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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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Cover Page



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3 | The Reception of the Ban on China's Export Duties: Concerns, Solutions, and the Missing Piece

The high-profile *China—Raw Materials* and *China—Rare Earths* cases have been the subject of considerable discussion by practitioners and scholars. A large part of this discussion has focused on two major concerns regarding the AB's interpretation in effect denying China's right to justify the use of export duties under GATT Article XX. First, this interpretation in favour of an absolute ban on China's export duties appears to be erroneous because it neglects several important considerations. Second, such an erroneous interpretation would result in negative implications for China and for the WTO in general. Thus various legal solutions to these concerns have been proposed, though none has been implemented to date, thereby raising the question of whether the ban even merits being corrected in practice. This chapter accordingly offers a comprehensive assessment of the current literature on the necessity of providing China with the policy space to impose export duties. The following discussion first introduces the debate on the two major concerns over the ban on China's export duties and then describes the various legal solutions that have been proposed. The discussion concludes by addressing what has been missing from the current discussion, namely whether an absolute ban on export duties would in practice prevent China from protecting the environment—which is of great importance in terms of efforts to correct the *China—Raw Materials* and *China—Rare Earths* decisions.

3.1 ERRONEOUS INTERPRETATION BASED ON AN OVERLY RIGID TEXTUAL ANALYSIS

The WTO panels and AB have traditionally taken a textual approach to interpretation. This choice was initially motivated in part by a desire to avoid accusations of bias from individual members and thereby to establish the credibility of the WTO as the new institution took shape.¹³⁵ As applied in the *China—Raw Materials* and *China—Rare Earths* cases concerning China's export duty commitments, the textual analysis has incurred criticism over its rigidity in failing to take into account all of the necessary considerations for a correct interpretation, given the fact that China has never explicitly

135 Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98(2) *The American Journal of International Law* (2004), at 261.

relinquished its right to use export duties in a manner consistent with Article XX. These neglected considerations are illustrated as follows.

First, accession protocols are essentially different from other multilateral trade agreements annexed to the WTO Agreement. The former ones are often loosely drafted because the acceding country lacks the bargaining power that could provide either the necessary checks and balances to produce carefully-drafted rules or the legal competence to establish a precise meaning for a given term.¹³⁶ Thus a strict textual approach to accession protocols—as if they had been negotiated and drafted with such care that any omission, in this case the lack of reference to Article XX in China’s export duty commitments, represents a ‘deliberate choice’ by the parties—seems in this context a dubious hermeneutic.¹³⁷

Moreover, unlike other multilateral trade agreements, China’s accession protocol does not focus on a single subject matter, such as trade in goods or services.¹³⁸ Instead, the protocol covers subjects across the entire spectrum of the WTO Agreement and therefore cannot be understood in isolation.¹³⁹ In this sense, explicit reference to GATT Article VIII in Paragraph 11.3 does not amount to the exclusion of all other provisions in the GATT, such as Article XX.¹⁴⁰ Otherwise, it would be necessary to make the absurd assumption that some fundamental provisions in the GATT, such as Article I, ‘Most-Favoured-Nation Treatment’, and Article III, ‘National Treatment’, are not applicable to China’s export duty commitments.¹⁴¹ In this context, it would be redundant for Paragraph 11.3 to state explicitly, ‘consistent with the GATT 1994’, a term that the AB found could establish the applicability of Article XX to Paragraph 11.3, because this is the precondition that is tacitly agreed upon in China’s accession protocol.¹⁴²

Second, the value of the interests protected by Article XX is too significant to be signed away in a silent manner. The supreme status of Article XX is based on its function as the last resort for members within the WTO framework, thus maintaining the delicate balance of the entire WTO regime.¹⁴³

136 Julia Ya Qin, ‘Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection’, 46(5) *Journal of World Trade* 1147 (2012), at 1157.

137 *Ibid.*

138 Qin (2012), above n 135, at 1156.

139 *Ibid.*

140 Bin Gu, ‘Applicability of GATT Article XX in *China–Raw Materials* a Clash within the WTO Agreement’, 15(4) *Journal of International Economic Law* (2012), at 1024.

141 *Ibid.*

142 Delei Pend and Bohua Gong, ‘Comments on The Findings About the Application of GATT Article XX in *China Raw–Materials*’, 5 *International Business Research* (2011), at 29.

