

## **WTO Ruling On Raw Materials Could Strengthen Rules On Ag Export Curbs**

A January ruling by the Appellate Body that China's export curbs on several raw materials violated its World Trade Organization commitments could make it more difficult for WTO members to justify export restrictions on agricultural commodities that are aimed at protecting local consumers from spikes in international commodity prices, according to a new paper released by the International Food and Agricultural Trade Policy Council (IPC).

While conventional wisdom has held that WTO rules on export restrictions are weak, the September paper argues that the Appellate Body ruling in the raw materials case can be interpreted as strengthening them, for three reasons.

First, the paper points out, the Appellate Body interpreted Article XI:2(a) of the General Agreement on Tariffs and Trade (GATT) rather strictly. That article provides an exception to the general GATT prohibition on export restrictions if the restrictions are put in place to prevent or relieve a "critical shortage."

In its ruling, the Appellate Body held that the restrictions and their surrounding circumstances must be scrutinized to determine that in fact, objectively, all the criteria of Article XI:2(a) are met, according to the paper written by Robert Howse, a law professor at New York University, and Tim Josling, an international relations professor at Stanford University.

"The [Appellate Body's] approach suggests that the invocation of GATT exceptions to justify export restrictions as a response to the scarcity of essential commodities must be carefully policed and circumscribed through the case-by-case application of the legal rules by the dispute settlement organs," the authors wrote. This finding signals that a country may not simply "self-judge" what constitutes a critical shortage that would qualify for the Article XI:2(a) exception, they said.

"Those who favor domestic self-sufficiency as the way to realize the right to food or who believe that international law contains a strong notion of national sovereignty over natural resources will not be happy with the [Appellate Body's] approach," because such justifications for export restraints may not pass muster with the Appellate Body, they added.

Both the IPC and the paper's authors argue that export restrictions on agricultural commodities are counterproductive because they tend to exacerbate price volatility and can therefore hurt food-importing countries.

Secondly, the Appellate Body's strict interpretation of GATT Article XI:2(a) could also have the effect of bolstering a related provision in the WTO Agreement on Agriculture, according to the paper.

Article 12 of that agreement stipulates that, when a WTO member institutes new export restrictions in accordance with GATT Article XI:2(a), it must do two things, the first of which is to give "due consideration to the effects of such prohibition or restriction on importing Members' food security." It must also give notice in writing, as far in advance as practicable, to the WTO Committee on Agriculture and consult with any interested members about the restriction.

Although the raw materials ruling dealt with mineral commodities as opposed to agricultural ones, Howse and Josling argued that since the Appellate Body interpreted GATT Article XI:2(a) in a restrictive way, it may also interpret the related provisions in Article 12 in a fairly restrictive manner as well.

This could mean that the "due consideration" requirements of Article 12 are stronger than initially thought, and could require varying the application of export restrictions depending on how various countries are affected.

Finally, the authors pointed out that the Appellate Body in the raw materials case also examined another available exception to the GATT prohibitions on export restrictions, GATT Article XX(g), which gives a general exemption from GATT rules for measures "relating to the conservation of exhaustible resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

The paper argues that even though an Article XX(g) exception could potentially be applied to a measure covering the same products as the Article XI:2(a) exception, the Appellate Body made clear the "division of labor" between the two exceptions, in that Article XI:2(a) is much more narrowly circumscribed because it uses the term "critical" while the other does not.

The authors then signaled that it may be difficult for WTO members who put in place agricultural export restrictions to qualify for the exception in Article XX(g), since it requires such restrictions to be taken in conjunction with restrictions on domestic production or consumption.

The paper argues that the Appellate Body jurisprudence in the raw materials case reveals the need for WTO members to be able to work with an international organization dealing with food security in order to determine whether their proposed export restriction is in response to a "critical shortage" and evaluate the impacts of the restriction on its trading partners.

Such an international mechanism would help ensure the country is meeting the requirements of GATT Article XI:2(a) and Article 12 of the Agriculture Agreement, they argued.