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Pure Business, Law Enforcement or Sheer Politics? The EU's WTO Complaints against Chinese Export Restrictions on Raw Materials

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DEPARTMENT OF EU INTERNATIONAL
RELATIONS AND DIPLOMACY STUDIES

EU Diplomacy Paper

06 / 2013



College of Europe
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Department of EU International Relations
and Diplomacy Studies

EU Diplomacy Papers 6/2013

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The EU's WTO Complaints against Chinese Export
Restrictions on Raw Materials**

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About the Author

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Abstract

In light of the growing international competition among states and globally operating companies for limited natural resources, export restrictions on raw materials have become a popular means for governments to strive for various goals, including industrial development, natural resource conservation and environmental protection. For instance, China as a major supplier of many raw materials has been using its powerful position to both economic and political ends. The European Union (EU), alongside economic heavyweights such as the US, Japan and Mexico, launched two high-profile cases against such export restrictions by China at the WTO in 2009 and 2012. Against this background, this paper analyses the EU's motivations in the initiation of trade disputes on export restrictions at WTO, particularly focusing on the two cases with China. It argues that the EU's WTO complaints against export restrictions on raw materials are to a large extent motivated by its economic and systemic interests rather than political interests. The EU is more likely to launch a WTO complaint, the stronger the potential and actual impact on its economy, the more ambiguous the WTO rules and the stronger the internal or external lobbying by member states or companies. This argumentation is based on the analysis of pertinent factors such as the economic impact, the ambiguity of WTO law on export restrictions and the pressure by individual member states on the EU as well as the role of joint complaints at the WTO and political considerations influencing the EU's decision-making process.

Introduction

"There is oil in the Middle East; there is rare earth in China..." (Deng Xiaoping, 1992)¹

In light of growing international competition among states, globally operating companies and limited natural resources,² export restrictions³ on raw materials have become a popular means for governments to attempt to achieve various goals including industrial development, natural resource conservation and environmental protection.⁴ As trade is vital for securing access to such raw materials – with no country being entirely self-sufficient⁵ – export restrictions in the form of export taxes, quotas, licensing or minimum export prices on finite or renewable raw materials such as minerals or agricultural commodities can have a deleterious effect on global welfare, according to the WTO World Trade Report 2010.⁶ This is especially true when applied by a large country, as reducing the supply to world markets leads to higher international prices, puts inflationary pressures on poorer countries and fuels international tensions.⁷

While restrictive measures on exports have always been part of a government's policy toolbox, a new form of strategic use of such policies became apparent in September 2010: at that time, China's temporary ban on rare earth exports to Japan evolved into a maritime incident in the East China Sea and a subsequent political quarrel between the two countries.⁸ This event marked the "drawing of a line in the sand" according to Kingsnorth:⁹ first, it raised global awareness on China's quasi-monopoly on the production of a number of raw materials important to foreign

¹ Quoted in Krugman, Paul, "Rare and Foolish", *New York Times*, 17 October 2010.

² For reasons of simplicity, this paper uses the terms 'natural resources', 'raw materials' and 'strategic minerals/metals' interchangeably.

³ This paper understands export restrictions as "measures directly affecting exports" as broadly defined in the WTO's Trade Policy Review papers. Further, this paper makes no distinction between export duties and export taxes. Taken from: Kim, Jeonghoi, "Recent Trends in Export Restrictions", *OECD Trade Policy Papers*, no. 101, OECD Publishing, Paris, 2010, pp. 5-6.

⁴ UNEP, ITC & ICTSD, "Trade and Environment Briefings: Export Restrictions", *ICTSD Programme on Global Economic Policy and Institutions*, Policy Brief, no. 2, June 2012, International Centre for Trade and Sustainable Development, Geneva, p. 1.

⁵ *Ibid.*, p. 1.

⁶ World Trade Organization, *World Trade Report 2010 – Trade in Natural Resources*, WTO Publishing, Geneva, 2010, p. 42.

⁷ Kim, *op.cit.*, p. 11.

⁸ Zajec, Olivier, "China – Herr über die seltenen Erden" (China – Master of the rare earths), *Le Monde diplomatique*, no. 9342, 12 November 2010, p. 1.

⁹ Kingsnorth, Dudley J., "The Global Rare Earths Industry: A Delicate Balancing Act", *Deutsche Rohstoffagentur* (German Raw Material Agency), 16 April 2012.

manufacturing industries, as well as on the unreliability of China as a long-term supplier of these. Second, in light of former president Deng Xiaoping's famous expression quoted above, it also revealed the country's willingness to use this economic power as leverage to political ends. Third, the incident again fuelled the debate on how China has built up its strategic position to create trade-distorting effects, systemically giving domestic downstream industries a competitive advantage over foreign competitors by providing cheaper access to raw materials through the imposition of export restrictions.

Having failed to make any substantive progress with China as regards restrictive measures in bilateral fora, the EU, alongside the US and Mexico, launched a complaint at the WTO concerning export restrictions on several raw materials introduced by China in 2009.¹⁰ Having prevailed in the Appellate Body's ruling in the beginning of 2012, the EU – together with the USA and Japan – then filed another, different complaint with the WTO Dispute Settlement Body (DSB) on the question of export restrictions on rare earths, tungsten and molybdenum in March 2013.¹¹

Considering predictions that the issue of export restrictions is likely to be a permanent one – as some raw materials are finite and demand is growing¹² –, the present paper intends to analyze the EU's motivations in the initiation of trade disputes on export restrictions within the framework of the WTO. While particularly focusing on the above-mentioned cases of *China - Raw Materials*¹³ and *China - Rare Earths*,¹⁴ the underlying overall objective is to examine a broader set of factors – economic, systemic and political – which influence the EU's decision-making process with regard to the submission of complaints before the WTO DSB.

