<Reference>

EXPORT RESTRICTIONS

The significance of discussing export restrictions

Export restrictions on natural resources and foodstuffs have been raised recently as a problem issue in terms of international trade, and have been a topic of discussion several times, including in the WTO Doha Round negotiations in the fields of Non-Agricultural Market Access (NAMA) and agriculture. Quantitative restrictions have conventionally focused on imports, but in this section we will particularly look at the export aspect, explaining the disciplines over export restrictions prescribed mainly in the WTO Agreements, in addition to considering current problems and future potential strategies.

1. PROBLEMS RELATING TO EXPORT RESTRICTIONS

(1) Current situation

Similar to those of imports, the restrictions and controls of exports are implemented by a number of countries. The following export restrictions can be observed and categorized depending on their objectives.

1. Export tariffs (taxes) designed to generate fiscal revenue

One type of measures, as seen in developing countries where domestic tax collection mechanism is insufficiently developed, involves restricting exports in order to generate fiscal revenue. This usually takes the form of an export tax (export tariffs), which can be effectively levied at borders. (See Ch.4 , “Tariffs” (1) 2. “The function of tariffs”)

2. Export restrictions/Export tariffs (taxes) to protect domestic industry

Similar to import restrictions, export restrictions are sometimes used not only to generate fiscal revenue from exports, but also to maintain the competitiveness of a country's industry. For example, restricting the export of a rare resource material and allocating it preferentially for domestic industry allows country to maintain the competitiveness of their domestic industry.

3. Export limits/Export tarriffs（taxes）to protect domestic supply

If a country is short of foodstuffs, export restrictions on food are sometimes imposed, in order to ensure sufficient domestic supply.

4. Investment-related export demand

The execution of certain measures may be required (performance requirement) as one condition of authorizing investment. One example of this is an export performance requirement that seeks a specific level of exports, etc. (for rules relating to investment-related performance requirements, see Part III, Ch.5)

5. Other (diplomatic measures, trade security management, etc.)

Export restrictions may also be implemented as a diplomatic tool. For example, as an economic sanction measure based on United Nations Security Council Resolution 748, Japan prohibited engaging in the export in or the trade agency for trade in aircrafts and component parts to Libya by revising the Foreign Exchange Order and the Export Trade Control Order. (The sanctions based on the Security Council resolution in question were later suspended after the resolution of the case. The Japanese government thus decided, in principle, not to prohibit or reject such transactions on basis of the Security Council Resolution when applying laws and regulations since then).

Furthermore, export restrictions may be implemented based on United Nations Security Council resolutions, international treaties, and international export control frameworks, with the objective of preventing the proliferation of nuclear and other weapons of mass destruction (see the column below).

In the past, often exports were voluntarily restrained according to the demands of the importing country. As explained below, however, currently voluntary export restrictions including requests for such restrictions are now clearly prohibited by the Agreement on Safeguards.

Of all the types mentioned above, export restrictions on natural resources

implemented by producing countries have the greatest potential to become a vital problem from the points of view of individual countries' economic activities and security, due to the fact that countries with few natural resources, such as Japan, are dependent on imports of natural resources such as rare metals from a limited number of countries. Furthermore, export restrictions on food also cause serious problems that directly affect the lives of people in developing countries and other countries that import food by leading to the reduction of food supply to international market and raising international prices.

Column: Security Trade Control

In many countries, weapons, and goods and technologies that could be converted into nuclear weapons or other weapons of mass destruction are subject to export restrictions, based on Security Council resolutions and international treaties, etc., in order to maintain national and international peace and security. Some major international frameworks are indicated below.

(1) Security Council Resolution 1540 (adopted 28th April 2004)

Requests each states to enforce strict export control by deciding that all states shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery, including by establishing appropriate controls over related materials.

(2) International treaties

1. Nuclear Non-proliferation Treaty (effective 1970, ratified by Japan in 1976)

Prohibits the transfer by nuclear-weapon states of such weapons to other countries, and the receipt, manufacture and procurement of nuclear weapons by non-nuclear weapon states.

2. Biological Weapons Convention (effective 1975, ratified by Japan in 1997)

Prohibits the development, manufacture or storage of biological or toxic weapons, and stipulate their disposal.

3. Chemical Weapons Convention (effective 1997, ratified by Japan in 1995)

Prohibits the development, manufacture or storage of chemical weapons, and restrict the transfer, etc., of toxic chemical substances that could be used in chemical weapons.

(3) International frameworks for export control

1. Wassenaar Arrangement

In order to prevent the excessive stockpiling of conventional arms that could threaten regional stability, the Arrangement provides a framework to manage the export of weapons and highly sensitive dual-use goods and technologies, with 40 participating states (as of February 2011).

2. Nuclear Suppliers Group

In order to prevent the proliferation of nuclear weapons, the framework regulates controls on the export of items that are especially designed or prepared for nuclear use and items or technologies that can contribute to develop nuclear weapons. As of February 2011, there were 46 participating states.

3. Australia Group

A framework that controls the export of raw materials for chemical agents, or goods and technologies that can contribute to produce biological weapons or equipment. As of February 2011, there were 40 participating states.

4. Missile Technology Control Regime

A framework that controls transportation methods for missiles and other weapons of mass destruction, as well as the export of goods and technologies that can contribute to their development. As of February 2011, there were 34 participating states.

Based on these Security Council resolutions, international treaties and international export control frameworks, Japan implements trade security controls via its Foreign Exchange and Foreign Trade Law. Were Japan's high-level goods and technologies to be used in the development of weapons of mass destructions in countries such as North Korea or Iran, which are considered in danger of developing nuclear abilities, it would present a significant threat not only to Japan but also to international society as a whole, and for this reason, it is necessary to ensure that such threats are prevented in advance through the strict security trade control. From this perspective, GATT Article XXI permits certain exceptions for security reasons.

(2) Problems arising with international rules regarding export restriction measures by various countries

The chapters of Section 1 of this report comment on the following individual countries' export restriction measures.

1. China (See Section 1, Chapter 1: China)

- Export restrictions on raw materials

2. USA (See Section 1, Chapter 2: USA)

- Export control systems

- Export restrictions on logs

3. ASEAN (See Section 1, Chapter 3: ASEAN)

- Export restrictions, etc., on logs and processed wood (Indonesia)

- Export restrictions on logs, etc. (Malaysia)

4. Canada (See Section 1, Chapter 9: Canada)

- Export restrictions on logs

Column: Food export restrictions in different countries

Between 2007 and 2008, various countries implemented export restriction measures, in the face of crop failures in the EU and Australia, increasing demand for cereals in emerging countries, and the increased use of cereals for fuel, which led to increases in the price of food, and as part of their strategies to ensure domestic supply and control inflation.

The following countries had implemented export restrictions (including the application of export tariffs) between 2007 and 2008: Argentina, India, Indonesia, Ukraine, Egypt, Kazakhstan, Cambodia, Kyrgyzstan, Serbia, Tanzania, China, Nepal, Pakistan, Bangladesh, Brazil, Vietnam, Bolivia, Russia.

Export restriction measures have a distorting effect on trade, and additionally, create obstacles to the stable import of foodstuffs to Japan and other food-importing countries, creating a serious problem in terms of guaranteeing food security.

In general, prohibitions or restrictions of exports are prohibited by general elimination of quantitative restrictions under GATT Article XI, and only permitted in extremely limited cases set out in GATT Article XI:2 and Article XX relating to raw commodities. At present, Article XXII of the Agreement on Agriculture contains provisions relating to the prohibition or limiting of exports, but “prior written notification before the introduction of new measures” and “agreements between interested parties (States)” provided in this article are not sufficiently carried out, which leads to lack of clarity, predictability and stability.

For these reasons, the spread of export restriction measures by various countries presents a range of problems for Japan and other food importing countries. The problems that importing countries face include, for example: they cannot (i) get information about such measures before their implementation due to there being no prior notification, (ii) come to any agreement between interested parties (States) in advance of implementation, (iii) respond swiftly through, for example, making up for the shortfall through by imports from other countries, and (iv) establish whether various countries' measures are justifiable from the perspectives of GATT Articles XI and XX.

Japan, along with Switzerland, has made a proposal regarding export restrictions in the Doha Round of negotiations, from the perspective of countries that import food, aiming at tightening conditions for the implementation of export restriction measures, and monitoring the continuation of such measures. Furthermore, the G8 Leaders Statement on Global Food Security at the Lake Toya Summit in Hokkaido contained reference to concerns regarding export restriction measures, and the G8 Experts' Assembly, as well as other assemblies, have called for the abolition of existing export restriction measures and the tightening of new export restriction measures.

Concerning this, some countries currently implementing export restriction measures have, in light of the fact that they expect good harvests, begun to lift restrictions, but many countries still have export restrictions in place on an ongoing basis.

(Reference: 30th April 2008, Overview of Japan-Switzerland's Proposal regarding Export Restrictions, from the presentation on the Ministry of Agriculture, Forestry & Fisheries' Website)

1. Background

○ The world's food supply is approaching crisis, due to the increasing use of agricultural produce as an energy source, the increased demand for agricultural produce accompanying the expansion in populations in China and India, and the frequency of abnormal climatic conditions in line with global warming.

○ Against this background, there has been a sudden acceleration in the implementation of export restrictions regarding wheat and other cereals in certain countries. This has led to raised prices, causing significant impact on food security for countries importing food, particularly poorer developing countries.

○ The current Chair's proposal includes strengthening of provisions relating to export restrictions, such as the specification of time limits. However, based on the situation outlined above and in order to ensure more effective strengthening of discipline it will be necessary to clarify the rules relating to the implementation of export restrictions, as well as for importing countries to reach an agreement, to a certain extent, with countries trying to implement export restrictions.

2. Contents

(1) Clarification of rules

- New export restrictions should only be implemented when truly necessary from the perspectives of production, stocks and domestic consumption, etc.

- Countries implementing export restrictions should pay careful consideration to the effect their actions will have on guaranteeing food security in importing countries. In particular, consideration is required regarding (i) imports of food when there are no regulations in place and (ii) ensuring food aid to developing countries with net imports of food.

(2) Creation of agreement mechanism within Committee on Agriculture

- Obligation to give prior notification to the Committee of Agriculture of the implementation of new export restrictions, and to reach prior agreement with interested importing countries

- If no agreement can be reached, a Standing Committee comprised of experts should give a decision

- For as long as the agreement is in place, or during the time taken by the Standing Committee comprised of experts to reach its decision, no new export restriction measures may be implemented.

2. OVERVIEW OF THE EXISTING RULES

(1) Outline of legal provisions

The current WTO Agreement contains provisions relating to export restrictions. The WTO Agreement can be broadly divided into (i) general prohibitions on quantitative restrictions, (ii) provisions relating to the procedures for application, and (iii) other considered regulations. In addition, provisions other than those in the WTO Agreement are outlined briefly below.

