrained from invoking the national security card, so familiar to trade lawyers in the field. The case also gives us a glimpse of the shape of future global regulation, as China undertook (as part of its accession obligations) additional requirements beyond the usual GATT-WTO rules. The ruling has also clarified the sheltering scope of the conservation clause under GATT Article XX, which sovereigns are increasingly likely to invoke in their interventions in export supplies. China’s and Asia’s rising demand for energy and raw materials, industrial rivalry, and growing demand for adequate food supplies means that the WTO is heading into uncharted waters. As free trade has become more widely accepted, the problem has become less about how even more free trade can be achieved, and more about how the demand for commodities which free trade has helped to facilitate can actually be met. The old national security-based understanding, which we had applied to export controls and restrictions, and its accompanying discourse, must now cede to the present-day realities of an unprecedented process of economic globalization. This article takes stock of existing GATT-WTO regulation, a comprehensive review of relevant GATT-WTO jurisprudence, a comparative survey of alternative regional solutions in North America and Europe, and a first look at newly emerging global regulatory approaches.
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Introduction

In 2009, the Obama Administration filed its first WTO suit against Chinese export restrictions on nine commodities, including magnesium, coke, yellow phosphorus, and zinc. Trade fairness is back on the agenda. US Trade Representative Ron Kirk said, “We are deeply troubled at what appears to be a conscious policy to create unfair advantages for Chinese industries that use these raw materials.”

Industrial production is dependent on stable access to raw inputs. Raw materials prices are governed by the market, but national policies also matter. Chinese retaliation against Japan—following a recent diplomatic rupture—in the form of cutting off supplies of rare earths illustrated this by threatening to bring Japanese high-technology production to its knees. Sovereign intervention in export supplies, such as Chinese rare earths restrictions on United States (US) manufacturing, already dominates news reports and more WTO litigation is expected in the future.

China’s export restriction regime of quotas, export duties and licensing requirements on copper, tungsten, and bauxite has previously threatened to adversely affect US manufacturing in the aircraft, semiconductor, detergent and steel industries. The Obama Administration focused on the aftershocks of a shortage of steel production inputs: namely, coke, silicon, and tungsten. One articulated fear was that China’s current restrictions would result in US manufacturers paying 70% more than Chinese producers for raw materials. Out of a total 336 million metric tons of coke that it produces annually, China currently only allows 12 million metric tons to be exported. The European Union (EU) filed a similar WTO complaint where it claimed that potentially 500,000 EU jobs could be affected by China’s restrictions.

6 Ellis, supra note 1.
7 Id.
likewise, filed suit. China lost, appealed to the WTO Appellate Body and lost again. All eyes are now on China’s restrictions on rare earths exports, where China Raw Materials is generally considered to be a mere prelude to potential litigation on rare earths.

The issue is not simply one concerning China. There are other potential areas of litigation although it may be too early to tell. The Indian Government has proposed a ban on iron ore exports to conserve ore for India’s own industrial needs. Russian timber and Indian chromite tell a similar story.

Each of these events should concern manufacturing and business for they go to the heart of industrial production capability and its financing, although similar questions may also be raised about the role that futures trading and speculation plays in inflating industrial input prices. More light will need to be shed on the interplay between futures activity and sovereign intervention in input markets. What is clear at present is that sovereign restrictions constitute an area of concern in their own right regardless of that interplay, although it cannot be assumed that market and other factors are not also a part of the larger problem—for example, in the area of food price volatility.

The concerns of policy-makers over international access to stable supplies extend beyond industrial production chains and include concerns over the socially destabilizing effects of high food prices. The stability and even the existence of governments can be affected by changes in food prices that produce a fear of widespread hunger. The 2008 food price crisis raised early concerns about ensuring stable food prices. By 2011, food price volatility had returned with a vengeance, swiftly following a ban on grain exports by Russia. Amidst expectations of a price rise in staple foods, wheat prices were already higher in 2011 than they were in 2008. In 2008, representatives of the banking industry went to Washington to persuade Congress and the Bush Administration to address the 40% price increase in wheat. As part of a pattern of global sovereign policy interventions, Ukraine, Russia, and Argentina imposed moratoriums on wheat exports. By March 2011, food price volatility was on

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8 Chiang & Martina, supra note 4.
10 Export Restrictions on Raw Materials, supra note 2.
the G20’s agenda and the call for disciplining food export restrictions went unchallenged even by key food exporters. This was noteworthy because countries like Russia and Argentina, which were expected to reject calls to discipline restrictions as they have done elsewhere, did not object. Food prices have become an issue that now confronts developed and developing countries alike. By November 2011, the matter had made its way to the WTO’s Committee on Agriculture as food import bills world-wide reached a record high USD 1.29 trillion, due not to increased import volume but to skyrocketing prices, notwithstanding lower freight costs. Earlier in January 2011, riots broke out in India and Algeria due to high food prices. By February 2011, China was so alarmed by what it saw as a clear connection between food price volatility and the Jasmine Revolution that it vowed to contain prices at home.

Elsewhere, the long-standing debate on disciplining oil export restrictions is an entire subject in itself. This is partly due to the historically complex interactions between OPEC and the GATT/WTO, with major OPEC members like Saudi Arabia only recently joining the WTO.

In addition, there are deeper structural factors at work. The GATT, traditionally, had focused on industrial market access, and was more concerned with disciplining barriers and restrictions on imports rather than those imposed on exports. Furthermore, because developing nations generally do not face high tariffs or tariff escalation for their natural resource exports, particularly in mining and fuels, the focus of developing country sovereign activity has been on the reverse export side. Developing nations imposed export taxes and captured monopoly rents in relation to their mineral and fuel exports. The aim was to offset high tariffs imposed by developed nations on developing country exports of other products. But even here, US

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16 Onion is a basic staple in India. See Alan Bjerga & Tony Dreibus, Record Food Prices Cause Riots, Stoke US Farm Economy, BLOOMBERG, Jan. 23, 2011, available at http://www.post-gazette.com/pg/11023/1119815-82.stm; Anjli Raval, Economic Fears as Indian Food Prices Soar, FINANCIAL TIMES (Jan. 6, 2011, 6:00 PM), http://www.ft.com/intl/cms/s/0/66b88094-1976-11e0-a853-00144feab49a.html#axzz2CdeFze5C.
Secretary of State, Hillary Clinton has threatened WTO litigation and US antitrust enforcement action to address OPEC behavior.\(^{20}\)

These wide-ranging issues are now being addressed under trade regulation. As a result, we are witnessing a major shift in the near-exclusive, central concern of global trade policy from the old “mercantilist” model of the past six decades—where trade negotiators focused on import barriers and reciprocal concessions while export restrictions were justified typically on grounds of national security and foreign policy—towards the increasing need to better regulate export restrictions.

The problem has a 21\(^{st}\)-century dimension; it is exacerbated by continued and intensifying global production fragmentation and the fragility of supply chains but, as the food crisis shows, is not limited to the industrial production, manufacturing, trading, and related financing sectors.

In Geneva, market access concerns continue to dominate the current Doha Round talks with very little to show after a decade of talks. Hard questions need now be asked about whether global trade regulation has kept up with global events. The disappointing Doha talks continue to operate within a 20\(^{th}\)-century framework while sovereign intervention causing industrial disruption through supply shortages and food supply concerns call for ever more urgent attention elsewhere.

On the regulatory side, GATT-WTO lawyers can count on one hand the number of real GATT disciplines on export price measures, quantitative barriers, and other conditions. We argue that, aside from disciplines on export quotas, trade lawyers would be hard pressed to show any other “real” global regulation. The rules are simply not up to the task but are evolving. A new global regulatory framework may yet arise in place of the old amidst an uncertain combination of global pressures, litigation behavior, and diplomatic and treaty initiatives.

**I. Doctrinal Maneuvers in the Dark: The GATT Provisions on Export Restrictions**

A threshold difficulty with the GATT-WTO regime on exports controls has been doctrinal uncertainty about whether various well-known GATT provisions apply equally to import and export barriers—i.e. whether these provisions apply to both import and export restrictions in a “symmetrical” manner. In contrast, EC Treaty Articles 28 and 29 are symmetrical in their treatment of import and export quantitative restrictions.\(^{21}\) In the past, GATT-ologists searched for symmetry, but as we will try to show, new rules need to be made. In the meantime, the regime is being shaped


\(^{21}\) Desta, *supra* note 18, at 532.
by litigation instead. This is not to say that how we frame our disputes about export restrictions in the context of trade litigation is less important in comparison with deliberate policy intervention and the design of new global rules. One of the primary features of recent litigation has been the absence of the “old” national security argument which used to be employed. Without its absence no progress can be made at the level of fresh global rules; otherwise, rational debate would be replaced by the sentiment, “My country, right or wrong.”

A. The MFN Obligation Applies to Import and Export Barriers and Other Restrictions

By and large the Most Favoured Nation (MFN) obligation in GATT Article I applies to both imports and exports. Likewise, under Article XI, the GATT’s general prohibition of quantitative trade restrictions also applies equally to both import and export restrictions. There, any semblance of an elegant symmetry between GATT rules on the import and export sides ends.

B. The GATT Bans Export Quotas, Not Export Taxes

(i) GATT Regulation of Export Quotas

The most important provision is GATT Article XI – the GATT’s general prohibition of quantitative restrictions (i.e. quotas). That prohibition applies to both import and export barriers, which makes sense, as both are equally distortive of trade.

Here, the GATT-era jurisprudence is fairly well-developed body. The most famous case was the GATT-era dispute in Japan – Semi-conductors. Following the US-Japan 1986 Semiconductor Pact, the Japanese Government had in-

22 While the obligation contained in GATT Article I (MFN) refers also to exports, and is generally taken to apply to exports inasmuch as it applies to imports, Article I:2, which deals with grandfathered preferences (e.g. the British Imperial and French colonial preferences which were in place in 1947), omits any explicit reference to export restrictions. Thankfully, Article I:2 is today largely of historical interest only. See A.L.C. de Mestral & T. Gruchalla-Wesierski, Extraterritorial Application of Export Control Legislation: Canada and the U.S.A. 45 (1990).


24 See the Agreement on Safeguards, art. 11:1(b) (disciplining voluntary exports restraints and orderly marketing arrangements) & n.4.

stituted measures to discourage Japanese exporters from dumping semiconductors abroad, and also instituted the monitoring and licensing of semiconductor exports which had occasioned indeterminate delays. The European Economic Community (EEC) brought a complaint arguing that Japan’s actions violated Article XI:1’s disciplines on export restrictions—i.e. that these were voluntary export restraint (VER) measures. According to the EEC, export restraints could only take the form of duties and tariffs. The panel, following the earlier ruling in EEC–Fruit, ruled that Article XI:1 applied in an identical fashion to both import and export measures and that notwithstanding the Japanese argument that its measures were not legally binding, these measures nonetheless violated Article XI:1 when judged by their effect and governmental origin.26 The panel reasoned that: “[T]he complex of measures constituted a coherent system restricting the sale for export of monitored semi-conductors at prices below company-specific costs to markets other than the United States, inconsistent with Article XI:1.”27

The panel held that the standard that was applicable to import licenses should, by analogy, be equally applicable to export licenses.28 This led the panel to conclude that Japan’s export licensing practices, which had led to delays of up to three months, were non-automatic (i.e. discretionary) and thus violated Article XI:1.29

Therefore, not only do the principles of Article XI:1 apply equally to restrictions on exports, but the panel regarded import and export restrictions to be the same (i.e. trade restrictions), albeit on differing sides of the equation.

