'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.

Part III:

Final Analysis: Is There a Way for China to Use Export Duties Legally in Order to Achieve Environmental Goals under WTO Law?

7 Is There a Legal Path to a Desirable Policy Space for China Under WTO Law?

The foregoing analysis refutes the view in support of an absolute ban on China's export duties in two respects. First, this simple prohibition is inconsistent with both the economic rationales and the practice of WTO members. Second, although China had prioritized the industrial purposes of export duties in the past, this role, however, has been substantially altered in the Guidelines of the Thirteenth Five-Year Plan (2016-2020) which make clear that export duties in combination with other taxes on production or consumption could form part of a new 'eco-tax system'. This good attempt is impeded by the *China—Raw Materials* and *China—Rare Earths* decisions, according to which China's export duties cannot be justified for environmental purposes. A solution is thus needed to provide China with appropriate policy space.

The current literature includes suggestions that the ban on China's export duties be altered by either judicial or political means. On the one hand, the AB could adopt a new interpretation to correct the *China—Raw Materials* and *China—Rare Earths* rulings. This approach faces a preliminary issue that has not been sufficiently recognized in the current literature, namely whether the AB could ever be convinced to depart from its previous decisions; the fact is that, in more than 20 years of jurisprudence, the AB has never explicitly reserved itself. Moreover, it is also challenging to develop a new substantive argument to prove China's right under Article XX after the previous two cases.

A political approach, on the other hand, would require China to request instead that the WTO's decision-making body issue an amendment, waiver, or authoritative interpretation establishing China's right to invoke Article XX. In pursuing this approach, a major challenge for China would be to garner sufficient support from other WTO members. For though not all political corrections of this sort necessarily require a consensus among members, the latter would presumably prefer not to break the general taboo against formal voting. This is another important issue that has yet to be addressed in the literature.

This chapter thus provides a comprehensive assessment of those approaches in order to find the most feasible way to 'greening' the WTO ban. It begins with a consideration of the likelihood that the AB would reconsider the *China—Raw Materials* and *China—Rare Earths* decisions. On

this point, the conclusion is reached that the AB could either overrule or (preferably) distinguish the absolute ban on China's export duties. The merits of substantive arguments in support of China's right under Article XX are then assessed in Sections 7.3 and 7.4, for determining which new interpretation would most likely be acceptable to the AB. All possible interpretative options based on both WTO norms and non-WTO norms in public international law are taken into account. The next consideration is the likelihood that a political correction would loosen the ban on China's export duties in light of treaty provisions concerning the adoption of amendments, waivers, authoritative interpretations, or a more flexible alternative. The feasibility of these conceivable political corrections is further discussed in Section 7.6. The chapter is concluded with a comparison of the most feasible judicial and political corrections.

7.1 Possible options to depart from the absolute ban on China's export duties

Various new interpretations of the relationship between China's export duty commitments and GATT Article XX have been proposed that would enable the use of the duties for environmental purposes. Such interpretations, however, would involve departing from the *China—Raw Materials* and *China—Rare Earths* decisions, something that the AB seems reluctantly to do given the apparent *de facto stare decisis* regime in WTO dispute settlement. To address this issue, possible legal options for the AB to depart from precedent in the context of WTO jurisprudence are considered in the following subsection. The advantages and disadvantages of those options are further assessed in the context of the practice of other selected tribunals at the international, regional, and national levels, based on which this section proposes the most feasible approach, relatively speaking, for the AB to reconsider the absolute ban on China's export duties.

7.1.1 Feasibility to depart from WTO jurisprudence

This part explores the potential options to depart from the previous AB reports supporting an absolute ban on China's export duties. First of all, given the fact that 'there is no rule of *stare decisis* in WTO dispute settlement',[491] one obvious way to get rid of the *China—Raw Materials* and *China—Rare Earths* decisions is to simply ask the AB to ignore them. But, as will be discussed below, this option is objectionable owing to its profoundly negative impacts on such important values as the legal certainty. This is why, as noted by former ICJ President Gilbert Guillaume, following prec-

491 WTO Secretariat, 'Legal Effect of Panel and AB Reports and DSB Recommendations and Rulings', available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm, (visited 18 June 2017).

edents is very common in international jurisdictions even if these international tribunals are in fact not formally obliged to comply with precedent.[492] In support of a *jurisprudence constante* regime in the multilateral trading system, this part discusses the other three options, namely explicit overruling, implicit overruling, and distinguishing, that could enable the AB to balance the precedential value and the flexibilities to loosen the grip of its settled jurisprudence.

7.1.1.1 Unwise to abandon the precedential value

WTO dispute settlement system is mandated to provide 'security and predictability to the multilateral trading system'.[493] Thus, for the purpose of creating 'legitimate expectations among WTO Members', the AB in *Japan—Alcoholic Beverages* suggested that its reports 'should be taken into account where they are relevant to any dispute'.[494] This raises the question of whether a panel or the AB itself may depart from an AB report in a relevant dispute.

In practice, the AB has never explicitly departed from its previous decisions.[495] In contrast, a panel had expressly challenged the AB's decisions in *US — Stainless Steel (Mexico)*. By acknowledging that the AB had reversed two panel decisions supporting the use of zeroing methodology in administrative review, the *US — Stainless Steel (Mexico)* panel still 'felt compelled to depart from' the AB's previous approach against the US's zeroing methodology.[496] For the AB, such departure from its 'well-established' jurisprudence had 'serious implications for the proper functioning of the WTO dispute settlement system'.[497] The AB thus in the same case required that subsequent panels should not be 'free to disregard the legal interpretations and the *ratio decidendi*' contained in previous AB reports unless 'cogent reasons' were presented for departing from them.[498]

The precedential value of AB reports, however, has drawn strong criticism from the US government. For instance, in its Trade Representative's 2018 Trade Policy Agenda and 2017 Annual Report, the US claimed that requiring panels to follow prior AB decisions absent 'cogent reasons' was

492 Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators', 2(1) Journal of International Dispute Settlement (2011), at 12.
493 'The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system'. Article 3,2 of the DSU.
494 AB Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, at 14.
495 Implicitly, the AB seems to have changed its position on the so-called aim and effects test in the *EC—Asbestos*. For further discussion, see Section 7.1.3.4.
496 Panel Report, *US — Stainless Steel (Mexico)*, para 7.106.
497 AB Report, *US—Stainless Steel (Mexico)*, paras 161-162.
498 Ibid., paras 158-160.

inconsistent with WTO rules.[499] The US appeared to suggest that the only interpretation that panels should follow was the authoritative interpretation adopted by WTO members under Article IX:2 of the WTO Agreement though, in practice, the only one request made for an authoritative interpretation was rejected by the US itself.[500]

This thesis argues that China should not support the US position even if the denial of the precedential value of AB reports could help China alter the absolute ban on its export duties. As correctly noted by the EU as a third participant in *US — Stainless Steel (Mexico)*, 'in practice most international tribunals do give certain weight to precedents when dealing with similar legal issues'.[501] The reason behind such common practice is rather self-evident which is for 'the maintenance of security and stability' as a primary function of law.[502]

That being said, however, '[t]he cult of the precedent is thus just as dangerous as the rejection of precedent'.[503] It is thus important to strike a balance between legal certainty and flexibility. The options to introduce flexibility into the WTO's precedent system are discussed as follows.

7.1.1.2 Option I: explicit overruling based on 'cogent reasons'

Within the framework of *jurisprudence constante*, a departure from precedent requires a tribunal to provide a good explanation in order to preserve the authority of precedent. That is to say, 'judicial precedents would only be devoid of authority if judges felt no need to offer reasons for their actions in those instances when they choose not to follow them'.[504] Thus the AB has introduced the concept of 'cogent reasons'.

The panel in the *US—Countervailing and Anti-Dumping Measures (China)* case defined the notion of 'cogent reasons' further in relation to four types of situations.[505] The first requires an authoritative interpretation under Article

499 Office of the United States Trade Representative, '2018 Trade Policy Agenda and 2017 Annual Report', at 28

500 Ibid. For further discussion about the use of authoritative interpretation to greening the ban on China's export duties, see Section 7.7.

501 Para 7.20. The EU referred to the practice of the European Court of Human Rights, the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court and the International Centre for Settlement of Investment Disputes. For further discussion about the practice of selected tribunals, see next subsection.

502 AB Report, *US—Stainless Steel (Mexico)*, footnote 313.

503 Guillaume (2011), see above n 492, at 23.

504 Neil Duxbury, 'Distinguishing, overruling and the problem of self-reference', in '*The Nature and Authority of Precedent*', (Cambridge University Press, 2008), at 112.

505 Panel Report, *US—Countervailing and Anti-Dumping Measures (China)*, para 7.317.

IX:2 of the WTO Agreement that departs from a prior AB interpretation, an option that is to be discussed in Section 7.6 of this chapter. The other three situations require demonstration that a prior AB interpretation proved to be either unworkable, in conflict with another provision of a covered agreement, or based on a factually incorrect premise. In view of these latter three criteria, Feng, a lawyer representing the Chinese government in the *China—Rare Earths*, has argued that there are indeed 'cogent reasons' for the AB to 'correct' the interpretation that it handed down in the *China—Raw Materials* and *China—Rare Earths* decisions.[506]

It is noteworthy that, although the notion of 'cogent reasons' has been clarified by a panel decision, there has been no successful attempt at offering 'cogent reasons' in front of the panels or the AB. Moreover, in the past 20 years, the AB has never explicitly departed from its prior decisions. The very infrequency appears to suggest that express overruling based on 'cogent reasons' is the first-best option in practice.

7.1.1.3 Option II: distinguishing

China may find a way that enable the AB to implicitly alter the *China—Raw Materials* and *China—Rare Earths* decisions by distinguishing them. Indeed, a common reason to not follow a precedent is that an earlier case does not apply to the instant one due to a distinction between them, which is often referred to as distinguishing. It is noteworthy that, in the more obvious form of distinguishing, if two cases are materially different, the earlier one is not really a precedent to the later one. In contrast, and more relevant to this chapter, is the more subtle form of distinguishing, namely 'where a court departs from a precedent by making a particular ruling depend on the presence of a more extensive range of material facts'.[507] For instance, assuming that a tribunal in an earlier case decided that facts A and B should lead to outcome X. In a later case when facts A and B obtain, the tribunal may still choose to not follow the earlier case by distinguishing it and deciding that outcome X should be caused by facts A, B and C. Thus, by adding to the conditions necessary for applying a precedent, the restrictive distinguishing in effect amends an earlier case by narrowing its applicable scope.

An obvious example of distinguishing WTO precedents can be found in the *Indonesia—Import Licensing Regimes* case in which the AB expressly distinguished its long-established sequence of analysis under GATT Article XX. In this case, Indonesia requested the AB to the reverse the panel's findings under Article XX because the panel did not follow the 'well-established sequence of analysis under Article XX' by assessing the chapeau of Article

506 Xuewei Feng, 'On the Feasibility of Self-Correction of the AB's Previous Decision: Lessons from China-Rare Earths', 2(1) China and WTO Review (2015), at 182.

507 Ibid., at 115.

XX without first examining the applicable paragraphs, namely paragraphs (a), (b), and (d) in the present case.[508] The sequence of analysis under Article XX was first set out in *US—Gasoline* in which the AB held that the analysis was two-tiered: first, provisional justification under the applicable paragraphs; second, further appraisal under the chapeau of Article XX.[509] This two-tiered sequence was highlighted in *US—Shrimp* as reflecting 'not inadvertence or random choice, but rather the fundamental structure and logic of Article XX'.[510] Thus, the panel in *Indonesia—Import Licensing Regimes*, choosing to only examine the measure under the chapeau of Article XX appears to be inconsistent with the AB's prior decisions.

However, rather than reversing the panel's findings, the AB held that, to first examine the applicable paragraphs, as the 'normal sequence', aimed to provide panels with the 'necessary tools to assess the requirements of the chapeau', namely to determine whether a discriminatory measure at issue was arbitrary or unjustifiable within the meaning of the chapeau and which 'conditions' prevailing in different countries are relevant in the context of the chapeau.[511] Thus, to distinguish between the normal circumstances and the 'particular circumstances' in which a panel might be able to analyse the elements under the applicable paragraphs that were relevant to assess the requirements of the chapeau 'even when the sequence of analysis under Article XX has not been followed',[512] the AB held that a panel might deviate from the 'normal sequence' in the 'particular circumstances of the case' provided that the panel had made findings under the applicable paragraphs in order to complete the analysis of the chapeau.[513] In this way, the AB effectively amended the sequence of analysis under Article XX by allowing a deviation under certain circumstances.

Compared with express overruling, however, the use of distinguishing has limitations. Although a tribunal could use distinguishing to amend a precedent by adding conditions, these conditions should be based on a material

508 AB Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017, para 5.86.

509 In *US – Gasoline*, the AB stated: 'In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX' at 20.

510 AB Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755, para. 119.

511 AB Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/AB/R, WT/DS478/AB/R, and Add.1, adopted 22 November 2017, para 5.99.

512 Ibid., 5.100.

513 Ibid., 5.101.

distinction between the precedent and the present one. After all, 'the judge who tries to distinguish cases on the basis of materially irrelevant facts is likely to be easily found out'.[514] Thus, when the important facts of two cases are identical, a tribunal may choose to overrule a precedent by 'declaring that, at least where the facts of a case are materially identical to those of the case at hand, a new ruling should be followed instead'.[515] In this way, the tribunal is *de facto* repealing a previous judgement rather than amending it.[516]

7.1.1.4 Option III: implicit overruling

It is noteworthy that the AB may have overruled its prior decisions in an implicit manner. Relevant here is the *EC—Asbestos* case in which the AB appeared to have implicitly overruled its prior decisions that explicitly rejected the 'aim and effect' test. This test was reinstated when the AB changed its established framework for analysing 'likeness' under GATT Article III in order to balancing trade and non-trade values. Specifically, in examining the 'likeness' of chrysotile asbestos fibres, which are known to be highly carcinogenic, to other fibres,[517] the AB maintained the guise of the previous framework by 'squeezing health effects into its competition-oriented framework' rather than simply adopting a new framework.[518]

The framework for analysing 'likeness', which was first established in the Report of the Working party on *Border Tax Adjustments*,[519] consists of four general criteria: (i) the properties, nature, and quality of the products in question; (ii) the end uses of the products; (iii) consumers' tastes and habits; and (iv) the tariff classification of the products.[520] Since these four general criteria simply serve as tools for sorting and examining the relevant evidence,[521] the assessment of 'likeness' necessarily depends on the legal provision at issue.[522] In the case of GATT Article III, the competitive relationship between products is of particular importance in this regard.[523]

514 Ibid., at 114.
515 Ibid., at 117.
516 Ibid., at 115.
517 WTO AB Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted on 12 March 2001.
518 Robert Howse, Comments on 'Interpretation and Institutional Choice at the WTO', Opinio Juris (2012), available at http://opiniojuris.org/2012/04/11/vjil-symposium-robert-howse-comments-on-interpretation-and-institutional-choice-at-the-wto/, (visited 10 June 2018).
519 Working Party Report, *Border Tax Adjustments*, BISD 18S/97, adopted 2 December 1970.
520 AB Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243, para 101.
521 Ibid, para 102.
522 Ibid, para 103.
523 Ibid, para 117.

Following this competition-oriented framework, the panel in *EC—Asbestos* relied largely on the second criterion, which addressed the end uses of products, to conclude that chrysotile asbestos fibres and certain other fibres were 'like products' under Article III:4.[524] The AB, however, with one member dissenting, was concerned about the consequences of ruling that a product with enormous health and safety risks was 'like' certain much safer substitutes.[525] It then linked the health risks associated with the carcinogenic fibres to 'consumer preferences', another of the four general criteria for assessing 'likeness'. Approaching the case from this perspective, the AB reasoned that, because the ultimate consumer might cease to buy a product associated with serious health problems,[526] the relevant manufacturers would likely weigh the risks of including chrysotile asbestos fibres in their products. In this respect, the AB changed its previous competition-oriented framework by giving the priority to public health and thus reversed the panel's conclusion that the carcinogenic fibres and their safer substitutes were 'like products'.[527]

To sum up, three options are theoretically available for the AB to not follow the *China—Raw Materials* and *China—Rare Earths* decisions, namely explicit overruling based on 'cogent reasons', implicit overruling, and distinguishing. Given the fact that the AB is a relatively young tribunal, it could be beneficial to examine the practice of other more mature tribunals from which a most feasible option, relatively speaking, might be discerned. This analysis is discussed in the next subsection.

7.1.2 Moves by other tribunals to deviate from precedent: Inspirations for the AB to reconsider *China – Raw Materials and China – Rare Earths*

The problem of how to avoid undesirable precedents is not unique to the AB. Tribunals at the international, regional, and domestic levels have faced similar problems and have developed ways of dealing with them. This subsection provides a comparative analysis of these practices by the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), and the highest courts of appeals in the United Kingdom (UK), Japan, and China. The aim here is

524 Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by AB Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305, para 84.

525 Robert Howse, Comments on 'Interpretation and Institutional Choice at the WTO', Opinio Juris (2012), available at http://opiniojuris.org/2012/04/11/vjil-symposium-robert-howse-comments-on-interpretation-and-institutional-choice-at-the-wto/, (visited 10 June 2018).

526 AB Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243, para 122.

527 Ibid, para 126.

to draw inspirations for the AB to reconsider the absolute ban on China's export duties.

7.1.2.1 The choice of tribunals at the international, regional, and national levels

In general, the comparison with the select international or regional tribunals has often been made by either the AB itself or relevant literature.[528] With regard to international tribunals, an analysis of the practice of the ICJ and ICTY could provide the AB with references on how the other international tribunals departed from precedents. With regard to select regional tribunals, similar to the AB, many judgements of the CJEU have trade-related aspects which could provide the former one with references on how to balance trade and non-trade interests. In contrast, although the ECtHR does not examine trade-related issues, its judgement may shed light on how the AB could accommodate environmental interests from a human rights perspective. Moreover, compared with international and regional tribunals, the national ones may have more experience with how to avoid undesirable precedents. In order to have an overview of the practice in both common law and civil law countries, this part examines the techniques of the highest appeal courts in the United Kingdom, Japan, and China to avoid undesirable precedents.

This comparison has its limitations because the select tribunals have different institutional features from the AB. According to certain criteria, the WTO dispute settlement is the least legalistic option.[529] The experience of the select tribunals thus may not be directly borrowed. That being said, however, the mandate of those tribunals may not significantly differ from the one of the WTO, namely, to provide 'security and predictability'. Therefore, the practice in other jurisdiction may still provide the AB with inspirations to depart from *China – Raw Materials* and *China – Rare Earths*.

7.1.2.2 Practice of international tribunals

7.1.2.2.1 International Court of Justice (ICJ)

Although Article 59 of the Statute of the International Court of Justice states that the ICJ's judgments 'has no binding force except between the parties and in respect of that particular case', the ICJ has developed rules of *de facto stare decisis* by 'closely following its earlier judgements'.[530] Relevant in this context is the holding of the ICJ in the *Cameroon—Nigeria* case that

528 See AB Report, *US—Stainless Steel (Mexico)* and Guillaume (2011), see above n 492.

529 Lisa L. Martin and Beth A. Simmons, *'International Institutions: An International Organization Reader'* (MIT Press, 2001), at 139.

530 August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Refl ections From the Perspective of Investment Arbitration', in Isabelle Buffard, James Crawford, Alain Pellet and Stephan Wittich (eds), '*International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*', (Brill, 2009), at 123.

it could depart from its own precedent if 'there is cause not to follow the reasoning and conclusions of earlier cases'.[531] It must be observed, however, that the ICJ has never explicitly departed from a prior judgment, having consistently chosen the options to implicitly overrule or distinguish the undesirable judgement.

The practice of implicit overruling is observed in a series of ICJ judgments concerning alternative methods of maritime delimitation.[532] One, often referred to as the equidistance method, requires that maritime boundaries between states follow a median line, every point of which is equidistant from the nearest points on the respective coasts. In contrast, the second method, which is result-oriented, requires application of equitable principles in order to achieve equitable results. In other words, tribunals are not bound by the aforementioned equidistance method and thus enjoy 'a significant degree of discretion which, however, comes at the cost of consistency and predictability'.[533]In its 1969 *North Sea Continental Shelf* ruling, the ICJ imposed a delimitation on the continental shelf in accordance with the second approach by 'taking account of all relevant circumstances,' including geological factors.[534] The choice of result-oriented approach seems to have caused uncertainty regarding maritime delimitation.[535]

The ICJ became aware of the problems and implicitly 'reversed its jurisprudence'.[536] It began with the 1985 *Libya—Malta* case in which the ICJ considered the equidistance line as the starting point for marine delimitation.[537] The result of equidistance method could be adjusted if such a correction is justified by geographic or other circumstances in order to achieve equitable results.[538] The large discretion conferred by the result-oriented approach is thus constrained by the preliminary use of equidistance method. This implicit overruling was confirmed and further generalised in the 2001 *Bahrain—Qatar* and 2009 *Romania—Ukraine* cases.[539] As a result,

531 ICJ Judgement, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, adopted on 11 June 1998, para. 28.

532 Guillaume (2011), see above n 492, at 11.

533 Alina Kaczorowska-Ireland, '*Public International Law (5th Edition)*', (Routledge, 2015), at 325.

534 ICJ Judgement, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, adopted on 20 February 1969.

535 'The law appeared increasingly uncertain and even arbitrary'. See Guillaume (2011), see above n 492, at 11.

536 ICJ Judgement, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, adopted on 3 June 1985, para 40.

537 Ibid., para 42.

538 Kaczorowska-Ireland (2015), above n 533, at 326.

539 Guillaume (2011), see above n 492, at 12. ICJ Judgement, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, adopted on 16 March 2001; ICJ Judgement, *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, adopted on 3 February 2009.

the ICJ 'abandoned' the original approach adopted in 1969 by 'successive strokes without recognizing its original mistake'.[540]

The use of implicit overruling and distinguishing is also apparent in a series of judgments concerning access to the ICJ by the Federal Republic of Yugoslavia (FRY), later Serbia and Montenegro, during the special period from 27 April 1992, when the FRY declared independence, to 1 November 2000, when it was admitted to the United Nations. By implicitly overruling and distinguishing precedents, the ICJ in a series of cases involving genocide claims found its jurisdiction over the FRY as a respondent but reached an opposite conclusion when the FRY was an applicant.

The first of these cases was brought by Bosnia and Herzegovina in 1993 against the FRY for alleged violations of the Genocide Convention. The ICJ determined in its 1996 judgment that it had jurisdiction over the FRY.[541] The reason is that when the FRY had, in asserting its independence, declared that it would abide strictly by all of the international commitments that the former Yugoslavia had entered into, this commitment included the Genocide Convention, Article IX of which permits a party to the convention to bring a case 'relating to the interpretation, application or fulfilment of the present Convention' before the ICJ. It is noteworthy that the FRY did not challenge the jurisdiction by arguing that it was not a member of the United Nations because the ICJ 'shall be open to the states parties to the present Statute' pursuant to Article 35(1) of the Statute.[542] The reason behind this strategy seemed to be consistent with the political narrative of the Milošević regime.[543]

After the change of the Milošević regime in 2000, the new FRY government abandoned the insistence on the FRY as a continuation of the Socialist Federal Republic of Yugoslavia and applied for membership of the United Nations as a new state. When the FRY was admitted to the United Nations as a new member, thereby establishing that it had not been a United Nations

---

540 Guillaume (2011), see above n 492, at 12.

541 ICJ Judgement, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, adopted on 11 July 1996, para 17.

542 '1. The Court shall be open to the states parties to the present Statute. 2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court. 3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court'.

543 Vojin Dimitrijević and Marko Milanović, 'The Strange Story of the Bosnian Genocide Case', 21(1) Leiden Journal of International Law (2008), at 72.

member in 1993, it challenged the above 1996 judgement.[544] By referring to Article 35(1) of the Statute, the FRY argued that the ICJ could not have asserted jurisdiction the FRY were not a member of the United Nations. Based on this change of fact, the FRY filed an application for revision of the 1996 judgment according to Article 61(1) of the Statute, which permits an application for revision of a judgment based on the discovery of decisive new factors. The ICJ did not, however, consider the FRY's membership in the United Nations in 2000 a decisive factor regarding the question of personal jurisdiction over it in the 1996 judgment. From the ICJ's perspective, the period from 1992 to 2000 was for the FRY '*sui generis*', during which the FRY considered itself bound by the Genocide Convention.[545] Thus the ICJ in its 2003 judgment ruled that the FRY's admission to the United Nations in 2000 did not constitute a new fact relating to potential revision of the 1996 judgment. It is noteworthy that Article 35(2) of the Statute permits the ICJ's jurisdiction over a non-party to it 'subject to the special provisions contained in treaties in force'. In this context, the 2003 judgment appears to suggest that Article IX of the Genocide Convention meets the requirements under Article 35(2) and thus extends the jurisdiction of the ICJ over the FRY as a non-member of the United Nations or a non-party to the Statute.[546]

A different approach involving the option of implicitly overruling was taken, however, in a later case, which this time was brought by the FRY against ten member States of NATO for the military bombing of the territory of Yugoslavia and other alleged violations of international law.[547] Following the 2003 judgment just described, although several respondents claimed that the FRY 'cannot rely on its acquiescence as respondent in one case in order to found jurisdiction as Applicant in this case',[548] the FRY argued that the ICJ should have personal jurisdiction over it as a party to Article IX of the Genocide Convention pursuant to Article 35(2) of the Statute. Concerning this argument, the ICJ, with reference to the drafting history,

544 UN Security Council, *3116th Meeting Resolution S/RES/777*, adopted on 16 September 1992; UN General Assembly, *Recommendation of the Security Council of 19 September 1992*, A/RES/47/1, adopted on 22 September 1992.

