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**Export controls as industrial  
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regulatory limitations on china  
– raw materials and china – rare  
earths cases**

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TWENTY YEARS OF WTO

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# Export controls as industrial policy on natural resources: regulatory limitations on china – raw materials and china – rare earths cases\*

Gustavo Ferreira Ribeiro\*\*

## Abstract

This paper evaluates the legal boundaries of export controls as industrial policies on natural resources, emphasizing articles XI, XX(i), and XX(j) of the GATT-94. The context comes from the concerned restrictions that led to the China – Raw Materials and China - Rare Earths cases at the WTO. Much of the literature has been focusing on systemic linkages: trade and environment/public health. Despite its importance, this paper innovates by focusing on the discretionary space of export controls as industrial policies that Members may adopt, without resorting to any environmental or public health arguments. Indeed, whether in Raw Materials the term industrial policy is not found in the dispute reports, in Rare Earths it appears at least thirty times in the Panel's report. After the analysis, this paper suggests distinct conformation of these spaces. Article XI of the GATT-94 would convey constricted space for export quotas due to time, substantive, and circumstantial criteria. Article XI of the GATT-94, on the other hand, would provide considerable room for export duties; though Members with specific accession commitments (e.g. China), may have curtailed it, as interpreted by the Appellate Body. Finally, Articles XX(i) and XX(j) of the GATT-94 would rarely accommodate “ordinary” industrial policies. Their use attaches to stabilization plans and international emergencies, respectively. As the economics implications of the concerned measures were not analyzed, the paper also paves the way for future law and economics perspectives on this topic.

**Keywords:** Exports Controls. Industrial Policy. Raw Materials. Rare earths. WTO.

## Resumo

Este artigo avalia as fronteiras legais de medidas de controles de exportação adotadas como parte de políticas industriais sobre recursos naturais, com ênfase nos Artigos XI, XX(i) e XX(j) do GATT-94. O contexto da discussão decorre de medidas desta natureza que culminaram com os casos *China – Matérias-Primas* e *China – Terras-Raras* na OMC. Muito da literatura relacionada aos casos foca questões sistêmicas: comércio e meio-ambiente/saúde pública. Apesar da importância dessas abordagens, este artigo inova ao analisar o espaço regulatório das medidas, sem qualquer recurso à retórica de meio-ambiente ou de saúde pública. De fato, se em *Matérias-Primas* o termo política industrial não é encontrado nos relatórios das decisões, em *Terras-raras* ele aparece pelo menos trinta vezes no Relatório do Painel. Após a análise, este artigo sugere conformações distintas de espaços regulatórios. O artigo XI do GATT-94 proporcionaria espaços restritos para o uso de cotas de exportação, em função de critérios temporais, substantivos e circunstanciais. Por outro lado, ofereceria espaços consideráveis para tarifas de exportação; embora Membros com compromissos específicos de acesso, como a China, podem tê-los diminuído, como interpretado pelo Órgão de Apelação. Finalmente, os Artigos XX(i) e XX(j) do GATT-94 dificilmente acomodariam políticas industriais convencionais. O uso destas exceções alude a planos de estabilização e emergências

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internacionais, respectivamente. Como as implicações econômicas destas medidas não foram analisadas, o artigo sugere pesquisas futuras no tema, com aportes jurídicos e econômicos.

**Palavras-chave:** Controles de Exportação. Política Industrial. Matérias-Primas. Terras-raras. OMC.

## 1 Introduction

Export controls on natural resources, adopted by China in the last decade, have sparked a complex discussion among WTO Members.

Measures of these nature – export controls on its own natural resources – are not unheard in the international trade history. In practice, they are observed since mercantilism (as a French law that prohibited gold exports in 1540), along the industrial revolution, between the Great Wars and also in the era of trade multilateralism.

However, the topic shall be revisited and expanded for at least two reasons: firstly, because the legal boundaries of export controls have been clarified<sup>1</sup>, though in distinct degrees; secondly, because it crosses a broad spectrum of economic interests, involving global chains and natural resources, and regulatory interests, related to industrial policy and environmental conservation.

Three situations illustrate the complexity of those interests: Brazil has mineral resources of different variety and strategic purposes, such as the elements called *rare earths*<sup>2</sup>. A specialized publication in the mining

industry also reports that the Mexican government will fund, in the near future, efforts to locate new rare earths deposits, since the known ones under the West Coast Sea are hardly extracted.<sup>3</sup> Yet, the expression *raw materials diplomacy* looms large in the international economic relations as a reference to the European Union articulation pro an international understanding to guarantee the supply of strategic raw materials. The visit of the Brazilian president in Germany, in 2012, was symptomatic. It was suggested, in that occasion, a strategic partnership with Brazil in raw materials, such as rare earths, aiming at stable supply, taking in consideration the implementation of the Chinese export restraint measures.<sup>4</sup>

In terms of international litigation, two recent cases brought to the WTO reveal more about the legal boundaries of export controls: *China – Raw Materials*<sup>5</sup> and *China Rare earths*<sup>6</sup>. Much of the literature about the cases has been focusing on the systemic issues and the trade and environmental linkages.<sup>7</sup> Despite

3 JAMASMIE, Cecilia. Mexico's Government to Fund Rare Earth Exploration. *Mining.com*, 23 mai 2014. Available at: <<http://www.mining.com/mexicos-government-to-fund-rare-earth-exploration-95877/>>. Last access on: 27 jul. 2014.

4 Brazil may have an important role on rare earths with estimates of reserves roughly at 3,5 billions of tons in places such as the Amazon and the Araxá-MG region, as reported in Brazilian papers. See RIBEIRO, G. F. Restrições à exportação de matérias-primas, multilateralismo e implicações para o Brasil. *Pontes: informações e análises sobre comércio e desenvolvimento sustentável*, v. 8, n. 3, p. 12-14, jun. 2012.

5 WORLD TRADE ORGANIZATION. Panel Reports. *China: Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)*. WT/DS394/DS395/DS398/R. 05 jul. 2011; WTO Appellate Body Reports. *China: Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)*. WT/DS394/DS395/DS398/AB/R. 30 jan. 2012.

