



# **SECURING ACCESS TO CRITICAL RAW MATERIALS: WHAT ROLE FOR THE WTO IN TACKLING EXPORT RESTRICTIONS?**

## **FOUR PROPOSALS FOR A TRANSATLANTIC AGENDA**

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On the cover: Huge dump trucks hauling ore out of an open pit copper mine in Utah. © Steve Baxter

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FOUR PROPOSALS FOR A TRANSATLANTIC AGENDA

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# EXECUTIVE SUMMARY

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Export restrictions (foremost tariffs and quotas) on critical raw materials are on the rise. Both United States Trade Representative Ron Kirk and his European colleague, EU Trade Commissioner Karel de Gucht, therefore welcomed the World Trade Organization (WTO) dispute settlement panel's finding on "China — Measures Related to the Exportation of Various Raw Materials" earlier this year. But how well is the WTO really equipped to discipline the use of export barriers to trade — in particular in the light of an increasing number of such measures? And what options do the United States and the European Union have to address limitations in WTO rules? After a short introduction of U.S. and EU critical material strategies and the role of trade policy instruments therein, this paper will give a brief overview of WTO rules on export restrictions and their limitations before turning to the dispute over Chinese export restrictions on certain raw materials. The last section will outline a four-track approach for the transatlantic partners to address the aforementioned challenges.

The paper proposes the following: First, the United States and EU should join forces in lobbying for a revision of WTO rules on export restriction.

Second, the transatlantic partners should push for rules on export restriction within their current negotiations on free trade agreements (FTA), while agreeing on a common legal language for these rules. Third, the United States and the EU need to keep in mind that trade policy alone will not suffice to address the issue. Thus, they should step up assistance to poorer countries in their efforts to reform public finance and design sustainable mineral policies in order to reduce the incentive for erecting trade barriers. And fourth, the transatlantic partners should join efforts in designing comprehensive resource strategies in which trade policy is an important but certainly not the only instrument to secure the supply of critical materials. One forum to coordinate and further a transatlantic agenda on critical raw materials is the Transatlantic Innovation Action Partnership (IAP) under the Transatlantic Economic Council (TEC). At the last meeting of the TEC in Washington D.C. on November 28, 2011, the United States and the EU restated their commitment to working together on trade policies to ensure access to critical raw materials. This is a good start. Now concrete actions must follow.

“This is a clear verdict for open trade and fair access to raw materials. It sends a strong signal to refrain from imposing unfair restrictions to trade and takes us one step closer to a level playing field for raw materials,” *EU Trade Commissioner Karel De Gucht on the WTO dispute panel’s decision dealing with Chinese barriers on raw material exports*<sup>1</sup>

“WTO rules are designed to deal with precisely these kinds of problems. If left undisciplined, these types of policies could proliferate not just within China but around the world — at the expense of everyone’s growth and development,” *USTR Ron Kirk on the WTO ruling on Chinese export barriers to resource trade*<sup>2</sup>

“It is certainly true that there is an imbalance in the WTO rule-book between the stringency of the rules for imports and their laxity for exports,” *WTO Director-General Pascal Lamy on WTO rules on export barriers*<sup>3</sup>

<sup>1</sup> Quoted in European Commission Directorate-General for Trade (2011), *EU Welcomes WTO Report on China’s Export Restrictions on Raw Materials*, July 5, 2011, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=723>.

<sup>2</sup> USTR (2011), *WTO Panel Finds against China’s Export Restraints on Raw Materials*, July 2011, <http://www.ustr.gov/about-us/press-office/press-releases/2011/july/wto-panel-finds-against-chinas-export-restraints-raw>.

<sup>3</sup> WTO (2011), *Lamy: Doha Will Oil the Wheels of World Commodities Trade*, Speech, January 31, 2011, [http://www.wto.org/english/news\\_e/sppl\\_e/sppl184\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl184_e.htm).

# 1 INTRODUCTION: GETTING TOUGH ON TRADE

**B**oth the United States and the European Union (EU) have become increasingly concerned about access to critical raw materials such as rare earth minerals, indium, cobalt, and lithium, which are indispensable in the production of many information and renewable energy technology products. Growing competition as well as increasing prices and price volatility, highly uneven geographical distributions of many metals and minerals across the globe, and rising government interventions in the markets such as export restrictions have fuelled worries about sufficient and affordable supply of raw materials.

The transatlantic partners are highly import-dependent: The EU covers, for example, 100 percent of its consumption of antimony, cobalt, molybdenum, niobium, platinum, rare earth minerals, tantalum, titanium minerals, and vanadium with imports. More than 80 percent of currently consumed manganese ore, iron ore, bauxite, and tin stem from abroad. The import-to-consumption ratio for zinc, chromium ores, and copper amounted to approximately 50 percent (copper) and over 60 percent (zinc) in 2008. Adding to this problematic picture is that most of the EU's import sources are highly concentrated.<sup>4</sup>

For the United States, the picture is very similar. In the case of indium, niobium, manganese, rare earths and many other metals that are crucial for high-tech products and green, laser, or telecommunications technology, for instance, the United States covered 100 percent of domestic demand with imports in 2009; the same applies to

gallium (99 percent) and germanium (90 percent).<sup>5</sup> The import-to-consumption ratio for zinc was at 76 percent in 2009, for tin it was 80 percent. Most of the supply sources for the United States are also highly concentrated. For example, the United States obtains 91 percent of its rare earths from China (Japan and France: 3 percent each; Russia: 1 percent; and others: 2 percent from 2005-2008); 63 percent of the imported lithium originates from Chile (35 percent from Argentina, 1 percent from China, and the remaining 1 percent from others).<sup>6</sup>

High import-dependence makes the United States and the EU particularly vulnerable to price volatility and interruptions in supply chains. Both are therefore currently developing resource strategies, in which trade policy plays an important role. In 2009, the European Commission's Directorate-General for Trade published its first *Raw Materials Policy 2009 Annual Report*, highlighting three goals: 1) integrating trade disciplines relevant to raw materials in ongoing trade negotiations at the WTO and free trade area (FTA) negotiations; 2) enforcing the rules tackling illegal trade barriers; and 3) reaching out to third countries to exchange views and analysis.<sup>7</sup> This was followed by the Commission's report on *Critical Raw Materials for the EU* in mid-2010. The EU plans to update its list of critical raw materials every three years. On February 2, 2011, the Commission published the EU's new resource strategy *Tackling the Challenges in Commodity Markets and on Raw Materials*. The strategy stands on three pillars: 1) securing fair and sustainable

*The United States and the EU are highly vulnerable to price fluctuations and disruptions of resource supply.*

<sup>4</sup> European Commission (2008), *The Raw Materials Initiative — Meeting our Critical Needs for Growth and Jobs in Europe*, Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament and the Council, SEC(2008) 2741, Brussels 2008. [http://www.euromines.org/who\\_is\\_downloads/raw\\_materials\\_initiative\\_annexes.pdf](http://www.euromines.org/who_is_downloads/raw_materials_initiative_annexes.pdf) (accessed May 31, 2011).

