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'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?

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PART I:

SETTING THE SCENE:
THE BACKGROUND AND RECEPTION
OF THE WTO BAN ON CHINA'S
EXPORT DUTIES

2 | Three WTO Cases Against China's Export Duties

WTO members are generally free to impose export duties, though some of them may be restricted in doing so by special commitments.⁵⁸ China is under such a restriction, since it committed in Paragraph 11.3 of China's Protocol of Accession (Paragraph 11.3) to maintaining no export duties apart from those on 84 products that fall within the maximum levels provided in Annex 6 of that protocol (Annex 6). Although China maintained export duties on only 58 products at the time of its accession,⁵⁹ it began in 2006 to impose them on so-called high-energy-intensive, high-pollution, and resources-based products including both raw materials and other products such as aluminum, steel, coal, chemical products, and fertilizers.⁶⁰ Some of them are not included in Annex 6. Justification was offered for these practices in the name of environmental protection, but several WTO members were unconvinced and chose to litigate against the specific duties on raw materials. This chapter introduces the facts and key issues of those duties in dispute.

2.1 FACTS OF THE EXPORT DUTIES IN *CHINA – RAW MATERIALS*, *CHINA – RARE EARTHS*, AND *CHINA – RAW MATERIALS II*

In late 2009, the US, EU, and Mexico brought the first case, which became known as *China-Raw Materials* because the products at issue included such raw materials as bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc.⁶¹ These materials, which were subject to export duties ranging from 10% to 40%, are essential for manufacturing steel, aluminium, and various chemicals, as well as their downstream products.⁶² The complainants claimed that the export duties

58 These special commitments can be found in the accession protocols of WTO–Mongolia (1997), WTO–Latvia (1999), WTO–China (2001), WTO–Saudi Arabia (2005), WTO–Vietnam (2007), WTO–Ukraine (2008), WTO–Russia (2012), WTO–Montenegro (2012), WTO–Tajikistan (2013), WTO–Kazakhstan (2015), and WTO–Afghanistan (2016). For further information, see Chapter 4.

59 WTO Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R; WT/DS395/R; WT/DS398/R, adopted 5 July 2011, footnote 176.

60 The duties on the latter group was applauded by some commentators, who see their potential to reduce carbon emissions in China. For further discussion, see Chapter 6.

61 *Ibid.*, para 7.59.

62 *Ibid.*, para 2.2.

in these cases were inconsistent with the obligations specified under Paragraph 11.3.

China did not contest this claim. It did, however, argue that those duties could be justified for environmental reasons under GATT Article XX. It thereby raised two questions. The first one regarding whether Article XX could be applied to the China's special commitments on export duties. The second one regarding whether China's export duties could meet the eligibility requirements under Article XX. A joint panel report issued in July 2011 provided negative answers to both questions, and the panel's finding was subsequently supported by the AB report of January 2012.⁶³ Following the recommendations of the Dispute Settlement Body (DSB), China removed the disputed export duties on 1 January 2013.⁶⁴

In 2012, even before China had implemented the DSB's recommendations in this case, the US, EU, and Japan brought the second case, which became known as *China-Rare Earths*. This time the complainants asserted that China's export duties of from 15 to 25% on 82 products—of which 52 were rare earths products, 15 tungsten products, and 9 molybdenum products—were not covered by Annex 6.⁶⁵ For the complaining governments, this case, like the previous one, was about access to important industrial raw materials. China for its part argued that the duties in dispute had been imposed in an effort to reduce environmental risks along the production chain of the raw materials at issue and that they were therefore, once again, justified under Article XX. Largely following the reasoning in *China-Raw Materials*, the panel and the AB in *China-Rare Earths* rejected China's arguments,⁶⁶ and on 20 May 2015 China fully implemented the rulings by removing the export duties in dispute.⁶⁷

On 13 July 2016, the US brought the third case against China's export duties.⁶⁸ The ones in dispute, ranging from 5% to 20%, had been imposed on 10 raw materials, namely antimony, cobalt, copper, graphite, lead, magnesia,

63 WTO AB Reports, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R, adopted 30 January 2012.

64 Status report by China, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/19/Add.1; WT/DS395/18/Add.1; WT/DS398/17/Add.1, adopted 18 January 2013.