6 WORLD TRADE ORGANIZATION. Panel Reports. *China: Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (China – Rare Earths)*. WT/DS431/DS432/DS433/R. 26 mar. 2014; WTO Appellate Body Reports. *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (China – Rare Earths)*. WT/DS431/DS432/DS433/AB/R. 07 ago. 2014 (released after the paper was written).

7 See KARAPINAR, Baris. Defining the legal boundaries of export restrictions: a case law analysis. *Journal of International Economic Law*, Oxford, v. 15, n. 2, p. 443-479, jun. 2012 (covering, fundamentally, export quotas and article XI of GATT-94, the possibility of recourse to GATT-94 exceptions in relation to China's Accession Protocol, and environmental considerations). LIU, Han-Wei; MAUGHAN, John. China's rare earth export quotas: out of the China-Raw material gate, but past the WTO's finish line? *Journal of International Economic Law*, Oxford, v. 15, n. 4, p. 971-1005, dec. 2012 (scrutinizing the Chinese regime of export quotas and discussing environmental issues); CONDON, Bradly. Comentario sobre China: materias primas: informe del órgano de apelación.

1 Most of the time, when one observes the political debates and the cases brought to the WTO, they refer to Members controlling, restricting, or banning *imports* from other Members. Those measures take the form of taxes on imports, technical barriers, quotas, import licensing, among others. Those measures can be, sometimes, justified by the WTO exceptions. Export restrictions, as the name suggests, are measures taken on its own *exports*. They can also be employed in the form of taxes (export taxes), quotas (export quotas), or licensing procedures (export licensing). Normally, one assumes broader regulatory space on export controls.

2 As Serra suggests, in opposition to their name, rare earths are neither rare nor earth. The name accounts to the difficulty in separating them from other elements of the periodic table. Rare earths are numbered between 57 and 71 in the Periodic Table, with the most abundant being Cerium (Ce) and the less Thulium (Tu), though plentiful as silver. Their properties (magnetic, fluorescent and chemical) are useful for high aggregated products used by display, wind mill turbines, hybrid vehicles, photovoltaic cells, and optical fibers industries. SERRA, Osvaldo Antonio. Rare earths: Brazil x China. *Journal of Brazilian Chemical Society*, São Paulo, v. 22, n. 5, p. 811-812, mai 2011. p. 811.

the relevance of those approaches, the cases also reveal the probable limits of industrial policies that Members may eventually adopt without any resort to the environmental rhetoric.

In fact, industrial policies<sup>8</sup>, as part of governmental action, can embrace import tariffs, subsidies, support for research and development, among others. This paper deals only, after a historical digression, with export controls (such as export quotas and export duties) as part of these policies and their likely justification under Articles XI, XX(i), XX(j) of GATT-94. The paper suggests the conformations of different degrees of regulatory space for industrial policies on each of these articles.

## 2 Development

### 2.1 The rebirth of export controls: from mercantilism to the multilateral system

With the birth of the Nation-State it is possible to contextualize the first employment of export controls over natural resources. The mercantilism of the XVI and XVII centuries, for instance, promoted manufactured exports and raw materials imports, aiming at metal accumulation. At that time, metals were fundamentally *payment means* which accumulation was perceived as the source of power and wealth.

Douglas Irwin observes that, in theory, mercantilists would agree that is good to export manufactured and bad to import them; on the contrary, raw material imports is good and it is bad to export them.<sup>9</sup> History also tells how the discovery, extraction and distribution of precious metals (gold, copper and, principally, silver, by then) made possible the rise of Portugal, Spain and the Netherlands, as opposing the Ottoman Empire, disaggregating the Muslim dominance in the African and Asia trade.<sup>10</sup> It is precisely from the mercantilism period that one can observe examples of exports

restrictions on mineral resources, as a French law that prohibited gold exports (1540), among others.<sup>11</sup>

Interestingly, around four centuries later, article XX(c) of the GATT kept a text with the same purpose. Restrictive measures related to gold and silver imports or exports are justified. In this case, the rationale can be found in the contemporaneous role of gold and silver as monetary reserves.<sup>12</sup>

For focus, this paper does not develop the many details related to export controls on monetary issues – like the gold and silver crisis on the XVIII and XIX centuries, the emergency of the gold standard in the XX century, and the Great Wars and the Big Depression impacts on the overall discussion.<sup>13</sup>

The issue at stake in this paper is the recent flourish of natural resources export controls that are not related with monetary issues. An OCDE report informs, for example, three cases of export controls over molybdenum, chromite and rare earths;<sup>14</sup> those elements are inputs to high technology industrial processing.

The report tells that, in 2007, China imposed a 10% export duty on molybdenum concentrates and oxides and ferromolybdenum and a 15% tax on molybdenum powder, among others. Yet, export quotas were implemented and had their levels reduced one year after. The main Chinese allegation related to environmental reasons (e.g. target residues from the mining industry) and the preservation of natural resources.<sup>15</sup> Still in 2007, India charged *ad rem* export duties on chromite, aiming

11 KELLENBENZ, Hermann. *The rise of the european economy: an economic history of continental Europe 1500-1750*. London: HM, 1976. p. 39.

12 It is reported that in the preparatory work of the International Conference on Trade and Employment (1947-1948), the Indian delegation accepted the exception in relation to gold, but considered that silver should be taken out of article XX(c) in the quality as a commodity. UNITED NATIONS. *E/PC/T/C. II/54*, 16 nov. 1946. p. 33.

13 For the historical aspects, see the third chapter of NASCIMENTO, Marco Antônio Alcântara. *Restrições às exportações no sistema multilateral de comércio: reflexões sobre desenvolvimento, soberania e liberalização do comércio*. 2014. 224f. Dissertation (Master's Degree) – Programa de Mestrado e Doutorado em Direito, Centro Universitário de Brasília, Brasília, 2014.

14 KORINEK, Jane; KIM, Jeonghoi. Export restrictions on strategic raw materials and their impact on trade. *OECD Trade Policy Working Papers*, n. 95, 29 mar. 2010. paragraph 27.