This approach was confirmed in another panel ruling, the subsequent India—Quantitative Restrictions case,30 which concerned quantitative restrictions that had been implemented by India for a wide range of tariff lines. According to the U.S., these restrictions were a direct violation of Article XI:1. However, one of the disputed measures concerned a “Negative List,” which was used by India to determine products for which import licenses were required.31 When assessing this measure, the panel cited the very broad scope of Article XI:1, which provided a general ban on both import and export quotas and then referred to its conclusions in the Japan—Semi-Conductor case. It also used the findings from that case, and the EEC—

26 Id. ¶¶ 105-106, 108-111, 115-118.
27 Id. ¶ 117.
28 Id. ¶ 118.
29 Id. ¶ 118.
31 Id. ¶¶ 3.13-.17.
Quantitative Restrictions case,\(^{32}\) to conclude that a non-automatic licensing system that causes delays is a restriction.\(^{33}\)

Another dispute dealing specifically with restrictions on exports was the Argentina—Bovine Hides case in 2001,\(^{34}\) which was initiated by a complaint from the European Communities (EC). This dispute concerned a measure, Resolution 2235, that had been implemented at the request of the Argentinian tanning industry,\(^{35}\) and which, according to the EC, had a restrictive effect on exports. The measure in question authorized representatives of the tanning industry to be present during customs controls of the hides before export.\(^{36}\) According to the EC the measure, although not overtly limiting exports, had the effect of a *de facto* export restriction and was therefore incompatible with Article XI:1.\(^{37}\)

The panel, prior to evaluating the substantive issues, made two observations concerning the application of Article XI:1. First, it noted that there was no doubt that the prohibition of Article XI:1 extended to both *de jure* and *de facto* restrictions.\(^{38}\) Secondly, it stated that the purpose of Article XI:1, like Articles I, II, and III of the GATT, was to protect competitive opportunities for imports as opposed to the protection of actual trade flows. In this case however, due to the *de facto* nature of the claim, the actual trade impact of the measure would also have to be taken into consideration.\(^{39}\) The panel proceeded to analyze the claims.

Firstly, the EC argued that the measure allowed the tanning industry representatives to manipulate the export procedure either by applying pressure on customs officials in order to prevent the export of shipments, or simply by operating to delay the shipments.\(^{40}\) The panel rejected this notion and stated that the EC had failed to present sufficient evidence as to how representatives could operate to delay shipments, or why the presence of the representatives would put pressure on customs officials.\(^{41}\) Such pressure could also easily have been applied outside of the export procedure. Aside from this, and more importantly, acting on such pressure by customs officials would be illegal under Argentinian law. As such, the panel noted

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\(^{33}\) *India—Quantitative Restrictions*, supra note 30, ¶¶ 5.128-131.


\(^{35}\) Bovine hides are raw material used by the tanneries to produce durable leather material that can then be used in items such as *inter alia* footwear and handbags. Leather tanning is the process of making leather from the skin of animals. See id. ¶¶ 2.8, 2.35.

\(^{36}\) Id. ¶¶ 2.35-37.

\(^{37}\) Id. ¶ 11.8.

\(^{38}\) Id. ¶ 11.17.

\(^{39}\) Id. ¶ 11.20.

\(^{40}\) Id. ¶ 11.23.

\(^{41}\) Id. ¶¶ 11.33-34.
that if it were to find the unlawful conduct of customs officials a violation of Article XI:1, it would engage in a vastly expansive reading of the provision that would be justified neither by the text of Article XI:1 nor the GATT/WTO jurisprudence that had developed over the years.\(^{42}\) In its second claim, the EC argued that the access to confidential information that the domestic tanning industry would gain through its representatives could inhibit the willingness of producers to export.\(^{43}\) Again the panel rejected the claim on the basis of insufficient evidence and concluded that mere access to confidential information was not proof of an export restriction, particularly as some of the information was also available through other sources.\(^ {44}\) Finally, the EC claimed that the measure was a tool for a domestic cartel of tanneries to enforce its position against those manufacturers that chose to export their products.\(^ {45}\) The panel acknowledged that there could very well be a domestic cartel, but went on to state that there is no obligation on Member States to investigate and prevent cartels from putting private export restrictions into effect.\(^ {46}\) The panel came to the conclusion that the EC had failed to provide evidence of a connection between a possible cartel and a restriction of exports through the disputed measure.\(^ {47}\)

As with the Japan—Semi-Conductor case, the conclusions of the panel would be used in another case concerning import restrictions, namely the India—Auto case.\(^ {48}\) Here the panel was asked to determine the compatibility of a trade balancing requirement, imposed by the Indian Government on the automotive sector, with Article XI:1. The measure in question concerned an indigenization requirement, which consisted of an obligation to source a minimum amount of parts from local industry, and a requirement that companies’ exports be equal to their imports over a defined period.\(^ {49}\) Both the EC and the US argued that the trade balancing requirements in this case were inconsistent with Article XI:1 as they restricted imports.\(^ {50}\) As with the earlier India—Quantitative Restrictions case, the panel again reverted to cases concerning export restrictions to determine whether a restriction on imports could be determined. According to the panel, the Japan—Semi-conductor case confirmed its view that the restriction in this case, which limited imports by linking them to export commitments, was within the scope of Article XI:1. This is because a restriction of exports below a certain price is similar to a limitation on imports that is made effective through

\(^{42}\) Id. ¶ 11.31.
\(^{43}\) Id. ¶ 11.37.
\(^{44}\) Id. ¶¶ 11.41.-43.
\(^{45}\) Id. ¶¶ 11.44.-45.
\(^{46}\) Id. ¶ 11.52.
\(^{47}\) Id. ¶¶ 11.53.-55.
\(^{48}\) Panel Report, India—Measures Affecting the Automotive Sector, WT/DS146/R, WT/DS175/R (Dec. 21, 2001) [hereinafter India—Autos].
\(^{49}\) Id. ¶ 2.5.
\(^{50}\) Id. ¶¶ 4.116, 4.119.
several disincentives, without the actual presence of a formal numeral limit on those imports. 51 The panel then, when looking at the implementation of the measure, cited the Argentina–Bovine Hides case where it had determined that a de facto restriction was inconsistent with Article XI:1.52

What can be observed from these cases is that GATT-WTO jurisprudence is relatively well-developed where there is a specific provision, such as Article XI, which clearly addresses both import and export restrictions in equal measure. The problem is not that panels have not addressed the issue of export restrictions where there exists specific regulation, but that they cannot do so where there is no clear symmetrical treatment of imports and exports in other parts of the GATT. We now turn to a prime example of such asymmetrical regulation under the GATT rules.

(ii) Non-Regulation of Export Duties

In contrast to Article XI’s regulation of quantitative restrictions, there is a near total disconnect between the regulation of import and export duties in the GATT’s tariff regime. When it came to the regulation of import tariffs, the GATT’s framers saw the close linkage between banning quantitative restrictions and coming up with a replacement policy tool—which was to express import barriers in tariff terms (under GATT Article II).

Read together, the effect of GATT Articles II and XI is that import restrictions should generally only take the form of tariffs and duties, import and export quotas should generally be prohibited, and import tariffs should be reduced over time by being subject to several subsequent “ Rounds” of global negotiations.53

The difficulty here is that Article II does not expressly mention export restrictions, and therefore does not provide for negotiations and binding commitments disciplining the supply side of the equation.54 Here lies a well-known debate between Dr. Frieder Roessler and Professor John Jackson. According to Roessler, export tariffs can be bound under Article II.55 Professor Jackson has disagreed with this view, and considers the question of export tariffs to be unregulated under the GATT.56

But as Melaku Geboye Desta has observed, export duties are nonetheless permitted and widely used, and there are hardly any commitments with respect to  

51 Id. ¶¶ 7.271-.272.
52 Id. ¶ 7.275.
54 DE MESTRAL & GRUCHALLA-WESERSKI, supra note 22, at 45.
export duty bindings and reductions in members’ schedules. In short, the GATT neither prohibits export duties nor requires export duty bindings. What is “fairly settled,” as Dr. Desta has observed, is that export tariffs may be used, are frequently used, and that few WTO members have bound their export tariffs under GATT Article II. What this means is that, absent the violation of some other WTO obligation, members are free to restrict exports through the use of exorbitant tariffs.

In sum, the dominant view is that GATT does not truly regulate export tariffs, duties and other charges, it only regulates export quotas. That may not be strictly true. Since the MFN rule applies to customs duties on exports, at the very least export duties cannot operate in a discriminatory manner. Thus, an export tariff concession by Member Country A to Member Country B must be extended to all GATT-WTO Members.

But it is nonetheless a major loophole that the GATT does not regulate export duties and other taxes beyond that.

C. Exceptions to GATT Article XI’s Export Quota Prohibition: Articles XI.2(a) and (b), and Articles XX and XI

Another asymmetry in the GATT-WTO’s export controls regime is that while Article XI:1 applies equally to export and import restrictions, special exceptions for export quotas are contained in GATT Article XI.

Under Article XI’s special exceptions for export quotas, quantitative restrictions on exports may be permitted if—for example—they are “temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party,” or if such restrictions are “necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade.” These only exempt a member from sanctions for imposing export quantitative restrictions, not from the discriminatory application of such quantitative restrictions. The non-discrimination rule will still have to be observed. Where such restrictions are also intended to be applied in a discriminatory way, the other exceptions clauses to Article XX would have to be relied upon.

57 Desta, supra note 18, at 533, 540.
58 Id. at 533.
59 This also explains why the Roessler-Jackson debate may be of theoretical interest only, since countries can still bind their export duties by having bound such duties bilaterally. See Jackson, supra note 56, at 499 n.12. Roessler, who provides the example of tin exports from Malaysia and Singapore, says: “It would seem that neither the wording of Article II nor the practice that has developed under it justifies Jackson’s narrow interpretation.” Roessler, supra note 55, at 27, 35.
60 GATT art. XI:2(a).
61 Id. at art. XI:2(b).
62 Id. at art. XIII:1; see also id. art. XVII (stating equivalent rule regarding state trading.
For example, Member Country A may impose export restrictions on commodity x, considered essential, to relieve a critical shortage, but if the restrictions are discriminatory then Member Country A would have to rely upon one of the exceptions enumerated in Article XX, say, Article XX(d). Article XX(d) allows measures that are not otherwise inconsistent with the GATT. The reason the export measure may be said not to contradict the GATT will in turn have to be based on some other governing rule—for example—UN sanctions against Member Country B. Under Article XXI(c), such action is justified because Member Country A is merely taking “action in pursuance of its obligations under the United Nations Charter for the maintenance of peace and security.” 63

Article XI’s critical shortages exception was raised by China in the Raw Materials case, but the panel ruled that China had not proven its case, saying that a “critical shortage” means a situation or event that is grave or likely to provoke a crisis and which can only be relieved or prevented through the application of a temporary measure. China’s quota was not “temporary” because the Chinese quota—in this case, for refractory grade bauxite—was already a decade old with no time limit in place for its application. 64 The recent Raw Materials panel ruling has not only asserted that it is for the panel to determine the existence of a critical shortage, but that the panel will interpret the criteria for the application of the exception. Therefore, Article XI(2)(a) operates in a vastly different manner from a security exception (under GATT Article XXI, discussed below).