1. General Elimination of Quantitative Restrictions

(a) General Elimination of Quantitative Restrictions (GATT Article XI)

This is the major provision setting forth the general prohibition of quantitative restrictions, and it is applicable to exports as well as imports. There are many exceptions for a variety of reasons (see Chapter 3 “Quantitative Restrictions” 1. Overview of rules).

As set out in this article, the prohibition does not apply to tariffs and other charges, so the prohibition does not apply to export tariffs (there is a debate, however, as to whether export tariffs fall under the scope of tariff concessions as in GATT Article II. Furthermore, high rates of export tariff (to an extent that is considered normally unthinkable, for example an export tariff of 3,000%) can also be pointed to as equivalent to quantitative restrictions as defined in GATT Article XI. On the other hand, it could be argued that such an export tariff does not constitute a quantitative restriction since exports are not prohibited so long as the exporter pays the tax. This issue requires further consideration. The definition/significance of tariffs is discussed in Chapter 4 "Tariffs".)

Furthermore, there are many exception provisions that apply to exports as well as imports.

<Exceptions to GATT Article XI>

(i) Exception in order to meet shortage in domestic supply of substance in question

- GATT Article XI:2(a) Shortage of food or other vital substance*
- GATT Article XI:2(c): Import restrictions on agricultural and fisheries products

*Article 12 of the Agreement on Agriculture contains the obligation of notification when GATT Article XI:2(a) (critical shortage of food or other vital substance) is applied, and an obligation to act considerately towards importing countries.

(ii) Other exceptions

- GATT Article XX: General Exceptions (in particular, (g) measures to conserve limited natural resources, (i) measures to guarantee the availability of vital raw materials for domestic processing industries, and (j) measures for the acquisition or allocation of commodities that are in short supply
- GATT Article XXI: Security Exceptions

- Exceptions to the application of GATT Article XI, and application to export measures

	Application to import measures	Application to export measures
GATT Article XI:2(a): Shortage of food or other vital substance	○	○
GATT Article XI:2(c): Import restrictions on agricultural and fisheries products	○	× （Obligation to notify and take consideration, outlined in Article 12 of Agreement on Agriculture, applies, however）
GATT Article XX: General Exceptions	○	○
GATT Article XXI: Security Exceptions	○	○

2. Provisions regarding procedure for application

(b) General Most Favored Nation Treatment (GATT Article I:1)

As with imports, WTO Members must grant most favored nation status to equivalent commodities from of other Members (see Chapter 1 “Most Favored Nation Treatment”)

(c) Non-Discriminatory Administration of Quantitative Restrictions

(GATT Article XIII)

As with imports, restrictions implemented on exports based on exceptional provisions must, in principle, be applied on a non-discriminatory basis (see Chapter 3 “Quantitative restrictions” 1. Overview of rules).

(d) Fees and Formalities (GATT Article VIII)

Fees and formalities relating to exports must be restricted to the calculated cost of services supplied. The need to restrict the complexity of procedures, and to reduce and simplify the required paperwork, is acknowledged.

(e) Publication and Administration of Trade Regulations (GATT Article X)

All laws and legal decisions, etc., related to international trade must be published

immediately on issue. The publication and execution of trade regulations relating to exports are subject to the discipline of this regulation, as one of the conditional regulations of GATT regarding transparency.

(f) Understanding relating to the interpretation of GATT Article XVII

Defines the notification obligations of entities engaging in state trade.

3. Other significant regulations

(g) Agreement on Safeguards (Article XI:3)

Prohibits so-called "grey area measures", in which the government of an importing country requests or extorts the government of an exporting country to impose autonomous export restrictions or similar actions (see Chapter 7 "Safeguards").

(h) Agreement on TRIMS (Article II:1)

Prohibits investment related to trade that infringes GATT Article III (National Treatment) or Article XI. A typical example would be export-performance requirements (see Chapter 8 "Trade-related Investment Measures")

Fig. 3-2(Ref): Comparison between provisions regarding importing and exporting countries with respect to agricultural products

	Import side	Export side
Tariffs	- Concessions to import tariffs on all agricultural products - Required to reduce through UR agreement - Safeguard measures in line with rules may be used to raise tariffs	- No concessions regarding export tariffs - No requirement to reduce export tariffs - No provisions, so new tariffs and raising of tariffs unregulated
Quantitative restrictions	- Import quantitative restrictions must in principle take the form of tariffs	- New export restrictions can be set based on the following conditions:

	- Minimum import opportunity ("Minimum access") defined	1. Consideration of the impact measures may have on food security in the importing country 2. Prior notification, and agreement with the importing country if required

Fig. 3-3(ref): Provisions from the perspective of the type of export restriction measures

Export restriction type	Provisions within the WTO Agreement
1. Measures based on function as source of fiscal revenue (particularly the imposition of export tariffs)	Principle: No particular prohibitory regulation. (There are some cases, however, where regulations are set by promises made on acceding to the WTO. Additionally, there is some debate as to whether this falls under the scope of GATT Article II on tariff imposition.)
2. Measures designed to protect domestic industry	Principle: Prohibited by GATT Article XI (Exceptions) - GATT Article XX (General Exceptions) (i) measures to guarantee the availability of vital raw materials for domestic processing industries
3. Measures to address shortage in domestic supply of substance in question	Principle: Prohibited by GATT Article XI (Exceptions) (i) Exception in order to meet shortage in domestic supply of substance in question - GATT Article XI:2(a) Shortage of food or other vital substance - GATT Article XI:2(c): Import restrictions on agricultural and fisheries products (ii) Other exceptions - GATT Article XX (General Exceptions) (g) Measures to conserve limited natural resources (i) Measures to guarantee the availability of vital raw materials for domestic processing industries (j) Measures for the acquisition or allocation of commodities that are in short supply
4. Measures relating to investment	Prohibits export-performance requirements based on Article II:1 of the TRIMS Agreement
5. Diplomatic measures	Principle: Prohibited by GATT Article XI

	(Exceptions) - GATT Article XXI: Security Exceptions - "Grey area measures" based on Agreement on Safeguards (Article 11(3)) prohibited

(2) Other provisions (WTO accession negotiations, bilateral/multilateral agreements)

1. WTO accession negotiations

Since the establishment of the WTO, countries negotiating membership have been required to make certain promises relating to export restrictions and are required to strictly observe certain obligations regarding these on admission to the organization.

According to the OECD report TD/TC/WP (2003) 7/FINAL: ANALYSIS OF NON-TARIFF MEASURES: THE CASE OF EXPORT RESTRICTIONS), promises relating to export restrictions can be classified into the following categories.

I: Promise or confirmation of strict adherence to the existing WTO Agreement (regulates adherence, regarding export restrictions, to GATT Articles XI, XII, XIII, XVII, XVIII, XIX, XX, XXI, the Agreement on Agriculture and the Agreement on Safeguards)

II: Emphasis on transparency requirements in GATT Article X

III: Provisions relating to commodities of interest to Member countries (ex. Mongolia: cashmere wool and non-ferrous metals; Albania: hides and leather; Moldova: wine)

IV: Additional requirements beyond the provisions of GATT (ex. China is required to make annual notifications of non-automatic export restrictions (Article 18, appendix 1A of China's Accession Agreement)

Outline of provisions relating to export restrictions on accession to the WTO (note)

Ecuador (acceded	4. Obligation exceeding those in the WTO Agreement

1996)	- Elimination of export restrictions unjustified within the WTO Agreement, which were not declared in the accession Working Group Report at time of accession.
Bulgaria (acceded 1996)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Export tariffs applied in order to reduce critical shortage of food and critical poverty of supply to domestic industry. These tariffs to be applied consistent with the WTO Agreement subsequent to accession. - Subsequent to acceding to the WTO, export tariffs to be minimized, or their size and scope of application to be changed, and details to be published in official publication.
Mongolia (acceded 1997)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - After acceding to the WTO, applicable conditions for licensing cessation of imports/exports or limiting trade volumes to be adapted to conditions in the WTO Agreement. 3. Provisions relating to commodities of interest to existing Member countries - Maintain export prohibition measures on cashmere wool until 1st October 1996 (subsequent introduction of 30% ad tax value export tariff) - Elimination of export license conditions for iron and non-ferrous metals by January 1997 4. Obligation exceeding those in the WTO Agreement - Progressive reduction in export tariffs, with elimination within 10 years of acceding
Panama (acceded 1997)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - After acceding to the WTO, applicable conditions for licensing cessation of imports/exports or limiting trade volumes to be adapted to conditions in the WTO Agreement. - Subsequent to accession, export controls may only be applied where they are consistent with regulations in the WTO Agreement

Republic of Kyrgyzstan (acceded 1998)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Subsequent to accession, export license controls to be brought in line with conditions in GATT Article XI
Latvia (acceded 1999)	4. Obligation exceeding those in the WTO Agreement - Publish all (export) tariff changes in official publication - Abolish all export tariffs, other than those applied to antiquities, covered by regulations in Appendix 3, by 1st January 2000
Estonia (acceded 1999)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Ensure complete alignment of export control conditions still in existence on accession with the WTO Agreement regulations 4. Obligation exceeding those in the WTO Agreement - Subsequent to acceding to the WTO, minimize the application of export taxes and bring those still applied in line with regulations in the WTO Agreement and with details published in official publication. Changes to the size and scope of application to be published in official publication.
Jordan (acceded 2000)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Ensure complete alignment of export control conditions still in existence on accession with WTO Agreement regulations
Georgia (acceded 2000)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Ensure complete alignment of export control conditions still in existence on accession with WTO Agreement regulations
Albania (acceded 2000)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Ensure complete alignment of export control conditions still in existence on accession with WTO Agreement regulations - Subsequent to accession, only export restrictions consistent with the regulations of GATT Article XI may be applied 3. Provisions relating to commodities of interest to existing

