

Defending Permanent Sovereignty over Natural Resources against the Obligation to Freely Trade: The International Legal Dimension

Daria Boklan & Chamundeeswari Kuppuswamy¹

Permanent sovereignty over natural resources (PSNR) and the principle of free trade are two strongly established principles in international law. The main question addressed by the authors of this article is whether it is fair to force states of origin of natural resources to export said resources to other states instead of exploiting them in the interest of their national development?

On the one hand trade in natural resources is subject to the legal rules of international trade law, law of the World Trade Organization (WTO) in particular, which enshrines an obligation to freely trade across borders. On the other hand, states possess permanent sovereignty over their natural resources which encompass both the right to trade in natural resources and the right to limit such trade. It is the balance between the two principles that is hard to reach. Analysis presented in this article reveals that existing provisions of the law of the WTO and its jurisprudence lean away from a just balance between the two. The obligation to enable free trade prevails over the rights derived from the permanent sovereignty over natural resources.

According to the WTO's Trade Policy Reviews, more than one-third of all notified export restrictions are in the natural resource sector. Yet, WTO rules are not effective enough to secure states' permanent sovereignty over their natural resources. Based on WTO jurisprudence and the outcomes of *China — Measures Related to the Exportation of Various Raw Materials (China-Raw Materials)*, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (China – Rare Earth)* and most recently in *Indonesia – Measures Relating to Raw Materials (Indonesia – Raw Materials)*, it is argued that the WTO jurisprudence overly favours the principle of free trade over PSNR.

Key words: permanent sovereignty over natural resources (PSNR), free trade, WTO law

1. Introduction

The rising demand in a world of finite supplies has caused widespread anxiety over the security in access to natural resources (Qin 2012, p 1151). Around one-fifth of global merchandise trade is trade in natural resources (Ruta & Venables 2012, p.1). Trade in natural resources increased by more than 50 per cent (to 3 trillion US\$) in 2021 (UNCTAD 2023, p.12). The geography of natural resource endowments means that resources are, more than almost any other products, internationally traded (UNCTAD 2023, p.12). This means that on the one hand such trade is subject to the legal rules of international trade law (law of the World Trade Organization (WTO) in particular) which enshrines obligation to trade freely across borders. On the other hand, states possess sovereignty over their natural resources which encompass both the right to trade in natural resources and the right to limit such trade. When states exercise their rights, particularly in the context of natural resources which are considered critical raw materials, the latter right, i.e. the right to limit trade in natural resources, is being curbed. This is a dilution of the principle of PSNR and impacts on a fundamental aspect of sovereignty of a state.

Consequently, the question of how to fulfill obligation to provide free trade enshrined in the agreements of the WTO to which most trading nations are parties to,² on the one hand and guarantee state sovereignty over natural resources on the other hand, is a top priority for states.

¹ Daria Boklan, Professor of Department of International Law, HSE University, Moscow, Russia. Address: 101000, Myasnitckaya 20, Moscow, Russia. E-mail: boklan5@yandex.ru; Chamundeeswari Kuppuswamy, Hertfordshire Law School, and Research Theme Champion for Global Economy at the Office of the Vice-Chancellor, University of Hertfordshire, Hatfield Hertfordshire, United Kingdom;

Although, more than one-third of all notified export restrictions are in resource sectors, according to the WTO's Trade Policy Reviews (Ruta & Venables 2012, p.12), nevertheless WTO rules are not effective enough to secure states permanent sovereignty over their natural resources. In the most recent case on this issue, in 2022 at the WTO *Indonesia – Raw Materials*³, Indonesia lost the case and was obliged to export its raw materials to the European Union.

This article presents the legal dimension, particularly the international legal dimension on the movement of natural resources through trade as mediated by (or lack of) state power. Following this introduction, the second section describes the method used in this paper. The third section elaborates on the legal nature of state sovereignty. The fourth section is focused on compatibility of free trade principle with permanent state sovereignty over the natural resources. The last section concludes the analysis with some recommendations.

2. Method

The paper adopts a doctrinal research method. The doctrinal research in this paper has a legal focus, drawing from public international law and international trade law, analysing documents and international decisions.

