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Trade Defence Instruments: A New Tool for the European Union's Extractivism

Victor Crochet*

Abstract

The European Union (EU) is regularly criticized for using its trade policies to arm-twist other countries into agreeing to supply European factories with raw materials. One area of its trade policy, however, has thus far escaped attention in this regard: trade defence. This should change as the EU increasingly uses trade defence instruments not only to address unfair trade practices but also to seek access to raw materials from other countries. It does so by imposing higher trade defence tariffs on countries that employ policies that ensure raw materials extracted within their territories are processed domestically. This approach is worrisome since, due to the EU's market size, it may discourage resource-rich countries from developing downstream industries of their own. Furthermore, these countries' policies are often in line with their international obligations so that the EU is unilaterally infringing on these countries' sovereignty over their natural resources when targeting these policies. These countries and their exporting producers should thus seize the means at their disposal to put a stop to the EU's practices.

1 Introduction

Securing access to raw materials has been high on the European Union's (EU) list of priorities for many years. In 2008, the European Commission adopted its 'raw materials initiative', which highlighted the EU's need to secure access to raw materials to ensure economic growth – in particular, those needed for new technologies.[1] With

* Associate at Van Bael & Bellis, Brussels, Belgium; PhD student, Cambridge University, United Kingdom. Email: vcrochet@vbb.com. The author also wishes to thank Elyse Kneller, Rebekah King, Vineet Hegde, Marcus Gustafsson and Akhil Raina for their valuable input on an earlier draft. All opinions and errors are the author's own. The author regularly represents exporting producers as well as foreign governments in trade defence investigations initiated by the European Commission. He also represents foreign governments in WTO proceedings initiated against or by the European Union.

[1] European Commission, *The Raw Materials Initiative: Meeting Our Critical Needs for Growth and Jobs in Europe*, 4 November 2008, available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0699:FIN:en:PDF.

regard to access to foreign raw materials, the EU has used its trade policies to achieve this goal in two ways, and has attracted criticism for trying to strong-arm its partners into agreeing to continue to supply European factories with raw materials.[2] It has first tried to promote specific rules regarding access to raw materials in its free trade agreements (FTA) with third countries. In this regard, a disagreement with Chile recently arose during the negotiations to update the EU–Chile FTA.[3] As Chile is the EU's main supplier of lithium, an essential component in the manufacturing of electrical batteries, the EU wanted to include provisions in the EU–Chile FTA that would forbid Chile from selling raw materials at a lower price in its domestic market than for export. Chile disagreed. As explained by its vice-minister for international economic relations, '[w]hen thinking of lithium, our approach is to create an industry around it, not just [be] a raw material exporter'.[4]

The EU has also used existing international rules to work towards eliminating export restrictions. The EU, for example, started World Trade Organization (WTO) proceedings against Indonesia over Indonesia's export restrictions on nickel ore and iron ore, two raw materials necessary in the production of stainless steel and electrical batteries.[5] While Indonesia used to be the world's main exporter of these raw materials, it now intends to incentivize foreign investors to help develop a supply chain to process these raw materials into steel or batteries for electric vehicles within Indonesia.[6]

These diverging opinions over trade in raw materials reflect a classic debate in international trade. On the one hand, developed countries have long opposed export barriers on raw materials, viewing them as beggar-thy-neighbour instruments that distort competition.[7] On the other hand, these countries have often been criticized for shaping the WTO and FTAs as well as for using their rules to force resource-rich developing countries into exporting their raw materials to foreign factories, thereby limiting these countries' ability to reap the benefit of their natural wealth endowment by developing manufacturing industries of their own.[8] In other words, critics argue that

[2] Euractiv, *Raw Materials: Towards a Global Resource War?*, 3 March 2011, available at www.euractiv.com/section/sustainable-dev/news/raw-materials-towards-a-global-resource-war/; J. Sydow, L. Fuhr and U. Straub, *Analysis of the EU Raw Materials Initiative*, 3 February 2011, available at www.boell.de/en/ecology/resource-governance-analysis-of-the-eu-raw-materials-initiative-11124.html.

[3] R. Emmott, 'Chile Aims to Seal Updated EU Trade Deal in Early 2021', *Reuters* (1 December 2020), available at www.reuters.com/article/us-eu-chile-trade-idUSKBN28B5EA; Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, OJ 2002 L 352/3.

[4] G. Leali, 'Europe's Hunger for Lithium Sparks Tensions with Chile', *Politico* (7 December 2020), available at www.politico.eu/article/europes-hunger-for-lithium-sparks-tensions-with-chile/.

[5] P. Blenkishop, 'EU Escalates WTO Case against Indonesia over Export Curbs', *Reuters* (14 January 2021), available at www.reuters.com/article/eu-indonesia-trade-idUSL8N2JP4Q2.

[6] P. Blenkinsop, 'Indonesia Says "Ready to Fight" EU at WTO over Nickel Export Curbs', *Reuters* (26 February 2021), available at www.reuters.com/article/us-eu-indonesia-trade-idUSKBN2AQ0GO.

[7] See Export Restrictions and Charges, GATT Doc. MTN.GNG/NG2/W/40, 8 August 1989; Market Access for Non-agricultural Products, WTO Doc. TN/MA/W/11/Add. 6, 27 April 2006; Market Access for Non-agricultural Products WTO Doc. TN/MA/W/101, 17 January 2008.

[8] See Export Restrictions and Charges, *supra* note 7; Statement by H.E. Mr Alfredo Chiaradia (Argentina), WTO Doc. WT/MIN(11)/ST/19, 16 December 2011, cited in Trade Policy Review Argentina, WTO Doc. WT/TPR/S/277, 13 February 2013, at 96; Trade Policy Review India, WTO Doc. WT/TPR/M/249/

international trade rules have been shaped in a way that worsens the resource curse – a phenomenon whereby resource-rich countries struggle to make effective use of their resources and often end up with low levels of economic development. Such a fate has affected resource-rich countries such as Zambia, Sierra Leone, Angola and Venezuela, which have not developed their manufacturing industries and created sustainable economic growth, despite their respective large reserves of natural resources.[9]

One area of international trade policy has so far escaped scrutiny in this debate: trade defence. Trade defence instruments (that is, anti-dumping and countervailing measures) are tools provided for under the WTO Agreements, which allow WTO members to impose higher tariffs than their bound tariffs (that is, the maximum import tariff that a WTO member agrees to apply on a particular good in its WTO schedule of concession) on 'unfairly' traded imports. Trade defence instruments should be made part of the debate as the EU now uses them to deter developing countries from encouraging the domestic processing of raw materials extracted within their territories to ensure that these materials are exported instead. In other words, the EU has turned its trade defence instruments into extractivist policy tools, thereby potentially worsening the resource curse. This seems to infringe upon other countries' permanent sovereignty over their natural resources as the EU targets policies that are in line with these countries' WTO commitments. This reconditioning of trade defence instruments also seems to go against the preamble of the Agreement Establishing the WTO, which provides that developing countries should be given a chance to develop.[10] Similarly, it contradicts the United Nation's 2030 Agenda for Sustainable Development, which recognizes the need for industrial diversification and value addition to commodities in developing countries.[11]

The aim of this article is to highlight how the EU has turned its trade defence instruments into extractivist policy tools and to assess what resource-rich countries targeted by the EU can do about it. I start this article by giving brief explanations of the concept of extractivism as well as the principle of permanent sovereignty over natural resources and assess how they interact with the structure of the world trading system. I conclude that, while the WTO might be seen as being extractivist as well as infringing on WTO members' permanent sovereignty over their natural resources, its structure does leave space for WTO members to encourage the processing of raw materials

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Add.2, 28 October 2011, at 45; J. Stiglitz, *Making Globalization Work* (2006); D. Rodrik, *The Globalization Paradox* (2010), ch. 3; Botero, Indalecio and Andrés Peña Galeano, 'Territories in Dispute: Tensions between "Extractivism", Ethnic Rights, Local Governments and the Environment in Bolivia, Colombia, Ecuador and Peru', in Graduate Institute Publications, *Alternative Pathways to Sustainable Development: Lessons from Latin America, International Development Policy*, Series no. 9 (2017), at 269–290; I. Espa, *Export Restrictions in Relation to Extractive Industries* (2015); J. Korinek and J. Bartos, 'Multilateralising Regionalism: Disciplines on Export Restrictions in Regional Trade Agreements', OECD Trade Policy Papers no. 139 (2012).

9 P. Stevens, G. Lahn and J. Kooroshy, *The Resource Curse Revisited* (2015).

10 Agreement Establishing the World Trade Organization 1994, 1867 UNTS 154.

11 GA Res. 70/1, 21 October 2015. See in particular goal 9 regarding the promotion of inclusive and sustainable industrialization.

domestically (section 2). In the next section, I discuss how the EU has tried to pressure its trade partners into not using this space by turning its trade defence instruments into potential extractivist policy tools through recently introduced changes to its trade defence practice. At the same time, I assess how affected WTO members, as well as their exporting producers, can seize the means at their disposal to put a brake on the EU's retooling of trade defence instruments into extractivist instruments (section 3). I provide some concluding remarks in the final section of this article (section 4).

2 Is the WTO an Extractivist Institution Infringing upon the Permanent Sovereignty over Natural Resources of Its Members?

While the main theme of this article is the EU's use of trade defence instruments, it is worth taking a brief detour to assess the potential extractivist structure of the world trading system. Indeed, the structure of this system does leave room for resource-rich countries to promote domestic processing of domestic raw materials, but the EU is trying to limit this manoeuvring room through its trade defence instruments.