545 ICJ Judgement, *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)*, adopted on 3 February 2003, paras 54–64.

546 Ibid.

547 ICJ Judgements, *Legality of Use of Force (Serbia and Montenegro v. Belgium); Legality of Use of Force (Serbia and Montenegro v. Canada); Legality of Use of Force (Serbia and Montenegro v. France); Legality of Use of Force (Serbia and Montenegro v. Germany); Legality of Use of Force (Serbia and Montenegro v. Italy); Legality of Use of Force (Serbia and Montenegro v. Netherlands); Legality of Use of Force (Serbia and Montenegro v. Portugal); Legality of Use of Force (Yugoslavia v. Spain); Legality of Use of Force (Yugoslavia v. United States of America)*, adopted on 15 December 2004.

548 ICJ Judgement, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, adopted on 15 December 2004, para 97.

interpreted the term 'treaties in force' under Article 35(2) restrictively and held that it only applied to the treaties in force by the date on which the ICJ Statute itself had entered into force (24 October 1945).[549] Accordingly, the Genocide Convention, which entered into force on 12 January 1951, was found to be irrelevant to this case. The ICJ thus in its 2004 judgment concluded that it had lacked jurisdiction over the case brought by the FRY (Serbia and Montenegro in 2004) because the latter did not, at the time of the institution of the present proceedings, namely 1999, have access to the ICJ under either Article 35(1) of the Statute, namely being a state party to the ICJ Statute, or Article 35(2), namely 'subject to the special provisions contained in treaties in force'. This 2004 judgment thus seemed to implicitly overrule the above 2003 case in which the ICJ found its jurisdiction over the FRY on the basis of Article IX of the Genocide Convention. According to a judge ad hoc in the 2003 case, a possible reason behind this overruling is that 'the Court which sat in 2004 was not the same Court which sat in 2003' and the majority had formed in 2004 within the ICJ wanted to use the 2004 case to 'sink' the 2003 judgement.[550]

This 2004 judgment was, however, distinguished in a third case, this one brought by Croatia against the FRY for alleged violations of the Genocide Convention in 1999. Croatia invoked Article IX of the Convention as the basis for the Court's jurisdiction. During the proceedings, with reference to the 2004 judgment, the FRY raised preliminary objections to the jurisdiction of the ICJ on the grounds that Croatia had filed its application before the FRY had been admitted to the United Nations, when it was not a party to the Statute, so that the conditions under Article 35(2) of the Statute were not met. While recognizing that some of the facts and legal issues that had been dealt with in the previous cases were relevant to the present case, the ICJ considered that, since none of those decisions were given between the same parties of the present case, by virtue of Article 59 of the Statute, the previous judgments had no effect of *res judicata* on the present case.[551] Concerning the question of whether the conditions under Article 35(2) of the Statute were met, departing from its approach in the 2004 judgment, the ICJ did not emphasize the legal status of the FRY (then Serbia) in relation to the Statute at the time of the filing of the application.[552] Instead, the ICJ held that there were certain situations in which realism and flexibility were called for to determine the jurisdiction. Thus, because Croatia could have instituted a new proceeding to overcome the issue of access, the question of access

549 Ibid., para 96.

550 Vojin Dimitrijević and Marko Milanović, 'The Strange Story of the Bosnian Genocide Case', 21(1) Leiden Journal of International Law (2008), at 82.

551 ICJ Judgement, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), adopted on 18 November 2008, para 53.

552 Ibid., para 58.

should not be an obstacle to the ICJ's jurisdiction.[553] Subsequently, the ICJ drew a distinction between the 2004 judgment and Croatia's case based on the fact that the FRY was the applicant in the former case but the respondent in the latter. The ICJ also relied on two further facts in reaching its conclusion. First, Croatia had exercised care in instituting the proceedings, doing so at a time when the FRY had filed the cases against NATO countries. Apparently, the FRY considered that it had the capacity to participate in the Court's proceedings. Second, because Croatia had submitted its Memorial after 2000, the ICJ concluded that the conditions under Article 35(1) had been satisfied and that it thus had jurisdiction over the FRY.[554]

The above assessment shows that, like the AB, the ICJ has also never explicitly overruled a prior judgment. In order to introduce flexibilities, it chooses to implicitly overrule or distinguish precedent.

7.1.2.2.2 International Criminal Tribunal for the Former Yugoslavia (ICTY)

The ICTY Statute is silent on the issue of *stare decisis*. The ICTY Appeals Chamber in the *Aleksovski* case appeared to support the rules of *de facto stare decisis* by emphasising the 'interests of certainty and predictability' to follow its previous judgements.[555] In the same case, however, the Appeals Chamber also held that it should be free to depart from the previous judgements for 'cogent reasons in the interests of justice' which refers to two situations: first, a previous decision has been decided 'on the basis of a wrong legal principle', and, second, a previous decision 'has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law".'[556] In practice, the Appeals Chamber has explicitly reversed previous holdings in several cases.

In *Kordić and Čerkez*, for instance, the Appeals Chamber explicitly overruled its judgements in *Vasiljević* and *Krstić* about the permissibility of cumulative convictions based on the same act.[557] In the latter cases, the Appeals Chamber held that the same conduct should not be convicted of both murder and persecution under Article 5 of the Rome Statute of the International Criminal Court (ICTY Statute) because the offence of murder

553 Ibid., paras 79–90.

554 Therefore, 'the Court's jurisprudence on the question of access in these cases with regard to Serbia's status cannot be deemed consistent and coherent'. See Hanqin Xue, 'Competent Parties—Jurisdiction ratione personae', in '*Jurisdiction of the International Court of Justice*', (Brill, 2009), at 152.

555 Appeals Chamber Judgement, *Prosecutor v. Zlatko Aleksovski*, adopted on 30 May 2001, paras 107-108.

556 Ibid.

557 Appeals Chamber Judgement, *Prosecutor v. Dario Kordić and Mario Čerkez*, adopted on 17 December 2004, para 1040.

is subsumed by that of persecution.[558] This finding was considered to incorrectly apply the legal test relating to cumulative convictions as set out in the Čelebići case which permitted multiple convictions on the basis of the same conduct provided that this conduct related to distinct crimes of which each one under a provision of the ICTY Statute contains 'a materially distinct element not contained in the other'.[559] Thus, through the correction of the *Vasiljević* and *Krstić* judgements, the Appeals Chamber further clarified the standards of Čelebići test emphasising the legal elements of each crime at issue rather than on the underlying conduct of the accused in order to 'ensuring that the convictions entered fully reflect his criminality'.[560]

Similarly in Žigić, the Appeals Chamber explicitly overruled its Čelebići judgement that permitted a reconsideration of a final judgement.[561] In the Appeals Chamber's view, unlike the review proceedings that require a party to provide 'evidence of a new fact', the application for such reconsideration only requires a party to assert an Appeal Judgement is in error 'allowing in effect the submission of a second appeal'.[562] The right to such reconsideration could be easily abused as evident in the Žigić case in which Mr. Žigić makes 'no serious attempt to establish the existence of a clear error' but merely to file 'frivolous application'.[563] To protect the 'the interests of justice' to the victims or convicted person, the Appeals Chamber, thus, concluded that that there was no mechanism to reconsider a final judgment other than the review process foreseen by the ICTY Statute.[564]

A more recent example is the 2013 *Perišić* case, in which the majority of the Appeals Chamber held that 'specific direction remains an element of the *actus reus* of aiding and abetting liability' and that 'no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt'.[565] Judge Liu offered a dissenting opinion and, one year later, as presiding judge joined with other judges in the 2014 Šainović et al. case to explicitly overrule the *Perišić* Appeal Judgement,

---

558 Appeals Chamber Judgement, *Prosecutor v. Mitar Vasiljevic*, adopted on 25 February 2004, para 146; Appeals Chamber Judgement, *Prosecutor v. Radislav Krstic*, adopted on 19 April 2004, para 231.

559 *Dario Kordi and Mario Cerkez*, above n 557.

560 Ibid., para 1033.

561 Appeals Chamber Decision on Zoran Žigić's Motion for Reconsideration of Appeals Chamber Judgement, adopted on 26 June 2006, para 9. 'In light of these considerations, the Appeals Chamber has come to the view that cogent reasons in the interests of justice demand its departure from the majority opinion in the *Čelebići* Judgement on Sentence Appeal'.

562 Ibid., para 8.

563 Ibid.

564 Ibid., para. 9.

565 Appeals Chamber Judgement, *Prosecutor v. Momčilo Perišić*, adopted on 28 February 2013, para 36.

stating that the finding, namely specific direction is an element of the *actus reus* of aiding and abetting liability, in the *Perišić* is 'in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard'.[566]

The Trial Chambers, on the other hand, unlike the Appeals Chambers, tend to distinguish a precedent when compelled to depart from it.[567] For example, the Trial Chamber was required to examine whether the Yugoslav Peoples' Army artillery attack against the Old Town of Dubrovnik on 6 December 1991 should be convicted of the offences of (a) devastation not justified by military necessity, (b) unlawful attacks on civilian objects, and (c) destruction or wilful damage of cultural property.[568] After acknowledging that the Appeals Chamber case law, namely the abovementioned Č*elebići* test, 'on a theoretical basis', would support finding cumulative convictions for those three offences due to their materially distinct elements,[569] the Trial Chamber held that the 'essential criminal conduct' in the present case is 'directly and comprehensively reflected' in the third offence, namely destruction or wilful damage of cultural property.[570] Thus, by emphasizing the 'particular circumstances' concerning the offences at issue, the Trial Chamber, explicitly amending the Čelebići test, found that the conduct at issue would only lead to the conviction of destruction or wilful damage of cultural property for 'the interests of justice and the purpose of punishment'.[571]

The above practice of the Appeals Chambers shows that, when a judicial institution is compelled to depart from a prior decision, it may bravely admit that a previous ruling was flawed. This provides the AB with support to adopt the option of explicit overruling. Moreover, given that both the Appeals Chambers and the AB are the highest appeal institutions, the different approaches between the Appeals Chambers and the Trial Chambers suggests that, if necessary, the AB could take a bolder step than a panel by explicitly correcting its prior decisions.

---

566 Appeals Chamber Judgement, *Prosecutor v. Nikola Sainovic, Nebojsa Pavkovic, Vladimir Lazarevic and Sreten Lukic*, adopted on 23 January 2014, paras 1649-1651.

567 'As regards Trial Chambers, they have generally taken for granted the need to abide by Appeals Chambers' holdings'. See Guido Acquaviva, Fausto Pocar, 'Stare decisis', Max Planck Encyclopedias of International Law, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1683?prd=EPIL (visited on 1September 2019).

568 Trial Judgement, *Prosecutor v. Pavle Strugar*, adopted on 31 January 2005, para 452.

569 Ibid., para 452.

570 Ibid., para 454.

571 Ibid., para 455.

7.1.2.3 Practice of regional tribunals

7.1.2.3.1 European Court of Human Rights (ECtHR)

Like the ICTY and the ICJ, the ECtHR has developed rules of *de facto stare decisis* for 'the interests of legal certainty', 'the orderly development of the Convention case-law' and 'foreseeability and equality before the law'.[572] It has been argued that 'the original Court was extremely reluctant to expressly overrule established interpretations of the Convention'.[573] The option of implicit overruling is thus applied in a number of old cases. For instance, the Court in *Huber* held that to provide district attorneys with multifarious roles of investigator, authoriser of detention, and prosecutor was inconsistent with inconsistent with Article 5(3) of the Convention regarding the independence of judicial officer.[574] This conclusion is sharply contrary to a prior judgement, namely *Schiesser*, according to which another district attorney in a similar situation was found consistent with Article 5(3).[575] The Court thus implicitly overruled *Schiesser* 'by not expressly acknowledging that they were overruling their earlier case law'. Another example is the *Borgers* case in which the participation of the Belgian avocat general in the deliberations of the Court of Cassation was found inconsistent with the fair trial commitments under Article 6(1) of the Convention,[576] despite that such practice was permitted according to the prior judgment of *Delcourt v Belgium*.[577]

The contemporary Court appears more willing to adopt the option of explicit overruling. For instance, in order to increase legal certainty regarding the scope of 'civil rights and obligations' under Article 6(1) of the Convention, the Court in *Pellegrin v France* explicitly overruled it case-law which 'contains a margin of uncertainty'.[578] The Court thus adopted a functional criterion approach based on which it 'wishes to put an end to the uncertainty which surrounds application of the guarantees of Article 6(1) to disputes between States and their servants'.[579] Eight years later in *Vilho Eskelinen and Others*, this functional criterion approach was, however, found unable to bring about 'a greater degree of certainty in this area as intended'.[580] The Court thus explicitly overruled the *Pellegrin* approach by

572 *Cossey v. the United Kingdom* [1991] 13 EHRR 622, ECHR 21, para 35.
573 Alastair Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law', 9(2) Human Rights Law Review (2009), at 183.
574 *Huber v. Switzerland* [1990] A 188, para 43.
575 *Schiesser v. Switzerland* [1979] 2 EHRR 417.
576 *Borgers v. Belgium* [1993] 15 EHRR 92.
577 *Delcourt v. Belgium* [1970] 1 EHRR 355, para 29.
578 *Pellegrin v France* [1999] 31 EHRR 26, para 60.
579 Ibid., para 61.
580 *Vilho Eskelinen and Others v. Finland* [2007] 45 EHRR 985, ECHR 2007-II, para 55.

introducing a new test to determine the applicability of Article 6(1) to civil servants.[581]

Another example is the *Kudla* case regarding unreasonable delays in the determination of judicial cases by national courts. Although both Article 6(1), right to 'a fair and public hearing within a reasonable time', and Article 13, right to 'an effective remedy before a national authority', of the Convention could potentially apply to such complaints, the Court previously declined to apply the latter provision which imposed less stringent requirements than Article 6(1).[582] This original approach was reconsidered 'forcing applicants to bring their Article 6(1) unreasonable delay complaints to Strasbourg rather than having them resolved domestically'.[583] Given 'the continuing accumulation of applications',[584] the Court thus in *Kudla v Poland* explicitly overruled its prior judgements by recognising 'the need to examine the applicant's complaint under Article 13 taken separately, in addition to its earlier finding of a violation of Article 6(1)'.[585] In other words, the application of Article 13 would require 'States to establish effective domestic remedies to deal with complaints of unreasonable delay in court proceedings'.[586]

The Court may also explicitly overrule precedent 'to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions'.[587] Illustrative in this context is the *Christine Goodwin* case, which concerned Article 8 of the Convention on respect for private life. The applicant in the case argued that the government of the United Kingdom had violated this provision by failing to recognize her gender reassignment.[588] The relevant precedents, such as the *Rees* judgement of 1986, suggested that the government's refusal to alter the register of births or to issue new birth certificates updating individuals' gender status could not be considered a prohibited interference with the right to respect for private life under Article 8.[589] However, after recognizing that 'it should not depart, without good reason, from precedents laid down in previous cases', the Grand Chamber in 2002 held that its interpretation must also take into account 'the changing conditions' within the contracting states and to

581 Ibid., para 56.
582 *Kudla v. Poland* [2002] 35 EHRR 11, para 146. For instance, *Kamasinski v. Austria* [1991] 13 EHRR 36.
583 Mowbray (2009), above n 573, at 192.
584 *Kudla*, above n 582, para 148.
585 Ibid., para 149.
586 Mowbray (2009), above n 573, at 192.
587 *Goodwin and Liberty (intervening) v. United Kingdom* [2002] 35 EHRR 447, ECHR 2002-VI, para 60.
588 Ibid.
589 *Rees v. United Kingdom* [1987] 9 EHRR 56. *Cossey v. the United Kingdom* [1991] 13 EHRR 622, ECHR 21.

ensure that the rights under the Conventions continued to be 'practical and effective' by maintaining 'a dynamic and evolutive approach'.[590] Thus, by looking at the 'present-day conditions',[591] the Grand Chamber explicitly overruled its precedents by holding that the appropriate interpretation and application of the Conventions should favour the applicant in the present case and thus found that the respondent government was in violation of its obligation under Article 8.[592]

In addition to the above examples of explicitly and implicitly overruling, Chambers of the ECtHR once adopted the option of distinguishing in the *Kopecký* case which concerned an applicant's claim for the restitution of coins belonging to his father. The key issue in this case was whether the applicant had in his possession the coins under the meaning of Article 1 of Protocol No. 1 to the European Convention on Human Rights, which states that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions'.[593] A Chamber of the ECtHR held that the 'present case should be distinguished from the case law' in which the applicants 'were excluded from the very beginning from the possibility of having the property restored' and on which the claims 'did not amount to a legitimate expectation'.[594] In the present case, however, a 'genuine dispute' was found to exist regarding whether the applicant could meet the requirements of the measure at issue, and thus the Court found that the applicant had a 'legitimate expectation' of obtaining effective enjoyment of the property right at issue.[595] In the view of the Chamber, the use of distinguishing in this case aimed to prevent the protection of the rights under the European

590 *Goodwin*, above n 587, para 74.

591 Ibid., para 75.

592 Ibid., para. 93. 'While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved' (para 74).

593 Article 1 of Protocol No. 1 to the European Convention on Human Rights.

594 *Kopecký v. Slovakia* [2005] 41 EHRR 43, ECHR 2004-IX, para 27.

595 Ibid., para 27. 'In this respect the present case should be distinguished from the cases of *Malhous v. the Czech Republic* and *Gratzinger and Gratzingerova v. the Czech Republic* referred to above or the case of Brezny & Brezny v. Slovakia (application no. 23131/93, Commission decision of 4 March 1996, DR 85, pp. 65-83) in which the Court and the Commission respectively found that the applicants' claims for restitution of property did not amount to a legitimate expectation in the sense of the Court's case-law. In those cases the applicants were excluded from the very beginning from the possibility of having the property restored as it was obvious either that they failed to meet the relevant requirements or that their claim clearly fell outside the relevant law'.

Conventions on Human Rights and its protocols from being revealed 'ineffective and illusory'.[596] This judgement was, however, reversed by the Grand Chamber.[597]

Besides offering support to the option of overruling and distinguishing, the above practice also provides a useful observation of the interaction between the Grand Chamber and a Chamber. The former one does not only correct the decisions made by a Chamber, but also has no hesitation in departing from its own inappropriate judgements. In contrast, although the AB has explicitly reversed the panel reports in several occasions,[598] it has never explicitly departed from its prior decisions. This reluctance to have any self-corrections could explain the extremist stance of the US to deny the precedential values of the AB reports. In this context, the AB may have additional reasons to consider the option of overruling in a future case.

7.1.2.3.2 Court of Justice of the European Union (CJEU)

The CJEU supports the rules of *de facto stare decisis* as 'there are passages in the judgements where the weights and the number of the previous decisions seen almost to be felt to be such as to make them binding in fact, if not in theory'.[599] In practice, the Court has explicitly overruled its previous decisions in several occasions. A good example is the change in the doctrine of common origin from the *HAG I* case to the *HAG II* case. *HAG 1* concerned the 'Hag' trademark on decaffeinated coffee that was registered by the German firm Hag AG in both Germany and Belgium in the early twentieth century; a Belgian 'Hag' trademark was subsequently assigned to a Belgian subsidiary of the German firm, namely Hag S.A. After the Second World War, Hag S.A. was seized by the Belgian government, and the Belgian 'Hag' trademark was assigned by Hag S.A. to Van Zuylen Frères. When Hag AG began to export its German 'Hag' decaffeinated coffee to Luxembourg in 1972, Van Zuylen Frères, defending its Benelux 'Hag' trademark, brought a case in Luxembourg to stop the import of the German product. Seeking to promote the free movement of goods, the Court in *HAG I* held that a

596 Ibid., para 29.

597 The Grand Chamber Judgement, *Kopecký v Slovakia*, adopted on 28 September 2004, para 52.
'In the light of the foregoing it can be concluded that the Court's case-law does not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by Article 1 of Protocol No. 1. The Court is therefore unable to follow the reasoning of the Chamber's majority on this point.'

598 For instance, the AB in the *US—Stainless Steel (Mexico)* case expressed deep concern over what it viewed as 'serious implications for the proper functioning of the WTO dispute settlement system' caused by the panel's decision to 'to depart from well-established AB jurisprudence clarifying the interpretation of the same legal issues'.

599 Gunnar Beck, 'The Legal Reasoning of the ECJ II' in '*The legal reasoning of the Court of Justice of the EU*', (Hart Publishing, 2013), at 238.

prohibition based solely on identical marks having a common origin would be incompatible with EU law, an approach often referred to as the doctrine of common origin.[600]

Years after the *HAG I* judgment, CNL-Sucal, the successor of Van Zuylen Frères, began to export its 'Hag' decaffeinated coffee from Belgium to Germany. In the *HAG II* case, Hag AG sought to exercise its German trademark rights in order to prohibit imports of Belgian 'Hag' decaffeinated coffee into Germany. This time, the Court held 'it necessary to reconsider the interpretation' in *HAG I* 'in the light of the case-law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods.[601] Subsequently, the Court found that the doctrine of common origin did not apply to situations in which the event separated a trademark from its original owner without the owner's consent. Thus, the *HAG II* judgment explicitly repeals the *HAG I* judgment by replacing the doctrine of common origin with the doctrine of 'consensual' common origin.[602] A possible reason behind this overruling is that 'the ruling in *HAG I*, which had been delivered sixteen years earlier, was out of step with subsequent developments in the case law on intellectual property rights and out of step with the evolving perception of the internal market'.[603]

A more recent example of explicit overruling was the 2008 *Metock* case, which concerned the question whether Directive 2004/38 regarding the right of EU citizens and their family members to move and reside freely within the EU precluded member states from requiring that a non-EU citizen have had prior lawful residence in order to benefit from its provi-

600 ECJ, Case 192–73 *Van Zuylen fr`eres v. Hag ('HAG I')* [1974] ECR 731.

601 Case C-10/89 *S.A. CNL-Sucal NV v. Hag GF AG ('HAG II')* [1990] ECR 3711, para 10. 'Bearing in mind the points outlined in the order for reference and in the discussions before the Court concerning the relevance of the Court's judgment in Case 192/73 Van Zuylen v HAG [1974] ECR 731 to the reply to the question asked by the national court, it should be stated at the outset that the Court believes it necessary to reconsider the interpretation given in that judgment in the light of the case-law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods'.

602 Robert S. Smith, 'The Unresolved Tension Between Trademark Protection and Free Movement of Goods in the European Community', 3 Duke Journal of Comparative & International Law (1992), at 122. 'Reviewing the case law of the ECJ and stressing the importance of the economic function of trademarks, Advocate General Jacobs proposed that the doctrine of common origin lacked any foundation in the EEC Treaty. Insofar as the facts of *Hag II* were concerned, the EC agreed', at 111.

603 Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?', in Julie Dickson and Pavlos Eleftheriadis(eds.), '*Philosophical Foundations of European Union Law*', (Oxford University Press, 2008), at 317.

sions.[604] In the 2003 *Akrich* case regarding Regulation No. 1612/68, which was subsequently amended by Directive 2004/38, the Court held that, in order to benefit from Article 10 of the regulation concerning the right to join an EU citizen employed in a different member state, a non-EU citizen spouse must indeed have had prior lawful residence in a member state.[605] However, the Court in *Metock* held that the 2003 judgment 'must be reconsidered' and thus explicitly overruled itself by concluding that the benefit of the right under Directive 2004/38 'cannot depend on the prior lawful residence of such a spouse in another Member State'.[606] This explicit departure is further apparent in the subsequent *Sahin* case, in which the Court affirmed the conclusion in *Metock* and made no mention of *Akrich*.[607]

Aside from the above examples, the Court also adopted the option of explicit overruling in other cases such as *Brown v Rentokil Ltd*[608] in which the Court explicitly overruled *Larsson*[609] in order to interpret the Sex Equality Directive more favourably for pregnant employees.[610] However, it would be incorrect to say that the Court is quite willing to overrule its precedents as a former Advocate General once stated: 'express departures from earlier cases are "as few as they are celebrated"'.[611] Thus, for example, a survey demonstrated that none of the fifty-two Grand Chamber' decisions of 2010, in which nearly 1,000 citations were made to previous cases, explicitly overruled its prior jurisprudence.[612] The following discussion introduces the practice of the Court to use the other two options to deviate from case law, namely implicit overruling and distinguishing.

---

604 ECJ, Case 127/08 *Blaise Baheten Metock and ors v. Minister for Justice, Equality and Law Reform* [2008] ECR 6241.

605 ECJ, Case 109/01 *Secretary of State for the Home Department v. Hacene Akrich* [2003] ECR 9607, para 50.

606 Ibid., para 58. 'It is true that the Court held in paragraphs 50 and 51 of Akrich that, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State (see, to that effect, *MRAX*, paragraph 59, and Case C-157/03 *Commission v Spain*, paragraph 28)'.