¹⁰ WTO cases arise between two governments, but in many cases more than one member is affected by the same measure. Then, one Panel can be established to hear the complainants in one formal disputes. See Sindico, Francesco, "Access to minerals: WTO export restrictions and climate change considerations", *Polinares – Working Paper*, no. 59, December 2012, p. 8; and European Commission, Directorate-General for Trade, "EU requests WTO panel on Chinese export restrictions on raw materials – Factsheet", Brussels, 4 November 2009.

¹¹ European Commission, "EU challenges China's rare earth export restrictions", IP/12/239, 13 March 2012, Brussels.

¹² UNEP, ITC & ICTSD, "Trade and Environment Briefings: Export Restrictions", *op.cit.*, p. 4.

¹³ Appellate Body Reports, "China – Measures Related to the Exportation of Various Raw Materials", WT/DS394/AB/R/WT/DS395/AB/R/DS398/AB/R, adopted 22 February 2012 (short: *China – Raw Materials*).

¹⁴ Official short title for DS432 "China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum".

The paper relies on a catalogue of criteria, on the basis of which the EU's economic, systemic and political motivations are successively assessed. First, bearing in mind that economic interests are at the heart of every case initiated by the EU at the DSB,¹⁵ the assessment of the *economic motivations* based on the EU is challenging export restrictions on raw materials will rely upon two indicators: one referring to the potentiality of economic impact, the other to the actual economic effects within the EU. The first indicator will be based upon the concept of criticality, introduced in the 2010 EU report on critical raw materials.¹⁶ It examines the potential economic impact on the EU's economy by looking at three aspects: the economic importance of the raw materials in question in terms of value-added of 17 broad sectors for the EU's manufacturing sector, the supply risks and the EU's degree of import dependence on these materials. The second indicator will focus on the extent to which EU companies, including both producers and processors, have to face serious competitive disadvantages compared to China's domestic downstream industry, and potentially cope with losses of employment and production capacities in the EU.¹⁷

Second, the analysis of the *systemic motivations* which push the EU to initiate complaints against export restrictions on natural resources will again rely upon two indicators. The first of these will be the EU's intention of creating a precedent of WTO case law,¹⁸ especially in the absence of clear WTO rules on export restrictions and a lack of clarity in the relationship between the GATT and WTO Accession Protocols by new WTO members. The second will focus on the degree to which the EU seeks to guarantee external coherence and respond to pressure by individual EU member states (on behalf of their respective industries) – either via external lobbying or internally through the member states in the Trade Policy Committee of the Council.

Third, in light of the interesting question of how political motivations play a role in the decision-making process considering the increasing number and length of some WTO cases, the examination of the *political motivations* will once again rely upon

¹⁵ Interview with EU Official, European Commission, DG Trade, Brussels, 14 March 2013.

¹⁶ European Commission, *op.cit.*, pp. 5-8.

¹⁷ European Commission, "EU challenges export restrictions on rare earths", MEMO 12/182, 13 March 2012, Brussels, p. 2.

¹⁸ In light of Article 3.2. Dispute Settlement Understanding (DSU), the provision of security and predictability to the international trade system is a central element. In the absence of a binding rule, this can be considered as a soft precedent for similar cases, as recently confirmed by the Appellate Body in *US - Clove Cigarettes* – stating that panels ought to ensure the core idea of this article.

two indicators. On the one hand, the EU's willingness to send a political message to the defendant to abide by the international trade rules will be scrutinised. Here, the structure and the decision-making process of the EU are especially interesting regarding the issue of retaliatory measures. On the other hand, the role of the other complainant parties and the degree to which they influence the decision-making process in the EU from the consultation phase to the actual contentious phase before the DSB deserves a closer analysis.

After the core analysis of the EU's economic, systemic and political motivations in the initiation of WTO complaints on export restrictions on raw materials, this paper's final section summarises the main findings and draws the conclusion that the EU is more likely to launch a WTO complaint, the stronger the potential and actual impact on its economy, the more ambiguous the WTO rules and the stronger the internal and external lobbying by member states or companies.

Analysis: China – Raw Materials and China – Rare Earths

Economic motivations I: The potential economic impact

In its Raw Material Strategy of 2008, coined "The Raw Materials Initiative – Meeting Our Critical Needs for Growth and Jobs in Europe", the EU already acknowledged that it would not be able to manage the transformation towards a more sustainable production as well as environmentally friendly products without using these so-called strategic metals.¹⁹ At the same time, it stated that "Europe is a supply chain economy" that procures its raw materials from "every part of the world" to empower its manufacturing industry, thus underlining the importance of free global trade for EU companies.²⁰

The following section first assesses the potential impact of export restrictions on raw materials on the EU's economy by looking at the economic importance of the concerned raw materials, the risks of supply and the EU's degree of import dependence on these materials. In a second step, the extent to which the EU industry is actually affected by these aforementioned measures will be analysed. The analytical focus lies here on the resulting competitive disadvantages compared to

¹⁹ European Commission, *The Raw Materials Initiative – Meeting Our critical Needs for Growth and Jobs in Europe*, *op.cit.*, p. 3.

²⁰ European Commission, *Raw Materials Policy – 2009 Annual Report*, Brussels, *op.cit.*, p. 8.

China's domestic downstream industry and the potential loss of employment and production capacities in the EU.