A *The WTO and Extractivism*

The WTO has often been criticized for limiting developing countries' ability to reap the benefits of their natural wealth endowment to develop manufacturing industries.[12] In other words, the WTO has been criticized for being an 'extractivist' institution. Extractivism is usually defined as the economic activities that remove large volumes of non-processed natural resources, especially for export.[13] Extractivist policies are those that ensure that countries continue to extract and export raw materials without processing them. The concept of extractivism takes its roots in the colonial and pre-colonial era when some regions of the world focused on extracting raw materials, while Europe specialized in processing these raw materials into finished goods.[14] Despite the end of colonization, the world economy remains somewhat similarly structured as most developed countries still import raw materials and export finished goods, while resource-rich developing countries export raw materials and import finished goods.[15]

The concept of extractivism was coined to describe the way in which many countries rich in natural resources find it difficult to develop, a phenomenon dubbed 'the resource curse' or 'the paradox of plenty'.[16] This phenomenon means that many societies with abundant natural resources have worse economic outcomes than those that lack natural resources because an abundance of resources typically crowd out

[12] Stiglitz, *supra* note 8; Rodrik, *supra* note 8, ch. 5.

[13] A. Acosta, *Extractivism and Neo-extractivism: Two Sides of the Same Curse*, in M. Lang and D. Mokrani (eds), *Beyond Development: Alternative Visions from Latin America* (2013), 61–86; A. Acosta, *Post-Extractivism: From Discourse to Practice – Reflections for Action*, Series no. 9 (2017).

[14] Rodrik, *supra* note 8, Chapter 7.

[15] Acosta, *Post-Extractivism*, *supra* note 13.

[16] B. Smith and D. Waldner, *Rethinking the Resource Curse* (2021).

activities that improve economic outcomes.[17] In simple terms, the abundance of natural resources coupled with weak regulatory institutions (as is the case in some developing countries)[18] makes an economy susceptible to appropriation by specific interest groups, which often leads to the allocation of production in only one sector (the extraction of raw materials).[19] This over-specialization of an economy subjects countries to economic vulnerability and overproduction when prices are high.[20] As a result, resource-rich developing countries tend to see their wealth concentrated in just one industry and their economy vulnerable to fluctuations in raw material market prices.

Some countries have found an antidote to the resource curse and have broken out of it. East Asian countries, such as Malaysia, are often cited as examples.[21] A few examples can also be found in Africa, such as Botswana.[22] There is much discussion on what these countries got right in breaking the curse and on how to replicate it elsewhere – from enhancing institutions and fighting corruption to redistributing gains made from extracting raw materials.[23] One method is, however, particularly relevant for the purpose of this article – namely, that many countries that broke out of the resource curse did so by developing domestic manufacturing sectors that process their natural resources.[24] These countries did so through a combination of import duties on processed goods and restrictions on exports of raw materials, thus encouraging the domestic production of processed goods.[25]

According to its detractors, the WTO and its rules can be considered as extractivist in that they worsen the resource curse through several mechanisms.[26] First, WTO rules limit WTO members' options to impose quantitative restrictions on exports of raw materials,[27] thus ensuring that raw materials valuable to developed countries cannot be confined to the country where they are extracted. This rule penalizes resource-rich developing WTO members since it often prevents downstream industries from emerging in these countries as foreign buyers of raw materials are usually more able and willing to offer higher prices for raw materials than potential domestic buyers. Second, WTO rules limit the ability of developing WTO members to provide subsidies that would encourage the domestic consumption of domestic raw materials (import substitution subsidies) and/or promote exports of finished goods (export subsidies).[28] This rule similarly harms resource-rich developing WTO members since it prevents them from assisting their potential downstream domestic industries to purchase domestic

[17] Leibbrandt and Lynham, 'Does the Paradox of Plenty Exist? Experimental Evidence on the Curse of Resource Abundance', 21 *Experimental Economics* (2018) 337.

[18] *Ibid.*

[19] Acosta, *Extractivism*, *supra* note 13.

[20] Stiglitz, *supra* note 8, at 132–148.

[21] Rodrik, *supra* note 8, ch. 7.

[22] Stiglitz, *supra* note 8, at 150.

[23] Acosta, *Extractivism*, *supra* note 13; Acosta, *Post-Extractivism*, *supra* note 13; Stiglitz, *supra* note 8, at 150.

[24] Stiglitz, *supra* note 8, at 150.

[25] Stiglitz, *supra* note 8, at 142–143.

[26] *Ibid.*; Rodrik, *supra* note 8.

[27] General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194, Art. XI.

[28] Agreement on Subsidies and Countervailing Measures (SCM Agreement) 1994, 1867 UNTS 14, Art. 3.

raw materials when competing with foreign buyers. Both rules disproportionately affect resource-rich developing countries as they may not have currently established downstream industries that can compete with developed countries' industries for the purchase of raw materials. Third, through their WTO schedules of concessions on goods, developed WTO members have placed higher tariffs on manufactured goods than on raw materials (a process known as tariff escalation),[29] making it more profitable for developing countries to export raw materials than to process them domestically before exporting.[30]

Despite these rules, there are built-in gaps in the WTO Agreements that create a policy space for developing countries to promote the domestic processing of raw materials.[31] First, while Article XI of the General Agreement on Tariffs and Trade (GATT) prohibits the imposition of quantitative export restrictions (such as an export ban or export quota),[32] it does not prevent the imposition of export taxes or export licensing mechanisms so long as they do not constitute prohibitions or restrictions on exportation[33] (these have been prohibited to some extent for several WTO members through their Protocols of Accession, however).[34] In this sense, WTO members, for example, are not prevented from imposing export taxes on raw materials in order to encourage the domestic processing of these raw materials by making them more expensive to purchase by foreign buyers. Second, the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) does allow WTO members to subsidize their raw material producers as long as these subsidies do not cause adverse effects to foreign producers of these raw materials.[35] Only subsidies contingent upon export performance, or the use of domestic products instead of imports, are prohibited under the SCM Agreement.[36] As such, a WTO member is allowed to provide support contingent upon domestic sales to its raw material producers in order to boost their domestic sales over exports. Third, the WTO does not have express rules prohibiting

[29] See *WTO Glossary*, available at www.wto.org/english/thewto_e/glossary_e/tariff_escalation_e.htm.

[30] Stiglitz, *supra* note 8, at 87.

[31] Espa, *supra* note 8.

[32] GATT, *supra* note 27.

[33] Export licensing mechanisms are found to constitute such prohibitions or restrictions on exportation when licenses are granted on a discretionary basis or only after significant delays. See WTO, *India – Quantitative Restrictions – Report of the Panel*, 22 September 1999, WTO/DS90/R, paras 5.127–5.130.

[34] For example, the Protocols of Accession of several World Trade Organization (WTO) members go further than this by forbidding export licensing and taxes as well. See, e.g., Protocol of Accession of China, paras 8 and 11; WTO, Report of the Working Party on the Accession of Mongolia to the World Trade Organization, Doc. WT/ACC/MNG/9, 27 June 1996, para. 24. Paragraph 2 of Protocol of Accession of Mongolia incorporates the paragraphs referred to in para. 61 of the Working Party's report, including para. 24. See WTO, Protocol for the Accession of Mongolia to the World Trade Organization, Doc. WT/ACC//MNG/11, 25 July 1996, para. 2; WTO, Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, Schedule CLXV, Doc. WT/ACC/RUS/70/Add.1, 17 November 2011. For a complete list, see Marceau, 'WTO and Export Restrictions', 20 *Journal of World Trade* (2016) 4.

[35] SCM Agreement, *supra* note 28, Arts 3, 6. As I discuss below, these subsidies could also be challenged if they were passed through producers of manufactured goods and, as a result, caused adverse effects to the interests of another WTO member.

[36] *Ibid.*, Art. 3.

dual pricing schemes (that is, government schemes setting a different price in the domestic market compared to export markets for the same products), meaning that these schemes are allowed so long as they do not run afoul of specific provisions of the WTO Agreements.[37] In other words, WTO members can provide incentives for the development of domestic processing industries by mandating lower domestic prices for natural resources as compared to export prices.

As a result, while it is true that some WTO rules can be seen as being extractivist, it cannot be plainly stated that the WTO and its rules do not provide any way out of the resource curse for resource-rich developing WTO members since it leaves several avenues for WTO members to encourage the domestic processing of natural resources.

B *The WTO and the Principle of Permanent Sovereignty over Natural Resources*

The built-in flexibilities in WTO rules constitute a policy space for WTO members to encourage the domestic processing of extracted raw materials. This policy space is in line with the principle of permanent sovereignty over natural resources, as explained by the WTO panel in *China – Raw Materials*.[38] The principle of permanent sovereignty over natural resources embodies the right of states and people to use their natural resources to pursue their own development.[39] This principle arose following the end of World War II and the beginning of the decolonization process as a corollary to the right of self-determination.[40] It is considered a principle of international law[41] flowing from the Charter of the United Nations[42] and enshrined in the United Nations Declaration on Permanent Sovereignty over Natural Resources.[43] It takes its origins in two of the United Nations' concerns: the need for developing countries' economic development and the right to self-determination of colonized peoples.[44]

In *China – Raw Materials*, the WTO panel explained that, by joining the WTO, WTO members had established limits to their permanent sovereignty over their natural resources when they exercised their sovereign right to enter into international agreements and therefore assumed rights and duties under WTO law.[45] These limits are set by what

[37] A. Marhold, *Fossil Fuel Subsidy Reform in the WTO: Options for Constraining Dual Pricing in the Multilateral Trading System* (2017).

[38] WTO, *China – Measures Related to the Exportation of Various Raw Materials – Report of the Panel*, 17 August 2011, Doc. WT/DS394/R/, para. 7.382.

[39] See N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997), ch. 1.

[40] Gonzalez Arreaza, 'Natural Resource Sovereignty and Economic Development in the WTO in Light of the Recent Case Law Involving Raw Materials and Rare Earths', 26, *Review of European, Comparative and International Environmental Law* (2017) 266; N. Schrijver, *Development without Destruction: The UN and Global Resource Management* (2010), ch. 5; Schrijver, *supra* note 39, chs 2, 3.

[41] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005)168, paras 243–246; see also Hobe, 'Evolution of the Principle of Permanent Sovereignty over Natural Resources', in M. Bungenberg and S. Hobe, *Permanent Sovereignty over Natural Resources* (2015) 1.

[42] Schrijver, *supra* note 40, ch. 5.

[43] GA Res. 1803(XVII), 14 December 1962.

[44] Arreaza, *supra* note 40; Schrijver, *supra* note 40, ch. 5; Schrijver, *supra* note 39, chs 2, 3.