607 ECJ, Case 551/07 *Deniz Sahin v. Bundesminister fur Inneres* [2008] ECR I-10453.

608 ECJ, Case 394/96 *Brown v Rentokil Ltd* [1998] ECR I-4185

609 ECJ, Case 400/95 *Larsson v Føtex Supermarked* [1997] ECR I-2757.

610 More examples of explicit overruling see Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?', in Julie Dickson and Pavlos Eleftheriadis(eds.), '*Philosophical Foundations of European Union Law*', (Oxford University Press, 2008), at 316.

611 Marc Jacob, 'Avoiding ECJ precedents II', in '*Precedents and Case-Based Reasoning in the European Court of Justice*', (Cambridge University Press, 2014), at 159.

612 Ibid., at 160.

As an example of implicit overruling,[613] the Court in *Wouters* simply ignored the *Métropole* judgment and reached an opposite conclusion.[614] In *Métropole*, the Court rejected to balance the pro and anti-competitive effects under Article 101(1) TFEU and held that 'it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement'.[615] In the Court's view, an analysis of the pro and anti-competitive effects 'can take place only in the specific framework' of Article 101(3) TFEU.[616] This refusal to balance the pro and anti-competitive effects under Article 101(1) was implicitly overruled in *Wouters* in which the Court accepted the pro and anti-competitive effects approach by holding that, in examining the application of Article 101(1) to a particular case, 'account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects' and 'it has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives'.[617] This implicit overruling was confirmed in *Meca-Medina*.[618]

The option of distinguishing is also attractive for the Court because it 'does not challenge a previous decision outright'.[619] The Court thus in *Keck* chose to distinguish its earlier judgements in order to limit the scope of concerning measures equivalent to quantitative restrictions (MEQRs) under Article 34 TFEU. MEQRs are more difficult to define than quantitative restrictions,[620] but in the *Dassonville* case, the Court found them to refer broadly to all rules with the potential to hinder intra-community trade.[621] According to this definition, the key to proving that a MEQR is operative is its effect, so

613 More examples of implicit overruling see Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?', in Julie Dickson and Pavlos Eleftheriadis(eds.), '*Philosophical Foundations of European Union Law*', (Oxford University Press, 2008), at 320.

614 ECJ, Case 309/99 *Wouters and Others* [2002] ECR I-1577.

615 ECJ, Case T-112/99 *Métropole télévision (M6) v Commission* [2001] ECR II-2459, para 107.

616 Ibid.

617 ECJ, Case 309/99 *Wouters and Others* [2002] ECR I-1577, para 97.

618 ECJ, T-313/02 *David Meca-Medina and Igor Majcen v. Commission* [2004] ECR II-3291 and Case 519/04 *David Meca-Medina and Igor Majcen v. Commission* [2006] I-6991, para 42. 'Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (*Wouters and Others*, paragraph 97) and are proportionate to them'.

619 Jacob (2014), above n 611, at 127.

620 Paul Craig and Gráinne de Búrca, '*EU Law – Text, Cases, and Materials*', Sixth Edition (Oxford University Press, 2011), at 639.

621 ECJ, Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837, para 5.

discriminatory intent is not required.[622] This broad view was affirmed by the Court in the *Cassis de Dijon* case, in which it further clarified the nature of MEQRs as national rules that inhibit trade and that thus differ from rules applicable within a country of origin, regardless of whether they discriminate against imported products.[623] Following the *Dassonville* and *Cassis de Dijon* judgments, an increasing number of traders began invoking Article 34 to challenge any rules perceived to limit their commercial freedom.[624]

This broad definition of MEQRs was narrowed in *Keck* in order to address concerns regarding potential abuse of Article 34.[625] This case involved two traders who, in an effort to increase their market share, sold coffee in France below cost, a type of transaction forbidden under French law. Their activity thus raised the question of of whether the French rules governing such a selling arrangement fell within the scope of (now) Article 34 TFEU. Had the broad definition of MEQRs under the *Dassonville* and *Cassis de Dijon* judgments been followed, the French rules at issue would indeed have been subject to this article. The Court, however, decided to 're-examine and clarify its case-law' by explicitly distinguishing between MEQRs and selling arrangements from the perspective of burden-sharing.[626] It held that 'by contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'.[627] That is to say, MEQRs that apply to all goods would likely still impose an extra burden on imported goods, whereas rules concerning selling arrangements would impose a similar burden on all goods, provided that these rules affect domestic and imported goods.[628] Based on this distinction, then, the Court limited the scope of the *Dassonville* and *Cassis de Dijon* judgments.

622 Craig (2011), above n 483, at 640.
623 ECJ, Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, para 8.
624 ECJ, Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECRI-6097, para 14.
625 'In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter'. Ibid.
626 Ibid., paras 15-17.
627 Ibid., para 16.
628 Ibid., paras 15-16.

A controversial example of the use of distinguishing, in a series of judgments regarding national procedural autonomy, shows that this technique can severely restrict the scope of a precedent. The case here is *Emmott*, in which the plaintiff, an Irish citizen, applied for a judicial review of her right to receive a retrospective social security payment under Directive 79/7/EEC for the period of time during which the directive had remained unimplemented. Her claim had been rejected because she had failed to apply for such a review 'within three months from the date when grounds for the application first arose'.[629] The Court, however, held that this time-limit requirement was inconsistent with EU law, reasoning that the national time-limits within which proceedings must be initiated by an individual against a defaulting member state for the purpose of protecting rights under a directive must run from the proper date on which the directive had been implemented.[630] Broadly speaking, the *Emmott* judgment could be considered to apply to all time-limit requirements that prevent individuals from enjoying the full extent of their rights under a directive owing to improper implementation of that directive by a member state.[631] Thus, the rationale behind this ruling could be that member states should not profit from their own failure to implement a directive by relying on time-limit requirements in national laws.[632]

However, critics of this judgment seem to have prevailed over time, for the Court ended up increasingly distancing itself from *Emmott*.[633] Thus the Court distinguished it in the subsequent *Steenhorst-Neerings* case with the argument that *Emmott* concerned 'the rule of domestic law fixing time-limits for bringing actions', but *Steenhorst-Neerings* concerned only the restriction of the retroactive effect of benefits claims to one year before they had been brought and imposed no restriction on the right of individuals to initiate a proceeding in order to protect the right under the directive.[634] The Court thereby limited the scope of the *Emmott* judgment to the time limit imposed on the initiation of judicial proceedings rather than that imposed on the retroactive effect of benefits claims while maintaining that the latter could also prevent an individual, at least in part, from enjoying his or her rights under a directive.[635]

---

629 Ibid., para 13.

630 ECJ, Case 208/90 *Theresa Emmott v. Minister for Social Welfare and Attorney General* [1991] ECR I-4269, para 23.

631 'Only the proper transposition of the directive will bring that state of uncertainty to an end and it is only upon that transposition that the legal certainty which must exist if individuals are to be required to assert their rights is created'. Ibid., para 22.

632 Nicola Notaro, 'Case C-188/95, *Fantask A/S and Others v. Industriministeriet (Erhvervsministeriet)*, Judgment of 2 December 1997, [1997] ECR I-6783', 35(6) Common Market Law Review (1998), at 1391.

633 Jacob (2014), above n 611, at 140.

634 ECJ, Case 338/91 *H. Steenhorst-Neerings v. Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475, para 21.

635 Notaro (1998), above n 632, at 1392.

The scope of *Emmott* was further restricted in the *Johnson* case, which shared similar facts with *Steenhorst-Neerings*.[636] Referring to the latter case, the Court held that the *Emmott* judgment could only apply to *Emmott*'s 'particular circumstances', which included a time limit that deprived the plaintiff of any opportunity to seek her right under the directive.[637] Like the time limit in *Steenhorst-Neerings*, the requirement in *Johnson* 'did not affect the right of individuals to rely on' the directive, which thus did not fall within the scope of the *Emmott* judgment.[638] The latter was thus limited to the restriction imposed on the initiation of judicial proceedings that absolutely prevented an individual from relying on a directive.

The *Fantask* case has been described as 'the final stage of what could be called the step-by-step overruling of the *Emmott* judgment'.[639] Unlike the time limit imposed on the retroactive effect of benefit claims in *Steenhorst-Neerings* and *Johnson*, the time limit in *Fantask* concerned the right to apply for refunding charges that had been levied erroneously under Directive 69/335/EEC of 17 July 1969 (amended by Council Directive 85/303/EEC of 10 June 1985), which imposed a harmonized duty on the raising of capital by companies and prohibited any other charge relating to the registration of companies. Relying on this directive, Fantask, a Danish firm, and several other companies in 1992 asked the Trade and Companies Office to refund certain charges that they had paid in the period from 1983 to that year. Under Danish law, however, a debt becomes statute-barred after five years running from the date on which it became payable.

Subsequently, the Court was asked to decide whether the time limit for the refund action could extend prior to the date on which Denmark actually implemented the directive. The applicants and the commission argued that a limitation period under a national law should not have commenced until the Directive had been properly transposed; their reasoning was that the *Emmott* judgment indicated that a member state could not rely on a limitation period under a national law as long as the directive in question had not been properly transposed into national law.[640] The Court, however, with reference to the *Steenhorst-Neerings* and the *Johnson* judgments, held that, irrespective of the date of transposition, the time limit at issue commenced on the date on which charges became payable, provided that it was not discriminatory and did not interfere significantly with the exercise of EU

636 ECJ, Case 410/92 *Elsie Rita Johnson v. Chief Adjudication Officer* [1994] ECR I-5483, paras 26–27.
637 Ibid., para 26.
638 Ibid., paras 28 and 36.
639 Notaro (1998), above n 632, at 1390.
640 ECJ, Case 188/95, *Fantask A/S and Others v. Industriministeriet (Erhvervsministeriet)*[1997] ECR I-6783, para 45.

rights.[641] Following this judgment, the applicants lost the right to claim a refund of charges that had erroneously been levied under the directive at issue because the time limit for some of the applications for repayment had expired.[642] Thus, by restricting the scope of the *Emmott* judgment to the 'particular circumstances', the Court arguably overruled the *Emmott* judgment 'in all but name' in an implicit manner.[643]

A more recent example of distinguishing is the *Alimanovic* case in which the Court narrowed the scope of the *Brey* judgement. In *Brey*, the Court had established the individual's personal situation test which required national authorities, in examining whether a person receiving social assistance had become an unreasonable burden on its social assistance system, to 'carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned'.[644] This test was amended by the *Alimanovic* case in which the Court, acknowledging the *Brey* judgement, held that 'no such individual assessment is necessary in circumstances such as those at issue in the main proceedings'.[645]

The above practice shows that the Court has adopted the options of explicit overruling, implicit overruling, and distinguishing to deviate from its previous judgments. Moreover, the series of judgments regarding national procedural autonomy shows that the use of distinguishing can severely restrict the scope of precedent.

---

641 'It is true that the Court held in *Emmott*, at paragraph 23, that until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time' (para 50). 'However, as was confirmed by the judgment in Case C-410/92 *Johnson v Chief Adjudication Officer* [1994] ECR 1-5483, at paragraph 26, it is clear from Case C-338/91 *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR 1-5475 that the solution adopted in Emmott was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive (see also *Haahr Petroleum*, cited above, paragraph 52, and Joined Cases C-114/95 and C-115/95 *Texaco and Olieselskabet Danmark* [1997] ECR 1-4263, paragraph 48)'. Ibid., para 51.

642 Ibid., para 44.

643 Jacob (2014), above n 611, at 142.

644 ECJ, Case 140/12 *Brey* [2013] EU:C:2013:565, para 64.

645 ECJ, Case 67/14 *Alimanovic* [2015] EU:C:2015:597, para 59. 'It must be stated in this connection that, although the Court has held that Directive 2004/38 requires a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system (judgment in Brey, C-140/12, EU:C:2013:565, paragraphs 64, 69 and 78), no such individual assessment is necessary in circumstances such as those at issue in the main proceedings'.

7.1.2.4 Practice of national tribunals

7.1.2.4.1 Common law system: United Kingdom

In the United Kingdom, the Supreme Court (HoL) had been absolutely bound to follow all of its previous decisions since its 1898 decision of *London Tramways Co Ltd v London Country Council* which committed the Lords to the rule that they were irreversibly bound by their own prior decisions.[646] Under the constraint of this rule, the HoL needed to rely on the option of distinguishing to depart from precedent. For instance, in the case of *Quin v Leatham*, Lord Shand explicitly distinguished between, on the one hand, the 1898 decision of *Allen v Flood*, in which the defendant representing a group of ironworkers persuaded their employers to stop employing the plaintiff shipwrights, and, one the other hand, the present case in which the defendant aimed to injure the plaintiff 'as distinguished from the intention of legitimately advancing their own interests'.[647] Based on this 'vital distinction', the defendant's act in *Quin v Leatham* thus was found to be prohibited.[648]

Although the rule of irreversible precedent was, by creating certainty in the law, made for the public interest, it was later on considered too rigid which may 'lead to injustice in a particular case and also unduly restrict the proper development of the law'.[649] Thus, the 1966 Lords' Practice Statement overruled the 1898 decision by proposing that the House of Lords could 'depart from a previous decision when it appears right to do so'.[650] The first example of the HoL to explicitly overrule its prior decision after the 1966 Statement is the 1968 case of *Conway v Rimmer* in which the HoL unanimously overruled its 1942 judgement of *Duncan v Cammell Laird and Co*.[651] In the latter case, the HoL held that a relevant document could be withheld during civil proceedings in order to protect the public interest including the situation in which the disclosure of a document would be damaging to the public interest or the public interest required certain information to be withheld from production.[652] Moreover, the same 1942 judgement also confirmed that ministers of the Crown could reject the production of a document in the form of affidavit stating that the production of the document would be against the public interest and this affidavit should be accepted

646 John H. Langbein, 'Modern Jurisprudence in the House of Lords the Passing of London Tramways', 53(5) Cornell Law Review (1968). 'Although an attitude of sanctity toward precedent hovered over English law for most of the nineteenth century, not until London Tramways was the rule of irreversible precedent made absolute'.

647 House of Lords, *Quinn v Leathem* [1901] UKHL 2, at 5.

648 Ibid., at 6.

649 Lord Chancellor's Practice Statement [1966] 3 All ER 77.

650 Ibid.

651 House of Lords, *Conway v Rimmer* [1968] AC 910.

652 House of Commons Library, 'Public Interest Immunity Research Paper 96/25', 22 February 1996, at 5.

by the Court as conclusive.[653] While the decision on the particular facts of *Duncan v Cammell Laird and Co*, as a wartime case following the 'Thetis' submarine disaster, was not questioned,[654] it was criticized for allowing ministers of the Crown to be the 'sole arbiters of the public interest'.[655] Twenty years later, the HoL explicitly overruled the *Duncan v Cammell Laird and Co* judgement in *Conway v Rimmer* in which the HoL held that the issue of public interest protection should be decided conclusively by the Court rather than a minister's affidavit claiming public interest immunity in order to prevent the ministry from abusing the claim of public interest.[656]

As another example, *R v Shivput* saw the first use of the 1966 Statement in criminal law. In this case, the HoL overruled its *Anderton v Ryan* judgement in which the appellant, who believed that the video recorder at issue was stolen, was found to be not guilty of attempting dishonestly to handle a stolen good because there was no evidence to prove that the video recorder was stolen. This judgement was considered to be inconsistent with the Criminal Attempts Act 1981 which clearly stated that 'a person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible'. To correct this mistake, only one year after the *Anderton v Ryan* judgement, the HoL explicitly overruled it in *R v Shivput* in which the appellant, which thought his suitcase contained prohibited drugs, was held to be guilty of attempting to commit a drugs offence though the suitcase at issue only contained dried cabbage, snuff or some other harmless vegetable matter.[657]

Until 1 October 2009, when the role of the HoL as the highest appeal court in the United Kingdom was replaced by a new Supreme Court, the HoL explicitly applied its 1966 Statement in 21 cases.[658] Although the Supreme Court did not re-issue the 1966 Statement, the Court in *Austin v Mayor and Burgesses of the London Borough of Southwark* held that that this Statement still applied to it as 'part of the established jurisprudence relating to the conduct of appeals' which was further confirmed in the Court's Practice Direction

653 House of Lords, *Duncan v Cammell Laird & Co. Ltd* [1942] AC 624.

654 House of Commons Library (1996), above n 652, at 6.

655 Ibid.

656 Ibid., at 7. Lord Pearce: '"It is not surprising" it has been said (Professor Wade, Administrative Law (2nd edn.) at p. 285) "that the Crown, having been given a blank cheque, yielded to the temptation to overdraw"'.

657 *Criminal Attempts Act 1981*

658 Louis Blom-Cooper, '1966 and All That: The Story of the Practice Statement', in Louis Blom-Cooper QC, Brice Dickson, and Gavin Drewry (eds.), '*The Judicial House of Lords 1876-2009*', (Oxford University Press, 2009), at 140. 'Thus it in the *R—G* case (2004) overruled its earlier decision on the meaning of recklessness in the *R—Caldwell* case (1982). Likewise, in *Horton—Sadler* (2006), the House of Lords decided to depart from the *Walkley—Precision Forgings Ltd* decision (1979)'.

3.[659] A recent illustration of the application of the 1966 Statement was seen in the 2016 judgement of *Knauer v Ministry of Justice* in which the Court explicitly departed from two HoL judgements, namely the 1979 judgement of *Cookson v Knowles* and the 1983 judgement of *Graham v Dodds*, because of a material change in the legal landscape concerning damages for death. In the Court's view, the application of the reasoning in these judgements was 'illogical and their application also results in unfair outcomes'.[660] Moreover, these unsatisfactory decisions had encouraged courts to distinguish them on inadequate grounds which undermined the certainty and consistency of law.[661] To solve these problems, the Court had 'no hesitation in concluding' that it should overrule the two HoL judgements.[662]

7.1.2.4.2 Civil law system: Japan

As an example outside common law systems, the decisions adopted by the Japanese Supreme Court constitute a source of law, to which the principle of *stare decisis* thus applies.[663] A lower court's deviation from the existing case law of the Supreme Court constitutes grounds for appeal in both civil and criminal cases, though such deviation nevertheless occurs. In such cases, when a lower court is of the opinion that the underlying Supreme Court case law is, for example, out-dated and no longer appropriate, it will usually try to distinguish the facts at issue from that law, thereby making it easier for the higher court to affirm the lower's decision.[664]

This technique of distinguishing is also used by the Supreme Court to avoid its own precedents. For instance, the Supreme Court once in the *Niigata Prefecture Public Safety Ordinance* case held that, unlike a general permit requirement, an advance notification requirement for a public demonstration was not against the freedom of expression because it could be justified

659 The Supreme Court of the United Kingdom, 'Practice Direction 3: Applications for Permission to Appeal'. Lord Hope DPSC: 'So the question which we must consider is not whether the Court has power to depart from the previous decisions of the House of Lords which have been referred to, but whether in the circumstances of this case it would be right for it to do so'.

660 UKSC, *Knauer v Ministry of Justice* [2016] AC 908, para 23.

661 Ibid.

662 Steve Wilson, Helen Rutherford, Tony Storey, and Natalie Wortley, '*English Legal System*', (Oxford University Press, 2017), Chapter 5. 'An argument that such a change should be left to Parliament was rejected as the law under consideration had been made by judges and should be corrected by judges. The change did not have wider implications best left to Parliament to consider and it had been recognised by the Law Commission in a report that legislation was unnecessary and that there was room for judicial manoeuvre'.

663 Toshiaki Iimura, 'The Binding Nature of Court Decisions in Japan's Civil Law System', Stanford Law School China Guiding Cases project Commentary No. 14, available at https://cgc.law.stanford.edu/commentaries/14-Iimura-Takabayashi-Rademacher/ (visited on 10 June 2018).

664 Ibid.

for the purpose of public safety.[665] In a later case, however, by implicitly distinguishing its prior decision, the Supreme Court found that a measure setting out advance permit requirements could also be justified in order to prevent a danger to the public safety because this requirement was not 'much different' than the advance notification requirement.[666] In another example, the Supreme Court reinterpreted its precedent on the condition for the public to seek damages against an unconstitutional government action. In the *Voting at Home* case, the Supreme Court held that abolishing and failing to reinstate a voting system that enabled seriously disabled voters to cast votes at home did not violate the unequivocal language of the Constitution which is the condition to permit a recovery of damages against an unconstitutional government action.[667] This condition was considered too stringent to practically prevent the public from seeking damages.[668] Subsequently, the Supreme Court in the *Overseas Voters* case reinterpreted the condition to seek damages broadly in order to grant damage award to the overseas voters at issue against the exclusion of them from the proportional representation election before 1998 and their exclusion from district elections after 1998.[669]

When no such distinction has been made, the Supreme Court must decide whether to correct its own case law or to overrule the lower court's decision; the former option requires the Grand Bench of the Supreme Court to render a decision, something that rarely happens.[670] For instance, the Supreme Court once explicitly overruled its precedent which denied the right of the defendant to challenge the constitutionality of government action to confiscate property that was owned by a third party.[671] Such a right was subsequently conferred to the defendant by the Supreme Court in the *Confiscation of the Third Party Property* case because the court believed that the defendant in effect being held liable for damages caused by confiscation to the third party owing the property at issue should have the right to challenge the confiscation order.[672] As another example, the Supreme Court in the *Patricide* case explicitly overruled its prior decision that imposed a heavier penalty against parricide than regular homicide.[673] According to the Criminal Code, a defendant convicted of parricide must go to jail, whereas a defendant convicted of regular homicide may not be necessarily subject to

665 Shigenori Matsui, 'Constitutional Precedents in Japan: A Comment on the Role of Precedent', 88(6) Washington University Law Review (2011), at 1675.
666 Ibid.
667 Ibid., at 1676.
668 Ibid.
669 Ibid., at 1677.
670 A decision rendered by the Grand Bench is one issued by a majority of all 15 Supreme Court judges.
671 Ibid., at 1674.
672 Ibid.
673 Ibid.

imprisonment sentence. The constitutional challenge to the heavier penalty against parricide was rejected by the Supreme Court in an earlier case. Subsequently, in the *Parricide* case, recognizing that the aim of heavier criminal punishment against parricide was to securing respect for parents which had been rejected by many countries, the majority of the Supreme Court held that the heavier penalty at issue that disallowed any chance to suspend the enforcement of the imprisonment sentence was unreasonable and thus explicitly overruled its precedent.[674] More recently, the Supreme Court in a 2008 decision found that its 1966 and 1992 decisions were contrary to the court's conclusion in the present case and therefore 'should be changed'.[675]

As a controversial example to show that the use of distinguishing can severely restrict the scope of a precedent, the Supreme Court once implicitly overruled its prior decision on the rights of public workers to strike. The National Public Workers Act prohibits all types of public workers from striking though Article 28 of the Constitution provides them with the right to strike. In the *All Postal Workers, Tokyo Central Post Office* case, the Supreme Court held that the right of public workers to strike could be deprived only when it is necessary to protect the public.[676] As for the requirements to determining whether union leaders who solicited the illegal strike of public workers should be subject to criminal punishment, the Court held that criminal penalties could only be imposed to the union leaders if the strike at issue (a) was for an illegitimate purpose, (b) was accompanied with violence, or (c) was continued for an improperly long time.[677] Possibly due to the strong criticism from conservative politicians in the ruling party and the change in the composition of the Supreme Court, the Court's prior approach favouring the rights of public workers to strike was completely changed in the *All Forest and Agricultural Public Workers, Police Office Act Amendment Opposition* case in which the majority of the Supreme Court held that the strike by public workers was not only against the public nature of their positions but also undermined the principle of representative government due to the influence of strike to legislation.[678] By implicitly overruling *All Postal Workers, Tokyo Central Post Office* decision, the Court found that the leaders of a union of agricultural and forest in the present could be subject to criminal punishment.[679]

674 Ibid., at 1675.
675 Iimura, above n 663.
676 Shigenori Matsui, 'Constitutional Precedents in Japan: A Comment on the Role of Precedent', 88(6) Washington University Law Review (2011), at 1678.
677 Ibid.
678 Ibid.
679 Ibid., at 1679.

7.1.2.4.3 'Socialist legal system with Chinese characteristics': Mainland China

Very different from the practice in the UK and Japan, the Supreme People's Court in China promulgates general judicial interpretations that elucidate statutory provisions. According to the Chinese Constitution and the Legislation Law, the National People's Congress (NPC) and its Standing Committee are to enact and amend basic laws. The NPC has authorized the C[ourt to interpret laws relating to their specific application at trial.[680] Over the years, the Court has promulgated numerous judicial interpretations pertaining to various areas of law that have legal effect and can be used by lower people's courts as the basis for a judgment.[681] It is noteworthy that, unlike the above-mentioned interpretations by other judges, the Supreme People's Court's judicial interpretations are not developed by adjudging cases but rather through such steps as placing an interpretation on the agenda, discussion, drafting, and revision. Thus the judicial interpretations have the characteristic of generality that is evident in their titles. As an example, one issued in 2015 concerning guidelines for granting remedies in environmental infringement cases was titled 'Supreme People's Court's Interpretation regarding Several Issues of the Application of Law in Adjudicating Environmental Infringement Liability Disputes'.

