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BOOK REVIEW

Chien-Huei Wu, *Law and Politics on Export Restrictions: WTO and Beyond*, Cambridge University Press, 2021, ISBN 9781108953566 (e-pub), doi:10.1017/9781108953566
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There is perhaps no better time than now for a book on export restrictions. One of the reasons that Chien-Huei's book is so relevant is because many issues explored in the monograph lead a 'real life' outside of the book. His work seeks to fill the gap in the academic literature with respect to the treatment of export restrictions in international law, where the disciplines of the World Trade Organization (WTO) take centre stage. Chien-Huei's book, however, is not limited only to the analysis of the WTO rules, covering also adjacent fields of investment treaties, competition law, and export controls. The book moreover takes into account political economy considerations and is written from the perspective of global supply chains, which would be of value to legal practitioners and non-lawyer audiences alike.

Chien-Huei begins his book with the fundamental question of how the notion of an 'export restriction' should be understood. In particular, should it be viewed as broader in scope than the general prohibition on quantitative restrictions captured by Article XI:1 of the General Agreement on Tariffs and Trade (GATT)?[1] This question cannot be answered without taking into account the WTO's overall attitude towards measures targeting exportation, that is to say measures adopted by an exporing country before goods leave its territory. Since the beginning, as the GATT in 1947, the WTO has generally contained comparatively fewer disciplines on policies affecting exportation than on policies affecting imports (that is, the policies adopted by an importing nation), focusing predominantly on the rules aimed at securing access to foreign markets.[2] Only in specific sectors, such as energy and natural resources, has there been the tendency of resource-rich countries to apply policies constraining exports. Besides the general obligation of Article XI of the GATT not to impose quantitative restrictions, such export restrictive practices were for a long time not meaningfully addressed in the GATT/WTO framework.[3] All this may have contributed to the subject of export constraining measures being underexplored.

Against this background, Chien-Huei appears to take a broad view on the scope of the notion of 'export restriction'. According to this view, a measure qualifies as an export restriction if it has a '*limiting* effect on exportation or the *potential to limit*', regardless of the specific legal form it takes.[4] Placing the emphasis on the limiting effect of a measure is, generally, in line with how the WTO adjudicative bodies have been deciding on whether a measure is a 'quantitative restriction' within the meaning of Article XI of the GATT.[5] Disregard for the legal form of a measure, however, makes the notion of 'export restriction' broader in scope than what is captured by Article

[1]1947 General Agreement on Tariffs and Trade (GATT), available at www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.
[2]P. C. Mavroidis, *Trade in Goods* (2013), at 59–60.
[3]A. A. Marhold, *Energy in International Trade Law: Concepts, Regulation and Changing Markets* (2021), at 35–49.
[4]C-H. Wu, *Law and Politics on Export Restrictions: WTO and Beyond* (2021), at 26.
[5]Appellate Body Report, China – Raw Materials (United States), adopted 20 February 2012, WTO/DS394/AB/R, paras. 319–320.

XI of the GATT. For instance, on this reading, measures that are fiscal in nature, such as taxes and customs duties, and which by virtue of the text of Article XI of the GATT are carved out from its scope, may be found to have a limiting effect on exportation, and consequently considered export restrictions.[6]

To what extent such a broad reading of the term, which marginalizes the consideration of the legal form of an export constraining measure, is appropriate as a matter of legal interpretation, and beneficial for a conceptual discussion on the subject, is debatable. While, arguably, many governmental regulations affecting trade would have at least some limiting effect on exports or imports, such an effect, in and of itself, does not turn these regulations into quantitative restrictions.[7] Depending on their specific legal form, trade regulations affecting imports may fall under various obligations of the GATT, such as national treatment with respect to tax measures (Article III:2), national treatment with respect to internal regulations (Article III:4) or obligations regarding customs duties and charges (Article II). It is a fundamental principle of WTO law that the mentioned legal provisions should be kept conceptually separate from Article XI:1 of the GATT becase they impose distinct obligations that are different in nature from the general obligation of Article XI:1 not to impose quantitative restrictions.[8] The same conceptual distinction between quantitative restrictions and other types of trade regulations would also have to hold for measures affecting exportation.