<sup>5</sup> U.S. Geological Survey (2010), *Mineral Commodity Summary 2010*, Washington D.C. 2010, <http://minerals.usgs.gov/minerals/pubs/mcs/2010/mcs2010.pdf>, p. 6.

<sup>6</sup> Id., p. 128; 92.

<sup>7</sup> European Commission Directorate-General for Trade (2009), *Raw Materials Policy 2009 Annual Report 2009*, Brussels, 2009, [http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc\\_146207.pdf](http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146207.pdf).

Trade policy is an integral part of national resource strategies on both sides of the Atlantic.

supply with raw materials from world markets through a new resource diplomacy; 2) fostering resource production within the EU through a National Minerals Policy that helps plan and monitor the member states' achievements and actions in the resource sector; and 3) enhancing research and development for improved recycling and substitution technologies as well as resource and product efficiency.<sup>8</sup>

Using trade instruments to ensure secure supply is an integral component of the EU's resource strategy, which seeks to "further embed raw materials issues, such as export restrictions and investment aspects, in ongoing and future EU trade negotiations in bilateral, plurilateral, and multilateral frameworks."<sup>9</sup> At the center of the EU's trade enforcement strategy stands the WTO and its dispute settlement procedure. In the fall of 2011, under the leadership of MEP Reinhard Bütikofer, the European Parliament presented a resolution on an effective raw materials strategy for Europe, calling on the WTO to closely monitor the impact of import and export restrictions and to strictly enforce WTO rules.<sup>10</sup>

While the United States has yet to put forward a comprehensive national resource strategy, security of supply has played a crucial role for years. In April 2010, the Government Accountability Office (GAO) published a report called *Rare*

<sup>8</sup> European Commission (2011), *Tackling the Challenges in Commodity Markets and on Raw Materials*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM(2011) 25 final, Brussels, 2.2.2011, [http://ec.europa.eu/enterprise/policies/raw-materials/files/docs/communication\\_en.pdf](http://ec.europa.eu/enterprise/policies/raw-materials/files/docs/communication_en.pdf).

<sup>9</sup> Id.

<sup>10</sup> European Parliament (2011), *European Parliament Resolution of 13 September 2011 on an Effective Raw Materials Strategy for Europe* (2011/2056(INI), September 13, 2011, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0364>.

*Earth Materials in the Defense Supply Chain*.

According to its findings, rare earths are crucial for numerous defense systems, such as precision-guided munitions, lasers, communication systems, radar systems, night vision equipment, and satellites.<sup>11</sup> The GAO report was followed by the *Critical Materials Strategy*, which was published in December 2010 by the Department of Energy (DOE). The DOE's strategy is based in three pillars: 1) diversified global supply chains: taking steps to facilitate extraction, processing, and manufacturing in the United States, as well as encouraging other nations to expedite alternative supplies; 2) development of substitutes: supporting research leading to material and technology substitutes; 3) recycling: reuse and more efficient use. An update of the report on critical materials is planned for the end of 2011.<sup>12</sup> The U.S. Congress meanwhile discussed a number of legislative proposals that address supply security of metals and minerals. In September 2010, the House of Representatives, for example, voted overwhelmingly for the *Rare Earths and Critical Materials Revitalization Act*, which planned to facilitate and accelerate the exploration and exploitation of rare earths and other critical materials. While none of the proposals became law in the 111<sup>th</sup> Congress, similar legislation was proposed in 2011 and is awaiting a vote. As in the EU, trade barriers on exports of critical materials are increasingly criticized in the United States, and the WTO is viewed as an important instrument to tackle the increasing number of export restrictions. At the center of attention stands China, which implements barriers on the export of numerous critical raw materials.

<sup>11</sup> GAO (2010), *Rare Earth Materials in the Defense Supply Chain*, GAO-10-617R, April 14, 2010, <http://www.gao.gov/new.items/d10617r.pdf> p. 27.

<sup>12</sup> U.S. Department of Energy (2010), *Critical Materials Strategy*, Washington D.C., December 2010.

The United States and the EU, later joined by Mexico, filed a complaint against the China at the WTO in June 2009 — the first comprehensive trade dispute settlement procedure on export restrictions under the GATT/WTO. In December 2009, a dispute settlement panel was established to evaluate the WTO compatibility of China's export quotas and duties on several materials, including bauxite, coke, fluorspar, magnesium and manganese, silicon carbide, and zinc. In early July 2011, the WTO dispute panel issued a verdict largely in favor of the complainants, which was welcomed by both USTR Ron Kirk and his European colleague, EU Trade Commissioner Karel de Gucht.<sup>13</sup> Both hope that the panel's finding will deter other countries from implementing export restrictions and serve as precedent for similar conflicts.

The United States has already threatened to contest China's rare earths policies at the WTO: USTR Kirk announced in his 2010 Report to Congress on China's WTO Compliance, "Going forward, the United States will continue to pursue vigorous engagement with China on this issue and will not hesitate to take further action, including WTO dispute settlement, if appropriate."<sup>14</sup> He charges that "China's policies provide substantial competitive advantages for downstream Chinese industries at the expense of non-Chinese users of these materials. They have also caused massive distortions and harmful disruptions in supply chains throughout the global marketplace."<sup>15</sup> Congress has also picked up on the issue. In September 2011, U.S. Senators Sherrod Brown (D-OH) and Rob Portman (R-OH) urged in a letter to Kirk to initiate a WTO dispute settlement

procedure on China's export restrictions on rare earth materials: "[...] China's hoarding of rare earth materials is yet another unfair and illegal violation of international trade laws [...]. Our manufacturers can compete with anyone, but when countries like China hoard materials, that's not competing — it's cheating," Brown complained.<sup>16</sup> "We are simply asking that the U.S. government enforce international trade law to end China's unfair quotas on rare materials necessary to manufacture numerous products," Portman added.<sup>17</sup>

But how well is the WTO really equipped to curtail the use of export restrictions — in particular in the light of an increasing number of such measures? And what options do the United States and the EU have to address limitations in WTO rules? After a short overview of the patterns and motivations for export restrictions, this paper will discuss WTO rules on these trade impediments and their limitation before turning to the dispute case on Chinese export restrictions on some raw materials. The last section will outline a four-track approach for the transatlantic partners to address the aforementioned challenges.<sup>18</sup>

*The United States and the EU are fighting Chinese export barriers to trade at the WTO — the final verdict is still open.*

<sup>13</sup> Stephen Castle (2011), "WTO Says Chinese Restrictions on Raw Materials Break Rules," *New York Times*, July 5, 2011.

<sup>14</sup> USTR (2010), *Report to Congress on China's WTO Compliance*, Washington D.C. 2010, [http://www.ustr.gov/webfm\\_send/2460](http://www.ustr.gov/webfm_send/2460).

<sup>15</sup> USTR, *supra* note 2.

<sup>16</sup> *Sens. Brown, Portman Urge President's Top Trade Adviser to Take China to World Trade Court*, September 19, 2011, [http://brown.senate.gov/newsroom/press\\_releases/release/?id=b18ed3ff-aebe-43c3-8e73-093a96042e91](http://brown.senate.gov/newsroom/press_releases/release/?id=b18ed3ff-aebe-43c3-8e73-093a96042e91)

<sup>17</sup> *Id.*

<sup>18</sup> For a discussion of the merits of WTO rules versus preferential trade agreements on settling conflicts over resource trade, see Stormy-Annika Mildner and Gitta Lauster (2011), "Settling Trade Disputes over Natural Resources: Limitations of International Trade Law to Tackle Export Restrictions," *Goettingen Journal of International Law* 3 (2011) 1, p. 251-281.

## 2 EXPORT RESTRICTIONS ON THE RISE

Export barriers on foodstuffs, metals and minerals, forestry and fishery products are on the rise.

While export restrictions are really nothing new, both the OECD and the WTO find that they have been on the rise in recent years. Export restrictions can take many different forms, ranging from taxes, duties, and charges, to quotas and export bans, mandatory minimum export prices, reductions of value added tax (VAT) rebates on exports, and stringent export licensing requirements. The most frequently used form is export taxes.<sup>19</sup>

In a 2010 analysis of the WTO's Trade Policy Reviews, the OECD finds that about half of the WTO members reviewed (65 of 128) impose export duties. The OECD study first highlights that the number of countries applying these duties over the period 2003 to 2009 was higher than in the previously analyzed period from 1997 to 2002. While only 39 of 100 member countries had imposed export restrictions in the earlier period, the number increased to 65 of 128 countries in the second period of analysis. Second, this particular trade policy instrument is mainly used by developing and least developed countries (LDCs). Of the 31 OECD countries under review, only 4 resorted to export duties. This percentage was considerably higher with regard to LDCs: In 21 of the reviewed 25 LDCs, the OECD found export duties. While export duties were usually applied to a limited number of products, many LDCs applied a blanket export tax, albeit at a low level. There was also a clear geographic concentration of such measures. Of 35 African countries analyzed, 30 applied export restrictions; of 23 Asian/Pacific countries, 13 resorted to these measures. Lastly, the OECD pointed out that the items most subjected to export duties were agricultural products (36 of 65 members reviewed), mineral and metal products (28 of 65 members), and products made from

<sup>19</sup> J. Korinek & J. Kim, *Export Restrictions on Strategic Raw Materials and their Impact on Trade*, OECD Trade Policy Working Papers (2010) 95.

**Table 1: Number of Countries Applying Export Duties, by Regions and other Groupings (2003-2009)**

	Number of WTO Members reviewed by TPRB*	WTO Members imposing export duties
Europe/Middle East	39	4
Americas	31	18
Asia/Pacific	23	13
Africa	35	30
Total	128	65
LDCs	25	21
OECD	31	4
Others	72	40

Source: Jeonghoi Kim, *Recent Trends in Export Restrictions*, OECD Trade Policy Working Paper No. 101, Paris 2010. \*TPRB: Trade Policy Review Body, p.7.

leather, hide, and skin (17 of 65 members), forestry (15 of 65 members), and fishery (13 of 65).<sup>20</sup>

According to WTO Director-General Pascal Lamy late 2011, "trade monitoring over the past six months has...[confirmed]...an increasing trend in the use of export restrictions." These measures mainly affected some food products and raw materials and minerals, where international prices have been on the rise.<sup>21</sup> From May 2011 to mid-October 2011, the G20 countries alone

<sup>20</sup> Jeonghoi Kim (2010), *Recent Trends in Export Restrictions*, OECD Trade Policy Working Paper No. 101, Paris 2010, p. 6f.

<sup>21</sup> WTO (2011), *Pascal Lamy, Trade Restrictions on the Rise*, Speech, June 21, 2011, [http://www.wto.org/english/news\\_e/sppl\\_e/sppl196\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl196_e.htm).

**Table 2: Export Restriction Measures by G20 Economies**

Type of measure	First Report (Apr - Aug 09)	Second Report (Sep 09 - Feb 10)	Third Report (Mar - mid-May10)	Fourth Report (mid-May - mid-Oct 10)	Fifth Report (mid-Oct - Apr 11)	Sixth Report (May - mid-Oct 11)
<b>Export</b>	9	7	5	4	11	19

Source: WTO, OECD, UNCTAD (2011), Report on G20 Trade and Investment Measures, May to Mid-October 2011, October 2011, <http://www.oecd.org/dataoecd/24/31/48941943.pdf>, p. 8.

implemented 19 new measures directly or indirectly restricting exports, compared with 11 measures in the preceding six-month period, a joint report by the WTO, OECD, and UNCTAD on G20 trade and investment measures recently concluded. Restrictive measures were taken mainly on agricultural products and minerals. The majority of measures were justified on the grounds of national responses to rising food prices, to secure domestic supply, or to address resource depletion.<sup>22</sup>

While export restrictions are thus a widespread phenomenon in the developing world, China, however, stands at the center of U.S. and EU attention and criticism. In its biennial review of China's trade policies in late May 2010, the WTO found that explicit (export prohibitions, export quotas, export licensing requirements, and export taxes) and implicit (less-than-full rebate of VAT on exports and state trading arrangements) export restrictions were a major feature of China's trade regime, giving domestic manufacturers an unfair advantage.<sup>23</sup>

Export restrictions are applied for many different reasons, including raising government revenues,

promoting downstream industries to diversify exports, controlling price fluctuations, and guaranteeing national security as well as protecting the environment, and human, plant, and animal welfare. For many poorer developing countries in particular, which lack sufficient taxation systems and governance mechanisms, raising government revenues through export tariffs is often easier than applying more complicated and politically difficult forms of taxation such as income or property taxes. Whilst certainly not being the first-best policy tool, export restrictions can be used to address market failures and can be justified in certain cases, such as national shortage of food supplies. China, on the other hand, is accused of using export restrictions not for achieving broader social goals but to alter the relative price of its companies' exports and to expand production of domestic industries thus improving their competitive advantage at the expense of foreign producers.

The OECD rightly warns that export restrictions rarely achieve their economic, social, or environmental objectives. Even more, they risk welfare losses for both the producer and importing countries. Thus, an export restriction on raw materials penalizes exporters of the restricted product, redistributing income from the primary to the secondary sector of an economy. This can result in inefficiencies, incentivizing too much production in the exporting country's industry. While export restrictions might help to diversify production

*Export restrictions are applied for many reasons: diversifying exports, controlling price fluctuations, guaranteeing national security as well as protecting the environment — but also giving domestic producers a competitive edge.*

<sup>22</sup> WTO, OECD, UNCTAD (2010), Report on G20 Trade and Investment Measures, May to Mid-October 2011, October 2011, <http://www.oecd.org/dataoecd/24/31/48941943.pdf>, p. 8.

<sup>23</sup> WTO (2010), Trade Policy Review, Report by the Secretariat: China, WT/TPR/S/230, April 26, 2010, [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp330\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp330_e.htm).

and exports, a negative side effect could be greater economic and social inequalities between rural and urban areas. In addition, by pushing a wedge between the price available to domestic processors and the price charged to foreign processors, export restrictions are often trade diverting and therefore risk serious trade disputes. The WTO has thus taken up the issue, devoting not only more time to analytically dealing with trade in raw materials (for example, the WTO devoted its 2010 World Trade Report to raw materials<sup>24</sup>). What's more, the issue has been brought to the WTO's dispute settlement body by several of the WTO's member countries.

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<sup>24</sup> WTO, *World Trade Report 2010. Trade in Natural Resources*, Geneva 2011, [http://www.wto.org/english/res\\_e/publications\\_e/wtr10\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr10_e.htm).

# 3 WTO RULES ON EXPORT RESTRICTIONS

**W**TO Director-General Lamy summarizes the problem as follows: “[...] export restrictions have not been a regular or major issue for the management of the trading system in the past, but they have the potential to create serious obstacles to trade in our increasingly integrated world economy.”<sup>25</sup> The WTO, just as its predecessor the GATT, has mostly focused on import barriers to trade in the past, vigorously pushing for stricter rules in market access and fostering liberalization. As a result, import barriers are already comparatively low. Export barriers to trade, on the other hand, only recently moved into the focus of the WTO.<sup>26</sup> What are the rules governing export restrictions?

## Export Duties

Export taxes are not prohibited by the WTO, though such taxes must be nondiscriminatory and transparent under Articles I and X of the 1994 GATT.

*Most Favored Nation Treatment:* Article I states: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges [...] any advantage, favor, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

<sup>25</sup> Pascal Lamy (2011), *Trade Restrictions on the Rise*, Speech, June 21, 2011, [http://www.wto.org/english/news\\_e/sppl\\_e/sppl196\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl196_e.htm).

<sup>26</sup> P. Collier & A. J. Venables (2010), *International Rules for Trade in Natural Resources*, 2010, [http://www.wto.org/english/res\\_e/reser\\_e/ersd201006\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201006_e.pdf); Barfield (2009), *Trade and Raw Materials — Looking ahead*, September 29, 2009, <http://www.aei.org/speech/28745>.

*Binding Concession:* Unlike import barriers, export tariffs are not bound, i.e. once reduced, export duties can be increased again without violating a country’s obligations under WTO rules. There is no legal framework for members to schedule commitments with respect to exports. GATT Article II (Schedules of Concession) only concerns import duties and charges in connection with importation. Accordingly, the application of export taxes has not, so far, been found to violate WTO rules.<sup>27</sup>

## Publication and Administration of Trade Regulations:

According to Article X, 3(a), “each contracting party shall administer in a uniform, impartial, and reasonable manner all its laws, regulations, decisions, and rulings of the kind described in paragraph 1 of this Article,” these measures being “laws, regulations, judicial decisions, and administrative rulings of general application.”

## Obligations under WTO Accession Agreements:

Although general WTO rules thus do not discipline members’ application of export taxes, some members have agreed on stricter rules within their accession agreements, such as Bulgaria, Ukraine, and Vietnam. The commitments undertaken by China are by far the most comprehensive. Part I (11.3) of the Accession Protocol (Taxes and Charges Levied on Imports and Exports) obliges the country to refrain from export duties on products that are not listed in Annex 6 of the Accession Protocol. Furthermore, the country is required to limit any export duties imposed on products that are listed in Annex 6 to the stated rates (Note to Annex 6). Most of the 84 exceptions, listed in Annex 6, concern metals ranging from lead and zinc ores to scrap iron, providing for export duty rates of 20 to 40

<sup>27</sup> D. Crosby (2008), “WTO Legal Status and Evolving Practice of Export Taxes,” 12 *Bridges Review*, 2008, <http://ictsd.org/i/news/bridges/32741/>.

*Export barriers to trade moved to the center of the WTO’s attention only recently.*

WTO rules on export tariffs are much more lax than rules on import barriers to trade.

percent on products. The tariff levels listed are thus maximum levels, which should not be exceeded. The note to Annex 6 also states that China would need to “consult with affected members prior to increasing applied tariffs with a view of finding a mutually acceptable solution.”<sup>28</sup> Furthermore, the Working Party Report also binds the country to eliminate export restrictions. Paragraph 162 specifically states: “The representative of China confirmed that China would abide by WTO rules in respect of nonautomatic export licensing and export restrictions. The Foreign Trade Law would also be brought into conformity with GATT requirements. Moreover, export restrictions and licensing would only be applied, after the date of accession, in those cases where this was justified by GATT provisions.” Within paragraph 165, China agreed to notify to the WTO annually remaining nonautomatic restrictions on exports and would eliminate these unless they could be justified under the WTO Agreement.<sup>29</sup>

Export restrictions are also an important issue in the accession negotiations with Russia. Contentious issues include export barriers on minerals, ferrous and non-ferrous metals and scraps, petrochemicals, natural gas, and raw hides and skins. For example, the export tax on copper scrap amounts to 50 percent.<sup>30</sup>

### Quantitative Restrictions

While the application of export duties, taxes, and other charges is generally permitted, WTO rules are

<sup>28</sup> WTO (2001), *Accession of the People's Republic of China*, 2001 [http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm), p. 95.

<sup>29</sup> WTO (2001), *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, October 1, 2001, [http://www.wto.org/english/thewto\\_e/acc\\_e/completeacc\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm).

<sup>30</sup> Cf. BDI (2009), *Übersicht über bestehende Handels- und Wettbewerbsverzerrungen auf den Rohstoffmärkten* (June 2009), not published overview.

tougher on quantitative export restrictions such as quotas, bans, minimum prices, and nonautomatic licensing requirements.

*General Elimination of Quantitative Restrictions:* The main rule pertaining to these measures is Article XI:1 of the 1994 GATT: “No prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses, or other measures, shall be instituted or maintained by any contracting party [...] on the exportation or sale for export of any product destined for the territory of any other contracting party.”

Additional treatment of export restrictions can be found in Article 12 in the WTO Agreement on Agriculture, which stipulates that any member, instituting “any new export prohibition or restriction on foodstuff in accordance with paragraph 2(a) of Article XI of GATT 1994” shall (a) “give due consideration to the effects of such prohibition or restriction on importing Members’ food security”; (b) “give notice in writing, as far in advance as practicable, to the Committee on Agriculture” and “consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the measure in question,” before imposing such a measure.<sup>31</sup> However, these obligations do not apply “to any developing country Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned.” While Article 12 requires members to notify the WTO when they restrict food exports, there are no penalties for ignoring the rule.

*Administration of Quantitative Restrictions:* GATT Article XIII requires the nondiscriminatory

<sup>31</sup> WTO, *Agreement on Agriculture*, Article 12, [http://www.wto.org/english/docs\\_e/legal\\_e/14-ag.pdf](http://www.wto.org/english/docs_e/legal_e/14-ag.pdf).

administration of quantitative restrictions: “No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.”