Economic importance of concerned raw materials

Raw materials play a significant role for high-tech and green business applications, so-called 'environmental technologies', as they increase energy efficiency and reduce CO₂ emissions. They are especially used in the automotive, equipment, chemicals and hi-tech electronics industries as well as for renewable energy, construction, machinery and modern aircraft production.²¹ In its efforts to evaluate the most crucial and economically important raw materials for its industries, the EU – calculating the value-added of 17 broad sectors covering almost 90% of total value-added for the EU's manufacturing sector in 2006 – has identified 14 critical raw materials out of 41 potential candidates.²² Four of these figure on the list of raw materials whose restricted access the EU has been, and still is, challenging in the selected WTO cases.²³ Among these are magnesium and fluorspar in the first case, and rare earths and tungsten in the second case. Considering only EU imports in non-energy industrial materials such as rare earths and other natural resources, their amount accounted for about 10% of overall imports to the EU in 2010, amounting to EUR 142 billion.²⁴

Against this background, the EU's economy and its industries rely to a significant degree on raw materials which – despite their general use in only small quantities – constitute the foundation of numerous industrial value chains of technologically sophisticated products within the EU.²⁵ Regarding their future economic importance to the EU, a report of the German Ministry of Economy and Technology stated that due to rapid technological change, the demand for raw materials by driving emerging economies is expected to evolve rapidly by 2030, making trade more important, but also increasing the likelihood of bottlenecks.²⁶

²¹ Korinek, Jane & Kim, Jeonghoi, "Export Restrictions on Strategic Raw Materials and Their Impact on Trade and Global Supply", in OECD, *The Economic Impact of Export Restrictions on Raw Materials*, Paris, OECD, 2010, pp. 104-105.

²² European Commission, *Critical Raw Materials for the EU – Report of the Ad-hoc Working Group on defining critical raw materials*, Brussels, 30 July 2010, pp. 16, 22.

²³ *Ibid.*

²⁴ European Commission, Directorate-General for Trade, "EU Trade Policy for Raw Materials Second Activity Report", Brussels, 30 May 2012, pp. 4-5.

²⁵ *Ibid.*; see also Korinek & Kim, *op.cit.*, pp. 104-105.

²⁶ European Commission, *Critical Raw Materials for the EU – Report of the Ad-hoc Working Group on defining critical raw materials*, *op.cit.*, p. 7.

Risk of supply

In addition to the evident economic importance of the selected raw materials for the EU, the risk of supply of these resources is a significant factor for the EU when challenging China's export restrictions. Indeed, in a report on critical raw materials, the EU points out itself that an upstream bottleneck in the supply of raw materials has the potential to "threaten the whole value chain"²⁷ of technological innovation.²⁸

First of all, many of the raw materials at issue in both WTO cases are produced in only a small number of countries.²⁹ While some of them are almost entirely produced in a single country, the production of many of them is often concentrated in three producing countries or mining regions, including China, Russia, South Africa and the US.³⁰ The case of China is particularly interesting in this regard: having a high share of world production in a number of raw materials, China has great influence on reducing or increasing the risk of supply, merely due to the concentrated production of, for instance, rare earths, tungsten and magnesium.³¹

Second, in many cases, China's high share of global production of raw materials is accompanied by a low level of substitutability as well as low recycling rates.³² This holds particularly true for the natural resources that are the object of EU complaints at the WTO. Substitution is limited in the cases of fluor spar and tungsten both due to high costs of alternatives or current technologies and apparent loss of performance – with regard to the technical and environmental aspects.³³

Third, an additional risk for a secure supply of raw materials is the environmental risk, that is, the intention of a country to protect its environment and, in doing so, endangering the supply of raw materials. Four of the selected raw materials in the WTO cases are particularly exposed to countries' measures of environmental

²⁷ *Ibid.*, p. 24. The report takes into account the political and economic stability, the level of concentration of raw materials, the availability of substitutes and recycling and the so-called environmental risk.

²⁸ European Commission, *Tackling the Challenges in Commodity Markets and on Raw Materials*, *op.cit.*, p. 12.

²⁹ Mildner, Stormy-Annika, "Securing Access to Critical Raw Materials: What Role for the WTO in Tackling Export Restrictions? - Four Proposal for a Transatlantic Agenda", *Transatlantic Academy Paper Series*, Washington, D.C., December 2011, p. 3.

³⁰ Korinek & Kim, *op.cit.*, pp. 107-108.

³¹ China's share in world production of these strategic minerals accounts for: 96.99% for rare earths, 93% for magnesium, 91% for tungsten, 36% for molybdenum and 20.22% for manganese. See European Union, "Economic Importance of Selected Raw Materials", 12 September 2012.

³² European Commission, *Critical Raw Materials for the EU – Report of the Ad-hoc Working Group on defining critical raw materials*, *op.cit.*, p. 7.

³³ *Ibid.*, pp. 36-38.

protection: rare earths, magnesium, fluorspar and tungsten. The poor environmental performance by China according to the World Bank EPI index not only explains in part China's will to control damaging mining practices, but also makes the recourse to means such as export restrictions appear to be all the more likely in the future.³⁴

Import dependence

Last but not least, despite having been undervalued by the EU in its strategic papers on critical raw materials, the EU's high import dependence is often said to be one of the most important factors for the EU when it comes to securing raw materials – making it vulnerable to price volatility and interruption in supply chains.³⁵ With regard to the strategic minerals in both WTO cases, the EU's import dependency often amounts to far more than 50%.³⁶ Combined with the fact that China is the largest producer of many raw materials, the economic vulnerability towards this single country is far greater than towards any other exporting country of raw materials – as exporting countries with a large market share will have by definition a stronger influence on world prices.³⁷

Economic motivations II: The actual effect on the EU's economy

Perhaps even more important than the potentiality of being economically exposed and affected by China's restrictive measures on raw materials exports, is the actual economic impact that the EU is facing. This includes a double pricing system, loss in market shares, limited access to raw materials and loss of employment within the EU. Generally speaking, export restrictions on strategic minerals result in an economic impact which can be distinguished from that of other materials or products, due to their particular features. These include their high importance to the EU's industrial value chain, concentrated production, few substitutes and high import dependence.³⁸ According to findings of the EU Ad-hoc Working Group, restrictive Chinese measures on strategic minerals cause an increase in global prices for these materials while also distorting global competition for downstream industries, given that Chinese processing industries have access to cheaper raw material supply than

³⁴ European Commission, *Critical Raw Materials for the EU – Report of the Ad-hoc Working Group on defining critical raw materials*, *op.cit.*, pp. 36-38.