When necessary, the Court does not hesitate to 'overrule' its judicial interpretations by issuing decisions regarding their repeal. The most recent such decision, titled the 'Supreme People's Court's Decision regarding the Repeal of Some Judicial Interpretations and Judicial Interpretation-Type Documents (12th Batch)', was adopted in 2017 in order to abolish 15 judicial interpretations that had been issued in the period from 1988 to 2013.[682] According to this decision, the reasons to repeal 15 judicial interpretations range from these interpretations conflicting with new legislation to the changing conditions within China.[683] Thus, when it comes to loosening the grip of its own precedents, the Court has fewer incentives to rely on the technique of distinguishing. Similarly, the generality characteristic of judicial interpretations enables lower courts to get around these interpretations easily, even resulting in the problem of 'different adjudicatory outcomes for the same type of cases or different interpretations for the same law'.[684]

680 *Resolution of the Standing Committee of the National People's Congress regarding Strengthening the Work of Statutory Interpretation*, National People's Congress Standing Committee, 10 June 1981.

681 Vai Io Lo, 'Towards the Rule of Law: Judicial Lawmaking in China', 28(2) Bond Law Review (2016), at 153.

682 Supreme People's Court's Decision regarding the Repeal of Some Judicial Interpretations and Judicial Interpretation-Type Documents (12th Batch), available at http://www.court.gov.cn/zixun-xiangqing-61462.html visited on 10 June 2018.

683 Ibid.

684 Lo (2016), above n 681, at 155.

In an effort to address such threats to the credibility of the judiciary in China, the Supreme People's Court began in 2010 to establish a system of guiding cases.[685] Thus, whereas judicial interpretations that are formulated and promulgated by the Court provide lower people's courts with general guidance, the guiding cases demonstrate ways in which specific and concrete problems have been dealt with in the context of specific cases. The Office of Work on Guiding Cases in the Court selects and recommends cases from across the judicial system that are to be decided further by the Adjudicatory Committee of the Court. A standard guiding case consists of eight components: a title, keywords, a summary of the judgment, relevant legal rules, basic facts, the adjudicatory outcome, the reasoning behind the judgment, and the names of the deciding judges.[686] During the period from January 2012 to November 2017, the Supreme Court of China issued 92 such guiding cases, which touched on topics including administrative law and procedure, civil procedure, company law, consumer protection, contract law, criminal law, intellectual property, labour and employment, maritime law, property law, torts, and unfair competition.

The lower courts, however, may not have the need to use the technique of distinguishing to avoid the guiding cases, one major reason being the insufficient number of guiding cases to follow owing to the slow pace of issuance: as of the end of 2015, a total of only 241 cases cited guiding cases, only 79 doing so explicitly by clearly citing the relevant guiding cases in their reasoning.[687] Moreover, guiding cases, unlike judicial interpretations, are not a source of law in China and thus have less authority. The 2010 Provisions regarding the Work of Guiding Cases requires only that the lower people's courts 'refer' to the guiding cases in their adjudication of similar cases and not that they use the guiding cases as the 'adjudicatory basis'.[688] The 2015 Detailed Rules on the Provisions regarding the Work of Guiding Cases, however, requires that, when the parties refer to a relevant guiding case, lower courts must indicate whether it has followed the guiding case and justify its approach in this regard.[689]

---

685 *Provisions of the Supreme People's Court Concerning Work on Case Guidance*, Discussed and Passed by the Adjudication Committee of the Supreme People's Court on 15 November 2010 and Issued on 26 November 2010.

686 *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*, Discussed and Passed by the Adjudication Committee of the Supreme People's Court on April 27, 2015 and Issued on 13 May 2015, Article 3.

687 Lo (2016), above n 681, at 163. Citing guiding cases implicitly means that the adjudicatory outcomes are consistent with the relevant guiding cases though these cases are not cited in the reasoning part.

688 *Provisions of the Supreme People's Court Concerning Work on Case Guidance*, Article 7. *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*, Article 10.

689 *Detailed Implementing Rules*, Article 11.

7.1.3 Suggestions to loosen the grip of *China—Raw Materials and China—Rare Earths* in light of the new facts of China's export duties

The above practices by tribunals at the international, regional, and national levels to deviate from precedents illustrate their efforts to strike a balance between legal certainty and flexibility in order to deal with important public policy issues or simply to keep up with the times (an overview see Table 10 at the end of this chapter).[690] The major techniques of deviation, namely explicit overruling, implicit overruling, and distinguishing, have been adopted in different situations. Among the three options, it is very difficult to say which one is completely superior to the others because all of them have their advantages and limitations. Depends on the particular facts of given case, however, there may exist an optimal option, relatively speaking, based on which positive impacts would be maximised. The following discussion seeks to find the optimal option for the AB to depart from the *China – Raw Materials* and *China – Rare Earths* decisions.

Compared with the other two options, an explicit overruling of earlier precedents may generate greater clarity in the existing body of case-law. A good example is the *Christine Goodwin* case where the ECtHR Grand Chamber explicitly overruled its precedents based on which Article 8 of the ECHR does not require a full legal recognition of gender re-assignment. After *Christine Goodwin*, it is quite clear that the old judgements, such as *Rees*, are no longer applicable owing to 'the changing conditions' within the contracting states. In other words, it leaves no room to doubt whether the precedents before *Christine Goodwin* might still be applicable, as in the case of implicit overruling, or to what extent those precedents would apply in the future, as in the case of distinguishing.

It is noteworthy that *Christine Goodwin* overruled the previous judgements that were made more than 15 years ago. This long period of time provides the Grand Chamber with good reasons to update its case-law in order to reflect 'societal changes'. In contrast, if a tribunal overrules a very recent decision, it may sometimes generate confusion and raises doubt about the direction and decisiveness of the tribunal. A classic example is the Šainović et al. case where the ICTY Appeals Chamber in 2014 found the *Perišić* Appeal Judgement, which was made by a different bench in 2013, was wrong and explicitly overruled it. Given this conflict between the different benches of the Appeals Chamber, it has been claimed that the ICTY jurisprudence on certain legal issues involved in these cases 'remains in a state of

690 'Too much adherence to precedent and there is a risk of injustice and stagnation. Too little observance of it, and certainty, predictability, and fairness will suffer'. See Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?', in Julie Dickson and Pavlos Eleftheriadis(eds.), '*Philosophical Foundations of European Union Law*', (Oxford University Press, 2008), at 311.

flux and fragmentation' based on which the result of a future case 'will very much depend on which judges get assigned to their Appeals Chamber'.[691]

The more recent WTO decision, namely *China – Rare Earths*, that banned China's export duties was made five years ago. Although this period is longer than the above ICTY example, it may not be long enough for the AB to adopt an evolutionary approach as the Grand Chamber did in *Christine Goodwin*. In *US — Shrimp*, the AB adopted an evolutionary interpretation to update the meaning of 'exhaustible natural resources', which, as particularly noted by the AB, was 'actually crafted more than 50 years ago'.[692] Thus, in order to explicitly overrule *China – Rare Earths*, the AB may need to admit its interpretive errors, which it has never did, in both *China – Rare Earths* and *China – Raw Materials*. This seems to suggest that explicit overruling may only be a second-best option for the AB to depart from the ban on China's export duties.

Compared with explicit overruling, implicit overruling does not require the AB to provide any reasons. This approach was preferred by the ECtHR at its early stage.[693] For instance, the original Court in *Huber v Switzerland* completely reversed its *Schiesser v Switzerland* judgement without acknowledging the practice of overruling.[694] The same approach was also adopted in *Borgers v Belgium* where the Court made findings that were directly at odds with its *Delcourt* decision but again refused to speak of overruling.[695] This practice was criticised by one dissenting judge in *Borgers* for failing 'to do what a court that overrules an important judgment should do: it failed to state its reasons for doing so clearly and convincingly'.[696] Indeed, as the AB has repeatedly emphasised, its decisions should be followed unless 'cogent reasons' are presented. It is thus difficult to imagine how the AB would deliver a decision that is directly at odds with *China – Rare Earths* and *China – Raw Materials* without offering any good reasons. As a result, the option of implicit overruling seems to be the least feasible one for the AB to alter the ban on China's export duties.

Distinguishing could be the first-best option. This technique has been widely used by various tribunals including the AB itself. As discussed above, for instance, the AB in *Indonesia—Import Licensing Regimes* case expressly distinguished its long-established sequence of analysis under

691 Marko Milanovic, 'The Self-Fragmentation of the ICTY Appeals Chamber', EJIL: Talk!, at https://www.ejiltalk.org/the-self-fragmentation-of-the-icty-appeals-chamber/ (visited on 30 July 2019).
692 AB Report, *US — Shrimp*, para 129.
693 Mowbray (2009), above n 573.
694 For further information, see 7.1.2.3.1.
695 Ibid.
696 Dissenting Opinion of Judge Martens at para 1.

GATT Article XX with a distinction between the 'normal sequence' and the special one that could be adopted in the 'particular circumstances of the case'. Following this approach, the AB may also draw a line between the 'bad' export duties and those 'good' ones that would contribute to environmental protection based on the new facts of China's export duties as discussed in the previous chapters.[697]

It is noteworthy that the new facts of China's export duties may also provide the AB with sufficient incentives to adopt the options of distinguishing or overruling. The AB has in a few cases departed from its strict textual approach in order to accommodate environmental interests, in particular in the *US—Shrimp* decision just mentioned. In that case, the AB adopted an 'evolutionary' approach according to which it interpreted the phrase 'exhaustible natural resources' broadly to include not only 'non-living' resources but also living species, specifically turtles.[698] The *China—Raw Materials* and *China—Rare Earths* rulings suggest, however, that, in two significant respects, the AB was not convinced that the denial of China's right to invoke the GATT environmental exceptions would significantly hinder its environmental protection efforts. First, as the complainants pointed out in *China—Rare Earths*, certain high-level Chinese documents, including the Guidelines of the Eleventh and Twelfth Five-Year Plans (for the period from 2006 to 2015), make clear that China's export duties were designed to increase the domestic production of high value-added downstream products that rely on the raw materials at issue. Second, export duties represent only the second-best option for protecting the environment.

However, as the preliminary analysis offered here shows, this reasoning has lost much of its persuasive force in light of changes in the factual context relating to China's export duties. Thus the Guidelines of the Thirteenth Five-Year Plan (for 2016-2020) explicitly prioritize the environmental purpose of export duties, and several subsector-level five-year plans appear to associate this environmental motivation with carbon leakage. Regarding the argument that China should always opt for the first-best option, it fails to take into account situations in which this option is financially or practically unavailable.[699] In the case of China, as seen in Chapter 6, export duties could play an important role to tackle carbon leakage, an issue unaddressed in either *China—Raw Materials* or *China—Rare Earths*.

---

697 For further discussion, see section 7.4.

698 AB Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para 130. 'From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary".'

699 More actual examples see Chapter 4.

For these reasons, the AB may in the future find itself in the awkward situation of having to decide whether WTO law should prohibit China's use of export duties, even as part of a genuine climate policy, despite the fact that the country is the world's largest emitter of greenhouse gases. Such a position on the part of the AB is likely to meet with resistance from forces such as the major international environmental groups that united in opposition to the WTO decision that prohibited the US from adopting an extraterritorial measure to protect sea turtles.[700] Indeed, responding to the fact that global warming is accelerating even more rapidly than scientists had until recently anticipated, a recent and alarming IPCC report calls urgently for all nations to combat it through 'rapid, far-reaching and unprecedented' actions.[701] The WTO's refusal to allow China to impose export duties on energy-intensive products is thus inconsistent with the pro-environmental stance that the organization has long been projected.[702]

The situation would become even more awkward should a future multilateral environmental agreement explicitly authorise the use of export duties by contracting parties for the purpose of combatting climate change. This much is made clear in a suggestion in a World Bank research paper that it would be fruitful to explore 'alternative possible negotiated agreements (such as export taxes aimed at neutralizing leakage effects)'.[703] In light of this evidence, the AB needs to address the explicit conflict between its decision and a multilateral environmental agreement.

Moreover, in the absence of such an agreement, an absolute ban on China's export duties also stands to undermine international cooperation on climate change by triggering further WTO disputes.[704] As a WTO working paper acknowledges, export duties 'may respond to threats of border tax adjustments abroad' by 'internalizing the amount of GHG tax their exports may

700 ICTSD, 'Shrimp-Turtle Ruling Gets Lukewarm Reaction from All Sides', 2 (40) Bridges (1998).

701 'Limiting global warming to 1.5°C would require rapid, far-reaching and unprecedented changes in all aspects of society'. See IPCC, 'Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments', 8 October 2018, available at https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/, (visited 14 November 2018).

702 For instance, the broad statement, 'Under WTO rules, as confirmed by WTO jurisprudence, members can adopt trade-related measures aimed at protecting the environment, subject to certain specified conditions', is no longer valid. https://www.wto.org/english/tratop_e/envir_e/envir_e.htm

703 Copeland (2012), above n 11, at 41.

704 See Chapter 6.

otherwise pay in the importing country'.[705] This being the case, on the one hand, it would seem profoundly unfair were China to be prevented, owing to the two-tier membership structure of the WTO, from using export duties as a countermeasure. On the other hand, without access to export duties as a more acceptable alternative, China is likely to bring a case against any BTAs targeting its exports.

To conclude the argument here, the change in the factual context of China's export duties—namely recognition of their potential to combat climate change—may provide the AB with sufficient new incentives to reconsider its prior decisions on the matter. In this respect at least, a new interpretation that allows China to use export duties for an environmental purpose remains a possibility. In this context, the best feasible option for the AB to depart from its *China—Raw Materials* and *China—Rare Earths* decisions would be to distinguish them; its second-best option would be to overrule them. With this standard in mind, specific feasibility tests for determining which new interpretation is mostly acceptable to the AB are offered in the following three sections.

7.2 Possible options to develop a new substantive argument

The previous two sections have established that the AB could adjust the absolute ban on China's export duties by overruling or distinguishing its prior decisions, and the new facts of China's export duties would provide the AB with sufficient incentives to do so. Once the constraint of rule of precedent is loosened, a follow-up question is how to develop a *substantive* argument that provides China with policy space to use export duties to protect the environment. In other words, given the silence on the applicability of the environmental exceptions under Article XX to China's export duty commitments, a new argument should give meaning to that silence.

As noted by the AB, textual silence does not necessarily equal to negative intent of the treaty's drafters. In the past, the AB had no hesitation in giving meaning to the silence concerning several procedural issues, including the burden of proof, the interest required to bring a claim, the admissibility of

705 'The GATT does not contain any discipline on export taxes or any price-based measures other than the most-favoured nation principle. It is not clear to what extent national climate change programmes will lead to action on exports. However, some authors have suggested that countries whose GHG emissions are related to products destined for export may respond to threats of border tax adjustments abroad with the adoption of their own export taxes, thus internalizing the amount of GHG tax their exports may otherwise pay in the importing country'. Patrick Low, Gabrielle Marceau, Julia Reinaud, 'The Interface between the Trade and Climate Change Regimes: Scoping the Issues', ERSD Staff Working Paper (2011), at 4.

amicus curiae briefs, and the principle of *res judicata*, doing so with reference to general principles of law or the practices of international tribunals.[706] No party protested such judicial act of formulating detailed rules of procedure and evidence.[707]

When it came to interpreting a substantive silence, the AB appeared to be more cautious and tended to largely reply on the context and the object and purpose of WTO agreements.[708] The *Canada—Autos* case, for instance, hinged on silence regarding the scope of SCM Agreement Article 3.1(b), specifically whether the article extended alike to subsidies contingent 'in law' and to subsidies contingent 'in fact' with respect to the use of domestic over imported goods. Taking into consideration the context and especially the object and purpose of Article 3.1(b), the AB found that this provision applied to subsidies contingent 'in law or in fact' because a narrow interpretation of the silence would 'make circumvention of obligations by Members too easy'.[709] By contrast, a negative example is the *EC—Bananas III* case in which the AB refused to give meaning to the silence on whether WTO members could deviate from GATT Article XIII in their commitments to market access and concessions on agricultural goods by stating that, if such deviation were intended, WTO members 'could, and presumably would, have done so'.[710]

A superficial look at the precedent of *EC—Bananas III* seems to support the absolute ban on China's export duties. As the panel noted in *China – Raw Materials*, 'if China and WTO Members wanted the defences of GATT Article XX to be available to violations of China's export duty commitments, they could have said so in Paragraph 11.3 or elsewhere in China's Accession Protocol'.[711] However, the nature of the silence in *EC—Bananas III* is fundamentally different from the one of the silence on the applicability of the environmental exceptions to China's export duty commitments.

In *EC—Bananas III*, the EU was seeking the right to allocate tariff quota shares on bananas in a discriminatory manner. WTO members have, however, given away such right concerning trade in goods under GATT

706 Isabelle Van Damme, 'The Interpretation of Silence in the WTO Covered Agreements', in '*Treaty Interpretation by the WTO Appellate Body*' (Oxford University Press, 2009), at 136.

707 Georges Abi-Saab, 'The Appellate Body and treaty interpretation', in Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes (eds), '*The WTO at Ten: The Contribution of the Dispute Settlement System*' (Cambridge University Press, 2006), at 463.

708 Ibid., at 140.

709 Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985, para 142.

710 Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 59, para 157.

711 Panel Report, *China – Raw Materials*, para 7.140.

Article XIII, entitled 'Non-discriminatory Administration of Quantitative Restrictions'. To reclaim such right concerning trade in agricultural goods, the EU referred to the Agreement on Agriculture (AoA) which is a separate agreement, to a degree, shelters agricultural policies from the full impact of GATT disciplines.[712] However, the agricultural 'exceptions' provided in the AoA are silent on this issue of administration of quantitative restrictions. Thus, the AB correctly decided to not give meaning to that silence because there is a lack of textual support in the AoA to establish a right which has been given away in the GATT 1994.

In contrast, one can hardly disagree that China did have the right to use export duties for environmental purposes before entry into the WTO. Thus, the key issue in *China – Raw Materials* and *China – Rare Earths* was whether China had not silently negotiated away its right to invoke Article XX during its accession rather than reclaiming a right which had been generally prohibited by other WTO agreements. In this context, the dissenting panellist in *China – Rare Earths* correctly suggested that if the WTO members wanted China to abandon the right to invoke Article XX in Paragraph 11.3, 'they would have said so explicitly'.[713] Eventually, the AB seemed to find that China had implicitly waived its right to invoke Article XX in Paragraph 11.3 based on such textual support as a specific exception clause to China's export duty commitments.[714]

The rationale behind a new substantive argument is thus to challenge the existence of China's 'acquiescence' to abandon its right to use export duties to protect the environment. This is likely to demand a lower burden of proof than reclaiming such right. Bearing in mind this distinction, there are two major approaches to develop a new substantive argument in favour of China's green export duties: (i) there is textual support in China's accession documents to show that China has not acquiesced in giving away its right to use export duties for environmental purposes, or (ii) it is legally impossible for China to give away such important right in a silent way.

The first approach was largely adopted in *China – Raw Materials* and *China – Rare Earths* in which China spent much of its efforts on providing analyses of the relevant WTO provisions that indicate China's right to invoke Article XX. Although all of China's attempts to find textual support in WTO agreements were eventually dismissed by the AB, it does not necessarily mean that China would never find such support in a future case.

712 Article 21 Final Provisions. 1. The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.

713 7.137.

714 Article VIII, and specific exception

Alternatively, the second approach directly calls into question the assumption that China could legally negotiate away its right to use export duties to protect the environment in a silent manner. The starting point here is that, although WTO members have in practice required acceding members to make more stringent commitments as their 'entry fee',[715] the amount of the charges should not be unlimited. On the one hand, the 'entry fee' is subject to the legal constraints from public international law. For instance, a WTO-plus commitment that requires the acceding member to abandon its right to ban the import of slave-made goods is very likely to be prohibited by a peremptory norm.[716] As acknowledged by the panel in *China – Raw Materials*, the result of an absolute ban on China's export duties is apparently 'imbalanced' though it is not for the panel to 'recalibrate' it.[717] This raises the question of whether public international law would prevent such imbalance.

On the other hand, WTO law itself may also impose constraints on the 'entry fee'. As the panel suggested in *China – Raw Materials*, an interpretation that prevented China from enacting necessary environmental or public health measures 'would likely be inconsistent with the object and purpose of the WTO Agreement' though it subsequently found that an absolute ban on China's export duties would not prevent China from protecting the environment.[718] However, as the preliminary analysis offered here shows, an absolute ban on China's export duties would indeed prevent it from adopting an important climate policy tool. Following these approaches, the next two sections explore the substantive arguments that provide China with policy space to use export duties to protect the environment.

7.3 Feasibility tests for interpretative options based on customary international law or non-WTO treaties

As acknowledged by the AB, WTO rules are not intended to be read in 'clinical isolation from public international law'.[719] In practice, all of the five major sources of international law, namely treaties between or among states, customary international law, general principles of law, judicial decisions, and the writings of 'the most highly qualified publicists', have been applied

715 Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, para 7.112. 'Ultimately, the acceding Member and the WTO membership recognize that the intensively negotiated content of an accession package is the "entry fee" to the WTO system'.

716 Under Article 53 of the VCLT, any treaty that conflicts with a peremptory norm is void.

717 7.160 and footnote 192.

718 Ibid., para 7.111. para 7.117.

719 AB Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, para 17.

in settling WTO disputes.[720] Jurisprudence shows that general principles of law, judicial decisions, and the writings of 'the most highly qualified publicists are not likely to play a significant role in giving a positive meaning to the silence on the relationship between Article XX and China's export duties commitment.[721] This section thus discusses the application of treaties and customary international law in settling disputes and explores the interpretive options based on them.

7.3.1 Possibilities and challenges to apply customary international law or non-WTO treaties in settling WTO disputes

7.3.1.1 The application of customary international law

Customary international law contains rules binding on all states that apply automatically to WTO agreements. The AB has at times understood 'general international law' to mean customary international law. In *US—Line Pipe*, for instance, the expressions 'customary international law rules on state responsibility' and 'general international law on state responsibility' were considered synonymous,[722] and in *EC—Hormones* the AB equated the two notions by referring to 'general or customary international law'.[723]

Another of the AB's expressions relating to customary international law is the 'general principle of international law'. This concept appears related to the definition of general principles of law, for the panel in *EC—Approval and Marketing of Biotech Products* stated that a 'general principle of international law' implies either customary international law, general principles of law, or both.[724] According to the definition in the Statute of the ICJ, however, general principles of law refer to norms in national legal systems that should be used differently from 'general principles of international law'.[725] Thus, in *US—Shrimp*, the AB described good faith as 'a general principle of law and a general principle of international law'. In this context, a general principle of international law could be seen as part of customary international law.

---

720 The Statute of the International Court of Justice is annexed to the 1945 Charter of the United Nations.

721 General principles of law in practice is only used to clarify procedural issues whereas the other two are secondary source.

722 AB Report, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted on 15 February 2002, para 259.

723 AB Reports, *European Communities - EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted on 16 January 1998, para 124.

724 Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted on 29 September 2006.

725 Christopher Greenwood, 'Sources of International Law: An Introduction', available at http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf, (visited 18 June 2017).

With a common intention, WTO members may contract out customary international law from WTO treaties. Thus the panel stated in *Korea—Government Procurement* that customary international law applied to the extent to which the WTO treaties did not 'contract out' from it.[726] This position was further confirmed by the AB in *US—Cotton Yarn*, in which it found that derogation from a general international principle of proportionality of countermeasures could be justified only if the drafters of the WTO rules had expressly provided for it.[727] However, the derogation from customary international law should not include peremptory norms as the overriding principles of international law.[728]

The challenge of applying customary international law is that, being by nature an unwritten source, it requires panels and the AB to identify the norm at issue that has attained this status. Within its jurisprudence, the AB has found that several provisions in the VCLT contain rules of customary international law, including in *US—Offset Act*,[729] *Japan—Alcoholic Beverages II*,[730] and *Korea—Procurement*,[731] as well as in Articles 26, 32, and 48 of the VCLT. The AB has found other sources of customary international law as well. In *US—Line Pipe*, for example, it identified rules in Article 51 of the International Law Commission (ILC) Articles on State Responsibility as principles of customary international law.[732] So also in the *US—Shrimp* case, the AB referred to 'good faith' as such a principle.

Owing to the broad application of customary international law, panels and the AB are very careful about applying it. Thus, in *Guatemala—Cement II*, the panel refused to recognize the concept of 'harmless error', which required a party to show injury before obtaining the right to be compensated for a procedural error, as part of customary international law though Guatemala claimed that this concept, having been recognized by the ICJ, should also be applied in the present case to excuse its violation of procedural rules of the

726 Panel Report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R, adopted on 19 June 2000, para. 7.96.

727 AB Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted on 8 October 2001, para 120.

728 Joost Pauwelyn, 'The Application of Non-WTO Rules of International Law in WTO Dispute Settlement', in '*The World Trade Organization: Legal, Economic and Political Analysis*', Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer (eds.), Springer, 2005, at 1405-1425.