143 Ying Liu, ‘The Applicability of Environmental Protection Exceptions to WTO-Plus Obligations: In View of the *China – Raw Materials* and *China – Rare Earths* Cases’, 27(1) *Leiden Journal of International Law* (2014), at 127.

It may be incorrect to assume that Article XX should apply to all WTO agreements because a few of them do not have this exception.¹⁴⁴ Such an absence could, however, be carefully negotiated by all WTO members. In contrast, the absence of a reference to Article XX in China's accession protocol may well be a drafting error which should not be considered as negotiating away the right to regulate the public good, especially in the absence of 'thorough and sufficiently open debate amongst all stakeholders'.¹⁴⁵

Third, the significant value under Article XX is closely related to the objective and purpose of the WTO Agreement, which should be among the considerations in treaty interpretation according to Article 31 of the VCLT. In *China—Raw Materials* and *China—Rare Earths*, China was unable to invoke Articles XX(b) and (g), the provisions referring to the values that WTO members have agreed to reaffirm in the preamble of the WTO Agreement that articulates the organization's 'mission'.¹⁴⁶ In this context, the silence regarding the applicability of Article XX in China's accession protocol should not amount to a waiver of China's essential rights to pursue environmental objectives.¹⁴⁷ In other words, the '*expressio unius* approach' adopted by the AB 'can easily be reversed by reference to a more teleological approach to interpretation'.¹⁴⁸ In this sense, the AB could have engaged in a 'courageous' interpretation that allowed for the availability of Article XX defences for violations of non-GATT obligations even in cases in which there is no specific language regarding their incorporation.¹⁴⁹

Fourth, China's export duty commitments in Paragraph 11.3 have a special nature as a WTO-plus obligation.¹⁵⁰ One major reason to deny China's right under Article XX is based on a textual difference between Paragraph 11.3 and Paragraphs 11.1 and 11.2. The latter ones broadly refer to the GATT 1994 in general, which in the view of the AB textually incorporated all the GATT provisions including Article XX, whereas Paragraph 11.3 only refers to a specific GATT provision, namely Article VIII. This led the AB to conclude that there is a common intention to exclude the applicability of Article XX to Paragraph 11.3.¹⁵¹ This conclusion is, however, considered suspect. Unlike Paragraphs 11.1 and 11.2, both of which emphasize obligations already

144 Ehring (2013), above n 16, at 359.

145 Bronckers and Maskus (2014), above n 19, at 401.

146 Ilaria Espa, 'The AB Approach to the Applicability of Article XX GATT In the Light of China – Raw Materials: A Missed Opportunity?', 46(6) *Journal of World Trade* (2012), at 1420-1421.

147 Gu (2012), above n 139, at 1029.

148 Eric W Bond and Joel P. Trachtman, '*China—Rare Earths*: Export Restrictions and the Limits of Textual Interpretation', 15(2) *World Trade Review* (2016), at 208.

149 Espa (2012), above 145, at 1421.

150 Jingdong Liu, 'Accession Protocols: Legal Status in the WTO Legal System', 48 *Journal of World Trade* (2014), at 123.

151 *Ibid.* para 5.64.

existent under the GATT 1994, Paragraph 11.3 includes two types commitments, namely the elimination of export duties as a WTO-plus obligation and the use of fees connected with importation and exportation as an existent GATT obligation.¹⁵² In this context, while Paragraph 11.3 emphasizes the existent obligation concerning fees by referring to GATT Article VIII, it does not need to do so with regard to the WTO-plus obligation concerning export duties through reference to any GATT provision, including Article XX.¹⁵³ In this context, the absence of a reference to either the GATT 1994 in general or Article XX in specific should not be considered a common intention to prevent China from adopting export duties in a manner consistent with Article XX.

Fifth, although China's export duty commitments under Paragraph 11.3 do not have a corresponding obligation under the GATT 1994, there is a systemic relationship between them, based on which Article XX should apply to Paragraph 11.3.¹⁵⁴ The reason is that the use of export duties is inherently related to the GATT disciplines on customs tariffs and export restrictions.¹⁵⁵ In this context, contrary to the AB's finding that there should be a textual connection between Article XX and Paragraph 11.3, the latter's systemically intrinsic relationship with the GATT 1994 is sufficient to enable China to justify the violation of it under Article XX.¹⁵⁶ As a counter-argument, this approach may generate arbitrary results because there seems to be no clear-cut standard for determining the intrinsic relationship between a WTO-plus obligation and the subject-matter of one particular multilateral trade agreement.¹⁵⁷