The legal doctrinal method places judicial and executive sources in a dominant position, wherein statements from case law and treaties are treated as primary sources. Primary sources used in this paper include decisions from the International Court of Justice (ICJ), the WTO Panel (a WTO Dispute Settlement Panel is an ad-hoc collection of three (or five, in some cases) experts who are assembled to adjudicate over a trade dispute involving at least two member nations of the World Trade Organization. The functions of the panels are to protect the rights of member nations while encouraging predictability and uniformity in the dispute resolution process⁴), WTO Appellate body (the body above the WTO Panel, where appeals from the Panel are directed to), and the Permanent Court of International Justice (PCIJ). Key international treaties used in the analysis are the General Agreement on Trade and Tariffs (GATT), and the Marrakesh Agreement establishing the World Trade Organisation. Soft law includes the United Nations General Assembly Resolutions, and negotiations leading up to international treaties, secondary sources, including original articles and commentaries. Secondary literature used pertain to commentaries by scholars on GATT provisions, human rights treaties, nature of sovereignty, and other aspects of public international and trade laws.

3. Legal Nature of State Sovereignty

In the Peace of Westphalia, sovereignty meant a recognition by each party of other states' authorities as full and legitimate governments within their territory (Croxtton 1999, p. 570). In the *Island of Palmas* case, arbitrator M. Huber stated that sovereignty in the relations between States signifies independence. Independence, in regard to a portion of the globe, is the right to exercise therein, to the exclusion of any other state, the functions of a state.⁵ Sovereignty is regarded as an assumption about authority (Hinsley 1967, p.242) and implies a form of legitimation (Ruggie 1983, p. 276). A State is not subject to the legal power of another State or any other higher authority and stands in principle on an equal footing with other States: *par in parem non habet imperium* (Schrijver 2000, p. 65).

The Westphalian model, for the first time, established sovereignty not just over people, which had existed before, but sovereignty over a particular territory (Ruggie 1983, p. 579). It was recognized that in order to protect the population, control over territory was essential. This is

² There are 164 WTO members to date.

³ Panel Report, *Indonesia – Measures Related to Raw Materials*. WT/DS592/R., 30 November 2022.

⁴ <https://www.curtis.com/glossary/international-trade/wto-dispute-settlement>

⁵ Permanent Court of Arbitration. *Island of Palmas case (Netherlands v. USA)*. Award of 4 April 1928 // UN Reports of International Arbitral Awards. Vol. II. p. 838.

evident in Judge Alvarez's separate opinion in the *Corfu Channel* case wherein sovereignty is understood as the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States.⁶ There was no clear explicit permanent sovereignty over the natural resources delineated at this point, although the inclusion of territorial sovereignty was said to be all encompassing.

However, during negotiations on drafting the General Agreement on Trade and Tariffs (GATT) in 1946, the US delegate submitted that trade in natural resources should not be restricted based on the interest of the country which holds it. This position of the US triggered initiative of developing countries which resulted in adoption of the UN resolutions on permanent sovereignty over natural resources (PSNR) (Scott 2008). Thus, once established, territorial control and ownership over resources are an intimate expression of a state's independence as it has come to become by being accepted as an essential attribute of sovereignty (Banai 2016).

Therefore, being an attribute of statehood, or in other words being a necessary quality of a state sovereignty cannot be limited by nature because a state cannot be "less or more sovereign" and sovereignty cannot be quantitatively measured (Boklan and Kuppuswamy 2024).

However, sovereign rights, including right to exploit natural resources are mirrored by the corresponding obligations. One of such obligations is the obligation not to cause harm to the environment of other States. But this obligation, like all other international legal obligations provided in treaties or international customs is not a limitation to the state's sovereignty, but the expression of state sovereignty. This argument is supported by international case law. Thus, the PCIJ in the *S.S. Wimbledon* case regarded the right of entering into international engagements as an attribute of State sovereignty.⁷ This was reaffirmed by the PCIJ in its advisory opinions on the *Exchange of Greek and Turkish Population*⁸ and on the jurisdiction of the European Danube Commission between Galatz and Braila⁹. According to more recent case law of the WTO Dispute Settlement Body (DSB), the ability to enter into international agreements, such as the WTO Agreement, is a quintessential example of the exercise of sovereignty. The Panel specifically underlined that in joining the WTO, China obtained significant commercial and institutional benefits, including those for its natural resources. It also committed to abiding by WTO rights and obligations.¹⁰ The International Court of Justice (ICJ) underlined that PSNR creates a corresponding duty to recognize and respect other states' PSNR. This means that States are obliged to refrain from actions that may be prejudicial to PSNR of other States.¹¹ Such obligations are examples of exercising of state sovereignty but not limitations to it. The opposite conclusion would lead us to the absurd outcome, according to which the more a state participates in the treaties the less sovereign it becomes, because it bears more international obligations enshrined in such treaties. State sovereignty as such must be distinguished from rights and corresponding obligations deriving from state sovereignty.