China appealed and as this article went to press, news broke that the Appellate Body has ruled against China. 65 On appeal, China argued that— notwithstanding its older, and therefore seemingly less-than-temporary measures—the exception also applies to future, “long-term,” anticipated shortages and not just to situations which are currently so grave as to threaten to provoke a crisis. 66 The Appellate Body disagreed, in a ruling which confirms the panel’s earlier ruling. According to the Appellate Body, the “critical shortages” exception operates to allow temporary measures only to “bridge a passing need.” 67
D. The Article XXI(b) Legal Black Hole: United States Practice Regarding the “Security Exception” during the Cold War

The most serious problem with disciplining export restrictions has not been with the design of GATT Article XI. It is that Member Country A may choose to rely upon Article XXI(b) instead, which allows it to take “any action which it considers necessary for the protection of its essential security interests” where that relates to the three heads specified therein, including action “taken in time of war or other emergency in international relations.”

The major issue here has to do with whether the phrase “which it considers necessary” is to be subjected to the subjective or self-interpretation of the Member Country itself.

In 1949, US Cold War restrictions on exports to Czechoslovakia were subject to unsuccessful GATT proceedings. Czechoslovakia failed in its argument that Article XXI could be resorted to only when military goods were at issue. Two years later, another complaint by Czechoslovakia led the US to seek a waiver under GATT Article XXV instead. The waiver was not granted. But the GATT parties declared, according to the pragmatic ethos of that era, that the two parties could go on to suspend the obligations between them.

In the first Czechoslovakia case, the UK delegate took the pragmatic view that while each country must be a judge of its own security, contracting parties should not take steps which would undermine the GATT. Nonetheless, the Czechoslovakia case has been cited and relied upon by the US as the basis for broad discretionary power on the part of the WTO member seeking to impose restrictions. For example, former US Assistant Secretary of Commerce, the late William Howard Lash III, wrote regarding the Helms-Burton case that:

Article XXI of the GATT acknowledges each member’s right to act as it deems necessary for the protection of its essential security interests in time of war or other international emergency. Helms-Burton is legal and would survive WTO review. Article XXI explicitly recognizes that countries can act unilaterally in the name of essential security. But it declines to define exactly what constitutes essential security. In an earlier dispute involving U.S. export restrictions on Czechoslovakia for a Decision Under Article XXIII, at 6, GATT/CP.3/SR.22 (June 8, 1949), available at http://www.worldtradelaw.net/reports/gattpanels/usexportrestrictions.pdf.


GATT CP. 3/SR. 22, supra note 68, at 7 (Mr. Shackle, United Kingdom).
vakia, the GATT determined that each country is the final judge on questions relating to its own security. WTO members have recognized this principle for over 35 years, and that a country’s security interest may be threatened by a potential as well as actual danger. Similarly, in 1985, our embargo on Nicaragua relied on the GATT security exception. The trade community accepted this—and so did the International Court of Justice.

This remains the US position, but it is also true that the Cold War GATT system was probably too weak to question US policy at the time. 72 Academic commentary has merely countered that the three headings under Article XXI(b) are nonetheless “objectively ascertainable.” 73

One argument against taking a subjective reading involves the EC, Canadian, and Australian embargo on Argentina during the Falklands dispute. Professor de Mestral and Mr. Gruchalla-Wesierski have argued that the 1983 GATT Decision Concerning Article XXI of the General Agreement had—following debate on the Argentine complaint—upheld such an “objective” reading of Article XXI. 74 Others, most notably Professor Lowenfeld, have also argued against a “completely subjective” reading of Article XXI. 75 Nonetheless, Lowenfeld accepts that the 1983 Decision only recorded the failure of the parties to agree on that precise issue, was content to lay down procedural guidelines for the notification of the Contracting Parties in such cases, and required that such notification procedures would themselves be subject to Article XXI(a). 76

In the subsequent Nicaraguan complaint against the US 1985 total trade embargo where the US again relied on Article XXI(b)(iii), 77 the GATT panel report was

72 ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 68 (1975); see also DE MESTRAL & GRUCHALLA-WESIERSKI, supra note 22, at 48.
73 DE MESTRAL & GRUCHALLA-WESIERSKI, supra note 22, at 48. A contrary view has been expressed by other (principally American) writers. For example, Professors Jackson, Davey and Sykes have criticized Article XXI for being broad, vague and therefore unascertainable. JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1080 (5th ed. 2008) (citing JACKSON, supra note 56 at 748-52). Likewise, Professor Lowenfeld’s views, below, although nuanced are along similar lines. This article will seek to argue against the hold this view, correct or otherwise, should continue to have on our broader appreciation of the GATT disciplines on export controls in light of current-day circumstances.
74 DE MESTRAL & GRUCHALLA-WESIERSKI, supra note 22, at 49.
77 Report of the Panel, United States—Trade Measures Affecting Nicaragua,
never adopted. The panel declared that it could not rule either way since the US had only consented to the panel’s establishment on the condition that the panel would be precluded from examining the US Article XXI justification. Nicaragua protested against this limited mandate given to the panel by opposing the adoption of the report. The Nicaraguan example is therefore far-reaching in that the issue there was not whether the US could apply its own subjective interpretation to Article XXI, but whether the GATT was incompetent to deal with Article XXI cases in the first place. The EC representative in fact supported the limited mandate of the panel by stating that it is not for the GATT to resolve disputes involving national security. This would have made Article XXI not only a subjective provision, but also a legal black hole.

US policy has subsequently been to preclude any risk whatsoever of an authoritative determination on the meaning of Article XXI. Thus, in the complaint brought by the EU against the US Helms-Burton Act, the US and EU again reached a compromise solution. The Clinton Administration would continue to waive the secondary boycott under the Helms-Burton Act and, in return, the EU (with Britain as Council President) would discontinue the case, thereby precluding any authoritative determination on the issue. Professor Lowenfeld has observed that “Neither the United States nor the EU, however, had an incentive to test the reach of Article XXI of the GATT, and both had reason to settle out of court . . . . The United States neither prevailed on nor surrendered its interpretation of Article XXI.”

The history of Article XXI raises a host of interesting questions in today’s circumstances, particularly in light of the recent litigation against China over raw materials export restrictions. Would the US have brought the latest suit against China had China imposed its export restrictions on national security grounds? Why did China not raise the national security argument? What would newspaper headlines have said had it done so? On the part of the US, did it truly consider this case to be different from previous cases where a national security argument could, in its view, have applied instead?

E. Other GATT Disciplines: GATT Article X’s Transparency Requirement

GATT/C/M/188 (June 28, 1985).

\[76\] Id.

\[79\] See LOWENFELD, supra note 76 at 922.

\[80\] LOWENFELD, supra note 75, at 409-10. The reference in Professor Lowenfeld’s essays is to Article XX, but this is clearly a typographical error. See also Tommy Koh, My Experience with the WTO Dispute Settlement System, in ECONOMIC DIPLOMACY: ESSAYS AND REFLECTIONS BY SINGAPORE’S NEGOTIATORS 141, 144-147 (C.L. Lim & Margaret Liang eds., 2011) (recollecting an experience as the Singapore WTO Panelist in the case).
If GATT-WTO disciplines are eviscerated by Article XXI (a proposition we argue against in this article), this would leave only the ban on export quotas as the primary multilateral restraint on export controls. Aside from this restraint, there are only a number of other “softer” restraints on export restrictive measures.

Chief among these is the “transparency” or notification requirement under GATT Article X. Export restrictions should therefore be published prior to their implementation.81 But even here, Article XXI would continue to operate, even to the point of hollowing out that requirement entirely. This is because provisions like GATT Articles XX and XXI provide for general exceptions to the disciplines of the GATT-WTO. Under this interpretation, Article X’s transparency requirement does not apply if export restrictions are justified under Articles XX and XI because of the general scope of those exceptions.82

While de Mestral and Gruchalla-Wesierski appear to disagree with this view in principle, they nonetheless admit Article XXI(a)’s express stipulation that “Nothing in this agreement shall be construed … to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.” The Contracting Parties’ 1983 Decision also accepted that Article XXI(a) ultimately trumps any notification requirement.

Similarly, Professor Jackson’s recommendation that Article XX should be amended to provide for the notification of export restrictions already suggests (correctly) that the transparency obligation, likewise, does not apply to restrictions justified under Article XX. Another commentator has also recommended amending Article XX and XXI altogether so as to accommodate compulsory notification.83

In short, any successful defense under Articles XX and XXI operates to preclude Article X’s transparency requirements as well.84

Thus, despite 60 years of GATT-WTO practice, faint light has been cast on the GATT’s export provisions due to the sorts of Cold War imperatives that made the invocation of a national security argument plausible. Another factor is that international trade policy and negotiations are primarily conceived in a mercantile manner. The focus of the GATT Contracting Parties, and subsequently, the WTO Members has primarily, if not near-exclusively, been on import as opposed to export restrictions.85 Historically, “the trading system came into being with market access as its primary objective,” and:

81 de Mestral & Gruchalla-Wesierski, supra note 22, at 45.
82 Both GATT Articles XX and XXI employ the operative phrase “nothing in this Agreement,” thereby suggesting the general (broad) application of the exceptions stated therein.
84 For a survey of a range of other relevant GATT provisions, see id.
85 For a history of proposals by GATT Contracting Parties and WTO Members that
This is clearly discernible in the balance of obligations created between import restrictions (exporters’ concerns) . . . and export restrictions (importers’ concerns) . . . . Trade measures which would restrict the quantity of allowable imports [i.e. quantitative import restrictions] are subject to a flat prohibition under GATT Article XI . . . . [T]his principle . . . has . . . been supplemented by the unstated obligation to enter into periodic negotiations for the reduction and capping of non-quantitative restrictions, which take the form of tariff bindings.

As we have seen, Article XI’s application to export controls is littered with further exceptions instead, and Article II’s application to export duties is uncertain. These structural and contextual considerations of the GATT-WTO system explain the thinness of the GATT-WTO regime on export restrictions. Further guidance may occasionally be found in the jurisprudence of the GATT and WTO panels, and that of the WTO Appellate Body but observers have rightly commented that further disciplines should ideally be negotiation-based not litigation-based. This, however, does not detract from the importance of the litigation brought by the US, EU, and others against China. The China—Raw Materials case demonstrates the key role that Article XX arguments will likely play going forward, as opposed to the “old Article XXI” argument.

II. Production Relocation Effects, the Raw Materials Dispute, and the Growing Importance of GATT Article XX

A. The Raw Materials Case: GATT Article XX Comes of Age

The current US and EU complaint against China appears altogether different, and symptomatic of a game change. For one, it is the first major litigation occurring in the current era of global trade regulation. Instead of the high politics of the past, global contestation over resources and industrial rivalry take center-stage. This is not to say that the raw materials dispute and the latest dispute over rare earths in particular do not have national security and—in the latter case—military dimensions; merely, that it is remarkable that the legal issue has not been framed thus.