65 WTO Panel Reports, *China — Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R; WT/DS432/R; WT/DS433/R, adopted 26 March 2014, para 7.30. and 7.46.

66 WTO AB Reports, *China — Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R; WT/DS432/AB/R; WT/DS433/AB/R, adopted 7 August 2014.

67 Understanding Between China and the United States Regarding Procedures Under Articles 21 And 22 Of the DSU, WT/DS431/17, adopted 26 May 2015.

68 *China — Export Duties on Certain Raw Materials — Request for consultations by the United States*, WT/DS508/1; G/L/1147, adopted 14 July 2016.

talc, tantalum, tin, and chromium.⁶⁹ These export duties, in addition to one on indium, were subsequently challenged by the EU on 19 July 2016.⁷⁰ Although the duties at issue were prohibited by Paragraph 11.3, China again tried to justify its practice by referring to Article XX.⁷¹ The two complaining governments argued that China's arguments were without merit on the grounds that Article XX had been held to be not applicable to a breach of Paragraph 11.3 in *China-Raw Materials* and *China-Rare Earths*. In November 2016, the DSB agreed to create a WTO panel to examine the third case. But the panellists have not yet been chosen after more than two years. Presumably this case is currently on inactive status.⁷² On the other hand, China has already removed the export duties at issue according to its Tariff Plan for 2018 and the most recent one for 2019.⁷³

In the above three cases, the applicability of Article XX to China's export duty commitments has been subject to continuing dispute. The next section first briefly illustrates the reasoning of the panels and the AB that disallows China to invoke the environmental exceptions under Article XX in *China – Raw Materials* and *China – Rare Earths*. Moreover, although Article XX was found not available to justify the use of export duties in these two cases, China was still given the chance to present its environmental defences for the sake of argument. These defences will be introduced subsequently in order to show the rationale of China's export duties.

2.2 THE APPLICABILITY OF GATT ARTICLE XX TO CHINA'S EXPORT DUTY COMMITMENTS

WTO law is silent on the relationship between GATT Article XX and China's export duty commitments in its accession protocol. This kind of silence may have different meanings in different contexts,⁷⁴ so the panel and the AB are mandated to offer clarity according to 'customary rules of interpretation of

69 Ibid.

70 China — Duties and other Measures concerning the Exportation of Certain Raw Materials — Request for consultations by the European Union, G/L/1148; WT/DS509/1, adopted 25 July 2016.

71 WTO Secretariat, 'China Blocks US Panel Request in Dispute over Raw Materials', https://www.wto.org/english/news_e/news16_e/dsb_26oct16_e.htm 26 October 2016, (visited 27 December 2018).

72 The WTO website shows that 'The Dispute Settlement Body has agreed to create a panel, but the panellists have not yet been chosen', see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds508_e.htm, (visited 27 December 2018).

73 China's Tariff Plan for 2018, see <http://gss.mof.gov.cn/zhengwuxinxi/zhengcefabu/201712/P020171215531852388756.pdf>, (visited 27 December 2018). China's Tariff Plan for 2019, see <http://gss.mof.gov.cn/mofhome/guanshui/zhengwuxinxi/zhengcefabu/201812/P020181221619892272965.pdf>, (visited 27 December 2018).

74 AB Reports, *Canada — Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 31 May 2000, para 138.

public international law'.⁷⁵ Although these customary rules are not further specified in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the AB has determined that Articles 31, 32, and 33 of the Vienna Convention on the Law of Treaties (VCLT) can serve as points of reference for discerning the relevant customary rules.⁷⁶ Following these methods of interpretation, the panels and the AB examined China's five major arguments in support of applying Article XX to the violations of export duty commitments. The five arguments are as follows.

2.2.1 Incorporation theory⁷⁷

The silence on the applicability of Article XX to Paragraph 11.3 means that it is unclear whether WTO members intended to permit China to impose export duties in a manner consistent with Article XX, which thus is open to interpretation. In an effort to ascertain the common intention of WTO members, the complainants in *China—Raw Materials* referred to an 'incorporation theory' according to which the defences of Article XX were available only for two types of violations: those that involve GATT provisions and those that incorporate Article XX justifications by reference.⁷⁸

This theory was inspired by *China—Publications and Audiovisual Products* in which China sought to apply Article XX to another commitment in Paragraph 5.1 of its accession protocol.⁷⁹ The AB in that case found that the introductory clause of Paragraph 5.1, 'without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement', provided a textual basis for incorporating Article XX.⁸⁰ In other words, if there is