PSNR is part of state sovereignty. It enshrines the right of peoples and nations to permanent sovereignty over their natural wealth and resources which must be exercised in the interest of their national development and of the wellbeing of the people of the State concerned. The exploration, development and disposition of such resources, as well as the import of the

⁶ *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v Albania) (Separate Opinion of Judge Alvarez) [1949], p. 43

⁷ PCIJ. *Case of the S.S. "Wimbledon"* (United Kingdom, France, Italy, Japan v. Germany). Judgment of 17 August 1923 // P.C.I.J. (ser. A) No. 1. 1937. p.25.

⁸ PCIJ, Advisory opinion of 21 February 1925 on *Exchange of Greek and Turkish Population* (Series B, No. 10), pp.21-22

⁹ PCIJ, Advisory opinion of 8 December 1927 on *Jurisdiction of the European Danube Commission between Galatz and Braila* (Series B, No. 14), p. 36

¹⁰ WTO, 2012. *China — Measures Related to the Exportation of Various Raw Materials*. Appellate Body Report WT/DS394/AB/R; WT/DS395/AB/R; and WT/DS398/AB/R. para 7.382

¹¹ ICJ. *Case Concerning East Timor (Portugal v. Australia)*. Judgment of 30 June 1995 // I.C.J. Reports. 1995. Dissenting opinion of Judge Weeramantry. P. 190, 204, 221; Ibid. Dissenting opinion of Judge Skubiszewski. p. 264, 270.

foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.¹² The ICJ expressly affirmed the status of the principle of PSNR as a rule of customary international law.¹³ This principle features in over 80 UN General Assembly Resolutions (Schrijver 1997) and also been enshrined in many international agreements predominantly governing international environmental relations.¹⁴ PSNR forms part of the Charter of Economic Rights and Duties of States of 1974 and of the Rio Declaration on Environment and Development of 1992. It is also enshrined in the 1966 International Covenant on Civil and Political Rights; the 1966 International Covenant on Economic, Social, and Cultural Rights.

The notion that the sovereign right to natural resources belongs to peoples – hence a human right – is an exceedingly powerful one. It suggests that the State is merely the representative of its citizens in exercising this right and that the State has the duty to exercise such right diligently and in the best interest of its population (Qin 2012, p. 1165). Therefore, many developing countries regard export tariffs as a legitimate tool for economic development (World Trade Report 2010, p. 184). The permanent character of the sovereignty over the natural resources implies that the right to dispose freely of natural resources can always be regained, notwithstanding contractual obligations to the contrary. It is clear that the sovereign rights over natural resources are granted to peoples on the basis of territorial sovereignty rather than a principle of sharing the world's resources (Schrijver 1997, p 263, 386). Such approach should be taken into account when interpreting rules and disciplines of international trade law, including the principle of free trade enshrined in the WTO agreements.

4. Compatibility of Obligation to Enable Free Trade with State Sovereignty over Natural Resources

4.1 Free trade facilitation through non-discrimination principles

There is no sovereignty upon all tradable goods; sovereignty exists only upon natural resources. At the same time the Marrakesh Agreement establishing the WTO was concluded without any additional specific obligations on natural resources, leaving existing disciplines—primarily those that were already in GATT 1947—as the only instruments available to address trade in natural resources (Hughes & Marceau 2013, p. 269-270). One important issue in the relationship between natural resources and international trade law concerns timing – in other words, the question of *when* natural resources become subject to international trade disciplines, and can be seen as qualifying as ‘goods’ or ‘products’ within the meaning of trade law (Kulovesi 2016, p. 49). One of the fundamental questions in the debate over trade in natural resources is whether and when a non-extracted or harvested resource for instance, a standing tree, an oil reserve or even an aquifer—can be considered “goods” subject to WTO disciplines (Hughes & Marceau 2013, p. 269-270 p. 274).