*Customs Formalities:* Last, Article VIII of the GATT applies to measures imposed in the context of customs formalities. Thus, for example, it prohibits excessive customs fees and requires that fees do not represent (i) a taxation of export for fiscal purposes, or (ii) an indirect protection to domestic products.<sup>32</sup>

### Subsidies

In principle, certain export restrictions can be challenged under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement, 1.1(a) and (b)). A subsidy exists if there is (i) a financial contribution by a government or public body, and (ii) the financial contribution confers a benefit. Accordingly, some observers argue that lower prices for the domestic industry resulting from the imposition of export taxes could be considered a “financial contribution” under the SCM Agreement. So far, this however, has not been confirmed. Thus, the Panel in the dispute “United States — Measures Treating Export Restraints as Subsidies” found that an export restraint, defined as including export taxes, did not constitute a financial contribution as the language of the SCM

Agreement is not clear on this matter.<sup>33</sup> The jury is therefore still out on whether export restrictions are an actionable subsidy under WTO rules.

### Exemptions to the Rules

For most rules, there are also exceptions under the WTO, allowing export prohibitions and restrictions for certain public policy purposes. These can be found in GATT Articles XI, XX, and XXI.

*Critical Shortages:* Article XI:2 permits the imposition of quantitative restrictions if they (i) are temporarily applied to relieve critical shortages of foodstuffs or other products essential to the exporting contracting party, or (ii) are necessary for the marketing of commodities. As the WTO Appellate Body has yet to publish its decision on the case “China — Measures Related to the Exportation of Various Raw Materials,” there is still some uncertainty with regard to what constitutes a critical shortage and which products would fall under this exception.

*Protection of Human, Animal, or Plant Life or Health:* Article XX of the GATT, a so-called general exception to the rules, can be used to exempt certain measures from WTO obligations if they are “...necessary to protect human, animal, or plant life and health...” (XX(b)) or they relate “...to the conservation of exhaustible natural resources” and “are made effective in conjunction with restrictions on domestic production or consumption” (XX(g)). In addition, Article XX(i) permits export restrictions for price stabilization purposes, and Article XX(c) contains an exception related to gold and silver.

*National Security:* Export restrictions to safeguard national security can be justified under Article

*Exceptions to the rules leave ample policy space.*

<sup>32</sup> WTO, *General Agreement on Tariffs and Trade*, 1994, [=GATT 1994], [http://www.wto.org/english/docs\\_e/legal\\_e/06-gatt.pdf](http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf).

<sup>33</sup> Panel Report (2001), *United States — Measures Treating Export Restraints as Subsidies*, WT/DS194/R, June 29, 2001, <http://www.worldtradelaw.net/reports/wtopanels/us-exportrestraints%28panel%29.pdf>.

XXI. Article XXI(b) concerns nuclear and military-related goods as well as actions “taken in time of war or other emergency in international relations.” As many of the other articles, this rule leaves ample space for interpretation. Thus, it is not clear whether “other emergency in international relations” applies only to political emergencies or also extends to social and economic emergencies.

*Waiver:* According to Article IX(3) of the Marrakesh Agreement Establishing the World Trade Organization, if three-fourths of WTO members agree, the General Council can, in exceptional circumstances, decide to waive an obligation imposed on a Member by any of the WTO’s agreements.<sup>34</sup> The requirement of exceptional circumstances has never been specified, and did not curtail the waiver power in the past.

<sup>34</sup> Despite the “three-fourths” requirement, waiver decisions today are exclusively taken by consensus. Isabel Feichtner, “The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests,” in *European Journal of International Law*, (2009) 20 (3): 615-645.

According to Article IX(4) of the WTO Agreement, waiver decisions are temporary and have to have a termination date. If they are granted for more than a year, they not only need to be reviewed annually by the Ministerial Conference, but also can be subject to terms and conditions.<sup>35</sup>

The overview of WTO rules on export barriers to trade shows two things: Not only are rules governing these barriers limited in scope, their language is rather weak and leaves ample space for interpretation.

<sup>35</sup> In 2003, for example, the General Council granted requesting members (Australia, Brazil, Canada, Israel, Japan, Korea, Philippines, Sierra Leone, Thailand, United Arab Emirates, and United States) a waiver from GATT rules (Article I:1, Article XI:1, and Article XIII:1) to undertake measures under the Kimberley Process (foremost a certification scheme) to curb trade in conflict diamonds while supporting legitimate diamond trade. On December 19, 2006, the WTO General Council adopted a decision to extend the waiver through December 31, 2012.

# 4 THE WTO DISPUTE “CHINA — MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS”

On June 23, 2009, the United States and the EU (later joined by Mexico) presented a formal Request of Consultation to deal with the dispute existing with China, claiming that export restraints (including quotas and export taxes) imposed by China on a number of raw materials violated WTO rules on export restrictions. The materials in question include various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc. China is an important producer of each of these materials, which are used in many technology products. Four types of restraints were identified: export duties, export quotas, export licensing, and minimum export price requirements. In response to the filed

Argentina, Brazil, Canada, Chile, Colombia, Ecuador, India, Japan, Korea, Norway, and Turkey joined the cases as third-parties. On July 5, 2011, the panel provided a report to its members. On August 31, 2011, China notified the dispute settlement body of its decision to appeal certain parts of the panel’s finding; on September 6, the EU followed suit, announcing that it would also challenge parts of the panel decision at the WTO’s Appellate Body.

### The Complainant’s Position

The United States and the EU both submitted their first written statements in June 2010. The United States claimed that China subjected over 600 items to nonautomatic licensing and over 350 items to

*China is an important producer of metals and minerals — and subjects the export of many of them to export tariffs and quotas.*

**Table 3: China’s Percentage in Global Production of Selected Metals and Minerals, 2010**

	Bauxite	Fluorspar	Manganese	Magnesium	Silicon carbide	Silicon metal	Zinc
<b>Global Production</b>	19.0%	55.6%	21.5%	57.3%	45.0%	66.7%	29.2%
<b>Global Rank</b>	2	1	1	1	1	1	1

Source: U.S. Geological Survey, *Mineral Commodity Summaries, various Summaries, 2011*, <http://minerals.usgs.gov/minerals/pubs/commodity/#Z>.

Requests of Consultation, three dispute cases were established (United States versus China DS394, EU versus China DS395, and Mexico versus China DS398). After consultation with China on multiple occasions did not lead to a settlement, the EU proceeded to require a Panel establishment by the WTO on July 2, 2009, followed by a similar request by Canada, Mexico, and Turkey on July 6 and the United States on November 4, 2009. The DSB established a single panel, pursuant to Article 9.1 of the Dispute Settlement Understanding (DSU), to examine the disputes DS394, DS395, and DS398, on December 21, 2009. Several countries, including

export duties. These export restraints had become increasingly restrictive over time; export quota amounts had decreased while export duty rates had increased.<sup>36</sup> The United States and the EU argued that while export restriction could be justified in certain cases such as national shortage of food supplies and national security considerations, the ones applied by China skewed the playing field against foreign countries in the production and

<sup>36</sup> USTR (2010), *Executive Summary of U.S. First Written Submission*, June 6, 2010, via [http://www.worldtradelaw.net/wtodisputesubmissions/us/DS394\\_USFirstWrittenSubmission.pdf](http://www.worldtradelaw.net/wtodisputesubmissions/us/DS394_USFirstWrittenSubmission.pdf).