[45] *China –Raw Materials – Report of the Panel*, *supra* note 38, para. 7.382.

WTO members agreed to in the WTO Agreements and their Protocols of Accession. WTO members should therefore be free to use the policy space left to them from the WTO Agreements and their Protocols of Accession in order to use their natural wealth as they see fit.[46] It follows that other WTO members should not unilaterally limit these WTO members' permanent sovereignty over their natural resources by taking unilateral action against them when they act in line with their WTO commitments.

3 The EU's Extractivist Use of Trade Defence Instruments

The EU does not seem to agree that WTO members should be free to use the policy space left to them regarding their raw materials under WTO rules. The EU has used FTAs to further reduce its trade partners' sovereignty over their natural resources.[47] This is worrying considering the EU's strong bargaining power.[48] Yet developing countries are free to accept further limits on their permanent sovereignty over their natural resources just as they were initially free to limit their sovereignty when joining the WTO. Trade defence instruments, on the other hand, while often condemned for not being economically sound and for being used for protectionist purposes,[49] are not usually described as playing a role in extractivist policies.

Trade defence instruments – namely, anti-dumping measures and countervailing measures (that is, measures to address subsidies) – are expressly allowed under WTO law by Article VI of the GATT and further elaborated upon under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement) and the SCM Agreement.[50] They allow a WTO member to impose import duties on imports considered as 'unfairly' traded from specific countries following an investigation by the relevant authority of that WTO member (in the EU, this is the Commission). The EU now uses these instruments not only as a means to address 'unfair' trade practices but also as a new form of tariff escalation. The seeds for this extractivist use of trade defence instruments by the EU were already planted in the EU's 2008 'raw materials initiative' that provided that:

> [t]he EU should ensure that any distortion in the cost of raw materials resulting from dual-pricing practices or other mechanisms in operation in the exporting country is addressed and offset in the context of anti-dumping investigations. Increased and effective recourse to … trade defence instruments (safeguard and anti-subsidy) are other means of tackling trade distortions in access to raw materials.[51]

[46] Arreaza, *supra* note 40; N. Schrijver, *Self-determination of Peoples and Sovereignty over Natural Wealth and Resources*, available at www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIChapter5.pdf.

[47] Korinek and Bartos, *supra* note 8.

[48] S. Meunier, *Trading Voices: The European Union in International Commercial Negotiations* (2007), ch. 2.

[49] D. Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (2017), ch. 10; Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1997), ch. 10.

[50] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement) 1994, 1868 UNTS 201.

[51] European Commission, *supra* note 1.

Since 2008, the EU has done just that. It has engineered new ways to allow for higher anti-dumping and countervailing duties on imports of finished goods in situations where a developing country adopts policies to ensure that raw materials extracted from within its territory are processed domestically. The EU does so even when the targeted country is legitimately acting in line with its WTO commitments, meaning that the EU infringes on this country's sovereign right over its natural resources without its consent. This has potential negative consequences for resource-rich developing countries, which may be discouraged from stimulating the development of downstream industries and may prefer to continue exporting raw materials instead.[52]

A *Changes Regarding Anti-dumping Investigations*

Before turning to how the EU has amended its approach to anti-dumping for extractivist purposes, a brief explanation regarding the functioning of anti-dumping investigations and measures, with a particular focus on the EU's practice, is needed. Under EU law, the imposition of anti-dumping measures is regulated by the Basic Anti-Dumping Regulation,[53] which empowers the Commission to impose such measures following an investigation when certain criteria are met – namely, that imports are being dumped[54] and cause material injury or a threat thereof to the Union industry of the like product.[55] Anti-dumping measures can be imposed on imports from a particular country when it is found that exporting producers in that country are dumping (that is, selling below what is called 'normal value') and that the dumped imports cause or threaten to cause injury to the domestic industry.[56] These measures take the form of an individual import duty per exporting producer.[57] Anti-dumping measures are thus meant to offset price discrimination by individual exporting producers – that is, a situation where an exporting producer sells at a lower price in its export market than in its domestic market.[58]

The extent of this price discrimination is called the dumping margin and is normally expressed as the difference between ex-works (EXW) domestic and EXW export prices (that is, a price 'brought back' to the exporting producer's factory gate), per product type. This EXW domestic price is named the 'normal value'. When an exporting producer does not sell a particular product type or sells it below its cost of production domestically, the EXW export price for that product type will be compared to the so-called 'constructed normal value', which is calculated by adding an amount for general, selling and administrative expenses as well as profit to the exporting producer's

[52] Yungho Weng and Chih-Ming Hung, 'Tariff Escalation and De-escalation: The Role of Market Structure', 71 *Japanese Economic Review* (2020) 233.

[53] Council Regulation 2016/1036 (Basic Anti-Dumping Regulation), OJ 2016 L 176/21.

[54] *Ibid.*, Art. 2.

[55] *Ibid.*, Art. 3.

[56] GATT, *supra* note 27, Art. VI; Anti-Dumping Agreement, *supra* note 50, Art. 1. See also Basic Anti-Dumping Regulation, *supra* note 53, Art. 1.

[57] Anti-Dumping Agreement, *supra* note 50, Art. 9.

[58] *Ibid.*, Art. 2. See also Basic Anti-Dumping Regulation, *supra* note 53, Art. 2.

production cost for that product type.[59] Thus, higher costs of production result in higher dumping margins as they lead to (i) more sales below cost of production and (ii) a higher constructed normal value. This is an important point since, as we will see in section 3.A.1, the Commission has engineered a new way to artificially increase exporting producers' costs of production when such producers are based in countries with policies encouraging the domestic processing of raw materials.

Once it is established that the overall dumping margin from the concerned country is above a *de minimis* threshold and that these imports are causing or threatening to cause material injury to the domestic industry,[60] the WTO member conducting the investigation can impose an individual duty per exporting producer at an amount that cannot be higher than each exporting producer's dumping margin. However, it can be lower if a lower duty is sufficient to remove the injury.[61] This second point is important since under EU law, as we will see in section 3.A.2, the Commission normally limits the amount of anti-dumping duties to the so-called injury margin if that margin is lower than the dumping margin (this rule is called 'the lesser duty rule').[62] In the EU, this injury margin is calculated by comparing an exporting producer's price per product type with the Union industry's target price per product type to their customers in the EU.[63] The target price is calculated as the Union industry's cost of production for that product type plus a target profit of no less than 6 per cent.[64] The Commission, however, has been granted the ability to waive the lesser duty rule in case of raw material distortions caused by export restrictions,[65] thus leading to potentially higher anti-dumping duties.

1 Upward Adjustments to Exporting Producers' Costs of Production in Case of Export Restrictions on Raw Materials

(a) Commission's practice and recent developments

The first paragraph of Article 2(5) of the Basic Anti-Dumping Regulation concerns the costs of production for establishing the normal value and mirrors Article 2.2.1.1 of the Anti-Dumping Agreement. It provides that 'costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration'.

[59] Anti-Dumping Agreement, *supra* note 50, Art. 2.2. See also Basic Anti-Dumping Regulation, *supra* note 53, Art. 2(3). For more details on how dumping margins are computed, see Van Bael & Bellis, *EU Anti-Dumping and Other Trade Defence Instruments* (2019), ch. 3.

[60] Anti-Dumping Agreement, *supra* note 50, Arts 2, 3; see also Basic Anti-Dumping Regulation, *supra* note 53, Arts 2, 3.

[61] *Ibid.*, Art. 9(1).

[62] Basic Anti-Dumping Regulation, *supra* note 53, Art. 7(2).

[63] Van Bael & Bellis, *supra* note 59, ch. 7.

[64] Basic Anti-Dumping Regulation, *supra* note 53, Art. 7(2c).

[65] See section 3.B.1.

The second paragraph of Article 2(5) of the Basic Anti-Dumping Regulation, which has no equivalent in the Anti-Dumping Agreement, further provides that, '[i]f costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets'. This paragraph was introduced in 2002 and was expressly designed to make it possible to adjust costs in Russia and other former Soviet Union countries that were considered to be artificially low – in particular, the cost of energy.[66] Over the last decade, the Commission has used these provisions to adjust the costs of production of exporting producers in anti-dumping investigations upwards when it considers that one of the costs of the raw materials is distorted because of dual pricing schemes or export restrictions.[67] For example, the Commission regularly discards the cost of gas in Russian exporting producers' records on the basis that domestic gas prices in Russia are regulated prices that are below market prices paid in unregulated export markets.[68]

When it finds that the cost of a raw material is distorted, the Commission will replace this cost in the exporting producer's record by the price of the raw material on the international market, thereby increasing the exporting producer's costs of production. This upward adjustment to the costs of production of exporting producers leads to much higher dumping margins as it artificially increases the constructed normal value (which is calculated as cost of production plus an amount for general, selling and administrative expenses as well as profit) and decreases the number of profitable transactions taken into account to establish the normal value (as unprofitable transactions are not taken into account to establish the normal value).[69] This methodology thus fits into the EU's extractivist agenda as it punishes foreign exporters of downstream products with higher anti-dumping duties for their governments' policies aimed at moving away from the extraction and export of raw materials.

[66] Council Regulation 1972/2002, OJ 2002 L 305/1.

[67] See, e.g., Council Implementing Regulation 1194/2013, OJ 2013 L 315/2. See the detailed analysis of the issue in Council Implementing Regulation 1251/2009, OJ 2009 L 338/5, Recitals 20–27, which was upheld by the General Court in Case T-118/10, *Acron OAO v. Council* (EU:T:2013:67), paras 51–53; see also Council Decision 661/2008, OJ 2008 L 185/1, Recitals 32–36, 57–78, which was upheld by the General Court in Case T-459/08, *EuroChem Mineral and Chemical Company OAO (EuroChem MCC) v. Council* (EU:T:2013:66); Council Regulation 236/2008, OJ 2008 L 75/1, Recitals 17–46, which was upheld by the General Court in Case T-235/08, *Acron OAO and Dorogobuzh OAO v. Council* (EU:T:2013:65); Council Regulation 1911/2006, OJ 2006 L 365/26, Recitals 27–28 (Algeria), 58 (Russia), which was upheld by the General Court in Case T-84/07, *EuroChem Mineral and Chemical Company OAO (EuroChem MCC) v. Council* (EU:T:2013:64), paras 41–60.