There are two different approaches regarding this issue presented in the existing literature. Melaku Desta explains that when natural resources are being traded (or might potentially be traded), they are effectively treated as goods/products, and as a result of this,

¹² Permanent Sovereignty over Natural Resources General Assembly resolution 1803 (XVII) New York, 14 December 1962. https://legal.un.org/avl/ha/ga_1803/ga_1803.html

¹³ International Court of Justice (*hereinafter* – ICJ). *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. Judgment of 19 December 2005 // I.C.J. Reports. 2005. p. 168, para 244.

¹⁴ The Convention on Biological Diversity. 5 June 1992. Article 3; The United Nations Framework Convention on Climate Change. 9 May 1992. Preambular 8; Vienna Convention on Succession of States in respect of Treaties. 23 August 1978. Article 13.

measures regulating them are subject to the various trade-in-goods agreements set out in Annex 1A of the WTO Marrakesh Agreement. Although “natural resources” are not goods themselves, they appear to be something akin to “potential” goods and, therefore, fall within the scope of “goods”/ “products” within the meaning of the WTO law. Through extraction and processing, they can be turned into goods, and can be sold as commercial products. In other words, WTO law comes into play only after a certain natural resource has passed through a production process and has been converted into a product ready for exchange and trade. The WTO law may extend to measures applied at pre-production stage, if these measures affect the competitive relationship between products on the market (Desta 2010). WTO Members are free in their decision whether or not to mine or harvest their natural resources, or the extent to which they do so. Yet whenever they mine or harvest, they must normally make the natural resources they produce available to other WTO Members as well – except in a case of temporary, critical shortage (Bronckers & Maskus 2014, p. 393).

According to the second approach, presented by Valerie Hughes and Gabrielle Marceau, WTO rules on goods can extend to natural resources even if they have not yet been harvested or extracted, and are as such not tradable (Hughes & Marceau 2013, p. 297). Jorge Viñuales specifically underlines that in context of the WTO, water, ice and snow have been included in tariff headings under the GATT, indicating that they do become ‘goods’ covered by WTO rules at some point (Viñuales 2009, p. 203).

The Appellate Body addressed this issue in *the US–Softwood Lumber IV* dispute. The Appellate Body pointed out that the ordinary meaning of the term “goods” should not be read so as to exclude tangible items of property, like trees, that are severable from land.¹⁵ Nothing leads us to the view that tangible items—such as standing, unfelled trees—that are not both tradable as such and subject to tariff classification, should be excluded from the coverage of the term “goods”. It follows that we agree with the Panel that standing timber—trees—are “goods” within the meaning of Article 1.1(a)(1)(iii) of the *SCM Agreement*.¹⁶ Therefore, trees were considered as ‘goods’ and WTO law applied to them *before* they had been cut (Kulovesi 2016, p. 50).

However, this does not mean that the WTO obligates its Members to extract their resources and trade them with others (Hughes & Marceau 2013, p. 297). This was the reason why the 1960s and 1970s witnessed the emergence of the generalized system of preferences, which permitted tariff preferences to be granted to exports of developing countries. Through what is known as the Enabling Clause, these preferences operated as an exception to the obligation under the General Agreement on Tariffs and Trade (GATT) 1947 to accord most-favored-nation (MFN) treatment to products from all Contracting Parties to the GATT. This permissible discrimination in favour of developing countries resulted in privileging exports in raw materials (World Trade Report 2010, p. 164).

Policies on resource depletion (including exploration) have traditionally been viewed as sovereign matters of resource-owning countries (Cameron 2012). Governments apply export restrictions to achieve several policy objectives. These include fiscal revenue, development and social policies. Policies can seek to reduce the negative externalities caused by pollution associated with mining or processing. Assuming there is a finite supply of non-renewable resources; governments can also justify their interventions on the basis that they must guarantee resources for future generations (Tongeren, Korinek & Kim 2010). This is because sovereign interest derived from the principle of PSNR provides for the welfare of that particular nation. In 2010 the WTO in its report highlighted that trade has the potential to improve efficiency and increase welfare of nations by shifting resources from regions of relative abundance to regions of relative scarcity. However, welfare gains are complicated by factors such as the exhaustibility of natural resources and pervasive market failures (World Trade Report 2010, p. 202).

¹⁵ *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* WT/DS257/AB/R, adopted 17 February 2004, para 59.

¹⁶ *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* WT/DS257/AB/R, adopted 17 February 2004, para 67.

In accordance with the 2013 United Nations General Assembly Resolution *International Trade and Development*, international trade is an engine for development and sustained economic growth. It also reaffirms the critical role that a universal, rules-based, open, non-discriminatory, and equitable multilateral trading system, as well as meaningful trade liberalization, can play in stimulating economic growth and development worldwide; thereby benefiting all countries at all stages of development (UN General Assembly Resolution 2013). Free trade is a largely theoretical policy under which governments impose absolutely no tariffs, taxes, or duties on imports, or quotas on exports (Longley 2021). WTO law includes non-discrimination principles, the most-favoured nation treatment (MFN) and national treatment (NT), both serve to secure free trade.

Numerous questions arise as to how exactly WTO non-discrimination principles can be applied to trade in natural resources (Marceau 2012). These questions are directly connected with where there is compatibility or even contradiction between sovereign states' right to exploit natural resources in the interest of their national development and at the same time to fulfil obligation to enable free trade in natural resources between states.

The issue of limiting the power of the states to administrative functions, such as licensing, in relation to trade in natural resources, is being discussed within the WTO for more than twenty years. And, according to the WTO law even such limited trade restrictive measures like licensing should be based on certain standards (e.g. non-discrimination, fair and equitable treatment, etc) (Desta 2010).

The term "natural resources" features in the GATT in two of its provisions. Article XVII, paragraph 1 (a), Annex I states "governmental measures imposed to ensure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources, but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute 'exclusive' special privileges". In simple terms, governmental measures which affect trade in natural resources will be regarded as "exclusive special privileges" and will be subject to the MFN and NT obligations.

Article XX (g) enshrines general exception providing WTO members with the right to apply trade restrictive measures (including ones that do not comply with MFN and NT) relating to the conservation of exhaustible natural resources. The term 'relating to' is defined as 'having some connection with, being connected to'.¹⁷ The WTO Appellate Body has found that, to determine this connection, the relationship between the general structure and design of the measure at stake must be examined.¹⁸ The 'relating to' criterion must be considered by looking at the challenged measure 'in light of its policy and regulatory context and not in isolation'.¹⁹ There must be a close and genuine relationship between the ends and the means.²⁰ However, such an assessment would not require an evaluation of the actual impact of the concerned measure.²¹ Article XX (g) does not prescribe an empirical effects test, given the well-known problems associated with determining causation.²² Therefore, the assessment of 'relating to' does not require the respondent to establish the contribution of the measure to its objective. Instead, the panel looks at the nature of the challenged measure to determine whether, as a matter of design, aim and architecture, they assist, support or further the goal.²³ This means that measures which can be justified under Article XX (g) should be specifically focused on conservation of

¹⁷ WTO, *China – Measures Related to Exportation of Various Raw Materials – Report of the Appellate Body*, January 2012, WT/DS395/20, para 30.

¹⁸ WTO, *United States-Importation of Certain Shrimp and Shrimp Products: Appellate Report*, para 136. October 1998 WT/DS58/AB/R

¹⁹ WTO, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Report of the Panel (China – Rare Earth, Panel Report)*, 29 August 2014, WT/DS431/17, para 7.289.

²⁰ *US – Shrimp, Appellate Report, supra* note 122, para 136.

²¹ WTO, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Report of the Appellate Body*, 29 August 2014, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, para. 5.147.

²² *Ibid.*, para. 5.112.

²³ *China – Rare Earth, Panel Report*, para. 7.379.

natural resources and cannot be invoked in case states exercise their sovereign right to exploit natural resources “in the interest of their national development”.

This, for example, means that, the moment OPEC (Organization of Petroleum Exporting Countries) countries produce the crude and ban its exportation, or make exportation conditional on any further processing within the countries; they would be in breach of their WTO obligations (Desta 2010) derived from non-discrimination principles.