The above survey shows that the textual approach adopted by the AB is certainly too rigid compared with a more teleological approach which may eventually find China's right to protect public policy. However, one can hardly argue that the preference over the textual approach in these cases is legally wrong. On the contrary, abandoning the textual approach for some good purpose may constitute a kind of activism on the part of the AB in taking up issues that should have been addressed by the 'legislative branch' of the WTO.¹⁵⁸ In contrast, a more compelling line of argument correctly questions the reasonableness or even legality of the premise that China

152 Liu (2014), above n 150, at 123.

153 Ibid.

154 Jiayang Hu, 'Reconsideration of Applicability of Article XX in GATT: From the Perspective of the Relationship Between GATT 1994 and Other Multilateral Trade Agreements in Goods', 6(2) *Journal of Shanghai Jiaotong University (Philosophy and Social Sciences)* (2014) at 15.

155 Qin (2012), above n 135, at 1156.

156 Hu (2014), above 153, at 34.

157 Ehring (2013), above n 16, at 357-358.

158 Danielle Spiegel-Feld and Stephanie Switzer, 'Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements After *China-Raw Materials*', 38 *Yale Journal of International Law Online* (2012), at 28.

could silently sign away its important right to protect public policy under Article XX.¹⁵⁹ Its persuasiveness, however, largely depends on whether the values protected by Article XX are truly at stake which is discussed next.

3.2 NEGATIVE IMPLICATIONS CAUSED BY AN ABSOLUTE BAN ON CHINA'S EXPORT DUTIES

Two major concerns over environmental protection and fairness have been raised. First, an absolute ban on China's export duties may unduly limit China's policy space when it comes to protecting the environment.¹⁶⁰ Moreover, as the criteria set out in *China—Raw Materials* and *China—Rare Earths* may also apply to the export duty commitments of other acceded members, including Mongolia, Latvia, Saudi Arabia, Montenegro, and Tajikistan, their policy space for the use of export duties could be similarly constrained.¹⁶¹ Second, the two decisions may further increase the inequality of the already existing two-tier membership structure of the WTO, thus potentially undermining the legitimacy of the organization as a whole. In this subsection, these negative implications and counter-arguments against them are reviewed.

3.2.1 Environment-related concerns

Although China's export duties failed to meet the requirements of the environmental exceptions under Article XX in *China—Raw Materials* and *China—Rare Earths*, this, in the view of some commentators, does not necessarily mean that the duties would never be consistent with Article XX.¹⁶² Accordingly, China's policy space for environmental protection would likely be constrained by a wholesale prohibition on the imposition of export duties.¹⁶³ Moreover, these decisions might also prevent China from using export duties as a climate policy tool, an issue unaddressed in either *China—Raw Materials* or *China—Rare Earths*.¹⁶⁴

¹⁵⁹ For further discussion, see Chapter 7.

¹⁶⁰ Bin Gu, 'Mineral Export Restraints and Sustainable Development—Are Rare Earths Testing the WTO's Loopholes?', 14(4) *Journal of International Economic Law* (2011), at 783.

¹⁶¹ Baris Karapinar, 'Defining the Legal Boundaries of Export Restrictions: A Case Law Analysis', 15(2) *Journal of International Economic Law* (2012), at 461.

¹⁶² For further discussion on whether China's export duties can ever be justified under Article XX, see Chapter 8.

¹⁶³ Cai Fang, 'What Are the Lessons from *China—Raw Materials*?', *China Environment News*, available at <http://cwto.mofcom.gov.cn/article/m/201202/20120207978584.shtml>, (visited 18 June 2017).

¹⁶⁴ *Ibid.* Also see Baris Karapinar and Kateryna Holzer, 'Legal Implications of the Use of Export Taxes in Addressing Carbon Leakage: Competing Border Adjustment Measures', 10(1) *New Zealand Journal of Public and International Law* (2012), at 34. For further discussion, see Chapter 6.