[68] Council Regulation2015/110, OJ 2015 L 20/6, Recital 69.

[69] It should also be noted that the issue of inputs purchased at low costs in anti-dumping investigations, also known as 'input dumping', came up during the negotiations that led to the WTO Agreement but did not lead to any provision on the issue. See Ad hoc Committee on Antidumping Practices, Draft Recommendations Concerning Treatment of the Practice Known as Input Dumping, Doc. ADP/W/83/Rev.2, 19 December 1984.

In this regard, in *Biodiesel (Argentina)*, the Commission, relying on Article 2(5) of the Basic Anti-Dumping Regulation, found that Argentinean domestic prices for the main raw material to produce biodiesel (soybeans) were artificially lower than international prices due to a distortion created by the Argentine export tax system and that, consequently, the costs of the main raw materials were not reasonably reflected in the records of the exporting producers.[70] The Commission therefore replaced the costs of soybeans reported in the records of the exporting producers with reference prices published by the Argentinean authorities and then imposed artificially inflated anti-dumping duties on that basis. As discussed above, WTO members, however, have not given up their right to impose export taxes when joining the WTO so that the EU's action clearly encroached upon Argentina's sovereignty over its natural resources.

Argentina brought the matter to the WTO. The WTO Appellate Body in *EU – Biodiesel (Argentina)*,[71] found that the EU had acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement in that 'Article 2.2.1.1 of the WTO Anti-Dumping Agreement requires a comparison between the costs in the producer's or exporter's records and the costs incurred by such producer or exporter'.[72] Thus, the WTO Appellate Body did 'not consider that there is an additional or abstract standard of "reasonableness" that governs the meaning of "costs"'[73] and ruled that Article 2.2.1.1 does not permit an investigating authority to enquire into whether the records of the producer reasonably reflect international prices.[74] To remedy its mistakes, the Commission initiated a review and recalculated the normal value on the basis of the actual costs incurred by the exporting producers, as reflected in the companies'

[70] Council Regulation 1194/2013, OJ 2013 L 315/2, Recitals 35–40. WTO, *European Union – Anti-Dumping Measures on Biodiesel from Argentina – Report from the Appellate Body*, 26 October 2016, WT/DS473/AB/R.

[71] *EU – Biodiesel (Argentina) – Report from the Appellate Body*, *supra* note 70, paras 6.26, 6.56. The WTO Appellate Body clarified that the requirement that the records kept by the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration 'relates to whether the records of the exporter or producer suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration'. This requirement, however, does not allow the authorities to consider which costs would pertain to the production and sale of that product in 'normal circumstances' – that is, in the absence of the alleged distortion caused by Argentina's export tax system (para. 6.30). For more details on this case, see Crowley and Hillman, 'Slamming the Door on Trade Policy Discretion? The WTO Appellate Body's Ruling on Market Distortions and Production Costs in *EU – Biodiesel (Argentina)*', 17 *World Trade Review* (2018) 2, at 195–213.

[72] *EU – Biodiesel (Argentina) – Report from the Appellate Body*, *supra* note 70, para. 6.41; WTO, *European Union – Anti-Dumping Measures on Biodiesel from Indonesia – Report from the Panel*, 28 February 2018, WT/DS480/R, para. 7.22.

[73] *EU – Biodiesel (Argentina) – Report from the Appellate Body*, *supra* note 70, para. 6.37.

[74] *EU – Biodiesel (Indonesia) – Report from the Panel*, *supra* note 72, para. 7.22; see also *EU – Biodiesel (Argentina) – Report from the Appellate Body*, *supra* note 70, para. 6.30. It should also be noted that the Commission itself acknowledged that the reasonableness of the costs in the exporting producers' records should not be assessed in the regulation implementing the WTO Dispute Settlement Body's findings in *EU – Biodiesel (Argentina)*. See Commission Implementing Regulation 2017/1578, OJ 2017 L 239/9, Recitals 61–62.

records.[75] The Commission was also found to have acted inconsistently with WTO rules by the WTO Panel in *EU – Biodiesel (Indonesia)* for similarly disregarding the actual costs incurred by Indonesian biodiesel producers.[76] This methodology has been subsequently and repeatedly condemned by the WTO panels and the WTO Appellate Body in other disputes.[77]

Despite this clear case law, several developments are worth mentioning as it appears that the issue surrounding this extractivist use of anti-dumping measures has not been put to rest just yet. To start with, the Commission has not yet amended its practice and continues to disregard raw material costs in exporting producers' records when it deems that these costs are distorted due to export restrictions.[78] In 2019, the WTO Dispute Settlement Body adopted the WTO Panel and WTO Appellate Body reports in *Ukraine – Ammonium Nitrate*, concerning an anti-dumping investigation where Ukraine's investigating authority disregarded the Russian producers' actual costs of production for gas after comparing them with the export price of gas from Russia.[79] In that case, the WTO Panel and WTO Appellate Body confirmed the findings in the *EU – Biodiesel* cases, indicating that there is no standard of reasonableness of 'costs' that would allow investigating authorities to disregard input prices when such prices are lower than other prices internationally.[80] However, when a Russian exporting producer pointed out that, in the Commission's anti-dumping investigation on imports of urea ammonium nitrate (UAN) from Russia, the Commission was applying the exact same methodology that had been deemed unlawful in *Ukraine – Ammonium Nitrate*, the Commission replied that '[i]t should be noted that the WTO panel report in DS493 concerns a dispute between Russia and Ukraine whereby Russia challenged the determinations reached by Ukraine. The Union was not involved in that case'.[81] The Commission thus considered that it was not bound by the WTO ruling in *Ukraine – Ammonium Nitrate*.

On the same note, the EU also appealed 'into the void' the last WTO panel report condemning the EU for this practice – namely, *EU – Cost Adjustment Methodologies II (Russia)*.[82] In other words, due to both the lack of a standing WTO Appellate Body and the fact that Russia refused to enter into an appeal arbitration under Article 25 of the WTO Dispute Settlement Understanding, the WTO panel report cannot be officially

[75] Commission Implementing Regulation 2017/1578, OJ 2017 L 239/9.

[76] *EU – Biodiesel (Indonesia) – Report from the Panel*, *supra* note 72.

[77] WTO, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate – Report of the Appellate Body*, 12 September 2019, WT/DS493/AB/R, section 6.2; WTO, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate – Report of the Panel*, 8 April 2020, WT/DS493/RPT, section 7.4.1; WTO, *European Union — Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint) – Report of the Panel*, 24 July 2020, WT/DS494/R, section 7.2; WTO, *Australia – Anti-Dumping Measures on A4 Copy Paper – Report of the Panel*, 4 December 2019, WT/DS529/R, section 7.2.

[78] See, e.g., Commission Implementing Regulation 2019/576, OJ 2019 L 100/7.

[79] *Ukraine – Ammonium Nitrate – Report of the Appellate Body*, *supra* note 77.

[80] *Ibid.*, para. 6.88; *EU – Biodiesel (Argentina) – Report from the Appellate Body*, *supra* note 70, paras 6.37, 6.56.

[81] Commission Implementing Regulation 2019/576, OJ 2019 L 100/7, Recital 57.

[82] *EU – Cost Adjustment Methodologies (Russia) – Report of the Panel*, *supra* note 79.

adopted by the WTO Dispute Settlement Body.[83] In that case, Russia challenged the EU's application of Article 2(5) of the Basic Anti-Dumping Regulation in several investigations and the EU's unwritten measure (the 'Cost Adjustment Methodology'), whereby the Commission discards the actual costs of production for investigated companies in the country of origin when it considers that one of the raw material's costs are not in line with international prices. Following in the footsteps of the WTO Appellate Body, the WTO Panel agreed with Russia's challenge and found that the EU's methodology violated the WTO Anti-Dumping Agreement as Article 2.1.1.1 of that Agreement does not allow investigating authorities to assess the reasonableness of the costs in an exporting producer's records.[84] The EU disagreed with these findings and appealed the report 'into the void', indicating that the Commission will continue to use this methodology to further its extractivist agenda.

In this regard, the recent WTO Panel in *Australia – Anti-Dumping Measures on A4 Copy Paper* seemed to accede to the possibility of disregarding production costs in anti-dumping investigations when these costs are affected by export restrictions.[85] In the underlying investigation on imports of A4 copy paper from Indonesia, the Australian investigating authority disregarded Indonesian producers' actual costs for pulp after concluding that they did not reasonably reflect competitive market costs. Despite the underlying facts of this case being similar to those in *Ukraine – Ammonium Nitrate*, the WTO Panel found that the Australian investigating authority was not prevented from assessing the reasonableness of the costs in the exporting producers' records.[86] The WTO Panel concluded that the term 'normally' in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement provides a separate basis for disregarding an exporter's records as the basis for establishing costs.[87] As a result, the WTO Panel determined that 'the investigating authority has to consider whether the records satisfy the two explicit conditions and establish that, although the records are in accordance with GAAP [Generally Accepted Accounting Principles] of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration, it nonetheless finds a compelling reason, distinct from the two explicit conditions, to disregard [such records]'.[88] In that case, the Australian investigating authority had not expressly established that the Indonesian producers' records met the two conditions of the first sentence of Article 2.2.1.1 – namely (i) that the records of the exporting producer are kept in accordance with the generally accepted accounting principles of the country concerned and (ii) that it is shown that the records

[83] WTO, *EU Appeals Panel Report on EU Dumping Methodologies, Duties on Russian Imports*, 28 August 2020, available at www.wto.org/english/news_e/news20_e/ds494apl_28aug20_e.htm.

[84] *EU – Cost Adjustment Methodologies II (Russia)*, Report of the Panel, *supra* note 82, paras 7.97–7.107.

[85] *Australia – Anti-Dumping Measures on A4 Copy Paper*, *supra* note 77.