	Member countries - Decision taken on 16th September 1999 to abolish export prohibitions on designated leather and other commodities
Oman (acceded 2000)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Ensure complete alignment of export control conditions still in existence on accession with WTO Agreement regulations
Croatia (acceded 2000)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Subsequent to accession, only export restrictions consistent with the regulations of the WTO Agreement may be applied 4. Obligation exceeding those in the WTO Agreement - As of January 1999, all export allocations, export prohibitions and other forms of export restrictions abolished
Lithuania (acceded 2001)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Subsequent to accession, only export restrictions consistent with the regulations of GATT Article XI may be applied
Moldova (acceded 2001)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - All new policy mechanisms introduced in the future to be completely in line with regulations in the WTO Agreement 3. Provisions relating to commodities of interest to existing Member countries - Interim export restrictions imposed on non-bottled wine, designed to improve the image of Moldovan wine, to be lifted
China (acceded 2001)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - All customs fees and levies, as well as domestic taxes and domestic surcharges (including additional value tax) to be brought in line with GATT - Strict adherence to regulations in the WTO Agreement with

	regard to non-automatic export permits and export limits - Align external trade laws with GATT conditions - Subsequent to accession, only export limits and permits justified by the regulations GATT may be applied 4. Obligation exceeding those in the WTO Agreement - Abolition of all levies and surcharges on exported goods, except where the accession agreement specifically details otherwise or the charge is in line with the regulations of GATT Article VIII. (Where tariffs are levied, upper limits for tariffs must be set.) - The list of export permits/accredited supervising agencies to be kept up to date, and changes to be published in an official publication - Remaining non-automatic export limits to be notified to the WTO on an annual basis, and to be lifted other than where they are justified based on the WTO Agreement or China's accession agreement
Taiwan (acceded 2002)	No additional obligations in addition to those relating to export restrictions in the WTO Agreement
Macedonia (acceded 2003)	No additional obligations in addition to those relating to export restrictions in the WTO Agreement
Armenia (acceded 2003)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Export license conditions and other export control conditions to be made consistent with regulations in the WTO Agreement
Cambodia (acceded 2004)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Subsequent to accession, export measure laws and regulations, and their application, to be made consistent with regulations in the WTO Agreement
Nepal (acceded 2004)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Surcharges, fees, etc., occurring in relation to exports to be made consistent with the WTO Agreement - Export license conditions and other export control conditions to

	be made consistent with regulations in the WTO Agreement
Saudi Arabia (acceded 2005)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - All laws, regulations, conditions and surcharges/taxes relating to exports, as well as export control conditions remaining at time of accession, to be made consistent with WTO obligations. 4. Obligation exceeding those in the WTO Agreement - No export control measures to be maintained, other than those regarding certain exceptional commodities (plants, bred horses and subsidized wheat/flour) - No controls on the export of wheat/flour, other than subsidized products, and export licenses to be approved - Any trading company or manufacturing company to be able to apply for an export license without paying a fee - Reasons for the automatic/non-automatic approval of export licenses to be detailed in appendix - Export license application procedures to be published on website, and any changes to the details of export restrictions to be published in official publication - Export prohibitions on scrap metal to be abolished before accession - Conditions for approval of re-exports of food to be abolished on accession (re-export of subsidized foods to depend on the repayment of the subsidy value) - Export tariffs may only be applied to leather (level of tariff to be specifically regulated) - Iron and steel scrap may not have export tariffs imposed.
Vietnam (acceded 2007)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - Export restrictions to be brought completely in line with regulations in the WTO Agreement
Tonga (acceded 2007)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement

	- Export restrictions to be brought in line with regulations in the WTO Agreement
Ukraine (acceded 2008)	1. Confirmation of strict adherence to obligations related to export restrictions in the WTO Agreement - All future export license requirements, export restrictions, quantitative export restrictions and other measures to be consistent with the WTO Agreement - Export license fees to be made consistent with GATT Article VIII, both now and in the future 4. Obligation exceeding those in the WTO Agreement - No application of staged reduction, increase or other effect equivalent to an increase in export tariffs relating to designated commodities (except in cases justified by GATT exceptions) - Publication of all changes in policy relating to the application of existing export tariffs - No application of minimum export price restrictions subsequent to accession - Abolition of existing export restrictions relating to non-ferrous metals, precious metals other than gold or silver, precious stones other than diamonds, or cereals - Revision of quantitative export restrictions applied as part of trade bail-out decision process
Cape Verde (acceded 2008)	No additional obligations in addition to those relating to export restrictions in the WTO Agreement

(Note: Created by METI from regulations relating to export restrictions, export tariffs, etc., included in accession Protocols and accession Working Group reports for each country/region. In addition to these provisions regarding exports, it is important to remember that various types of "Export subsidies" and "State trade", etc., also exist.)

2. Provisions in bilateral/multilateral agreements

Some provisions relating to export restrictions have also been defined in bilateral or multilateral agreements. A look at Japan's EPAs shows the following regulations (for details, see Part III, Chapter 1 "Issues on Trade in Goods", 4. Related Provisions). Furthermore, the Japan-Brunei EPA, which features the first chapter relating to energy ever included in a Japanese EPA, regulates implementing export restrictions in existing

contracts, and requires notification in writing when such measures are introduced. Additionally, the Japan-Indonesia EPA includes a chapter on energy and mined resources, as well as defining a range of requirements in relation to export and import restrictions (see Part III Chapter 7 on "Energy").

- Export tariffs

Prohibitions on export tariffs	Japan-Singapore EPA, Japan-Mexico EPA, Japan-Chile EPA (with conditions attached), Japan-Brunei EPA (in relation to new tariffs only), Japan-Switzerland EPA
Working towards abolition of export tariffs	Japan-Philippines EPA

- Export limits

Reconfirming GATT regulations	Japan-Mexico EPA, Japan-Chile EPA

3. Other provisions (multilateral agreements (Basel Convention, Montreal Protocol, Washington Convention)

The Basel Convention (the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal), the Montreal Protocol (the Montreal Protocol on Substances that Deplete the Ozone Layer) and the Washington Convention (the Convention on International Trade in Endangered Species of Wild Fauna and Flora) include provisions relating to export restrictions (for the Relationship between the WTO Agreement and trade restrictive measures pursuant to multilateral environmental agreements, see first half of this chapter "(4) Relationship between the WTO agreement and trade restrictive measures pursuant to multilateral environmental agreements")

Column : International Commodities Agreements

(a) International Commodities Agreements

International Commodities Agreements aim to facilitate the sustainable development of emerging economies, through ensuring a stable supply of primary

commodities to consumer countries, and avoiding price crashes or sudden fluctuations (see 2001 White Paper on International Economy and Trade, Part IV, Chapter 5, Section 5). Japan is party to several such agreements. Additionally, in the WTO Agreement, GATT Article XX(h) regulates "measures undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the contracting parties and not disapproved by them or which is itself so submitted and not so disapproved", thereby acknowledging such agreements in GATT's General Exceptions. To date, however, no such procedures have been approved.

- Major international commodities agreements

	Organi-zation founded	Products covered	Organization name (website)	No. of member states/ regions
2001 International Cocoa Agreement (valid until September 2010)	1973	Cocoa (cocoa beans and cocoa products)	International Cocoa Organizations http://www.icco.org	18
2007 International Coffee Agreement (valid for 10 years from date of adoption)	1963	Coffee beans and coffee products	International Coffee Organization http://www.ico.org/	34
2006 International Tropical Timber Agreement (prior agreement extended while adoption measures prepared)	1986	Tropical timber	International Tropical Timber Organization http://www.itto.or.jp	45

1995 International Grains Arrangement (re-adopted on 1st July 2009 to increase scope to cover new grains)	1949 → renamed 1995	Rice, wheat, maize, barley, rye, etc.	International Wheat Council → International Grain Council http:/ www.gc.org.uk	26
2005 International Agreement on Olive Oil and Table Olives (valid until December 2014)	1956	Olive oil and table olives	International Olive Council http://www.internationaloli eoil.org/	17

Created by METI from information on each organization's website, the 2001 White Paper on International Economy and Trade (Member countries based on website information current to February 2011. European Union counted as single region).

Provisions within international commodities agreements include not only provisions relating to exports in order to achieve the objectives of each agreement (these objectives include various aspects such as supply/demand adjustments, price controls, promotion of consumption, market information collection, development, etc.), but also various other provisions relating to inventory and manufacture, consumption, etc. An outline of the main quantitative restriction mechanisms regulated by the agreements in order to achieve these objectives is given below.

(i) Multilateral contract method

A method in which the exporting country and the importing country trade the commodity covered by the agreement within a fixed price band.

(ii) Export allocation method

A fixed quantity of the commodity is allocated to each exporting country party to the agreement, allowing control of trade volumes and indirectly alleviating the effects of sudden price fluctuation.

(iii) Buffer stock method

A buffer stock, comprising a fixed volume of the commodity and of cash, is created,

and this buffer stock is released for wholesale when the market price of the commodity rises above a certain level, therefore preventing a significant rise in the price. If the market price of the commodity falls below a certain level, the method allows for the commodity to be bought from the market in order to support the price (in principle, no intervention by the buffer stock is permitted while the market price is within the specified price band).

Commodities agreements are not new; before the Second World War, during the period of global depression, supply or production limits were agreed between governments with the aim of preventing price crashes in primary commodities, and international agreements with the nature of cartels were entered into in the private sector. There are still some agreements in place today which gain more understanding of consumer countries by applying them in conformity with free trade and non-discriminatory principles accompanied the market economy mechanisms, and supplement the aspects of "Trade not Aid" based on the principles of UNCTAD, etc.

Column : The relationship between export restriction measures and the conservation of limited natural resources

Regardless of the prohibition of quantitative restrictions in GATT Article XI, GATT Article XX (g) allows for the justification of export limits in cases where limited natural resources require conservation (see the provision text below). Such measures, however, are permitted "if such measures are made effective in conjunction with restrictions on domestic production or consumption". So under what specific circumstances are export restrictions permitted? Are all restrictions justified if domestic limits are also imposed? The following section considers the boundaries of export limit measures, in reference to the WTO's case regarding USA gasoline standards (DS2).

GATT Article XX – General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

((a) to (h) abbreviated)

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

1. Explanation of the condition "if such measures are made effective in conjunction with restrictions on domestic production or consumption"

The Appellate Body ruled, in the USA gasoline case, that although there was a requirement for the gasoline standards to be applied "even-handedly" to both imports and domestic product, it was not required to be applied "equally", concluding therefore that the measures satisfied the requirement to be "in conjunction with restrictions on domestic production or consumption" by imposing restrictions both on imported gasoline and domestic one. As a result, therefore, it can be understood that where applied to export limit measures, (1) restrictions on domestic production or consumption are required to be "even-handed" regarding both exports and domestic product, but not necessarily "the same".

2. Regarding the conditions given in the body of GATT Article XX regarding "arbitrary or unjustifiable discrimination" and "disguised restrictions"

In the US gasoline case, while there is scope, in consideration of the costs to domestic refineries, for selecting "individual standards", set in consideration of conventional standards for domestic refineries, and "unified standards" to be applied to all overseas refineries, since no consideration was in fact given to selecting individual standards for overseas refineries, the application of restrictions was considered "inappropriately discriminatory" and "limits disguised as international trade", which were not justified by GATT Article XX. Applying this to export limits, we can extrapolate that (2) if a certain level of consideration is being paid to domestic business, it thereby follows that similar levels of consideration must be paid to businesses overseas.

Based on the above, where WTO Members implement export limit measures, and state that they are justified by GATT Article XX(g) regulating conservation of exhaustible natural resources, prior examples of such import limit measures suggest that these measures must be related to the conservation of exhaustible natural resources(note), and that (1) domestic limits must be handled even-handedly (without a requirement to be "the same") regarding exports and domestically produced product, (2) if a certain level of consideration is being paid to domestic business, it thereby follows that similar levels of consideration must be paid to businesses overseas.

Since these issues mean that limiting exports to below the upper limit of domestic production and thereby reserving part of domestic production solely for domestic consumption results in giving preferential treatment to the domestic production of downstream products in relation to export restrictions, it is doubtful that this action can be justified. (Regarding rare metals, which are unevenly distributed in producing areas, the limiting of exports has a major impact on businesses overseas. It is thought that this will become particularly apparent in the future.)