Besides the potential constraints on China's policy space to protect the environment, an absolute ban on its export duties may leave no room for China to develop a sound environmental policy within the WTO legal framework. It has been argued that, if Article XX is found to be applicable, China could have advanced its export duties in order to meet the requirements of the environmental exceptions, as for instance, introducing corresponding limits for domestic consumption.¹⁶⁵ On the contrary, however, the extreme constraint of the absolute ban on its export duties appears to have pushed China to resort to such non-market means as compelling mergers of small and medium-sized producers of raw materials with a few large state-owned enterprises.¹⁶⁶

The persuasiveness of the above environmental arguments is, however, diminished by two major counter-arguments. The first one calls into question of the significance of export duties as an environmental measure. It has been argued that the negative environmental impact of an absolute prohibition on export duties is very limited because the duties are at best a temporary environmental protection measure.¹⁶⁷ This line of thought suggests that China's export duties could well be replaced by other traditional environmental policy instruments.¹⁶⁸ For instance, when it comes to limit the environmental harm associated with the manufacture of certain products, one alternative would be to implement a quota or tax on the production.¹⁶⁹ In this way, the protectionist aspects of export duties would be eliminated while the environmental benefits would be preserved.¹⁷⁰ Another alternative for China is to seek advanced environmental technologies from abroad to upgrade its out-dated production technology.¹⁷¹ A more controversial

165 Bill Butcher, 'WTO Open Trade Rules and Domestic Environmental Protection Policies: A Balancing Approach', in Larry Kreiser, Socheol Lee, Kazuhiro Ueta, Janet E. Milne and Hope Ashiabor (eds), *Environmental Taxation and Green Fiscal Reform* (Edward Elgar 2014), 69–81 at 77.

166 Julia Ya Qin, 'Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection', 46(5) *Journal of World Trade* 1147 (2012), at 1178.

167 Zhixiong Huang, 12(3) 'From "Market Access" to "Resource Acquire"—Thoughts on China Raw Materials', 1 *Studies in Law and Business* (2010), at 43.

168 Baris Karapinar, 'China's Export Restriction Policies: Complying With 'WTO Plus' or Undermining Multilateralism', 10(03) *World Trade Review* (2011), at 405.

169 Mark Wu and James Salzman, 'Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy', 108(2) *Northwestern University Law Review* (2013), at 461. Also see Yong Li, 'Trade Disputes Caused by Export Restrictions on Rare Earths and Its Countermeasures under the WTO Framework', 13(4) *Journal of Shanghai University of Finance and Economics* (2011), at 40.

170 *Ibid.*

171 Brigid Gavin, 'Sustainable Development of China's Rare Earth Industry within and without the WTO', 49(3) *Journal of World Trade* (2015), at 514. For further discussion on a different proposal about a barter exchange of frontier technologies for minerals, see Gu (2011), above n 159, at 803.

alternative would be to replace export duties with other types of export restrictive measures such as an export quota, which could be imposed in a manner consistent with GATT Article XX.¹⁷² It seems to run counter to the WTO's strong preference for tariffs over the less transparent non-tariff barriers and thus encourages China to take an undesirable path.¹⁷³

The second counter-argument calls into question of the actual motive behind China's export duties. It has been argued that an absolute prohibition on these duties would not practically prevent China from protecting the environment because it simply does not genuinely consider export duties to be a part of its environmental policy.¹⁷⁴ This line of thought may have been provoked by the fact that the measures imposing the challenged export duties in the *China—Raw Materials* and *China – Rare Earths* cases did not cite any environmental purposes or explain sufficiently how they would contribute to conserving natural resources or protecting public health. Moreover, the absence of restrictions on domestic consumption of the raw materials in dispute raises the suspicion that the challenged duties were adopted with the intention of creating differentials between the domestic and international prices of raw materials in order to further such industrial aims as fostering Chinese downstream sectors,¹⁷⁵ encouraging foreign companies to transfer production to China,¹⁷⁶ and maintaining control of key natural resources for domestic supply chains.¹⁷⁷

Arguably, China's omission to explain the environmental rationale behind its export duties may in part be attributable to the manner in which legislation is drafted in China, which involves broad aspirational statements rather than specific and detailed provisions.¹⁷⁸ Regarding the lack of complementary measure to restrict the domestic consumption in China, one may argue that this country is just beginning to implement and enforce environmental legislation, so there is undoubtedly room for improvement.¹⁷⁹ In this context, one Chinese scholar has argued that rather than absolutely prohibiting export duties, the WTO would be better advised to

172 Ehring (2013), above n 16, at 361.

173 Bill (2014), above n 164, at 73.

174 C.L. Lim and J.H. Senduk, 'You Don't Miss Your Water "Til Your River Runs Dry" Regulating Industrial Supply Shortages After *China—Raw Materials*', 18 *Stanford Journal of Law, Business & Finance* (2012), at 76.