[86] Note that the WTO panel in that case found inspiration in an *obiter dictum* where the WTO Appellate Body discussed the term 'normally'. See *Ukraine – Ammonium Nitrate – Report of the Appellate Body*, *supra* note 77, paras 6.87, 6.105; see also Crowley and Hillman, *supra* note 71, at 195–213.

[87] *Australia – Anti-Dumping Measures on A4 Copy Paper*, *supra* note 77, paras 7.109–7.115.

[88] *Ibid.*, para. 7.117.

reasonably reflect the costs associated with the production and sale of the product under consideration – before rejecting the costs in those records 'for other reasons'. As a result, the WTO Panel found that the Australian investigating authority's reliance on the term 'normally' was inconsistent with Article 2.2.1.1 as it did not give effect to the entirety of this provision before disregarding the costs.[89]

The WTO Panel's interpretation appears overly formalistic in nature as it would, in effect, allow investigating authorities to disregard exporting producers' recorded costs based on the conclusion that the circumstances are not 'normal' as long as it formally checks that the two conditions of Article 2.2.1.1 are met. This is particularly questionable as it could be used by investigating authorities to do exactly what the WTO Appellate Body condemned in *EU – Biodiesel (Argentina)*, *EU – Biodiesel (Indonesia)* and *Ukraine – Ammonium Nitrate* – that is, to assess the reasonableness of the costs incurred by an exporting producer against an international benchmark.[90] Furthermore, this interpretation would seem to go against the principle of permanent sovereignty over natural resources as it would allow WTO members to impose unilateral measures in response to another WTO member exercising its sovereign rights over its natural resources in a way that is consistent with its WTO commitments.[91]

These recent developments should be a cause for concern as they highlight the EU's intention to continue its practice of disregarding actual costs of production in case of export restrictions, despite the fact that this methodology has been repeatedly condemned by the WTO. It is concerning because, through this methodology, the Commission does not address price discrimination by an individual exporting producer (which is what anti-dumping measures are intended for) but, rather, furthers its own extractivist trade agenda by attacking governmental measures regarding access to raw materials. Furthermore, the possibility of the WTO nuancing its case law so as to now accept this methodology is worrisome as the export restrictions are often fully in line with the targeted WTO members' WTO commitments. Thus, accepting this methodology, in essence, would infringe upon WTO members' permanent sovereignty over their natural resources.

(b) Can a brake be put on the Commission's approach?

The possibility to adjust exporting producers' costs of production upward in the case of export restrictions on raw materials in anti-dumping investigations is not expressly provided in the text of the Basic Anti-Dumping Regulation or in the Anti-Dumping Agreement. However, Recitals 3 and 4 of Council Regulation (EC) 1972/2002, which introduced the second paragraph of Article 2(5) of the Basic Anti-Dumping Regulation, indicates that exporting producers' costs of production should be disregarded when they are affected by 'a particular market situation'

[89] *Ibid.*, para. 7.124.

[90] *EU – Biodiesel (Argentina) – Report from the Appellate Body*, *supra* note 70, para. 6.56.

[91] Arreaza, *supra* note 40; Schrijver, *supra* note 40.

resulting in 'domestic prices being out of line with world-market prices or prices in other representative markets'.[92] These recitals have resulted in tensions between the case law of the Court of Justice for the European Union (CJEU) and that of the WTO, as explained below.

The issue of upward adjustments to costs of production in the case of export restrictions on raw materials first reached the EU courts before it was addressed by the WTO. In a series of cases, the EU courts found that the Commission's approach was legal under EU law in light of Recitals 3 and 4 of Council Regulation 1972/2002.[93] In this regard, the EU courts limited their review to whether the export restrictions at hand could in fact affect the prices of raw materials in the domestic market.[94] Following the WTO reports in *EU – Biodiesel*, the Commission did use the WTO Enabling Regulation to amend the anti-dumping measures in the *Biodiesel* case.[95] However, this did not prevent the Commission from continuing to apply Article 2(5) of the Basic Anti-Dumping Regulation in order to disregard actual costs of production when they are affected by export restrictions in other investigations and to appeal 'into the void' the latest WTO panel report on this issue. As such, while WTO members targeted by this methodology could consider having recourse to the Dispute Settlement Mechanism on this issue, they should only do so if they have joined the multi-party interim appeal arbitration arrangement or are willing to enter into appeal arbitration under Article 25 of the Dispute Settlement Understanding with the EU.

Another option would be to bring the matter before the EU courts anew by arguing that their case law[96] should be revised given the WTO rulings in *EU – Biodiesel* and *Ukraine – Ammonium Nitrate*. Indeed, no challenge to this methodology has been brought before the EU courts since these rulings were adopted.[97] This approach may have limited chances of success, however, since the EU courts should follow past WTO

[92] Council Regulation 1972/2002, OJ 2002 L 305/1.

[93] Case T-121/14, *PT Pelita Agung Agrindustri v. Council* (EU:T:2016:500), para. 59; see also Case T-120/14, *PT Ciliandra Perkasa v. Council* (EU:T:2016:501), para. 59; Case T-118/14, *LDC Argentina v. Council* (EU:T:2016:502); Case T-117/14, *Cargill v. Council* (EU:T:2016:503); Cases T-112/14 to T-116/14 and T-119/14, *Molinos Rio de la Plata v. Council* (EU:T:2016:509); Case T-111/14, *Unitec Bio v. Council* (EU:T:2016:505); Case T-80/14, *PT Musim Mas v. Council* (EU:T:2016:504); Case T-139/14, *PT Wilmar v. Council* (EU:T:2016:499).

[94] *Molinos Rio de la Plata*, *supra* note 93, Recital 95; see also *LDC Argentina*, *supra* note 93; *Cargill*, *supra* note 93; *Unitec Bio*, *supra* note 93.

[95] Commission Regulation 2017/1578, OJ 2017 L 239/9.

[96] *Molinos Rio de la Plata*, *supra* note 93, Recital 95; see also *LDC Argentina*, *supra* note 93; *Cargill*, *supra* note 93; *Unitec Bio*, *supra* note 93.

[97] It should, however, be noted that the EU's CJEU, in discussing the issue of changes in circumstances to justify the opening of a review of an anti-dumping measure, stated that '[t]he Court finds that, in the present case, the question is not whether, as the applicants maintain, gas prices in Russia are per se remunerative, but whether they reasonably reflect a price normally charged on undistorted markets, without it being necessary in the present case to take a position on the intervener's contention that price changes cannot, as such, be changes in circumstances'. The General Court then assessed whether prices in Russia were still regulated by the state. See Case T-45/19, *Acron and Others v. Commission* (EU:T:2021:238), paras 59–68. While this concerned a different issue than that discussed in section 3.A.1, it may indicate that the EU courts will not amend their previous case law in light of the WTO rulings in the *EU – Biodiesel* cases.

rulings only insofar as the Basic Anti-Dumping Regulation implements a particular obligation assumed in the context of the WTO or refers explicitly to specific provisions of the WTO Agreements.[98] As discussed above, while the first paragraph of Article 2(5) of the Basic Anti-Dumping Regulation reflects Article 2.2.1.1 of the Anti-Dumping Agreement, the second paragraph has no equivalent.[99] Furthermore, Recitals 3 and 4 of Council Regulation 1972/2002 expressly indicate that this paragraph was introduced to address situations where raw material costs are affected by distortions. Thus, while the EU courts should follow WTO jurisprudence in regard to the first paragraph of Article 2(5), they have no such obligations with regard to the second paragraph.[100] As a result, the EU courts may still uphold the validity of the Commission's approach.

Any litigant bringing this matter forward to the EU courts once again, however, would be wise to also invoke the principle of permanent sovereignty over natural resources. Indeed, in the recent *Front Polisario*[101] and *Western Sahara Campaign UK*[102] cases, the principle of permanent sovereignty over natural resources was confirmed as a binding principle on the EU's actions. In those cases, the EU court reviewed the EU's actions and interpreted the rules so as to ensure that the EU's actions complied with these principles of international law.[103] A similar argument could be put forth with regard to the interpretation of Article 2(5) of the Basic Anti-Dumping Regulation since the current reading of this provision contravenes the principle of permanent sovereignty over natural resources by unilaterally punishing countries that want to dispose of their natural resources to develop their own domestic industries in a way that is consistent with their WTO commitments.

2 Waiver of the Lesser Duty Rule in Case of Export Restrictions on Raw Materials

(a) Recent amendment to the Basic Anti-Dumping Regulation

The Basic Anti-Dumping Regulation provides for the application of the 'lesser duty rule'. This rule means that the amount of the anti-dumping duty that the Commission imposes must not exceed the dumping margin, but it should be less if such lesser duty would be adequate to remove the injury to the Union industry.[104] In other words, the absolute maximum duty that can be imposed is the dumping margin, irrespective of the injury suffered by the Union industry, and the minimum amount is whatever

[98] Case C-21/14 P, *Commission v. Rusal Armenal* (EU:C:2015:494), para. 41.

[99] *Acron OAO, supra* note 67, paras 63–66; Case C-76/00 P, *Petrotub and Republica v. Council* (EU:C:2003:4), paras 53–56.

[100] *Acron OAO, supra* note 67, paras 63–66; *Petrotub and Republica, supra* note 99, paras 53–56.

[101] Case T-512/12, *Front Polisario v. Council of the European Union* (EU:T:2015:953); Case C-104/16 P, *Council v. Front Polisario* (EU:C:2016:973).

[102] Case C-266/16, *Western Sahara Campaign UK* (EU:C:2018:118).

[103] Prickartz, 'The European Union's Common Fisheries Policy, the Right to Self-determination and Permanent Sovereignty over Natural Resources', 35(1) *International Journal of Marine and Coastal Law* (2019) 82.

[104] Basic Anti-Dumping Regulation, *supra* note 54, Art. 9(4) (definitive duties), Art. 7(2) (provisional duties).

is needed to eliminate the injury.[105] The Commission usually computes the injury margin by comparing the exporting producers' sales price per product type to the Union industry's target price (that is, a constructed price based on the cost of production plus a target profit) for a comparable product type.