(Note: Conditions for "Measures relating to the conservation of exhaustible natural resources"

The GATT Panel in the Canadian unprocessed herring/salmon case (regarding whether or not measures were related to the conservation of exhaustible natural resources) made a decision based on whether or not the conservation of the exhaustible natural resource was the "main objective" of the measures. However, the WTO Appellate Body in the USA gasoline case concluded, having noted that the "main objective" was neither the wording of the agreement itself, nor any wording created as a litmus test (although this itself was not the point of issue), that the USA's gasoline standards could not be considered, either circumstantially or incidentally, as having the objective of preventing atmospheric pollution (in other words, the USA's gasoline standards were indeed measures relating to the

conservation of an exhaustible natural resource).)

Column : China's Rare Earth Policy

I. Introduction

It has been 20 years since the original *Report on Compliance by Major Trading Partners with Trade Agreements* sought to bring "rule-oriented" trade policy to the world in 1992. From the standpoint of resolving international economic disputes in a calm and constructive manner, its primary goal was to correct the dominant atmosphere of identifying "unfair trade practice" without paying due attention to internationally agreed-upon trade rules, and too much focusing on the "results" of trade. In the meantime, in 1995, the World Trade Organization (WTO) was formed as the successor to the General Agreement on Tariffs and Trade (GATT), and the multilateral trading system was strengthened and expanded both qualitatively and quantitatively. With the WTO agreements and relevant international norms, the "rule-oriented" approach for resolving international economic disputes can be said to have essentially formed a solid foundation in the international economic order.

The "correction" of deviations from the internationally agreed-upon rules should be conducted in accordance with those rules. At the same time, however, the original *Report on Compliance by Major Trading Partners with Trade Agreements* pointed out the importance of "the economic perspective" as well as the "rule-oriented" approach. In addition to engaging the GATT dispute settlement procedures, the Report suggested that adopting economic measures to boost competitiveness, or policy support through international cooperation, would be effective for resolving international economic disputes. This is because the Report was written from the viewpoint that "ascertaining possible impact of deviations from the rules would have on the economic development of the country and the world as a whole" by considering issues from multiple angles—not only legal but also economic perspectives— would prevent the deviations while also strongly motivating the "correction" process and making it more effective.

In recent years, interdependence within the global economy has deepened. Particularly after the global financial crisis in 2008, disputes over "behind-the-border" measures have been increasing amid clashes of multiple sets of trade rules and each country's industrial policies. In order to uphold the "rule-oriented" approach during turning points in the international economic order, it seems that analysis of such measures needs to be extended to cover the objectives and backgrounds for their introduction, and even their secondary effects, so that the objective structure of the measures themselves can be accurately

understood. Otherwise, measures ostensibly taken for environmental or safety reasons can provide pretexts for "murky" protectionism.

Even if, in their objective structure, China's rare earth export restrictions are implemented in conjunction with restrictions on domestic production, the gap between export quotas and production quotas is reserved for domestic usage. The significant nature of such restrictions should be recognized. Based on such understandings, this essay tries to analyze China's rare earth issues from various angles.

II. Significant Cuts in Export Quotas, and Responses by the World

The name "rare earth" collectively refers to 17 elements[1] that comprise a subset of the 31 rare metals. Rare earth elements are indispensable minerals for the high-tech industry[2] and are used in a broad range of products, including rare earth magnets, glass substrates for hard disk drives, abrasive agents for liquid crystal panel displays, and catalysts for automotive emissions and petroleum refining. Demand for rare earth elements is expected to continue growing, based on the fact that the minerals are used in next-generation vehicles, energy-efficient home appliances, wind power generators, and other products related to the green industry, which has witnessed significant market expansion in recent years.

As of today, China controls approximately 97% of the rare earth elements supply, and the supply chain is complex. First, rare earth elements are separated from ore and refined in China. After some portion of them are alloyed, they are processed into abrasive agents, catalyst materials, magnets, and other products in Japan; and then, those components are incorporated into high-tech products manufactured all over the world, including in China. Of the total global production of approximately 120,000 tons[3] of rare earth elements, approximately 70,000 tons[4] are believed to be consumed in China, with Japan consuming

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[1] Lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, lutetium, yttrium, and scandium.

[2] Jane Korinek and Jeonghoi Kim, "Export Restriction on Strategic Raw Materials and Their Impact on Trade," *OECD Policy Working Papers,* No. 95 (2010), p. 19,

[3] U.S. Geological Survey, Mineral Commodity Summaries (2010).

[4] J. Korinek and J. Kim, *supra note*. 2, p. 19.

approximately 30,000 tons of the total rest of the world (*i.e.*, excluding China) demand of 50,000. According to data released by China's General Administration of Customs, 48% of China's total rare earth exports in 2010 went to Japan, with 18% going to the United States. Although China's rare earth export quotas have been reduced yearly since 2006, a drastic cut in 2010 of some 40% compared with the preceding year can be said to have brought the supply constraint into full view.

For several decades after the initial discovery of the industrial value of rare earth elements, the world's largest supplier was the United States. However, entering the 1990s China rapidly expanded its global market share through low-price sales, thereby acquiring a monopolistic market position. Not all rare earth elements are actually rare, since there are plenty of reserves all over the world. What in fact is rare are countries where the resources can be extracted economically.[5] China controls about 30 to 35%[6] of the total global deposits of rare earth elements, with operational mines currently outside China located in the United States, India and Australia. Of particular note is that dysprosium and other heavy rare earth elements that are essential for the magnets used in high-performance motors for next-generation vehicles are concentrated in China.

When a single country obtains monopolistic status in the global market, that country's control over the price strengthens due to its centralized power to determine supply, resulting in market distortions. This raises questions regarding the stability of supply. In recent years, China has tightened restrictions on rare earth elements and the supply has continued to decline, substantiating these concerns. On July 8, 2010, China's Ministry of Commerce announced a rare earth export quota of 7,976 tons for the second half of 2010. This constituted a substantial reduction of approximately 72% compared with the export quota for the second half of 2009. In addition, the export quota for the first half of 2011 was cut by some 35%, to 14,446 tons, compared with an export quota of 22,283 tons for the first half of 2010. Furthermore, in recent years the Chinese government has increasingly been involved in the rare earth supply chain to strengthen its management influence in manufacturing, processing and export. There are also reports that Chinese companies are actively engaging in R&D on rare earthrelated technologies, overseas mining and corporate acquisitions.

The European Commission has a profound sense of crisis regarding supply constraints on raw materials that are critical to industrial activities. In its October report on trade barriers,

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[5] John Seaman, "Rare Earths and Clean Energy: Analyzing China's Upper Hand" (2010), p. 6.

[6] "China's chokehold on rare earth elements," *IHT* (10/11/ 2010), p. 8.

the Commission called it a "very worrying trend" and "discrimination against foreign companies" when the Chinese government reduced rare earth export quotas by 30 % for Chinese vendors while it reduced them 50% for joint ventures with overseas businesses. The Commission additionally criticized China's export restrictions for "causing distortions in the market and placing foreign products that rely on rare earth elements in an extremely disadvantageous position." The European Union has voiced renewed worries about reductions in rare earth export quotas and demanded higher quotas at EU-China High-Level Economic Dialogues and other fora. It has further expressed the concern that the 2011 export quota that the Chinese government announced at the end of December cannot even meet the export quantities China has promised heretofore with Europe.

In the United States, there is a growing recognition that the restrictions on rare earth elements and reliance on China for their supply is not only a problem for the economy, but also a threat to national security. In a report submitted to the Congress in April 2010, the U.S. Government Accountability Office (GAO) pointed out that rare earth elements are used widely in the defense sector and that it would take as many as 15 years to restructure the U.S. supply chain. Moreover, Section 843 of the National Defense Authorization Act for Fiscal Year 2010 mandates that the GAO investigate the dependence of rare earth elements in the defense supply chain. In October 2010, the Office of the United States Trade Representative (USTR) launched an investigation into China's restrictions on rare earth exports pursuant to Section 301 of the Trade Act of 1974, based on a petition by the United Steelworkers (USW) alleging that the restrictions are having a negative impact on the U.S. high-tech and especially new technology industries. At the same time, despite continued diplomatic efforts that included directly expressing concerns to China in the dialogues of the U.S.-China Joint Commission on Commerce and Trade (JCCT) and other fora, there was no change in China's policy, and the situation was not resolved. In its annual report on China submitted to the Congress in December, the USTR expressed a policy that it "will not hesitate to take further actions, including WTO dispute settlement, if appropriate." Moreover, the U.S. Department of Energy is setting forth a policy orientation of strengthening cooperation with Japan and Europe on rare earth elements and other critical resources and carrying out R&D on resource recycling. In a report released in December, the Department of Energy identified a three-pronged policy of diversification of suppliers, development of alternative materials, and promotion of recycling, for the purpose of securing stable procurement of critical resources, with rare earth elements topping the list.[7] At present, as a first step in rebuilding the domestic production network, the Department of Energy is advancing the processes of government loan guarantees to enable the resumption of operations at Molycorp Minerals, the largest U.S. rare earth producer.

[7] U.S. Department of Energy, "Critical Materials Strategy" (2010), p. 6.

The OECD is also carrying out an investigation regarding export regulations on raw materials, analyzing the impact of rare earth export restrictions on trade, and is considering holding workshops and seminars on export restrictions.

Thus, there have been various policy responses to China's tightening regulations on rare earth elements, but if we now turn our attention toward China's overall industrial policy, we can see that China aims to transition from an industrial structure centered on resource and low value-added product exports to high value-added industries. When thinking about the rare earth issue, it seems quite meaningful also to take into consideration China's overall rare earth and related industrial policies that underlie the "export restrictions."

III. China's Rare Earth Industrial Policy --- A Background in Chinese Society

1. The History of Rare Earth Industries: From Domestic Resources Development to Overseas Resources and Technologies Acquisition

As mentioned above, rare earth elements are used in a wide variety of industries and are indispensable metals for high-tech devices. It was Deng Xiaoping who said, "There is oil in the Middle East; there is rare earth in China," when he gave his famous address during his tour of the southern part of China in 1992. It is generally believed that rare earth elements have assumed a definite position in China's state strategy since this address by Deng Xiaoping, but in fact China has a long history of rare earth development that can be traced back to the discovery of rare earth deposit in Bayan Obo, Inner Mongolia Autonomous Region in 1927.

Since the discovery of the mineral deposits in 1927 until the beginning of the 1960s, small amounts of rare earth elements had been refined from raw ores concurrent with iron, steel and copper production in the Baotou District, Inner Mongolia. However, as the U.S. advanced its research on rare earth elements and their extraordinary unique characters were discovered, China also set out to develop a full-fledged structure of rare earth production. In 1963, kicked off by the establishment of the Baotou Rare Earth Research Institute in Baotou District, which launched R&D on effective methods of extraction and related technologies for rare earth elements, China's rare earth drive continued with the discovery and development of new mines outside of Inner Mongolia one after another during the 1960s and 70s. Since the beginning of the era of Deng Xiaoping, rare earth elements have been a definite component of the overall state strategy, with production and R&D on

related technologies being carried out nationwide. In the 11 years that Deng Xiaoping served as Paramount Leader from 1978 to 1989, China's rare earth production achieved an average growth rate of approximately 40% per year. Then in 1989, China overtook the United States, which had until then been the world's largest rare earth producer.