*Export restrictions employed by large producer countries can artificially create scarcity and drive up the price.*

export of numerous processed products. According to the complainants, the export restrictions artificially created scarcity, causing higher prices for the said materials on global markets while lowering their prices for Chinese producers. By pushing a wedge between the price available to domestic producers and the price charged to foreign producers, the complainants argued, the export restrictions were trade diverting, entailing global welfare losses.

The complainants claimed three types of violations.<sup>37</sup> First, China's export duties were inconsistent with its commitment in paragraph 11.3 of the WTO accession protocol not to apply export duties on the raw materials in question. Thus, the country imposed export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc, although none of these materials is listed in Annex 6. The country had also not informed its large trading partners and did not engage in finding a mutually acceptable solution, the complainants criticized. Furthermore, China imposed tariffs on yellow phosphorus at a rate above the one listed in the Annex.

Second, the complainants claimed that China's quantitative restrictions on various forms of bauxite, coke, fluorspar, silicon carbide, and zinc infringed Article XI:1 of the GATT as well as the country's obligations under paragraphs 162 and 165 of its Working Party Report.

<sup>37</sup> European Commission (2011), *EU Requests WTO Panel on Chinese Export Restrictions on Raw Materials*, November 4, 2011, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=481>; "EU, U.S. Act against China on Raw Material Exports," *EurActiv* June 24, 2009, <http://www.euractiv.com/en/trade/eu-us-act-china-raw-material-exports/article-183436>; EU (2010), *First Written Submission by the European Union on China — Measures Related to the Exportation of Various Raw Materials*, Geneva June 1, 2010, [http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc\\_146779.pdf](http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146779.pdf).

Third, according to the complainants, China's fees and formalities on exportation were administered in a manner that was not uniform, impartial, and reasonable thus violating Article X:3(a), while also being excessive and thus in violation with Article VIII:1(a). Last, they were not published promptly in a manner that allowed governments and traders to become familiar with them, therefore being in violation with Article X:1.<sup>38</sup>

Four, the complainants argued that China could justify its export restrictions neither with Article XI:2(a) nor Article XX(b) and (g). Not only did the language of its Accession Agreement not foresee such a possibility (this would also concern the general exception under Article XXI), China also failed, according to the complainants, to show convincingly that the export restraints were closely related to the conservation of these raw materials. It also did not show that it implemented the restrictions in conjunction with restrictions on domestic production and consumption, thus not meeting the criteria of Article XX(g). The complainants argued likewise with regard to XX(b). Concerning China's invocation of Article XI:2(a), the complainants claimed that China neither fulfilled the "critical shortage" nor the "essential product" criteria of this Article.<sup>39</sup>

### **The Defendant's Position**

Not surprisingly, China followed another line of argument. "The goal of export administrative measures on some raw materials is to protect the environment and our limited resources," the

<sup>38</sup> *EU Requests WTO Consultations on Chinese Export Restrictions on Raw Materials*, June 23, 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/287&format=HTML&aged=0&language=EN&guiLanguage=en>; USTR, *WTO Panel Finds against China's Export Restraints on Raw Materials*, July 2011.

<sup>39</sup> WTO (2011), *China-Measures Related to the Exploration of Various Raw Materials*. Reports of the Panel, Addendum, 5 July 2011.

Ministry of Commerce argued.<sup>40</sup> This was, however, not the only reason for the export restrictions. A Chinese Ministry of Commerce statement emphasized: “The regulations conform to the needs of China’s own [sustainable] development, while also advancing China’s efforts towards the sustainable development of the global economy.”<sup>41</sup> China emphasized: “What is fundamentally at stake in these disputes is the sovereign right of a developing country Member of the WTO to chart a course, over time, towards sustainable development through the exploitation of its natural resources.”<sup>42</sup>

China did not contest the complaint that its export tariffs violated the country’s Accession Agreement. Rather, it justified its export duties on fluorspar and bauxite with the need to conserve natural resources, referring to Article XX(g), while referring to Article XX(b) with regard to export duties on coke, manganese, magnesium, and zinc, as well as export quotas applied to coke and silicon carbide, arguing that such measures were necessary to protect human and animal health as well as the environment. China further claimed that refractory-grade bauxite and fluorspar were exhaustible natural resources, being scarce and not easily substitutable, and thus needed to be managed and protected. China further stated that its export duties were an integral part of the country’s sustainable mineral policy, which also included mineral resource taxes and compensation fees, environmental standards, as well as caps on extraction and initial processing. It also highlighted that it had adopted a comprehensive strategy for

reducing risks to human, animal, and plant life and health resulting from high energy-consuming and polluting production of nonferrous metals. According to China, the export restrictions on these materials would lead to a reduction of production and therefore also a reduction of the pollution associated with them.

With regard to export quotas on bauxite China referred to Article XI:2(a) GATT, arguing that export barriers were needed to prevent a critical shortage of the material, as well as to Article XX(g) GATT, claiming that the barriers would help to conserve the resource in question.

Overall, China claimed that “[...] the principle of sovereignty, over natural resources; the objective of sustainable development; and, the objective of economic diversification beyond trade in raw materials, set forth in Article XXXVI:5 GATT 1994, support China’s interpretation of Article XI and XX GATT 1994.”<sup>43</sup>

### The WTO’s Ruling<sup>44</sup>

In July 2011, the WTO issued its long-awaited ruling on the conflict over Chinese barriers on the export of minerals and metals, coming out largely in favor of the complainants. The panel emphasized that “China’s right to economic development and its sovereignty over its natural resources are not in conflict with China’s rights and obligations as a WTO Member. When China chose to join the WTO in full exercise of its sovereignty, China made the concurrent decision that its sovereign rights over its natural resources would thereafter be exercised within the parameters of the WTO

*China has certainly a right to its sovereignty over natural resources — but also has to abide to WTO rules.*

<sup>40</sup> Quoted in “China Defends Export Restrictions on Raw Materials,” May 11, 2009, <http://business.inquirer.net/money/breakingnews/view/20091105-234406/China-defends-export-restrictions-on-raw-materials>.

<sup>41</sup> Quoted in “China Defends Export Restrictions,” *BBC News*, November 5, 2009, <http://news.bbc.co.uk/2/hi/business/8344053.stm>.

<sup>42</sup> WTO (2011), Addendum, *supra* note 39.

<sup>43</sup> *Id.*, p. D-12.