When applied to trade in natural resources, non-discrimination principles of the WTO are aimed at ensuring a fairer distribution of these resources throughout the world (Lele 2010). However, is it really “fair” to force state of origin of natural resources to export them to the other state instead of exploiting them “in the interest of its national development” under its sovereign right derived from the PSNR? Addressing this question we have to take into account that one of the objectives of the Marrakesh Agreement establishing the WTO enshrined in its preamble is “optimal use of the world’s resources in accordance with the objective of sustainable development”. As Julia Ya Qin correctly points out a nation’s right to use and exploit its natural resources for economic development is implicit in its sovereignty over natural resources (Qin 2012, p. 1163).

Natural resources are genuinely scarce resources, having been exploited abusively in a context marked by trade liberalization in which no State is able to take steps to protect them without heed to legal constraints (Lele 2010).

4.2 WTO case law on raw materials

The WTO jurisprudence addressed trade in natural resources in the context of the PSNR resolving a number of trade disputes, namely *China — Measures Related to the Exportation of Various Raw Materials (China-Raw Materials)*, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (China – Rare Earth)* and most recently in *Indonesia – Measures Relating to Raw Materials (Indonesia – Raw Materials)*. Therefore, further analysis is based on the panels’ conclusions from the resolution of these four trade disputes.

In *China – Rare Earths* the Panel noted that the international law principles of PSNR should be taken into account when interpreting subparagraph (g) of Article XX of the GATT.²⁴ In the Panel’s view, there is no doubt that the general principle of states’ PSNR is a “relevant” rule of law applicable to the parties.²⁵ Moreover, the Panel referred to the Principles two and four of the Rio Declaration²⁶ and concluded that conservation and economic development are not mutually exclusive policy goals; they can operate in harmony.²⁷ Then, the Panel interpreted the term “conservation” and determined “that ‘conservation’ as used in Article XX (g) is not limited to mere ‘preservation of natural resources’.”²⁸ It also includes measures that regulate and control natural resource exploration in the light of the WTO Member’s own objectives and policy goals, including economic and sustainable development.²⁹ Quotas and any other measure used in pursuit of conservation could be among such measures and serve as conservation policy tools.³⁰ However, this right is limited by at least two conditions. First, is the obligation of the state not to regulate and control an international natural resource market.³¹ Second is that trade-restrictive measures imposed by a state should operate jointly with the restrictions on domestic protection

²⁴ According to this provision GATT inconsistent measures could be justified in case they relate to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

²⁵ Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*. WT/DS431/R. 26 March 2014. para. 7.262.

²⁶ Ibid. para. 7.263.

²⁷ Ibid. para. 7.265.

²⁸ Ibid paras 7.266-7.267.

²⁹ Ibid paras 7.266-7.267.

³⁰ Ibid. paras 7.270, 7.291.

³¹ Ibid. para 7.268.

or consumption in order to be justified under Article XX (g).³² The Panel's and Appellate Body's reading of Article XX (g) in *China-Raw materials* appears to confirm that, while Members do not need to offer free access to their natural resources, once the resource has been collected and designated for sale, constraints placed on international consumption must be coupled with effective and even-handed constraints on domestic consumption. While the constraints need not be equal, and foreign trading partners may bear some burden, the domestic restrictions must be real, and they must operate concurrently in order to qualify for the justification provided under Article XX (g) (Hughes & Marceau 2013, p. 289).

The latter requirement infringes rights of natural resources holding sovereigns and makes a defense under Article XX (g) of the GATT ineffective. This has already been raised by the WTO. In 2010 the WTO noted that certain WTO members have begun increasing the restrictions applicable to exports of raw materials by imposing quotas or taxes on exports of such products with a view to guaranteeing local supply and meeting the demand of downstream industries. The desired effect would have been to lower domestic prices (available to domestic production), and it can lead to higher world prices for such products (World Trade Report 2010, p. 164).

The *Indonesia – Measures Relating to Raw Materials* case of 2022 demonstrates that the WTO Panel considered obligation to provide free trade as prevailing over the right to exploit natural resources “in the interest of national development of holding them states”.

In this case the EU challenged export ban imposed by Indonesia on trade in natural resources (raw materials) and some other related to trade in raw materials measures. The EU qualified these measures as quantitative export restrictions prohibited by the GATT (Article XI:1).³³ The Panel sided with the EU and did not find grounds for Indonesia to justify its measures, neither under Article XX (d) nor under Article XI: 2 exceptions. Although the Panel did not exclude from the ambit of Article XI:2(a) measures related to exhaustible natural resources³⁴ it concluded that flexibility of this Article is not meant to enable WTO members to impose restrictions upon the export of a raw material in order to protect or promote domestic industry.³⁵ This means that state holding natural resources cannot invoke Article XI: 2 (a) as justification for the purposes of development of its national industry, like production of EV (electric vehicle) batteries in Indonesia.