75 Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

76 AB Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 29 April 1996, para 17. Article 31 of the VCLT requires a treaty interpreter to commence the process of interpretation in accordance with the ordinary meaning of the terms of the treaty, in their context, and in light of the treaty's objective and purpose. When an interpretation according to Article 31 of the VCLT 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable', a treaty interpreter may have recourse to supplementary means of interpretation, such as 'the preparatory work of the treaty and the circumstances of its conclusion', as stated in Article 32 of the VCLT. Article 33 of the VCLT considers the roles languages can play in treaty interpretation.

77 Borrowed from André de Hoogh, 'The Relationship between China's Protocol of Accession and the GATT, 1994: *China – Rare Earths* and the Incorporation Theory — Off with its Head! (Part 1)', available at <http://www.rug.nl/news/2014/05/rare-earths>, (visited 18 June 2017).

78 WTO Panel Reports, *China – Raw Materials*, para 7.111.

79 WTO DISPUTE DS363, '*China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products.*'

80 WTO AB Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R 21, adopted on 21 December 2009, paras 216-233.

such language present that allows the incorporation of Article XX, then this means that WTO members intended to allow the application of Article XX to a non-GATT provision.

Following this approach, although China's export duty commitments lack the same introductory clause of Paragraph 5.1, it in *China—Raw Materials* argued that several other provisions in its Protocol of Accession and Accession Working Party Report could provide a textual basis for incorporating Article XX.⁸¹ The panel, however, rejected this line of reasoning.⁸² In its view, if the common intention of WTO members had been to make Article XX applicable to Paragraph 11.3, they would have included a reference more expressly to this effect such as the introductory clause of Paragraph 5.1.⁸³

In its appeal of the decision, China argued that the mere absence of an express reference to Article XX in Paragraph 11.3 did not mean that WTO members intended to exclude its applicability.⁸⁴ In response, the AB examined the ordinary meaning and context of Paragraph 11.3 and identified three things that reflected the intention of WTO members to exclude the applicability of Article XX. First, the 'exceptional circumstances' in Annex 6 of China's Protocol of Accession that justified the use of export duty commitments did not include Article XX.⁸⁵ Second, Paragraph 11.3 confirmed that China could impose export duties in conformity with Article VIII of the GATT 1994, and not as per Article XX.⁸⁶ Third, while both Paragraphs 11.1 and 11.2 of China's Protocol of Accession refer to the GATT 1994 in general, Paragraph 11.3 does not include such a reference that can be interpreted as incorporating Article XX.⁸⁷

2.2.2 Inherent right

In *China—Raw Materials*, China developed a second major argument by stating that it should be allowed, based on its inherent right to regulate trade for the promotion of conservation and public health, to impose export duties in a manner consistent with GATT Article XX, unless it had explic-

81 WTO Panel Reports, *China – Raw Materials*, paras 7.125. and 7.133. From a contextual perspective, China argued that Paragraph 170 of its Accession Working Party Report, which includes a subsection titled 'Taxes and Charges Levied on Imports and Exports', can support its argument.

82 *Ibid.*, para 7.151.

83 *Ibid.*, para 7.154.

84 WTO AB Reports, *China – Raw Materials*, para 274.

85 *Ibid.*, para 284.

86 *Ibid.*, para 291.

87 *Ibid.*, para 293.

itly abandoned this right.⁸⁸ The panel, however, found that China had, in fact, exercised this right when concluding its accession protocol.⁸⁹ In the appeal, China argued that, given the silence on the relationship between Article XX and its export duty commitments, the assumption that it had abandoned its right to invoke Article XX distorted the balance of rights and obligations established in its accession protocol, particularly in the light of the objectives of the Agreement Establishing the World Trade Organization (the 'WTO Agreement').⁹⁰ In the end, although the AB acknowledged sustainable development as one of the objectives of the WTO Agreement, it nevertheless found that none of the objectives provides 'specific guidance' on the question of applicability.⁹¹