15 KORINEK, Jane; KIM, Jeonghoi. Export restrictions on strategic raw materials and their impact on trade. *OECD Trade Policy Working Papers*, n. 95, 29 mar. 2010. paragraph 28.

*Revista de Derecho Económico Internacional*, v. 2, n. 2, 2012 (analyzing procedural and substantive aspects decided by the Appellate Body).

8 This paper does not enter the wisdom or foolish of these policies in terms of economic consequences.

9 IRWIN, Douglas apud GODD, Walter. *Dictionary of trade policy terms*. 4. ed. London: CUP, 2002. p. 227.

10 ERLICHMAN, Howard. *Conquest, tribute and trade: the quest for precious metals and the birth of globalization*. New York: Prometheus, 2010. p. 10.

at increasing its supply for the domestic downstream industry.<sup>16</sup> Just to contextualize, the chromite price was globally increasing as a result of Chinese consumption. As a consequence of the Indian measures, China begun to import from South Africa which, on its turn, expressed worries and also considered implementing export restrictions on chromite.<sup>17</sup> Finally, as to rare earths, it was China again that, at the end of 2006, among other measures, introduced a 10% export duties and increased rates in the two following years.<sup>18</sup>

From the application of the Chinese measures, the discussion evolved at the WTO resulting in the aforementioned paradigmatic cases which are contextualized in the following section.

## 2.2 The recent cases: China – raw materials and China – rare earths

As introduced, the *China – Raw Materials* and *China – Rare Earths* are relatively recent. In the first, the consultation process began in June 2009 with the United States and European Union request to China. Mexico joined the consultations later on, in August. In November 2009, the United States, the European Union and Mexico asked for the establishment of panel which occurred by the deliberation of the Dispute Settlement Body (DSB) in the same month. Brazil, among other Members, joined as third party.

The Panel report circulated on July 05, 2011. Due to China's appeal, the Appellation Body circulated its decision seven months later, on January 30, 2012. The dispute involved Chinese export restraints related to nine products: bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc – which inspired the name of the case. Generally, the products are raw materials largely

used in processing industry. The complaints identified as least for kinds of restrictions applied, in a variety of forms, by China: (i) export duties; (ii) export quotas; (iii) export licensing; and (iv) export minimum prices. In the DSB meeting, on January 28, 2013, China informed the promulgation of a new statute that would have removed the export duties and quotas on certain raw materials, which would have fully implemented the DSB recommendations.<sup>19</sup>

In *China – Rare Earths*, the United States requested consultations with China in March of 2012, pointing out many Chinese export restraints on rare earths, tungsten and molybdenum, similarly to the previous case. The European Union and Japan joined consultations later on.<sup>20</sup> The Panel report circulated on March 26, 2014. By the time this paper was written, the case was under appeal, as requested by the United States and China.<sup>21</sup>

The referred disputes take on many issues. For instance, China's Accession Protocol (CAP) and its relation to the WTO agreements is invoked and analyzed, since China has assumed commitments related to export controls in the Protocol, covering quotas and export duties. The Chinese allegations that some measures contributed to the objective of protecting human, animal or plant life or health (article XX (b) of GATT-94) are also scrutinized. In the same token, the contribution of the measures to the conservation of exhaustible natural resources is also on the spot (article XX (g) of GATT-94), among other issues.

Notwithstanding those questions, the interest of this paper are the controversies involving the impact of the decisions on the discretionary power of industrial policies on natural resources, once export controls are used. Are those measures compatible with the multilateral trade system, when they do not have any

16 KORINEK, Jane; KIM, Jeonghoi. Export restrictions on strategic raw materials and their impact on trade. *OECD Trade Policy Working Papers*, n. 95, 29 mar. 2010. paragraph 36.

17 KORINEK, Jane; KIM, Jeonghoi. Export restrictions on strategic raw materials and their impact on trade. *OECD Trade Policy Working Papers*, n. 95, 29 mar. 2010. paragraph 39-40. South Africa concerned on the long term effect of profitability on its processing industries.

18 KORINEK, Jane; KIM, Jeonghoi. Export restrictions on strategic raw materials and their impact on trade. *OECD Trade Policy Working Papers*, n. 95, 29 mar. 2010. paragraph 52.

19 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of various raw materials. 28 jan. 2013. Available at: <[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)>. Last access on: 27 jul. 2014.

20 It is curious to acknowledge the absence of Mexico as a complainant or third party in this case, contrary to its complainant position in *Raw Materials*.

21 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, tungsten and molybdenum. 29 aug. 2014. Available at: <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds431\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm)>. Last access on: 27 jul. 2014.



appeal to environmental or public health concerns? Since, by definition, those measures are trade distorting, in which circumstances are they, if ever, allowed of justified?

### 2.3 Export quotas and article XI of GATT-94

Imagine that a Member imposes export quotas with the objective of raising the supply of product to their local industry. The Member is straightforward about the objective of the measure as a pillar of its industrial policy. Do those measures find comfort on the WTO rules?

As known, the general elimination of quantitative restrictions, according to article XI: 1 of the GATT-94, deals not only with the eliminations on imports of products of other Members, but also on *exports* of products destined to other Members. This is a pacified point that comes straightly from the text of the agreement.<sup>22</sup>

Until recently, less developed in the GATT and WTO jurisprudence were the exceptions to Article XI (such as article XI:2(a) of GATT-94)<sup>23</sup> that could accommodate the imagined measure. Precisely, China invoked Article XI:2(a) as a defense to the applied quotas on refractory-grade bauxite, in tandem with other exceptions.<sup>24</sup>

China, in summary, raises the possibility of restricting exports because of strong foreign demand, physical exhaustibility, and/or domestic regulatory limits on access. China also mentions that the complainants themselves have recognized that refractory-grade bauxite is essential, necessary and critical to their economies. Moreover, complainants would have themselves applied prohibitions and restrictions on products that they deem essential for

22 Article XI:1 of the GATT-94: “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

23 Artigo XI:2 of the GATT-94: “(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party [...]”

24 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.227.

downstream domestic industries, for periods exceeding decades. To illustrate this point, China mentions a US 43-year-old restriction and prohibition on the export of unprocessed timber harvested in US federal lands and a European 37-year prohibition and restriction on the export of various types of ferrous and non-ferrous metal waste and scrap.<sup>25</sup>

A plain reading of Article XI:2(a) of the GATT-94 certainly suggests some room to justify those measures in the context of industrial policy, but under which limits? Once analyzed, the Panel divides the interpretation on the following terms: *temporarily, essential, to prevent or relief critical shortages*,<sup>26</sup> which are revisited on appeal in the same case and barely changed in the Panel’s interpretation in *Rare Earths*.