729 AB Report, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted on 16 January 2003, footnote 247.

730 AB Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 4 October 1996, footnote 17.

731 Panel Report, *Korea — Measures Affecting Government Procurement*, WT/DS163/R, adopted on 1 May 2000, para 7.123.

732 AB Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, para 259.

Anti-Dumping Agreement.[733] Moreover, the AB also in *EC—Hormones* and *US—Anti-Dumping and Countervailing Duties (China)* showed its reluctance to identify the status of customary international law. In the former example, the EU claimed that the precautionary principle, as a general principle of customary international environmental law, could allow it to act cautious 'when setting health standards in the face of conflicting scientific information and uncertainty'.[734] However, acknowledging that the status of the precautionary principle in international law was still debatable among 'academics, law practitioners, regulators and judges', the AB held that it is 'unnecessary, and probably imprudent' for it to address the question of whether the precautionary principle had attained this status because this principle still awaited 'authoritative formulation'.[735] In the latter case concerning whether Article 5 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts reflects customary rules of international law, the AB found that it was not necessary for it to resolve this question because its legal analysis was not based on Article 5.[736]

Once a rule is found to attain the status of customary international law, the next step for a panel or the AB is to decide how to apply it. It is commonly accepted that customary international law can play a role in interpreting specific WTO terms. As discussed, Article 3.2 of the DSU requires that the panel and the AB clarify WTO regulations according to customary rules of interpretation. A typical example is the application of the aforementioned principle of good faith; although this principle can be found in neither the WTO Agreement nor the GATT 1994,[737] the AB in *US—Shrimp* linked the balance of rights and obligations under the chapeau of Article XX with it, based on which linkage the text of the chapeau had been interpreted as prohibiting the abusive exercise of a state's rights. In the AB's view, this principle, as customary international law, provided it with 'additional interpretative guidance'.[738]

Whereas the AB may apply customary international law in a complementary manner, namely providing 'additional interpretative guidance', in treaty interpretation, it appears to be reluctant to apply substantive

733 Panel Report, *Guatemala — Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*, WT/DS156/R, adopted on 24 October 2000, para 8.22.

734 AB Report, *AB Report, EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, para 16.

735 Ibid., para 123.

736 AB Report, *US — Anti-Dumping and Countervailing Duties (China)*, para. 311.

737 Several agreements attached to the WTO Agreements refer to good faith. For instance, Articles 3.10 and 4.3 of the DSU and Articles 24, 48.2, and 58(c) of the TRIPS.

738 AB Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, para 158.

customary international law independently in dispute settlement.[739] To be sure, a WTO member cannot bring a WTO complaint based solely on customary international law: according to Article 1.1 of the DSU, WTO dispute settlement only accepts a legal claim based on certain WTO agreements that are listed in its Appendix 1.

Thus, the independent use of customary international law here refers to the gap-filling role of these non-WTO norms. Unlike the common use of non-WTO norms to fill in the procedural gap in WTO agreements,[740] the gap-filling role of substantive customary international law is very limited. For instance, in *India—Patents (US)*, the AB reversed a panel's finding regarding the principle of 'legitimate expectations', pointing out that an interpretation should not import unintended concepts into a treaty.[741] In other words, the principle of 'legitimate expectations' cannot impose an independent obligation on WTO members in the absence of a legal basis in the TRIPS Agreement.[742]

As an exceptional example concerning the application of substantive customary international law independent from WTO rules, in response to the argument of the US in *US—Offset Act* that 'no basis or justification in the WTO Agreement for a WTO dispute settlement panel to conclude that a Member has not acted in good faith, or to enforce a principle of good faith as a substantive obligation agreed to by WTO Members',[743] the AB held that 'Clearly, therefore, there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith' by referring to its previous practice of using the principle of good faith.[744] Thus, it found a basis for applying the principle of good faith independently in order to assess the manner in which a WTO member had fulfilled its obligations but this ruling drew criticism from both WTO members and scholars.[745] One major reason behind this criticism is that, unlike to independently apply procedural non-WTO norms in disputes base

739 Jan Wouters, Dominic Coppens, Dylan Geraets, 'The influence of general principles of law', in '*Liberalising Trade in the EU and the WTO A Legal Comparison*', Sanford E. Gaines, Birgitte Egelund Olsen, Karsten Engsig Sørensen (eds), Cambridge University Press, 2012, at 9. 'In other words, it seems that a claim cannot be based on customary international law and that it can also not be invoked as a defence to justify a violation of a WTO provision'.

740 See subsection 1.2.3.

741 AB Report, *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS50/AB/R, paras 42 and 45.

742 Wouters, Coppens, and Geraets (2012), above n 739.

743 AB Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, para 296.

744 Ibid., para 297.

745 Minutes of Meeting Held on 27 January 2003. Dispute Settlement Body, WT/DSB/M/142, 6 March 2003, para 57. Andrew D. Mitchell, '*Legal Principles in WTO Disputes*', Cambridge University Press, 2008, at 136. Wouters, Coppens, and Geraets (2012), above n 739, at 49.

on the AB's inherent jurisdiction, there is no legal basis for the AB to apply substantive customary international law to interpret provisions that do not specifically reflect such a rule.[746] It is noteworthy that, however, this exceptional decision has minimal practical relevance because the AB appeared to suggest that a violation of a WTO provision is a necessary condition to find a member to not act in good faith.[747] In other words, in the absence of a breach of a WTO treaty provision, a WTO member cannot be found to violate the principle of good faith.

7.3.1.2 The application of non-WTO treaties

Treaties, unlike customary international law, are binding only on the contracting parties. WTO jurisprudence, however, shows that non-WTO treaties can sometimes be applied in the process of interpreting specific WTO terms. For instance, in *US—Shrimp*, the AB interpreted the term 'exhaustible natural resources' in Article XX(g) by referring to several modern international conventions, including the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity, and the Convention on International Trade in Endangered Species.[748]

It is, however, unclear whether a WTO member could use non-WTO treaties to justify its violation of WTO rules. In the *Chile—Swordfish* case, the EU challenged Chilean legislation, which prohibited unloading of swordfish in its ports under Article 165 of its fisheries laws, before the WTO based on Articles V, providing for freedom of transit for goods through the territory of each contracting party on their way to or from other contracting parties, and XI, prohibiting quantitative restrictions on imports or exports, of the GATT 1994. Chile chose, with reference to the UNCLOS, the International Tribunal for the Law of the Sea (ITLOS) as an alternative forum to resolve the dispute and, having made various arrangements regarding the procedural suspension of WTO and UNCLOS provisions, settled with the EU in 2010.[749] However, if Chile had chosen to invoke several articles concerning conservation of environmental resources under UNCLOS, such as Article 64 calling for cooperation in ensuring conservation of highly migratory species and Articles 116 to 119 relating to conservation of the living resources of the high seas, in its defence in front of the AB, it is unclear whether the AB would allow it to do so.

---

746 Andrew D. Mitchell, 'Good Faith in WTO Dispute Settlement', 7(2) Melbourne Journal of International Law (2006), 'these provisions do not specifically reflect the principle of good faith beyond the general requirement that they be interpreted in good faith'.

747 AB Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, para 298.

748 AB Report, *US — Shrimp*, paras 128 – 132.

749 WTO Secretariat, '*Chile — Measures affecting the Transit and Importing of Swordfish*', available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm, (visited 18 June 2017).

In this context, Pauwelyn has argued that, if a non-WTO treaty binds the parties in a WTO dispute, this treaty then must be considered a potential defence.[750] To support his argument, he cites the AB's encouragement of the US in the *US—Shrimp* case to conclude treaties with other WTO members for the protection of sea turtles in order to avoid 'arbitrary or unjustifiable discrimination'. In his view, such a treaty, once concluded, could be used as a defence against a claim of 'arbitrary or unjustifiable discrimination'. To date, though, no WTO member has referred to a non-WTO treaty as part of a defence.

7.3.2 Options based on customary international law

At the oral hearing of the appeal of *China—Rare Earths*, China developed a new argument based on Article 30(3) of the VCLT.[751] Although the AB criticized China's failure to provide sufficient supporting evidence for this argument, China may develop it further in a future dispute. In keeping with the proposal of Qin,[752] the first issue to be examined is whether the application of VCLT Article 30 can lead to an interpretation in support of China's right to impose export duties. The next concern is the extent to which public international law does not support the *China—Raw Materials* and *China—Rare Earths* decisions, which touches on the feasibility of using the principle of sustainable development and the principle of abuse of rights as a defence against the denial of China's right under Article XX.

7.3.2.1 Paragraph 11.3 as a subsequent agreement or practice modifying WTO treaties

To further develop China's argument as mentioned above, Qin proposed considering China's Accession Protocol as a subsequent agreement as defined under VCLT Article 30(3), a provision that has been used as a basis for modifying WTO treaties.[753] Approached this way, China's export duty commitments under Paragraph 11.3 of its Accession Protocol have, in effect, modified GATT Article XI:1 so that this article essentially regulates them.[754] Thus, since GATT Article XX applies to Article XI:1, China is entitled to justify its use of export duties under the former unless the Accession Protocol explicitly states otherwise.

---

750 Joost Pauwelyn, 'The Application of Non-WTO Rules of International Law in WTO Dispute Settlement', in '*The World Trade Organization: Legal, Economic and Political Analysis*', Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer (eds.), Springer, 2005, at1416.

751 The AB found in *US—Gasoline* that the general rule of interpretation in Article 31 of the VCLT was part of customary international law.

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

753 Ibid. at 404-411

754 Ibid.

The interpretation of Paragraph 11.3 as a subsequent agreement, however, will face legal challenges. In particular, Article 30(3) only applies to the situation in which 'all the parties to the earlier treaty are parties also to the later treaty', that is to say in order to consider China's Accession Protocol as a subsequent agreement under VCLT Article 30(3), the parties to the Protocol should be the same as those to the earlier treaty, namely the GATT 1994. By contrast, however, China's Accession Protocol was signed between it and the WTO, while the GATT 1994 was signed by the original WTO members, of which China was not one. Therefore, Article 30(3) seems to be irrelevant to explain the relationship between Paragraph 11.3 and the GATT 1994.

In addressing this legal issue, Qin argued that China's Accession Protocol can be treated as a multilateral agreement signed by WTO members, on the grounds that it represented a consensus among them.[755] This argument is based on the approach, termed 'functionalism', to consider that international organizations are mere functional vehicles for their member states.[756] In this sense, the parties to China's Accession Protocol, as a subsequent agreement, are in effect the same as the parties to the GATT 1994 in its capacity as an earlier treaty.

Regardless of the controversial nature of the 'functionalism' approach,[757] it is noteworthy that the conclusion of a treaty requires the approval of national decision-makers, however, and only China's parliament ratified its Accession Protocol.[758] Therefore, if the conclusion of China's Accession Protocol is considered a subsequent agreement that modifies the GATT 1994, the functionalist perspective fails to explain why the national decision-makers in other WTO member countries were excluded from the process of amendment. Furthermore, the form of China's Accession Protocol also lacks the rigor of treaty texts as a subsequent agreement to the GATT 1994.

As an alternative to the functionalist perspective, Qin proposes a bold solution by considering China's Accession Protocol subsequent practice for modifying WTO treaties. Yet while the parties to a subsequent practice need not necessarily to have been signatories to an earlier treaty, to consider China's Accession Protocol subsequent practice faces other legal challenges.

---

755 Ibid.

756 Ibid.

757 Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations', 25(3) European Journal of International Law (2014), at 645. 'It turns out that functionalism, as developed by Reinsch, was inspired by his familiarity with colonial administration: colonialism and international organization both manifested cooperation between states. While this is no reason to discard functionalism, it does provide an argument for viewing international organizations more critically than functionalism habitually does'.

758 WTO Secretariat, 'WTO Ministerial Conference approves China's accession', https://www.wto.org/english/news_e/pres01_e/pr252_e.htm, (visited 18 June 2017).

It is in this respect important to note that the concept of a subsequent practice modifying treaties is not even mentioned in the VCLT; there was, during its drafting, a proposal of the ILC to include it as a means to modify a treaty by proposing 'treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions',[759] but this was rejected owing to uncertainty regarding the effect of subsequent practice on the principle of consent and appeared to be the only proposed article of the ILC that was completely abandoned by the negotiator in 1966.[760]

In fact, the idea to amend or modify treaties by subsequent practice of the parties has still not been generally recognized by states nowadays according to the Fifth ILC Report (2018) on subsequent agreements and subsequent practice in relation to the interpretation of treaties.[761] Although, in practice, the ICJ has taken a decidedly liberal approach to recognizing the role of subsequent practice in treaty modification,[762] WTO jurisprudence, to date, has only recognized the role of subsequent practice in treaty interpretation.[763] Considering the lack of consensus among the states on recognizing subsequent practice as a way to change treaties, the AB is not likely to introduce the new role of subsequent practice in treaty interpretation. And even if the AB does so, it is noteworthy that subsequent practice requires the common intention of the WTO members. In both *China—Raw Materials* and *China—Rare Earths*, however, the differing opinions among the third-party participants that shared the legal position of China's Accession Protocol indicate a lack of common intention as required by subsequent practice. Thus, the argument that China's Accession Protocol modified the GATT 1994 is likely to be accepted by the AB.

Moreover, the argument based on subsequent practice, though aiming to favour China's export duties, may not be even accepted by the Chinese government itself which just recently rejected the position to use subsequent practice 'as a tool to expand the scope of interpretation or to covertly amend the treaty' in the UN.[764]

---

759 A/CN.4/SER.A/1966/Add.l YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1966, Volume II Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly UNITEDNATIONS, at 91.

760 Georg Nolte, '*Treaties and Subsequent Practice*', Oxford University Press (2013), at 130.

761 Fifth ILC Report (2018) on subsequent agreements and subsequent practice in relation to the interpretation of treaties, para 66.

762 Julia Ya Qin, 'Conundrum of WTO Accession Protocols: In Search of Legality and Legitimacy', 55(2), Virginia Journal of International Law (2015), at 408.

763 Ibid.

764 United Nations, General Assembly Seventy-first Session Official Records, 11 November 2016, para 70.

Lastly, aside from all the above legal difficulties involved with interpreting China's Accession Protocol as either a subsequent agreement under VCLT Article 30(3) or subsequent practice, it is also uncertain whether the AB would view China's export duty commitments under Paragraph 11.3 of its Accession Protocol as a means to modify GATT Article XI:1; for in *China—Rare Earths*, the majority of the panel found that the commitment to eliminate export duties did not relate to GATT Article XI.[765] That is to say, even if China's Accession Protocol is generally considered a tool to modify the GATT 1994, the AB may still find that Article XI is not modified by Paragraph 11.3.

7.3.2.2 The principle of sustainable development

From *China—Raw Materials* to *China—Raw Materials II*, China has consistently argued that its export duties are intended to promote sustainable development. This claim in turn raises the question if sustainable development can, in the context of public international law, serve as an independent ground against the denial of China's right to impose export duties under Article XX.

As noted several times, the AB in the *US—Shrimp* case used sustainable development as a legitimizing factor for an evolutionary interpretation by broadening the scope of the term 'exhaustible natural resources' to include sea turtles.[766] In that case, however, the AB referred to sustainable development as an objective in the WTO Agreement rather than as a principle of customary international law. As a result, the legal implications of sustainable development have been 'drawn in a strictly conventional capacity' when it comes to settling WTO disputes.[767] For instance, the AB in *China – Raw Materials* held that the objective of sustainable development in the WTO Agreement does not provide 'specific guidance' clarifying the relationship between Paragraph 11.3 and GATT Article XX. Following this conventional approach, the AB would certainly not accept China's defence against the denial of its right under Article XX solely based on the objective of sustainable development.

Such a defence could be feasible, however, if the AB considers sustainable development as a norm of *jus cogens*.

As peremptory norms of general international law, *jus cogens* norms, such as prohibitions of the slave trade, can invalidate conflicting rules, including WTO norms.[768] In other words, *jus cogens* norms enjoy absolute

765 Panel Reports, *China – Rare Earths*, para 7.95.
766 AB Report, *US – Shrimp*, para 130.
767 Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm', 23(2) European Journal of International Law (2012), at 386.
768 Articles 53 and 64 of the VCLT.

priority over other norms and permit of no derogation. It is accordingly doubtful that a panel or the AB would have the authority to nullify a WTO norm for a violation of *jus cogens*.[769] In this sense, were sustainable development to attain the status of a *jus cogens* norm, the strong presumption against violating such a norm would encourage an interpretation that allows China to use export duties for the purpose of sustainable development.[770]

However, sustainable development seems to have not yet attained this status. For while the existence of the category of *jus cogens* norms is recognized internationally, there is little international consensus as to which specific norms qualify.[771] A relevant notion in the literature might be the 'right to life', which is protected under every international human rights convention, but this right has not developed into a general prohibition against failing to avoid—or perhaps better, general permission to take measures to avoid—environmental damage that threatens the international community as a whole.[772] Moreover, tribunals have been in practice extremely cautious about recognizing *jus cogens* status owing to uncertainty regarding the potential implications for a tribunal's legitimacy.[773] This being the case, it is also unrealistic to expect the AB, which once avoided addressing the question of whether the precautionary principle had attained the status of customary international law and proposed to wait for 'authoritative formulation', to find that sustainable development has attained the status of a *jus cogens* norm.

Alternatively, it can perhaps more easily be argued that sustainable development has attained the status of customary international law.[774] Thus, the AB would be required to rule in favour of China's export duties if China could prove, first, the notion of sustainable development conflicts with an absolute prohibition on China's export duties, and, second, sustainable development prevails over China's export duty commitments. However, it would be difficult for China to prove the existence of a conflict between the principle of sustainable development and the absolute prohibition on

769 The mandate of the panel and the AB is limited to recommending that a national measure be consistent with WTO laws. See Gabrielle Marceau, '*WTO Dispute Settlement and Human Rights*', 13(4) European Journal of International Law (2002) at 756.

770 Ibid.

771 Possible norms of *jus cogens* include the prohibition on the use of force (e.g., an agreement between states to commit aggression against another state would be void), the prohibition on genocide and violations of other fundamental human rights.

772 Eva M. Kornicker Uhlmann, 'State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms', 11 Georgetown Environmental Law Review (1998), at 135.

773 Matthew Saul, 'Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges', 5(1) Asian Journal of International Law (2015) at 27.

774 Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm', 23(2) European Journal of International Law (2012), at 385.

China's export duties. At least in theory, because customary international law is by nature less specific and explicit than a treaty provision, the latter is likely to prevail as *lex specialis* whenever a conflict arises between them.[775] Therefore, in a future case, even if the AB were to find an absolute prohibition on China's export duties to be conflict with the principle of sustainable development, the prohibition would still likely to carry greater weight. Thus, considering the very cautious stance of the AB to identify customary international law and the vague nature of sustainable development, it is not feasible for China to rely on the principle of sustainable development as an independent ground against the denial of China's right under Article XX in a future case though this principle may help develop a more teleological approach prioritizing the environmental objective under WTO law which is discussed in the next section.

7.3.2.3 The principle of good faith

In *US—Shrimp*, the AB referred to the principle of good faith for additional interpretative guidance in deciding whether the US passed the test under the *chapeau* of GATT Article XX.[776] In the view of the AB, in the application of the principle of good faith, the abuse of rights should be prohibited. Thus the doctrine of abuse of rights, for the AB, is one application of the principle of good faith, which requires that a state's right 'must be exercised *bona fide*, that is to say, reasonably'.[777]

The reception of the *China—Raw Materials* and *China—Rare Earths* decisions makes the stance of the complaining governments in seeking to prohibit China from using export duties appear extreme and unreasonable. Moreover, this thesis also shows that this outcome would in practice constrain China's policy space to protect the environment, an especially pressing concern in the context of global climate change. Since the doctrine of abuse of rights 'prevents a Party to an agreement from exercising its rights in a way that is unreasonable in light of the spirit of the agreement',[778] the question arises whether the principle relating to the abuse of rights could serve to address what China views as the unreasonable acts of the complainants in the two cases.

---

775 Joost Pauwelyn, 'How to Win a WTO Dispute Based on Non-WTO Law? Questions of Jurisdiction and Merits', 37(6) Journal of World Trade (2003), at 1025.

776 AB Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 158.

777 Ibid.

778 Thomas Cottier and Krista N. Schefer, 'Good Faith and the Protection of Legitimate Expectations' in Marco Bronckers and Reinhard Quick (eds.), '*New Directions in International Economic Law, Essays: Essays in Honour of John H.Jackson*', (Kluwer Law International, 2000), at 127.

Abuse of rights has expressly served as the basis of a claim before the ICJ, specifically in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, in which the Spanish government invoked 'an abuse of the right of diplomatic protection'.[779] Although this principle has never been applied independently in WTO disputes, the AB in *US—Offset Act* found a basis for applying the principle of good faith independently in order to assess the manner in which a WTO member had fulfilled its obligations. In this context, China may argue that the principle of abuse of rights, as part of the principle of good faith, prohibits WTO members from assuming that China has implicitly signed away its valuable rights under Article XX. Indeed, as the panel held in *China—Rare Earths*, an interpretation of WTO law that in effect prevented WTO members from taking necessary measures to protect the environment could be considered inconsistent with the object and purpose of WTO law and thus 'manifestly absurd or unreasonable'.[780]

In *US—Offset Act*, however, the AB also appeared to suggest that a violation of a WTO provision is a necessary condition to find a member to not act in good faith. In this context, alternatively, China could claim that the attempt to deny its right to use export duties under Article XX constitutes an abuse of procedural rights under Article 3(10) of the DSU, according to which all WTO members must engage in dispute settlement procedures in good faith. In view of the *US—Shrimp* case, the denial of China's right to impose export duties under Article XX could, then, constitute an unreasonably exercise of rights. This option is, however, less feasible than the above one because it requires the AB to adopt a very broad interpretation on procedural rights.

7.3.3 Options based on non-WTO treaties

As discussed above, after the *US—Shrimp* case, a treaty between the US and other WTO members designed to protect sea turtles could serve as a defence for the United States against a future claim of 'arbitrary or unjustifiable discrimination'. Thus, if China could conclude a treaty between it and the complaining governments defining the legitimate use of export duties to protect the environment, this treaty could be used as defence against a claim of the violation of China's export duty commitments in a future case. However, this kind of agreement on the environmental role of China's export duties is not likely to be reached because, as evident in the *China—Raw Materials* and *China—Rare Earths* cases, the complaining governments, suggesting that China's export duties could be replaced by other better environmental instrument, rejected to recognize the importance of export duties in protecting the environment.

779 Judgment of 5 February 1970 Second Phase Procedure(s): Preliminary objections, at 15.
780 Panel Reports, *China –Rare Earths*, para 7.111.

Aside from relying on a bilateral agreement, WTO members may also invoke a decision under the dispute settlement mechanism of a non-WTO treaty against a WTO complaint. Thus, by way of example, following the recommendations of the Resolution of the International Labour Conference (ILC) recommending action against Myanmar for breaching the International Labour Organization's Forced Labour Convention, a number of WTO members at one point imposed trade embargoes against Myanmar; had the latter complained to the WTO, the former would have been allowed to use the ILC recommendations, as the later and more specific norm, as a defence.[781] After all, the WTO may also expect other international organizations to respect an explicit WTO authorization.[782]

For instance, in the *EC — Bananas III* case, the Arbitrators found that Ecuador, pursuant to Article 22.2 of the DSU, may request authorization by the DSB to suspend certain TRIPS obligations as a countermeasure against a prior WTO violation by the EU's import regime for bananas.[783] To be sure, Ecuador never exercised its right to adopt such a countermeasure, but instead negotiated a settlement with the EU to improve market access for its bananas.[784] But if Ecuador did suspend intellectual property protection, the WTO would expect the WIPO to refuse finding a violation of the WIPO administered treaties.

This option is, however, not available to China because export duties have not been authorized under any organization of non-WTO treaties. In the absence of such an authorization, China may argue that export duties are instead authorized under a multilateral environmental agreement (MEA). Relevant in this context, the Montreal Protocol allows for trade restrictive measures that are inconsistent with the GATT 1994 against non-parties. To date, these authorized trade restrictive measures have never been challenged, though they are believed to be protected by GATT Article XX.[785] If, however, a measure such as an export ban authorized by the Montreal Protocol were to fail to pass the test under Article XX,[786] the Montreal Protocol could arguably be used as an independent defence. For instance, as

781 Joost Pauwelyn, 'How to Win a WTO Dispute Based on Non-WTO Law? Questions of Jurisdiction and Merits', 37(6) Journal of World Trade (2003), at 1022.

782 Ibid., at 1023.

783 Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V.

784 See Notification of Mutually Agreed Solution, EC - Bananas III, WT/DS27/58, 2 July 2001.

785 The Ozone Secretariat in 1999 issued a communication to the WTO Committee on Trade and Environment noting that the measures could be saved under Article XX. See Duncan Brack and Kevin Gray, 'Multilateral Environmental Agreements and the WTO', IISD Report (2003), at 20.

786 Ibid., at 21. The Director of the WTO Trade and Environment Division in 1996 suggested that the Protocol's trade measures would not pass the tests under GATT Article XX.

discussed in subsection 2.1.3, if Chile in the *Chile—Swordfish* case chose to invoke several articles concerning conservation of environmental resources under UNCLOS in its defence, the AB may allow it to do so.

In this context, China could refer to the Paris Agreement, which is within the United Nations Framework Convention on Climate Change (UNFCCC), as a defence against a WTO complaint prohibiting it from using export duties for fighting climate change. It is noteworthy that China in its second communication to the UNFCCC described its export duties as a type of instrument designed to 'effectively control greenhouse gas emissions'.[787] This assertion has also received support from some research reports, including a 2012 World Bank research paper suggesting that export duties could play a positive role in future negotiations aimed at reducing carbon leakage.[788]

However, unlike the Montreal Protocol, the Paris Agreement does not explicitly authorize China to impose export duties. So the AB needs to determine whether the Paris Agreement requires, or at least permits, China to adopt export duties as part of its climate policy, and this determination could also require China to prove the necessity of export duties to combat climate change. Therefore, although the Paris Agreement confirms China's target of halting the increase in its carbon emissions by around 2030, there remains enormous uncertainty regarding whether the AB would accept the Paris Agreement as a defence permitting a violation of China's export duty commitments. Moreover, one important assumption behind this option is that the Paris Agreement is binding on these WTO members which could potentially bring a case against China's export duties. This assumption is, however, challenged by the recent announcement of the United States, which keeps litigating against China's export duties in the *China—Raw Materials*, *China—Rare Earths* and *China—Raw Materials II* cases, of its intention to withdraw from the Paris Agreement though it can be argued that the absence of the US may increase the necessity of providing China with more policy space to fight climate change.

To conclude the present section, all potential interpretative options based on non-WTO norms appear to require the AB to overrule its prior decisions explicitly and therefore constitute second-best options. Among them, the argument that China's export duty commitments should be viewed as a subsequent agreement or practice modifying GATT Article XI is unlikely to be accepted by the AB.[789] Similarly, the AB can be expected to reject argu-

787 UNFCCC (2004), above n 6.

788 Copeland (2012), above n 11, at 41.

789 The reason is that, on the one hand, the parties to the China's Accession Protocol are not the same as those to the GATT 1994; and on the other hand, even China itself recently rejected considering subsequent practice as a tool to modify treaties.

ments based solely on the principles of sustainable development or of the Paris Agreement, though these non-WTO norms could bolster an interpretation favouring China's export duties. A more feasible second-best option appears to be founded on the principle of good faith which might be used to against the assumption that China has implicitly signed away its valuable rights under Article XX. Alternatively, another less feasible option would be to argue that the denial of China's rights under Article XX is inconsistent with the principle of prohibition of abuse of rights under Article 3(10) of the DSU. The feasibility of various interpretative options under WTO law is assessed in the following section.

7.4 Feasibility tests for interpretative options based on WTO law

In this section, the feasibility of two major interpretative options under WTO law is assessed. The first is based largely on the major criticism of the *China—Raw Materials* and *China—Rare Earths* decisions discussed in Chapter 3, namely that the AB, in adhering to a strict textual approach, ignored the environmental concerns raised in the Preamble to the WTO Agreement. The discussion begins by addressing the feasibility of the AB adopting a more teleological approach that gives greater weight to the environmental aims under WTO law than in the earlier cases. Since the AB has already found that the preamble does not provide 'specific guidance' that would clarify the relationship between Paragraph 11.3 and GATT Article XX, such an approach would likely require explicit departure from its previous decisions, a move that, as has been seen, constitutes a second-best approach. In an effort to find the most feasible solution, a second interpretative option is proposed that would enable the AB to distinguish the absolute ban on China's export duties.

7.4.1 A more teleological approach in light of the environmental context in the preamble of the WTO Agreement

The preamble to the WTO Agreement addresses several important environmental issues regarding 'sustainable development' and directives to 'preserve the environment'. This environmental context, as the AB held in the *US—Shrimp* case, 'must add colour, texture and shading' to its interpretation.[790] This ruling, however, at least in the opinion of some scholars, was not followed in the *China—Raw Materials* and *China—Rare Earths* cases, and a group of interpretations has been proposed according to which the AB could take a relatively more holistic approach by emphasizing the preamble's environmental context. The following discussion accordingly presents two ways in which the AB could adopt a new interpretation permitting China to

790 AB Report, *US – Shrimp*, para 153.

use export duties under Article XX by relying on the environmental objective of WTO law.

7.4.1.1 Explicitly prioritizing the object of environmental protection

If the object of environmental protection has some form of relative primacy in WTO law, the AB could rely on it to give meaning to the silence on the applicability of the environmental exceptions under Article XX to China's export duty commitments. There is, however, a lack of WTO jurisprudence about the prioritization of a treaty's purpose and object. In order to provide the AB with a good example, this discussion refers to the ECJ's *Kadi I* judgment concerned implementation of resolutions of the United Nations (UN) Security Council that imposed sanctions under Chapter VII of the UN Charter against individuals and entities alleged to be associated with terrorism. To give effect to these resolutions, the Council of the European Union adopted a regulation ordering the freezing of the funds and other assets of persons and entities appearing on a list annexed to the regulation. The appellants claimed that this regulation should be annulled because it infringed several of their fundamental rights, namely to respect for property, to be heard before a court of law, and to effective judicial review.[791]

At first, this claim was rejected by the Court of First Instance because it lacked the jurisdiction to review the validity of the basis of regulation at issue, namely the relevant resolution adopted under Chapter VII of the UN Charter, which prevails over the obligations of member states under EU law by virtue of Article 103 of the UN Charter.[792] Subsequently, the claim of the appellants that the regulation violated their fundamental rights was supported by the ECJ, which held that, if it were to find a measure giving effect to a resolution of the UN Security Council to be inconsistent with 'a higher rule of law in the Community legal order', this finding would not change the 'primacy of that resolution in international law'.[793]

Relevant in the context of prioritizing the object of environmental protection in WTO law is the practice of the ECJ in finding that the protection of fundamental rights at issue, as part of the 'very foundations' of the EU legal order,[794] forms 'the constitutional principles' of the EU law.[795] While

791 ECJ, Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (2008) ECRI-6351, para 59.

792 Except where these violate jus cogens. The CFI concluded that fundamental rights as protected by jus cogens have not been infringed. Kadi CFI judgment, paras 212-31, 233-91.

793 *Kadi* (2008), above n 791, para 288.

794 Ibid., para 304.

795 Ibid., para 285.

the Court emphasised the importance of the protection of fundamental rights against 'the alleged absolute primacy of the resolutions of the Security Council', it also appeared to imply a 'hierarchy of norms' within EU primary law.[796] Thus, from a constitutional perspective, a finding by the AB that a hierarchy of norms exists in WTO law in which the object of environmental protection has primacy would support the argument that China cannot legally sign away its right under Article XX during the accession negotiations, at least not in a silent manner.

The AB, however, has never established such a hierarchy of norms. Although the panel held in *China—Rare Earths* that an interpretation of WTO law according to which WTO members were legally prevented from taking measures necessary to protect the environment could be inconsistent with the object and purpose of WTO law, and that such a result could also be 'manifestly absurd or unreasonable',[797] which seems to suggest that environmental protection is one of the fundamental values under WTO law, this perspective has not been confirmed by the AB. On the contrary, the WTO has 'no constitutional court, no constitutional convention, and no constitutional drafting process',[798] and while scholars have articulated at least three approaches to WTO constitutionalism,[799] the use of constitutional analogies in analysing the WTO has not met with universal approval.[800] Thus, the AB is unlikely to prioritize the object of environmental protection in WTO law explicitly. Alternatively, the following discussion assesses the feasibility of the AB implicitly prioritizing the object of environmental protection under WTO law as part of overriding principles.

---

796 Ibid., para 305. Also see Armin Cuyvers, '"Give me one good reason": The unified standard of review for sanctions after Kadi II' 51(6) Common Market Law Review (2014), footnote 14.

797 Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by AB Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, DSR 2014:IV, para 7.111.

798 Jeffrey L. Dunoff, 'Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law', 17(3) European Journal of International Law (2006), at 650.

799 Ibid., at 651. The three approaches include constitution as institutional architecture, constitution as normative commitment, and constitution as judicial mediation. The first approach highlights the institutional design of the WTO's constitution and posits that the constitution serves to efficiently resolve disputes between states. The second approach understands the constitution as a set of normative commitments to values such as individual freedom and the rule of law. The last approach focuses on the role of the judiciary in gradually constructing a package of constitutional norms through dispute resolution.

800 Ibid.

7.4.1.2 *Implicitly prioritizing the object of environmental protection*

Although the AB has not attempted to categorize various types of norms as constitutional or non-constitutional,[801] it does in practice treat certain norms differently from others in adopting a more teleological approach. Thus, to return to a useful example, it adopted in the *US—Shrimp* case an evolutionary interpretation that broadened the scope of 'natural resources' under Article XX(g) with reference to the environmental concerns articulated in the preamble.[802]

Another example of a more teleological approach can be found in the AB's interpretation in the same case concerning the acceptance of *amicus curiae* briefs, which non-state actors have submitted in attempts to participate in WTO dispute settlement proceedings. According to Article 13 of the DSU, panels have the right to 'seek' information from any relevant source, including non-state actors; in *US—Shrimp*, the panel refused to consider several *amicus curiae* briefs on the grounds that it had not sought them.[803] On appeal, however, the AB explicitly rejected the panel's conclusion;[804] referring to the object and purpose of the panel's mandate under Article 11 of the DSU, the AB interpreted the term 'seek' to include accepting even briefs that had not been requested by the panel.[805] From a constitutional perspective, the AB chose an active fact-finding procedure in order to preserve the legitimacy of the WTO dispute-settlement proceedings.[806]

Compared with the two examples relating to *US—Shrimp*, however, the silence regarding the applicability of Article XX to China's export duty commitments would require the AB to give much greater weight to the environmental issues raised in the Preamble to the WTO Agreement if it were to support China's right. Such a teleological approach can in fact be discerned in a series of decisions by the AB regarding zeroing, a calculation methodology employed in the context of anti-dumping efforts that is not explicitly prohibited by the WTO.

---

801 Isabelle Van Damme, 'Treaty Interpretation by the WTO AB', 21(3) European Journal of International Law (2010), at 644.

802 AB Report, *US — Shrimp*, paras 129–131.

803 Panel Report, *US — Shrimp*, para. 7.8.

804 AB Report, *US — Shrimp*, para 110.

805 But the panel still had the discretionary authority to reject them. AB Report, *US — Shrimp*, para 108.

806 Deborah Z. Cass, 'The 'Constitutionalization' of International Trade Law: Judicial Norm-generation as the Engine of Constitutional Development in International Trade', 12(1) European Journal of International Law (2001), at 61. This interpretation is opposed by a large number of WTO members in a subsequent case and in practice the panel and the AB only address the amicus brief which is appended to a party's submission. Arguably, this undermines the constitutional arguments provided by Cass. See Dunoff (2006), above n 462, at 660.

Specifically, during an anti-dumping investigation, the level of anti-dumping duties is assessed based on the dumping margin, which refers to the gap between domestic and export prices. A positive dumping margin describes instances in which an export price exceeds a domestic price and a negative dumping margin those in which the latter exceed the former. Since a product under investigation usually consists of various sub-products, its overall dumping margin is estimated as the sum of the dumping margins of the various individual sub-products, which may include both positive and negative margins. The zeroing methodology, however, ignores the negative dumping margin, in effect inflating the overall dumping margin for the product under investigation.

Thus, in *EC—Audio Cassettes*, Japan complained that the zeroing practice of the European Communities was inconsistent with 'fair comparison' under Article 2 of the Tokyo Round Anti-Dumping Code because it inflated dumping margins in this manner.[807] This argument was rejected by the panel, which opined that Article 2 concerned only those circumstances in which domestic prices exceed export prices and that nothing in it prevented the European Communities from adopting its own zeroing practice.[808] In other words, since Article 2 was silent on situations in which export prices exceed domestic prices, WTO members were free to exclude the negative dumping margin from anti-dumping investigations. Article 2 of the Tokyo Round Anti-Dumping Code now appears in Article 2 of the Agreement on Implementation of Article VI of the GATT 1994 (the 'Anti-Dumping Agreement').

Based on Article 2, the AB in the *EC-Bed Linen* case made a surprising departure from the *EC—Audio Cassettes* decision by holding that, because the zeroing methodology would indeed generate unfair results, it was therefore inconsistent with 'fair comparison' under the article,[809] which was exactly the position put forward by Japan and rejected by the panel in *EC—Audio Cassettes*. From a constitutional perspective, this hermeneutical shift reflects the AB's concern regarding the negative effects of the increasingly common practice of zeroing on 'the very *telos* of the WTO (free trade)'.[810]

In a series of subsequent cases, the AB held the zeroing methodology to be illegal in the context of, not only the original investigation, but also the administrative review process.[811] In the *US—Continued Zeroing* case, the AB faced a challenge in interpreting Article 17.6(ii) of the Anti-Dumping

807 Panel Report, *EC—Audio Cassettes*, para 115.
808 Ibid., para 350.
809 AB Report, *EC–Bed Linen*, para 59.
810 Sungjoon Cho, 'Global Constitutional Lawmaking', 31(3) University of Pennsylvania Journal of International Law (2014), at 23.
811 Ibid., at 13-18.

Agreement, a provision that regulates situations in which the panel has found that the agreement 'admits of more than one permissible interpretation'. According to this article, WTO members can choose 'one of those permissible interpretations', a strict textual analysis of which was likely to support the position of the US that 'dumping may be determined for individual export transactions'.[812] In order to avoid validating the zeroing methodology, the AB therefore employed a teleological interpretation that prioritized the first sentence of Article 17.6(ii).[813]

This zeroing jurisprudence, however, was met with harsh criticism on the grounds that it represented judicial activism. The US, for instance, at one point described the invalidation of zeroing as 'making up rules that the United States never negotiated'.[814] Several attempts to reach a compromise between the jurisprudence and the opposition of the US also failed in the WTO.[815] This being the case, when it comes to China's export duties, even if the AB were to understand environmental protection to be the very *telos* of the WTO, it would still be extremely cautious in employing an approach similar to that employed in the zeroing jurisprudence.

Further, a more teleological approach in light of the environmental context of the Preamble to the WTO Agreement would also require the AB to depart explicitly from its prior decisions, which, again, it has never done. As an alternative, the following discussion accordingly seeks an interpretation that would enable the AB to depart *implicitly* from the *China—Raw Materials* and *China—Rare Earths* decisions.

7.4.2 A new interpretation that distinguishes the *China—Raw Materials and China—Rare Earths* decisions

While various new interpretations have been proposed to repeal the *China—Raw Materials* and *China—Rare Earths* decisions, the feasibility for the AB to amend these decisions by employing the option of distinguishing has not been addressed.[816] In *Indonesia—Import Licensing Regimes*, the AB was requested to decide whether a panel should always follow the sequence of two-tiered analysis under Article XX. By distinguishing the normal situations and the 'particular circumstances' in which a panel might be able to analyse the elements under the applicable paragraphs that were relevant to assess the requirements of the chapeau without following the 'normal sequence', the AB narrowed the scope to apply the 'normal sequence' of

812 Panel Report, *US—Continued Zeroing*, para 7.162.
813 Cho (2014), above n 748, at 21.
814 Communication from the United States, 'Offsets for Non-Dumped Comparisons', 2, TN/RL/W/208, 5 June 2007.
815 Cho (2014), above n 748, at 23.
816 See Chapter 3.

two-tiered analysis that was established by the AB itself in *US—Gasoline*. This example raises the question of whether the scope to apply the *China—Raw Materials* and *China—Rare Earths* decisions could be limited to the extent that provides China with policy space to protect the environment.

As discussed in Chapter 4, the EU, one of the complainants in all three cases against China's export duties, once proposed a WTO agreement to restrict the use of export duties in the context of the Doha Development Agenda's negotiations on non-agricultural market access,[817] but that instance, it did not propose an absolute prohibition on export duties. Rather, the EU acknowledged their legitimate application in the context of 'financial crises, infant industry, environment (preservation of natural resources), and local short supply'.[818] In a broader context, then, when WTO members have sought to restrict the use of export duties through regional trade agreements, contracting parties have often been provided with exceptions under which their use is permitted.[819] By addressing the environmental issues associated with what China views as an extreme stance against its export duties, the AB could draw a clear line between protectionist export duties and those adopted for an environmental purpose.

In terms of its scope, Paragraph 11.3 regulates 'all taxes and charges applied to exports' except fees that are strictly related to the approximate costs of services rendered under GATT Article VIII. This broad notion is further defined in Paragraph 155 of China's Accession Working Party Report as 'taxes and charges applied exclusively to exports'. The term 'exclusively' here seems to suggest that Paragraph 11.3 excludes situations in which taxes and charges are not applied exclusively to exports. Such situations could, however, be regulated under Paragraph 170 of China's Accession Working Party Report, which states that 'China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations' under a section titled 'Taxes and Charges Levied on Imports and Exports'.

As the AB held in *China-Raw Materials*, Paragraph 170 is concerned with internal taxes that affect imports and exports, such as value-added taxes, which differ from the export duty commitments under Paragraph 155. Following this interpretation, China's commitments regarding taxes levied on exports can be classified into one or the other of two groups. The first includes taxes applied exclusively to exports, which are regulated by Para-

817 ICTSD, 'WTO Legal Status and Evolving Practice of Export Taxes', available at http://www.ictsd.org/bridges-news/bridges/news/wto-legal-status-and-evolving-practice-of-export-taxes, (visited 18 June 2017).

818 The European Communities, *Revised Submission on Export Taxes*, TN/MA/W/101, 17 January 2008, para 4(1).

819 Korinek and Bartos (2012), above n 267.

graph 11.3 and, according to the AB's rulings in *China—Raw Materials* and *China—Rare Earths*, cannot be justified under GATT Article XX. The second group includes taxes that do not apply exclusively to exports, which are regulated by Paragraph 170, a provision concerned with internal taxes.

This distinction provides grounds for a new interpretation that departs implicitly from the prior decisions over China's export duties. The reason is that, since Paragraph 170 refers explicitly to Article III:2 of the GATT, which requires that internal taxes treat imported and domestic products equally, it can be argued that this national treatment requirement also applies to taxes on exported and domestically-consumed products.

A violation of this extended requirement under Article III:2, however, could be justified under GATT Article XX. This distinction between export duties and internal taxes that affect exports is further supported by a report by the Havana Conference indicating that one of the criteria for making this distinction is whether 'they apply exclusively to imported products without being related in any way to similar charges collected internally on like domestic products',[820] language similar to that of Paragraph 155.

This distinction is important for providing China with policy space to use export duties for an environmental purpose. For from an economic perspective, export duties may encourage domestic sales, and this is 'an undesirable consequence for a policy designed to further environmental goals'.[821] In this context, taxes applied exclusively to exports, as absolutely prohibited by Paragraph 11.3, are by nature not likely to be helpful in the pursuit of an environmental goal, which is more likely to be achieved when export duties are adopted in conjunction with corresponding restrictions on domestic consumption. This being the case, it may be wondered whether an export duty as defined in Paragraph 11.3 that had been adopted in conjunction with an internal tax, such as a consumption tax, would thereby constitute an internal tax under Paragraph 170.

A textual analysis of Paragraphs 155 and 170 suggests that export duties and internal taxes are closely related. The former, which regulate the use of export duties, fall under a section titled 'Customs Tariffs, Fees and Charges for Services Rendered, *Application of Internal Taxes to Exports*' (emphasis added). By contrast, Paragraph 170, which regulates the use of internal taxes affecting exports, falls under a section titled 'Taxes and Charges Levied on Imports and Exports'. The correlation between the titles of these two sections suggests that export duties may indeed be understood to constitute internal taxes that affect exports, at least under certain circumstances.

820 Havana Report, para 42.
821 Panel Reports, *China- Rare Earths*, para 7.169.

This interpretation is admittedly inconsistent with the traditional definition of internal taxes in the context of WTO jurisprudence. There are two decisive criteria for distinguishing import duties from internal taxes according to the AB's holding in the *China—Auto Parts* case. First, for a charge on a product to constitute an ordinary customs duty, the obligation to pay it must accrue the moment the product enters a particular customs territory (rather than when it is sold in a particular market).[822] Second, for a charge on a product to constitute an internal tax under GATT Article III:2, the obligation to pay must accrue owing to an internal factor (e.g., because the product was re-sold or used domestically).[823] Following these criteria, export duties do not constitute internal taxes, regardless of the existence of corresponding charges on domestic consumption, because the obligation to pay them accrues at the moment of export and because the motivation for the obligation is to enable the products at issue to leave a particular territory rather than to be sold within it.

This traditional definition of internal taxes, however, may ignore the distinction between those that affect imports and those that affect exports. To achieve a protectionist purpose with regard to imports, a country must impose higher charges on imported products than it does on like domestic products. Thus, for instance, as mentioned in Chapter 4, a Korean tax on imported distilled alcoholic beverages that exceeded the tax on the traditional national drink, soju, was found to be inconsistent with GATT Article III:2.[824] In contrast, a country that seeks to achieve a protectionist purpose with regard to exports must impose higher charges on exported industrial inputs than on domestically-consumed industrial inputs if it is to be successful. This protectionist purpose, however, cannot be achieved by means of internal taxes in the traditional sense because such taxes in practice fail to distinguish between products that are exported and those that are consumed domestically.

In this context, it would be pointless for China, by reading Paragraph 170 together with GATT Article III:2, to agree not to impose internal taxes that treat exported and domestically-consumed products differently. As the AB held in *Japan—Alcoholic Beverages II*, the aim of Article III:2 is to 'avoid protectionism in the application of internal tax'.[825] In order to make China's commitment under Paragraph 170 more meaningful, this provision could be used to regulate instances of protectionism in which export duties are adopted in conjunction with similar but lower charges on domestic

822 AB Report, *China—Auto Parts*, para 158.
823 Ibid., paras 162-163.
824 AB Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I.
825 AB Report, *Japan — Alcoholic Beverages II*, at 16.

consumption, in contrast with situations in which charges are 'applied *exclusively* to exports' (emphasis added) as regulated by Paragraph 155.

Following this interpretation, if China's export duties were adopted in isolation, they would be regulated by Paragraphs 155 and 11.3, a situation that could not be justified under GATT Article XX. Such an interpretation would not constrain China's policy space to protect the environment because the environmental purpose of the export duties would have to be achieved by imposing corresponding charges on domestic consumption, as described in Paragraph 170 and Article III:2, provisions requiring China to impose charges on exported and domestically-consumed products in a non-discriminatory manner. If China's intent were to impose higher charges (by way of export duties) on exported than on domestically-consumed products in the pursuit of an environmental goal, Article XX could be invoked to determine whether such discrimination would be justified.

This interpretation is of importance in combatting carbon leakage, a problem caused by discrepancies in the climate policies that have been adopted in various countries. In order to equalize the prices of energy-intensive products from China with those from countries that have adopted stricter climate measures, duties could be applied to exports of Chinese products. Since many of the energy-intensive products are final products, an increase in prices on the former would not provide support for Chinese industry, such support having been a major concern of the complaining governments in the *China—Raw Materials* and *China—Rare Earths* cases. Admittedly, the imposition of export duties on energy-intensive raw materials, even in conjunction with similar charges on domestic consumption, could still provide Chinese industry with preferential access to these resources. Such discrimination could, however, be addressed by Article XX, which provides fairly strict tests for protectionist measures, as will be discussed in the next chapter.

Aside from preserving China's policy space for combatting climate change, this new interpretation could also forestall future disputes regarding its export duties. For the fact is that, following the *China—Raw Materials* and *China—Rare Earths* decisions, China has nevertheless continued to impose export duties on certain products, behaviour that has led the EU and US to bring a third case, namely *China—Raw Materials II*, before the WTO. To some extent, China's persistence in this regard has been provoked by the extreme stance of the complaining governments and the contested outcomes of the *China—Raw Materials* and *China—Rare Earths* decisions. In this context, should the AB continue to support the complaining governments, China would still not be persuaded to abandon its export duties completely. Alternatively, the AB could send a clear message regarding the proper use of export duties—that is, in a less protectionist manner. China would then need to counterbalance export duties with similar charges on

domestic consumption in order to be compliance with Article XX, a provision that would make it difficult for the country to evade its export duty commitments, especially since it currently imposes consumption taxes on only 14 products apart from those at issue in *China—Raw Materials II*.[826]

In short, the analysis presented in this section shows that the AB is unlikely to accept a teleological approach informed by the environmental context in the Preamble to the WTO Agreement. It is instead more likely to accept an interpretation that draws a line between export duties of the sort at issue in the two previous cases, which exclusively restrict the exports, and 'export duties plus' that are adopted in combination with supplementary restrictions on domestic consumption. Following this line of reasoning, the AB would not need to depart from its prior decisions explicitly in order to accommodate both the trade values articulated in Paragraph 11.3 and the environmental values articulated in the Preamble to the WTO Agreement. Moreover, as in the case of the *Keck* proviso, this option would also provide guidance regarding a proper, which is to say less protectionist, way to impose export duties. Although this interpretation would still require the AB to go beyond its preferred strict textual approach, it represents the best among a number of unappealing paths by which the AB could surmount the difficulties created by the *China—Raw Materials* and *China—Rare Earths* decisions. Alternatively, the AB could also distinguish export duties from those enacted for the purpose of combatting climate change, a move that would certainly provide China with the requisite policy space. Such a move would also, however, send the unwelcome message that China cannot use export duties to address domestic concerns until those concerns threaten the rest of the world. This distinction is, therefore, less desirable than the one between regular export duties and 'export duties plus'.

It is noteworthy that the options of distinguishing or overruling only constitute the judicial way to alter the ban on China's export duties. This outcome could also be achieved by political intervention. This approach has a broader scope of application than the judicial way because it could prevent not only the wrong outcomes caused by a bad precedent but also those caused by bad law. To solve the problem in the latter situation is usually beyond the power of a tribunal which thus tends to not rule against the text of law in order to avoid the charge of judicial law-making.[827] The next two sections explore the feasibility for a political solution.

---

826 *Regulation on Consumption Taxes*, the State Council, No.539.

827 One of the exceptional cases is the *Les Verts* in which the Court read into Article 173 EEC (the current Article 263 TFEU) a right to bring a case for annulment against binding acts of the European Parliament though the treaty text only refers to acts of the Council and the Commission. By contrast, the ECJ explicitly refused to de facto alter the text of 263 TFEU in the *Unión de Pequeños Agricultores v Council* (UPA). Case 294/83 *'Les Verts' v European Parliament* [1986] ECR 1339.

7.5 Possible options to alter the absolute ban on China's export duties through a political correction

The WTO Agreement gives great power to the decision-making body, which consists of the Ministerial Conference and the General Council. The former, as the organization's most authoritative body, has the power to settle all matters involving any of the multilateral trade agreements;[828] since it normally meets only every other year, however, day-to-day business is conducted by the latter.[829] As mentioned, various solutions have been proposed in which China would request that the decision-making body adopt an amendment, a waiver, or an authoritative interpretation reversing the *China—Raw Materials* and *China—Rare Earths* decisions. The theoretical possibilities of these solutions are examined in this section.

First, it is theoretically possible to change the outcome of the *China—Raw Materials* and *China—Rare Earths* decisions through an amendment of China's accession protocol by, for instance, incorporating GATT Article XX into Paragraph 11.3.[830] One may worry that there is no legal basis in the WTO Agreement for amending an accession protocol because neither Article XII, a provision dealing with accessions, nor Article X, a provision dealing with amendments, specifies the procedure to amend the terms agreed in a protocol.[831] It is noteworthy, however, Paragraph 1.2 in China's accession protocol clearly states that this protocol 'shall be *an integral part* of the WTO Agreement'.[832] Although there has been a considerable academic debate as to whether a protocol of accession can self-declare itself to be part of another agreement, i.e., the WTO Agreement,[833] such an objection has never been raised in practice. The disputes regarding China's accession protocol have been actually proceeded on the assumption that this protocol is part of the WTO Agreement based on the integration clause of Paragraph

828 Article IV:1 of the WTO Agreement. Two plurilatural agreements set out in Annex 4 to the WTO Agreement are subject to different rules according to Article IV:8 of the WTO Agreement.

829 WTO Secretariat, 'The WTO General Council', https://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm, (visited 18 June 2017).

830 Liu (2014), above n 149.

831 This may explain why some authors did not even discuss the possibility of amending China' accession protocol while proposing a change of that protocol. They instead advocated the negotiation of a new plurilateral agreement. See Petros C. Mavroidis and André Sapir, 'China and the World Trade Organisation: Towards a Better Fit', Bruegel Working Paper Issue 6, 11 June 2019, https://bruegel.org/2019/06/china-and-the-world-trade-organisation-towards-a-better-fit/, (visited 10 September 2019).

832 Paragraph 1.2 of China's Protocol of Accession.

833 For a recent overview, see Dylan Geraets, '*Accession to the World Trade Organization: A Legal Analysis*', (Edward Elgar, 2018).

1.2.[834] These facts seem to suggest that China's export duty commitments could be amended following the general procedural rules under Article X of the WTO Agreement.

Under these ordinary rules, 'any Member' may submit a proposal for an amendment to the Ministerial Conference, which then has 90 days to try to reach a consensus on it.[835] If no consensus is forthcoming, the Conference may decide, by a two-thirds majority vote, to submit the proposal to the WTO membership for acceptance. While an amendment takes effect once two-thirds of members have ratified it,[836] it is not binding on those that have not. The amendment process is thus complex and likely time-consuming.[837] To simplify this process, an alternative procedure has been suggested that consider China's accession protocol as a bilateral treaty between the acceding country and the WTO as an organisation.[838] A mutual consent of China and of the WTO is thus needed to amend China's accession protocol. The consent of the latter one generally takes decisions by consensus or, failing that, by simple majority.[839] Compared with the aforementioned ordinary procedure, this alternative option certainly looks more efficient because it does not require further acceptance by WTO members. On the other hand, it also allows the membership to take a decision with the least formality and a simple majority that possibly counts China. An obvious disadvantage of this alternative, however, is that the WTO membership at large may not accept this unusual legal construct.

Second, it is also theoretically possible to have a political correction through a waiver under Article IX:3 of the WTO Agreement. This may provide China with a legal defence to a claim for breach of its export duty commitments. The panel in *EC—Bananas III*, for instance, held that, although the tariff preferences at issue in the case were inconsistent with GATT Article I:1, the EU could use the Lomé Waiver as a defence to a claim that Article I:1

834 AB Report, *China – Rare Earths*, para 5.19, footnote 422. 'We note that this proposition has not been contested either in the present disputes or in any prior dispute involving China's Accession Protocol. In addition, we take note of the Panel's statement that, in all prior cases involving China's Accession Protocol, panels and the Appellate Body "have proceeded on the assumption" that Paragraph 1.2 serves, inter alia, the function of making the obligations in China's Accession Protocol enforceable under the DSU'.

835 The Ministerial Conference must receive a proposal for an amendment by a Member or one of the three specialized Councils.

836 Article X:7 of the WTO Agreement.

837 It took almost 12 years after the proposal was adopted for the first amendment of a WTO agreement, TRIPS, to enter into force. For further information, see Section 7.6.

838 Julia Ya Qin, 'The Challenge of Interpreting 'WTO-PLUS' Provisions', 44 (1) Journal of World Trade (2010), at 134.

839 Article IX.1 of the WTO Agreement.

had been violated.[840] By analogy, China could request a waiver permitting it to impose export duties for environmental purposes.

In seeking a waiver of its export duty commitments, China must first request that the Council for Trade in Goods[841] consider its specific policy objectives and its reasons for being unable to achieve them within the context of the commitments.[842] As Mongolia's request for a waiver of its export duty commitments regarding raw cashmere made clear,[843] the environmental purpose of preventing 'extensive environmental damages and desertification' constitutes legitimate justification for a member's deviation from its export duty commitments.[844] Thus, the purposes of China's export duties such as fighting climate change are also likely to be recognized as legitimate justification for China to deviate from its export duty commitments. In the next step in the process, the Council for Trade in Goods must, within a period not exceeding 90 days, submit a report to the Ministerial Conference or General Council.[845] The support of three-fourths of WTO members is required for approval.[846] Although a consensus is preferred as a statement about decision-making procedures by the Chairman of the General Council under Article IX of the WTO Agreement reveals,[847] the same statement also makes clear that the preference to a consensus 'does not preclude a Member from requesting a vote'.[848] China thus could demand a

840 Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU, WT/DS27/R/GTM/HND, WT/DS27/R/MEX, and WT/DS27/R/USA, paras 7.131 – 7.134.

841 Requests for waivers concerning the multilateral trade agreements in Annexes 1A, 1B and 1C must initially be submitted to the relevant sectoral Council.

842 Paragraph 3 of the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994.

843 Communication from Mongolia, 'Request for a Waiver, G/C/W/571 and G/C/W/580, 26 January 2007.

844 Ibid. G/C/W/571, at 3. Footnote 3 'Goat heads 2002 accounted to 9,134 thousand. By 2005, they grew to 13,267 thousand, or by 1.5 times those in 2002. This rapid increase in the number of goat heads caused devaluation in the quality of cashmere'.

845 Article IX:3(a) of the WTO Agreement.

846 Article IX:3 of the WTO Agreement. But waivers for extensions of transition periods or periods of staged implementation require consensus as required by footnote 4 of the WTO Agreement.

847 Statement by the Chairman as Agreed by the General Council on 15 November 1995, Decision Making Procedures under Articles IX and XII of the WTO Agreement, WT/L/93, 24 November 1995.

848 James Harrison, 'Legal and Political Oversight of WTO Waivers', 11(2) Journal of International Economic Law (2008), at 413

vote in the absence of a consensus. This move, however, would require the WTO members to break the general taboo against formal voting.[849]

Third, an authoritative interpretation may also alter the absolute ban on China's export duties. However, compared with an amendment or waiver, this option involves more uncertainties due to its limited legal effects. Although Article IX:2 of the WTO Agreement accords to the Ministerial Conference and General Council the 'exclusive authority to adopt interpretations' of WTO agreements, the final sentence of Article IX:2 requires that that an authoritative interpretation 'shall not be used in a manner that would undermine the amendment provisions of Article X'. Thus, if a modification of the WTO ban on China's export duties is considered to fall exclusively within the scope of an amendment, the option of an authoritative interpretation will be unavailable for China.

Moreover, only one request has yet been made for an authoritative interpretation. The very infrequency appears to suggest that authoritative interpretations are not desirable in practice.[850] One possible reason is to avoid the discussion of the demarcation line with amendments. One may thus argue that the role of authoritative interpretations in practice has been taken over by those Ministerial Decisions or Declarations under Article IV:1 (Ministerial Conference) that constitute subsequent agreements on the interpretation of a provision of a WTO agreement within the meaning of VCLT Article 31(3)(a). In this sense, China may request the Ministerial Conference to take a decision updating its accession protocol regarding the use of export duties to protect the environment as a 'fudge'.[851] The feasibility of these political corrections is discussed below.

---

849 An illustrative example in this regard is a 2009 call by the Egyptian ambassador for a vote to recognize Palestine as an observer; while many members supported the ambassador's effort in political terms, they valued more highly continued adherence to the general ban on voting. The Egyptian ambassador was thus persuaded to drop the matter. See Craig Van Grasstek, 'The History and Future of the World Trade Organization', WTO Publications (2013), at 219.

850 Other factors to explain the non-use of Article IX:2 of the WTO Agreement see Claus-Dieter Ehlermann and Lothar Ehring, 'The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements', 8(4) Journal of International Economic Law (2005), at 818.

851 For general discussion of the decision-making in the WTO, see Pieter Jan Kuijper, 'WTO Institutional Aspects', in Daniel Bethlehem, Isabelle Van Damme, Donald McRae, and Rodney Neufeld (eds.), '*The Oxford Handbook of International Trade Law*' (Oxford, 2009). Mary Footer, 'Principal rule-making', in '*An Institutional and Normative Analysis of the World Trade Organization*' (Martinus Nijhoff, 2006).

7.6 Feasibility tests for amendments, waivers, authoritative interpretations, or Ministerial Decisions

The previous section illustrates the challenges of various political corrections. This section assesses the feasibility for China to overcome these challenges in light of WTO practice regarding the adoption of amendments, waivers, authoritative interpretations, and Ministerial Decisions.

7.6.1 Article X:1: an amendment as a formal correction

7.6.1.1 Amendments in practice

On 23 January 2017, the WTO announced an amendment to its Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, the first to a core WTO agreement since the organization's establishment in 1995.[852] This amendment was based on a protocol unanimously adopted by WTO members in 2005, the aim of which was to improve the access of less-affluent member states to affordable generic medicines produced in other countries by creating a system of compulsory licensing for pharmaceutical products produced solely for export.[853]

Under the TRIPS Agreement, WTO members can issue compulsory licences that permit companies to make a patented product or to use a patented process under licence without the consent of the patent owner when the reason for doing so is to protect public health. This flexibility, however, extends only to the domestic market in the country in which the drugs are produced, leaving countries without the capacity to produce generic drugs unable procure them at affordable prices. In order to address this issue, WTO members in 2003 decided to waive the restriction that limited these compulsory licences to local markets.[854] Since the waivers were designed to function as temporary instruments under the WTO Agreement, the amendment to the TRIPS Agreement in effect created a permanent legal basis for dealing with issues concerning compulsory licences.

However, the permanent legal effect of the amendment comes with a price, in that, compared with the adoption of a waiver, amendment procedures

852 WTO Secretariat, 'WTO IP Rules Amended to Ease Poor Countries' Access to Affordable Medicines', https://www.wto.org/english/news_e/news17_e/trip_23jan17_e.htm, (visited 18 June 2017). The Protocol (2001) Amending the Annex to the Agreement on Trade in Civil Aircraft amended a plurilateral agreement.

853 The Protocol is attached to the General Council Decision on Amendment of the TRIPS Agreement, WT/L/641, adopted on 6 December 2005. The TRIPS Amendment itself is annexed to the Protocol.

854 General Council Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 and Corr.1, adopted on 30 August 2003,

are more cumbersome. For unlike waivers, amendments take legal effect only if at least two thirds of WTO members have deposited formal instruments of acceptance with the Director-General, a process that can result in considerable delays;[855] thus it took almost 12 years for the amendment to the TRIPS Agreement to enter into force. This problem could be solved, though, if WTO members were willing to take the necessary steps. A good parallel is the process for accepting the Protocol of Amendment to insert the WTO Trade Facilitation Agreement into Annex 1A of the WTO Agreement, which the General Council completed on 27 November 2014, marking the first multilateral deal in the WTO's 21-year history; in this case, two years elapsed before the amendment received the necessary two-thirds acceptance (specifically by 110 of the 164 WTO members).[856]

Another disadvantage of amendments is that, even after one enters into force, WTO members that have not accepted it retain their rights under the agreements as originally drafted. The result is a two-tier system that undermines the effectiveness of an amendment by making it depend largely on the consent of a few key members. Thus, for example, a protocol amending Part I of the GATT 1947 was abandoned after 10 years because one contracting party was unable to obtain parliamentary approval.[857] Moreover, even if all members were eventually to accept the amendment for incorporating the new agreement, a two-tier system would still exist, at least temporarily, because the length of time required for the domestic ratification process varies considerably among WTO members. For these reasons, an amendment would not serve to address an urgent issue in practice.

7.6.1.2 Feasibility to amending China's export duty commitments

The above practice of amendments shows that to amend China's export duty commitments is not an ideal option if China needs these duties to address urgent environmental issues. Alternatively, it has been argued that China's accession protocol could be seen as a bilateral treaty between China and the WTO.[858]

In this scenario, Article IX (Decision-Making) or Article XII (Accession) should apply. Either way, once the WTO as a contracting party agrees to amend China's export duty commitments, no such further formal acceptance as ratification by individual WTO members would be required. This

855 Article X:7 of the WTO Agreement.
856 WTO Secretariat, 'WTO's Trade Facilitation Agreement enters into force', available at https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm (visited on 10 June).
857 BISD 15S/65.
858 Qin (2010), above n 838, at 134.

would allow the membership to take a decision with the least formality and thus increase efficiency. More importantly, if a consensus is not achieved, a majority of the votes cast under Article IX or a two-thirds majority for approval under Article XII would be sufficient to amend China's export duty commitments. Such a decision would be binding on all WTO members.[859] The challenge is, however, that WTO members may prefer not to break the general taboo against formal voting. Moreover, this alternative reading of the existing relationship between China's accession protocol and the WTO Agreement also comes with a considerable degree of uncertainty because neither Article X (Amendments) nor Article XII specifies the procedure for amendments to an accession protocol.[860]

A much more conventional view would perhaps treat China's accession protocol as part of the WTO Agreement. Article X thus should apply. As discussed in the previous section, the effectiveness of any amendment designed to create a desirable policy space for China under this provision would be undermined if China could not get the support from all WTO members. The reason is that an amendment only takes effect on those that have ratified it. Thus, China would be unable to invoke Article XX to justify its export duties during any litigation with the members that are unwilling to ratify it.

As revealed in the *China—Raw Materials*, *China—Rare Earths*, and *China—Raw Materials II* cases, the extreme stance of the complaining governments in denying China's right to use export duties under Article XX shows that these members are accordingly unlikely to support an amendment that contradicts their claims in the three cases. Moreover, several third parties that had supported the claims of the complainants in the earlier cases would be similarly unlikely to agree to any such amendment. Since the unfriendly members number among China's major export destinations,[861] the effectiveness of an amendment option would be greatly undermined.

The issue concerning the effectiveness of the amendment could alternatively be addressed through a waiver releasing WTO members from certain legal obligations under the WTO agreements.[862] In the aforementioned case of the amendment to the TRIPS Agreement, members that have not accepted the amendment can refer to the 2003 waiver decision regarding access to afford-

859 Ibid.

860 Qin thus proposed to add a special procedure to Article X. See Julia Ya Qin, 'The Conundrum of WTO Accession Protocols: In Search of Legality and Legitimacy', 55(2), Virginia Journal of International Law (2015).

861 In 2015, the top export destinations of China are the United States ($457B), Hong Kong ($273B), Japan ($152B), Germany ($97.4B) and South Korea ($90.1B).

862 ACWL, 'Giving Legal Effect to the Results of the Doha Round: An Analysis of the Methods of Changing WTO Law', Background Paper for ACWL Members and LDCs (2006), at 9.

able medicines from a third country. The following discussion explores the feasibility of a waiver as a stopgap measure that would allow China to use export duties under certain circumstances.

7.6.2 Article IX:3: a waiver as a stopgap measure

7.6.2.1 Waivers in practice

WTO members rely more heavily on waivers than amendments as a means to deviate from agreed-upon trade disciplines. Thus, while only two amendments have been approved since the organization's establishment in 1995,[863] in 2017 alone the General Council granted eight waivers.[864] An individual WTO member may request suspension of its obligations in this way for two main reasons.[865] One is to address capacity problems in complying with WTO commitments, examples being waivers that extended transitional periods for implementing obligations under the Customs Valuation Agreement, the Individual Harmonized System waiver decisions, and the waivers of Cuba's obligation under GATT Article XV:6, which article required any contracting party that ceased to be a member of the International Monetary Fund to enter into a special exchange agreement with the WTO.[866]

The second major reason that an individual WTO member might seek to be released from its obligations is in order to accommodate policy conflicts, that is, to retain a WTO-inconsistent measure in the furtherance of specific policy objectives. Rather than addressing the incapacity of a WTO member, this type of waiver relieves a member of an obligation that has impeded the achievement of certain objectives, examples being waivers that permit trade-related investment measures, that render compliance with specific commitments unnecessary, and that allow for protectionist measures, residual quantitative restrictions, tariff surcharges, and market integration. Relevant in the context of China's export duties is Mongolia's request in 2007 for a five-year waiver of its export duty commitments regarding raw cashmere.[867] For Mongolia, export duties could contribute to improve the

863 Introduction of Harmonized System 2002 changes to WTO schedules of tariff concessions; Introduction of Harmonized System 2007 changes to WTO schedules of tariff concessions; Introduction of Harmonized System 2012 changes into WTO schedules of tariff concessions; Introduction of Harmonized System 2017 changes to WTO schedules of tariff concessions; Former Trust Territory of the Pacific Islands; Trade Preferences granted to Nepal; Application of autonomous preferential treatment to the Western Balkans; Article XV:6 – Extension of waiver.

864 WTO Secretariat, The WTO 2018 Annual Report, 31 May 2018.

865 Isabel Feichtner, '*The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law*', *Law*' (Cambridge University Press, 2012), at 52

866 Request for an extension of the waiver concerning Article XV:6 of the GATT 1994, WT/L/100, 12 December 2016.

867 Communication from Mongolia, 'Request for a Waiver, G/C/W/571 and G/C/W/580, 26 January 2007.

competitiveness of local cashmere industry and to address 'environmental concerns as the increase in exports of raw cashmere has encouraged the growth of goat herds that now surpass the sustainability of the country's pasture lands'.[868] In the same year, the Council for Trade in Goods approved Mongolia's request.

Waivers can be adopted for the benefit of groups of members as well, in which case they are referred to as 'collective waivers'.[869] WTO members have generally adopted such waivers in the pursuit of three major objectives. One is to defer compliance with WTO obligation, a good example being the 2002 suspension of the obligations of least developed country members with respect to pharmaceutical products under Article 70.9 of the TRIPS Agreement until 1 January 2016.[870] The waiver of this obligation was part of a package of measures intended to mitigate the obligations that the TRIPS Agreement impose on developing countries and that affect their capacity to ensure affordable health care for their populations.

The second major objective of collective waivers is exemplified by the above-mentioned 2003 TRIPS waiver, which modified existing WTO rules. Unlike the 2002 TRIPS waiver decision just discussed, the 2003 TRIPS waiver released any least developed country member and any other WTO member that had notified the TRIPS Council from the requirements that normally restrict the use of compulsory licensing with respect to pharmaceutical products· Another example of this type of waiver is the GATT practice of permitting preferential tariff treatment in accordance with the General System of Preferences as agreed upon in UNCTAD as well as preferential trade arrangements among developing countries, which were later replaced by the Enabling Clause and now form a permanent part of the GATT 1994.[871]

A third major objective in adopting waivers is to coordinate WTO rules with other international legal regimes. Thus, for instance, the collective Harmonized System (HS) waivers mentioned above have been adopted in order to suspend GATT Article II for WTO members that have implemented changes to the Harmonized Commodity Description and Coding System in their domestic tariffs but require additional time to adapt their GATT schedules

868 WTO Secretariat, 'Goods Council approves waivers for Mongolia, US', available at https://www.wto.org/english/news_e/news07_e/good_counc_9july07_e.htm (visited on 10 June 2018).

869 Isabel Feichtner, '*The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law*', *Law*' (Cambridge University Press, 2012), at 124.

870 Article 70.9 of the TRIPS Agreement: to grant exclusive marketing rights to pharmaceutical products.

871 Generalized System of Preferences, Decision of 25 June 1971, L/3545, 28 June 1971. Trade Negotiations Among Developing Countries, Decision of 26 November 1971, L/3636, 30 November 1971.

of concessions accordingly.[872] More specifically, most WTO members cannot completely adapt these schedules to HS changes before those changes are able to take effect on account of the administrative complexity involved and the need for tariff renegotiations.[873] An HS collective waiver can, then, legalize the domestic implementation of HS changes before those changes have been made to the schedules of concessions; otherwise, the changes could be inconsistent with the prohibition under GATT Article II of a change in a domestic tariff that negatively impacts tariff reduction commitments.

Instructive here as well is the collective waiver legalizing trade measures that were mandated under the 2002 Kimberley Process Certification Scheme for Rough Diamonds, the aim of which was to suppress trade in so-called conflict or blood diamonds. The measure at issue, under which participants in the scheme could neither import rough diamonds from nor export them to non-participants, had the potential to violate several WTO obligations, including the obligation to grant most-favoured-nation treatment under GATT Article I:1, the prohibition on quantitative restrictions under Article XI:1, and the requirement that quantitative restrictions be non-discriminatory under Article XIII:1. To avoid the norm conflict, a waiver was granted by the General Council on 15 May 2003 that suspended Articles I:1, XI:1, and XIII:1 retroactively from the date on which the scheme was launched until 31 December 2006. [874]

Waivers have one major disadvantage that amendments do not, namely that they are granted only on a time-bound basis and can be modified or terminated by a simple majority of WTO members during annual reviews. For this reason, WTO members seeking a permanent and definitive reduction of their obligations cannot rely on waivers alone. It is noteworthy, however, that the 2003 TRIPS waiver decision did not specify a termination date as required by Article IX:4 of the WTO Agreement but rather stated that the waiver would terminate for each member when the amendment replacing the decision took effect. This practice speaks to the role of waivers as an interim instrument in the pursuit of a permanent suspension of obligations through the adoption of an amendment, which shed light on how to permanently allow China to use export duties for environmental purposes under WTO law.

---

872 Up to the end of 2010, twenty-six collective Harmonized System waivers (including extension decisions) have been adopted by the WTO General Council. Collective waivers see the Secretariat, Committee on Market Access, Situation of Schedules of WTO Members, G/MA/W/23/Rev. 6, 19 March 2009.

873 Isabel Feichtner, '*The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law*', *Law*' (Cambridge University Press, 2012), at 149.

874 General Council, Decision of 15 May 2003, WT/L/518, 27 May 2003. The waiver decision was extended until 31 December 2012 by a second decision of 15 December 2006. General Council, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of 15 December 2006, WT/L/676, 19 December 2006.

7.6.2.2 Feasibility to waive China's export duty commitments

The above practice of waivers shows that this instrument could be a feasible option for China to address urgent environmental issues. Moreover, since a waiver is a more temporary exception than an amendment, the consensus requirement, as discussed in the previous section, may be met more easily than is the case with the approval of an amendment for reasons as follows.

Articles IX:3 and IX:4 of the WTO Agreement stipulate that a waiver should be granted in exceptional circumstances and that any such decision should specify the conditions to which it applies and the date on which it is to expire. WTO members could, then, in order to prevent China from misusing Article XX for an industrial purpose, set conditions stricter than the article itself by permitting export duties to be imposed only in conjunction with identical or at least similar restrictions on domestic consumption. In this way, China's domestic industry is less likely to receive preferable access to raw materials, an outcome that has been a major concern in regard to the three cases challenging its export duties.

More importantly, any waiver granted for a period of more than a year is, as alluded to earlier, subject to annual review, in the context of which WTO members have the opportunity to determine whether the exceptional circumstances justifying it persist. Thus, if a simple majority of members were to conclude that an absolute prohibition on export duties has not been or is no longer a cause of environmental concern in China, any relevant waiver could be modified or allowed to expire.[875] These procedures regarding the approval and monitoring of waivers may help China to convince other members to allow the use of export duties in exceptional circumstances, such as for the purpose of tackling carbon leakage.

Alternatively, China could offer a political package deal in which export duties and other, unrelated items are combined in a manner sufficiently attractive to members who have opposed its imposition of the duties. In this context, the waiver at issue could function as an enforcement mechanism to ensure China's compliance with the other commitments included in the package deal. Thus, for instance, China has recently been considering a new export control law designed to protect 'important strategic resources' by placing 'sensitive products' on the Export Control List. In so doing, China has raised concerns that it may restrict exports of essential industrial inputs by invoking GATT security exceptions. In order to prevent such an outcome, WTO members could in exchange permit China to use export duties for environmental purposes in the form of a waiver. In this way, China's dropping of its plans to restrict the exports of raw materials for

875 Article IX:4 of the WTO Agreement.

security reasons would represent, not a formal precondition for the granting of the waiver, but rather a form of political engagement with China based on its need to secure the votes of the other WTO members. To be sure, this particular exchange as just described would not likely be of insufficient interest to China, which would want to see other elements as part of the package deal, the nature of which is beyond the scope of the present discussion.

As a further alternative means to obtain recognition of its right the use export duties to combat climate change, China could request a collective waiver allowing for the adoption of WTO-inconsistent measures with reference to the exceptional circumstances created by climate change.[876] One the one hand, an import border tax adjustment on carbon-intensive products, for instance, especially those varying in terms of the carbon intensity of their production, could violate GATT Article I (regarding most favoured nation), Article II (non-tariff duties or charges), or Article III (national treatment).[877] On the other hand, an export rebate that returns any carbon taxes paid in connection with domestic production could render it an export subsidy, something prohibited under the SCM Agreement. The export rebates, unlike import BTAs, if found to be inconsistent with the SCM Agreement, may not be justified under Article XX, which pertains to violations of the SCM prohibitions on export subsidies. In exchange for China's agreement to waive those obligations, though, WTO members could allow it to use the prohibited export duties as a climate policy instrument.

7.6.3 Article IX:2: an authoritative interpretation as a flexible correction

An authoritative interpretation, which was not part of the GATT 1947, would appear to be a necessary instrument amid the checks and balances of judicial interpretation adopted by the AB.[878] The space for judicial interpretations has increased owing to the differing systems of checks and balances that distinguish the GATT from the WTO.[879] To begin with, under the GATT dispute settlement system, individual members can veto the adoption of a judicial interpretation. Thus, for instance, the US has blocked the adoption of judicial interpretation that made what it considered to be inappropriate

876 James Bacchus, 'The Case for a WTO Climate Waiver', Centre for International Governance Innovation Special Report, 2 November 2017.

877 Joel P. Trachtman, 'WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes', RFF Discussion Paper 16-3 (2016).

878 Claus-Dieter Ehlermann and Lothar Ehring, 'The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements', 8(4) Journal of International Economic Law (2005), at 812.

879 Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98(2) The American Journal of International Law (2004), at 263.

claims.[880] Under the current WTO dispute settlement system, by contrast, a consensus is required to block the adoption of such an interpretation. The formation of this sort of consensus is unlikely, however, because the victorious party in a dispute at least can be expected to refuse to join in blocking a report favourable to itself. In this context, an authoritative interpretation could have been widely used to correct judicial interpretation because Article IX:2 of the WTO Agreement only requires a three-fourths supermajority of members for the adoption of an authoritative interpretation that binds all of them, including those who voted in opposition.

However, only one request has yet been made for an authoritative interpretation. This single request, by the EU, was for a clarification of the relationship between Articles 21.5 and 22 of the DSU.[881] The US, however, objected that the requested interpretation would have contradicted the final sentence of Article IX:2 of the WTO Agreement, which states that an authoritative interpretation 'shall not be used in a manner that would undermine the amendment provisions of Article X'.[882] This argument, however, fails to take into account the divergence of views among WTO members regarding the correct application of the DSU rules at issue, which divergence itself suggests that the rules lack sufficient clarity and that an authoritative interpretation represents a better solution than an amendment.[883]

Unconvincing though it may be, this argument could also be extended to the interpretation of the silence on the relationship between Article XX and China's export duty commitments. As has been seen, the AB held in the *China—Raw Materials* and *China—Rare Earths* cases that this silence does not justify China's use of export duties under Article XX. From China's perspective, since the AB's interpretation was in error, it would be reasonable to request an authoritative interpretation that would clarify the relationship at issue. The members that had prevailed in the disputed cases, and perhaps others, conversely, would almost certainly block China's request by arguing that granting it would amount to an amendment and therefore be beyond the scope of an authoritative interpretation. In theory, China does not necessarily have to win the support of all members because Article IX:2 only requires a three-fourths supermajority of members for the adoption of an authoritative interpretation that binds all of them. In practice, however, WTO members may prefer not to break the general taboo against formal voting.

880 Ibid.

881 Request of an Authoritative Interpretation pursuant to Article IX:2 of the Treaty Establishing the WTO, 25 January 1999, WT/GC/W/133.

882 Claus-Dieter Ehlermann and Lothar Ehring, 'The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements', 8(4) Journal of International Economic Law (2005), at 814.

883 Ibid.

7.6.4 Article IV:1: a more flexible alternative

The very infrequency appears to suggest that authoritative interpretations are not desirable in practice.[884] One possible reason is to avoid the discussion of the demarcation line with amendments. As an alternative, China may thus request the Ministerial Conference to take a decision under Article IV:1 of the WTO Agreement updating its accession protocol regarding the use of export duties to protect the environment. This decision may constitute a subsequent agreement on the interpretation of a provision of a WTO agreement within the meaning of VCLT Article 31(3)(a).

In practice, Ministerial Decisions or Declarations have been found to qualify as subsequent agreements in *US – Clove Cigarettes* and *Australia – Tobacco Plain Packaging*. In the former case, the AB found that Paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns constitutes a 'subsequent agreement between the parties' within the meaning of VCLT Art. 31(3)(a). The AB thus held that the measure allowing only three months between the publication and the entry into force of the technical regulation at issue was inconsistent with TBT Article 2.12 because Paragraph 5.2 required a minimum of six months in that situation.[885] In the AB's view, a Ministerial Decision may qualify as a 'subsequent agreement between the parties' if '(i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an agreement between Members on the interpretation or application of a provision of WTO law'.[886] In a more recent example of *Australia – Tobacco Plain Packaging*, the panel qualified the Public Health Declaration, which 'was adopted by a consensus decision of WTO Members, at the highest level, on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO', as a 'subsequent agreement between the parties'.[887] To support its analysis, the panel referred to the *US – Clove Cigarettes* AB report.[888]

The idea that Ministerial Decisions or Declarations may substitute for authoritative interpretations to clarify WTO rules seems to gain support from *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*. In these cases, the AB stated that 'in the WTO context, multilateral interpretations adopted pursuant to Article IX:2 of the WTO Agreement are most akin to subsequent agreements within the meaning of Article 31(3)(a) of the Vienna Convention'.[889] In other words, once Ministerial Decisions

884 Ehlermann and Ehring (2005), above n 850.
885 AB Report, *US – Clove Cigarettes*, paras 241–75.
886 Ibid., para 262.
887 Panel Report, *Australia – Tobacco Plain Packaging*, para 7.2409.
888 Ibid., footnote 5010.
889 AB Report, *EC — Bananas III*, para 390.

or Declarations are found to constitute subsequent agreements, they may function as authoritative interpretations.

The challenge here is that such a Ministerial Decision or Declaration as a subsequent agreement may not legally correct the absolute ban on China's export duties. As the AB emphasised in *US – Clove Cigarettes*, authoritative interpretations under Article IX:2 and subsequent agreements within the meaning of VCLT Article 31(3)(a) 'serve different functions and have different legal effects under WTO law'.[890] A strict reading of the AB's reasoning seems to suggest that subsequent agreements cannot take over the role of authoritative interpretations to correct an AB interpretation.

This problem could be solved by introducing an update that does not explicitly contradict the *China—Raw Materials* and *China—Rare Earths* decisions. As discussed in Section 7.4, the AB is likely to accept an implicit correction that draws a line between export duties of the sort at issue in the two previous cases, which exclusively restrict the exports, and 'export duties plus' that are adopted in combination with supplementary restrictions on domestic consumption. For the same reason, WTO members, especially the victorious parties in the two cases, may find it easier to accept a ministerial update that does not explicitly alter the WTO ban on China's export duties. Moreover, in order to make such updates more attractive, such updates could also include a redefinition of other commitments in China's accession protocol such as subsidies or technology transfer which are of the interest to the rest of the WTO membership.

To sum up, all political options are constrained in practice by the organization's *de facto* consensus requirement. China might find it easier to seek a consensus for a waiver as a stopgap measure, the legal effects of which would be conditional and temporary, rather than an amendment or an authoritative interpretation. This much is suggested by Mongolia's successful request for a waiver of its export duty commitments on raw cashmere and by the fact that waivers have been adopted much more often than amendments (of which there have been only two) or authoritative interpretations (which to date have not been used at all). In terms of a long-term solution, an authoritative interpretation is more flexible than an amendment which generally requires formal acceptance.[891] Given the unpopularity of authoritative interpretations in practice, China may request the Ministerial

890 AB Report, *US – Clove Cigarettes*, para 257.

891 As discussed in Section 7.6.1.2, it has been argued that China's accession protocol could be seen as a bilateral treaty between China and the WTO. In this scenario, once the WTO as a contracting party agrees to amend China's export duty commitments, no such further formal acceptance as ratification by individual WTO members would be required. This alternative reading, however, comes with a considerable degree of uncertainty because neither Article X (Amendments) nor Article XII specifies the procedure for amendments to an accession protocol.

Conference to take a decision updating its accession protocol regarding the use of export duties to protect the environment. To make such updates more attractive, they may not need to explicitly contradict the *China—Raw Materials* and *China—Rare Earths* decisions but rather to distinguish them by drawing a line between export duties and 'export duties plus'.

7.7 Conclusions

This chapter has offered a thorough analysis of the judicial and political options for creating desirable policy space for China's export duties. Thus, to begin with, the AB could adopt a new interpretation that allows China to adopt export duties for environmental purposes. On the one hand, the evolving context of China's export duties could provide the AB with good reasons to reconsider its prior decisions in this regard. As the survey of the practice of selected tribunals in this chapter suggests, the AB could choose either to distinguish (the most feasible option) or to overrule (the second-best) the *China—Raw Materials* and *China—Rare Earths* rulings.[892]

There remain, on the other hand, substantive and feasible arguments regarding the applicability of Article XX to export duties. Thus China could argue from the perspective of non-WTO norms that the assumption that it has signed away its rights under Article XX is inconsistent the principle of good faith or that the denial of its rights under Article XX is inconsistent with the prohibition of abuse of rights under Article 3(10) of the DSU. However, both of these interpretative options would require the AB to overrule its prior decisions explicitly and for this reason constitute second-best choices.

A more feasible interpretative option, and one based on WTO norms, has been proposed in this chapter. This new interpretation involves drawing a line between regular export duties applied exclusively to exports on the one hand and 'export duties plus'—those adopted in conjunction with corresponding restrictions on domestic consumption—on the other. This interpretation could allow the AB to provide China with the policy space to adopt export duties for environmental purposes without reversing its *China—Raw Materials* and *China—Rare Earths* decisions. Alternatively, the AB could distinguish between regular export duties and those adopted

892 Unlike the option of overruling which in effect repeals an earlier judgement, the technique of distinguishing aims to amend a previous judgement, by adding to conditions necessary for applying such a judgement, which is considered less judicial radical and more commonly used by international, regional, and domestic tribunals when avoiding an awkward situation that is to be caused by a prior decision. See Neil Duxbury, 'Distinguishing, overruling and the problem of self-reference', in '*The Nature and Authority of Precedent*', (Cambridge University Press, 2008), at 115.

for the purpose of combatting climate change. However, while this option would provide China with the space to enact policies that would be of benefit to the entire world, it would also, as has been seen, send the unwelcome message that China could only impose export duties in circumstances in which its domestic environmental concerns pose an international threat. For this reason, the distinction between regular export duties and 'export duties plus' is preferable.

Turning now from judicial to political options, China could request an amendment, waiver, or authoritative interpretation permitting the imposition of export duties for environmental purposes. Considering the challenges raised by the WTO's *de facto* consensus requirement to pursue such political options, the simplest approach for China might be to seek a consensus for an individual waiver, as Mongolia was able to do in 2007. Such a waiver could be part of a package deal that includes additional commitments by China to liberalize trade. Alternatively, a collective waiver could be sought covering all of the climate change measures that have been considered inconsistent with WTO law. Using this approach, China might be able to garner support from the US and EU, which might themselves wish to impose BTAs on carbon-intensive products at some point in the future.

While waivers could be useful as a stopgap measure, China may request amendments or authoritative interpretations as a long-term solution in order to better accommodate the climate considerations.[893] Given the rigidity of amendment processes and the deep unpopularity of authoritative interpretations in practice, this thesis has proposed a more flexible alternative based on Article IX:2 of the WTO Agreement.[894] China thus may request the Ministerial Conference to take decisions updating its accession protocol under which 'export duties plus' could be adopted in a manner consistent with Article XX.

Should the environmental exceptions under Article XX become available with respect to China's export duty commitments, its policy space to use these duties to protect the environment would be subject to the fairly strict tests specified in Article XX. A practical question for China therefore concerns the manner in which its export duties could be justified under these exceptions. This issue is taken up in the following chapter, which concludes with some policy recommendations.

---

893 'Thus without a commitment or fall-back mechanism (like an import border adjusment), export taxes cannot be regarded as an equivalent tool to the long-term EU carbon pricing'. Dröge (2009), above n 225, at 68.

894 These decisions may constitute subsequent agreements on the interpretation of a provision of a WTO agreement within the meaning of VCLT Article 31(3)(a).

Table 10: Moves by tribunals at the international, regional, and national levels to deviate from precedents

Tribunals	**Moves to deviate from undesirable precedents**		
International level			
International Criminal Tribunal for the Former Yugoslavia (ICTY)	**Overruling**		
	Case	**Practice**	**Reasons**
	Kordić and Čerkez Appeal Judgement (2004)	Explicitly overruled the *Krstić* Appeal Judgement (2004) and *Vasiljević* Appeal Judgement (2004) 'The Appeals Chamber considers that cogent reasons warrant a departure from this jurisprudence as an incorrect application of the *Čelebići* test to intra-Article 5 convictions' (para 1040).	The precedents incorrectly apply the legal test relating to cumulative convictions as set out in the *Čelebići* case. To 'ensuring that the convictions entered fully reflect his criminality' (para 1033).
	Žigić Appeal Decision (2005)	Explicitly overruled the *Čelebići* Appeal Judgement (2001) 'In light of these considerations, the Appeals Chamber has come to the view that cogent reasons in the interests of justice demand its departure from the majority opinion in the *Čelebići* Judgement on Sentence Appeal' (para 9).	The precedent is inconsistent with the ICTY Statute. To protect the 'the interests of justice' to the victims or convicted person.
	Šainović et al. Appeal Judgement (2014)	Explicitly overruled the *Perišić* Appeal Judgement (2013) 'Consequently, the Appeals Chamber, Judge Tuzmukhamedov dissenting, unequivocally rejects the approach adopted in the Perišić Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard' (para 1650).	The precedent is inconsistent with prevailing jurisprudence and customary international law regarding the *actus reus* of aiding and abetting liability.

	Distinguishing		
	Case	**Practice**	**Reasons**
	Strugar Trial Judgement (2005)	Explicitly distinguished the *Čelebići* Appeal Judgement (2001) 'A strict application of the above mentioned Appeals Chamber test would allow cumulative convictions... ...'(para 449); 'Counts 4 and 5 really add no materially distinct element, given the particular circumstances in which these offences were committed.' (para 454).	Due to the 'particular circumstances' concerning the offences, some of the essential criminal conducts are 'directly and comprehensively reflected' in the others. Thus, the precedent should be amended in order to preserve the 'interests of justice and the purposes of punishment' (para 454).
International Court of Justice (ICJ)	**Overruling**		
	Case	**Practice**	**Reasons**
	Libya—Malta Judgement (1985)	Implicitly overruled the *North Sea Continental Shelf* Judgement (1969) 'However to rely on this jurisprudence would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, it finds warrant for doing so in a régime of the title itself which used to allot those factors a place which now belongs to the past, in so far as sea-bed areas less than 200 miles from the Coast are concerned' (para 40).	The 1969 Judgement, which stepped away from the equidistance method, appeared to cause uncertainties.
	NATO Judgement (2004)	Implicitly overruled the *Genocide* Judgement (2003)	The majority had formed in 2004 within the ICJ wanted to use the 2004 case to 'sink' the 2003 judgement.
	Distinguishing		
	Case	**Practice**	**Reasons**
	Genocide Judgement (2008)	Implicitly distinguished the *NATO* Judgement (2004)	Not available.

Regional level			
	Overruling		
	Case	**Practice**	**Reasons**
European Court of Human Rights (ECtHR)	*Huber v. Switzerland (1990)*	Implicitly overruled *Schiesser v. Switzerland (1979)* 'Clearly the Convention does not rule out the possibility of the judicial officer who orders the detention carrying out other duties, but his impartiality is open to doubt ... if he is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority. Since that was the situation in the present case, there has been a breach of Article 5(3)', para 43.	Not available.
	Borgers v. Belgium (1993)	Implicitly overruled *Delcourt v. Belgium (1970)* 'In conclusion, having regard to the requirements of the rights of the defence and of the principle of the equality of arms and to the role of appearances in determining whether they have been complied with, the Court finds a violation of Article 6(1)', para 29.	Not available.
	Vilho Eskelinen and Others v. Finland (2007)	Explicitly overruled *Pellegrin v. France (1999)* 'The Court can only conclude that the functional criterion, as applied in practice, has not simplified the analysis of the applicability of Article 6 in proceedings to which a civil servant is a party or brought about a greater degree of certainty in this area as intended (see, mutatis mutandis, Perez v. France [GC], no. 47287/99, x 55, ECHR 2004-I.)', para 55. 'It is against this back-ground and for these reasons that the Court finds that the functional criterion adopted in the case of *Pellegrin* must be further developed,' para 56.	The original approach was found unable to bring about 'a greater degree of certainty in this area as intended'.

	Kudla v. Poland (2002)	Explicitly overruled *Kamasinski v. Austria (1991)* 'In the Court's view, the time has come to review its case-law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6(1),' para 148.	The original approach was reconsidered 'forcing applicants to bring their Article 6(1) unreasonable delay complaints to Strasbourg rather than having them resolved domestically'.
	Christine Goodwin—United Kingdom (2002)	Explicitly overruled the *Rees* Judgement (1986) and *Cossey* Judgement (1990) '…… it should not depart, without good reason, from precedents laid down in previous cases (see, for example, Chapman v. the United Kingdom [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved', para 74.	In order to take into account 'the changing conditions' within the contracting states and to ensure that the rights under the Conventions continued to be 'practical and effective', para 74.

	Distinguishing		
	Case	**Practice**	**Reasons**
	Kopecký (2003)	Explicitly distinguished the *Malhous* Grand Chamber Judgement (2000) and *Gratzinger and Gratzingerova* Grand Chamber Judgement (2002) 'In this respect the present case should be distinguished from the cases of *Malhous v. the Czech Republic* and *Gratzinger and Gratzingerova v. the Czech Republic* referred to above or the case of *Brezny & Brezny v. Slovakia* (application no. 23131/93, Commission decision of 4 March 1996, DR 85, pp. 65-83) in which the Court and the Commission respectively found that the applicants' claims for restitution of property did not amount to a legitimate expectation in the sense of the Court's case-law. In those cases the applicants were excluded from the very beginning from the possibility of having the property restored as it was obvious either that they failed to meet the relevant requirements or that their claim clearly fell outside the relevant law' (para 27).	In order to prevent the protection of the rights under the European Conventions on Human Rights and its protocols from being revealed 'ineffective and illusory'.

	Overruling		
	Case	**Practice**	**Reasons**
Court of Justice of the European Union (CJEU)	*HAG II* Judgement (1990)	Explicitly overruled the *HAG I* Judgement (1974) 'Bearing in mind the points outlined in the order for reference and in the discussions before the Court concerning the relevance of the Court's judgment in Case 192/73 *Van Zuylen v HAG* [1974] ECR 731 to the reply to the question asked by the national court, it should be stated at the outset that the Court believes it necessary to reconsider the interpretation given in that judgment in the light of the case-law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods' (para 10).	The precedent was out of step with subsequent developments in the case law on intellectual property rights and out of step with the evolving perception of the internal market. '... ...given in that judgment in the light of the case-law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods' (para 10).
	Metock Judgement (2008)	Explicitly overruled the *Akrich* Judgement (2003) 'It is true that the Court held in paragraphs 50 and 51 of *Akrich* that, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State (see, to that effect, *MRAX*, paragraph 59, and Case C-157/03 *Commission v Spain*, paragraph 28)' (para 58) .	In order to protect the right of EU citizens and their family members to move and reside freely within the EU. 'The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State' (para 28).
	Wouters Judgement (2002)	Implicitly overruled the *Métropole* Judgement (2001) by ignoring it.	The Court did not explain.

	Distinguishing		
	Case	**Practice**	**Reasons**
	Keck Judgement (1993)	Explicitly distinguished the *Dassonville* Judgement (1974) and *Cassis de Dijon* Judgement (1979) 'By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States' (para 16).	In order to address concerns regarding potential abuse of Article 34. 'In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter' (para 14).

	Steenhorst-Neerings Judgement (1993), *Johnson* Judgement (1994), *and Fantask* Judgement (1997)	Explicitly distinguished the *Emmott* Judgement (1991) 'However, as was confirmed by the judgment in Case C-410/92 *Johnson v Chief Adjudication Officer* [1994] ECR 1-5483, at paragraph 26, it is clear from Case C-338/91 *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR 1-5475 that the solution adopted in *Emmott* was justified by the particular circumstances of that case, in which the time-bar had the result of depriving the applicant of any opportunity whatever to rely on her right to equal treatment under a Community directive (see also *Haahr Petroleum*, cited above, paragraph 52, and Joined Cases C-114/95 and C-115/95 *Texaco and Olieselskabet Danmark* [1997] ECR 1-4263, paragraph 48)' (para 51).	Critics of the *Emmott* judgment seem to have prevailed over time, for the Court ended up distancing itself from this judgement.
	Alimanovic Judgement (2015)	Explicitly distinguished the *Brey* Judgement (2013) 'It must be stated in this connection that, although the Court has held that Directive 2004/38 requires a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system (judgment in Brey, C-140/12, EU:C:2013:565, paragraphs 64, 69 and 78), no such individual assessment is necessary in circumstances such as those at issue in the main proceedings' (para 59).	The Court did not explain.

	Altmark Judgement (2003)	Implicitly distinguished the *Ferring* Judgement (2001) 'It follows from those judgments that, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty' (para 87).	In order to prevent member states from abusing the *Ferring* formula.
Domestic level			
United Kingdom	**Overruling**		
	Case	**Practice**	**Reasons**
	Conway v Rimmer (1968)	Explicitly overruled *Duncan v Cammell Laird and Co* (1942)	In order to prevent the ministry from abusing the claim of public interest.
	R v Shivput (1987)	Explicitly overruled *Anderton v Ryan* (1985)	The precedent was considered to be inconsistent with the Criminal Attempts Act 1981.
	Knauer v Ministry of Justice (2016)	Explicitly overruled *Cookson v Knowles* (1979) and *Graham v Dodds* (1983)	Because of a material change in the legal landscape concerning damages for death.
	Distinguishing		
	Case	Practice	**Reasons**
	Quin v Leatham (1901)	Explicitly distinguished *Allen v Flood* (1898)	The Court did not explain.
Japan	**Overruling**		
	Case	**Practice**	**Reasons**
	Confiscation of the Third Party Property Supreme Court Judgement (1962)	Explicitly overruled a 1960 Supreme Court Judgement	The Court did not explain.
	Parricide Supreme Court Judgement (1973)	Explicitly overruled a 1950 Supreme Court Judgement	Heavier criminal punishment against parricide, to securing respect for parents, had been rejected by many countries and the heavier penalty at issue that disallowed any chance to suspend the enforcement of the imprisonment sentence was unreasonable.

	All Forest and Agricultural Public Workers, Police Office Act Amendment Opposition Supreme Court Judgement (1973)	Implicitly overruled the *All Postal Workers, Tokyo Central Post Office* Supreme Court Judgement (1966)	Possibly due to the strong criticism from conservative politicians in the ruling party and the change in the composition of the Supreme Court.
	Distinguishing		
	Case	**Practice**	**Reasons**
	Niigata Prefecture Public Safety Ordinance Supreme Court Judgement (1960)	Implicitly distinguished the *Tokyo Public Safety Ordinance* Supreme Court Judgement (1954)	In order to prevent a danger to the public safety.
	Overseas Voters Supreme Court Judgement (2005)	Implicitly distinguished the *Voting at Home* Supreme Court Judgement (1985)	The condition to permit a recovery of damages against an unconstitutional government action as set out in the 1985 Judgement was too stringent to practically prevent the public from seeking damages.
China	**Overruling**		
	Case	**Practice**	**Reasons**
	Supreme People's Court's Decision regarding the Repeal of Some Judicial Interpretations	The most recent such decision, titled the 'Supreme People's Court's Decision regarding the Repeal of Some Judicial Interpretations and Judicial Interpretation-Type Documents (11th Batch)', was adopted in 2017 in order to explicitly abolish 15 judicial interpretations that had been issued in the period from 1988 to 2013.	Ranging from the juridical interpretations at issue conflicting with new legislation to the changing conditions within China.
	Distinguishing		
	Case	**Practice**	**Reasons**
	When necessary, the Court does not hesitate to explicitly 'overrule' its judicial interpretations by issuing decisions regarding their repeal and thus it has fewer incentives to rely on the technique of distinguishing.		