175 Karapinar (2011), above n 167, at 404.

176 Gavin (2015), above n 170, at 503.

177 Elizabeth Trujillo, 'A Dialogical Approach to Trade and Environment', 16(3) *Journal of International Economic Law* (2013), at 556.

178 Ruth Jebe, Don Mayer, and Yong-Shik Lee, 'China's Export Restrictions of Raw Materials and Rare Earths: A New Balance Between Free Trade and Environmental Protection?', 44(4) *George Washington International Law Review* (2012), at 639.

179 *Ibid.*, at 641.

provide China with guidance regarding how to properly use export duties to protect the environment.¹⁸⁰

In contrast, his Western counterparts appear to have a more critical view of China's actual motives. For instance, although the Chinese government removed the export duties at issue in accordance with the *China—Raw Materials* and *China – Rare Earths* decisions, the more recent *China—Raw Materials II* dispute raises the concern that Chinese industrial policymakers are exploiting 'the WTO's "free pass" for temporary breach to their advantage without major consequence' and thus there are 'little incentives for authorities to constrain similar behavior in the future'.¹⁸¹ One may challenge such perceptions by referring to China's voluntary adjustment of its environmental policy in reaction to the *China – Rare Earths* including 'the improvement of environmental regulations on rare earths' and 'the mobilization of local governments to better implement rare earths industrial polices which cover the areas of mining, production, circulation, and industry consolidation'.¹⁸² This line of thought, however, appears to implicitly support the first counter-argument concerning the usefulness of export duties for protecting the environment.

The above survey shows that the question relating to the usefulness of export duties to protect the environment is of the greatest importance. Its answer would determine the seriousness of the environmental problems caused by the *China—Raw Materials* and *China – Rare Earths* decisions. Moreover, without knowing the answer, no matter what China reacts to these decisions, its reaction could always be interpreted as acting in bad faith. The abolish of export duties could be seen as supporting the claim that the declared environmental purpose of these duties was a mere pretext, whereas to keep imposing export duties is certainly exploiting the WTO dispute settlement mechanism for temporary breach. The current literature, however, provides no clear answer to this crucial question.¹⁸³

180 Xiaoyong He, 'The Relationship Between Article XX of the GATT and Protocol on the Accession of the People's Republic of China—A Rational Approach to China Raw Materials', 11(6) *Law Science* (2012), at 66.

181 Mark Wu, 'China's Export Restrictions and the Limits of WTO Law', 16(4) *World Trade Review* (2017), at 674.

182 Chenxi Wang, 'WTO Rare Earths Case's Influence on China's Domestic Regulatory Changes', 52(2) *Journal of World Trade* (2018), at 329. For the author, the change of environmental policy after the *China – Rare Earths* shows that 'China supports the WTO DSS, keeping its good compliance record with the WTO rulings, maintaining its reputation as an active player in the WTO DSS, and embracing the WTO's far-reaching impact on its domestic management regime'.

183 For further discussion on this issue, see Chapter 4.

3.2.2 Inequality-related concerns

Compared with the environment-related concerns, it is more certain that the *China—Raw Materials* and *China – Rare Earths* decisions would exacerbate the inequality-related problems in the WTO. Surely no one would disagree that the acceded WTO members generally do not enjoy *de jure* equality with the founder ones within the organization because the former ones are very often required to make so-called ‘WTO-plus’ commitments during their accession.¹⁸⁴ China’s export duty commitments serve as a good example because WTO members are generally free to impose export duties. This inequality caused by the two-tier membership system, standing in sharp contrast with the original aim of the WTO,¹⁸⁵ raises such serious concerns as the legalist tendencies of the WTO.¹⁸⁶ In this context, a further denial of the right of China, as already a second-class member, to protect public policy under Article XX would cause a significant imbalance in the rights and obligations which may raise a serious constitutional issue for WTO jurisprudence¹⁸⁷ or even challenge the international rule of law in the long run.¹⁸⁸ Aside from commitments regarding export duties, the *China—Raw Materials* and *China – Rare Earths* decisions may also increase the inequality under the two-tier membership system with respect to other ‘WTO-plus’ commitments. Following the criteria set out in the decisions, an exception clause in a multilateral trade agreement is generally not applicable to a violation of a country-specific commitment in an accession package unless the clause is specifically incorporated into the text.¹⁸⁹