#### 2.3.1 Temporarily

In *China – Raw Materials*, the Panel, by looking at the literal meaning in the three official languages of the WTO, observes that *temporarily* is for *a time only* and *during a limited time*. On its turn, *limited time* would mean *appointed, fixed and circumscribed within definite limits, bounded, restricted*. These definitions would suggest a fixed time-limit for the application of measures addressing critical shortages of products essential to the exporting Member.<sup>27</sup>

While referring to other AB decisions about the need to read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously<sup>28</sup>, the Panel refers to the text of article XX(g) of GATT-94 that deals with the conservation of exhaustible natural.<sup>29</sup> To the Panel, if a time-based distinction would have not been made, Members could resort indistinguishably to either Article XI:2(a) or XX(g) to address the problem

25 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.241-7.242.

26 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.250.

27 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.255.

28 That the so-called principle of “effective-interpretation” or effectiveness in interpretation found in the international law doctrine.

29 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.256-7.257.

of an exhaustible natural resource.<sup>30</sup> This would, one can infer, jeopardize the principle of effective interpretation. The Panel also rebates the Chinese allegation about the need to use supplementary means of interpretation (in accordance with article 32 of the Vienna Convention)<sup>31</sup>. China's argument comes from the fact that Australia, at the time of negotiating the GATT 1947, requested the application of an export ban on merino sheep for an extended period of time, in support of its view that measures may be applied under Article XI:2(a) for extended periods. The Panel, however, disagrees and sees no need to resort to article 32, since the interpretation is not ambiguous or obscure.<sup>32</sup>

On appeal, the Appellate Body, also resorting to the dictionary meanings, posits that *temporarily* is defined as *[l]asting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need.*<sup>33</sup> Once played with *applied*, says the Appellate Body, the terms describes measures that are applied for a limited time, a measure taken to bridge a passing need, or measures that are applied in a interim.<sup>34</sup> It should be noted that the Appellate Body agrees with the Panel's interpretation that the prohibitions or restriction, under the meaning of Article XI:2(a) have to do with a finite measure, that is, applied from a limited time. However, the Appellate Body disagrees with the Panel as to the necessity of fixing the duration in advance.<sup>35</sup> In *Rare Earths*, on its

30 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.257.

31 United Nations Convention on the Law of Treaties, Article 32 - Supplementary means of interpretation: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

32 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.260.

33 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 323.

34 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 323.

35 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 330-331. See also CONDON, Bradly. Comentario sobre China: materias primas: informe del órgano de apelación. *Revista de Derecho Económico Internacional*, v. 2, n. 2, 2012. p. 105. KELLENBENZ, Hermann.

turn, there are no further discussions on this issue. The Panel just refers to what the Appellate Body, in *Raw Materials*, has decided.<sup>36</sup>

### 2.3.2 Essential

China's assertion is that the appraisal of *essentialness* of a product to a Member, which would be confirmed by the WTO Preamble as a context of interpretation, is a function of the quantitative contribution of the product through its entire value chain. This contribution could have been made as to the gross domestic product, education, healthcare, infrastructure, technological progress, or scientific research.<sup>37</sup> In addition, purportedly finding further support for this interpretation, a broad range of products could be considered essential: from serving basic consumptions needs to meeting economic needs (such as input needed for production).<sup>38</sup> The European Union, on its turn, points out that such a broad interpretation would render other provisions redundant. This would be the case of Article XX(i) of the GATT-94 that deals with export restrictions on domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry, in some circumstances<sup>39</sup> (issue that this paper will tackle later).

The Panel, in *Raw Materials*, starts the analysis looking at the meaning of *other products*, which is qualified by *essential to the exporting Member*.<sup>40</sup> As to the latter, extracting again the meaning from dictionaries, *essential to* means: *affecting the essence of anything; material,*

*The rise of the european economy: an economic history of Continental Europe 1500-1750.* London: HM, 1976. p. 8.

36 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/ DS431/DS432/DS433/AB/R, 07 ago. 2014. paragraph 7.453.

37 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.263.

38 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.264. This support would come from the Understanding on the Balance-of-Payments Provisions of GATT – 94, Article XXXVI:5 of the GATT-94 and its Ad Note.

39 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.264.

40 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.273.

*important, constituting, or forming part of, the essence of anything; and absolutely necessary, indispensably requisite.*<sup>41</sup> Later, by referring to the preparatory work of GATT-47, the Panel affirms that the reference to *essential to the exporting Member*, apparently, has been added to elucidate that the importance of any product should be *judged* in relation to the particular country concerned.<sup>42</sup>

However, the Panel also says that neither the terms of Article XI:2(a) of GATT-94 nor its negotiating history means that a Member can, *on its own*, determine whether a product is essential to it.<sup>43</sup> The Panel brings up the national security exception of article XXI(b) of GATT-94, to develop its rationale. Article XXI(b) of GATT-94 states that nothing in GATT-94 shall be construed to prevent any Member from taking any action which *it considers* necessary for the protection of its essential security interests. Supposedly, the broader discretion as to *essential* in article XXI(b), and the lesser one, in article XI:2(a) of GATT-94 is the absence of *it considers* in the latter.<sup>44</sup>

In sum, the Panel asserts that a product may be essential when it is important, necessary, or indispensable to a particular Member and this can include a product that is an input to an important product or industry. However, the determination of essentialness must take into account “the particular circumstances faced by that Member at the time that a Member applied the restriction”.<sup>45</sup> One can infer that the Panel tells apart the essentialness analysis in two aspects: who detains

the powers to determine the essentialness – not left to a particular Member; and, as a corollary, what are the circumstances related to essentialness – taking into account the particular ones that the Member faced. *Karapinar*, on the last issue, criticizes the Panel decision since the *benchmark* used for asserting the essentialness of the concerned *commodity* is not clear.<sup>46</sup>