Under Deng Xiaoping's leadership, the 863 Program that China launched in 1986 with the goal of catching up to the western countries in science and technology was aimed at developing technologies for both military and consumer applications in designated sectors, including "new materials." According to the U.S. Congressional Cox Committee Report, these "new materials" included rare earth elements.[8] Initially China focused on domestic R&D based on the 863 Program and related Rules and Regulations, but starting in the 1990s China proactively sought foreign technologies by aggressively acquiring rare earth mines and rare earth-using industrial operations overseas. A well-known example of technology transfer via acquisition was the purchase of Magnequench, Inc. (currently Neo Materials Technologies Inc.) by China National Non-Ferrous Metals Import & Export Corp. and San Huan New Materials Co. in 1995. Magnequench is the Indiana, U.S. manufacturer of rare earth magnets used in automobiles and hard disk drives whose production lines and the technologies were ultimately all moved to China in 1999, although the U.S. Congress initially approved the acquisition under the condition that the production lines remain in the United States. The recent trends in China's major acquisitions of mines and businesses are as follows.

- 2002: China Minmetals Corporation begins providing financial assistance to Wings Enterprises, Inc., which owns the Mt. Pea Ridge rare earth mine in Missouri, U.S.
- 2005: China National Offshore Oil Corporation makes a failed bid to acquire Unocal Corporation[9] of California, U.S.
- 2009: China Nonferrous Metal Mining (Group) Co., Ltd. (CNMC) makes a failed attempt to acquire 51% of the shares of Lynas Corporation Ltd. in Australia, which owns the Mt. Weld rare earth mine.
- 2009: East China Exploration and Development Bureau (ECE) acquires a 25% share in Arafura Resources Limited of Australia, which owns the Nolan's Bore rare earth mine.
- 2009: China Investment Corporation (CIC) acquires a 17% share in major Canadian mining company Teck Resources Ltd., which owns the Iron Hill rare earth mine in Colorado, U.S.

[8] The United States House of Representatives Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China "The Cox Report", Chapter 1, p. 12.

[9] The company owned the Mountain Pass rare earth mine.

Experts project that China's demand for rare earth elements will exceed its domestic production by 2012.[10] It has also been pointed out that, besides additional proactive acquisitions, China is attempting to sign contracts for all mining outputs in excess of local demand in the countries where the mines are located to be exported to China in return for China exporting its mineral refining technologies. Such service exports[11] and resource acquisitions by China are intimately linked. Although the issue of government support for such activities is by its nature a service trade issue, there are no specific rules concerning subsidies in the General Agreement on Trade in Services (GATS).[12]

Outside the WTO agreements, the OECD's guidelines on export credits function as an international instrument stipulating the conditions for state support in the goods and service trade. In general, the government-affiliated financial institutions in each country have a public export credit system[13] that supports goods and service exports of its own industry through credit and loan guarantees. To prevent unfair competition in international trade via unlimited utilization of such public export credit, 23 major developed countries, including Japan, agreed to a public export credit arrangement (known as the OECD Export Credit Arrangement; the "Gentlemen's Agreement")[14] in 1978.

The OECD Export Credit Arrangement stipulates the conditions for state support of goods and service exports by the government and government-affiliated bodies, particularly insurance, guarantees, loan and interest subsidies with a redemption period of two years or longer (maximum redemption periods, minimum interest rates, redemption methods, minimum risk premium rates, etc.). On the other hand, the possibility cannot be ruled out that countries not party to the OECD Export Credit Arrangement are presenting more

[10] Marc Humphries, "Rare Earth Elements: The Global Supply Chain," *Congressional Research Service,* p. 4 (2010).

[11] There are four modes of service exports covered under GATS: cross-border supply, consumption abroad, commercial presence, and presence of a natural person. (Refer to p. 321 of the 2010 Report on Compliance by Major Trading Partners with Trade Agreements.) This essay focuses on commercial presence and presence of natural persons.

[12] International rules in the service trade sector are still a new field. The GATS, established in 1995, is by its nature a framework agreement, and the content of the provision on subsidies is going to take shape through the process of negotiation (Article 15).

[13] "Export credit" refers to a system for providing financing or debt guarantees to the importing country for financial and service exports.

[14] Currently 28 countries are participating in the Agreement.

generous and advantageous conditions for their service trade sectors than those countries that are party to the Arrangement. Support via credit and loan guarantees by countries for their own businesses' technology-service and infrastructure exports, as well as implementation of strategies to obtain resource interests en bloc, is spreading among emerging countries, raising concern in the international community.[15] Fred P. Hochberg, Director of the Export-Import Bank of the United States stated at a public Congressional hearing, "Ex-Im faces the growing challenge of meeting the competition of countries who are not members of the OECD and, therefore, do not have to abide by the Arrangement. China is the country most often cited."

A similar observation is noted in "the Industrial Structure Vision 2010," a report submitted to Japanese Minister of Economy, Trade and Industry by the Industrial Structure Council's Industrial Competitiveness Committee. It states, "In order to counteract excessive, that is, in deviation from the rules, public export credit by emerging countries, such countries should be urged to conform their actions to OECD rules and WTO agreements on subsidies, and even with counter-proposals (matching) to be offered, if necessary." Thus, the situation should carefully be monitored. There is an expectation that rules concerning service export subsidies will be developed in the international system so that no country including an emerging one may benefit from using undisciplined government export credit as leverage to obtain technology-service exports and resource interests en bloc, which would also unnecessarily fuel resource acquisition competition.

2. Restructuring and Integration of the Rare Earth Industry, and its Social Background

Although the state government of China has worked to promote the rare earth industry since the 1960s, many of the domestic producers of rare earth elements are still small-to-medium-sized companies, and thus, the country's production output is not high overall.[16] China's National Development and Reform Commission has indicated that it will pursue a tri-polar clusters strategy in Inner Mongolia, Sichuan and Jiangxi in order to effect structural adjustments, business integrations, economies of scale and enhanced competitiveness, which accords with the content of the 2009-2015 Rare Earth Industry

[15] Vivien Foster, William Butterfield, Chuan Chen, Nataliya Pushak, "Building Bridges: China's Growing Role as Infrastructure Financier for Africa," *World Bank Trends and Policies* (2008); Export-Import Bank of the United States of America, "Report to the US Congress on Export Credit Competition and the Export-Import Bank of the Unites States" (2009); and others.

[16] "China Investment Corporation (CIC) to establish rare earth company in Inner Mongolia," *China Daily* (9/24/2009).

Development Plan as reported by the Chinese newspaper *21st Century Business China*. According to a Chinese media report,[17] the Plan classifies three major resource regions—Inner Mongolia and Shandong Province (the North) with the focus on light rare earth elements; Sichuan Province (the West) with the focus on light rare earth elements as well; and the provinces of Jiangxi, Guangdong, Fujian, Hunan and Guangxi (the South) with the focus on heavy rare earth elements—into which production will be consolidated to strengthen management of development and extraction. More than 200 existing rare earth related businesses[18] are in the process of consolidation until 2012 under the umbrella of three major companies: Baotou Iron and Steel Group Company Limited in the North, Jiangxi Cooper Corporation in the West, and China Minmetals Rare Earth Co., Ltd. in the South.[19]

As technology advances globally and industry becomes more sophisticated, demand for rare earth elements as the critical raw materials for high-tech products continues to grow not only within China, but all around the world. However, international pricing of rare earth elements has remained at a relatively low level because of the large, inexpensive supply from China. Since rare earth elements acquire added value for the first time when they are processed into components for high-tech products, there is a persistent complaint within China that "rare earth importing countries are buying the raw material from China on the cheap, processing them, and turning out massive profits." China Chamber of Commerce of Metals Minerals & Chemical Importers & Exporters (CCCMC), an affiliated organization of China's Ministry of Commerce, has indicated in an announcement reported in Caijing Magazine, "We will support export restrictions on rare earth elements. Rare earth export restrictions should not be merely restrictions for the sake of restrictions. [Export restrictions] must be implemented in order to gain the initiative in pricing, which is to the benefit of rare earth companies in the long run."[20] Liu Aisheng of the Chinese

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[17] "A member of National Development and Reform Commission says: Rare earth industry must strength itself fundamentally," *China Powder* (9/29/2009), a statement in a National Development and Reform Commission interview with then-Deputy Director of Industry Xiong Bilin.

[18] According to the National Development and Reform Commission plan, the industry is to be consolidated into 20 companies or fewer by 2020. "Rare earth industry adjusts to slow market," *China Daily* (9/7/2009); Cindy Hurst, "China's Rare Earth Elements Industry: What Can the West Learn?" *IAGS Report*, (2010), p.20; Atsushi Shibayama, *et al*, "Survey Report on Rare Earth Element Development Status in China," p. 2. Methods to be used include tightening the raw materials supply system and consolidating it under a system that will require approval from the commission, tightening funding rules by narrowing financing avenues and raising interest rates, and requiring stricter qualifications according to companies' production capacity.

[19] "Overview of China's Strengthened Management of Rare Earth Resources and (Proposed) Revision to the 2009-2015 Rare Earth Industry Development Plan," JOGMEG (2009), p. 3.

[20] "Are international rules to be decided by China?" *Caijing Magazine* (8/24/2010).

Society of Rare Earths stated at the Rare Earth Summit held in August 2010 in Beijing that the prices of rare earth elements should reflect their costs.[21] Reflecting such opinions within China, Premier Wen Jiabao spoke before an audience in the Sino-German dialogue as follows. "China would never block the export of rare earth minerals, but said the minerals should be exported for a reasonable price and at a reasonable volume,"[22] He also noted at the Sixth China-EU Business Summit that "It is necessary to exercise management and control over the rare earth industry, but there won't be any embargo. China is not using rare earth as a bargaining chip."[23] Those statements were reported all over the world. Note that since China's dramatic reduction in rare earth exports in 2010, the price of rare earth elements, primarily for light rare earth elements, has been surging.

Furthermore, China's rare earth policy does not merely cause international price increases. China is said to be using "export restrictions" as leverage to transform its industrial structure-- from extensive extraction and refining to a more valuable one by inducing rare earth related production lines and technology centers transfer from advanced countries,[24] and incorporating rare earth user industries in their value chain.[25] If the trend to suddenly cut export quotas continues next year and beyond, companies that have no rare earth sources outside of China will not be able to address this change and ultimately will be forced to choose either relocating their production lines to China or withdrawing from the rare earth related industry. Although the Chinese government has not admitted publicly that such a policy exists, a 2009 Congressional report by the US-China Economic and Security Review Commission presented the following statement by Zhao Shuanglian, Deputy Chief of the Inner Mongolia Autonomous Region that was reported in Chinese

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[21] "Status of Rare Earth Production and Consumption in China", Mineral and Natural Resources Division, Natural Resources and Fuel Department, Agency for Natural Resources and Energy, Ministry of Economy, Trade and Industry, (2010), p. 12.