It is true, of course, that, as already mentioned above, the GATT pays much less attention to national policies affecting exportation than to those affecting imports. Aside from Article XI, of the provisions mentioned above, only Article II of the GATT could be relevant for measures targeting exports.[9] As to domestic non-fiscal measures on exports, Article III of the GATT is not applicable and there is no other provision in the GATT imposing comparable limitations. Due to this asymmetry in the legal obligations governing import and export measures, the temptation to disregard the legal form of an export constraining measure in favour of simply focusing on its (potential) trade effect is strong, and perhaps even understandable. It is submitted, however, that such an approach obscures important conceptual and policy nuances, which go to the heart of the question of whether the WTO framework needs any additional rules on export restrictions, the point I will return to below.

Structurally, the content of the book is divided between three chapters, dealing, respectively, with the following three blocks of issues: (i) rules on export restrictions in the WTO; (ii) political economy and national security considerations in the context of export restrictions; (iii) linkages between export restrictions and the adjacent fields of investment and competition law, in the context of global supply chains. The discussion logically starts with the analysis of WTO rules. It is in this part of the book that the author offers the most comprehensive treatment of the subject – from Article XI of the GATT, other potentially relevant WTO agreements, to WTO accession protocols and free trade agreements. It is notable, at the same time, that the author has chosen to discuss the national security provision of the GATT (Article XXI), in so far as it could justify an export restriction, in the next chapter.

One of the key claims of the book is that the WTO framework does not contain sufficient rules on export restrictions.[10] The inability of the multilateral WTO rules to discipline export constraining policies that are effected through measures falling outside the scope of Article XI of

[6]Article XI:1 of the GATT provides as follows:

> 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.

[7]Appellate Body Reports, Argentina – Import Measures, adopted 26 January 2015, WTO/DS438/AB/R, para. 5.217.

[8]See generally J. Pauwelyn, 'Rien Ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS', (2005) 4 *World Trade Review* 131.

[9]P. C. Mavroidis, *The Regulation of International Trade, Volume 1: GATT* (2016), at 87.

[10]See Wu, *supra* note 4, at 12.

the GATT has been convincingly demonstrated by Chien-Huei. Notable examples of such policies are export tariffis and taxes, both of which are explicitly carved out from the scope of Article XI of the GATT. Even though the account of the efforts to negotiate additional disciplines on such policies in the WTO is provided in the book, the author appears somewhat agnostic to the question of whether such disciplines are, at all, desirable. If one follows his broad understanding of the term, export constraining measures can take various forms and be applied based on different policy considerations. In this light, an argument can be made that having horizontal disciplines on such measures, without taking into account such differences, is not desirable because it could hinder legitimate regulation. Dealing with export constraining policies in a piecemeal fashion, through a combination of obligations in accession protocols and free trade agreements (the *status quo*) may, on the other hand, allow such flexibility, and in this sense, be the preferred option.

One of the questions Chien-Huei explores in his book is the issue of voluntary export restraints. In the GATT years, it was not entirely clear to what extent voluntary export restraints were permitted.[11] With the establishment of the WTO, Article 11.1(b) of the Agreement on Safeguards has explicitly prohibited such measures.[12] Yet, in recent years, the practice of voluntary export restraints has re-emerged. As noted by Chien-Huei, some countries agreed to limit exports to the United States (US) in order to avoid tariffs imposed by the Trump Administration.[13] More recently, the Netherlands and Japan have agreed to restrict the exportation of semi-conductors to China.[14] While offering to reduce exports in response to US tariffs resembles the classical economic logic of voluntary export restraints, restrictions on the exportation of semi-conductors are underpinned by geopolitical considerations.[15] While the geopolitical underpinnings may not change the nature of this measure in terms of its trade impact, the very likelihood that security interests could be implicated certainly changes the discourse around it, as well as the potential avenues for its political and legal justification.