In *Raw Materials*, the Appellate Body develops the interpretation of *essential* as part of the full set of terms in Article XI:2(a). First, it overlaps with the Panel that *essential* is defined as *absolutely indispensable or necessary*.<sup>47</sup> But read together, Article XI:2(a) of GATT-94 would sound as *critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products*. The inclusion of foodstuffs only indicates what can be considered essential for a Member, but not limiting the sense of essential products to foodstuff.<sup>48</sup>

In *Rare Earths*, likewise the interpretation of *temporarily*, the Panel does not provide further discussions on the topic. It just refers to what the Appellate Body has said, in *Raw Materials*.<sup>49</sup>

### 2.3.3 To prevent or relieve critical shortages<sup>50</sup>

At first, the Panel, in *China – Raw Materials*, and just as the previous methods of interpretation, construes the expression in accordance with its plain sense, in the following order: *prevent, relieve, shortage, and critical*. Among the available meanings, they would signify, respectively: *to anticipate in action, to act in advance of; to ease or mitigate; deficiency in quantity; and of the nature of, or constituting, a crisis* – as to the latter, the plain meaning would be *a turning-point, a vitally important or decisive stage*.

46 KARAPINAR, Baris. Defining the legal boundaries of export restrictions: a case law analysis. *Journal of International Economic Law*, Oxford, v. 15, n. 2, p. 443-479, jun. 2012. p. 10.

47 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 326.

48 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 326.

49 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/R, 26 mar. 2014. paragraph 7.453.

50 As a Portuguese native speaker, this author recalls that the Brazilian official translation comes straightly from the French version of the GATT-94: *pour prévenir une situation critique due à une Pénurie*. In the English and Spanish versions the expression is more concise and corresponds, respectively, to *para prevenir o remediar una escasez aguda* and *to prevent or relieve critical shortages*.

41 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.275.

42 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.275, footnote 465.

43 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.276.

44 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.276-7.277. In fact, this is one of the arguments since the Panel, when looking at *essential*, crosses other provisions, such as Article 4 of the BOP. The Panel, however, understands Article XI: 2(a) as broader than the BOP exception and does not use it to interpret *essential*. WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.278-7.279.

45 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.282.

<sup>51</sup> The Panel also agrees with the European assertion that *temporarily* contextually informs the notion of *critical shortages*. As a consequence, “if there is no possibility for an existing shortage ever to cease to exist, it will not be possible to ‘relieve or prevent’ it through an export restriction applied on a temporary basis”.<sup>52</sup>

On appeal, the Appellate Body basically follows the ordinary meaning put forward by the Panel.<sup>53</sup> It deepens the interpretation, however, by finding context of interpretation in the *general or local short supply* contained in Article XX(j) of GATT-94. In this sense, while Article XI:2(a) is qualified by *critical, shortages* (or *short supply*) of Article XX(j) of GATT-94 would not have been tempered in the same way. This textual distinction makes the Appellate Body, following the canons of effective interpretation, assert that the kind of shortages found in Article XI:2(a) of GATT-94 is more narrowly circumscribed than that of Article XX(j) of GATT-94.<sup>54</sup>

The Appellate Body also takes on the Chinese appeal about incongruence and incoherence about the statement that if there is no possibility for an existing shortage ever to cease to exist, it will not be possible to relieve or prevent it through a temporary export restriction. The point is made since the Panel recognized before the possibility of alleviating or eliminating shortages of an exhaustible natural resource, as a result of advances in reserve detection or extraction techniques, or even that new technology or conditions might lessen demand.<sup>55</sup> However, the Appellate Body maintains the Panel’s view since the interpretation referred to an “if-condition” statement; when there is no possibility for an existing shortage ever to cease to exist.<sup>56</sup>

51 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.294-7.296.

52 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.297.

53 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 324.

54 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 325.

55 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 342.

56 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum.

Karapinar disapproves the Appellate Body upholding on the grounds that the Panel “was referring to a factual situation in relation to the very nature of exhaustible natural resources, namely their inevitable exhaustion, drawing a crucial conclusion that an export restriction would not relieve or eliminate their shortage in supply”. The Panel conclusion would be incoherent once disregarding the idea of relative scarcity – remediable – and looking only at absolute scarcity.<sup>57</sup>

The Panel, in *Rare Earths* does not develop the issue. As already pointed out in relation to *temporarily* and *essential*, it just refers to what the Appellate Body had said in *Raw Materials*.<sup>58</sup>

### 2.3.4 Intermediate remarks

Once the legal limits of Article XI:2(a) of GATT-94 are disclosed, it appears to accommodate industrial policies dealing with natural resources; nonetheless, its utilization is circumscribed by time (*temporarily*), substantive (*essential*), and circumstantial limits (*prevent or relieve shortages*) sculpted by the jurisprudence.

Indeed, if in *Raw Materials* the term *industrial policy* is not found either in the Panel’s or the Appellate Body’s reports, in *Rare Earths* it appears at least thirty times in relation to export quotas. Moreover, the Panel not only admits Members rights to pursue industrial policies.<sup>59</sup> It also acknowledges that “the GATT 1994 and other WTO covered agreements generally allow Members to adopt measures in pursuit of their industrial policy needs, and even recognize that, in certain circumstances, Members’ industrial policy needs, and especially the imperative to protect vulnerable domestic industries, can override GATT obligations”.<sup>60</sup> Article XI:2(a) of GATT-94 is accordingly one of these circumstances.

WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 343.

57 KARAPINAR, Baris. Defining the legal boundaries of export restrictions: a case law analysis. *Journal of International Economic Law*, Oxford, v. 15, n. 2, p. 443-479, jun. 2012. p. 13-14.

58 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/R, 26 mar. 2014. paragraph 7.453.

59 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/R, 26 mar. 2014. paragraph 7.613, 7.804, 7.819, and 7.829.