<sup>44</sup> For a summary of the Panel’s Ruling see: WTO (2011), *China-Measures Related to the Exportation of Various Raw Materials*, 2011, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds398\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds398_e.htm); Kanaga Raja (2011), *WTO Rules Against China in Raw Materials Dispute*, Third World Network, July 7, 2011.

Export restrictions are seldom an efficient policy tool to address environmental externalities or conserve exhaustible natural resources.

provisions.”<sup>45</sup> Some of the important findings include:

*Obligations Pertaining to the Accession Agreement:* One of the key findings of the panel is that China violated its obligations under its Accession Agreement. Many observers were surprised about the strict interpretation of the legal text, which is currently challenged by China at the WTO’s Appellate Body. According to the Panel’s finding, the wording of the Accession Protocol did not allow for the use of general exceptions under Article XX of the GATT. This puts the country at quite a disadvantage vis-a-vis other WTO members. However, the panel argued that both China and the WTO members had been aware of this fact and intended such an interpretation during the accession negotiations so that there was no legal ground for invoking exceptions. Furthermore, the panel found that China failed to consult with its trading partners pursuant to Note to Annex 6 of its Accession Protocol before implementing the export restrictions.

*Prevention of a Critical Shortage:* On the issue of “critical shortage” of bauxite justified under Article XI:2(a) GATT, the panel specified that the term “critical shortage” referred to situations or events that are grave or provoking crisis and that can be prevented and relieved through the application of measures on a temporary, and not an indefinite or permanent, basis. The panel agreed that the product was essential to China but did not find a critical shortage of the material in question.

*Protection of Human, Animal, or Plant Life or Health:* The Panel further found that even assuming that China could invoke Article XX(b) of the GATT 1994 to justify its export duties contrary to its Accession Protocol, China failed to provide

the necessary proof to invoke Article XX(b) for its export duties on forms of magnesium, manganese, and zinc and its export quotas on coke and silicon carbide. China did not show that these measures would lead to a reduction in pollution in the short- or the long-run and thus contribute to an improvement of the health of its people. In general, the panel stated that “export restrictions are not an efficient policy to address environmental externalities when these derive from domestic production rather than exports or imports.”<sup>46</sup>

*Conservation of Exhaustible Natural Resources:* The panel specified, “in order for a measure to be justified under Article XX(g), the measure at issue must: (i) ‘relate to the conservation of an exhaustible natural resource’, and (ii) be ‘made effective in conjunction with restrictions on domestic production or consumption.’” The panel found that China met neither of these requirements on export quotas on bauxite and export duties on fluorspar. The panel argued that China was not able to demonstrate that it imposed restrictions on domestic production or consumption to conserve the raw materials in question. The panel also warned against unintended consequences: “export restriction on an exhaustible natural resource, by reducing the domestic price of the materials, works in effect as a subsidy to the downstream sector, with the likely result that the downstream sector will demand over time more of these resources than it would have absent the export restriction. This could offset the reduction in extraction determined by the export restriction.”<sup>47</sup>

### China’s Appeal

China’s appeal before the Appellate Body of the WTO came at little surprise. Among other points, China appealed the panel’s interpretation and

<sup>45</sup> WTO (2011), *China-Measures Related to the Exportation of Various Raw Materials. Reports of the Panel*, July 5, 2011.

<sup>46</sup> Id.

<sup>47</sup> Id.

application of the term “temporarily” and the panel’s interpretation of the term “critical shortages” in Article XI:2(a) of the GATT. Furthermore, China asked the Appellate Body to reverse the Panel’s finding on the phrase “made effective in conjunction with,” in Article XX(g) of the GATT 1994. China claimed that “the Panel erred in interpreting this phrase to require a showing that the ‘purpose’ of a challenged measure is to make effective restrictions on domestic production or consumption.”<sup>48</sup> The Appellate Body is likely to also spend some time on the panel’s interpretation of China’s Accession Protocol — another criticism voiced by China. The ruling will shed some more light on the relationship between accession agreements and WTO rules as well as specify central terms within Article XI and XX. A verdict is expected in December 2011; the ruling is likely to become available for the public in early 2012.

While the WTO legal order does not feature a rule of binding precedent, i.e. previous decisions have no binding force, they are not be ignored, due to their persuasiveness. “China — Measures Related to the Exportation of Various Raw Materials” will, at least in part be indicative for future disputes on export restrictions.

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<sup>48</sup> WTO (2011), *China-Measures Related to the Exportation of Various Raw Materials*. Notification of an Appeal by China under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review, September 2, 2011.

# 5 OPTIONS FOR THE EUROPEAN UNION AND THE UNITED STATES

*The Transatlantic Innovation Action Partnership is an important forum to advance EU-U.S. cooperation on raw materials.*

**G**iven the WTO panel ruling on “China — Measures Related to the Exportation of Various Raw Materials” and the limitations of multilateral trade law, what options are on the table for the United States and the EU to effectively discipline export barriers while at the same time leaving enough policy space for addressing environmental and security concerns? The EU and United States should follow a four track approach:

1. Join forces in lobbying for a revision of WTO rules on export restriction;
2. Push for rules on export restriction within their current negotiations of free trade agreements (FTAs), while agreeing on a common legal language for these rules;
3. Address the root of the problem, assisting poorer countries in their efforts to reform their taxation systems and design sustainable mineral policies; and
4. Join efforts in designing comprehensive resource strategies in which trade policy is one of many instruments to secure supply with critical materials.

One forum to coordinate and further their efforts is the Transatlantic Innovation Action Partnership (IAP) under the Transatlantic Economic Council (TEC), as one of its initial topics specifically is critical raw materials, e.g. trade transparency and barrier elimination, investment, research, and innovation.

### Track I: Improving WTO Rules

Many observers hope that the current WTO ruling on Chinese export restrictions will be a benchmark for other disputes. While it has cast more light on some of the WTO rules pertaining to export restriction, it is a somewhat special case. Very few WTO members face such strict rules on export tariffs as China. Thus, trying to solve disputes over

export restrictions through the WTO’s dispute settlement procedure, while rules remain weak, promises limited success. Even worse, this strategy would be highly risky as it could intensify the rift between industrialized and developing countries within the WTO.<sup>49</sup>

The best way to go ahead would therefore be to adjust the rules book, subordinating export duties under the same strict rules as import tariffs, while at the same time allowing for the same exceptions clarifying the language therein. Accordingly, the EU strongly supported including the issue in the current negotiations, the Doha Development Round, asking for substantive commitments by all WTO Members to bind and eliminate or reduce export taxes. The EU tabled three main arguments for limiting export restrictions: 1) export taxes can have serious trade distorting effects, in particular when applied by major suppliers; 2) export taxes can serve as indirect subsidization of processing industries, creating unfair trade advantages; and 3) export taxes can serve to displace imports on the market of the exporting country.<sup>50</sup> To get the issue on board despite strong opposition from the developing countries, the EU resorted to quite a creative approach: It dealt with export tariffs in its NAMA proposal (non-agricultural market access negotiations) on non-tariff barriers (NTBs) to trade, declaring the issue a “tax” matter — albeit with little success. The most recent draft modalities for NAMA do not refer to the EU’s proposal. Slightly more promising was an initiative by the United States, Japan, and Korea on transparency, focusing on export licensing. In addition, export restrictions were also discussed during the agriculture negotiations. While most participants agreed that some disciplines were needed to ensure

<sup>49</sup> C. Barfield, *Trade and Raw Materials — Looking ahead*, September 29, 2009, <http://www.aei.org/speech/28745>.