³⁵ Mildner, "Securing Access to Critical Raw Materials", *op.cit.*, p. 3.

³⁶ European Commission, *Critical Raw Materials for the EU – Report of the Ad-hoc Working Group on defining critical raw materials*, *op.cit.*, pp. 77-81.

³⁷ Bellmann & Wilke, *op.cit.*, p. 199.

³⁸ Korinek & Kim, *op.cit.*, pp. 104-105.

do, for instance, EU competitors.³⁹ This can be considered as “an implicit subsidy for the domestic processing industries, providing them with an artificial advantage”, and resulting in the distortion of the level playing field that is guaranteed and provided for under international trade rules, especially WTO agreements.⁴⁰ Chinese processing firms then increase competition on the EU and international markets by offering, for instance, molybdenum products below actual costs, thanks to the local purchasing edge.⁴¹

In order to shed light on the high economic interests at stake for the EU, the Commission published figures regarding the total added value, as well as EU jobs directly or indirectly depending on the raw material industry. According to official documents, the EU business sector dealing with raw materials provides a total added value of EUR 1300 billion, employing approximately 30 million people within the EU. Also, the EU's imports of these natural resources accounted for a third of all EU imports, if energy imports are included. Leaving aside the energy industrial materials and focusing on rare earths and other raw materials, the imports weighed about 10% of overall imports to the EU at a value of EUR 142 billion.⁴²

Against this background, China's policy measures on strategic minerals can have the effect of reducing to a very small circle EU manufacturing companies in metals, increasing the dependency of leading-edge industries on monopolistic supplies, and result in the loss of a sector of the EU's economy. This is even before taking into account the meaningful costs in terms of loss of know-how and research and development capability.⁴³

Bearing in mind that the economic impact of restrictive export measures is difficult to assess,⁴⁴ the question of whether the EU has been affected or not, and to what extent, still needs to be raised. A brief analysis of the example of rare earths will help to shed light on this matter. According to EU sources, the impact of export restrictions

³⁹ European Commission, *Critical Raw Materials for the EU – Report of the Ad-hoc Working Group on defining critical raw materials*, *op.cit.*, p. 23.

⁴⁰ Kim, *op.cit.*, p. 13.

⁴¹ Plansee, “Impacts of export restrictions on an EU company in the refractory metals industry”, Conference on the EU Trade Policy and Raw Materials, European Commission, Brussels, 29 September 2008, p. 2.

⁴² *Ibid.*, p. 4-5; see also European Commission, Directorate-General for Trade, “Raw Materials”, Brussels, 28 January 2013.

⁴³ Hilpert, Hanns Günther & Kröger, Antje Elisabeth, “Chinesisches Monopol bei Seltenen Erden: Risiko für die Hochtechnologie” (China's Monopoly on Rare Earths: Risks for High-Technology), *DIW-Wochenbericht*, no. 19, 2011, p. 7.

⁴⁴ UNEP, ITC & ICTSD, “Trade and Environment Briefings: Export Restrictions”, *op.cit.*, p. 1.

on rare earths has been both the most significant and the most visible.⁴⁵ While some rare earth elements have seen drastic price increases of up to 1000% after the quota tightening by China in 2010, average export prices for all 17 rare earth elements are generally up to 100% higher compared to Chinese domestic prices.⁴⁶ As a result of this, EU companies were either obliged to abandon production of some products, increase final prices or relocate to China for a more viable access to raw materials.⁴⁷ Already in 2009, an independent analysis by the OECD found that export quotas and taxes imposed by China forced non-Chinese rare earth processors to pay 30% more for the supply, excluding costs for transportation and storage.⁴⁸ Different sources confirm that quotas imposed by China on rare earths have been significantly reduced from 2010 to 2012, with the level of demand being approximately 66% higher than the actual level of supply.⁴⁹ This evidently leads to tremendous competition among global operators in need of these metals, creating high uncertainty for all EU businesses across the value chains as far as predictable supply and stable global market prices are concerned.⁵⁰

Systemic motivations I: The defence and ambiguity of WTO law

Following its 2008 Raw Material Strategy, the EU has increasingly emphasised the importance of the enforcement of trade rules at the WTO in its subsequent reports on raw materials. In light of the length of DSB procedures and the subsequent absence of direct economic relief for EU companies, the idea of considering the merits of initiating WTO procedures, not only for the purpose of lifting export restrictions on vital raw materials, but also to create “important case law so as long as existing GATT rules lack clarity and are limited in scope” has been increasingly vocalised, particularly by the Ad-hoc Working Group.⁵¹ Furthermore, as the Commission exclusively represents the EU member states in trade matters, the influence of important member states is thought to be decisive in the EU’s decision-making, especially regarding the issue of external coherence.

⁴⁵ European Commission, “EU challenges export restrictions on rare earths”, pp. 1-2.

⁴⁶ European Union, “Economic Importance of Selected Raw Materials”, *op.cit.*

⁴⁷ *Ibid.*

⁴⁸ Korinek & Kim, *op.cit.*, p. 118.

⁴⁹ Kingsnorth, “The Global Rare Earths Industry: A Delicate Balancing Act”, *op.cit.*

⁵⁰ Korinek & Kim, *op.cit.*, pp. 116-120.

⁵¹ European Commission, *Critical Raw Materials for the EU – Report of the Ad-hoc Working Group on defining critical raw materials*, *op.cit.*, p. 9.

The following section thus scrutinises in a first step the EU's intention of defending international trade rules and of creating a precedent of WTO case law, especially in the absence of clear WTO rules on export restrictions, before looking in a second step at the degree to which the EU seeks to guarantee external coherence among its member states and responds to internal or external pressure by individual EU member states.