60 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/R, 26 mar. 2014. paragraph 7.453.

## 2.4 Export duties and article XI of the GATT-94

Assume now that a Member imposes export duties on natural resource as part of its industrial policy to increase inputs for domestic markets. Would that measure be consistent under WTO Law?

The Panel report, in *Raw material*, may be understood as drawing two categories of Members at the WTO concerning the different regulatory space available to them to apply export duties. In the first (original membership and those whose terms of their accession protocols allows export duties), the space would be larger without prohibitions to use export duties. That discretion comes from the plain disposition of Article XI which excludes *duties, taxes or other charges from its scope* from its application. The second group would encompass acceding Members with specific export duties obligations in their Protocol of Access, such as China, in the paradigmatic cases.<sup>61</sup>

To the Panel, because of paragraph 11.3 of China's Accession Protocol (CAP), China would be constrained on the use of export duties. Importantly, it would also be limited to resort of GATT general exceptions, such as Article XX of the GATT-94.<sup>62</sup> The Panel *mindfully* makes this distinction and asserts that the situation created by this interpretation, if solely taken, is *imbalanced*. However, the Panel affirms that cannot find in the CAP, or in any other part, legal ground to interpret paragraph 11.3 of PAC as allowing resort to Article XX of the GATT-94.<sup>63</sup>

The Appellate Body analyses in detail a handful of objections placed on: the terms of paragraph 11.3 of PAC<sup>64</sup>; the reference made to Annex 6 of the PAC (a list of products on which export duties could be applied);<sup>65</sup> the reference made to Article VIII of the

61 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.160.

62 Paragraph 11.3 of CAP: "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994."

63 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.160.

64 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 279.

65 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum.

GATT;<sup>66</sup> the right of China to regulate trade in light of environmental and public health considerations; among others.<sup>67</sup> However, it upholds the Panel's decision for the absence of error in the interpretation. There would be no grounds in CAP, once a violation is found on the use of export duties, allowing the invocation of Article XX of the GATT-94.<sup>68</sup>

In *China – Rare Earths*, the Panel reenters the discussion on export duties, acknowledging the previous interpretation of the Appellate Body<sup>69</sup>. It recalls that, in 2012, China imposed export duties ranging from 5% to 25% on 58 products of rare earths, 15 of tungsten, and 9 of molybdenum. As those products were not listed in Annex 6 of the CAP, the Panel points out the incompatibility of those measures with paragraph 11.3 of CAP.<sup>70</sup>

In an extended examination, the Panel reconsiders whether paragraph 11.3 of CAP is subject to further defense under Article XX of the GATT-94.<sup>71</sup> Of core relevance, the Panel debates how to interpret *silence* in the PAC. Would the mere absence of reference in paragraph 11.3 of CAP, to Article XX of the GATT-94, be enough to refrain its application? China and Brazil – the later as a third party – recall the *US – Carbon Steel* case to respond negatively:

the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement ... [s]uch silence does

WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 281.

66 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 288-292.

67 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 300-306.

68 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/R, 26 mar. 2014. paragraph 300-307.

69 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/R, 26 mar. 2014. paragraph 7.35-7.40.

70 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/R, 26 mar. 2014. paragraph 7.48.

71 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/R, 26 mar. 2014. paragraph 7.54. The analysis starts by resuming the reports of *Raw materials*, as well as mentioning a request from China to a preliminar assessment of the issue, though denied.

not exclude the possibility that the requirement was intended to be included by implication.<sup>72</sup>

The Panel, nonetheless, finds *parallels* rather than discrepancy between *US – Carbon Steel* and *China – Raw Materials* since, amongst five depicted points, the texts in both cases do not make any express reference to the provisions of the text intended to be applied.<sup>73</sup>

The sensitiveness of this finding is made known in the Panel's conclusion. The Panel emphasizes the limited implications of its findings, "in terms of China being able to adopt and maintain measures to protect the environment and the life and health of its population".<sup>74</sup> Truly, the conundrum leads to a separate opinion stating that the obligations of paragraph 11.3 of the CAP are subject to the general exceptions (Article XX) of the GATT-94. Yet, the dissenting opinion also remarks that the measures would not survive the

72 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/ DS431/DS432/DS433/R, 26 mar. 2014. paragraph 7.66.

73 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/ DS431/DS432/DS433/R, 26 mar. 2014. The five coincident points are: first, they deal with treaty interpretation and they discuss whether a provision (paragraph 9 of Article 11(9) of SCM / article XX of the GATT-94) applies to another provision (article 21(3) of the SCM / paragraph 3.11 of the CAP), being negative the response (paragraph 7.67). Second, both analyses begin by searching the allegedly references to which resort is sought, being negative the answer (paragraph 7.68). Third, both cases consider the importance of using the technic of introducing references in the concerned agreements (paragraph 7.69). Fourth, they both dealt with the lack of a reference that is not observed in subsequent paragraphs (paragraph 7.70). Finally, both cases would have explained the necessity of establishing an overall equilibrium between the rights and obligations of Members and the WTO agreements would not offer specific orientation on this (paragraph 7.71). The Panel also debates the Chinese argument about the systemic relation between the CAP and the GATT-94 (paragraph 7.73-7.99); the terms *nothing in this agreement* contained in the chapeau of Article XX of the GATT-94 (paragraph 7.100-7.104); and the objective and purpose of the WTO Agreements (paragraph 7.105-7.114), though the Panel does not change its view about the inapplicability of Article XX of the GATT in relation to paragraph 3.11 of the CAP. About the later, the Panel, at the same time, agrees with China that an interpretation that left sovereign States legally aisled from adopting measures to protect human, animal or plant life or health would be probably incompatible with the objective and purpose of the Agreement. However, it disagrees with China that this would be a consequence of the Appellate Body's decision in *Raw Materials* (paragraph 7.114). In this sense, the Panel had previously quoted that China, in any moment, presented arguments to support the assumption that export duties were the only tool and way to face environmental and public health issues (paragraph 7.113).