[22] "Premier Wen reassures foreign investors," *China Daily* (7/19/2010). On July 17, Premier Wen Jiabao similarly stated in the context of export restrictions on rare earth elements, "However, sustainable development of the rare earth element industry requires the securing of rational pricing and rational export quantities." "Rare Earth Security –the Five Disputes-", *Oriental Morning Post* (8/3/2010).

[23] "Rare earth will not be used as bargaining chip" *China Daily* (10/8/2010).

[24] "Foreign Enterprises Enter Chinese Rare Earth Processing Venture" *Xin Jiang Investment Network* (10/8/2010); "China Dangles Rare Earth Resources to Investors," *WSJ* (8/16/2010).

[25] J. Korinek and J. Kim, *supra note*. 2, p. 20.

newspapers: "[by cutting exports and controlling production,] the government wants to ''attract users of rare earths to set up in Inner Mongolia'' to develop manufacturing."[26]

Restructuring of industrial structure to a more high value-added one is said to be required because China needs to create employment of an additional 300 million people by 2020.[27] This has major significance for China. Controlling the supply chain of rare earth elements that are indispensable for high-tech products and enticing transfer of high value-added sectors to China which significantly contribute to expand the variety and scale of the industries surely is in line with the Chinese government's policy of maintaining and securing employment and raising the average wage and standard of living.

With the background outlined above, China domestically has long subsidized rare earth resource development and R&D. In its actions toward other countries, it has secured rare earth supply and raised technology level through embarking on export restrictions, acquisition of overseas businesses and obtaining mining interests. Now China is indicating a policy of further boosting its competitiveness in this area[28] by restructuring its domestic rare earth industry[29] and strengthening its management for domestic mines.[30]

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[26] US-China Economic and Security Review Commission, "2009 Report to the Congress," p. 63; Xiao Yu and Eugene Tang, "China Considers Rare Earth Reserve in Inner Mongolia," *Bloomberg*, (9/2/2009); "Rare earth, common problem," *China Daily*, (9/3/2009).

[27] R. Jones, "The Battle for Rare Earth," *South China Morning Post*, (4/11/2010).

[28] As information for reference, in an ordinary session of China's State Council (cabinet meeting) on February 16, 2011, all newspapers in China reported that the Council indicated it aims to promote rational development, productive order, more efficient usage, technological innovation, and consolidation to bring about the sustainable and healthy development of the rare earth industry over the next five years. "State Council will streamline rare earth industry within 5 years. Rare earth new deal policy" *International Finance News*, *Xinhua News Agency* (2/17/2011) and others.

[29] State Council, "View on Industry Consolidation and Restructuring" (9/6/2010). The Council mentioned six intensive industrial sectors, especially rare earth production, and announced their intention to advance business mergers and tie-ups in those sectors to promote consolidation.

[30] Ministry of Land and Resources, "Notice on the Special Regulating and Inspecting concerning the Control of Development of Rare Earth Minerals" (11/18/2010): Regarding management of rare earth and other resources, the Ministry plans to promote mutual cooperation among related regions, crackdown on underground exploration without a license, confiscation of minerals generated illegally, and stricter business licensing and management for businesses that deal with resources; Ministry of Land and Resources, "Announcement concerning the Establishment of Primary Rare Earth Mine State Management Regions" (1/4/2011): Stipulated that the mining areas of Ganzhou City, Jiangxi Province, where heavy rare earth mines are concentrated, will be placed under direct state management.

3. Technology Transfer, Industry Restructuring and their Relationship with International Trade Rules

Although China is promoting industrial restructuring in the name of indigenous innovation with the aim of transitioning to a high value-added rare earth industry, a critical element in that process is "technology transfer" from advanced countries. How will China's foray into consumer markets-- the of transferring production lines to China in exchange for access to resources, mandatory disclosure requirements, or demands to foreign businesses for technical information-- be reconciled with international trade rules? First of all, the act of requesting designated technologies be transferred in order to secure investment approval is not itself normally a problem as long as the host country does not restrict freedom of investment. But if China were to demand that foreign businesses that already operate in China must transfer their technologies to China as a prerequisite for their business licenses, it may be inconsistent with the obligations under China's WTO Accession Agreements.[31]

Moreover, China's structural policies, *i.e.*, its industrial restructuring and integration, should be examined. According to experts, China is taking measures in its restructuring and consolidation of the rare earth industry to limit participation by foreign businesses in the extraction and refining process[32] (Provisional Regulations on Administration of Foreign Investment in the Rare Earth Industry) and measures to consolidate production processes under giant state-owned enterprises. Furthermore, Chinese officials have indicated[33] their intention to establish a rare earth industry association by May 2011. The association is modeled after the iron and steel manufacturing industry group, which handles iron ore price negotiations with resource majors, and is slated to be formed out of 93 interested companies involved in extraction, production, distribution and export. The move is seen as a way to improve on the conventional way of operating, where each company handles

[31] When China signed on to the WTO Agreement, it promised to uphold the measures specified in the TRIMs Agreement concerning the trade-related requirements for approval of foreign investment, including those concerning local content requests that violate GATT Article III and export/import balance demands that violate GATT Articles III and Article XI. It also promised that approval of foreign investment , would not be conditioned on any performance requirements whatsoever, including export demands or technology transfer demands.

[32] Provisional Regulations on Administration of Foreign Investment in the Rare Earth Industry.

[33] "Beijing likely to set up a trade body for rare earths," *China Daily*, (12/29/2010). This was made clear by Wang Caifeng, who is the founder of the body in question and worked at the Ministry of Industry and Information Technology, at the rare earth international summit held in Beijing. In an article by *China Business News Daily* on the 28th, Wang told the newspaper that the body was being established with the aim of strengthening control of pricing. "A former official of Ministry of Industry and Information Technology said rare earth association will likely be established next year.," *China Business News Daily* (12/28/2010).

production and sales in a patchwork manner, with the aim of unifying the industry's negotiating strength against foreign businesses, strengthening management of production and sales quantities, and gaining more influence over pricing. China's Ministry of Commerce has already announced a reduction in rare earth export quotas compared with the previous year of approximately 35% for the first half of 2011, and has advanced restructuring of the industry domestically through supply chain consolidation and integration. If under these circumstances there is additional government-led management of production and sales quantities, as well as more stringent international price controls, there is a high possibility that the procurement costs for trading companies in Japan, the United States and Europe will rise higher and higher. This matter needs to be continuously watched.

IV. Analysis of Rules Concerning Rare Earth Export Restrictions

1. Export Restrictions

Since their introduction, the consistency of China's rare earth export restrictions with GATT Article , which prohibits quantitative restrictions on imports and exports of industrial products, have been questioned. GATT Article XI prohibits all restrictions other than duties, taxes or other charges, and there is the possibility that China's setting of rare earth export quotas and its export licensing system could be regarded as "prohibitions or restrictions other than duties, taxes or other charges". However, even if GATT Article XI applies to the measures, exceptional treatment would be allowed provided that the provisions of GATT Article XX were satisfactorily invoked. China claims that its setting of rare earth export quotas and levying of export taxes are measures aimed at environmental protection and natural resource conservation, and that it is carrying out the measures in a way that does not contravene the provisions it consented to in the WTO Accession Agreement. The mention of environmental protection and natural resource conservation seem to have Articles XX(b) (which aims to "protect human, animal or plant life or health") and (g) (which is aimed at the "conservation of exhaustible natural resources"), squarely in mind.

GATT Article XX reads as follows:

Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which

would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(…)

(b) necessary to protect human, animal or plant life or health;

(…)

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

China is currently in a dramatic period of transition in its industrial structure. According to the US-China Economic Security Review Commission, from 1995 through 2004 the percentage of high- and medium-high technology exports increased from 33% to 52% of China's overall technology trade, while low and medium low-tech technology exports fell from 67% to 48%.[34] This period in which China rapidly boosted its high- and mid-high technology product manufacturing capacity overlaps with the period in which the Chinese government set up and approved state-initiative high-tech industry development zones one after another all around the country [35,] and carried out the process of aggressively acquiring high-tech factories externally and transferring production lines to within China. Especially since 2004, production of rare earth magnets has grown swiftly, driven by the rapid upgrading of Chinese industry. The domestic demand for rare earth elements is increasing yearly. China's domestic demand for rare earths is currently estimated to be about 70,000 tons, which would constitute roughly 60% of total global consumption.[36]

As mentioned above, multiple experts forecast that China's domestic demand for rare earth elements will catch up to its domestic production quantities by 2012.[37] Even though China

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[34] U.S.-China Economic and Security Review Commission "2005 Report to the Congress," p. 87.

[35] Kicked off by the establishment of the Zhongguancun National Innovation Demonstration Zone in 1988, the State Council had approved 54 high-level advanced technology zones by 1992. To date, 56 high-level advanced industrial technology zones have been approved.

[36] J. Korinek and J. Kim, *supra note*. 2, p. 19.

[37] Kingsnorth, Lifton, *et al.*

supplies around 97% of the world's rare earth demand, its underground deposits only comprise about 30 to 35% of the global total potential reserves of rare earth elements. China's Ministry of Commerce announced a study result in October stating that reserves could dry up in 15 to 20 years if development continues at the current pace[38], and that emphasizes the necessity of conserving resources.

Moreover, although China's rare earth industry expanded its output rapidly over the past dozen or so years, at the same time China claims that there are serious pollution problems in its production areas. The extraction and refining of rare earth elements entails the possibility of heavy environmental damage if environmental measures are not taken with great care in industrial processes, such as contamination from strong acids (ammonium sulfate, which is conspicuous in ion adsorption mines[39]) and outflow of radioactive materials coexisting with rare earth elements. In addition, it is said that China's outdated facilities and the laxness of the government's environmental regulations are bringing about environmental disasters through water and soil contamination.

Chen Deming, Minister of the Chinese Ministry of Commerce, has at certain times explained such domestic circumstances, and has gone on to state that "China's measures are consistent with the WTO agreement," in that "China is reducing rare earth production to protect the environment and conserve natural resources, and is simultaneously placing restrictions on domestic consumption."

Well then, in what specific circumstances are export restrictions really justified pursuant to GATT Article XX? As for the content of the Article concerning "necessary" in Article XX(b), what has been identified in the WTO precedents that have invoked Article XX, such as the *Tuna-Dolphin* and *U.S. Gasoline* cases, was that "necessity" refers to the fact that there are no alternative measures reasonably available to pursue the objective of the measures taken (1st *Tuna-Dolphin* case[40]) and the fact that primary purpose of the measure is to protect human, animal or plant life or health (2nd *Tuna-Dolphin* case[41]). As to Article

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[38] "Rare earth reserve in China only available for 20 years", Securities Daily *(10/18/2010), and others.*

[39] Extraction fluids (such as ammonium sulfate) are flushed into several pipes embedded deeply in the mine, the extracted fluid that includes metals is pooled at the foot of the mountain, and the metals are collected along with the fluid.