Besides exacerbating the division between new and other members, the two decisions may also increase the inequality among those acceded members which have made export duties commitments. Following the criteria set out in these decisions, six of these member nations, China, Mongolia, Latvia, Saudi Arabia, Montenegro, and Tajikistan, are prohibited from imposing export duties in any event, while the other five, Vietnam, Ukraine, Russia,

184 Steve Charnovitz, ‘Mapping the Law of WTO Accession’, in Steve Charnovitz, *The Path of World Trade Law in the 21st Century* (World Scientific Publishing, 2014). Also see Matthieu Burnay and Jan Wouters, ‘The EU and China in the WTO: What Contribution to the International Rule of Law? – Reflections in Light of the Raw Materials and Rare Earths Disputes’, in Jianwei Wang and Weiqing Song (eds), *China, the European Union, and the International Politics of Global Governance* (Springer, 2016).

185 The original aim of the WTO was to create a single regime applying to all members, or at least to those groups of members sharing a comparable economic situation. See Bronckers and Maskus (2014), above n 19, at 400.

186 Mitali Tyagi, ‘Flesh on a Legal Fiction: Early Practice in the WTO on Accession Protocols’, 15(2) *Journal of International Economic Law* (2012), at 297.

187 Mitsuo Matsushita, ‘Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources’, 3(2) *Trade, Law and Development* (2011), at 286-287.

188 Burnay and Wouters (2016), above n 183, at 13.

189 Espa (2012), above 145, at 1407.

Kazakhstan, and Afghanistan, retain the ability to impose export duties in a manner consistent with GATT Article XX.¹⁹⁰ This result is objectionable because there is no good reason why the generally-accepted public policy exceptions ‘cannot be invoked by *all* WTO Members in respect of the *same* type of obligation’.¹⁹¹

3.3 PROPOSED LEGAL SOLUTIONS AND THE MISSING PIECE IN CURRENT DISCUSSION

Various legal solutions have been proposed to address the concerns discussed above through an alteration of the absolute ban on China’s export duties. In a judicial way, there is a call for a new interpretation that allows China to justify the use of export duties under Article XX. For instance, from the perspective of public international law, Qin has proposed that China’s export duty commitments be considered as either a subsequent agreement or subsequent practice of WTO members modifying GATT Article XI under Article 30 of the VCLT.¹⁹² In the context of WTO law, a more holistic interpretation has been proposed that gives greater weight to the objective of sustainable development as recognized in the preamble to the WTO Agreement in order to enable China to use export duties in a manner consistent with Article XX.¹⁹³

In a non-judicial way, China is advised to request that the WTO’s decision-making body either approve an amendment to current WTO disciplines on export restrictions in order to incorporate Article XX into China’s commitment on export duties¹⁹⁴ or adopt an authoritative interpretation that corrects the *China—Raw Materials* and *China—Rare Earths* decisions.¹⁹⁵ In the case of an amendment, Russia’s export duty commitments offer guidance.¹⁹⁶ Having learned the lessons of China’s omission in the drafting of its export duty commitments, Russia created a new section in the ‘Schedules of Concession and Commitments’ annexed to the GATT 1994 in which to record its export duty commitments.¹⁹⁷ In order to make use of such an approach, China could request that the WTO’s Ministerial Conference approve an amendment to its export duty commitments that either transfers them to its own ‘Schedules of Concession and Commitments’ or

190 Qin (2012), above n 135, at 1152.

191 Bronckers and Maskus (2014), above n 19, at 400.

192 Julia Ya Qin, ‘Conundrum of WTO Accession Protocols: In Search of Legality and Legitimacy’, 55(2), *Virginia Journal of International Law* (2015), at 404.

193 Liu (2014), above n 150, at 132.

194 Minyou Yu and Chuanhai Hu, ‘Be Careful About the Negative Implications from *China—Raw Materials* Rulings’ 11(14) *Journal of International Trade* (2012), at 64.