Another aspect today is the prominence of considerations of fairness, namely, that export restrictions make inputs of local raw materials cheaper for domestic producers and more expensive for their international competitors—i.e. production relocation effects are implicated. Recall that complaints against export controls may export duties should be addressed as well, see Latina, Piermartini, & Ruta, supra note 19, at 5-9.

86 Desta, supra note 18, at 532.
take other forms—e.g. MFN or Article XI complaints. Export barriers may themselves be justified on a range of different grounds, from the highly political (justification typified by the invocation of Article XXI) to the more "routine" (e.g. justifications under GATT Article XX).

The China—Raw Materials case puts the spotlight on Article XX. The complaint in the raw materials litigation concerned measures implemented by the Chinese government that, according to countries like the US, EU, and Mexico, impede the exportation of various raw materials. The effect of these measures, according to the complainants, is that exports of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc are severely restricted. These measures are of particular significance to the US and EU as they are instrumental to the production of steel, aluminum, industrial products, and a number of chemicals. Citing the production relocation effects of China’s restrictions, the US and EU fear that the inability to obtain sufficient supplies of these materials will severely affect the capability of their domestic producers to compete on the global market.

The legal arguments revolved around GATT Articles XI (i.e. a prohibition on the restriction of exports) and XX (i.e. that these are measures taken to protect natural resources and health). The background however, is one that demonstrates the new
global struggle for natural resources and the delicate balance in current global production chains where access to raw materials becomes of crucial importance.  

B. The Coke Case and the International Transfer of Dirty Industries

Conflict over coke production is a good illustration of the struggle over raw materials. Coke is critical to steel production. It is used as a fuel in the process of making steel from iron ore, making it an essential raw material. As such it has, in the past, already caused tensions between China and the EU. The process of coke production however, is extremely environmentally unfriendly because it releases polluting agents (inter alia sulfur dioxide, which causes acid rain, and benzopyrene, which is one of the worst carcinogenic chemicals). It is also extremely wasteful. Typically, two metric tons of coal are needed to produce one metric ton of coke. All this has led to environmental pressures in the developed world to reduce coke production facilities.

In spite of this reduction in coke production, some of the world’s largest steel producing companies still reside in the EU and the US. The biggest steel producer in the world is the European headquartered ArcelorMittal, other major European producers are ThyssenKrupp and Riva; the biggest steel producing companies in the US are US Steel and Nucor. As a result, there is an increasing dependence by the EU and the US on imports of coke and similar raw materials from countries that suffer from less stringent environmental pressures—namely, China. Predictably, this has led to concerns and conflicts with China concerning the export of coke and other raw materials. The last major dispute concerning Chinese export restrictions on raw materials dates back to 2004 when China, having studied the effects of pollution, announced that it would reduce its export quota for coke by twenty-six percent. The EU, fearing a shortage of supplies, immediately responded by asking China to re-
scind this measure under the threat of the initiation of a complaint at the WTO. Eventually, the EU and China were able to resolve their differences and the matter was settled.\footnote{Henry S. Gao, Aggressive Legalism: The East Asian Experience and Lessons for China, in China’s Participation in the WTO 315, 335-36 (Henry Gao & Donald Lewis eds., 2005).}

This was at a time when China’s WTO litigation behavior weighed on the side of settlement, a picture that has since changed.\footnote{See Tina Wang, China’s Coming of Age in the WTO War, FORBES (Apr. 20, 2009, 10:00 PM), http://www.forbes.com/2009/04/20/china-wto-trade-markets-economy-law_print.html.}

C. Return of the Coke Dispute and China’s Industrial Appetite for Raw Materials

The current dispute is in many ways very similar to the coke dispute, and could perhaps even be considered to be a continuation of that dispute. Again, measures that restrict exports are involved, and again, the Chinese government has cited environmental concerns. Ever since the settlement that was reached in 2004, the Chinese government has continued to restrict the export of various raw materials through a range of measures. Over the course of that same period, China continued to develop rapidly and its appetite for raw materials grew with equal measure. In 2008, China consumed more coal than the US, the EU, and Japan combined.\footnote{Steven Mufson and Blaine Harden, Coal Can’t Fill World’s Burning Appetite, WASH. POST (Mar. 20, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/03/19/AR2008031903859_pf.html.} This situation of ever-increasing demand from the developing world combined with sustained demand from the developed world has led to a steady increase in prices of raw materials over the past decade.\footnote{The price for coke had increased by 700% between 2001 and 2008. Although 2009 saw a decline in prices, they have again risen in 2010. See Miyoung Kim, Mini-mills Prompts Rush for Steel Scrap, REUTERS (Aug. 18, 2008, 9:09 AM), http://uk.reuters.com/article/stocksNews/idUKARO8265920080818.}

The Chinese export restricting measures, according to the complainants in the Raw Materials case, only served to exacerbate the effects of the scarcity of these commodities. This led the EU and the US to accuse China of manipulating global prices, thereby distorting global competition—i.e. of causing production relocation effects.\footnote{See Brian Blackstone, U.S., Europe File Trade Complaint Against China, WALL ST. J. (June 24, 2009), http://online.wsj.com/article/SB124576651805444861.html.}

The EU and the US requested consultations at the WTO in June 2009. Consultations were held in July and September 2009\footnote{See EC Consultations Request, supra note 87; US Consultations Request, supra note 87.} and, as the parties were unable to
arrive at a mutually satisfactory solution, a request for the establishment of a panel was submitted in November 2009.\textsuperscript{103}

In their complaints, the EU and US (together with Mexico) contend that the export restricting measures are a calculated effort by the Chinese government to control prices for raw materials. The disputed export restrictions, according to the complainants, significantly reduce international supplies thereby driving up global prices. As China is the largest producer for most of these materials its domestic prices, due to oversupply, will remain significantly lower.\textsuperscript{104} This situation will give Chinese producers the advantage of lower precursor prices while allowing them to provide lower-priced secondary products like steel and aluminum. Chinese producers are therefore gaining an unfair advantage over their EU, US, and other counterparts. The EU says that the Chinese measures in question could affect an estimated 4\% of European industrial production.\textsuperscript{105}

According to the EU and US, China’s wide variety of export restricting measures have led to violations of its obligations under WTO provisions and China’s Accession Protocol.\textsuperscript{106} Complainants have two main grievances with regard to the disputed measures: firstly that they result in export restrictions or other impediments to exports; secondly that they are equal to export duties.\textsuperscript{107}

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\textsuperscript{103} See US Panel Request, supra note 87; EC Panel Request, supra note 87. Mexico, which had filed its request for consultation in August 2009, also joined with the request for the establishment of a Panel in November 2009. Mexico Consultations Request, supra note 87; Mexico Panel Request, supra note 87.
\textsuperscript{104} See EC Panel Request, supra note 87; US Panel Request, supra note 87; Mexico Panel Request, supra note 87.
\textsuperscript{105} See Has the Trade War Begun?, supra note 91.
\textsuperscript{107} See EC Panel Request, supra note 87; US Panel Request, supra note 87; Mexico Panel Request, supra note 87.
\end{flushleft}
D. The Case Against China: Quotas, Duties, and Breaches of Transparency Obligations

With regard to the export restricting measures, complainants cite that China has implemented quantitative restrictions, such as quotas, for the export of bauxite, coke, fluorspar, silicon carbide and zinc.108 Such restrictions directly violate China’s obligations according to Article XI:1 of the GATT, which specifically prohibits the use of quotas as a means of restricting trade. The measures also violate China’s Accession Protocol obligations, a set of additional or “WTO-plus” obligations which China signed up to in return for its admission into the WTO.109

Complainants also cite several measures that amount to export duty rates, “temporary” export duty rates, and/or “special” export duty rates of various magnitudes on the export of: bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc. These duties were imposed in spite of the fact that they are either not listed in Annex 6 of China’s Accession Protocol,110 or, in case of materials that are listed in Annex 6 of the Accession Protocol, at rates that exceed the designated maximum rates.111 The complainants add to this the fact that in addition to these export duties, China implemented a bidding system for the export of bauxite, fluorspar, and silicon carbide. As a result, enterprises wishing to export these materials are required to pay a bidding charge.112 The complainants contend that these measures result in a direct violation of further obligations under the Accession Protocol.113

Complainants also found that China imposed “other measures” that resulted in restraints on the exportation of these materials. Such restrictions were: applied in a non-uniform manner, not impartial and reasonable, and imposed excessive fees and formalities on exportation. The complainants also argued that China neglected to publish certain measures pertaining to requirements, restrictions or prohibitions on exports.114

110 Bauxite, fluorspar, and silicon carbide are not listed in Annex 6 of Accession Protocol.
112 Id. at 4.
114 Id. at 6.
The first of these “other measures” concerns the aforementioned export quotas imposed on bauxite, coke, fluorspar, silicon carbide, and zinc. In connection with the administration of the quotas for these materials, China imposes restrictions on the right of Chinese enterprises as well as foreign enterprises and individuals to export.\(^\text{115}\)

E. Other Chinese Measures: Complaints About China’s Export Regime

Complainants further cite measures concerning the allocation of export quotas on bauxite, fluorspar, and silicon carbide. As previously mentioned, these quotas are allocated through a bidding system. The requirements and procedures for this bidding system are controlled by the government and are administered through ministries and other organizations under the State Council as well as chambers of commerce and industry associations, in a manner that restricts exports and is not uniform, impartial and reasonable.\(^\text{116}\) In connection with the administration of this bidding system, China also requires foreign-invested enterprises to satisfy certain criteria in order to export these materials that Chinese enterprises need not satisfy.\(^\text{117}\)

With regard to the export of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc, complainants note that these materials are subject to a system of non-automatic licensing. Aside from manganese, this system of non-automatic licensing is imposed as an additional restraint on all these materials in connection with the aforementioned export quotas.\(^\text{118}\)

Complainants argued that China imposed a quantitative restriction on exports by requiring that the prices of the materials concerned meet or exceed a set minimum price. The price requirements were, according to the complainants, not uniform, impartial or reasonable and were administered through ministries and other organizations under the State Council as well as chambers of commerce and industry associations in a manner that restricted exports.\(^\text{119}\)

All these measures are further complicated by the fact that China, contrary to the transparency requirements under Article X, has neglected to publish many of them, thus further hindering exports. Complainants cite that China did not publish any measures in relation to the price requirements for exports nor with regard to the amount for the export quota for zinc or any other conditions or procedures or criteria for applying entities that are needed to qualify for the exportation of zinc.\(^\text{120}\)

\(^{115}\) Id.
\(^{116}\) Id.
\(^{117}\) Id.
\(^{118}\) Id.
\(^{119}\) Id.
\(^{120}\) Id.
Finally, complainants claim that China also imposes excessive fees and formalities in relation to the exportation of these materials. These measures, according to complainants, are in violation of Article VIII:1 and VIII:4, Article X:1 and X:3(a) and Article XI:1 of the GATT, and paragraphs 2(A)2, 5.1, 5.2 and 8.2 of Part I of the Accession Protocol, which incorporates commitments in paragraphs 83, 84, 162, and 165 of the Working Party Report.

F. China’s Defense, and the Panel and Appellate Rulings

China rejected the allegations, and maintained that it is fully within its rights to implement the disputed measures. It emphasized that the measures were justified as part of environmental protection and energy conservation measures approved under the 11th five-year economic plan (2006-2011).