The defence of international trade rules

The EU expresses its clear support for the multilateral trade system and aims to ensure that others abide by their WTO obligations.⁵² Regarding export restrictions on raw materials, some experts argue that the WTO and its dispute settlement procedure "stand at the center of the EU's trade enforcement strategy".⁵³ Bearing in mind the EU's objectives to deter other countries from applying export restrictions,⁵⁴ one can assume that the EU saw a clear interest in defending WTO rules by bringing forward both cases against Chinese export restrictions. It was widely considered that the result of *China - Raw Materials* would furthermore have far reaching implications for the whole WTO system in general.⁵⁵ The reason for this will be scrutinised in the following section.

The lack of clear WTO rules on export restrictions

Since the EU has started the two 'high-profile' cases at the WTO against Chinese export restrictions, it has become well-known that the current WTO rules on the use of restrictive measures on exports are far less sophisticated than those governing the use of imports. Whereas export duties such as taxes are not explicitly addressed at all in the GATT, quantitative restrictions are forbidden according to Article XI:1 GATT, although exceptions to this provision remain quite unclear.⁵⁶ Those exceptions are, inter alia, the protection of human, animal, plant life and health as well as the conservation of natural exhaustible resources in Art. XX (b) and (g) GATT. Moreover, when China joined the WTO in 2001, it agreed to eliminate *all* taxes and charges on

⁵² European Commission, Directorate-General for Trade, *What is Europe's Trade Policy?*, Brussels, 2009, p. 4.

⁵³ Mildner, "Securing Access to Critical Raw Materials", *op.cit.*, p. 4.

⁵⁴ *Ibid.*

⁵⁵ Zhixiong, Huang, "EU-China Trade Disputes in the WTO", *International Review of Wuhan University*, vol. 6, 2007, p. 321.

⁵⁶ Bellmann & Wilke, *op.cit.*, p. 198.

exports as part of the Accession Protocol with the exception of some materials explicitly listed in the Annex and measures taken according to Article VIII GATT.⁵⁷

This constellation lead to the core problems in both WTO cases, especially *China – Raw Materials*: on the one hand, the rights available under the GATT and other international law to apply export restrictions on domestic natural resources and, on the other hand, the applicability of GATT exceptions to commitments made by a WTO member in its Accession Protocol.⁵⁸ In *China – Raw Materials*, China's argumentation was twofold: first, it argued that it had the right to regulate exports of its raw materials on the basis of the principle of sovereignty over natural resources recognised under general public international law. Second, China stated that it could invoke the exceptions and derogations available in Articles XX and XI to justify its export regime, even though it goes against the obligations contained within its Accession Protocol.⁵⁹ These exceptions include the conservation of exhaustible natural resources, the protection of public health and the relief of critical shortages of products essential to the exporting country.

The EU's rationale when going to the WTO is primarily an economic one; yet, according to some interviewees, a very welcome side effect of important cases is the establishment of a solid legal basis by clarifying existing WTO provisions.⁶⁰ This holds particularly true for cases which tackle a so-called systemic problem. As the EU has a clear stance in favour of free trade and against export restrictions of any kind, unless justified under WTO law,⁶¹ both *China - Raw Materials* and *China - Rare Earths* could easily create incentives to other governments to impose export restrictions on raw materials.⁶²

As mentioned before, *China - Raw Materials* has led to important clarifications and "may dissuade at least some countries" from applying China's policy of export restrictions.⁶³ First, the Appellate Body threw light on the matter of how principles of international law relate to the interpretation of WTO exceptions, finding that these do not permit a WTO member "to derogate from the commitments it had undertaken

⁵⁷ Rolland, Sonia E., "China – Raw Materials: WTO Rules on Chinese Natural Resources Export Dispute", *Insights*, vol. 16, issue 21, American Society of International Law, 19 June 2012.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Interview with EU Official, European Commission, DG Trade, Brussels, 14 March 2013.

⁶¹ European Commission, "EU welcomes WTO report on China's export restrictions on raw materials", *op.cit.*

⁶² Interview with Abbott, Roderick, former Deputy Director General with the European Commission and the WTO, Brussels, 11 April 2013.

⁶³ "The WTO and China: Hands slapped", *The Economist*, 7 July 2011.

under the WTO system".⁶⁴ Second, it also clarified the relationship between the GATT and a WTO member's Accession Protocol, ruling that if exceptions to Article XX GATT on export restrictions were to be legitimately invoked by a WTO member, the Accession Protocol "must expressly provide for such measures".⁶⁵

The EU thus welcomed this first ever ruling on export restrictions on natural resources,⁶⁶ especially since the jurisprudence of the Appellate Body can be considered as having the effect of a soft precedent with regard to the duty to ensure "security and predictability to the multilateral trading system" under Article 3.2 DSU.⁶⁷ Hence, regarding the still ongoing *China - Rare Earths* dispute, the established soft precedent obviously had an important impact on the EU's decision to start a second and similar WTO complaint against Chinese export restrictions and raised the EU's chances of success.

Systemic motivations II: The Commission as the member states' mandataire?

The next step will be to assess the degree to which EU member states and the industries concerned have influenced the Commission into taking up the issue and finally pursuing it before the WTO DSB. Therefore, both external and internal influence processes, such as lobbying or via the Trade Policy Committee of the Council will be examined.

Among the EU member states with considerable interests in the secure and predictable supply of raw materials are Germany, France and Italy. Germany's metal resources are almost non-existent; its industrial demand for these resources, however, is one of the world's largest, and its imports amounted to approximately EUR 22 billion in 2010.⁶⁸ A study of the KfW Group in 2011 identified very critical natural resources for Germany, including both tungsten and rare earths, for its automobile, renewable energy, engine-building and chemical industries.⁶⁹ As a net importer of

⁶⁴ Rolland, *op.cit.*

⁶⁵ *Ibid.*

⁶⁶ Two prior cases - *Japan - Semiconductor* and *Argentina - Hides and Leather* - dealt with export controls, yet these cases covered export restrictions mainly in light of Articles XI:1 and X:3(a) GATT.

⁶⁷ "Understanding on Rules and Procedures Governing the Settlement of Disputes", *op.cit.*, p. 354.

⁶⁸ Mildner, Stormy-Annika & Howald, Julia, "Deutschland", in Mildner, Stormy-Annika & Hilpert, Hanns Günther (eds.), *Nationale Alleingänge oder internationale Kooperation? Analyse und Vergleich der Rohstoffstrategien der G20-Staaten* (National unilateralism or international cooperation? Analysis and comparison of raw material strategies of the G20), SWP-Studie, German Institute for International Politics and Security, February 2013, Berlin, p. 59.

⁶⁹ *Ibid.*

metallic resources, France is highly dependent on trade for its supply.⁷⁰ Although its industrial sector only accounted for 13% of the GDP in 2012, France's automobile, aviation, defense and chemical industry still rely heavily on the import of metallic materials, especially molybdenum, aluminium and rare earths which are at stake in the cases before the WTO.⁷¹ Similarly, Italy as the EU's second largest steel producer and consumer is highly dependent on imports of raw materials, especially aluminium, zinc and fluorspar.⁷²

The means of internal lobbying

As part of the decision-making framework of the EU's Common Commercial Policy, the TPC has formally only a consultative function, but decisions taken within this former 'Article 113 (133) Committee' are usually followed by the Commission.⁷³ The Commission mostly initiates a case at the WTO after the consultation of the TPC, as the consensus-based approach in EU trade policy rarely requires the transfer to COREPER and subsequently the Council.

According to interviews conducted by the author, unanimous support among all EU member states was given in the concerned WTO cases for a number of reasons: first, raw materials figure high-up on the agenda since the EU's first strategy in 2008. Second, many European industries are reliant on them and consumers and workers risk being negatively affected in case of shortages. Third, divisions of protectionist versus liberal EU member states are nonexistent in export restriction matters on raw materials, as all of them have a clear stance against such measures. Finally, the enforcement of WTO commitments according to the principle of *pacta sunt servanda* is a top priority for member states, especially as there are not many supplying countries in raw materials. However, the launching of a WTO complaint is

⁷⁰ Wassenberg, Florian, "Frankreich", in Mildner, Stormy-Annika & Hilpert, Hanns Günther (eds.), *Nationale Alleingänge oder internationale Kooperation? Analyse und Vergleich der Rohstoffstrategien der G20-Staaten* (National unilateralism or international cooperation? Analysis and comparison of raw material strategies of the G20), SWP-Studie, German Institute for International Politics and Security, February 2013, Berlin, p. 79.

⁷¹ *Ibid.*

⁷² Benjamins, Malte Paolo & Hilpert, Hanns Günther, "Italien", in Mildner, Stormy-Annika & Hilpert, Hanns Günther (eds.), *Nationale Alleingänge oder internationale Kooperation? Analyse und Vergleich der Rohstoffstrategien der G20-Staaten* (National unilateralism or international cooperation? Analysis and comparison of raw material strategies of the G20), SWP-Studie, German Institute for International Politics and Security, February 2013, Berlin, p. 100.

⁷³ Niemann, Arne, "Deliberation and Bargaining in the Article 113 Committee and the 1996/97 IGC Representatives Group", in Naurin, Wallace (ed.), *Unveiling the Council of the EU: Games Governments Play in Brussels*, Basingstoke, Palgrave Macmillan, 2008, p. 129.

also the recognition of failure of bilateral talks as well as being time and resource consuming, so it is considered as a last resort for the EU.⁷⁴

Regarding the internal lobbying in both WTO cases, interviews revealed a certain reluctance of EU companies to collaborate with the Commission on information gathering regarding the impact of China's export restrictions.⁷⁵ This is due to fears of retaliation, particularly significant with regard to China, and as a result companies have through national governments actually been slowing down the proceedings that would lead to a potential WTO complaint.⁷⁶ The restricted number of firms concerned by a stable raw material supply further aggravated this issue.

The process of external influence

According to some interviewees, the external pressure exercised by some EU companies and respective member states – reluctant to share information and pursuing a more diffuse lobbying approach – has had a bigger impact on the Commission's action than internal lobbying in setting the subject of export restrictions high on the agenda and eventually bringing a case to the WTO.⁷⁷

First, important and vocal national federations such as the Federation of German Industries have actively been putting pressure on other EU member states and the Commission itself to challenge Chinese export restrictions on raw materials by linking them to a possible offshoring of hi-technology industries and green businesses from Germany.⁷⁸

Second, even more challenging to the EU are national raw material strategies adopted by a number of member states, including bilateral cooperation agreements to secure the supply of raw materials between governments and individual companies.⁷⁹ For example, the French-based group Rhodia concluded supply contracts with, inter alia, Australia.⁸⁰

⁷⁴ Interview with EU Official, European Commission, DG Trade, Brussels, 25 April 2013.

⁷⁵ Interview with Bourgeois, Jacques, former Senior Official with the European Commission, Bruges, 22 February 2013.

⁷⁶ *Ibid.*

⁷⁷ Interview with Abbott, Roderick, former Deputy Director General with the European Commission and the WTO, Brussels, 11 April 2013.

⁷⁸ Pache, T. "Rohstoffangst lässt Firmen auswandern" (Fear of raw material shortage leads firms to offshore), *Financial Times Deutschland*, 17 January 2012.

⁷⁹ Wassenberg, *op.cit.*, p. 78.

⁸⁰ Zajec, Olivier, "China – Herr über die seltenen Erden" (China – Master of the rare earths), *Le Monde diplomatique*, no. 9342, 12 November 2010, p. 7.