195 Liu (2014), above n 150, at 751.

196 Qin (2012), above n 135, at 1160.

197 *Ibid.*

directly incorporates Article XX.¹⁹⁸ Alternatively, China may also request that the Ministerial Conference or General Council adopt an authoritative interpretation that corrects *China—Raw Materials* and *China—Rare Earths* decisions.¹⁹⁹

China, however, seems to lack confidence in convincing the WTO members or the AB to support the proposed legal solutions. On the one hand, it has not sought help from the WTO's decision-making body to date. On the other hand, China is also reluctant to develop a new interpretation in the more recent *China—Raw Materials II* case, otherwise it could have responded more actively in the settlement process. This raises the question of whether the absolute ban on China's export duties even merits being corrected in practice.

This thesis argues that neither the WTO members nor the AB would be interested in altering the absolute ban merely because the textual approach adopted by the AB in *China—Raw Materials* and *China—Rare Earths* was criticized for being too rigid. As shown in Section 3.1, the adherence to the text-first approach in these cases may not be a clear-cut error in a strictly legal sense though the silence on the relationship between Article XX and China's export duty commitments does provide the AB with interpretive space to adopt a more ideal approach, for avoiding all the negative implications caused by a rigid textual analysis as discussed in Section 3.2.

Similarly, the general concerns for unfairness alone would also be insufficient to convince the WTO members or the AB to support the proposed legal solutions. Indeed, although the preamble of the WTO Agreement calls for 'the elimination of discriminatory treatment in international trade relations', discriminatory treatment against certain acceded members is in practice permitted.²⁰⁰ In this context, the WTO decisions that exacerbate the inequality among WTO members concerning the use of export duties seems to be just adding one more example to the existing discriminatory treatment in the WTO. As argued by Ehring, nothing in WTO law or 'superior international law' prohibits WTO members from taking advantage of an acceding member during negotiations.²⁰¹

198 Yu (2012), above n 193, at 64.

199 Liu (2014), above n 150.

200 As a result, 'the argument that non-discrimination is constitutional principle of the WTO is facetious at best'. See Charnovitz (2014), above n 183.

201 'There is, however, no legal basis for this claim of discrimination because the WTO prohibitions on discrimination apply to Members' treatment of trade, but not to the negotiation of WTO agreements, nor does superior international law contain a norm prohibiting the unequal treatment of equal situations (despite the principle of sovereign equality) when it comes to negotiating international agreements'. See Ehring (2013), above n 16, at 344.

In contrast, the environmental concern is of great importance in deciding whether WTO members or the AB should support a correction of the *China—Raw Materials* and *China—Rare Earths* decisions. Even an author like Ehring with a critical view of the unfairness concerns may agree that the discrimination applied to the negotiation of accession protocols should not prevent a country from pursuing ‘fundamental societal interests’.²⁰² As he correctly put it, ‘one needs to ask whether the values protected by Article XX truly can be threatened by the obligations at stake’.²⁰³ Thus, to justify his argument in favour of an absolute ban on China’s export duties, he claimed that the environmental concerns are merely ‘the fog created by political statements and litigation advocacy’ and ‘a public policy problem does not really seem to exist’.²⁰⁴ Interestingly, this similar view was also repeatedly emphasized by the complainants and the panels as an attempt to justify the denial of China’s right under Article XX.²⁰⁵ In this sense, all of them seem to agree that, if disallowing China to impose export duties would indeed prevent it from protecting the environmental under certain circumstances, the decisions placing an absolute ban on China’s export duties should be reconsidered. Otherwise, the discussion of those environmental concerns is of more academic interest than practical importance.²⁰⁶

The current literature, however, provides no clear answer to the crucial question of whether an absolute ban on China’s export duties would in practice constrain its policy space to protect the environment. In particular, there is a lack of research examining the validity of the two counter-arguments relating to the usefulness of export duties to protect the environment and to the real purpose of China’s export duties. The next steps involve filling in the missing piece in current discussion through an examination of practices of WTO members that support the use of export duties to protect the environment (Chapter 4), the actual motive behind China’s export duties (Chapter 5), and the potential role of the duties in tackling carbon leakage, which remained unaddressed in *China—Raw Materials* and *China—Rare Earths* (Chapter 6).

202 Ibid., at 361.

203 Ibid., at 359.

204 Ibid., at 361.

205 The panel in *China—Rare Earth* went so far as to suggest that an interpretation that prevented China from enacting necessary environmental or public health measures had the potential to become ‘manifestly absurd or unreasonable’. See Panel Reports, *China—Rare Earth*, para 7.111.

206 For instance, no environmental group has condemned the absolute prohibition on China’s export duties to date. See Wu and Salzman (2013), above n 168, at 450.