<sup>50</sup> J. Kim, *Recent Trends in Export Restrictions*, OECD Trade Policy Working Paper No. 101, 2010, p. 20.

stable supplies for importing countries, there was no agreement on the scope of these disciplines.

A modification of WTO rules, although desirable, is currently therefore rather unlikely. An alternative would be to push for a plurilateral agreement within the WTO, modelled along the lines of the Plurilateral Agreement on Government Procurement. Membership in these agreements is voluntary. Without doubt, such an approach would not be easy: First, it would go against the Single Undertaking approach of the Doha Round, requiring that every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. In other words, "Nothing is agreed until everything is agreed." Second, a like-minded countries' accord like this would barely be able to tackle the problem, as major commodities producers such as China are very likely to join and thus also not be bound to these regulations. Third, most developing countries are in fierce opposition to such an approach.

Despite these restrictions, the EU and United States should continue to lobby for stricter rules on export barriers to trade within the context of the WTO, exploring possibilities of forming a plurilateral agreement on the issue which could serve as stepping stone for including stricter rules in the WTO texts further down the road. It is clear that the United States and the EU will only succeed if they join forces on the issue.

### Track II: Using FTAs to Enforce Free Trade

While the scope and ambition of rules on export restrictions vary among the bilateral and plurilateral PTAs (preferential trade agreements such as free trade agreements [FTAs] and customs unions [CUs]), some FTAs go well beyond the WTO, including stricter rules on export tariffs. For example, export taxes are prohibited among the member countries of several regional FTAs

such as the EU, the North American Free Trade Agreement (NAFTA), and the Mercado Común del Sur (Mercosur). They are also prohibited in some bilateral FTAs, including, among others, the FTAs between Canada and Chile, Canada and Costa Rica, and Japan and Singapore, Australia and New Zealand as well as between the EU and Mexico.<sup>51</sup> As both the EU and the United States are currently engaged in several FTA negotiations, would this be a viable option to discipline the use of export barriers?

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

While these are serious limitations, FTAs have, in the past, served as a way to tackle issues that are not yet ready for WTO negotiation such as services and intellectual property rights. Thus they serve as a kind of laboratory for new rules that

*FTAs can serve as stepping stone for stricter WTO rules on export restrictions.*

<sup>51</sup> R. Piermartini (2004), *The Role of Export Taxes in the Field of Primary Commodities*, [http://www.wto.org/english/res\\_e/booksp\\_e/discussion\\_papers4\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/discussion_papers4_e.pdf), p. 2.

*The United States and the EU need to address the root of the problem, taking into account different motivations for export restrictions.*

can, when the time is ripe, be transferred to the multilateral level. It is therefore a strategy worth following. At the same time, it would be advisable for the transatlantic partners to agree on a common language on new rules to make them compatible and easily transferable to the WTO when the time comes.

### **Track III: Addressing the Root of the Problem: Governance Assistance**

While China stands at the center of attention and criticism, most export restrictions are in fact applied by the less and least developed countries, and motivations behind them vary greatly. Whilst in general, income from (import and export) tariffs as percentage of overall government revenues has decreased steadily, least developed countries, in particular, still consider them a reliable source of income. They often find raising government revenues through export tariffs easier than through more complicated and politically difficult forms of taxation such as income or property taxes.<sup>52</sup> Another reason for implementing export barriers is a critical shortage of essential products, foremost foodstuffs. During the food crisis in 2007/2008, when prices for many agricultural products skyrocketed, many developing countries resorted to export restrictions to protect the local population from shortages. Last but not least, many developing countries resort to export barriers to address human health and environmental concerns.

Thus, the first step in effectively addressing export restrictions must always be a careful analysis of the motivation behind a certain export barrier. Thus, in some cases, for instance China's export restrictions on many raw materials, WTO dispute settlement is the right instrument to address the problem. In other cases, however, development/governance assistance to improve public finance, taxation of

<sup>52</sup> *Id.*, p. 3.

extractives industries, and the environmental and social impact of resource extraction might be a more promising way to go. Resource governance is already an important issue within both European and U.S. development assistance. To improve the effectiveness of these bilateral efforts, the EU and United States should work more closely together on the ground so that developing countries do not have to resort to export barriers in the first place.

### **Track IV: A Comprehensive Resource Strategy**

It is self-evident that trade policy is only one of many instruments needed to secure a reliable supply of critical materials at sustainable prices. Both transatlantic partners are therefore currently in the process of developing comprehensive strategies, which include three elements: 1) diversifying the global supply chains by securing access to resources abroad and facilitating extraction, processing, and manufacturing at home; 2) developing material and technology substitutes, enhancing recycling, and a more efficient use of resources; and 3) increasing transparency on resource availability and demand, and publishing regular reports on critical materials. While the strategies differ slightly with regard to the weight attached to their components — the United States emphasizes utilization of domestic resources, while the EU's strategy has a stronger focus on domestic approaches to resource efficiency and market access abroad — there is much space for a collaborative effort. What's more, they have already the forum to do so: the Transatlantic Innovation Action Partnership.

The Innovation Action Partnership Work Plan was launched at the TEC meeting in December 2010 to strengthen joint efforts to promote innovation and the commercialization of emerging technologies. The EU and United States agreed to cooperate on the development of innovation policies that will encourage productive, growth enhancing policies,

access to raw materials, and the development of eco-friendly products. With regard to raw materials, the transatlantic partners announced collaboration on: 1) research across the value chain, including on recycling, mining, and substitution; 2) limiting the number of trade distortions jeopardizing the efficient use of resources, encouraging governments to pursue least-trade restrictive policies; and 3) creating an environment favorable to investment and the development of production and transport capacities of raw and recycled materials. Just recently, at its sixth meeting in Washington D.C. on November 28, 2011, the TEC agreed to work more intensively together to ensure the supply with critical raw materials by developing trade policy strategies to eliminate barriers as well as by working together on research and recycling.<sup>53</sup> While this is a good start, concrete action now needs to follow.

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<sup>53</sup> Transatlantic Economic Council, *EU-U.S. Transatlantic Economic Council Joint Statement*, November 29, 2011, Washington D.C. <http://eurunion.org/eu/EU-U.S.-Transatlantic-Economic-Council-Joint-Statement.html>; PR News Wire, *EU and U.S. Boost Economic Partnership*, November 29, 2011, <http://www.prnewswire.com/news-releases/eu-and-us-boost-economic-partnership-134712038.html>.

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