It was in the Commission's interest to guarantee fair access to and a secure supply of raw materials by challenging the WTO-inconsistent measures on exports applied by China. This was expected to prevent further action from individual member states that would undermine external EU coherence and avoid interstate competition over the access to precious raw materials.

Still, the question remains whether the Commission partly pursued its own institutional interests, particularly when considering the fears of retaliation against EU companies which rely on Chinese raw material imports. Bearing in mind the reluctance of EU member states and respective companies when challenging China at the WTO, the Commission has the possibility to link the issue at stake to a more general judicial problem in WTO law.⁸¹ In this way, the Commission reinforces the image of the EU as a defender of multilateral trade rules and thus its presence in international trade politics.⁸²

Political motivations I: Sending a political message?

Finally, to assess the so-called "politico-strategic rationale" of the EU's WTO complaints on export restrictions on raw materials, this section will examine the political motivations. It looks first at the EU's willingness to send a political message or retaliate against another WTO complaint brought by China, before scrutinising the role and influence of the other complainants and their political objectives.

First of all, the politico-economic circumstances surrounding both complaints, but especially *China - Rare Earths*, must be seen in light of the overall stalemate in EU-China trade relations. Despite a growing number of high-level fora, controversial issues such as the EU's granting of 'Market Economy Status' to China, the arms embargo, the EU's trade deficit and the failure of the negotiations for a Partnership and Cooperation Agreement overly politicise their relationship.⁸³ In addition to this, fears of a "fully fledged trade war"⁸⁴ might already have become a reality over the last few of years: the EU has launched several anti-dumping investigations against

⁸¹ Interview with EU Official on DSB, European Commission – DG Trade, Brussels, 14 March 2013.

⁸² Interview with Abbott, *op.cit.*

⁸³ Erixon, Frederik, "Mercantilist Misconceptions: A Détente Strategy for EU-China Relations", *ECIPE*, Policy Briefs, no. 8, Brussels, 2012.

⁸⁴ Chaffin, Joshua, "EU faces up to China over 'mother of all cases'", *Financial Times*, 31 January 2013.

China, even specifically targeting Chinese imports from downstream producers that have supposedly benefitted from its exports restrictions on raw materials.⁸⁵

Second, in the context of increasing trade frictions between the EU and China, the issue of retaliation has risen to the top of the EU's and other countries' agendas.⁸⁶ Under WTO law, retaliation is clearly prohibited in Article 3.10 of the DSU which established the principle of good faith. Yet, the EU has been suggesting that countries like China may tend to start WTO disputes in the wake of EU investigations or cases brought before the WTO, including the solar panel case.⁸⁷ Concerning *China - Rare Earths*, fears of retaliatory measures against EU companies or the EU itself were also present; but by acting jointly with the US and Japan, the EU hoped to avoid similar raw material cuts to those that targeted Japan in 2010.⁸⁸ Still, only nine days after the start of the case, China announced that it would impose anti-dumping duties on photographic paper imports from the EU, the US and Japan.⁸⁹

Third, regarding the question of whether the EU's action in the WTO cases is also politically motivated, it can be argued that the EU's internal structure – with the consensus-based involvement of different Directorates-General of the Commission and member states – only partly allows for this. Within the EU, once the issue has been raised by EU member states in the TPC, the Commission's Directorate General for Trade starts to investigate and gather information on economic, systemic and judicial impacts.⁹⁰ Based on a consensus-based recommendation of the TPC, the Trade Commissioner then takes the decision of whether to proceed to the diplomatic negotiating stage of a WTO dispute or not.⁹¹ There is an acknowledged margin for political deliberation on the Commissioner's level.⁹² However, once the dispute reaches the contentious stage and a panel is established, the Legal Service of the Commission takes over – putting forward the legal side of the case and cooling down political tensions, if they existed.⁹³

⁸⁵ *Ibid.*

⁸⁶ "China's economy and the WTO: All change", *The Economist*, 10 December 2012.

⁸⁷ Chaffin, *op.cit.*

⁸⁸ Beattie, Alan, "Fight against China on rare earths", *Financial Times*, 13 March 2012.

⁸⁹ Freedman, Jennifer, "China floods the WTO with Tit-for-Tat", *Bloomberg Businessweek*, 7 June 2012.

⁹⁰ Interview with EU Official on DSB, European Commission – DG Trade, Brussels, 14 March 2013.

⁹¹ *Ibid.*

⁹² Chaffin, *op.cit.*

⁹³ Interview with EU Official on DSB, Delegation of the European Union to the United Nations in Geneva, Geneva, 6 March 2013.

Political motivations II: The role of the other complainants

To further assess the political circumstances surrounding the EU's action at the DSB against China's export restrictions, the role of the other complainants – namely the United States, Japan and Mexico – including their influence on the EU's decision-making process is considered in the next section.

The fellow complainants: the USA, Japan and Mexico

When the US launched *China - Raw Materials* at the WTO in 2009, shortly after Barack Obama became President, experts presumed that this closely watched case was a first move of the new US administration to show its willingness to put more pressure on China to abide by the rules of the international trade system.⁹⁴ Even more so, *China - Rare Earths* was said to have strong political incentives “to look tough on China” as 2012 was an election year, with Obama aiming to prove his rigorous stance on trade matters and outbid the Republicans' rhetoric against China with concrete administrative action.⁹⁵ Similarly, Japan's move in 2012 to complain against Chinese export restrictions marked the first time ever that the country had sued China at the WTO, demonstrating both an evident political decision as well as its enormous economic import dependence on China with regard to rare earths.⁹⁶ When Mexico joined the EU and the US in *China - Raw Materials* in 2009, this showed that not only industrialised countries were complaining against China but also emerging economies.⁹⁷

The impact on the EU's decision-making process

These circumstances had several consequences for the EU: the EU benefited in both WTO cases from the ‘troika’, especially in the first case. According to EU officials, the US were in the leadership position allowing for the EU to go along while taking the back seat.⁹⁸ In *China - Rare Earths*, although being more active in the elaboration and preparation of arguments, the EU stood in the shadow of the tough stance of the Obama administration on China, as well as Japan's politically motivated action.