The Panel specifically underlined that the GATT must be interpreted in a manner consistent with the PSNR while WTO members must exercise their PSNR consistently with their WTO obligations.³⁶ This shows that WTO law and although providing for measures related to conservation of natural resources³⁷ is ineffective in terms of protection of the right to exploit natural resources in the interest of national development of holding these natural resources states.

Where raw materials are concerned, ‘the lack of a clear right on the part of a WTO Member to modify or withdraw its export concessions is at odds with the principle of permanent

³²Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*. WT/DS394/AB/R. 30 January 2012. §356 The Panel stated that there must be some meaningful correspondence or cooperation between the two measures, and they must somehow help or reinforce one another or further one another's operational goals. Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*. para 7.301.

³³ The EU challenges export ban on nickel ore and Domestic Processing Requirement (DPR) that nickel ore should be processed or refined domestically with only the subsequent downstream products permitted to be exported. Panel Report, *Indonesia – Measures Related to Raw Materials*. WT/DS592/R., 30 November 2022. paras 7.14, 7.17.

³⁴ Panel Report, *Indonesia – Measures Related to Raw Materials*. WT/DS592/R. 30 November 2022. para 7.95.

³⁵ Ibid. para 7.100.

³⁶ Ibid. para 7.137.

³⁷ The following disputes resolved by the WTO Dispute settlement body address environmental concerns: *European Communities – Measures affecting asbestos and asbestos-containing products*, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, *United States – Standards for Reformulated and Conventional Gasoline*, *Brazil – Measures Affecting Imports of Retreaded Tyres*, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*.

sovereignty over natural resources’ (Qin 2012, p.1170). The authors agree with Julia Ya Qin, who argues that export duties tend to lower the domestic prices of raw materials and raise their foreign prices. Hence, a country can use export duties to promote and protect its domestic industries utilizing the raw materials. For developing countries, especially those that are overly dependent on the export of primary commodities, promoting domestic processing and downstream industries can be an effective way to diversify their economies and to ‘climb up the value chain’(Qin 2012, p.1163).

This means that a more balanced approach is required within the WTO focused on securing rights of the states who are holders of the natural resources derived from the PSNR. Julia Ya Qin proposes modification of legal regulation of imposition of the export duties on natural resources (Qin 2012, p.1186).

5. Conclusion

PSNR, being an attribute of statehood, which is a necessary quality of a state, cannot be limited because a state cannot be “less or more sovereign”. The sovereign right to exploit natural resources in the interest of national development of states endowed with natural resources implied within statehood is however challenged by WTO trade regime which prioritizes free trade above all other principles.

The absence of an effective WTO discipline on export restrictions leaves many economies, developed and developing, vulnerable to shortage and price fluctuations in the supply of raw materials. In an era of globalized supply chains, the lack of security and stability in access to raw materials poses serious risks to numerous industries and businesses. At the other extreme, the ‘ironclad’ discipline imposed on the selected acceding Members takes away the right of these countries to use export duties as a legitimate tool for economic development, for they are not allowed to keep a greater share of their natural resources for domestic use and instead must sell their resource-based products to all domestic and foreign purchasers on an equal basis (Qin 2012, p.1148). International regulation is unlikely to succeed if it tries to encroach on sovereignty over natural resources.

With the collapse of the WTO Doha Round of negotiations, the prospect for negotiating a new multilateral discipline on trade in natural resources remains dim (Qin 2012, p.1151). The only policy space now available to address issues relating to natural resources is restricted. It is available to new members joining the WTO. As part of the process of accession, incoming WTO Members can agree to additional obligations not included within the WTO Agreement. Indeed, export duties on natural resources are now often regulated in Accession Protocols and sometimes prohibited above a fixed level (Hughes & Marceau 2013, p 294).

To address the problem, this paper suggests a more fundamental approach, that of treaty reform. It recommends the introduction of new exception to the non-discrimination and free trade principles defending interests of the state holding natural resources based on the PSNR principle. This is because states possess permanent sovereignty over their natural resources which encompass both the right to trade in natural resources and the right to limit such trade for the purposes of economic development providing for welfare of that particular nation.

References

Banai A (2016) Sovereignty over natural resources and its implications for climate justice. Wiley Interdisciplinary Reviews: Climate Change, John Wiley & Sons <<https://ideas.repec.org/a/wly/wirecc/v7y2016i2p238-250.html>> Accessed 26 August 2024

Bronckers M, Maskus KE China Raw Materials: A Controversial Step towards Evenhanded Exploitation of Natural Resources (2014) World Trade Review. <http://dx.doi.org/10.1017/S1474745614000032>

Cameron P (2012) Session 40: International governance of energy trade: WTO and Energy Charter Treaty https://www.wto.org/english/forums_e/public_forum11_e/session40_summ_e.doc. Accessed 26 August 2024

Croxton D (1999) The Peace of Westphalia of 1648 and the Origins of Sovereignty. *The International History Review*. <https://doi.org/10.1080/07075332.1999.9640869>

Desta M (2010) To what extent are WTO rules relevant to trade in natural resources? https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_desta_e.htm. Accessed 26 August 2024

Desta M (2010) Trade in natural resources: are there any gaps in the rules? https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_dest2_e.htm. Accessed 26 August 2024

Hinsley FH (1967) The Concept of Sovereignty and the Relations Between States. *Journal of International Affairs*

Hughes V, Marceau G (2013) WTO and Trade in Natural Resources. In: L. Boisson de Chazournes, C. Leb and M. Tignino (eds) *International Law and Freshwater, The Multiple Challenges*, Edward Elgar, pp 269-270

Kulovesi K (2016) International trade: Natural resources and the World Trade Organization. In: Morgera E, Kulovesi K (eds) *Research Handbook on International Law and Natural Resources*, Edward Elgar Publishing pp 46-66

Kuppuswamy C, Boklan D (2024) Beyond free trade in raw materials: Reconciling international trade rules with planetary boundaries. *The Extractive Industries and Society*. <https://doi.org/10.1016/j.exis.2024.101481>

Longley R (2021) What Is Free Trade? Definition, Theories, Pros, and Cons. <https://www.thoughtco.com/free-trade-definition-theories-4571024>. Accessed 26 August 2024

Lele TT (2010) The conservation of natural resources in WTO law: the case of tropical forest resources https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_9july10_e.htm. Accessed 26 August 2024

Marceau G (2012) Session 40: International governance of energy trade: WTO and Energy Charter Treaty https://www.wto.org/english/forums_e/public_forum11_e/session40_summ_e.doc. Accessed 26 August 2024

Qin JY (2012) Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection. *Journal of World Trade*. <http://digitalcommons.wayne.edu/lawfrp/116>. Accessed 26 August 2024

Ruggie J. (1983). *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*. *World Politics*.

Ruta M, Venables AJ (2012) : International trade in natural resources: Practice and policy. WTO Staff Working Paper, No. ERSD-2012-07 <https://doi.org/10.30875/5717c8f8-en>. Accessed 26 August 2024.

Schrijver N. (2000). The changing nature of state sovereignty. *British Yearbook of International Law*.

Scott A. (2008) *The Evolution of Resource Property Rights*. Oxford University Press, New York, NY

Schrijver N (1997) *Sovereignty over Natural Resources, Balancing Rights and Duties*. Cambridge: Cambridge University Press, Cambridge.

Tongeren F, Korinek J, Kim J (2010) Natural resources and export restrictions https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_oecd_e.htm. Accessed 26 August 2024

UNCTAD Key Statistics and Trends in International Trade (2023) The remarkable trade rebound of 2021 and 2022. United Nations publication issued by the United Nations Conference on Trade and Development. <https://unctad.org/publication/key-statistics-and-trends-international-trade-2022>. Accessed 26 August 2024

UN General Assembly Resolution, International Trade and Development. A/Res/68/199. 20 December 2013. URL: <http://undocs.org/A/RES/68/199>.

Viñuales J 'Iced Freshwater Resources: A Legal Exploration' (2009) 20 *Yearbook of International Environmental Law*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652762. Accessed 26 August 2024

World Trade Report 2010. P. 184. https://www.wto.org/english/res_e/publications_e/wtr10_e.htm. Accessed 26 August 2024