The Commission applied the lesser duty rule automatically in proceedings initiated before 8 June 2018, and there were a considerable number of cases where the anti-dumping duties were based on the injury margin as the level of the dumping margin exceeded what was necessary to remove the injury suffered by the Union industry.[106] However, as of the entry into force of Council Regulation 2018/825, which amended the Basic Anti-Dumping Regulation, on 8 June 2018,[107] the Commission can now waive the lesser duty rule if the product concerned is affected by 'distortions on raw materials' accounting for at least 17 per cent of the cost of production of the product being investigated. These distortions include 'dual pricing schemes, export taxes, export surtax, export quota, export prohibition, fiscal tax on exports, licensing requirements, minimum export price, value added tax (VAT) refund reduction or withdrawal, restriction on customs clearance point for exporters, qualified exporters list, domestic market obligation [and] captive mining'.[108] Before deciding to apply the waiver and thereby not limit the anti-dumping duties to the injury margin, the Commission must 'clearly conclude' that it is in the EU's interest to do so and 'examine all pertinent information such as the levels of spare capacity in the exporting country, competition for raw materials, and the effect on supply chains of Union companies'.[109]

As a result, the Commission can impose higher duties up to the level of the dumping margin in cases where the country of the exporting producer has policies in place that ensure that raw materials extracted in its territory are used for processing in its territory even when these policies are in line with WTO rules. Indeed, the stated *raison d'être* of this provision is that:

> [t]hird countries increasingly interfere in the trade of raw materials with a view to keeping raw materials in those countries for the benefit of domestic downstream users, for instance by imposing export taxes or operating dual pricing schemes. Such interference creates additional distortions of trade. As a result, the costs of raw materials do not reflect the operation of normal market forces of supply and demand for a given raw material. As a result, Union producers are not only harmed by dumping, but suffer from additional distortions of trade compared to third-country downstream producers which engage in such practices. In order to adequately protect trade, due regard should be had to such distortions when determining the level of duties to be imposed.[110]

This recital clearly highlights the EU's intention to include anti-dumping measures into its extractivist policy arsenal, as it shows the EU's intention to enable the Commission

[105] Case T-351/13, *Crown Equipment (Suzhou) Co. Ltd and Crown Gabelstapler GmbH & Co. KG v. Council* (EU:T:2016:616), paras 49–50.

[106] Van Bael & Bellis, *supra* note 59, ch. 7.

[107] Council Regulation 2018/825, OJ 2018 L 143/1.

[108] Basic Anti-Dumping Regulation, *supra* note 53, Art. 7(2a).

[109] *Ibid.*, Art. 7(2b).

[110] Council Regulation 2018/825, OJ 2018 L 143/7, Recital 8.

to impose higher anti-dumping duties on foreign exporters of downstream products when their government has in place policies encouraging the domestic processing of raw materials.

So far, in most cases where the application of this provision has been requested by the complainants,[111] the Commission has found that it was not necessary to assess whether there were in fact distortions of raw materials since the dumping margin was lower than the injury margin.[112] Yet, in *Certain Hot Rolled Stainless Steel Sheets*, the Commission assessed whether there were raw material distortions in Indonesia and China. With regard to Indonesia, the Commission found that Indonesia had in place various export restrictions on nickel ore, an essential raw material to produce stainless steel, ranging from an export ban to export taxes or export licensing requirements depending on the purity of the nickel ore.[113] The Commission added that this resulted in nickel ore prices in Indonesia being 30 per cent lower than prices in the Philippines, which the Commission considered to be a comparable nickel ore market to that of Indonesia.[114] The Commission similarly found that China had in place an export tax on stainless steel scrap, ferrosilicon, nickel pig iron and ferrochromium as well as a licensing requirement on ferrosilicon, vanadium, ferronickel and ferrochromium.[115] While the Commission indicated that these measures 'create a comparative disadvantage for the Union industry compared to the exporting producers in the countries concerned',[116] the Commission considered that it was not in the EU's interest to waive the lesser duty rule due to strong pressure from downstream users.[117]

In *Ukraine – Ammonium Nitrate*, however, the Commission added insult to injury. Not only did it not apply the lesser duty rule, but it also applied Article 2(5) of the Basic Anti-Dumping Regulation, discussed above, in order to impose duties based on an inflated dumping margin with respect to the Russian exporting producers. The Commission decided first to increase the cost of gas in these producers' records as it found that Gazprom, Russia's largest gas supplier, was mandated by law to sell domestically at prices set by the Russian government.[118] The Commission noted that, although this rule only applied to Gazprom, other gas suppliers aligned their prices with Gazprom since it was by far the largest gas supplier in Russia.[119] As a result, the Commission replaced the Russian exporting producers' actual cost for gas with Russia's export price of gas as a benchmark,[120] thus artificially inflating these producers' dumping

[111] Commission Regulation 2020/776, OJ 2020 L 189/1, Recitals 1114–1115, 1157.

[112] Commission Regulation 2021/9, OJ 2021 L 3/4, Recital 172; Commission Regulation 2021/854, OJ 2021 L 188/61, Recitals 174–178; Commission Regulation 2020/1428, OJ 2020 L 336/8, Recital 348. In Commission Regulation 2021/582, OJ 2021 L 124/40, Recitals 476–480, the Commission found that despite the export restrictions in place in China, the prices of the relevant raw materials were in line with international market prices so that it did not waive the lesser duty rule.

[113] Commission Regulation 2020/508, OJ 2020 L 110/3, Recital 342.

[114] *Ibid.*, Recitals 344–345.

[115] *Ibid.*, Recital 347.

[116] *Ibid.*, Recital 357.

[117] *Ibid.*, Recital 377.

[118] Commission Regulation 2019/576, OJ 2019 L 100/7, Recital 53.

[119] *Ibid.*

[120] *Ibid.*, Recital 59.

margins. The Commission then turned to the question of whether it should waive the lesser duty rule. The Commission concluded that the cost of gas easily satisfied the 17 per cent of the cost of production threshold[121] and that this cost was distorted because of the dual pricing scheme mandated by law for Gazprom, the export tax on gas and the fact that Gazprom was the only Russian gas supplier licensed to export gas.[122] The Commission thus concluded that the lesser duty rule should be waived, stressing that doing so would be in the EU's interest since the EU producers of UAN were particularly impacted by the distortions, as they purchased gas exported from Russia to produce UAN and thus competed for raw materials with Russian producers.[123]

The ability to waive the lesser duty rule in cases of distortions of raw materials thus allows the Commission to address through anti-dumping duties, not only the injury caused to the Union industry by the exporting producers under investigation, but also that caused to the Union industry by the government of the exporting country through export restrictions on raw materials needed by the Union industry. By doing so, the EU largely departs from the classical understanding of anti-dumping measures as a means to address price discrimination by individual exporting producers[124] to instead address extractivist concerns over competition for access to raw materials. This is worrisome as many of the distortions taken into account to decide whether to waive the lesser duty rule are in line with WTO members' WTO commitments, so that, in essence, this methodology reduces the policy space left by the WTO Agreements to developing countries over their natural resources. When looked at together with the Commission's methodology of disregarding costs when they are affected by export restrictions for the determination of a producer's cost of production for the dumping margin calculation, the ability to waive the lesser duty rule confirms the intention of the EU to turn its anti-dumping measures into potential extractivist trade policy instruments.[125]

(b) Any way out?

The possibility of waiving the lesser duty rule in the case of export restrictions on raw materials is expressly provided for by Article 7(2a) of the Basic Anti-Dumping Regulation and Article 12(1) of the EU Basic Anti-Subsidy Regulation.[126] At the same time, while the Anti-Dumping Agreement encourages the application of the lesser duty rule, it expressly allows WTO members to impose anti-dumping duties at a level not higher than the dumping margin,[127] even if that margin is higher than what is

[121] *Ibid.*, Recital 210.

[122] *Ibid.*, Recitals 212–215.

[123] *Ibid.*, Recitals 227–228.

[124] See, e.g., WTO, *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India – Report of the Appellate Body*, 8 April 2003, WT/DS141/AB/RW, para. 108.

[125] European Commission, *supra* note 1; Council Regulation 2018/825, OJ 2018 L 143/7, Recital 8 (discussed above regarding the waiver of the lesser duty rule).

[126] To my knowledge, while some other WTO members apply the lesser duty rule, only the European Union (EU) waives it in case of export restrictions on raw materials.

[127] Anti-Dumping Agreement, *supra* note 50, Art. 9.1; see also SCM Agreement, *supra* note 28, Art. 19.2.

adequate to remove the injury to the domestic industry.[128] Thus, a challenge before the EU courts or before the WTO seems to have zero chances of success.

One option, although somewhat idealistic, is for developing countries to negotiate the inclusion of specific provisions curtailing the Commission's possibility of waiving the lesser duty rule in the trade defence chapters of their FTAs with the EU. Such a provision is, for example, included in the EU–Singapore FTA, which provides that '[s]hould a Party decide to impose any anti-dumping or countervailing duty, the amount of such duty shall not exceed the margin of dumping or countervailable subsidies, and it should be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry'.[129]

B *Changes Regarding Anti-subsidy Investigations*

In addition to the EU's new anti-dumping approach, the Commission has recently engineered two new ways to treat export restrictions as subsidies in anti-subsidy investigations, thereby further reducing resource-rich WTO members' policy space over their natural resources. Through these new approaches, the Commission can impose higher countervailing duties on imports of finished goods manufactured from raw materials obtained at lower costs thanks to government policies encouraging their domestic processing. Thus, the EU has also added countervailing measures to its extractivist policy toolbox. Before turning to how exactly the EU has been doing so, a brief explanation regarding anti-subsidy investigations and countervailing measures is needed.

Under EU law, the imposition of countervailing measures is regulated by the EU Basic Anti-Subsidy Regulation.[130] It empowers the Commission to impose countervailing measures against imports from a particular country following an investigation, once it can be established that imports are being subsidized[131] and cause material injury or a threat thereof to the Union industry of the like product.[132] The assessment of these criteria can be conducted on a country-wide basis but is usually done per exporting producer. It can result in a country-wide duty or an individual duty per exporting producer, depending on how the analysis is conducted.[133] A subsidy is defined by the SCM Agreement and the EU Basic Anti-Subsidy Regulation as a financial contribution from a government or public body that confers a benefit on its recipient (meaning that the contribution is more favourable than what would be obtained in the market).[134]

[128] WTO, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Report of the Appellate Body*, 15 July 2011, WT/DS397/AB/R, para. 336.

[129] See Free Trade Agreement between the European Union and the Republic of Singapore, OJ 2019 L 294/3, Art. 3.3.

[130] Council Regulation 2016/1037 (Basic Anti-Subsidy Regulation), OJ 2016 L 176/55.

[131] *Ibid.*, Arts 2–7.

[132] *Ibid.*, Art. 8.

[133] SCM Agreement, *supra* note 28, Art. 19; Basic Anti-Subsidy Regulation, *supra* note 130, Art. 15.

[134] Basic Anti-Subsidy Regulation, *supra* note 130, Arts 3, 4; SCM Agreement, *supra* note 28, Arts 1, 2. See further Van Bael & Bellis, *supra* note 59, part II; D. Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (2014), ch. 3.

A financial contribution can take several forms such as the provision of goods at less than adequate remuneration or a direct transfer of funds. A financial contribution granted by a private body can also be considered a subsidy if the government has 'entrusted' or 'directed' that private body to provide a financial contribution.[135] This is an important point since, as we will see in section 3.B.1, the Commission now considers that, in case of export restrictions on raw materials, all raw material producers in a country can be considered to be entrusted or directed by the government to sell their raw materials at low prices, thus resulting in a subsidy. The SCM Agreement and the EU Basic Anti-Subsidy Regulation also provide that a subsidy exists when there is 'any form of income or price support'.[136] As we will see in section 3.B.2, the Commission has also recently interpreted these terms in order to consider export restrictions on raw materials as subsidies. To be made subject to countervailing duties, a subsidy must also be found to be specific,[137] meaning that it is not generally available throughout the economy.[138]

The sum of the benefits received by an exporting producer (that is, the difference between the financial contributions that the exporting producers could have received on the market and those it actually received) divided by that entity's turnover is called the subsidy margin. As with anti-dumping measures, countervailing duties cannot exceed an exporting producer's subsidy margin, but they can be lower if the duty is considered sufficient to remove the injury.[139] In this regard, the possibility of waiving the lesser duty rule, discussed above, in the context of anti-dumping investigations has also been granted to the Commission in anti-subsidy investigations.[140] The criteria for doing so, however, are more lenient in anti-subsidy investigations since the Commission is obliged to waive the lesser duty rule, except if it is not in the EU's interest to do so. Thus, the Commission does not have to assess whether there are raw material distortions in order to waive the lesser duty rule in anti-subsidy investigations.[141]

1 Export Restrictions on Raw Materials as 'Entrustment' or 'Direction' of Private Parties

In anti-subsidy investigations, the Commission's recent practice has been to consider that, if domestic prices are lower than export prices for raw materials (caused by export restrictions on raw materials or subsidization of the input suppliers), this can constitute a subsidy. The Commission equates such low domestic prices with 'direction' or 'entrustment' of private parties by the government in the sense of the SCM Agreement and the EU Basic Anti-Subsidy Regulation, even without direct

[135] Basic Anti-Subsidy Regulation, *supra* note 130, Art. 3; SCM Agreement, *supra* note 28, Art. 1.
[136] Basic Anti-Subsidy Regulation, *supra* note 130, Art. 3; SCM Agreement, *supra* note 28, Art. 1.
[137] Basic Anti-Subsidy Regulation, *supra* note 130, Art. 4; SCM Agreement, *supra* note 28, Art. 2.
[138] WTO, *United States – Subsidies on Upland Cotton – Report of the Panel*, 21 March 2005, WT/DS267/R, para. 7.1141.
[139] SCM Agreement, *supra* note 28, Art. 19.2.
[140] Council Regulation 2017/2321, OJ 2017 L 338/1, Art. 12(1).
[141] Council Regulation 2018/825, OJ 2018 L 143/7, Recital 10.

government involvement. It then calculates the benefit received from these lower priced inputs by comparing their prices with prices on the international market. This artificially increases the total benefit received by exporting producers, leading to higher countervailing duties.

For example, in *Organic Coated Steel*, the Commission found that the government of China had taken steps to discourage the exports of hot-rolled and cold-rolled steel used in the production of organic coated steel through lower VAT refunds when these products were exported as compared to when they were sold domestically. On that basis, it decided that producers of these inputs were entrusted and directed by the government of China to sell at lower prices to the exporting producers of organic coated steel.[142] The Commission then compared the prices at which these inputs were sold to the exporting producers with world market prices to establish the amount of benefit, which resulted in subsidy margins of up to 27.63 per cent.[143]

In *E-bikes*, the Commission concluded that all producers of engines and batteries in China were 'entrusted' and 'directed' by the Chinese government to sell at low prices to Chinese e-bike producers because they sold at lower prices domestically than abroad. The Commission added that some of these producers were also either state-owned enterprises or members of the Chinese Cycling Association and that they were likely to be subsidized individually by the Chinese government. Having determined that there was a subsidy within the meaning of the SCM Agreement and the EU Basic Anti-Subsidy Regulation, the Commission then calculated the subsidy amount by comparing the domestic purchase prices of engines and batteries with the export prices of engines and batteries to the EU.[144] This subsidy alone accounted for almost 12.5 per cent of the individual subsidy margin for certain Chinese e-bike producers.[145]

Similarly, in *Biodiesel*, the Commission concluded that all producers of soybeans were 'entrusted' and 'directed' to sell soybeans to biodiesel producers at less than adequate remuneration, as the government of Argentina sought to reduce the domestic price of soybeans through several measures, including export taxes on soybeans, subsidies to soybean producers and countermeasures on producing other grains.[146] In order to calculate the subsidy amount, the Commission compared the domestic purchase prices of soy beans for the exporting producers under investigation with prices on the international market,[147] which led to substantial subsidy amounts of up to 33 per cent.[148] These findings seem to be in complete opposition with the principle of sovereignty over natural resources as most, if not all, these measures are in line with the targeted WTO members' WTO commitments. These findings do not seem to be in line with WTO rules either for the following reasons.

[142] Commission Regulation 215/2013, OJ 2013 L 73/13, Recitals 91–96.
[143] *Ibid.*, Recitals 103–104.
[144] Commission Regulation 2019/72, OJ 2019 L 16/5, Recitals 379–425, 443–488.
[145] *Ibid.*, Tables 3, 4.
[146] Commission Regulation 2019/244, OJ 2019 L 40/1, Recitals 84–135.
[147] *Ibid.*, Recitals 217–221.
[148] *Ibid.*, Table 3.

First, according to WTO case law, while the SCM Agreement acknowledges that seemingly private conduct may be attributable to a government for the purposes of determining whether there has been a 'financial contribution',[149] the definition of 'financial contribution' contains several requirements that must be assessed and present for each raw material supplier separately.[150] The Commission's approach is not in line with this jurisprudence as it disregards 'the case-by-case' nature of this determination leading to the result that entire sectors of the exporting country's economy can be considered as entrusted or directed.[151]

Second, the standard established by WTO panels and the WTO Appellate Body for entrustment or direction is not met by the EU in cases of export restraints since, even though export restraints may have the effect of lowering domestic prices, the nature of export restraints is not equivalent to explicit government actions.[152] In this regard, the EU seems to have changed its tune as it correctly explained several years ago that '[t]he only alternative which would meet the standard of "government direction" is the case in which the government would direct the pineapple producers to provide their pineapples to the juice industry at fixed prices. Only such a regulatory measure would really correspond to the government directly buying pineapples and selling them to the juice industry at a determined price, since it would eliminate the discretion open to producers in the face of an export restraint'.[153]

Third, the EU's treatment of domestic prices for raw materials that are lower than export prices as subsidies does not seem to meet the specificity criteria enshrined in the SCM Agreement since these raw materials are generally available for purchase by anyone in the exporting country at lower prices.[154]

Fourth, as explained by the WTO panel in *US – Softwood Lumber III*, if an investigating authority is of the opinion that a government is subsidizing an input of the product under investigation, this investigating authority must conduct a pass-through analysis to assess how much of the subsidies received by the input producers is passed on to their customers.[155] In other words, the investigating authority cannot presume, but rather must establish, whether and to what extent the benefit of the subsidy to the input producer has actually been passed through to the downstream buyer that is

[149] WTO, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea – Report of the Appellate Body*, 7 November 2000, WT/DS99/RW, para. 108.

[150] WTO, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Report of the Appellate Body*, 8 December 2012, WT/DS436/AB/R, paras 4.36–4.37.

[151] *Ibid.*

[152] WTO, *United States – Measures Treating Export Restraints as Subsidies – Report of the Panel*, 29 June 2006, WT/DS194/R, paras 8.32–8.36; see also Crowley and Hillman, *supra* note 73. In this regard, the EU seems to have changed its position substantially as it previously supported this interpretation. See WTO, Executive Summary of Third Party Written Submission by the European Communities before the Panel in *US – DRAMS – Report of the Appellate Body*, *supra* note 153, Annex B-1, para. 18.

[153] *Ibid.*, Annex B-1, para. 18.

[154] *US – Upland Cotton – Report of the Panel*, *supra* note 138, para. 7.1141.

[155] WTO, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada – Report of the Panel*, 27 September 2002, WT/DS236/R, paras 7.68–7.69.

targeted by the anti-subsidy investigation.[156] The Commission, however, does not conduct this analysis and instead considers that the government in question provides the input at less than adequate remuneration.

It thus appears that the export restrictions on raw materials assessed by the Commission 'cannot constitute government-entrusted or government-directed provision of goods in the sense … of the SCM Agreement'.[157] Hence, while this approach fits squarely within the EU's retooling of trade defence instruments as extractivist policy tools, by countervailing these WTO-consistent measures, the Commission unilaterally infringes on those targeted WTO members' sovereign right over their natural resources and disregards WTO rules.

2 Export Restrictions on Raw Materials as Income or Price Support

The Commission's recent practice has also been to consider that export restrictions on raw materials resulting in lower domestic prices compared to export prices can constitute subsidies in the form of 'income or price support' within the meaning of the SCM Agreement and the EU Basic Anti-Subsidy Regulation. Similar to the first methodology described above, this increases the total benefit received by exporting producers, resulting in higher countervailing duties. In *EU – Biodiesel*, the Commission found that export taxes on soybeans and subsidies to soybean producers (discussed above) also qualified as 'any form of income or price support' as they amounted to regulatory conditions that artificially allowed producers to obtain soybeans at lower prices than those available internationally.[158] The Commission considered 'any form of income or price support' in very broad terms.[159] The Commission specified that the terms 'income or price support' cover a broad category of measures as they are qualified by the term 'any form' and concluded that the terms 'income or price support' include all forms that directly or indirectly provide income or price support.[160]

In order to determine whether the measures at stake could qualify as income or price support in this case, the Commission examined whether the government of Argentina intended to support the creation and development of the biodiesel industry, what kind of measures the government adopted to support the biodiesel industry and whether those measures qualified as 'any form of income or price support'.[161] The Commission found that the government of Argentina had intended to support the creation and development of the biodiesel industry and had taken supporting measures in this sense such as export taxes on soybeans, export quotas on the production of grains other

[156] Shadikhodjaev, 'How to Pass a Pass-Through Test: The Case of Input Subsidies', 15 *Journal of International Economic Law* (2012) 621.

[157] *US – Export Restraints as Subsidies – Report of the Panel*, *supra* note 155, para. 8.75.

[158] Commission Regulation 2019/244, OJ 2019 L 40/1, Recitals 186–207.

[159] *Ibid.*, Recital 171.

[160] *Ibid.*, Recital 173.

[161] *Ibid.*, Recital 177.

than soybeans, import bans on soybeans and subsidies to soybean growers.[162] The Commission considered that these measures qualified as 'any form of income or price support' as they allowed producers to obtain soybeans at lower prices than those available internationally.[163]

These findings are in contradiction to the SCM Agreement as interpreted by WTO panels and the WTO Appellate Body. The WTO panel in *China – Grain Oriented Flat-rolled Electrical Steel* found that, 'despite the potential for a broad interpretation of the term "price support"', 'a more narrow interpretation is appropriate'.[164] That is, the WTO panel continued, the existence of each of the types of financial contributions is determined 'by reference to the action of the government concerned, rather than by reference to the effects of the measure on a market'.[165] The WTO panel made clear that 'price support' does not include all government intervention that may have merely an effect on prices.[166] Consequently, it found that 'price support' includes direct government intervention in the market with the design to fix the price of a good at a particular level; for example, through the purchase of surplus production when the price is set above equilibrium[167] or when the government sets or targets a given price.[168] It therefore does not capture every government measure that has an incidental and random effect on price so that 'price support' involves 'the government setting and maintaining a fixed price, rather than a random change in price merely being a side-effect of any form of government measure'.[169]

These findings are applicable to the investigation in *Biodiesel* because the Commission found that the series of measures laid down by the Argentinean government in the forms of export taxes and subsidies to input producers were 'price support' arising from the fact that they 'artificially allow biodiesel producers to obtain soybeans at lower prices than those available internationally'.[170] Following WTO jurisprudence, these should not have been qualified as 'price support' since the government of Argentina did not fix soybean prices at a particular level. Thus, this is another example where the Commission disregarded a developing country's permanent sovereignty over their natural resources as well as WTO rules to further its extractivist goals.

[162] *Ibid.*, Recitals 186–202.

[163] *Ibid.*, Recitals 203–207. Note that the Commission also mentions a measure artificially inflating the purchase prices of biodiesel by fuel companies in Argentina but concluded that no exporting producer benefited from it during the investigation.

[164] WTO, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States – Report of the Panel*, 20 November 2012, WT/DS414/R, para. 7.85.

[165] *Ibid.*

[166] *Ibid.*, para. 7.86.

[167] *Ibid.*

[168] *Ibid.*, para. 7.84. This is necessarily the case for income support too, which is defined as 'government payments to maintain individuals' (or producers') incomes at some prescribed minimum level'.

[169] *Ibid.*, paras 7.86–7.87, citing *US – DRAMS – Report of the Appellate Body*, *supra* note 149, para. 114.

[170] Commission Regulation 2019/244, OJ 2019 L 40/1, Recital 203.

3 Can the Commission's Retooling of Countervailing Measures as Extractivist Policy Tools Be Stopped?

The Commission's treatment of export restrictions as subsidies is not expressly allowed by the EU Basic Anti-Subsidy Regulation or by the SCM Agreement. It merely results from the Commission's own interpretation and seems to be in clear violation of the provisions of the SCM Agreement. Challenging the EU's practice of considering export restrictions as subsidies in anti-subsidy investigations before the WTO could thus be fruitfully attempted.[171] A challenge to the regulations imposing countervailing duties by exporting producers before the EU courts is also conceivable. However, the EU courts often grant a very wide margin of discretion to the Commission in anti-subsidy investigations due to the complexity of the economic, political and legal situations at hand.[172] This can make it potentially more difficult to challenge the findings of subsidization before the EU courts.

4 Concluding Remarks

While recent changes to the EU's trade defence instruments to reflect environmental and social concerns are more bark than bite,[173] its new approaches regarding access to raw materials are not. Faced with the inability to amend its WTO schedule of concessions on goods to increase its bound import tariffs on new types of finished goods made with raw materials that are absent in the EU, such as e-bikes[174] or parts of windmills,[175] the EU has thus turned its trade defence instruments into a new form of tariff escalation. Higher tariffs are now imposed on processed goods when the Union industry is at a disadvantage when it comes to access to raw materials.[176] The EU's actions would not be so worrying if the EU were not one of the world's largest consumer markets. This is so because the imposition of these higher trade defence duties, or the threat thereof, may have a chilling effect on resource-rich developing countries' willingness to encourage consumption of domestic raw materials and the development of downstream industries. Indeed, these developing countries may consider that they are better off continuing to export raw materials instead.[177] This may seriously limit

[171] It should be noted that only one challenge has ever been brought to the WTO against the EU's use of countervailing measures. See WTO, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan – Report of the Panel*, 6 July 2017, WT/DS486/R; WTO, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan – Report of the Appellate Body*, 16 May 2018, WT/DS486/AB/R, where Pakistan successfully challenged the EU's countervailing measures on imports of polyethylene terephthalate.

[172] See, e.g., Case T-300/03, *Moser Baer India v. Council* (EU:T:2006:289), para. 40.

[173] Gustafsson and Crochet, 'At the Crossroads of Trade and Environment: The Growing Influence of Environmental Policy on EU Trade Law', in A. Orsini and E. Kavvatha (eds), *EU Environmental Governance* (2020) 187, at 190–193.

[174] Commission Regulation 2019/72, OJ 2019 L 16/5.

[175] Commission Regulation 2020/776, OJ 2020 L 189/1.

[176] European Commission, *supra* note 1.

[177] Weng and Hung, *supra* note 52, at 233–246.

these countries' chances of developing.[178] It is even more concerning that other developed WTO members are increasingly following similar approaches in their own trade defence practices.[179]

The developments discussed in this article thus highlight a shift in the Commission's use of its trade defence measures: from a policy of solely addressing price discrimination or subsidization to one of ensuring the supply of raw materials for European factories.[180] This is not what trade defence instruments were designed for. Using them to address measures, such as export taxes, which are WTO consistent infringes upon the principle of permanent sovereignty over natural resources by punishing trading partners for exercising their sovereign rights under the WTO Agreements. Indeed, even though a few of the export restrictions relied upon by the Commission to justify imposing higher duties are not in line with the enacting WTO members' WTO commitments, most of them are. The EU now imposes higher trade defence duties against exporters whose governments have put in place export taxes, export licensing requirements and dual pricing schemes on raw materials extracted within their territories or provide support to raw material and input suppliers. Yet such measures normally fall within the policy space allowed to WTO members under WTO rules to encourage the processing of extracted raw materials domestically in line with the principle of permanent sovereignty over natural resources.[181]

The EU's willingness to strong-arm its trade partners into ensuring a steady supply of raw materials is not new and is due mainly to the EU's ongoing lack of natural resources. The EU has usually taken such action in bilateral or multilateral forums, such as FTAs[182] or the WTO dispute settlement mechanism.[183] However, for those interested in ensuring that developing countries can reap the benefits of the natural resources with which they are endowed, a close eye should be kept on how the EU uses its trade defence instruments. Targeted WTO members and their exporting producers should seize the means at their disposal to put a brake on the

[178] Stiglitz, *supra* note 8.

[179] The upward adjustment to cost of production discussed in section 3.A.1 has been adopted by Australia. See WTO, *Australia – Anti-Dumping Measures on A4 Copy Paper – Report of the Appellate Body*, 27 January 2020, WT/DS529/R. Likewise, the USA has long treated export restrictions as subsidies similarly to the EU's approach discussed in section 3.B. See Department of Commerce, Countervailing Duties; Final Rule, 63 Fed. Reg. 65351, 25 November 1998; Department of Commerce, Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia, 75 Fed. Reg. 59209, 27 September 2010, at 12–14, Issues and Decision Memorandum.

[180] Council Regulation 2018/825, OJ 2018 L 143/7, Recital 8.

[181] See section 2.A.

[182] Emmott, supra note 3.

[183] See, for example, WTO proceedings in *Indonesia – Measures Relating to Raw Materials* DS592 (Panel Report not yet issued); *China – Duties and other Measures Concerning the Exportation of Certain Raw Materials*, DS509 (Panel not yet composed); *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, DS432 (Panel and Appellate Body Reports adopted on 29 August 2014); and *China – Measures Related to the Exportation of Various Raw Materials*, DS395 (Panel and Appellate Body Reports adopted on 22 February 2012).

EU's (and other developed countries') repurposing of trade defence instruments as extractivist policy tools by challenging the Commission's regulations imposing anti-dumping and countervailing measures before the WTO and before the EU courts as well as negotiating specific provisions in FTAs with the EU to curtail the Commission's practices.