In the two chapters that follow, Chien-Huei expands his analysis and looks beyond the WTO. As the author himself explains, his purpose in these chapters is to link WTO law, public international law, investment, and competition law in order to expose how public international law helps justify the adoption or maintenance of export restrictions, and how investment and competition law contribute to their regulation.[16] The intellectual contribution of these chapters to the engagement with the subject of export restrictions appears, however, somewhat limited, as their function seems predominantly more contextual than critical. One would also expect that, having provided an in-depth analysis of the WTO framework, the author would circle back to his initial claim on the insufficient regulation of export restrictions in the WTO and take stock or offer some reflections. Instead, the discussion simply moves on to new areas, without much of a pause.

The above-mentioned criticism notwithstanding, one can still find many intruging issues explored in these chapters. For example, delving into the topic of political economy and national security, Chien-Huei first traces the establishment of the Wassenaar Arrangement for trade in arms and dual-use products before moving to the discussion of the national security provision in the WTO framework. Chien-Huei analyses the recent WTO disputes where national security has been invoked as a defence, highlighting the tension between the inescapability of a judicial review of this clause and the political undesirability of such a review.

[11]P. van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (2022), at 536.

[12]WTO Agreement on Safeguards, available at www.wto.org/english/docs_e/legal_e/25-safeg_e.htm.

[13]See Wu, *supra* note 4, at 62.

[14]D. Sevastopulo and S. Fleming, 'Netherlands and Japan Join US in Restricting Chip Exports to China', *Financial Times*, 28 January 2023, available at www.ft.com/content/baa27f42-0557-4377-839b-a4f4524cfa20.

[15]J. Mark and D. Tiff Roberts, 'United States–China Semiconductor Standoff: A Supply Chain under Stress', *Atlantic Council*, 23 February 2023, available at www.atlanticcouncil.org/in-depth-research-reports/issue-brief/united-states-china-semiconductor-standoff-a-supply-chain-under-stress/.

[16]See Wu, *supra* note 4, at 14.

A rather insightful aspect of Chien-Huei's analysis is the use of real-life case-studies to test the possible application of the national security exception in different scenarios, some of which are, at the time of writing this review, unfolding in real time.[17] These case studies actualize even more the questions Chien-Huei has been grappling with in his book. In particular, how broadly could one interpret the notion of 'emergency in international relations', which is the gateway to the application of the security exception under Article XXI(b)(iii) of the GATT? This could become a critical interpretative issue for WTO adjudicators, if more countries rely on the security exception to justify measures aimed at defending geopolitical interests. At first attempt, the US was unsuccessful in pushing the boundaries of this notion before a WTO panel in a dispute on its steel and alumunium tariffs.[18] It remains to be seen to what extent the reasoning of the panel in that dispute will be followed in the future cases.

The book further explores the impact of export restrictions on global supply chains in terms of linkages between trade, on the one hand, and investment and competition law, on the other. In the globalized world, trade and investment go hand in hand and it is almost obvious that trade restrictions may impact investment flows. Trade and investment policies may, likewise, complement or undermine each other if ill-designed. The interaction between trade and competition law would follow a similar pattern. It is undeniable that, in some contexts, international trade law disciplines may resemble competition law, even though the ideas underlying these two legal fields are strikingly different.

Chien-Huei fittingly concludes his book with the transposition of the themes he has explored into the immediate aftermath of the global COVID-19 pandemic, which magnified the harmful effect of uncontrolled imposition of unilateral export restrictions. Alas, the inclination towards trade restrictions has not weakend in the post-pandemic world, only the emphasis has shifted towards national security and strategic considerations. Overall, Chien-Huei's book offers a thorough and balanced treatment of various issues pertaining to the regulation of export constraining policies in international economic law and beyond. In this way, the book contributes to many academic and policy debates taking place in the field. Its relevance is further underscored by the current proliferation of export and other kinds of trade barriers.

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[17]See, for example, China's challenge of US export control measures regarding semi-conductors, available at www.wto.org/english/news_e/news22_e/ds615rfc_15dec22_e.htm.

[18]Panel Report, United States – Certain Measures on Steel and Aluminium Products (China), circulated 9 December 2022, WTO/DS544/R, para. 7.148 (currently under appeal).

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