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

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8 China's Policy Space for Adopting 'Export Duties Plus' Under GATT Article XX

Following the judicial or political options as suggested in the previous chapter, while export duties, which exclusively restrict exports, should be prohibited outright, 'export duties plus' that are adopted in combination with supplementary restrictions on domestic consumption would be allowed for pursuing environmental purposes subject to the scrutiny of Article XX. An important follow-up question concerning China's policy space for adopting 'export duties plus' is whether Article XX requires 'export duties plus' to always treat domestic and foreign consumers in an identical manner. In other words, if differential 'export duties plus' are proved to reduce pollution, would these duties necessarily be prohibited under Article XX.

It has been argued that China should impose equivalent charges on products destined for domestic consumption in order to justify its export duties under Article XX.[895] At least from an economic point of view, the price of targeted products under 'export duties plus' should be same for both Chinese and foreign consumers in order to allocate those products to the most efficient consumers.[896] Moreover, identical 'export duties plus' would also dismiss the suspicion that 'export duties plus' are actually adopted to provide Chinese downstream industries with favourable access to raw materials.

This thesis generally subscribes to the above view and suggests that 'export duties plus' should be adopted identically in most cases. One exception, however, might be found in the climate change regime where the parties listed in Annex I of the UNFCCC have explicitly committed to take a greater

895 Bond and Trachtman (2016), above n 147, at 199. 'Economic efficiency suggests a simple solution, which is that the price of Chinese products should be the same for both Chinese and foreign consumers. The reduced output under the conservation policy should be allocated to its most productive uses, which requires consumers in all locations facing the same price'.

896 When a large proportion of products is exported, one may argue that efficiency cost of export duties is relatively low because there are not many consumers in China anyway. Given that export duties have less administrative cost than identical 'export duties plus' or production taxes, when the increase of administrative efficiency outweighs the loss of economic efficiency, export duties might make economic sense. But this is an exceptional case for export duties rather than differential 'export duties plus'.

mitigation role than non-Annex I countries like China in light of the principle of 'common but differentiated responsibilities'.[897]

The requirement of identical 'export duties plus' seems to be at odds with the *differentiated* obligations of Annex I and non-Annex I countries because it may in effect require China to adopt the *same* climate measures as those in place in Annex I countries. The reason is that, when it comes to combating climate change, identical 'export duties plus' constitute a *de facto* economy-wide carbon tax. Thus, for instance, when 'export duties plus' are used to counter BTAs involving carbon-outsourcing countries, which are most likely listed in Annex I, the requirement of identical restrictions in effect would impose upon China a mitigation policy as stringent as that in place in Annex I countries. This result may be inconsistent with the principle of 'common but differentiated responsibilities'.[898]

Alternatively, China may impose identical 'export duties plus' in a less stringent manner. This, however, may not solve the problem of carbon leakage because the carbon cost of Chinese exports remains lower compared with those from Annex I countries. Such an outcome contradicts the fundamental goal of deploying 'export duties plus' as a more feasible alternative to address the concern of carbon leakage.[899]

This dilemma shows the unique features of the climate change problem. On the one hand, compared with other global environmental problems, cutting carbon emissions is more costly and complicated. For instance, while countries can achieve the goal of protecting ozone layer under the Montreal Protocol by 'switching one set of chemicals for another', there are currently no straightforward solutions to replace fossil fuels with low carbon energy

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897 For instance, all parties have committed to take general actions under UNFCCC Article 4(1), whereas only Annex I parties have agreed to follow more stringent rules under Article 4(2). For a comprehensive analysis of this issue, see Jutta Brunnée and Charlotte Streck, 'The UNFCCC as a negotiation forum: towards common but more differentiated responsibilities', 13(5) Climate Policy (2013).

898 For instance, Hertel has argued that BTAs requiring non-Annex I countries to adopt mitigation policies that are 'comparable in effect to those' adopted by Annex I countries are inconsistent with the principle of 'common but differentiated responsibilities' and thus cannot be justified under Article XX. See Michael Hertel, 'Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities' 45(3) Journal of World Trade (2011). Annex I countries are thus generally advised to adopt BTAs that distinguish countries in light of the principle of 'common but differentiated responsibilities'. See Michael A. Mehling, Harro van Asselt, Kasturi Das, Susanne Droege and Cleo Verkuijl, 'Designing Border Carbon Adjustments for Enhanced Climate Action', 113(3) American Journal of International Law (2019), at 469. Fabio C. Morosini, 'Trade and Climate Change: Unveiling the Principle of Common But Differentiated Responsibilities from the WTO Agreements', 42 George Washington International Law Review (2010), at 747.

899 See Chapter 6.

sources.[900] This appears to be the rationale behind the legal distinction between Annex I and non-Annex I countries under the UNFCCC.[901] On the other hand, China's position as both a non-Annex I party as well as the largest emitter and exporter of carbon dioxide emissions adds another layer of complexity. Any ambitious climate action taken by Annex I countries may fail to effectively tackle carbon leakage if China is exempted from adequately targeting its carbon-intensive exports.

The present chapter takes up the question of whether Article XX is flexible enough to accommodate the unique characteristics of the climate change issue. Given that neither Articles XX(b) or XX(g) requires identical treatment, Section 8.1 focuses on the comparison of different policy spaces for adopting 'export duties plus' under these subparagraphs. In Section 8.2 and 8.3, the issue of whether differential 'export duties plus' would necessarily constitute 'arbitrary or unjustifiable discrimination' or 'disguised restriction on international trade' under the chapeau is addressed. These findings are applied to China's current environmental policy in Section 8.4. This analysis serves in turn as the basis for a series of policy recommendations.

8.1 Tests under Articles XX(b) and XX(g)

Articles XX(b) and XX(g) do not necessarily prohibit differential 'export duties plus' because the tests under these subparagraphs examine the measures as a whole, not merely their discriminatory aspects.[902] Thus at least two discriminatory measures in the past have been successfully justified under Articles XX(b) or XX(g). In the *Brazil—Retreaded Tyres* case, an import prohibition on retreaded tyres together with exemption of retreaded tyres imported from MERCOSUR countries was found consistent with Article XX(b). In the *US—Gasoline* case, a gasoline rule that applied different methods to domestic and imported gasoline was justified under Article XX(g). That being said, however, different treatment may undermine the effectiveness of 'export duties plus' in terms of reducing pollution because they could incentivise the manufacture of targeted products for Chinese consumers. This section examines the feasibility of justifying 'export duties plus' under Articles XX(b) and XX(g). The findings serve in turn as the basis for a comparison of different policy spaces for adopting 'export duties plus' under these subparagraphs.

900 'That makes persuading people to act on climate change a lot harder than simply switching one set of chemicals for another'. Carbon Brief, 'Why we may never get a Montreal protocol for climate change', 12 September 2014, https://www.carbonbrief.org/why-we-may-never-get-a-montreal-protocol-for-climate-change (visited on 13 August 2019).

901 There is no such a distinction, for instance, under the Montreal Protocol.

902 Patrick Low, Gabrielle Marceau, Julia Reinaud, 'The Interface between the Trade and Climate Change Regimes: Scoping the Issues', 46(3) Journal of World Trade (2012), at 509.

8.1.1 Article XX(b): local pollution

Article XX(b) permits WTO members to adopt measures that are 'necessary to protect human, animal or plant life or health', a provision easily connected to the goal of reducing local pollution associated with the manufacture of high-polluting products.[903] To succeed in a claim under Article XX(b), China must first show that the challenged 'export duties plus' are specifically designed to protect the environment or public health. This purpose test, as shown in the *China—Rare Earths* case, requires the text of the challenged measures to demonstrate a link between 'export duties plus' and the avowed environmental purpose.[904] One such link is to show that export duties may reduce various negative environmental impacts associated with the manufacture of the targeted products. Thus, for instance, as the panel in *China—Rare Earths* recognized, environmental harm caused by the manufacture of high-polluting products can take the form of water pollution.[905]

Once the harm arising from the manufacture of high-polluting products has been proved, China needs to demonstrate that 'export duties plus' are designed and structured to reduce their manufacture, a fact relevant to domestic and foreign demand alike. Export duties, however, can only decrease foreign demand. Therefore, their potential to reduce the production of the targeted products is proportional to the extent to which they are consumed outside China. One essential aspect of proving the environmental purpose of 'export duties plus' is accordingly the proportion of the targeted products destined for export.

Also essential to proving the environmental purpose of 'export duties plus' is the restriction on domestic consumption. Absent an identical restriction, the price differential between foreign markets and the Chinese market could generate an increase in domestic consumption that would undermine the capacity of 'export duties plus' to reduce the manufacture of the targeted products in China.[906] In this case, the adverse effect would reduce the ability to prove the environmental purpose of differential 'export duties plus'.

Analysis of the purpose test would be complicated if the targeted products include industrial inputs. In this situation, a lower price on products destined for domestic consumption than on those for exports could provide industry in China with preferential access to these industrial inputs. Thus, in the *China-Rare Earths* case, the panel suspected China of having adopted the challenged export duties in order to incentivise the domestic use of

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903 Ibid. at 512.
904 Panel Reports, *China – Rare Earths*, para 7.165.
905 Ibid. para 7.152 and 7.156.
906 Ibid. para 7.169.

the targeted raw materials, thereby raising the question of whether these duties would still pass the purpose test if they in effect offered advantages to domestic industry.

The answer appears to be affirmative, at least according to the *Brazil—Retreaded Tyres* case, in which the panel, while recognizing that the import of used tyres through court injunction (which in effect benefitted the domestic retreaded tyres industry which needs used tyres as industrial inputs) could undermine the effectiveness of the import ban in terms of reducing waste tyres in Brazil,[907] nevertheless found that the ban at issue had been adopted for an environmental purpose under Article XX(b).[908] In light of this ruling, differential 'export duties plus' on industrial inputs may stand chance of passing the purpose test.

If 'export duties plus' are found to have been adopted for an environmental purpose, the necessity test under Article XX(b) requires China as a first step to prove that the environmental interests at stake are significant. Significant interests could include the nation's public health, as claimed in *China—Raw Materials* and *China—Rare Earths*. Relevant in this context is the AB's statement in *Brazil—Retreaded Tyres* that 'few interests are more vital and important than protecting human beings from health risks, and . . . protecting the environment is no less important'.[909] China's 'export duties plus' on high-polluting products seem likely to meet this requirement.

Another requirement under the necessity test is the demonstration that 'export duties plus' have made or are likely to 'make a material contribution' to the furtherance of reducing local pollution, which represents a higher threshold than the aforementioned purpose test. To estimate such a contribution, an analysis could rely on either quantitative projections into the future or on qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.[910] In either of these methods for assessing the material contribution of 'export duties plus', the two essential elements mentioned above in the context of the purpose test, namely export proportions and restrictions on domestic consumption, also play important roles. One may argument that the more the targeted products are consumed abroad, the more policy space for China to adopt 'export duties

907 The import ban on retreaded tyres (which are produced by using used tyre casings) in dispute aims to reduce waste tyres in Brazil. However, the court injunctions at issue leads to imports of used tyres which thus could undermine the effectiveness of the former measure. Panel Report, *Brazil — Retreaded Tyres*, para 7.107 For instance, 'The European Communities argues that this discriminates in favour of domestic retreaded tyres made from imported used tyres, which generate the same waste as that arising from imported retreads'. Panel Report, *Brazil — Retreaded Tyres*, para 7.241.

908 Ibid., para 7.215.

909 AB Report, *Brazil – Retreaded Tyres*, paras 144 and 179.

910 Low, Marceau and Reinaud (2012), above n6, at 509.

plus'. It is noteworthy that the requirement of material contribution does not necessarily prohibits differential 'export duties plus'. In the *Brazil—Retreaded Tyres* case, a discriminatory measure was nevertheless found to make a material contribution to the protection of public health.

The necessity test would further examine the trade restrictiveness of 'export duties plus', assessing whether they are necessary to protect the alleged environmental interests. The *China—Raw Materials* case shows that the trade-restrictive effects depend in part on the market size of the exporting country.[911] Since China, as the world's largest exporter, has a large export share for many products, its export duties may be found to have a large trade-restrictive impact. The analysis of trade restrictiveness is, however, irrelevant to the discriminatory aspects of differential 'export duties plus'.

If 'export duties plus', be it identical or differential, are found to be necessary on a preliminary basis, it is for the complaining governments to show, in the first instance, that there are no reasonably available alternatives.[912] Thus the complainants need to prove, first, that the proposed alternatives are financially or practically within China's reach and, second, that these alternatives are capable of achieving at least the same level of environmental protection as the 'export duties plus' at issue.[913]

For the purpose of reducing local pollution, the complainants in *China—Raw Materials* and *China—Rare Earths* identified various alternative measures such as a pollution tax that restrict the production in general. In response to China's argument that many of these measures had already been implemented, the panel suggested that they could be strengthened.[914] Indeed, China after the *China—Rare Earths* decision, for instance in 2015, replaced the export duties with increased environmental protection taxes on the production of the minerals in dispute.[915] In a future case, it would accordingly be difficult for China to explain why it could not likewise increase environmental protection taxes instead of imposing 'export duties plus'. China may argue that, compared with such demand-side measures as environmental protection taxes, 'export duties plus' as a type of demand-side control measure could enable lifestyle and behavioural change.

When it comes to differential 'export duties plus', however, it seems to be very difficult for China to explain why this discriminatory measure could not be replaced by identical 'export duties plus'. One possible argument

911 Panel Reports, *China – Raw Materials*, para 7.563.
912 AB Reports, *US — Gambling*, para 309
913 Patrick (2012), above n6, at 514
914 Panel Reports, *China – Rare Earths*, para 7.186.
915 Notice on Imposing Resources Taxes in 2015, the Ministry of Finance, Cai Shui [2015] No.52.

might be based on potential financial difficulties. For instance, assuming that Chinese consumers can only afford 15% consumption taxes on Product A, China may impose 15% 'export duties plus' in an identical manner. If such identical 'export duties plus' are proved to be too weak to limit the manufacture of Product A, China may decide to impose differential 'export duties plus' including 20% export duties together with 15% consumption taxes. The persuasiveness of this argument may depend on the proportion of targeted products that is consumed abroad.

In short, compared with identical 'export duties plus', differential 'export duties plus' may undermine their effectiveness in reducing local pollution and, thus, reduce their chance of being justified under Article XX(b). The biggest challenge here seems to be the necessity test, which requires proof that alternative measures consistent with the WTO not be reasonably available. In contrast, there is no such a test under Article XX(g) as discussed below.

8.1.2 Article XX(g): global pollution

Article XX(g) permits WTO members to adopt measures relating to 'the conservation of exhaustible natural resources'. The *US—Gasoline* decision shows that clean air, which naturally falls under the 'natural resources' category, could be affected by pollutants, for which reason regulation of pollutant-emitting gasoline combustion was justifiable. Following this line of reasoning, Article XX(g) could be relevant to 'export duties plus' that reduce global pollution such as carbon emissions; for preserving the global climate could be considered analogous to the preservation of clean air or to addressing potentially dangerous levels of carbon and other greenhouse gases in the atmosphere.[916] Alternatively, the loss of biodiversity as a result of climate change may also qualify as the exhaustion of a natural resource.[917]

In a manner similar to the purpose test under Article XX(b), the term 'relate to' under Article XX(g) also requires 'a close and genuine relationship' between 'export duties plus' and their purpose of reducing global pollution.[918] As the AB held in the *US – Gasoline* case, 'a close and genuine relationship' requires that a measure should be directed primarily at the conservation of such resources.[919] Thus 'export duties plus', be it identical

916 Bradly J. Condon, 'Climate Change and Unresolved Issues in WTO Law', 12(4) Journal of International Economic Law (2009), at 911-12.
917 Jochem Wiers, 'French Ideas on Climate and Trade Policies', 2(1) Carbon & Climate Law Review (2008), at 25.
918 AB Report, *US – Shrimp*, para 136.
919 AB Report, *US – Gasoline*, at 17.

or differential, would fall within the scope of Article XX(g) if they were adopted primarily for reducing global pollution.

The feasibility of passing the purpose test largely depends on the contribution of 'export duties plus' to reduce the manufacture of targeted products, such as those energy-intensive ones, in China. Again, as discussed above, this contribution is closely related to the export proportion of the targeted products and to the restriction on their domestic consumption. Therefore, although the purpose test does not require 'export duties plus' to be identical, different treatment may decrease the feasibility of justifying 'export duties plus' under Article XX(g). It is noteworthy that, according to the panel report in the 1987 *Herring and Salmon* case, which was referred to by the panel in *US—Gasoline*, 'primarily aimed at the conservation of an exhaustible natural resource' does not require a measure to be 'necessary or essential' to the conservation purpose.[920] This ruling appears to suggest that the purpose test under paragraph XX(g) sets a lower threshold than the 'necessity test' under paragraph XX(b).

Although Article XX(g) does not include a 'necessity test', this paragraph requires explicitly that China should prove 'export duties plus' to have been 'made effective in conjunction with domestic restrictions on production or consumption'. As the AB noted in *US—Gasoline*, a meaningful parallel domestic restriction needs to be imposed in an even-handed manner.[921] This so-called 'even-handedness' requirement, however, does not necessarily prohibit differential 'export duties plus'.

The *China—Raw Materials* decision shows that a complementary measure that restricts domestic production alone is not even-handed because such a restriction affects both foreign and domestic consumers, whereas export duties affect foreign consumers exclusively.[922] In this context, 'export duties plus' may include a parallel restriction on domestic consumption, which can be fiscal in nature (e.g. consumption taxes) or quantitative (e.g. consumption quotas). Such a restriction on domestic consumption does not, however, need to be identical with export duties. In the *US—Gasoline* case, a measure that imposed greater costs on foreign producers than domestic producers (thereby favouring the latter over the former) was still found to meet the requirement of even-handedness despite having failed to pass the tests under the chapeau of Article XX. Indeed, as the AB stated in *China – Rare Earths*, the so-called 'even-handedness' requirement merely prohibits 'a significantly more onerous burden on foreign consumers or producers'.[923]

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920 Panel Report, *US — Gasoline*, at 15.
921 AB Report, *US – Gasoline*, at 20-21.
922 Panel Reports, *China – Raw Materials*, para 7.465.
923 AB Report, *China – Rare Earths*, para 5.134.

8.1.3 Comparing different policy spaces under Articles XX(b) and XX(g)

The above analysis shows that, compared with Article XX(b), Article XX(g) generally provides more policy space for adopting 'export duties plus'. In terms of identical 'export duties plus', they would certainly meet the 'even-handedness' requirement under Article XX(g). In contrast, even if 'export duties plus' domestic and foreign consumers in an identical manner, they might still be found to fail the necessity test under Article XX(b). In other words, Article XX provides China with more policy space to adopt identical 'export duties plus' for reducing global pollution.

This result makes economic sense because global negative environmental externalities are more difficult to solve than local ones. Local environmental problems, such as water or soil pollution, arguably improve after a sufficient level of income has been reached.[924] In other words, the negative impacts on local environments caused by trade may be outweighed by the benefits of trade in the long run. In contrast, global negative environmental externalities may worsen as a consequence of international trade at any given level of income;[925] for, unlike local pollution, which can be tackled at the national level, such pressing issues as ozone depletion, air pollution, and carbon emissions cannot be addressed effectively on a country-by-country basis because of the free rider problem.[926] It is thus reasonable to provide China with more policy space to tackle global environmental problems.

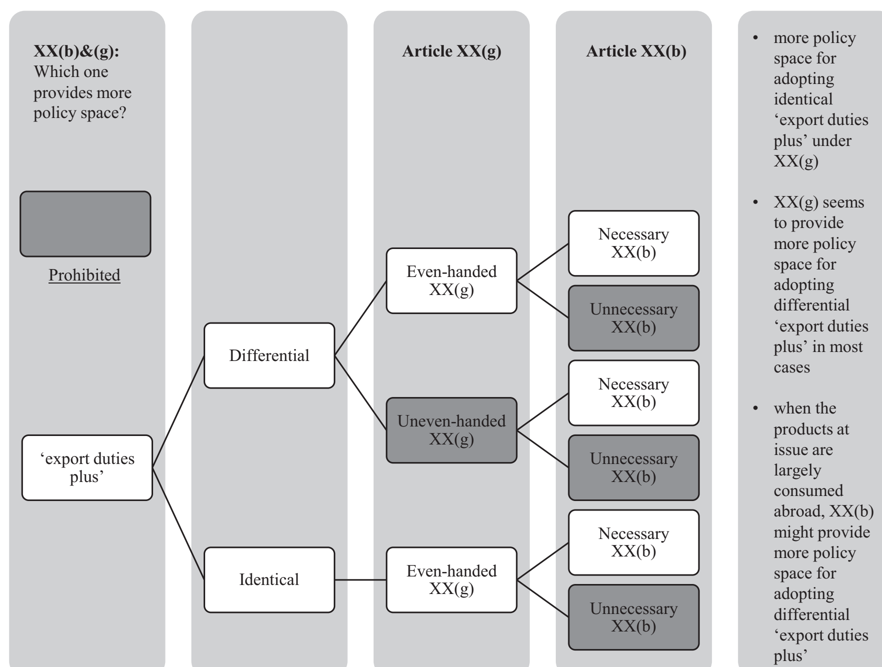
When it comes to differential 'export duties plus', Article XX(g) seems to provide more policy space in most cases. The 'even-handedness' test requires 'export duties plus' to not impose 'a significantly more onerous burden on foreign consumers or producers'.[927] According to this standard, one may argue that a 1/4 difference between export duties (20%) and domestic charges (15%) might be permitted under Article XX(g), whereas a 1/2 difference (20% export duties plus 10% domestic charges) could be prohibited. The former one, however, might still be found to fail the necessity test under Article XX(b). In this case, Article XX(g) provides more policy space for adopting differential 'export duties plus' to reduce global pollution. In exceptional cases where the products at issue are primarily consumed abroad, the 'export duties plus' that are not even-handed under Article XX(g) might nevertheless be found necessary under Article XX(b) (see Chart 2).

Compared with identical 'export duties plus', differential 'export duties plus' that are provisionally justified under Articles XX(b) or XX(g) need to

924 Frankel (2012), above n 27, at 25.
925 Ibid.
926 Ibid.
927 Ibid.

be further assessed under the chapeau of Article XX. The next two sections discuss whether those differential 'export duties plus' would necessarily constitute 'arbitrary or unjustifiable discrimination' or 'disguised restriction on international trade'.

Chart 2: Different policy space under Articles XX(b) and XX(g)



8.2 First condition of the chapeau: 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail'

After differential 'export duties plus' have been provisionally justified under Articles XX(b) or XX(g), they must further meet the requirements under the chapeau, the aim of which is to prevent abuse of the exceptions described in Article XX. These requirements have proven decisive in justifying a measure with a discriminatory aspect, an example being the *US—Gasoline* case, in which, although the US was permitted to impose certain standards on gasoline in order to protect clean air under Article XX(g), the gasoline rule eventually failed to meet the conditions under the chapeau because of its different methods applied to domestic and imported gasoline.[928] The discussion that follows explores the feasibility of differen-

928 Another example is the *Brazil—Retreaded Tyres* case.

tial 'export duties plus' meeting the requirements concerning 'arbitrary or unjustifiable discrimination'.

8.2.1 Do 'the same conditions' prevail?

The chapeau prohibits 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail'; this language suggests that there are two separate conditions that could justify differential 'export duties plus'. First, China would need to prove that the 'the same conditions' that prevail domestically do not prevail in in countries that are importing the products at issue. Alternatively, China would need to prove that the discrimination caused by differential 'export duties plus' is not 'arbitrary or unjustifiable'. This subsection examines the feasibility of meeting the first condition.

That differences in the prevailing conditions in various countries are relevant to the analysis under the chapeau was made clear when the AB held in the *EC—Seal Products* case that the particular policy objective of the applicable subparagraph of Article XX provided 'pertinent context'.[929] This interpretation appears to suggest that the conditions in China and the importing countries at issue could be examined in the context of the environmental purposes of 'export duties plus'. If the conditions prevailing in China and in these importing countries differ with respect to reducing local or global pollution, differential 'export duties plus' would not constitute discrimination within the meaning of the chapeau.

The panel in *China-Rare Earths* assumed that the same conditions indeed prevailed across China and the complaining countries in terms of the use of export restrictions to reduce local pollution. As a result, China's export duties were found to constitute discrimination under the chapeau solely based on the difference in treatment accorded to products destined for domestic consumption and those destined for exports.[930]

Possible support for this assumption could be that the specific goal of reducing pollution generated by the production of certain products is served irrespective of where the products are consumed. Thus, for instance, the consumption of high-polluting products manufactured in China by either a Chinese consumer or a consumer abroad would generate the same amount of pollution associated with the manufacture of these products. In other words, at least for the purpose of reducing pollution, the conditions prevailing in China and in importing countries seem to be the same.

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929 AB Report, *EC – Seal Products*, para 5.300.
930 Panel Reports, *China—Rare Earths*, para 7.190.

One exception, however, might be found in the climate change regime where the parties listed in Annex I of the UNFCCC have explicitly committed to take a greater mitigation role than non-Annex I parties like China in light of the principle of 'common but differentiated responsibilities'. Unlike the vague and thus controversial distinction between developing and developed countries under WTO law,[931] the distinction between Annex I and non-Annex I parties is clearly recorded in the UNFCCC.[932] In terms of substantial commitments, for instance, all parties have committed to take general actions under Article 4(1) of that convention, whereas only Annex I parties have agreed to follow more stringent rules under Article 4(2).[933] Given the important position of the UNFCCC as a framework treaty for fighting climate change, it may provide 'pertinent context' to assess the conditions in China and the importing countries.[934] In other words, for the purpose of fighting climate change, the conditions prevailing in China and in Annex I parties might not be the same.

That being the case, differential 'export duties plus' for fighting climate change would not constitute discrimination within the meaning of the chapeau. Indeed, as the AB recognized in *US—Shrimp*, differing conditions may call for different approaches.[935] If, however, the conditions in China and the importing countries were found to be the same, China would need to prove that the national treatment-type discrimination associated with differential 'export duties plus' is not 'arbitrary or unjustifiable' under the chapeau, as is discussed as follows.

8.2.2 Is such discrimination 'arbitrary or unjustifiable'?

Once a measure is found to constitute discrimination within the meaning of the chapeau, it is very challenging to prove such discrimination is not 'arbitrary or unjustifiable'. At least six GATT-inconsistent measures have

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931 Anabel González, 'Bridging the Divide between Developed and Developing Countries in WTO Negotiations', PIIE, 12 March 2019, at https://www.piie.com/blogs/trade-investment-policy-watch/bridging-divide-between-developed-and-developing-countries-wto (visited on 15 July 2019).

932 'Annex I Parties include the industrialized countries that were members of the OECD (Organisation for Economic Co-operation and Development) in 1992, plus countries with economies in transition (the EIT Parties), including the Russian Federation, the Baltic States, and several Central and Eastern European States'. UNFCCC, 'Parties & Observers', at https://unfccc.int/parties-observers (visited on 15 July 2019).

933 For a comprehensive analysis of those different commitments, see Brunnée and Streck (2013), above n 836.

934 Scholars generally support that a proper interpretation of the chapeau should take into account the principle of 'common but differentiated responsibilities'. For instance, Hertel (2011); Mehling, van Asselt, Das, Droege and Verkuijl (2019), above n 837.

935 AB Report, *US – Shrimp*, para 164-65.

been provisionally justified under Article XX,[936] but only two were found not to constitute 'arbitrary or unjustifiable discrimination' under the chapeau, namely the ban on asbestos in the *EC—Asbestos* case and the revised guidelines prohibiting the import of shrimp and shrimp products from non-certified countries in *US—Shrimp* (*Article 21.5—Malaysia*). Neither of them has a discriminatory aspect. In contrast, other such measures with a discriminatory aspect were eventually found to discriminate arbitrarily, unjustifiably, or in both respects against the products of the complaining WTO members.

A major challenge to justify differential 'export duties plus' is to articulate why the different treatment towards domestic and foreign consumers relates to the reduction of local or global pollution. In the *Brazil—Retreaded Tyres* case, although the panel acknowledged that the MERCOSUR exception and the imports of used tyres constitute discrimination, it still found that the measure as a whole met the requirements of the chapeau.[937] In particular, in its analysis of the justifiability of the MERCOSUR exception or the court injunction under the chapeau, the panel held that, as long as the achievement of the environmental purpose was not 'significantly undermined' by such discriminatory aspects, they should not constitute 'arbitrary or unjustifiable discrimination'.[938]

This quantitative approach was later rejected by the AB on the grounds that there was no support for it in the text of Article XX.[939] In the view of the AB, if the alleged rationale behind a discriminatory provision does not relate to the pursuit of, or would contravene, an objective that had been justified provisionally, the discrimination cannot be justified under the chapeau to any degree.[940] The AB accordingly found that both the MERCOSUR exception and the court injunction constituted 'arbitrary or unjustifiable discrimination' and that the injunction in addition constituted a 'disguised restriction on international trade' because the purposes for the measures bore no relationship to the claimed purpose of the import ban on retreaded tyres relating to Article XX.[941]

Following this line of reasoning, differential 'export duties plus' would constitute 'arbitrary or unjustifiable discrimination' unless China could prove that the discrimination against foreign consumers actually relates to the purpose of reducing pollution. China may not be able to succeed in

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936 *US — Shrimp (DS58), US — Gasoline (DS2), EC — Asbestos (DS135), Argentina — Hides and Leather (DS155), Brazil—Retreaded Tyres (DS 332),* and *EC—Seal Products (DS 400; DS401).*

937 Panel Report, *Brazil—Retreaded Tyres*, paras 7.356-7.357.

938 Ibid. paras 7.288-7.289; 7.348-7.349.

939 AB Report, *Brazil—Retreaded Tyres*, para 229 and para 239.

940 Ibid. para 228.

941 AB Report, *Brazil—Retreaded Tyres*, para 247 and para 251.

most cases because, as discussed above, the reduction of pollution seems to be served irrespective of where the products are consumed. China might argue that its consumers may not be able to bear the same environmental costs as those in developed countries. This argument, however, does not seem relevant to the reduction of pollution because it is based on economic considerations. Moreover, such economic considerations could be accommodated if China chooses to impose identical 'export duties plus' in a less stringent manner. Indeed, although the Preamble to the WTO Agreement suggests that WTO members may adopt various approaches to protecting the environment 'in a manner consistent with their respective needs and concerns at different levels of economic development', it does not authorise China to discriminate consumers in developed countries. As a result, differential 'export duties plus' are prohibited in most cases.

Again, one exception might be found in the climate change regime where, compared with Annex I parties of the UNFCCC, China together with other non-Annex I parties have only made less stringent commitments. This difference might serve as a justification for charging a lower carbon price for products consumed in China. In other words, higher carbon price might be charged for products consumed in Annex I countries because they have explicitly committed to take a greater mitigation role. To effectively tackle carbon leakage by equalising the carbon costs among China's exports and those from Annex I countries, the requirement of identical 'export duties plus', as a *de facto* economy-wide carbon tax, may in effect require China to adopt the same climate measures as those in place in Annex I countries. This result seems to be inconsistent with the principle of 'common but differentiated responsibilities'.[942] If China chooses to impose identical 'export duties plus' in a less stringent manner, the carbon cost of Chinese exports remains lower compared with those from Annex I countries. The issue of carbon leakage is thus failed to be effectively addressed.[943] Given these considerations, 'export duties plus' might be allowed to differentiate Annex I and non-Annex I parties for the purpose of fighting climate change.

It has been argued that the AB appeared to have softened its zero-tolerance stance on measures with disconnected purposes in the *EC—Seal Products* case.[944] This raises the question of whether the aforementioned economic considerations might be accommodated under the chapeau. In *EC—Seal Products*, to balance the public moral concerns on seal welfare and the

942 For instance, it has been argued that any measure requiring non-Annex I countries to adopt mitigation policies that are 'comparable in effect to those' adopted by Annex I countries is inconsistent with the principle of 'common but differentiated responsibilities' and thus cannot be justified under Article XX.

943 See Chapter 6.

944 Gracia Marín Durán, 'Measures with Multiple Competing Purposes after EC–Seal Products: Avoiding a Conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement', 19(2) Journal of International Economic Law (2016).

protection of Inuit cultural identity, the EU had banned the sale of seal and seal-containing products while carving out exceptions, including one for such products derived from hunts conducted by Inuit or other indigenous communities (the IC exception). The AB faulted the measure based on the reason that the rationale behind the IC exception was not connected to achieving seal welfare and other 'additional factors'.[945] This finding was in contrast with the earlier decision in the *Brazil—Retreaded Tyres* case, in which the AB faulted the measure based solely on the lack of connection.[946] In this context, the additional inquiry into 'additional factors' might indicate that the AB implicitly accepted the purpose of the IC exception as legitimate. In other words, the EU's ban might be justified under the chapeau despite the lack of a rational connection between protecting the Inuit on the one hand and protecting seals on the other.[947] This interpretation may not, however, gain support from the concluding paragraph of the AB's analysis, which seems to suggest that the rational connection requirement is decisive in determining the arbitrariness or unjustifiability of a discrimination case.[948]

Moreover, even if the AB were to allow a justification based on irrelevant purposes under the chapeau, the scope of legitimate purposes to justify discrimination under the chapeau would remain unclear. Bartels has proposed four interpretive options for justifying discrimination based on (i) one of the reasons set out in the subparagraphs of Article XX (even if the reason for such discrimination were to differ from the reason for the measure itself), (ii) reasons recognized elsewhere in the GATT 1994 or other WTO agreements, (iii) reasons recognized in international standards, and, least likely, (iv) legitimate objectives without reference to other normative considerations.[949] The economic considerations behind favourable treatment for Chinese consumers, however, do not appear to fall within any of these categories.

Although the differentiation between Annex I and non-Annex I parties might be found relevant to fighting climate change, China may need to consult with its trading partners before the adoption of such differential 'export duties plus'. In the *US — Shrimp* case, the import ban on shrimp products was found to constitute 'unjustifiable discrimination' because the US failed to engage negotiations with other WTO members 'with the objective of concluding bilateral or multilateral agreements for the protection

945 AB Report, *EC — Seal Products*, para 5.321.
946 Donald H. Regan, 'Measures with Multiple Purposes: Puzzles from EC—Seal Products' AJIL Unbound (25 June 2015); Julia Y. Qin, 'Accommodating Divergent Policy Objectives under WTO Law: Reflections on EC—Seal Products' AJIL Unbound (25 June 2015); Bartels (2015), above n 53, at 119.
947 Bartels (2015), above n 53, at 117.
948 Durán (2016), above n 872, at 480.
949 Bartels (2015), above n 53, at 118.

and conservation of sea'.[950] The AB made it clear in the *US — Shrimp(Article 21.5— Malaysia)* case that WTO members need to make serious efforts, in good faith, to engage in negotiations with other members.[951] Such efforts may prevent 'export duties plus' from being 'unjustifiable discrimination'.

8.2.3 Differential 'export duties plus' might be permitted for fighting climate change

This section shows that differential 'export duties plus' for reducing local or global pollution may constitute 'arbitrary or unjustifiable discrimination' in most cases. On the other hand, given that Annex I parties have generally agreed to follow more stringent rules under the UNFCCC, 'export duties plus' might be permitted to differentiate Annex I and non-Annex I parties for the purpose of fighting climate change in two ways in light of the principle of 'common but differentiated responsibilities'.[952]

The first option for China is to argue that the same conditions do not prevail between China and Annex I parties. The UNFCCC, as a framework treaty for fighting climate change, may provide 'pertinent context' to this argument. In this way, the difference between charges on energy-intensive products destined for Chinese consumers and for consumers in Annex I countries does not even constitute 'discrimination' within the meaning of the chapeau.[953] Alternatively, if differential 'export duties plus' are found to be discriminatory, China may argue that the different commitments made by Annex I and non-Annex I parties of the UNFCCC in light of the principle of 'common but differentiated responsibilities' serves as a justification for charging a higher carbon price for products consumed in Annex I countries. This may provide justification for the discrimination associated with differential 'export duties plus'.

In the context of the assessment of subparagraphs (b) and (g), the differential 'export duties plus' that do not impose 'a significantly more onerous burden' on consumers in Annex I countries, for instance, a 1/4 difference between export duties (20%) and domestic charges (15%), might meet the first condition of the chapeau. Speculatively, as discussed in the previous section, the differential 'export duties plus' that impose 'a significantly more onerous burden' on foreign consumers might be justified under Article

950 AB Report, *US — Shrimp*, para 166.

951 AB Report, *US — Shrimp(Article 21.5— Malaysia)*, paras 115-134.

952 For a general view that a proper interpretation of the chapeau should take into account the principle of 'common but differentiated responsibilities', see Hertel (2011), and Mehling, van Asselt, Das, Droege and Verkuijl (2019), above n 837.

953 Julia Y. Qin, 'Accommodating Divergent Policy Objectives under WTO Law: Reflections on EC—Seal Products' AJIL Unbound (25 June 2015), available at https://www.asil.org/blogs/accommodating-divergent-policy-objectives-under-wto-law-reflections-ec%E2%80%94seal-products, (visited 4 December 2017).

XX(b), provided that the products at issue are primarily consumed abroad. This raises the question of whether such significant level of differentiation, for instance, export duties (20%) together with domestic charges (5%), could also be justified for the purpose of fighting climate change.

Although the answer appears to be affirmative,[954] such a situation can hardly occur. In order to effectively reduce carbon emissions, China needs to impose 'export duties plus' on a range of products. Given China's huge domestic market, targeted products are very unlikely to be primarily consumed abroad. In this sense, the above speculation is actually irrelevant to the analysis of differential 'export duties plus' for fighting climate change.

After differential 'export duties plus' has met the first condition of the chapeau, they could still be found to constitute a 'disguised restriction on international trade' under the second condition. The reason is that if differential 'export duties plus' cover raw materials, the difference between charges on products destined for domestic consumption and those destined for Annex I countries could provide Chinese downstream producers with preferential access to industrial inputs. This issue is examined in the next section.

8.3 Second condition of the chapeau: 'disguised restriction on international trade'

The AB in *US – Gasoline* implies that the concepts of 'disguised restriction on international trade' and 'arbitrary or unjustifiable discrimination' may overlap because the former one 'includes disguised discrimination in international trade'.[955] The term 'disguised restriction', however, has not been clearly defined in WTO jurisprudence. If the requirement regarding 'disguised restriction on international trade' prohibits any measure that could potentially benefit domestic industry, then differential 'export duties plus' should perhaps exclude upstream products in order to eliminate any chance of favouring Chinse downstream producers. This result would, however, undermine the effectiveness of this measure because many

954 This result is indeed odd because it is difficult to rationalize why should a measure targeting XX(b)-related global pollution could differentiate more than the one targeting XX(g)-related global pollution under the chapeau. This odd result is, however, consistent with case law. The first condition of the chapeau is 'qualitative', whether a discriminatory aspect relates to the legitimate objective of the measure, rather than 'quantitative', how much greater a differential could be accepted (e.g. the even-handedness test). Thus, even though it is tempting to suggest that a measure targeting XX(b)-related global pollution should not be allowed to differentiate more than the one targeting XX(g)-related global pollution, this conclusion may not be supported by case law.

955 AB Report, *United States – Gasoline*, at 25.

carbon-intensive products exposed to trade are 'at or near the beginning of the value chain'.[956] The following two subsections thus argue that favouring domestic industry is not dispositive of a violation of the second condition of the chapeau. That being said, however, it is equally important to address concerns that China might circumvent WTO rules by providing Chinese producers with cheaper industrial inputs. The final subsection therefore proposes additional limits on the use of differential 'export duties plus' for fighting climate change.

8.3.1 Distinguishing between active discrimination and passive discrimination

The AB held in *Japan—Alcoholic Beverages* that, although a protectionist aim is difficult to establish, the protective application of a measure can most often be discerned based on the 'design, architecture and revealing structure', which is in turn essential in determining whether a measure constitutes a 'disguised restriction on international trade'.[957] The term 'disguised restriction' thus appears to suggest that a challenged measure has a mixture of a claimed purpose, that is, the one to be justified under the subparagraph and a hidden purpose that is likely to be protective.[958] The question in light of these considerations is whether the requirement regarding 'disguised restrictions on international trade' prohibits only measures with an entirely or primarily hidden protective purpose or should also include, more broadly, measures with any protective purpose, even if the hidden protective purpose is minor compared with the legitimate purpose.[959] In the former case, China may still have policy space to impose differential 'export duties plus' on industrial inputs that are energy-intensive.

Relevant here is the panel's explicit support for the former condition in *Brazil—Retreaded Tyres*. In that case, it found that, as long as the achievement of the environmental purpose of the import ban on retreaded tyres was not 'significantly undermined' by the imports of used tyres protected by the court injunction (and that in effect favoured domestic producers of retreaded tyres), the ban did not constitute a 'disguised restriction on international trade'.[960] In other words, the panel recognized that a measure should not be considered a 'disguised restriction' under the chapeau if the hidden protective purpose—in this case that associated with the court injunction—is minor in comparison with the environmental purpose of the

956 Aaron Cosbey, Susanne Droege, Carolyn Fischer, Julia Reinaud, John Stephenson, Lutz Weischer and Peter Wooders, 'A Guide for the Concerned: Guidance on the elaboration and implementation of border carbon adjustment', entwined November 2012, at 13, https://www.iisd.org/pdf/2012/bca_guidance.pdf (visited on 19 August 2019).

957 AB Report, *Japan – Alcoholic Beverages II*, at 27-29.

958 Bartels (2015), above n 53, at 123.

959 Ibid.

960 Panel Report, *Brazil — Retreaded Tyres*, paras 217-219.

import ban. This quantitative approach was, however, explicitly rejected by the AB in the same case.

Nevertheless, the quantitative approach might still apply to differential 'export duties plus' because their discriminatory aspect differs from the discriminatory aspect of the measure at issue in *Brazil—Retreaded Tyres*. Unlike in the latter case, in which the Brazilian government through the court injunction rendered its import ban on used tyres discriminatory, the discriminatory aspect of export duties is inherent, requiring the adoption of a complementary measure to counter this effect. Such passively discriminatory side effects, it could be argued, deserve a more lenient approach. As the panel held in *EC—Asbestos*, favouring domestic industry is 'a natural consequence of prohibiting a given product and in itself cannot justify the conclusion that the measure has a protectionist aim, as long as it remains within certain limits'.[961] In this context, differential 'export duties plus' could be allowed to target industrial inputs if they are adopted primarily for fighting climate change.

8.3.2 The irrelevance of the hidden protectionist aim

Alternatively, as the following analysis shows, the AB does not even need to consider the hidden protective purpose of China's export duties under the chapeau. It is noteworthy that the AB has never tried to determine whether a measure at issue has a hidden protective aim under the chapeau. The AB in the *US—Gasoline* case, in finding that the discriminatory aspect of cost considerations constituted a 'disguised restriction on international trade',[962] criticized the 'omission' on the part of the US in failing to account for the costs to foreign refiners.[963] Similarly, in the *Brazil—Retreaded Tyres* case, when the AB found that the imports of used tyres, as raw materials in the production of retreaded tyres, constituted a 'disguised restriction on international trade' owing to the court injunction discussed earlier, it faulted the rationale for the disconnection of the injunction from the purpose of protecting public health rather than hiding a protective aim, namely to promote the domestic retreaded tyres industry.

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961 Panel Report, *EC — Asbestos*, para 8.239.

962 In the *US—Gasoline* case, the US, as part of an effort to prevent and control air pollution, had adopted the Clean Air Act, which required its Environmental Protection Agency to establish an individual and a statutory baseline for gasoline. Under this regime, domestic gasoline was subject to the individual baseline, while imported gasoline was automatically subject to the statutory baseline except under certain conditions. To justify the discriminatory aspect of the gasoline baselines under the chapeau, the US argued that it would have been impossible in terms of cost for domestic refiners to meet the statutory baselines. This argument was rejected by the AB, which found that the US had failed to account for the same cost considerations for foreign refiners.

963 Ibid., *US – Gasoline*, at 29.

A similar approach can also be found in other jurisdictions. In CJEU jurisprudence, for instance, the *Ladbrokes* case concerns a measure reserved a gambling licence to a single operator for the combined aims of preventing gambling addiction and fighting fraud.[964] Although the two purposes could be justified under Article 52 TFEU, there was concern that the Member States might use these purposes of as a mask for protectionism which results in 'arbitrary state monopolisation'.[965] The court, however, did not try to examine the potential protectionist aim of the measure at issue but looked only at the most suitable purposes of the measure.[966] The ruling in the *Ladbrokes* case thus allowed a Member State to provide gambling services relating to fighting fraud as long as this function did not undermine the purpose of preventing addiction.[967] One possible reason behind the reluctance of the AB or CJEU to look into the measure's hidden protective aim could be that doing so would place an undue burden of proof on the party to demonstrate the existence or nonexistence of a protectionist aim in a measure 'which sometimes can be indiscernible'.[968]

For the same reason, the panel and the AB in the past refused to examine the 'regulatory intent' and thus rejected the 'aim-and-effect' approach. In *Japan—Alcoholic Beverages II*, the panel criticized the 'aim-and-effect' approach for its 'important repercussion on the burden of proof imposed on the complainant' because the burden was on the complainant to prove the protectionist aim of a measure. The panel found it difficult to evaluate the determinative aims of the measure owing to the common practice regarding 'a multiplicity of aims that are sought through enactment of legislation'.[969] This rejection was then implicitly affirmed by the AB in the same case.[970] Therefore, should differential 'export duties plus' on industrial inputs be justified provisionally and do not constitute 'arbitrary or unjustifiable discrimination', the AB may choose not to examine their hidden protectionist purpose under the chapeau.

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964 Case C-258/08 Ladbrokes Betting & Gaming and Ladbrokes International [2010] ECR I-4757. See Stefaan Van den Bogaert and Armin Cuyvers, '"Money for nothing": The case law of the EU Court of Justice on the regulation of gambling', 48(4) Common Market Law Review (2011), at 1202.

965 Justin Franssen and Frank Tolboom, 'Practical Implications Of The Santa Casa Judgment', in Alan Littler, Nele Hoekx, Cyrille J.C.F. Fijnaut, and Alain-Laurent Verbeke (eds), '*In the Shadow of Luxembourg: EU and National Developments in the Regulation of Gambling*', (Brill, 2011), at 96.

966 Stefaan Van den Bogaert and Armin Cuyvers, '"Money for nothing": The case law of the EU Court of Justice on the regulation of gambling', 48(4) Common Market Law Review (2011), at 1208.

967 Ibid. at 1202.

968 Panel Report, *Japan – Alcoholic Beverages II*, para. 6.16.

969 Ibid., para. 6.16.

970 AB Report, *Japan – Alcoholic Beverages II*, at 115.

8.3.3 Additional limits on the use of differential 'export duties plus'

Admittedly, the above analysis does not sufficiently address an important concern that China might circumvent WTO rules by exclusively targeting carbon-intensive industrial inputs. In this way, differential 'export duties plus' may unfairly benefit Chinese downstream producers. To prevent China from abusing such policy space, this thesis proposes additional limits on the use of differential 'export duties plus' for fighting climate change in two scenarios (see Chart 3).

First, China may adopt differential 'export duties plus' as part of its climate initiative. In this scenario, the second condition of the chapeau may prohibit an exclusive coverage of upstream products. Objective criteria should instead be used to define the coverage of goods in the 'export duties plus' regime. A good example is the recommended criteria for carbon-outsourcing countries, namely carbon intensity and trade sensitivity, to decide scope of their BTAs.[971] Differential 'export duties plus' thus should cover both upstream and downstream products from sectors with high carbon intensity and trade exposure. This additional limit would prevent China from cherry-picking the carbon-intensive products that could potentially benefit Chinese downstream producers.

Second, differential 'export duties plus' may be adopted to counter a BTA. In this scenario, the second condition of the chapeau may require China to adopt its countermeasure in accordance with the scope of the BTA. The EU in 2019 issued a list of sectors that 'shall be deemed to be at risk of carbon leakage for the period 2021 to 2030'.[972] If the EU decides to impose a BTA on China's exports from the listed sectors, 'export duties plus' should at least cover those products. If the EU decides to adopt its BTA on a narrower scope of sectors,[973] to achieve a more ambitious climate target, China may also go beyond the coverage of the EU BTA, provided that the broad coverage of goods is defined in accordance with the objective criteria as discussed above.

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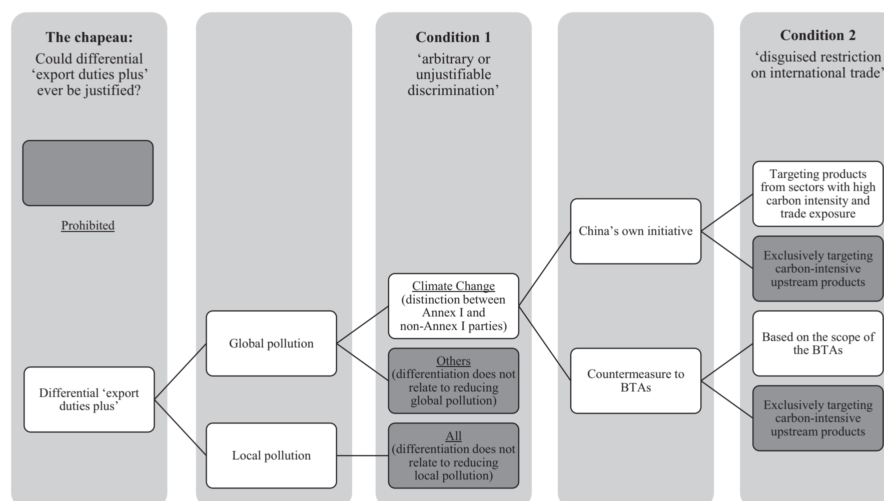
971 Cosbey (2012), above n 885, at 13.

972 Commission Delegated Decision (EU) 2019/708 of 15 February 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council concerning the determination of sectors and subsectors deemed at risk of carbon leakage for the period 2021 to 2030 (Text with EEA relevance.), L 120/20, 8 May 2019, at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019D0708&from=EN (visited on 19 August 2019).

973 It has been argued that BTAs should avoid over-broad sectoral coverage. See Cosbey (2012), above n 885, at 13.

Chart 3: Feasibility of justifying differential 'export duties plus' under the chapeau



8.4 A reality check on China's environmental policies targeting consumption

The above analysis shows that the feasibility of justifying 'export duties plus' largely relies on the degree of restriction on Chinese consumption. On the one hand, if 'export duties plus' treat domestic and foreign consumers in an identical manner, there is a good chance of justifying them under Article XX. If, on the other hand, fewer charges are imposed on products destined for domestic consumption, such differential 'export duties plus' might only be justified for the purpose of fighting climate change. An overview of China's environmental policies is thus offered here in order to identify the existing environmental measures that target consumption. This analysis serves in turn as a basis for policy recommendations.

To begin with, a major goal of China's environmental policies is to reach the targets set out in China's Five-Year Plan.[974] The Guidelines of the Eleventh Five-Year Plan (2006-2010) included three specific targets for pollution reduction: the air pollutant sulphur dioxide (SO_2); chemical oxygen demand (COD), which is a useful measure of water pollution; and GDP per unit of energy use, or 'energy intensity'. The Guidelines of the Twelfth Five-Year Plan (2011-2015) added another four reduction targets: ammoniacal nitrogen (N-NH3), which is a useful measure of water pollution; nitrogen oxides (NOx), a generic term for the forms of these compounds that contribute significantly to air pollution; greenhouse gases per capita and per unit of

974 For further information, see Chapter 5.

GDP, or 'carbon intensity'; and the proportion of primary energy consumption represented by non-fossil energy, or 'non-fossil energy consumption'.[975] These changes were followed in the Guidelines of the Thirteenth Five-Year Plan (2016-2020).

The central government distributes those pollution reduction targets to each region. Thus, for instance, in accordance with the national reduction targets established in the Guidelines of the Twelfth Five-Year Plan (2011-2015), the 2011 General Work Plan for Energy Conservation and Pollutant Discharge Reduction and the 2011 Work Plan for Greenhouse Gas Emission Control set the air and water pollution quotas, energy intensity reduction targets, and carbon intensity levels for 32 regions for the period from 2011 to 2015.[976] The 2016 General Work Plan for Energy Conservation and Pollutant Discharge Reduction in addition specifies energy consumption quotas for the 32 regions and an energy-intensity reduction target for various types of industry.

These regional targets are further distributed to each producer, with particular attention to those from the so-called 'high-polluting and high-energy consumption' industries. To increase the enforcement of these reduction targets, a new provision was added to the *Environmental Protection Law of the People's Republic of China* in 2014 that requires the establishment of a pollution permission management system under which companies can only discharge pollutants in accordance with their permissions.[977] This management system was implemented at the end of 2016 in accordance with a notice from the State Council requiring companies in the thermal power and paper industries to apply for pollution permissions.[978] In 2017, companies from major high-polluting industries began to be covered under this pollution permission management system.[979] The reduction of carbon emissions, by contrast, has been regulated under China's national emissions trading system since 2017. This system sets carbon emission quotas for companies involved in the petrochemical, chemical, building materials, steel, nonfer-

975 Guidelines of the Twelfth Five-Year Plan (2011-2015), adopted on 14 March 2011, available at http://www.gov.cn/2011lh/content_1825838_2.htm, (visited 4 December 2017).
976 Notice of the State Council on Issuing the Work Plan on Controlling Greenhouse Gas Emissions during the Period of the Twelfth Five-Year Plan (2011-2015), adopted on 1 December 2011, available at http://www.gov.cn/zwgk/2012-01/13/content_2043645.htm, (visited 4 December 2017).
977 Article 45 of the *Environmental Protection Law of the People's Republic of China*.
978 Notice of the General Office of the State Council on Printing and Distributing the Implementation Plan of the Permit for Control of Emission of Pollutants, adopted on 10 November 2016, available at http://www.gov.cn/zhengce/content/2016-11/21/content_5135510.htm, (visited 4 December 2017).
979 Ibid.

rous metals, paper, electricity, or aviation industries that consume energy equivalent to more than 10,000 tons of standard coal.[980]

In addition to the above quantitative restrictions, China also requires companies to pay pollution fees. The recently introduced *Environmental Protection Tax Law* calls for the replacement of pollution fees by environmental protection taxes, which are easier to enforce. [981] These taxes are applied to four main categories of taxable items, including air pollutants, water pollutants, solid waste, and noise pollution.[982] The scheme of environmental protection taxes is, however, unlikely to be extended to carbon emissions as suggested by China's Minister of Finance.[983]

Although the above measures may generally increase the environmental costs in China, none of them, however, serves to specifically restrict Chinese consumption. To target consumption, one quantitative option is to restrict the access of firms in China to certain products. Thus, for instance, in late 2014, the Ministries of Commerce, Environmental Protection, and Industry and Information Technology issued Green Purchasing Guidelines to encourage the consumption of environment-friendly and energy-saving raw materials, products, and services, such as those certified by the China Environmental United Certification Center and China Energy Conservation Program.[984] Article 15 of this measure explicitly discourages companies from purchasing products on the Environmentally Unfriendly List and other high-polluting and high-energy-consumption products, though this directive is not legally binding.[985] China may consider making these requirements mandatory.

With respect to fiscal restrictions on Chinese consumption, it is noteworthy that the consumption of recycled industrial inputs is encouraged in China in the form of a VAT rebate in order to conserve natural resources and reduce pollution and carbon emissions. In 2015, the Ministry of Finance

980 Notice of the General Office of the State Development and Reform Commission on Earnestly Enhancing the Key Work of Starting the Emission Trading Market in China, available at http://www.ndrc.gov.cn/zcfb/zcfbtz/201601/t20160122_772123.html, (visited 4 December 2017).

981 The *Environmental Protection Tax Law of the People's Republic of China*, adopted on 25 December 2016, available at http://www.npc.gov.cn/npc/xinwen/2016-12/25/content_2004993.htm, (visited 4 December 2017).

982 Ibid., Article 43.

983 Xinhuanet, 'China will not specifically tax carbon emissions', available at http://energy.people.com.cn/n1/2016/0321/c71661-28214363.html, (visited 4 December 2017).

984 Ministry of Commerce, Ministry of Environmental Protection and Ministry of Industry and Information Technology, issuing the Green Purchasing Guideline, available at http://www.mofcom.gov.cn/article/h/redht/201412/20141200846975.shtml, (visited 4 December 2017).

985 Article 15 of the Green Purchasing Guideline.

and the State Administration of Taxation provided recyclers a VAT rebate ranging from 30% to 100% relating to the use of various recycled industrial inputs, such as ferrous scrap.[986] However, although this favourable tax treatment may provide producers in China with incentives to increase resource utilization, it may not adequately restrict Chinese consumption of high-polluting and high-energy-consumption products.

In contrast, the experience with the consumption tax in China suggests a more effective alternative for restricting domestic consumption of high-polluting and high-energy-consumption products. The NDRC thus in 2013 called for the inclusion of those products within the scope of consumption taxes as a means to fulfil targets for reducing pollution and carbon emissions.[987] Following this suggestion, certain batteries and coatings with high levels of volatile organic compounds have since 2015 been added to products covered by China's consumption tax at a rate of 5% in order to reduce pollution and carbon emissions.[988] The Guidelines of the Thirteenth Five-Year Plan (2016-2020) call for continued improvements in China's consumption tax system,[989] and one interpretation of this commitment might be to cover more high-polluting and high-energy-consumption products.[990]

8.5 Conclusions

There is a good chance of justifying identical 'export duties plus' under Article XX for the purposes of reducing local pollution under subparagraph (b) or global pollution under subparagraph (g). Compared with Article XX(b), Article XX(g) provides more policy space because identical 'export duties plus' would certainly meet the 'even-handedness' requirement. Such 'export duties plus' might, however, fail the necessity test under Article XX(b) if, for instance, a less trade-restrictive alternative is available. Article XX(g) thus provides China with more policy space to adopt identical 'export duties plus' for targeting global pollution.

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986 Favourable Value-added tax List of Products and Services Concerning Comprehensive Utilization of Resources, available at http://www.chinatax.gov.cn/n810341/n810755/c1703758/content.html, (visited 4 December 2017).

987 Notice of National Development and Reform Commission on Enhancing its Work to Ensure Targets and Objectives of Energy Saving and Emission Reduction in 2013, available at http://www.ndrc.gov.cn/zcfb/zcfbtz/201308/t20130827_555124.html, (visited 4 December 2017).

988 Circular on Consumption Taxes on Battery Coatings, available at http://www.mof.gov.cn/zhengwuxinxi/caizhengwengao/wg2015/wg201503/201507/t20150722_1344546.html, (visited 4 December 2017).

989 Chapter 15 Section 3 of the Guidelines of the Thirteenth Five-Year Plan (2016-2020).

990 Xinhuanet, 'The Next Step of Tax Reform in China: Consumption Tax', available at http://news.xinhuanet.com/fortune/2017-08/04/c_1121428785.htm, (visited 4 December 2017).

In contrast, differential 'export duties plus' would be generally prohibited under Article XX because they discriminate against foreign consumers. On the one hand, although Articles XX(b) and XX(g) do not necessarily require identical treatment, more charges on products for export could incentivise Chinese consumption. This result would undermine the effectiveness of 'export duties plus' to reduce pollution and thus decrease chance of justifying them. In most cases, Article XX(g) seems to provide more policy space.[991]

If, on the other hand, differential 'export duties plus' are provisionally justified under Articles XX(b) or XX(g), they would generally fail to satisfy the first condition of the chapeau which prohibits 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail'. As an exception, however, 'export duties plus' might be permitted to differentiate Annex I and non-Annex I parties for the purpose of fighting climate change because Annex I parties have agreed to follow more stringent rules in light of the principle of 'common but differentiated responsibilities' under the UNFCCC. China thus may argue that 'the same conditions' do not prevail between China and Annex I parties. Alternatively, the discrimination against Annex I parties might be found not 'arbitrary or unjustifiable' because the more stringent commitments made by those parties could serve as a justification for charging a higher carbon price for products consumed there.

That being said, however, it is equally important to address concerns that China might use differential 'export duties plus' to provide Chinese downstream producers with favourable access to industrial inputs and thus circumvent WTO rules. This concern could be addressed by the second condition of the chapeau regarding 'disguised restriction on international trade', which has not been clearly defined in WTO jurisprudence. This requirement may prohibit China from exclusively targeting carbon-intensive upstream products. For the purpose of fighting climate change, differential 'export duties plus' should instead cover both upstream and downstream products from sectors with high carbon cost and trade sensitivity.

Finally, a reality check on China's environmental policies shows that domestic consumption has not been adequately restricted for environmental purposes. This situation is understandable because, given the *China – Raw Materials* and *China – Rare Earths* decisions that absolutely prohibit China's export duties, the sole restriction on Chinese consumption may induce companies to produce more high-polluting or energy-intensive products

991 In exceptional cases where the products at issue are primarily consumed abroad, the 'export duties plus' that are not even-handed under Article XX(g) might nevertheless be found necessary under Article XX(b). For further information, see Section 8.1.

for foreign consumers.[992] This is no longer a concern, however, because, as suggested in this thesis, 'export duties plus' could be part of China's demand-side environmental policies. A feasible option for restricting domestic consumption could involve broadening the existing scope of products that are subject to consumption taxes.

992 It has been argued that China may use quotas to restrict export. However, 'While it is possible to construct a policy package that uses an export quota in conjunction with consumption taxes, such a package would require continual adjustment of policies in response to changes in market conditions to avoid discriminatory outcomes.' See Bond and Trachtman (2016) above n 147, at 202. Moreover, as discussed in Chapter 4, given the three major disadvantages of quantitative restrictions compared with duties, such arguments do not seem to make economic sense as well.