



Universiteit
Leiden
The Netherlands

'Greening' the WTO Ban on China's Export Duties : Should WTO law allow China to use export duties to protect the environment and, if so, in what manner?

Jiang, F.

Citation

Jiang, F. (2020, February 19). *'Greening' the WTO Ban on China's Export Duties : Should WTO law allow China to use export duties to protect the environment and, if so, in what manner?*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/85512>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/85512>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/85512> holds various files of this Leiden University dissertation.

Author: Jiang, F.

Title: 'Greening' the WTO Ban on China's Export Duties : Should WTO law allow China to use export duties to protect the environment and, if so, in what manner?

Issue Date: 2020-02-19

'Greening' the WTO Ban on China's Export Duties

Should WTO law allow China to use export duties to protect the environment and, if so, in what manner?

'Greening' the WTO Ban on China's Export Duties

*Should WTO law allow China to use export
duties to protect the environment and, if so,
in what manner?*

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op woensdag 19 februari 2020
klokke 11.15 uur

door

Fengan Jiang
姜冯安

geboren te Shanghai, China

in 1986

Promotor: prof. dr. M.C.E.J. Bronckers

Copromotor: dr. A. Cuyvers

Promotiecommissie: prof. dr. F. Baetens (University of Oslo, Norway and
Leiden University)
prof. dr. J.H.J. Bourgeois (College of Europe, Bruges,
Belgium)
prof. dr. J. Liu (Chinese Academy of Social Sciences,
Beijing, China)
prof. dr. R.C. Tobler

Lay-out: AlphaZet prepress, Bodegraven
Printwerk: Ipskamp Printing

© 2019 Fengan Jiang

Behoudens de in of krachtens de Auteurswet van 1912 gestelde uitzonderingen mag niets in deze uitgave worden veeelvoudigd, opgeslagen in een geautomatiseerd gegevensbestand of openbaar gemaakt, in enige vorm op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.

Het reprorecht wordt niet uitgeoefend.

No part of this publication may be reproduced, stored in a retrieval system, made available or communicated to the public, in any form or by any means, without the prior permission in writing of the publisher, unless this is expressly permitted by law.

Acknowledgments

'Time present and time past/ Are both perhaps present in time future/ And time future contained in time past.' Perhaps my six wonderful years of study in Leiden had already transpired when I decided to work for a Sino-Dutch joint venture and later a Dutch law firm in Shanghai. I am thus looking forward to my next adventure.

This book could not have been written without the help and trust of my supervisor Marco and co-supervisor Armin. They have always been inspirational and encouraging by taking every opportunity to see my research 'half-full'. They have taught me how to embrace the complexity. They have helped me understand the Western way of thinking which is also essential for me to study EU-China relations in the future.

I would also like to thank Christa and Jacques. After I accepted their skiing invitation without knowing how to ski, I became a regular visitor to their mountain chalet in Braunwald where I had the chance to clear my mind and have inspiring conversation with them and their wonderful guests. Christa also kindly offered her place in Leiden to help me concentrate on finalizing my thesis.

With regard to my colleagues in Leiden, Stefaan helped me get through a very difficult period. Kristel and Maarten, as paranimfs, helped prepare the practical matters concerning my defence. I also owe my thanks to Agis, Alison, Amir, Barbora, Ben, Christophe, Daniel (Carter and Mândrescu), Darinka, David, Eduardo, Frederik, Freya, Hans, Ilektra, Jasmina, Jelle, Jet, Joop, Jorrit, Kristof, Lisa, Meehea, Melanie, Moritz, Pauline, Pavlos, Petra, Rick, Timothy, Tom, Valentin, Vasiliki, Veronika, and Vestert. Victoria, a graduate student, helped translate the summary of my thesis into Dutch at short notice.

With regard to the Chinese community in the Netherlands, Vice-President Xue Hanqin at the International Court of Justice and her assistant Jiang Bin provided valuable suggestions for improving my thesis. The Chinese Embassy in the Netherlands and the China Scholarship Council offered financial support to my research. I also owe my thanks to my Chinese colleagues: Anran, Danli, Dejian, Haiqing, Jing, Lei, Linlin, Qiuyin, Shaomei, Shuai, Yudan, Xiang, Wanlu, Weidong, Xuechan, Yang, Yifan, and Zhuang.