[40] 1st *Tuna-Dolphin* Case (DS21/R), para. 5.28.

[41] 2nd *Tuna-Dolphin* Case (DS29/R), paras. 5.38-5.39.

XX(g), the provision that "if such measures are made effective in conjunction with restrictions on domestic production or consumption," means that the export restrictions must be implemented together with restrictions on domestic production or consumption of natural resources. The panels for the GATT-era 2nd *Tuna-Dolphin* case and the post-WTO-establishment *U.S. Gasoline* case determined that measures made "related to" such conservation of exhaustible natural resources are those measures that are "primarily aimed at" the conservation of an exhaustible natural resources. As to the application of "primarily aimed at" to the "less favorable treatment" of imported gasoline in the U.S., the Appellate Body for the *U.S. Gasoline* case considered that the Panel had substantially applied the "necessary" test in paragraph (b).[42] The Appellate Body indicated that it was inappropriate for the "related to" phrasing in (g) to be interpreted as carrying the same standard of weight as the strong wording—"necessary"—that is used in (b), and therefore changed the Panel interpretation of the Article XX. It also noted that the phrase "primarily aimed at" "is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)."[43] The Appellate Body interpreted the "related to" criterion to be met provided that the measures cannot be regarded as merely incidentally or inadvertently aimed at the conservation of clean air for the purposes of Article XX(g)[44], even though there might exist a WTO-consistent alternative besides the measures implemented to accomplish . The Appellate Body went on to interpret "in conjunction with restrictions on domestic production or consumption" according to the usual meaning of the terms, their context, and the intent and goals of the Article's text,[45] and concluded that "even-handedness"[46] in dealing with domestic and foreign businesses is required when such restrictions are imposed. However, this "even-handedness" does not require identical treatment of domestic and imported products. Such an interpretation was also followed by the Appellate Body in the subsequent *U.S. Shrimp and Shrimp Product Import Prohibition* case[47].

Furthermore, even if a measure appears at first glance fulfills the provisions stipulated in paragraphs (b) and (g), the applicability of such exceptions is not recognized in cases applied in "a manner which would constitute a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade," as stipulated in the

[42] Appellate Body ruling on *U.S. Gasoline* Case(DS2/AB/R) ,p. 16

[43] *Id.*, p.19.

[44] *Id.*

[45] Article 31 of the Vienna Convention on the Law of Treaties, 1967.

[46] *Supra note*.42, p. 21.

[47] *U.S. Shrimp and Shrimp Product Import Prohibition* case (DS58/AB/R) , paras.143-145.

chapeau of the Article. In other words, preferential treatment for domestic industries under the guise of protecting the environment or conserving natural resources will not be permissible. The Appellate Body for the *U.S. Gasoline* case pointed out that, although the gasoline quality standard regulations at issue fall within the terms of Article XX(g),[48] the baseline establishment rules in the Gasoline Rule, in application, constitute "unjustifiable discrimination," and a "disguised restriction on international trade". This is because in applying the regulations, even though there might be a policy choice, the unified statutory baseline was established for foreign refiners while individual baselines that reflect their respective costs were introduced for domestic refiners. Hence in sum, although within the terms of Article XX(g), the baseline establishment rules are not entitled to the justifying protection afforded by Article XX as a whole.[49]

So far all panels where the interpretation of Article XX arose have been cases of import regulations, and there is no precedent for export regulations. Although there is some uncertainty as to whether the past interpretation can be applied as such to the present rare earth export restriction issue, restricting export quantities to below the level of the domestic production quota could raise a question because it reserves a certain portion of the production for domestic consumption. The even-handedness required in the *U.S. Gasoline* case does not require domestic and foreign businesses be treated in the identical manner. However, because there was a low chance of obtaining the data required for regulating the imported products, it would have been impossible to treat domestic and foreign businesses in the same condition in the first place. On the other hand, considering the objective structure of the present rare earth export restrictions, it is entirely unclear how reserves that can exclusively be used by domestic businesses contribute to the conservation of natural resources. It would be understandable to restrict exports in excess of production quotas in order to crack down on illegal mining, but even in that case, the reason for restricting export quantities to below the level of production quotas is still uncertain. Obviously, as we have seen, there is some doubt as to whether the measures taken by China meet the requirement of even-handedness and whether they are being conducted within the rationale of state discretion concerning resource conservation.

Moreover, are there not measures to effect environmental protection and natural resource

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[48] *Supra note*.42, p. 22. The panel (DS2) took up the issue of U.S. gasoline standards implemented to prevent air pollution. The panel ruled that, although "clean air" is an exhaustible natural resource, the U.S. gasoline standards were not "primarily aimed at" conserving exhaustible natural resources, hence did not fall under the purview of Article XX(g). However, the Appellate Body did not accept the panel's standard that paragraph (b), which requires necessity, and paragraph (g), which requires relevance, should be treated in exactly the same way, and hence ruled that the measures in question did fall under the purview of Article XX(g).

[49] The provision of Chapeau of Article XX20. *Supra* note.42, p.29.

conservation that are less discriminatory to foreign businesses in the first place? If so, there is a chance that the present measures are either "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade" stipulated in the chapeau of Article XX. On this point, the Ministry of Land and Resources' 2008-2015 Rare Earth Industry Development Plan mentions that rare earth production is being restricted for the sake of environmental protection, but the export restrictions mainly apply to rare earth elements in the raw materials stage, with almost no quantitative restrictions on the export of half-finished or final products that contain rare earth elements. As long as rare earth elements are consumed within China, they can be used as they always have been, so the incentives for rare earth production remain in place. Therefore, in response to the international hike in prices and the domestic increase in demand, it has also been pointed out that illegal mining that exploits the loopholes in the regulations is expanding.[50] There is surely room for debate as to whether the measures in place were appropriately implemented with the aim of environmental protection and natural resource conservation.

Furthermore, in the Accession Agreement to the WTO signed in 2001, China promised to abolish export duties for all goods except for those listed in the Appendix 6 to the Agreement. Numerous items including rare earth elements are not listed in the Appendix, and hence are items for which import duties are pledged to be abolished in the Accession Agreement. Therefore, consideration must also be given to whether the measures taken by China are inconsistent with the WTO Accession Agreement.

2. The Stagnant Flow of Rare Earth Exports

Since September 21, 2010, a significant slowdown in rare earth exports has been observed, due to stricter customs clearance procedures and so on. On September 22, the *New York Times* reported that China had placed an embargo on rare earth elements bound for Japan in

[50] "20000 tons of Rare Earths smuggled out of China" *China News* (10/12/2010).

retaliation for the Senkaku Boat Collision Incident,[51] leading various media outlets to report that China was engaging in an "embargo." However, China's Ministry of Commerce immediately held a press conference, at which it was explained that "there is no truth to the reports of an embargo" and that the delays in customs clearance were due to "stricter procedures to help crack down on smuggling."

As will be explained below, the lagging pace of rare earth exports bound for Japan since September 2010 was remedied in about two months, but supposing that customs inspections on only those goods bound for a certain country were tightened over a long period, document inspection were deliberately delayed, or other disadvantageous treatment were undertaken-- that would raise doubts about consistency with the most-favored-nation principle stipulated in GATT Article I.

V. Japan's Response

The Japanese government has continued to discuss the issue of rare earth export restrictions with China through all available channels. At the August 2010 Japan-China High-Level Economic Dialogue and the courtesy call to Premier Wen Jiabao by related Japanese Cabinet members during the dialogue, Minister of Economy, Trade and Industry Masayuki Naoshima and Minister of Foreign Affairs Katsuya Okada issued a request to Premier Wen Jiabao, Vice-Premier Wang Qishan, and other Chinese State Council members to review the reduction in export quotas. As to the substantial delays in exports since September 2010, serious requests at all levels for improvement were delivered to the Chinese

[51] On September 7, 2010, a Chinese fishing boat collided with a Japan Coast Guard patrol ship in Japanese waters off the coast of the Senkaku Islands. The Senkaku Islands are the proper territory of Japan, which exercises effective control over them, and foreign fishing vessels are not permitted to operate without Japanese government approval in Japan's territory extending 12 nautical miles from the islands and in the exclusive economic zone (EEZ) outside that area. However, when the Coast Guard discovered this fishing boat, it was operating illegally within Japanese waters. When the Coast Guard attempted to crack down on this fishing boat's illegal action, the boat collided with the Coast Guard patrol ship in an effort to flee, so the Coast Guard arrested the crew of the boat for obstruction of official duties and took them into custody.

government. At the November APEC meeting in Yokohama, Minister of Economy, Trade and Industry Akihiro Ohata met with Chairman Zhang Ping of China's National Development and Reform Commission and requested early improvement regarding the problem of sluggish rare earth exports from China. At that time, Chairman Zhang Ping replied, "The issue will be resolved before long", and in a while after that, the stagnant flow of export since September gradually returned toward normal. On the other hand, export quotas for the first half of 2011 have been cut further as mentioned in Section II, so Japan is requesting that China arrange the export quotas for the full year so that adequate supply can be secured. Japan has also exchanged views with the United States and European Union on the export restriction issues. At various international fora, Japan has also continued to coordinate with interested countries on resource export regulations, with the result that, although there was no direct mention of rare earth elements in the Yokohama APEC Summit and Ministers' Declaration and the G20 Summit Declaration in Seoul, those statements did incorporate wording that reaffirmed the commitment not to take new protectionist measures, *i.e.,* refrain from raising new barriers to investment or to trade in goods and services, imposing new "export restrictions," and so on.

Moreover, Japan has a large number of businesses in its competitive materials industry that are direct users of rare earth elements. To secure an environment in which these businesses can operate stably in Japan, the Ministry of Economy, Trade and Industry has announced a "Comprehensive Rare Earth Strategy" and is promoting a policy, from the perspective of projected demand growth and supply disruption risks due to uneven distribution of resources in supplier countries, that includes diversification of supply sources, recycling and other support for rare earth related industry placement within Japan, as well as development of alternative materials.

Japan has already made agreements on resource development with Vietnam, Mongolia, India and other resource-rich countries that have rare earth deposits, and has issued joint proclamations with leaders of certain countries. In parallel with the development of strategic, mutually beneficial relationships through resource diplomacy, Japan is domestically taking the world's most advanced measures to secure a stable supply of rare earth elements, including development of technologies for extracting rare earth elements from the waste from manufacturing processes and development of alternative materials using cutting-edge technology.