⁹⁴ Paradise, James. F., „U.S.-China Trade Relations: Ideas for Improvement, *China-US Focus*, 8 February 2013

⁹⁵ Mildner, Stormy-Annika, „Seltene Erden: USA und China streiten um strategisch bedeutsame Metalle“ (Rare Earths: The US and China argue about strategically important metals), *German Institute for International Politics and Security*, 15 March 2012, Berlin

⁹⁶ Baroncini, E., *op.cit.*, p. 53.

⁹⁷ Interview with EU Official on DSB, European Commission – DG Trade, Brussels, 14 March 2013

⁹⁸ Interview with EU Official on DSB, Delegation of the European Union to the United Nations in Geneva, Geneva, 6 March 2013

This is particularly important when dealing with China since retaliation against EU companies, as mentioned above, is a wide-spread phenomenon and suing China in a larger alliance puts the complainants in a less tenuous position. Furthermore, with regard to economic, judicial and political cooperation as well as the coordination between the complainants, independent observers have assessed an “unprecedented concerted action”⁹⁹ between the EU, the US and Japan in *China – Rare Earths*, thus underlining the global significance of the issue.¹⁰⁰

Conclusion

This paper analyzed the EU’s motivations in the initiation of trade disputes on export restrictions on raw materials within the framework of the WTO, particularly focusing on the two ‘high-profile’ cases with China in recent years. To this end, a broader set of indicators – economic, systemic and political – that influence the EU’s decision-making process with regard to the submission of WTO complaints was established and subsequently examined.

First, the indicators measuring the economic motivations that push the EU to introduce complaints at the WTO underline that the EU’s economic interest always needs to be strong when going to the WTO. On the one hand, the potential economic impact of export restrictions by China on certain identified raw materials – four of them being the object of both WTO cases – was found to be significant to the EU. On the other hand, the real economic effects on EU companies due to the existing Chinese trade restrictions are also very important, especially in the rare earth sector. Concrete examples demonstrated how double pricing, supply uncertainty and loss of market share to Chinese downstream industries clearly affect EU industries. Hence, in light of the indicators discussed, the EU’s economic motivation, influenced by its willingness to alter both its vulnerable and economically exposed position regarding restrictions on certain raw materials, can be considered as highly significant.

Second, the indicators measuring the systemic motivations have revealed interesting insights. In light of breaches of WTO law and a need for clarification of the relationship between the GATT, China’s Accession Protocol and general principles of international law, the EU’s systemic concern in both WTO cases was high. Moreover,

⁹⁹ Baroncini, *op.cit.*, p. 53.

¹⁰⁰ Beattie, Alan, “Fight against China on rare earths”, *Financial Times*, 13 March 2012.

contrary to the assumption that it was primarily the internal pressure of EU member states with strong economic interests that led the Commission to act at the WTO, external lobbying seemed to be even more important, given the companies' reluctance to cooperate because of fears of retaliation. This is why the Commission – certain of the member states' support – pursues partially its own institutional interests which are of a more judicial nature. Thus, the EU's systemic motivation in challenging export restrictions on natural resources can be considered as significant, being strongly influenced by its defence of WTO law and the need for clarification of the rules governing international trade. The EU is of course also motivated by its constant pursuit of external coherence in the light of internal and, even more so, external pressure by individual EU member states and companies.

Third, the indicators measuring the political motivations of the EU have illustrated that the EU's internal structure does not encourage the pursuit of political interests at the WTO. The EU benefits from its co-complainants' more assertive political reasoning in the WTO cases, taking the backseat and thus being less exposed to China's potential retaliation. Further, if its partners are economic powers, the EU also benefits from the political and systemic importance of the WTO cases and, if won, is then able to send a stronger political message to the defendant party.

All in all, this study has revealed that in the context of complaints against export restrictions at the WTO, the EU's motivations are to a large extent economic and systemic and to a minor extent political. The EU's approach is therefore rather following "pure business" and "law enforcement" interests than pursuing "sheer politics". Overall, the EU is more likely to launch a WTO complaint, the stronger the potential and actual impact on its economy, the more ambiguous the WTO rules and the stronger the internal or external lobbying by member states or companies.

The relevance of the study – despite having contributed to the yet largely unexplored field of the EU's use of the WTO DSB regarding the recent phenomenon of export restrictions on raw materials – must also be seen in the larger context of the EU's challenges at the WTO. The catalogue of criteria, while not claiming to be exhaustive in any sense, can be used to examine the EU's intentions in different cases at the WTO; yet, the significance of systemic and political interests might not be given to the same extent as raw materials are currently high on the WTO members' agendas. Further research in closely connected areas could, for instance, focus on the EU's motivation in filing complaints at the WTO against economically weaker

WTO members as well as on the impact of unimplemented measures by the defendant party on the EU's interests at the DSB after having been previously successful.

Given the lack of substantial literature on the EU's use of the WTO as well as the topicality of the research subject (export restrictions on raw materials), the paper primarily had recourse to policy analysis, research papers and interviews. In addition, export restrictions on strategic raw materials are a recent phenomenon, and the existence of only two cases – both concerning China – renders generalisation rather difficult; further cases in the future can therefore reveal new details that might complete the picture of EU motivations at the WTO DSB.

This study opened with a quote of Deng Xiaoping revealing that China would plan to use its reserves of raw materials not only for economic development but also as leverage for political ends. Analyzing the EU's WTO complaints against China's export restriction in this regard demonstrated the EU's willingness to make China abide by the rules of international trade, not because of political intentions as one might expect, but for economic and systemic reasons. This further underlines the EU's commitment to tackling political abuse of economic power by insisting on and reinforcing the WTO's rule-based system.

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