Moreover, during my fellowship with the WTO, internship with the United Nations ESCAP, and academic visit to the Chinese Academy of Social Sciences, many people helped me improve my research.

Finally, I would like to thank my parents and grandparents for their continued support.

Table of Contents

ACKNOWLEDGMENTS	V
TABLE OF CONTENTS	VII
LIST OF TABLES AND CHARTS	XIII
LIST OF ABBREVIATIONS	XV
1 INTRODUCTION	1
1.1 Scope of the study	2
1.1.1 Should WTO law allow China to use export duties to address trade-related environmental concerns and, if so, what form should these duties take?	2
1.1.2 Trade-related environmental concerns and the controversies surrounding the use of export duties to address them	5
1.1.2.1 Local and global environmental problems exacerbated by trade	5
1.1.2.2 Trade-related environmental problems in China	6
1.1.2.3 Controversies surrounding the use of export duties	8
1.1.3 Aims of this study	9
1.2 Structure of the analysis	10
1.2.1 Description of Part I: Setting the Scene	10
1.2.2 Description of Part II: The Extent to which an Absolute Ban on China's Export Duties Would Constrain the County's Capacity to Protect the Environment	11
1.2.3 Description of Part III: A Basis under WTO Law for China's Use of Export Duties to Address Environmental Concerns	11
1.3 Methodology	12
PART I: SETTING THE SCENE: THE BACKGROUND AND RECEPTION OF THE WTO BAN ON CHINA'S EXPORT DUTIES	15
2 THREE WTO CASES AGAINST CHINA'S EXPORT DUTIES	17
2.1 Facts of the export duties in <i>China – Raw Materials</i> , <i>China – Rare Earths</i> , and <i>China – Raw Materials II</i>	17
2.2 The applicability of GATT Article XX to China's export duty commitments	19

2.2.1	Incorporation theory	20
2.2.2	Inherent right	21
2.2.3	A holistic approach	22
2.2.4	Integration theory	23
2.2.5	Article 30(3) of the VCLT	24
2.3	Defences under Article XX(b) and XX(g)	25
3	THE RECEPTION OF THE BAN ON CHINA'S EXPORT DUTIES: CONCERNS, SOLUTIONS, AND THE MISSING PIECE	29
3.1	Erroneous interpretation based on an overly rigid textual analysis	29
3.2	Negative implications caused by an absolute ban on China's export duties	33
3.2.1	Environment-related concerns	33
3.2.2	Inequality-related concerns	37
3.3	Proposed legal solutions and the missing piece in current discussion	38
	PART II: PRELIMINARY ANALYSIS: WOULD AN ABSOLUTE PROHIBITION ON CHINA'S EXPORT DUTIES CONSTRAIN THE COUNTRY'S CAPACITY TO PROTECT THE ENVIRONMENT?	41
4	AN ABSOLUTE BAN ON EXPORT DUTIES WOULD PREVENT A COUNTRY FROM PROTECTING THE ENVIRONMENT UNDER CERTAIN CIRCUMSTANCES	43
4.1	Practice of WTO members to restrict exports for environmental purposes in the period from 2009 to 2016	44
4.1.1	General observations and actual examples of country practices to use export duties to reduce local or global pollution	44
4.1.2	Preference for export duties over quantitative export restrictions in practice	48
4.2	Environmental regulatory autonomy and regulatory preference at both the multilateral and regional levels	50
4.2.1	Environmental regulatory autonomy with respect to export restrictions	50
4.2.2	Regulatory preference for export duties over quantitative restrictions	52
4.3	Conclusions	55
5	A LEGALLY-BASED ASSESSMENT OF THE ACTUAL MOTIVES BEHIND CHINA'S EXPORT DUTIES	67
5.1	The potential actual motives behind China's export duties	68
5.1.1	The formation process of export duties in China	68
5.1.2	Different missions of the relevant actors in deciding export duties	70