VI. Concluding Remarks

The deepening interdependence in the global economy has created the present situation in

which the impact of a single country's policy decisions can ripple through the supply chain and affect the entire world. However, if a single country suddenly changes its supply quantities of critically important resources, takes advantage of its market power to benefit its own industries, or uses such a position as a bargaining chip in foreign policy, each country will be forced to recognize the risks and take steps to adapt. The securing of stable and reliable supplies of strategically important resources is a pressing challenge for all countries.

Regarding rare earth elements, changes are happening in the global supply structure in response to China's tightening of export restrictions. For instance, the United States is working to establish stable sources of rare earth elements for use in its defense sector at least, with the aim of raising its self-sufficiency by re-opening domestic mines. To meet the world's demand, potential supply countries are also exploring new production. The rare earth supply structure with 97% being produced in China could change substantially in the next few years. Moreover, amid the rare earth supply shortage, effective utilization of rare earth elements via global supply expansion, recycling, and resource-saving technologies is a challenge for the whole world, including China. Curbing environmental impact is similarly an urgent issue, and the technologies of developed countries for environmental damage mitigation likely will play a role. It will be necessary to continue watching to see how far China's quantitative export restrictions undertaken with the aim of saving resources and protecting the environment will be permitted from the standpoint of international rules. Yet, more than that, the recent rare earth issue presents the fundamental question of how countries can build competitive and cooperative relationships within the increasingly interdependent global economy.

○ Periodic Table of the Elements

Rare metals Rare earths

Period	Alkali metals	Alkaline earth metals	Rare earth family	Titanium family	Vanadium family	Chromium family	Manganese family	Iron family (4th period) Platinum family (5th and 6th periods)			Copper family	Zinc family	Aluminum family	Carbon family	Nitrogen family	Oxygen family	Halogens	Noble gases
1	1 H Hydrogen																	2 He Helium
2	3 Li Lithium	4 Be Beryllium											5 B Boron	6 C Carbon	7 N Nitrogen	8 O Oxygen	9 F Fluorine	10 Ne Neon
3	11 Na Sodium	12 Mg Magnesium											13 Al Aluminum	14 Si Silicon	15 P Phosphorus	16 S Sulfur	17 Cl Chlorine	18 Ar Argon
4	19 K Potassium	20 Ca Calcium	21 Sc Scandium	22 Ti Titanium	23 V Vanadium	24 Cr Chromium	25 Mn Manganese	26 Fe Iron	27 Co Cobalt	28 Ni Nickel	29 Cu Copper	30 Zn Zinc	31 Ga Gallium	32 Ge Germanium	33 As Arsenic	34 Se Selenium	35 Br Bromine	36 Kr Krypton
5	37 Rb Rubidium	38 Sr Strontium	39 Y Yttrium	40 Zr Zirconium	41 Nb Niobium	42 Mo Molybdenum	43 Tc Technetium	44 Ru Ruthenium	45 Rh Rhodium	46 Pd Palladium	47 Ag Silver	48 Cd Cadmium	49 In Indium	50 Sn Tin	51 Sb Antimony	52 Te Tellurium	53 I Iodine	54 Xe Xenon
6	55 Cs Cesium	56 Ba Barium	57～71 Lanthanides	72 Hf Hafnium	73 Ta Tantalum	74 W Tungsten	75 Re Rhenium	76 Os Osmium	77 Ir Iridium	78 Pt Platinum	79 Au Gold	80 Hg Mercury	81 Tl Thallium	82 Pb Lead	83 Bi Bismuth	84 Po Polonium	85 At Astatine	86 Rn Radon
7	87 Fr Francium	88 Ra Radium	89～103 Actinides															

Lanthanides	57 La Lanthanum	58 Ce Cerium	59 Pr Praseodymium	60 Nd Neodymium	61 Pm Promethium	62 Sm Samarium	63 Eu Europium	64 Gd Gadolinium	65 Tb Terbium	66 Dy Dysprosium	67 Ho Holmium	68 Er Erbium	69 Tm Thulium	70 Yb Ytterbium	71 Lu Lutetium

○ Examples of Application

Element	**Applications**
Mischmetal	Hydrogen-storing alloys, additives
Lanthanum	Optical lenses, catalysts, ferrite magnets
Cerium	Abrasives, catalysts
Neodymium	Rare earth magnets, condensers
Europium	Phosphors
Terbium	Phosphors, rare earth magnets
Dysprosium	Rare earth magnets

3. VALIDITY OF CURRENT PROVISIONS, AND FUTURE RESPONSE

(1) Validity of current provisions

The current WTO Agreement contains a certain level of provisions regarding export restrictions. It also, however, contains a range of exceptional provisions; and based on awareness that the provisions are not always valid with regard to various export restrictions currently in effect, a debate is underway regarding the strengthening of these provisions. Since there are so many complexities to formulate effective rules export restrictions valid among multiple states (such as individual state sovereignty, the retention of resources, environmental conservation, domestic industry protections, and fiscal aspects (generation of income through tariffs), etc.), interested states (usually importing countries) deal with export restrictions individually by implementing individual rules (promises made on acceding to the WTO or bilateral agreements) in the existing circumstances.

(2) The impact of export limits (including economic perspectives)

Nowadays, with the global economy in decline, various countries' export limits have been relaxed in comparison with earlier times. The fact, however, that no valid provisions exist regarding export restrictions, means that restrictions are introduced and abolished in response to economic conditions, making it difficult for companies to forecast developments. This may, in some cases, be unavoidably restricting the further progress of free trade and investment.

In the first half of this chapter, which deals with quantitative restrictions, as stated in "(3) Economic Aspects and Significance", there is a strong possibility that quantitative restrictions (including those on exports) may in fact damage the long-term development and profitability of the industry in question. Furthermore, since export quantitative restrictions, as with those imposed on imports, specify in advance the quantity and type of exports, as well as the business or company involved, these decisions may become arbitrary and unclear.

If export restrictions cause countries to hesitate regarding the specialization of industries in which they have high productivity, and to protect its own manufacturing

industry, it will result in obstacles to free trade, the effects of which raise the standard of welfare throughout the world.

(3) Future response

Japan emphasized the importance of the transparency of procedures relating to the setting of export limits for multilateral trade at the NAMA negotiations in the Doha Round of Negotiations (NAMA negotiations NTB Proposal: TN/MA/W/15/Add.4/Rev.5; joint proposers Taiwan, Korea, Ukraine, USA). Additionally, Japan has emphasized the need to strengthen regulations relating to export restrictions and limits, and export tariffs, which threaten the stability of food supplies, at agricultural negotiations. Furthermore, at OECD Trade Committee meetings, Japan has continually emphasized the need for policy discussion regarding the "transparency of regulations relating to trade and investment".

As stated in the introduction to this report, "In cases where international law has not existed until now it is necessary to establish such", and that "this position is the basic one taken within this report". As was also discussed in the introduction, however, when considering models for new international laws, it is necessary to ensure that "socially beneficial systems are selected, based on an accurate view of the implications of alternative rules and mechanisms to the economic welfare of each state".

4. MAJOR CASES

(1) Japan – Semiconductors (minimum price) (BISD 35S/116)

During the 1980s, based on the Japan-USA Semiconductor Agreement, Japan implemented minimum price restrictions on semiconductors it exported to regions other than the USA. (T export permit system was based on its Foreign Exchange and Foreign Trade Law, introduced with the objective of implementing COCOM restrictions, having been used since November 1986 for the monitoring of semiconductor export prices. Furthermore, at the time, Japan had also implemented semiconductor export monitoring measures, in order to prevent dumping, and was repeatedly giving guidance to exporting businesses not to implement dumping). The EEC (as it was then) stated that Japan's minimum export pricing restrictions on semiconductors were equivalent to an export

restriction defined in GATT Article XI. While Japan pointed out that the price restriction on exports of semiconductors was not legally binding, and that its measures were not within the scope of GATT provisions, The Panel considered that even though the export restrictions were not implemented according to legally binding measures but rather according to measures comprising unofficial guidance from government, it was deemed that they were within the scope of GATT Article XI:1, and that they were an infringement of GATT Article XI.

(2) Argentina - Leather (DS155)

Argentina's leather industry organization was granted pre-export customs agency rights over leather and other goods, and regulations were published regarding the procedures for leather and other products. According to these procedures, it was regulated that a domestic leather industry representative must accompany all pre-loading export inspections, and that the actual inspection must be implemented by a domestic leather industry representative.

The EU claimed that the presence of a domestic leather industry representative during export customs procedures was in fact equivalent to an export restriction, constituting an infringement of GATT Articles X:3(a) and XI:1. The panel judged that the measure was an infringement of GATT Article X:3(a), which requires that laws, regulations and other measures must be implemented fairly and rationally in respect to trade, and also that the procedures that regulate the export restrictions were covered by GATT Article XI. (However, since the EU had not proven that the intervention of a domestic leather industry in customs procedures was an infringement of GATT Article XI, the claim that this infringed Article XI was denied). Furthermore, the Panel ruled that although the procedure itself was not a direct restriction of exports, it could have the indirect effect of restricting exports, and was therefore an infringement of GATT Article XI, and stated that the fact that the domestic industry and the department responsible for export restrictions could be considered to be in a "collusive relationship" meant that there were indeed problems in reconciling the situation to GATT.

(3) US – Measures that utilize export limits as subsidies (DS194)

Canada alleged that Section 771(5) of the 1930 Tariff Act (revised by the Uruguay Round Agreements Act (URAA)), as interpreted by the Statement of Administrative Action accompanying the URAA, the Commerce Department's explanation of final rules with regard to countervailing duties, and the US administration's handling of export controls were contributing financially to other countries' export limit measures, and were in infringement of the Agreement on Subsidies.

The Panel indicated that in an abstract way, export limits did not constitute subsidies as defined by the Agreement on Subsidies, and that in this case, the export controls did not meet the conditions given in Article 1.1(a)(1)(iv) of the Agreement on Subsidies of having been consigned or instructed by the government, and that for this reason they could not be considered financial contributions as defined by Article 1.1(a) of the Agreement on Subsidies.

(4) China – Measures relating to the export of raw materials (DS394, 395, 398)

The US/EU had continued discussions relating to the fact that US/EU manufacturers were finding it difficult to source raw materials, but failing to find a satisfactory solution, requested a consultation with China at the WTO in June 2009 regarding China's export limits on raw materials. (Mexico also requested a consultation in August of the same year). Subsequently, in November 2009, the US, EU and Mexico, having consulted with China in both July and September but not having come to a solution, trilaterally requested the formation of a WTO panel. The problem highlighted by the three countries was the quantitative restrictions and export tariffs levied by China on nine substances (bauxite, coke, fluorite, magnesium, manganese, silicon carbide, silicon metal, white phosphorus and lead), and on processed or semi-processed products that incorporated these raw materials. They claimed that the measures infringed the general prohibitions on quantitative restrictions contained in GATT Article XI, and of China's accession agreement with the WTO (which contained promises to abolish export tariffs and establish an upper limit on export tariff rates). In response to this, China claimed that the measures were intended to protect the environment and conserve exhaustible natural resources, and were therefore consistent with WTO rules. (Currently, the panel is still considering the matter).