2.2.3 A holistic approach

In *China—Rare Earths*, China criticized the approach of the AB in *China – Raw Materials* for being insufficiently 'holistic' in addressing its arguments relating to the purpose of the WTO Agreement.⁹² For China, the result of the non-applicability ruling was inconsistent with the fundamental 'objective of sustainable development' as provided for in the preamble of the WTO Agreement.⁹³ Although the panel agreed with China's criticisms in this respect, going so far as to suggest that an interpretation that prevented China from enacting necessary environmental measures had the potential to become 'manifestly absurd or unreasonable',⁹⁴ it did not consider the non-applicability of Article XX to China's export duty commitments to be the proper legal context in which to address the issue. Instead, the panel pointed to environmental policy instruments other than export duties that China could legally use under WTO law.⁹⁵ Since China had never proven that export duties were 'the only type of instrument' to address the proclaimed environmental issues, the panel believed that the *China – Raw Materials* decision would not prevent China from pursuing its environmental goals.⁹⁶ It is uncertain, however, whether the AB would also subscribe to this reasoning.⁹⁷

88 WTO Panel Reports, *China – Raw Materials*, para 7.155.

89 Ibid., para 7.156.

90 WTO AB Reports, *China – Raw Materials*, para 305.

91 Ibid., para 306.

92 WTO Panel Reports, *China – Rare Earths*, para 7.105.

93 Ibid., paras 7.108-7.110.

94 Ibid., para 7.111.

95 Ibid., para 7.112.

96 Ibid., para 7.117.

97 China did not appeal against this finding which left no chance for the AB to review this particular reasoning.

2.2.4 Integration theory⁹⁸

In *China—Rare Earths*, China developed a novel argument that its export duty commitments was integrally linked to the GATT 1994 from a systemic perspective.⁹⁹ Following this approach, China argued that each provision in its accession protocol was integral to one or another of the Multilateral Trade Agreements annexed to the WTO Agreement in the light of Paragraph 1.2 of China's accession protocol and Article XII:1 of the WTO Agreement.¹⁰⁰ China further argued for the need to evaluate which Multilateral Trade Agreement relates intrinsically to Paragraph 11.3. For the Chinese government, since both the export duty commitments and the GATT 1994 involved regulation of trade in goods, the former one should automatically become part of the latter one. Conversely, since Article XX applied to all provisions in the GATT 1994, it should also apply to China's export duty commitments.¹⁰¹

The panel identified two underlying premises in China's argument and refuted both.¹⁰² First, the panel adopted a narrow interpretation of the language in Paragraph 1.2 and Article XII:1, finding that these provisions only suggested that China's Protocol of Accession was an integral part of the WTO Agreement, rather than specifically making the export duty commitments an integral part of the GATT 1994.¹⁰³ Second, the panel disagreed with the premise that China's export duty commitments were intrinsically related to the GATT 1994 because the latter did not require WTO members to eliminate export duties.¹⁰⁴

Notably, however, one panellist supported China's position,¹⁰⁵ arguing that there should be various ways for WTO members to express their common intention regarding the relationship between a provision of an accession

98 Borrowed from André de Hoogh, 'The Relationship between China's Protocol of Accession and the GATT 1994: China – Rare Earths and the Incorporation Theory — Off with its Head! (Part 2)', available at <http://www.rug.nl/rechten/organization/vakgroepen/int/guild-blog/blogs/rare-earth-and-the-incorporation-theory-off-with-its-head-part-2>, (visited 18 June 2017).

99 WTO Panel Reports, *China – Rare Earths*, para 7.75.

100 *Ibid.*, paras 7.76-7.90. For China, the term 'the WTO Agreement' in Paragraph 1.2 of its Protocol of Accession referred to the WTO Agreement and the Multilateral Trade Agreements annexed to it. Moreover, Article XII:1 of the WTO Agreement stipulates that the accession of WTO members shall apply to the WTO Agreement and its Multilateral Trade Agreements. In China's view, Article XII:1 suggested that the provisions in its Accession Protocol should be part of one of the Multilateral Trade Agreements.

101 *Ibid.*, para 7.100.

102 *Ibid.*, para 7.76.

103 *Ibid.*, paras 7.80-7.94.

104 *Ibid.*, para 7.95.

105 *Ibid.*, para 7.3.2.1.8.

protocol and other WTO agreements such as the GATT 1994.¹⁰⁶ In determining the common intention of members regarding how China's export duty commitments interacted with Article XX, the panellist found that those commitments, by their very nature, expanded China's obligations under the GATT 1994 because the export duty commitments and such GATT provisions as Article II and Article XI:1 deal with the overlapping subject matter of border tariff duties.¹⁰⁷ Moreover, this dissenting panellist also supported the aforementioned opinion that if WTO members had intended to exclude public policy exceptions under Article XX, they would have said so explicitly.¹⁰⁸ This opinion was also shared by three third-parties, namely Argentina, Brazil, and Russia.

It is noteworthy that more third-parties involved in the appeal process contesting the denial of China's right under Article XX than were involved in *China—Raw Materials*.¹⁰⁹ China, however, instead of appealing the whole inapplicability decision, requested the AB to only reverse part of the panel's finding, namely Paragraph 1.2 and Article XII:1 of the WTO Agreement fail to make its export duty commitments an integral part of the GATT 1994.¹¹⁰ This request was rejected by the AB which emphasised that Paragraph 1.2 and Article XII:1 were only general provisions designed to connect China's Protocol of Accession with the WTO Agreement and its Multilateral Trade Agreements.¹¹¹ To further determine the relationship between Article XX and China's export duty commitments in the accession protocol, a thorough analysis of all the relevant provisions should be required. Thus, while the lack of textual reference to Article XX in China's export duty commitments under Paragraph 11.3 is not dispositive in and of itself,¹¹² both the text and context of Paragraph 11.3 were held to suggest that WTO members did not, after all, intend to allow for the applicability of Article XX.¹¹³

2.2.5 Article 30(3) of the VCLT¹¹⁴

In its appeal of *China—Rare Earths*, China developed a new argument according to which its export duty commitments constituted a subsequent

106 Ibid., para 7.131.

107 Ibid., para 7.136.

108 Ibid., para 7.137.

109 Argentina, Brazil, Colombia, and Russia.

110 WTO AB Reports, *China – Rare Earths*, para 5.13.

111 Ibid., para 5.51.

112 Ibid., para 5.61.

113 Ibid., paras 5.63-5.65.

114 In its efforts regarding *China—Raw Materials* and *China—Rare Earths*, then, it appears that China has exhausted conventional approaches for affirming the applicability of GATT Article XX to Paragraph 11.3. China's arguments based on Article 30(3) of the VCLT thus demonstrate a desire to explore new solutions from the perspective of public international law. Various options from this perspective will be examined in Chapter 7.

agreement as described in Article 30(3) of the VCLT. For China, those commitments had modified GATT Article XI:1, for which reason Article XX should apply to the modified Article XI:1, i.e., the provision outlining China's export duty commitments.¹¹⁵ China's argument here was dismissed by the AB, which found that it had failed to provide sufficient support for its reasoning in light of public international law.¹¹⁶

Although none of the above arguments was accepted, the panels in both cases continued assessing China's environmental defences under Article XX. This following section shows why these defences have been found unconvincingly.

2.3 DEFENCES UNDER ARTICLE XX(B) AND XX(G)

GATT Article XX lays out a number of specific instances in which WTO-inconsistent measures could be justified subject to the requirements under a two-tiered test. The first tier of the test requires China's export duties to meet the requirements under any subparagraphs of Article XX. If those duties are provisionally justified, the second tier of the test further requires them to satisfy the requirements under the chapeau of Article XX.

In *China – Raw Materials*, China invoked both subparagraphs (b) and (g) of Article XX to argue that imposing export duties on the raw materials at issue would not only preserve exhaustible natural resources but also protect the local environment in China.¹¹⁷ Article XX(b) permits WTO members to adopt a measure that is 'necessary to protect human, animal or plant life or health'. For the Chinese government, the duties at issue should benefit from this provision because they would reduce local pollution generated during the production of coke, magnesium, manganese, and silicon carbide.¹¹⁸ In contrast, the complainants argued that these duties were actually adopted to provide Chinese companies with preferential access over their foreign competitors to the raw materials at issue.¹¹⁹

In an attempt to prove that its export duties had contributed materially to the reduction of pollution caused by the extraction of raw materials, China submitted two empirical studies showing that these duties decreased the demand for exports and therefore, in turn, decreased domestic production.¹²⁰ The accuracy of these studies was, however, questioned by the panel

115 Ibid., para 5.69.

116 Ibid., para 5.70.

117 Panel Reports, *China – Raw Materials*, para 7.356 and para 7.470.

118 Ibid., para 7.519.

119 Ibid., para 7.522.

120 Ibid., para 7.519.

on the grounds that they did not account for pollution that might be generated by additional production in the domestic downstream sector.¹²¹ In the absence of an appropriate domestic restriction, export duties were likely to increase such production and thus to undermine their material contribution to reducing pollution.¹²²

Moreover, the panel also questioned the necessity of China's export duties as an environmental policy instrument. In the panel's view, China had the capacity to achieve the same environmental goal by replacing the duties at issue with various alternative measures, namely investment in more environmentally friendly technologies, further encouragement and promotion of the recycling of consumer goods, increasing environmental standards, investing in 'infrastructure necessary to facilitate recycling scrap', stimulating greater local demand for scrap material without exhausting local supply, and introducing production restrictions or pollution controls on primary production.¹²³ Following its analysis, the panel found that China's export duties were not justified under Article XX(b).

With respect to Article XX(g), a provision that permits WTO members to impose measures that 'relate to the conservation of an exhaustible natural resource', China argued that the export duties on fluorspar would reduce domestic production of the resource by decreasing foreign demand.¹²⁴ However, the evidence submitted to the panel showed that, after the imposition of export duties, the domestic extraction of fluorspar in fact increased in response to a substantial increase in its domestic consumption.¹²⁵ Thus these duties were found to not satisfy the purpose test under Article XX(g).¹²⁶ Moreover, the panel also found that the imposition of these duties had not been 'even-handed' because China did not impose any similar restrictions on domestic consumption. In the panel's view, although the term 'even-handed' did not require identical treatment of domestic and foreign consumers, the imposition of all limitations solely on foreign consumers was clearly not acceptable.¹²⁷

In *China—Rare Earths*, China only invoked Article XX(b) to justify the use of export duties on the rare earth minerals, tungsten, and molybdenum.¹²⁸ Clearly having learnt some lessons from *China—Raw Materials*, when China imposed the duties on these raw materials, it made several official

121 Ibid., para 7.533.

122 Ibid., para 7.538.

123 Ibid., para 7.566.

124 Ibid., para 7.427.

125 Ibid., para 7.429.

126 Ibid., para 7.435.

127 Ibid., para 7.465.

128 Panel Reports, *China – Rare Earths*, para 7.49.

announcements regarding its environmental objectives in doing so.¹²⁹ These announcements, however, failed to convince the panel that the duties in dispute were truly adopted to protect the environment because no explanation had been offered regarding how controlling the exports would contribute to a decrease in the pollution associated with the production of raw materials.¹³⁰ Moreover, the panel found that China's export duties did not make a material contribution to reducing the pollution because there was no corresponding measure restricting domestic consumption.¹³¹ The mere imposition of export duties, rather than helping to control the production of raw materials, would encourage more intensive use of them by China's domestic downstream industries.¹³² Furthermore, various alternative measures were found to be available to China.¹³³ In the subsequent analysis regarding the requirements of the chapeau, China's export duties were found to constitute a 'disguised restriction on international trade' because they were not actually tailored to protect the environment.¹³⁴

The above assessment suggests that China's export duties were unlikely to be adopted for environmental purposes, largely owing to the lack of corresponding restrictions on domestic consumption of the targeted raw materials. This being the case, the *China—Raw Materials* and *China—Rare Earths* decisions that deny China's right to invoke Article XX seem to be accepted. After all, the duties in dispute would never be justified under Article XX. It is noteworthy, however, that these decisions also prohibit China from justifying any future export duties, no matter on raw materials or not, even if those duties could contribute meaningfully to environmental protection. Moreover, an absolute prohibition on China's export duties seems a fairly stringent finding, especially given that most WTO members remain free to impose duties on exports for any purpose. In this context, the *China—Raw Materials* and *China—Rare Earths* decisions have raised several concerns, which are discussed in the next chapter.

129 Ibid., paras 7.162-7.164.

130 Ibid., para 7.166.

131 Ibid., para 7.179.

132 Ibid., para 7.176.

133 '(i) increase volume restrictions on mining and production; (ii) establish effective pollution controls on mining and production; (iii) impose a resources tax on consumption; (iv) impose a pollution tax; and (v) develop and impose an export licensing system.' Ibid., paras 7.185-7.187.

134 Ibid., paras 7.191-7.192.