5.2	China's Five-Year Plan as a trustworthy policy indicator	73
5.3	The different roles of export duties in the context of Eleventh to Thirteenth Five-Year Plans (2006-2020)	75
5.3.1	Period of 2006-2015: economic development as a dominant purpose	75
5.3.2	Period of 2016-2020: a clear shift to environmental protection	79
5.4	Conclusions	82
6	A NEGLECTED ISSUE: NEGATIVE IMPACTS ON CHINA'S CAPACITY TO FIGHT CLIMATE CHANGE	87
6.1	Proposed options to tackle carbon leakage	88
6.2	Export duties as an alternative to import BTAs	92
6.3	China's export duties as a credible climate policy tool	93
6.4	Conclusions	97
	PART III: FINAL ANALYSIS: IS THERE A WAY FOR CHINA TO USE EXPORT DUTIES LEGALLY IN ORDER TO ACHIEVE ENVIRONMENTAL GOALS UNDER WTO LAW?	99
7	IS THERE A LEGAL PATH TO A DESIRABLE POLICY SPACE FOR CHINA UNDER WTO LAW?	101
7.1	Possible options to depart from the absolute ban on China's export duties	102
7.1.1	Feasibility to depart from WTO jurisprudence	102
7.1.1.1	Unwise to abandon the precedential value	103
7.1.1.2	Option I: explicit overruling based on 'cogent reasons'	104
7.1.1.3	Option II: distinguishing	105
7.1.1.4	Option III: implicit overruling	107
7.1.2	Moves by other tribunals to deviate from precedent: Inspirations for the AB to reconsider <i>China – Raw Materials and China – Rare Earths</i>	108
7.1.2.1	The choice of tribunals at the international, regional, and national levels	109
7.1.2.2	Practice of international tribunals	109
7.1.2.2.1	International Court of Justice (ICJ)	109
7.1.2.2.2	International Criminal Tribunal for the Former Yugoslavia (ICTY)	114
7.1.2.3	Practice of regional tribunals	117
7.1.2.3.1	European Court of Human Rights (ECtHR)	117
7.1.2.3.2	Court of Justice of the European Union (CJEU)	120
7.1.2.4	Practice of national tribunals	128
7.1.2.4.1	Common law system: United Kingdom	128

7.1.2.4.2	Civil law system: Japan	130
7.1.2.4.3	'Socialist legal system with Chinese characteristics': Mainland China	133
7.1.3	Suggestions to loosen the grip of <i>China—Raw Materials and China—Rare Earths</i> in light of the new facts of China's export duties	135
7.2	Possible options to develop a new substantive argument	139
7.3	Feasibility tests for interpretative options based on customary international law or non-WTO treaties	142
7.3.1	Possibilities and challenges to apply customary international law or non-WTO treaties in settling WTO disputes	143
7.3.1.1	The application of customary international law	143
7.3.1.2	The application of non-WTO treaties	147
7.3.2	Options based on customary international law	148
7.3.2.1	Paragraph 11.3 as a subsequent agreement or practice modifying WTO treaties	148
7.3.2.2	The principle of sustainable development	151
7.3.2.3	The principle of good faith	153
7.3.3	Options based on non-WTO treaties	154
7.4	Feasibility tests for interpretative options based on WTO law	157
7.4.1	A more teleological approach in light of the environmental context in the preamble of the WTO Agreement	157
7.4.1.1	Explicitly prioritizing the object of environmental protection	158
7.4.1.2	Implicitly prioritizing the object of environmental protection	160
7.4.2	A new interpretation that distinguishes the <i>China—Raw Materials and China—Rare Earths</i> decisions	162
7.5	Possible options to alter the absolute ban on China's export duties through a political correction	168
7.6	Feasibility tests for amendments, waivers, authoritative interpretations, or Ministerial Decisions	172
7.6.1	Article X:1: an amendment as a formal correction	172
7.6.1.1	Amendments in practice	172
7.6.1.2	Feasibility to amending China's export duty commitments	173
7.6.2	Article IX:3: a waiver as a stopgap measure	175
7.6.2.1	Waivers in practice	175
7.6.2.2	Feasibility to waive China's export duty commitments	178
7.6.3	Article IX:2: an authoritative interpretation as a flexible correction	179
7.6.4	Article IV:1: a more flexible alternative	181
7.7	Conclusions	183