China also cited the exceptions under Article XI:2(a), to prevent shortages of the materials concerned; Article XX(b), with regard to environmental concerns; and Article XX(g) GATT, with regard to concerns over the conservation of exhaustible natural resources as justifications for these measures.

As we have seen, China failed to convince the panel regarding the application of the “critical shortages” exception under Article XI:2. Its Article XX defense also failed in one of the most controversial GATT panel rulings to date—namely that the defense, although “general” in nature, cannot apply to the obligations China undertook in Paragraph 11.3 of its Accession Protocol. GATT Article XX cannot excuse China’s “WTO-plus” export duty commitments under its Accession Protocol because Paragraph 11.3 of China’s Accession Protocol falls outside the application of the GATT. The panel ruled, in contrast, that that defense is clearly available when what is involved is a measure which would violate the GATT itself—i.e. when it

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121 Id.
122 Id.
123 Appellate Body Report, China — Raw Materials, supra note 65, ¶¶ 41-43 (summarizing China’s written submission).
126 Under its Accession Protocol obligations, China had committed to the elimination of “all taxes and charges applied to exports” on all but 84 items which are instead subject to export duty caps, allowing for exceptions in relation to these 84 only where there have also been prior consultations (e.g. tungsten ore, ferrosilicon and certain aluminium products); see Accession Protocol, supra note 109 ¶ ¶ 11.3, Annex 6 and the Note thereto; as well as Working Party Report, supra note 109, ¶ 156.
comes to export quotas which fall squarely within China’s GATT Article XI prohibition of export quotas.\footnote{\textsuperscript{127}}

China appealed both the panel ruling on its Article XI defense, and the ruling on its inability to use the Article XX defense for its WTO-plus obligations. The Appellate Body has now confirmed the 2011 panel ruling on both those counts. In relation to China’s argument that Article XX applies to justify measures which would otherwise violate Paragraph 11.3 Accession Protocol obligations, the Appellate Body ruled that “had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in paragraph 11.3 or elsewhere in China’s accession protocol.”\footnote{\textsuperscript{128}}

A recent, seemingly conflicting, ruling was distinguished, in which China’s specific Accession Protocol obligation in that case (paragraph 5.1) had instead expressly incorporated the GATT provisions, thereby ensuring that Article XX applied to justify exceptions to that Accession Protocol obligation:\footnote{\textsuperscript{129}}

In China - Publications and Audiovisual Products, in the context of assessing a claim brought under Paragraph 5.1 of China’s Accession Protocol, the Appellate Body found that China could invoke Article XX(a) of the GATT 1994 to justify provisions found to be inconsistent with China’s trading rights commitments under its Accession Protocol and Accession Working Party Report. In reaching this finding, the Appellate Body relied on the language contained in the introductory clause of Paragraph 5.1, which states “[w]ithout prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement.” As noted by the Panel, such language is not found in Paragraph 11.3 of China’s Accession Protocol. We therefore do not agree with China to the extent that it suggests that the Appellate Body’s findings in China-Publications and Audiovisual Products indicate that China may have recourse to Article XX of the GATT 1994 to justify export duties that are inconsistent with Paragraph 11.3.

G. “The Dog That Did Not Bark”: Article XX’s Growing Importance

GATT Article XX may not apply to China’s Accession Protocol obligations, but its importance to the field of export restriction disciplines is hardly diminished by the Raw Materials case.

\footnote{\textsuperscript{127}} The panel did go on to assume, in arguendo, that even if Art. XX applied to the benefit of China, it would not have been of any avail to China where China failed to meet the requirements of Art. XX.
\footnote{\textsuperscript{128}} Appellate Body Report, China – Raw Materials, supra note 65, ¶ 293.
\footnote{\textsuperscript{129}} Id. ¶ 304.
Since the primary discipline against export restrictions lies in GATT Article XI’s quota prohibition, subject to the exceptions stated therein, had China succeeded in showing a critical supply shortage or pleaded national security concerns under Article XXI, things might have turned out differently.

The real game changer, when compared to the Cold War GATT disputes on export restrictions, is that China did not raise the national security defense. In the Silver Blaze, the famous fictional detective Sherlock Holmes demonstrates his acute powers of observation thus:

"Is there any point to which you would wish to draw my attention?"
"To the curious incident of the dog in the night-time."
"The dog did nothing in the night-time."
"That was the curious incident," remarked Sherlock Holmes.

During the Cold War, the United States consistently invoked national security in support of export sanctions. It did so in relation to Czechoslovakia in 1949, Poland and the USSR in 1982, the Nicaraguan trade embargo in 1985, and also in relation to Cuba under the Helms-Burton Act in 1996. China has not done so and it is perhaps not difficult to understand why. It would not have been convincing to do so and worse, the headlines would have screamed:

“NATIONAL SECURITY! CHINESE TRADE SANCTIONS AGAINST THE UNITED STATES AND EUROPE!”

Yet, if winning is what counts, the plausibility of such an argument and the issue of reputational costs would have mattered less. Because the United States has tried in the past to ensure that a WTO ruling on a nation’s right to invoke the national security argument never happened—say, when Europe challenged Helms-Burton—had China played the national security card and lost the case, the United States too would have “lost” something equally, if not more, valuable—namely, the right to subjective interpretation of the national security defense.

Whatever its reasons, China’s avoidance of such a high-stakes legal strategy serves to refocus our attention on what a genuinely effective regime for the regulation of export restrictions should look like in the present age of globalized production. Putting aside the failure to show a critical shortage of supplies under Article XI, the Raw Materials case should at least refocus the attention of business and policymakers on the exceptions under GATT Article XX; for once the Article XXI argument

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drops out of the picture, a Respondent in a WTO suit will have to fall back on Article XX (and the exceptions under Article XI).

H. Other Lessons From the Raw Materials Ruling

Recall that regulation of export duties is somewhere between uncertain and plain non-existent under GATT-WTO rules. One important reason for China’s loss was that it undertook further — i.e. so-called “WTO-plus” — obligations in relation to the elimination and limitation of export duties upon joining the WTO in 2011. A similar suit would therefore be ineffective against other GATT members, generally. Without additional rules, the WTO is less effective at regulating export restrictions.

III. Systemic, Regulatory, and Regime Frictions

A major cause of trade disputes during the Cold War was the existence of so-called “systemic” frictions due to the existence of different trade policy models; in other words, friction between the American, European, and Japanese models of capitalism. Is there an “American,” “European,” or “Mexican” view on export controls, as opposed to a “Chinese” view? Are there regional differences or approaches towards the regulation of export restrictions? Some have suggested that the Raw Materials dispute is partly the result of a flawed, industrialized nation perspective of the economic role of developing nations — i.e. a view that China should export more raw materials and import more finished industrial goods from abroad. To that extent, developing nations which are now seeking to play a larger industrial role — not least the “BRIC” economies (Brazil, Russia, India, and China) — reflect a shift away from these “old” economic stereotypes. While it is too early to tell, such changing roles could inform the shape of future global regulation. At present, what we have before us is just the enlarged appetite of such nations, with China at the forefront, for the industrial raw inputs that fuel export production and export-led growth, and the sort of litigation which has emerged from that new reality.

In order to avoid excessive speculation about the future shape of global law and policy, the following discussion will focus on established regional solutions, addressing regional and (in the case of NAFTA) developmental differences through the prism provided by existing regional trade arrangements. Such regional treaty “solu-

131 Accession Protocol, supra note 109, ¶ 11.3 & Annex 6 and the Note thereto; Working Party Report, supra note 109, ¶ 156.
tions” have sought to grapple with the export restrictions issue in ways that sometimes reflect, but at other times depart from, the GATT model of regulation.

A. The NAFTA Regime

NAFTA Article 2102 stipulates an equivalent rule to that under GATT Article XXI(b). Both treaty provisions preclude a treaty violation where the Party/Member takes an action which it considers necessary to its national security interests if such action relates to arms trafficking, or is taken in times of war or other international emergency. One difference is that under NAFTA, Article 2102(b)(iii) stipulates a further category of exclusion; namely that nothing shall also prevent “any Party from taking any actions that it considers necessary for the protection of its essential security interests . . . relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices[.].”

To that extent, the national security exception is just as broad, with NAFTA Article 2102 being, arguably, slightly broader.

Once we put aside such cases involving the invocation of national security, NAFTA’s “non-security” exceptions for export controls are more narrowly tailored than the exceptions existing under Arts. XI and XX of the GATT.

Interestingly, NAFTA Article 315 states that a restriction justified under GATT Article XI:2(a) (restrictions imposed to prevent or relieve critical shortages of foodstuffs or other essential products), Article XX(g) (restrictions relating to the conservation of exhaustible natural resources), XX(i) (restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry), and XX(j) (measures essential to the acquisition or distribution of products in general or local short supply) would be justified under NAFTA “only if” further conditions are met. Namely, that the exporting NAFTA party maintains the same proportion of exports to total supply as it had in the past 36 months, does not impose a higher price for exports than is charged domestically, and the exporting country’s “restriction does not require the disruption of normal channels of supply to that other party or normal proportions among specific goods or categories of goods supplied to that other party.” These further restrictions are plainly derived from

136 Id., supra note 135, art. 315(b).
137 Id.
the earlier Canada-US FTA, and we will call them the “proportionate access,” “non-price discrimination,” and “non-disruption” rules.

Of these, non-price discrimination is what remains in today’s US FTAs. The current US non-price discrimination rule is less rigorous as it does not govern (at least some of) the exceptional measures taken under GATT Articles XI and XX. In the case of the, multi-party, US-DR-CAFTA:

[No]o Party may adopt or maintain any duty, tax, or other charge on the export of any good to the territory of another Party, unless such duty, tax, or charge is adopted or maintained on any such good:

(a) when exported to the territories of all other Parties; and
(b) when destined for domestic consumption.

This rule is subject to exceptions listed in an annex. NAFTA Article 605 also extends the terms of Article 315 mutatis mutandis to the export by one NAFTA party to the other parties of an energy or basic petrochemical good.

NAFTA negotiations showed however how Mexico refused “to accept the FTA provision on proportional access” (i.e. a rule that reductions in supplies will be shared evenly between Mexican and American/Canadian consumers), despite the US continuing, with Canada’s support, to press for guaranteed access to Mexico’s oil resources during times of emergency. Thus, Annex 315 states: “Article 315 shall not apply as between Mexico and the other Parties.” What results is that Mexico is only bound by GATT disciplines on exports, and likewise, the US and Canada are only bound by GATT rules on any restriction of exports to Mexico. Annex 314 also states that Mexico may maintain domestic food support measures, and adopt or maintain export taxes on foodstuff during periods of critical shortage. Similarly, Annex 605 states that “the provisions of Article 605 shall not apply as between the other Parties and Mexico.”

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138 Can.-U.S. FTA art. 409.
139 Dominican-Republic-Central-America-United States Free Trade Agreement art. 3.11, [hereinafter CAFTA].
140 See CAFTA, supra note 139, art. 3.11(annex) (allowing Costa Rica to maintain existing export duties on bananas, coffee and meat. These are clearly negotiated exceptions which are reflective more of the nature of the negotiations themselves than issues of principle).
141 NAFTA, supra note 135, art. 605. As with NAFTA Article 315, Article 605 is derived from the Canada-US FTA. See Can.-U.S. FTA art. 904.
143 Id. at 89,116, 160-62, 170, 172, 234 (arguing that the earlier Canada-US FTA should simply be extended to Mexico holus-bolus).
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This means that Mexico, the US, and Canada are commonly bound only by NAFTA’s provisions on exports taxes which subject such taxes to MFN and national treatment, some additional disciplines on energy export restrictions which are sought to be justified on national security grounds, and NAFTA Article 309 (which incorporates GATT Article XI’s general prohibition of import or export quantitative restrictions and the exceptions thereto).

In sum, NAFTA imposes tighter controls on export restrictions than does the GATT, but at the same time exempts Mexico from most of these obligations. While there have been attempts to explain this simply as an outcome of the specific negotiations, it is clearly also a matter which involves Mexico’s needs, and views, as a developing country. In relation to the protracted discussion over the attempt to impose disciplines on Mexican energy export restrictions, Mexican negotiators cited Mexico’s history, constitution, and sovereignty—i.e. the well-known international law doctrine of permanent sovereignty over natural resources. As Mexico’s NAFTA Chief Negotiator explained it at the time: “[T]he energy sector had become part of a nationalist myth. In its fight for independence from foreign domination . . . the expropriation of oil companies in the 1930s had become a landmark that was celebrated politically as a great achievement.”

If Mexico enjoys looser disciplines under NAFTA, precisely because—like China—it views itself as developing country, and NAFTA acknowledges that the US and Canada cannot simply view Mexico as a source of cheap raw materials and inputs for US and Canadian higher value-added production and manufacturing requirements, why should the US and Mexico now consider China’s situation to be any different from Mexico’s situation during the NAFTA negotiations?

If the GATT regime truly imposes NAFTA-style disciplines on China, why would the US and Canada have negotiated those additional Canada-US FTA and NAFTA disciplines between themselves, and why would Mexico (which is bound by the GATT) have sought to exempt itself from these additional disciplines under NAFTA?

B. The EU Regime

While economic integration can take several forms, such as a free trade agreement or a customs union, where these represent varying degrees of integration,
the EU has chosen the deepest level of integration by choosing to become an economic union. One of the key building blocks for this union is the customs union. In contrast, NAFTA is a free-trade area where each country retains its own tariffs against nonmembers. A customs union, such as in the EU, involves far more. Member States must equalize their tariffs with nonmember countries. All this is done for the purpose of establishing a full Single Market. For this reason, the EU might be expected to present a far more developed system than either the NAFTA or GATT-WTO system. Whatever the truth of this, it is certainly more complex, by virtue of being a “court-driven” process.

Like NAFTA, the EU regime also stipulates a regulation that closely resembles GATT Article XXI(b). TFEU Articles 346-348 provide the Member States with the ability to take action in instances where they feel that national security interests compel them to do so. Article 346 provides that a Member State may take such measures with regards to arms, munitions, and war materials. This, however, is where all similarities with NAFTA end. From here, the provision goes on to provide an important nuance to this general rule, which states that “taking such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.”

In addition, TFEU Article 348 provides that should measures be taken that have the “effect of distorting the conditions of competition in the internal market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaties.” There is thus a strong emphasis on the protection of the Single Market principle within these provisions. As opposed to NAFTA, Member States are left with very little room to utilize the exception in this article beyond the situation of a national emergency.

As for the non-security exceptions in the EU, these too are very narrowly tailored. The EU adopts a two-pronged approach to the issue of trade liberalization and the creation of the centerpiece of the EU—the Single Market. First, TFEU Articles 28 and 29 establish the free movement of goods, and TFEU Articles 30-32 establish the Customs Union through inter alia the elimination of customs duties and charges on imports and exports between Member States. Second, TFEU Articles 34-37 serve to prohibit quantitative restrictions between Member States so as to prevent them from engaging in strategies that would affect the free movement of goods.

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150 Consolidated Version of the Treaty on the Functioning of the European Union art. 346(b), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].
151 TFEU art. 348.
The prohibition of duties on imports and exports as formulated in TFEU Article 30 is strictly construed. With regard to the interpretation of the term “goods,” and the width of the prohibition, the European Court of Justice (hereafter, “Court” or “ECJ”) has stated that the prohibition applies to “all customs duties that have a disruptive effect on all intra-community trade in goods.” The extent to which this “disruptive effect” on all intra-Community “trade in goods” is to be interpreted is explained in Commission v. Italy C-7/68, where Italy decided to levy a tax on the export of artistic, historical and archaeological articles. The purpose of this tax, according to Italy, was to ensure the safety and protection of the artistic, historical and archaeological goods present within its territory. Italy thought it could levy such a tax as it deemed such goods to fall outside of the definition of “all goods,” thus allowing them to be treated differently. This definition, in the opinion of Italy, clearly referred only to consumer goods or goods of general use, which these goods clearly were not. The Court ruled that Italy was wrong on both counts.

Concerning the interpretation of the term “all goods,” the Court made it clear that only exceptions expressly provided for by the Treaty would fall outside the term “all goods.” As no such exception had been made for artistic, historical and archaeological goods they fell within the definition of “all goods.” With regard to Italy’s export tax, the Court noted that the Treaty clearly prohibits customs duties and charges of equivalent effect on dealings between Member States. The fact that this provision makes no distinction concerning the nature or purpose of such a levy means that further analysis of the levy and its purpose is not necessary. Instead, it is presumed to hinder trade between Member States and is thus prohibited.

To ensure the effect of the prohibition on duties, the application of TFEU Articles 34-37 is also considered absolutely essential to the realization of the Single Market. By providing a broad interpretation of discriminatory treatment and the concept of what constitutes a quantitative restriction, it is extremely difficult for any Member State to find a way of exempting itself. The manner in which both TFEU Articles 34 and 35 are formulated provide, seemingly, symmetrical protection against any violations of the treaty.

Looking at the manner in which these provisions have previously been applied, the Court has always been equally strict regarding both discriminatory import and discriminatory export restrictions. Where there is any hint of discriminatory treatment, the ECJ is likely to dismiss the measure as a violation regardless of whether it is an import or export measure. Taking Commission v. Italy as an example, in

154 Id. at 423.
155 Id. at 423.
which the Italian authorities applied a particularly cumbersome data registration regime for imports, the ECJ was swift to dismiss the measure as a violation (i.e. of TFEU Article 34). We see the same approach in the export restrictions case of Bouhelier,\(^{157}\) in which a French rule which imposed quality checks on watches for export but not on those destined for the French domestic market, was found to be in violation of TFEU Article 34.

There appears, however, to be a difference in the way these provisions are applied to import and export measures where an export measure happens to be non-discriminatory. Discrimination is not required to find a violation of Article 34 by an import measure, but appears to be a requirement for an export measure to be considered in violation of Article 35. In cases where import measures are at issue, the ECJ tends to scrutinize the measure in question strictly under TFEU Article 34. Thus, under the ECJ ruling in Cassis de Dijon;\(^{158}\) a non-discriminatory import measure could still be construed to be a quantitative restriction and thereby ruled to be in conflict with the principle of TFEU Article 34.\(^{159}\) This does not, however, appear to apply to the case of export measures. Under TFEU Article 35—i.e. the rule applying to quantitative export restrictions—the ECJ had previously determined that this provision would only apply in cases of clear discrimination.\(^{160}\) Thus, should an exporter be confronted with a non-discriminatory measure that concerns, e.g., health and safety standards for products in that particular Member State the exporter will not be able to claim a violation of TFEU Article 35.

The reasoning behind this difference seems to lie in the idea that whereas an importer would suffer a “dual burden” through the application of non-discriminatory measures—i.e. the importer would have to satisfy the requirements both of its home state and those of the state from which it is importing the goods—such would not be the case for an exporter.\(^{161}\)

How different the EU regime is from the NAFTA regime is a matter of appreciation. The EU prohibits export duties as much as it prohibits import duties. In the case of export quotas, however, the ECJ seems to require discrimination before it may be willing to adopt a strict approach towards measures being equivalent to export quotas. Any difference, we believe, may however be more apparent than real. NAFTA appears to address this through a “non-price discrimination” rule. There may also simply be a greater readiness today, compared to the period of the mid-


\(^{159}\) Id. at 664.


\(^{161}\) Groenveld, 1979 E.C.R. at 3415-16.
1970s, to allow national social policies within the EU that might otherwise be considered to be the equivalent of export quotas.\(^{162}\)

Any latitude in the EU regime may turn out on closer inspection to be fundamentally no different in nature—even if the details differ—from exceptions provided by the GATT-WTO’s Article XX,\(^{163}\) for example, and their NAFTA analogue.\(^{164}\)

C. Developed-Developing Country Frictions?

Regulatory friction, stemming from the adoption of different economic models or developmental differences, may yet have some role to play in understanding the present dispute between the U.S., the EU and China. European integration, more so than in the case of North American regionalism, has resulted in a distinct conceptual framework, based on the philosophy of a customs union and the doctrine of the free movement of goods, which lends some support to the view that what is going on is also a case of regulatory, or regime friction.

Within itself, NAFTA also presents support for the systemic/regulatory friction argument. Within NAFTA, the parties acknowledge Mexico’s views and concerns as a developing nation and have not been unequivocal in championing tighter export controls in the face of Mexican resistance.

Both the US and the EU have advanced arguments of a regulatory nature such as the need to combat distortions in competition and higher prices through export restrictions. This suggests the role played by divergences over trade policy or principle. However, what may also be involved is a situation where there is a simple (or simpler) disconnect; namely, between viewing China as a source of cheap raw materials, and China’s view of itself as a global exporter of manufactured products. This is not to say that, on top of that simple disconnect, that there are not further differences over policy or principle. The US and EU may have viewed China’s economic role along stereotypical lines, but they were also concerned about the unfairness that would result from a hidden subsidy being granted to Chinese manufacturers


\(^{163}\) As Petersmann noted, the text of TFEU art. 30 was almost literally copied from Article XX. Its application if anything, due to the importance of TFEU art. 30 to the Single Market, is far more likely to be an even stricter interpretation than the application of Article XX. Ernst-Ulrich Petersmann, INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND (1995).

\(^{164}\) See Weiler, supra note 162, at 230.
through giving them access to cheaper raw inputs. At the same time, the example of Mexico’s exceptional treatment under NAFTA suggests that at times or at least in the context of treaty negotiations, according to the developmental needs or historical legacy of a developing nation (particularly its historical relationship with a more developed treaty partner) may be more important than issues of pure principle.

Accordingly, it may not be systemic or regulatory friction per se but, rather, a brewing Trans-Pacific and Sino-European trade tension based on economic competition, and tensions between the resource demands of developed manufacturing economies and China’s own internal resource demands, which lie at the heart of the issue. Simply put, China is (at least perceived to be) a larger threat than Mexico ever was.

Whatever the causes, there is a need to settle the common rules between economies in Europe and North America, which have already adopted tighter treaty rules on export barriers and others, such as China. This is what makes China Raw Materials noteworthy. Recalling litigation between Canada and the United States concerning Canadian restrictions on herring and salmon exports before both nations entered into mutual treaty rules, the Raw Materials litigation is the first time export barriers have been tested in China’s relationship with the EU and the US. If we were to adopt the “logic” of the US-Canada relationship as it evolved over time, such friction led eventually to the need for consensual treaty rules; rules which the US and Canada were eventually unable to compel Mexico to adopt during the NAFTA negotiations. In contrast, the European experience would be much harder to replicate on a global level; there, as we saw in the cases involving Italy, it was the ECJ—and the deep regional integration of the European Customs Unions which made such powerful institutional innovations as the ECJ possible—which could step in and compel a solution where similar issues have arisen.

IV. From the GATT to the WTO Era: Greater Certainty Through Judge-Made Law

A. From Helms-Burton to China Raw Materials

The principal post-GATT dispute prior to the Raw Materials case had been the Helms-Burton case. Helms-Burton, although occurring after the end of the Cold War, clearly belonged to a previous era. After all, Cuban sanctions epitomized the Cold War and it was for that reason that

A panel (and an appellate body panel if an appeal occurred) would need to consider judiciously and with great care competing policy objectives of the national

165 The dispute preceded the Canada-US FTA, and the subsequent creation of NAFTA.
security language. It is even conceivable that a line could be drawn that would prevent . . . abuse . . . yet defer to the US in the Helms-Burton case.\footnote{LOWENFELD, supra note 75, at 409.}

The China Raw Materials case is different, in our view. Here, a post-WTO accession China did not frame its case on the basis of a need to protect “essential security interests.” Instead, the dispute revolved around GATT Arts. XI and XX, supplemented by China’s additional “WTO-plus” accession obligations in relation to export tariffs.

To appreciate what we see as a shift in regulatory focus which we think this case represents, recall that GATT Article XX had—incredibly—been dismissed by legal commentators as being largely irrelevant to the debate over export restrictions during the GATT era.\footnote{See, e.g., de MESTRAL & GRUCHALLA-WIESIERSKI, supra note 22, at 46 (stating that only Article XX(d) was the only General Exception that had an impact on export controls).} In contrast, in the recent China Raw Materials case, China’s Ministry of Commerce (MOFCOM) had publicly cited “a state policy to protect the environment and preserve natural resources” as lawful justification for export taxes and quotas on a range of raw materials.\footnote{Beijing Hits Back at Trade Partners on Protectionism, S. CHINA MORNING POST (June 25, 2009, 12:00 AM), http://www.scmp.com/article/684824/beijing-hits-back-trade-partners-protectionism.}

Both Articles XX and XXI require a panel (or Appellate Body panel) to balance the competing policy considerations of allowing certain well-grounded, and even pragmatic, exceptions to GATT-WTO disciplines while seeking to prevent their abuse. Yet, clearly, attempts to prevent abuse of Article XXI-type action during the Cold War era have not been successful.

This is partly due to an additional factor. A large institutional change which has occurred since is that the WTO’s compulsory dispute settlement system, unlike the GATT era panels, now prevents a party from blocking the establishment of a panel, blocking the adoption of a panel report, or blocking the authorization of trade retaliation. As we have seen, that was why the US needed to reach a settlement with the EU in the Helms-Burton dispute where it otherwise would have risked a ruling which might foreclose future resort to an Article XXI argument in the manner which it has been accustomed to.
B. Refining the Conservation Clause

The China Raw Materials appeal has added much needed clarity to the operation of GATT Article XX, particularly Article XX(g) (the conservation clause).

Between the GATT era and the period following the establishment of the WTO, the Shrimp-Turtle case had already expanded the meaning of “exhaustible natural resources” under Article XX(g) to include the need to conserve living creatures, but in the course of so doing it implicitly recognized the application of that provision to mineral resource (e.g. petroleum) conservation measures. The Appellate Body in Shrimp also interpreted the need for a restrictive measure to “relate to” conservation to mean that so long as the “general structure or design of the measure” bears a relation to the aim of the restriction, then insofar as it is also a proportionate response to that aim—e.g. the need to conserve a particular exhaustible resource—such a measure would “relate to” that aim. Importantly, it read the phrase “exhaustible natural resources” in light of the contemporary concerns of the community of nations.

This leaves some interesting questions for the future. In Shrimp-Turtle, protection was extended to the conservation of living things because the Appellate Body took GATT 1947 to be a part of a “changing constitution” and did not adopt an “original intent” test.

Yet there is no reason in principle that it would not take the same approach to non-living mineral resource conservation policies upon which export restrictions are meant to be justified; indeed the Appellate Body seemed to assume the application of its views to mineral resources—an industry characterized by export restrictions and environmental concerns.

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169 Although our discussion focuses on the conservation clause under Article XX(g), today the following clauses of Article XX deserve closer attention in light of the problem with export restrictions: Arts. XX (b) (measures necessary to protect human, animal or plant life or health), (g) (measures relating to the conservation of exhaustible natural resources), (i) (concerning the need to ensure essential quantities of such materials to a domestic processing industry), and (j) (measures essential to the acquisition or distribution of products in general or local short supply). In the China Raw Materials case, China had also raised an Article XX(b) defense, unsuccessfully. Panel Report, China—Raw Materials, supra note 64, ¶ 7.612.

170 “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... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption,” GATT art. XX.


172 Id. ¶ 129.

This line of cases started with the Canadian—Salmon case, where the GATT panel there ruled that because Canada had restricted purchases of unprocessed fish by foreign processors and consumers but not purchases by domestic processors and consumers, the restrictive measure failed to show that it was primarily aimed at conservation. 174 In Tuna-Dolphin I, the GATT panel applied Canadian—Salmon. 175 Noting that in that previous ruling, the requirement that conservation measures should be taken “in conjunction with restrictions on domestic production or consumption” if it was also “primarily aimed at rendering effective these restrictions,” 176 it construed the “primarily aimed at” test to preclude cases where the limitation on trade is based on “unpredictable conditions,” thereby in turn imposing a procedural due process requirement of clear, prospective, and constant rules. The US restrictive measure violated this standard because it allowed imports of Mexican tuna conditioned upon a dolphin-taking rate which did not exceed the annual taking rate by US fishermen during the same period. However, since the US taking rate changed, Mexico could not be assured of the conformity of its conservation policies with US legal requirements. 177

In Tuna Dolphin II, the panel there also ruled that the “primarily aimed” test had not been satisfied because US measures were not primarily aimed at conservation but were measures “taken so as to force other countries to change their policies.” 178

As we have seen, Article XX(g) requires that an export restrictive measure must also be made effective in conjunction with restrictions on domestic production or consumption in order to enjoy the exemption which Article XX(g) affords. 179 In China Raw Materials, the panel had ruled—in relation to China’s quota restrictions—that “restrictions on domestic production or 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.” 180 On appeal, China challenged this second requirement—i.e. that the purpose of those export restrictions must be to ensure the effectiveness of those do-

176 Id. ¶ 5.31 (quoting Canada—Salmon, supra note 174, ¶ 4.6).
180 Panel Report, China—Raw Materials, supra note 64, ¶ 7.397.
mestic restrictions. The Appellate Body agreed with China and reversed this aspect of the panel ruling. 181

In other words, export restrictions sought to be justified under Article XX(g) must be even-handed, these measures must be made effective in conjunction with domestic measures (i.e. those which would affect domestic purchasers and producers as well, and not just foreign purchasers and producers) but need not ensure that the domestic measures are effective.

Crucially, as the Shrimp-Turtle case also showed, the chapeau of Article XX requires that the measure is not in any event applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or amount to a disguised restriction on international trade. 182

C. Relationship between the Critical Shortages and Conservation Clauses

Another important clarification in the China Raw Materials appeal ruling concerns the relationship between Article XI.2 (the critical shortages clause) and the conservation clause in Article XX(g). According to China, the panel had precluded the concurrent application of the two provisions. China’s defense hinged on the relationship between these two provisions insofar as it did not consider that the critical shortages clause allowed only temporary measures where such measures are also justified—i.e. over the longer-term—under Article XX(g).

In its ruling, the Appellate Body has now clarified that the critical shortages clause is an exception to the primary obligation not to impose quotas. Thus questions concerning the scope of the critical shortages clause are really questions concerning the scope of the Article XI prohibition against quotas. Insofar as Article XI.2 presents an exception to the general prohibition of quotas in Article XI itself, “where the requirements of Article XI.2(a) are met, there would be no scope for the application of Article XX, because no obligation exists.” 183

Likewise, we might add—where Article XX(g) is successfully pleaded, there would simply be no need to resort to Article XI.2.

But as the Appellate Body noted, nothing also prevents the two provisions from operating concurrently but within their respective spheres of application—a critical shortage may still coincide with a conservation measure, and it should not be thought that the panel said otherwise. 184

182 US—Shrimp, supra note 171, ¶¶ 118-121.
184 Id. ¶ 337.
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V. New Regulatory Approaches

A. There is a Range of Possibilities

In addition to having a fairly well developed body of jurisprudence for the regulation of export restrictions, the range of current-day policy imperatives may yet include a need to consider (1) “tarification” of export controls under GATT Article II (as with the imposition of bindings on Chinese export duties), (2) how the WTO should regulate such future phenomena as reverse dumping (i.e. selling above normal value), (3) the production relocation and other trade effects of restrictions either by (a) viewing such restrictions as implicit subsidies or (b) by having NAFTA’s non-price discrimination discipline (discussed above), as well as a need to (4) assess the case for export restrictions based on balance-of-payments difficulties. The EU has also gone further and (5) proposed a ban on export duties altogether, with limited exceptions for developing countries.185

B. Is There Such a Thing as Reverse Dumping?

Amongst these, reverse dumping is an untested idea, while treating export restrictions as a form of unlawful subsidy could yet present novel conceptual issues. There is however already some guidance on the matter in the GATT jurisprudence.

The panel in Japan-Semiconductors had ruled on the relationship between Article VI and Article XI. Japan had—interestingly—argued that its export restrictions could be justified on the basis of Article VI as a measure against dumping. The panel found that although Article VI:2 stated that contracting parties could levy a duty on dumped products, it was silent on actions by exporting countries and concluded that Article VI did not provide a justification for measures restricting exports.186

Unless a different view is adopted, treaty amendment would be required to design such a reverse dumping regime under the WTO, for which there is little prospect.

C. Tackling Export Restrictions Through Anti-Subsidy Law

A more conventional route may be through the direct application of an anti-subsidy framework of analysis, which essentially was what the US and EU complain

186 Japan – Semi-conductors, supra note 23, ¶ 32.
was about in relation to China’s raw materials restrictions, but this is no less problematic in light of our current legal understanding.

Subsidization through export restrictions had been analyzed in the US – Export Restraints case. The dispute had concerned a complaint by Canada over US legislation that treated export restrictions as a subsidy, thus allowing the US to implement countervailing measures. According to Canada this was inconsistent with Article I:1 of the Subsidies and Countervailing Duties Agreement (SCM). This article stipulates that a subsidy consists of two elements: (i) a financial contribution; which (ii) confers a benefit. As both parties agreed that an export restriction could confer a benefit but differed on whether this benefit could be seen as a financial contribution in the sense of Article I.1 SCM, the panel decided to limit itself to the latter issue.

It ruled that export restrictions could not be seen as a subsidy according to I:1 SCM as doing so would deviate too much from the principles of the agreement. Firstly, as stated in sub-paragraph (iv) of Article I:1 SCM, for a subsidy to be proven it is not sufficient that government intervention has led to a particular result. A financial contribution must be proven by reference to a distinct act of the government. A restriction on exports alone is not sufficient to satisfy this condition. Secondly, while the Panel agreed that the purpose of the SCM agreement was to curtail market distortions caused by sovereign intervention, it did not agree that every intervention which might in theory distort trade would necessarily comprise a subsidy. Such an approach would effectively result in the replacement of the “financial contribution” requirement altogether with any government action that could be understood to be a trade-distorting subsidy. Finally, when looking at the negotiation history of the SCM Agreement, the Panel noted that the term “financial contribution” had been specifically included to prevent the countervailing of benefits from any and all gov-

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188 Id. ¶ 3.1.
189 Id. ¶ 8.20; see also Appellate Body Report, Brazil—Export Financing Programme for Aircraft, ¶ 157, WT/DS46/AB/R (Aug. 2, 1999) [hereinafter Brazil—Aircraft].
190 See US—Exports Restraints, supra note 187, ¶ 8.17. The Panel defined the scope of the abstract term “export restriction” that it would use in its analysis of the measure as being: “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.”
192 Id. ¶ 8.34.
193 Id. ¶¶ 8.62–63.
ernment measures. Hence the panel rejected an approach that would merely focus on conferred benefits. 194

The panel therefore concluded that an export restraint as defined in this dispute 195 cannot constitute a government-entrusted or government-directed provision of goods in the sense of subparagraph (iv), and thus does not constitute a financial contribution (and is not a subsidy) in the sense of Article I:1 SCM. 196

Likewise, the available jurisprudence has been similarly unresponsive in the related area of regulating state trading enterprises (STEs). 197 In the WTO panel decision Canada—Wheat case 198 the behavior of STEs governed under Article XVII was discussed. Canada had set up an STE, the Canadian Wheat Board (CWB), which held exclusive rights with regard to the export of wheat. The US claimed that due to the manner in which the CWB organized its export sales, it was acting inconsistently with Article XVII. The US pointed to the higher price being offered for high-quality wheat in the Western Canadian domestic market versus in third-country markets. 199

The panel concluded that an STE will act in accordance with conditions that are advantageous to itself. Due to the fact that an STE is not solely a commercial vehicle but also a tool for the implementation of government policies, these conditions may not always perfectly reflect market conditions. 200 Thus, offering different prices to the domestic and export market for certain goods may be justified.

As a matter of broad principle, however, there are suggestions that the WTO Agreement, the SCM Agreement, and the WTO Anti-Dumping Agreement may still be used to address such behavior insofar as this behavior may otherwise affect the competitive positions of others in the market. 201

194 Id. ¶ 8.73.
195 Id. ¶ 8.17.
196 Id. ¶ 8.75.
199 Id. ¶ 6.113.
200 Id. ¶ 6.101.
201 See id. ¶ 6.104. The US, in its response to questions by the Panel, had argued that STEs could not be allowed to distinguish between sales in domestic and foreign markets due to Article XI. Therefore Member States could not be allowed to circumvent these obligations through an STE. See id., ¶ 6.46 & Exhibit A1, ¶ 30). Canada acknowledged the point that the note to Article XI expressly deals with STEs, but goes on to state that it does not refer to Articles I and III and that as such it is not concerned with discrimination. See id., ¶ 6.47.
D. “The Dracula Doctrine”

One of the principal tools that the framers of the GATT have relied upon is the imposition of transparency and consultation requirements. The thinking underlying transparency reflects how trade lawyers and policy-makers deal with particularly intractable problems. It is the simple maxim, “in the face of a powerful, overwhelming evil, cast daylight and evil’ll go away.” They call it the “Dracula Doctrine.”

Recall, however, that the GATT’s transparency requirements are also governed by the conservation (Article XX) and national security (Article XXI) clauses. Thus, the transparency requirements also benefit from a shift in the regulatory framework for export restrictions from a previously ungoverned security-centric framework towards a conservation-based one—i.e. export restrictions are no longer seen in the exclusive terms of national security discourse. This is especially the case where the jurisprudence on the sheltering scope of the conservation clause continues to grow in sophistication.

There is no guarantee that global conditions will not one day change and that national security will not return as a focal concept in the area of export restrictions. We have already seen how earlier attempts were made during the GATT era to denude a mere transparency requirement under GATT Article X in connection with the imposition of export restrictions by extending the scope of the Article XXI “national security exception” to such a transparency requirement. There is no guarantee that such sentiments will not one day return but there is one additional safeguard today that was not present before: namely, the compulsory jurisdiction of WTO dispute settlement panels. The “national security approach” worked where—as with the 1985 Nicaraguan case—the mandate of the panel could be restricted at the point of its establishment, but this is no longer legally possible. Thus, a panel would have jurisdiction regardless of the views of the Respondent WTO Member and there is at least the real possibility that a panel today will not tolerate a purely subjective reading of Article XXI. Recent experience also suggests that in the most intractable situations, such as in the interpretation of the proper scope of Article XXIV, imposing a mere transparency requirement has provided room for compromise among parties with starkly divergent views.

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203 See supra Part I.E.
204 See Jo-Ann Crawford & C.L. Lim, Cast Light and Evil Will Go Away: The Transparency Mechanism for Regulating Regional Trade Agreements Three Years After, 45 J. WORLD TRADE 375 (2011).
VI. The Prospect of Multilateral and Regional Initiatives

Because of the specter of supply shortages—be they of food, energy, raw materials or other industrial inputs—both business and policy-makers have taken note of global regulation of industrial supplies. While some have said that, from a public choice perspective, the era of import barriers is over due to the self-interest of multi-nationals invested in cross-border production and supply-chain manufacturing now pushing for continued liberalization, this is not necessarily true with regard to supply-side commodities trading. Sovereign intervention continues to feature prominently in this field, and industrial competition and rivalry means that sovereign intervention continues to pose challenges to trade liberalization driven by business and global production networks.

As a result of China’s and Asia’s rising demand for energy and raw materials, industrial rivalry, and growing demand for adequate food supplies, the WTO is heading into uncharted waters. As free trade became more widely accepted, the problem has become less about how even more free trade can be achieved, and more about how the demand for commodities which free trade has helped to facilitate can be met. The old national security-based understanding of export controls and restrictions, and its accompanying discourse, must cede to the present-day realities of unprecedented economic globalization.

Business and finance will intuitively understand the critical need for emerging new disciplines and approaches, as well as the need to refocus attention from the import to the supply side. Trade lawyers will equally need to revisit their professional self-understanding of how global rules operate. In the absence of fresh treaty initiatives and new rules, litigation will likely play a significant gap-filling role in this process. This "default" scenario is not new and has for long been the way the regulatory system handles the interface between trade and other regulatory concerns. It is not a pure coincidence that the new export restrictions jurisprudence draws from the same well as environmental, conservation, and a host of other social concerns. In turn, the new disciplines that are likely to be formed around such litigation are likely to supplant the national security-based discourse of the past.

This is not to suggest that litigation is a true substitute for freshly negotiated rules. As we have seen, there is already some progress on achieving consensus for new rules. Current multilateral efforts are directed at tackling the food price crisis.


207 See WTO Debates Food Security as Import Bills Soar, supra note 15 Food Prices: Report for G-20 Clears First Hurdle, supra note 14; Food Prices: Leaked UN Report Urges G-20 Action on
and there are various suggestions and proposals circulating concerning the development of new multilateral rules for export restrictions. For example, the proposal for a “WTO Agreement on Export Taxes,” which is intended to fill a gap left by the uncertainty surrounding the applicability of the GATT Article II regime of tariff bindings to export trade; and to expand the application of new rules—such as the Chinese Accession Protocol’s additional disciplines—even further. Another—more radical—approach mentioned earlier is a perceived need in some quarters to design new kinds of specialized anti-subsidy rules that seek to address price discrimination and any production relocation effects caused by export taxes and other restrictions on industrial raw materials.

At the regional level, the Obama Administration’s push for a Trans-Pacific Partnership (TPP) Agreement, which currently aims to be concluded by the latter part of 2013, deserves mention. It could help to address the gap, although there are no signs as yet of how it might wish to do so since no proposal has been revealed regarding export restrictions. The most obvious WTO-plus rule that needs to go into the TPP would be a “non-price discrimination” clause stipulating that a party will get to use export restraints only if it does not discriminate against foreign producers. Such a “non-price discrimination” clause is in virtually every free trade treaty the United States has initiated since NAFTA, so bringing it into the TPP talks should not be too difficult. Non-price discrimination should also not be a problematic issue for Japan if Japan were ultimately to join the TPP talks, Chile, the so-called “P-4” countries (i.e. Singapore, New Zealand, Chile and Brunei), and also for Australia.

The Japan-Chile Economic Partnership Agreement (EPA) employs a non-price discrimination clause in Article 16 that is similar, if not largely identical, to the prevalent US clause. Chile was probably the impetus for including this clause,
with Chile borrowing the clause from the US-Chile Free Trade Agreement (FTA). The P-4 agreement also adopts a non-price discrimination rule:

No Party may adopt or maintain any duty, tax, or other charge on the export of any good to the territory of the other Parties, unless such duty, tax, or charge is adopted or maintained on any such good when destined for domestic consumption. 214

A nearly identical clause is also present in the US-Australia FTA. 215

Other examples might include rules that, notwithstanding justified export restrictions, seek to maintain the same proportion of supplies—based on past average figures—which international purchasers have become accustomed to. 216

214 Because the agreement is multi-party, one might have expected a clause more akin to the US-DR-CAFTA clause (requiring the same charges to be applied to exports to “all other parties”). Instead, the Trans-Pacific SEP Agreement resembles the “purely bilateral” clause used in the US-Chile FTA, US-Peru TPA, KORUS and the US-Panama FTA. It cannot be imagined that the parties intended to require non-price discrimination between Parties A and B in respect of the exports of Party A to Party B, but to allow Party A to discriminate in favor of Party C.

215 U.S.-Aus. FTA art. 2.11.

216 However, there are signs that U.S. treaty practice has since abandoned express treaty provision for such a rule in its free trade agreements. See Lim, supra note 211.
Conclusion

What the current China case, the food price crisis, the looming fight over rare earths and a host of export moratoriums and restriction in recent years—ranging from wheat moratoriums in the Ukraine, Russia and Argentina to export caps on Argentinian beef—have shown is that while we have spent more than half a century in the GATT-WTO worrying about import restraints, considerably less time has been spent thinking about how export restraints are equally trade distortive notwithstanding the growth of global manufacturing inter-dependence.

World trade regulation now needs to take a hard look at sovereign supply-side constraints. The reason is economics defined—scarcity.

As the song goes:

And you don’t miss your water ’til your river runs dry
And you don’t miss your lover ’til they’re waving goodbye
And you don’t miss your water ’til your river runs dry
And you don’t miss your lady ’til she’s waving goodbye
Bye bye bye bye bye bye

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218 To wit: “the science which studies human behavior as a relationship between ends and scarce means which have alternative uses.” LIONEL ROBBINS, AN ESSAY ON THE NATURE & SIGNIFICANCE OF ECONOMIC SCIENCE 16 (2d ed. 1935).

219 RICHARD HAWLEY, YOU DON’T MISS YOUR WATER (TILL YOUR RIVER RUNS DRY).