74 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/ DS431/DS432/DS433/R, 26 mar. 2014. paragraph 7.117.

scrutiny of the standards of Article XX(b) of the GATT and the *chapeau* of Article XX of the GATT-94.<sup>75</sup>

In sum, it is clear that the regulatory space to apply export duties as part of an industrial policy on natural resources relates, to begin with, to the quality of the membership and the terms of the protocol of access, in case of an acceding Member. In the case of China, due to its protocol of accession, the conformation of this space is still under construction, considering the separate opinion and the current appeal on *Rare earths*.

## 2.5 Export restraints (in various types) and the downstream industry exception: article XX(i) of the GATT-94

Take for granted, at this point, export restraints applied out of the XI:2(a) contours as regards export quotas and duties. Would they be justified by other exceptions?

As introduced, along the *Raw Materials* dispute, China struggles to make use of the exception of conservation of exhaustible natural resources to justify the imposition of export duties on its refractory bauxite and fluorite. China suggests that Article XX(g) of the GATT-94 shall be interpreted in a manner that recognizes the sovereign Member rights on their natural resources. Additionally, *inter alia*, China points out that these rights must be exercised in the social and economic interest of the Members.<sup>76</sup> On the contrary, the US and Mexican submissions contend that China looks to incorporate the idea of *exercising rights over natural resources in its own social and economic interest* into the term *preservation*, altering the meaning of Article XX(g).

It is precisely in the context of interpretation of XX(g) that Article XX(i) of the GATT-94 comes into

75 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/ DS431/DS432/DS433/R, 26 mar. 2014. paragraph 7.119. The separate opinion tries to define the nature of paragraph 11.3 of the CAP. Whether the paragraph is part of the GATT-94, if it should be interpreted and applied as part of the Marrakesh Agreement, per se, or part of the WTO Agreement, but out of GATT-94. It concludes that it is part of China's obligations in trade of products, by adding to basic obligations of the GATT-94 related to border obligations (paragraph 7.138). Thus, once one cannot find an express rebuttal of Article XX in the CAP, the general exception should be applied in relation to paragraph 11.3 of the CAP.

76 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.364.

play.<sup>77</sup> Before that, the provision had never been dealt with in disputes. It is reported that the US and Mexico understand that the provision could be invoked to justify measures taken in the interest of downstream industry, provided that some conditions are met.<sup>78</sup> Inadvertently, while taking on the Chinese case over Article XX(g) of the GATT-94, which has well known standards, the complainants add a point that China had not even raised.

But once raised, the Panel refers to Article XX(i) as context to interpret Article XX(g), indicating that Article XX(i) takes care of situations in which exports restraints are applied to help the affected domestic industry. But even in this situation, the Panel recognizes, Article XX(i) “ensures consideration of the interests of foreign producers”.<sup>79</sup> The Panel, thus, finds symmetries to interpret both articles as part of a non-discriminatory system. That is to say:

Article XX(g), which provides an exception with respect to ‘conservation’, cannot be interpreted in such a way as to contradict the provisions of Article XX(i), i.e., to allow a Member, with respect to raw materials, to do indirectly what paragraph (i) prohibits directly. In other words, WTO Members cannot rely on Article XX(g) to excuse export restrictions adopted in aid of economic development if they operate to increase protection of the domestic industry.<sup>80</sup>

However, it sounds hard to find non-discrimination as a point of symmetry between the two provisions. At the same time that the Panel acknowledges that Article XX(i) cannot be imposed to increase the protection of the domestic industry,<sup>81</sup> it had previously

77 Article XX(i) of the GATT-94: “involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination”.

78 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.368.

79 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.384.

80 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.386.

81 WORLD TRADE ORGANIZATION. *China*: measures

admitted that Article XX(i) operates as to protect domestic industries. Article XX(i) seems to be, indeed, intrinsically discriminatory.

The argument is mitigated in practice for the very specific circumstances that Article XX(i) applies. *In dicta*, the Panel, turning to the scope of Articles XI:2(a) and XX(i) recalls that Article XX(i) applies in instances where a government ‘as part of a government stabilization plan’ holds the price below a benchmark world price.<sup>82</sup> This paper calls the attention thus to the potential difficulty to give meaning to Article XX(i) in a manner that conciliates explicit protection to the local processing industry with non-discrimination principles.

One can find support for this perception in debates about the GATT-47, just after its signature. In the 1950s, a Working Group (WG) was created with the specific mandate of exploring the GATT-47 provisions dealing with quantitative restrictions on exports and imports. As to the first, while analyzing the restrictions aiming at *promoting the processing domestic industry*, the WG affirms that:

the exemption of export restrictions associated with governmental stabilization plans contained in paragraph I (i) of Article XX [now Article XX(i)] might, in certain circumstances, be difficult to interpret, since a stabilization plan which maintains the domestic price at a level below the world price inevitably afford some advantage to the domestic industry; paragraph (i) refers to an increase in the protection afforded to the industry by the export restriction, but it may be difficult in practice to distinguish between the effects of the stabilization plan and the effects of the restriction.<sup>83</sup>

The WG concludes and adds that:

the Agreement [GATT-47] does not authorize the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its materials, or by reducing the supply of such materials available to

related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.386.

82 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R, 05 jul. 2011. paragraph 7.277, footnote. 466.

83 GATT. Working party “D” on quantitative restrictions: draft report to the contracting Parties. GATT/CP.4/D/5/Rev. 1, 21 march 1950. paragraph 11.

foreign competitors, or by other means. However, it was Agreed that the question of the objective of any given export restriction would have to be determined on the basis of the facts in each individual case.<sup>84</sup>

The issue is not reexamined on appeal in *Raw Materials*. In *Rare Earths* it comes out in the relation between Articles XX(g) and XX(i), and the Chinese arguments about the reach of its *conservation programs*, sovereignty over natural resources, and the management of resources supply. The Panel makes the point that the right of Members to “adopt ‘conservation programmes’ does not permit the exercise of boundless discretion such that WTO Members may adopt GATT-inconsistent measures as they see fit”. It would not be allowed, for instance, that Members apply measures based on Article XX(g) in “a way that achieves indirectly what other subparagraphs of Article XX, including Article XX(i), prohibit directly”.<sup>85</sup>

As noted, Article XX(i) offers room for regulation as part of a stabilization plan. This seems to demand, as a consequence, some event that has wobbled a Member. Hardly, an “ordinary” industrial policy containing export restrictions in any form, but out of the context of a de-stabilization event, could fit the exception. But shall the event happen, the non-discriminatory *standard* suggested by the Panel does not instruct much on how to conciliate industry protection and non-discrimination in the exception.

## 2.6 Export restraints and the general and local shortage exception conditioned by the equity partition obligation: article XX(j) of the GATT-94

Finally, in accordance with Article XX(j) of the GATT-94, one must wonder about the design of measures that restrain exports in order to acquire or distribute products in general or local short supply; provided, *inter alia*, that these measures are consistent with the principle that all Member are entitled to an equitable share of the international supply of such products. Have the cases built on this provision?<sup>86</sup>

84 GATT. *Working party “D” on quantitative restrictions*: draft report to the contracting Parties. GATT/CP.4/D/5/Rev. 1, 21 mar. 1950. paragraph 12.

85 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/AB/R, 07 ago. 2014. paragraph 7.269.

86 Article XX(j) of the GATT-94: “essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that

In *Raw Materials*, the debate on Article XX(j), similarly to what happened on Article XX(i), occurs in the interpretation context of Article XX(g). The European Union considers that the XX(j) exception, in the light of its *equity share* precept, would offer context of interpretation to the *impartiality* or *even-handedness* prescription found in Article XX(g).<sup>87</sup> The Appellate Body, on its turn, makes use of the exception as the context to interpret Article XI:2(a), not Article XX(g). It refers specifically to the *shortage* issue. While the shortage of Article XI:2(a) is qualified by *critical*, Articles XX(j)’s *shortage* do not receive the same adjective; as a result, the shortage, in the contours of Article XI:2(a) would be more narrowly defined than that from Article XX(j).<sup>88</sup>

In *Rare Earths*, once more, the dialogue on Article XX(j) is indirect and related, initially, to Article XX(g) requirement of *even-handedness*. But differently from the Panel in *Raw Materials*, the Panel understands that the equity share precept does not contribute as context to interpret Article XX(g). The Panel makes two arguments: “the fact that the concept of equity is explicitly invoked in Article XX(j) of the GATT 1994 but is not used in Article XX(g) leads to the Panel to conclude that this concept is not directly relevant in interpreting subparagraph (g)”. Secondly, *equity* would not offer further orientation to the interpretation of even-handedness in Article XX(g).<sup>89</sup>

Along the analysis about the application of the *chapeau* of Article XX, a little more on the history of Article XX(i) comes out. The Panel refers to the

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all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. Members shall review the need for this subparagraph not later than 30 June 1960.” In the search made (July of 2014), the author has not found the referred examination.

87 This paper refers to prescription, since *impartiality* is a case law concept that arises for the first time in the Appellate Body report in *US - Gasoline*. The Appellate Body name impartiality the text of Article XX(g), *in fine*, “measures are made effective in conjunction with restrictions on domestic production or consumption”. WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/R. 05 jul. 2011. paragraph 7.390.

88 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS394/DS395/DS398/AB/R, 30 jan. 2012. paragraph 325.

89 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/AB/R, 07 ago. 2014. paragraph 7.323.



summary of a meeting held in 1965 that tells the drafting circumstances of the provision: *severe shortages caused by war and other emergencies*.<sup>90</sup> All of these would confirm that Article XX(j) should not be used as context to interpret Article XX(g). Moreover, taken Articles XI:2, XIII (Non-Discriminatory Administration of Quantitative Restrictions), XXVIII (Modification of Schedules), and Article XX(i) of the GATT-94 together, the objective of the WTO rules would come clear on the table: “the overarching goal or concern [...] is to reduce distortion in trade flows caused by such restrictions and ensure that Members maintain the irrelative position vis-à-vis each other with respect to their market shares and access to goods and materials”.<sup>91</sup>

Similarly to the conclusions on Article XX(i), Article XX(j) seems to offer regulatory space for export restraints in very peculiar circumstance: the first, *as part of a stabilization plan*; the latter, as the drafting history indicates, in case of *severe shortages caused by war and other emergencies*.<sup>92</sup> Industrial policies would barely be encompassed by the exception.

### 3 Final remarks

This paper aimed at exploring the legal boundaries for Members to adopt export restraint measures in

90 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/AB/R, 07 ago. 2014. paragraph 7.359, footnote 551.

91 WORLD TRADE ORGANIZATION. *China*: measures related to the exportation of rare earths, Tungsten, and Molybdenum. WT/DS431/DS432/DS433/AB/R, 07 ago. 2014. paragraph 7.359.

92 Though, nowadays, one still can question its *raison d'être* in the face of Article XXI (Security Exceptions) broader prescription.

the context of industrial policies related to natural resources, without resorting to environmental or public health arguments. As observed, history is cyclic and the subject reemerges in two paradigmatic cases: China – Raw materials and China – Rare earths.

On the menu of regulatory measures, and without any judgment about their economic wisdom, there are certainly other alternatives out (e.g. regulation of concession, royalties etc.) and within the WTO (e.g. export licensing) that may serve industrial policy objectives. Indeed, once a measure is chosen based on trade regulation as a way to promote domestic processing of higher value added products and increase of supply in local markets, inevitably, the debate shifts to the WTO arena.

The cases then become relevant to delineate the limits of these measures. Besides the higher discretion left to most of the Members to apply export duties<sup>93</sup>, the latest interpretation on Articles XI: 2(a), XX(i) and XX(j) of the GATT-94 points out to much less maneuver: in the first case, because of time (temporarily), substantive (essential), and circumstantial limits (prevent or relieve shortages) shaped by the cases; as to others, for the peculiar circumstances of stabilization plans and international emergency, respectively.

The polemic about the application of general exceptions in case of the wording of protocol accession remains open. With the current appeal on Rare earth, the relationship can be further clarified.

93 One could still wonder whether export duties would, in some circumstances, amount to a Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994.

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