8	CHINA'S POLICY SPACE FOR ADOPTING 'EXPORT DUTIES PLUS' UNDER GATT ARTICLE XX	195
8.1	Tests under Articles XX(b) and XX(g)	197
8.1.1	Article XX(b): local pollution	198
8.1.2	Article XX(g): global pollution	201
8.1.3	Comparing different policy spaces under Articles XX(b) and XX(g)	203
8.2	First condition of the chapeau: 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail'	204
8.2.1	Do 'the same conditions' prevail?	205
8.2.2	Is such discrimination 'arbitrary or unjustifiable'?	206
8.2.3	Differential 'export duties plus' might be permitted for fighting climate change	210
8.3	Second condition of the chapeau: 'disguised restriction on international trade'	211
8.3.1	Distinguishing between active discrimination and passive discrimination	212
8.3.2	The irrelevance of the hidden protectionist aim	213
8.3.3	Additional limits on the use of differential 'export duties plus'	215
8.4	A reality check on China's environmental policies targeting consumption	216
8.5	Conclusions	219
9	IMPLICATIONS OF 'GREENING' THE WTO BAN ON CHINA'S EXPORT DUTIES	223
9.1	Lessons for addressing trade-related environmental concerns	223
9.1.1	Balancing environmental and economic interests	224
9.1.2	Hard cases make bad law	225
9.1.3	Moderation of extreme judicial outcomes is possible but would be difficult	226
9.2	Loosening the grip of precedent within the WTO's legal framework	228
9.3	Preventing circumvention of WTO rules: aluminium sector as an example	231
9.4	Final remarks	235
	SUMMARY	239
	SAMENVATTING (SUMMARY IN DUTCH)	243
	TABLE OF CASES	249
	MULTILATERAL TREATIES, DECLARATIONS AND DOCUMENTS	255
	BIBLIOGRAPHY	259
	CURRICULUM VITAE	271

List of Tables and Charts

TABLES

Table 1: Practice of WTO Members: export restrictive measures to protect the environment (non-international obligations)	56
Table 2: WTO limits on export duties	61
Table 3: RTAs limits on quantitative export restrictions	62
Table 4: RTAs limits on export duties	65
Table 5: Customs Tariff Commission members in the period from 2008 to 2012	84
Table 6: Comparing the Customs Tariff Commission members in the period from 2008 to 2012 and from 2017 to now	84
Table 7: Comparing the Guidelines of the Eleventh to Thirteenth Five-Year Plan (2006-2020)	85
Table 8: Comparing the subsector Five-Year Plans relevant to environmental protection (2006-2020)	86
Table 9: Comparing the subsector Five-Year Plans relevant to climate change (2006-2020)	86
Table 10: Moves by tribunals at the international, regional, and national levels to deviate from precedents	185

CHARTS

Chart 1: Export duties as an alternative to import BTAs	91
Chart 2: Different policy space under Articles XX(b) and XX(g)	204
Chart 3: Feasibility of justifying differential 'export duties plus' under the chapeau	216
Chart 4: A more sophisticated approach to balance environmental and economic interests	232

List of Abbreviations

AB	Appellate Body
ASEAN	Association of Southeast Asian Nations
BTA	border tax adjustment
CIS	Commonwealth of Independent States
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CJEU	Court of Justice of the European Union
COD	chemical oxygen demand
COOL	Certain Country of Origin Labelling
CPC	Communist Party of China
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAEU	Eurasian Economic Union
EC	European Community
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EU	European Union
GATT	General Agreement on Tariffs and Trade 1994
GCC	Gulf Cooperation Council
HHR	high-energy-intensive, high-pollution, and resources-based
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Labour Conference
IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
ITLOS	International Tribunal for the Law of the Sea
IUU	illegal, unreported and unregulated
MEAs	multilateral environmental agreements
MEQR	measures that had an equivalent effect on quantitative restriction
NDRC	National Development and Reform Commission
NPC	National People's Congress
NMVOCS	nonmethane volatile organic compounds
NO _x	nitrogen oxides
N-NH ₃	ammoniacal nitrogen
OECD	Organisation for Economic Co-operation and Development
PIIE	Peterson Institute for International Economics
PM _{2.5}	fine particulate matter
PRCEE	Policy Research Centre for Environment and Economy

RTA	regional trade agreement
SADC	Southern African Development Community
SO ₂	sulphur dioxide
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UK	United Kingdom
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization