

Chinese Natural Resources Disputes: A Never-Ending Story?



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Contents

1	Introduction	39
2	Driving Factors Behind Chinese Natural Resources Disputes	42
2.1	Pervasiveness of China's Regime on Export Restrictions	42
2.2	Criticality of Targeted Raw Materials	44
2.3	Magnitude of the Economic Effects of China's Export Restrictions	46
3	China-Specific WTO Obligations on the Export Side	48
3.1	China's WTO Obligations on the Use of Export Duties	48
3.2	China's WTO Obligations on the Use of Export Quantitative Restrictions	50
4	Assessing China's Regulatory Autonomy to Impose (Mineral) Export Restraints	52
4.1	Regulatory Autonomy to Impose Export Duties	52
4.2	Regulatory Autonomy to Impose Export Quotas	55
5	Conclusion	58
	References	59

1 Introduction

In the summer 2016, the US and the European Union (EU) initiated a new dispute against China at the World Trade Organization (WTO), which concerned the export duties and the export quotas imposed by the Chinese government on various raw materials of mineral origin (namely, antimony, chromium, cobalt, copper, ferro-nickel, graphite, indium, lead, magnesia, talc, tantalum and tin).¹ Consultations

¹Request for Consultations by The United States, *China – Export Duties on Certain Raw Materials*, G/L/1147, WT/DS508/1, 14 July 2016, later supplemented by Request for Consultations by The United States, Addendum, *China – Export Duties On Certain Raw Materials*, G/L/1147/Add.1, WT/DS508/1/Add.1, 25 July 2016. Request for consultations by the European Union, *China – Duties*

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M. Bungenberg et al. (eds.), *European Yearbook of International Economic Law 2018*,

European Yearbook of International Economic Law (2019) 9: 39–60,

https://doi.org/10.1007/8165_2018_2, Published online: 13 December 2018

39

among the parties have hitherto been launched and failed; a single panel was thus established on 23 November 2016.² This is the third time China's regime of export restrictions on raw materials gets under scrutiny at the WTO since 2009.³ In a first dispute, *China – Raw Materials*, the measures at issue were the export duties and the export quotas that China maintained on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous and zinc.⁴ A second case, *China – Rare Earths*, challenged the export duties and the export quotas imposed on rare earth elements, tungsten and molybdenum.⁵

The series of raw materials disputes targeting China reflects China's peculiar position as a leading supplier of mineral resources in the international market, on the one hand, and as an emerging economy sustaining unprecedented economic transformation through a variety of instruments of "green" industrial policy such as export restrictions, on the other hand.⁶ At the same time, it is arguably a reflection of the specific obligations on the export side that China has assumed in addition to standard disciplines contained in the General Agreement on Tariffs and Trade (GATT) in the context of its WTO accession.⁷ The former aspect has made it a privileged target on the part of those net-importing countries that depend on access to Chinese natural resources to feed the needs of key manufacturing sectors.⁸ The latter aspect has rendered its export regime exceptionally vulnerable to WTO challenges.

Not surprisingly, WTO disputes on export restrictions have all targeted China so far and repeatedly condemned any of the measures at issue: under paragraph 11.3 of its Accession Protocol, in the case of export duties, and under Article XI:1 GATT, in

and other Measures concerning the Exportation of Certain Raw Materials, G/L/1148, WT/DS509/1, 25 July 2016, later supplemented by Request for consultations by the European Union, Addendum, *China – Duties and other Measures concerning the Exportation of Certain Raw Materials*, G/L/1148/Add.1, WT/DS509/1/Add.1, 23 August 2016.

²Dispute Settlement Body—Minutes of meeting held in the Centre William Rappard on 23 November 2016, WT/DSB/M/389, 23 January 2017, pp. 6–7.

³The third raw materials dispute will be henceforth referred to with its official short title: *China – Raw Materials II*.

⁴See Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII (hereinafter Appellate Body Reports, *China – Raw Materials*), p. 3295.

⁵See Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, adopted 7 August 2014, DSR 2014:IV (hereinafter Appellate Body Reports, *China – Rare Earths*), p. 1127.

⁶As it is known, export restrictions depress the price of raw materials in the imposing country. This may lead to a reduction of domestic production, which in turn contributes mitigating the negative environmental externalities linked to extractive activities by slowing the pace of extraction, and, consequently, the rate of depletion of finite resources. It may however also boost the domestic downstream industries that avail themselves of the cheaper raw materials to the detriment of foreign competitors. For a thorough discussion on this duality, see Wu and Salzman (2014), pp. 426–430.

⁷See Sect. 3.

⁸As one of the largest exporter of critical minerals and metals, China can affect world supply and drive up world prices through the use of export barriers, in addition to artificially lowering domestic prices. See Sect. 2.3.

the case of export quotas. Significantly, moreover, China's efforts to defend its mineral export restraints as measures forming part of comprehensive environmental and/or conservation strategies under Article XX(b) and Article XX(g) GATT were also dismissed: Article XX GATT was found a priori unavailable for violations of China's export duty commitments as contained in its Accession Protocol; China's Article XI:1 GATT-inconsistent quantitative restrictions were instead condemned as constituting an instrument of industrial policy.⁹

The approach espoused by the Appellate Body in the first disputes seems to leave very little room to China for defending its export duties and quotas in the latest pending dispute, inasmuch as *China – Raw Materials II* revolves around the same core legal issues. What it is more, it arguably exposes China to a very high chance to be subject to other similar WTO challenges as long as China's export regime continues to encompass the same type of measures that were condemned in previous raw materials disputes.¹⁰

In light of all the foregoing, this article aims at dissecting the factual circumstances and the legal premises that made China's export regime the target of a raw materials "saga" with a view to exploring whether and, if so, under which conditions the recent WTO case law on (mineral) export restraints makes it any more likely for new similar disputes to be initiated against it. This article is thus organised as follows: Sect. 2 illustrates the driving factors behind the raw materials disputes launched against China's export duties and quotas on mineral resources. This is followed by an analysis of the WTO obligations on the export side binding on China (Sect. 3). Section 4 discusses the implications with regards to China's regulatory autonomy to impose export restrictions for alleged sustainable economic development needs compared to other resource-endowed WTO Members. Finally, Sect. 5 provides some general conclusions on the likelihood of new WTO disputes on (mineral) export restraints involving China.

⁹As it is known, GATT Article XX(b) and (g) justify, respectively, measures necessary to protect human, animal and plant life or health, and measures related to the conservation of exhaustible natural resources. Pursuant to the introductory paragraph of Article XX, any such measure cannot nevertheless be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." For a detailed analysis of China's defensive arguments, see for all *Espa* (2015), pp. 194–208.

¹⁰For a detailed explanation of how the so-called likeness of success argument conditions the choice of disputes, see *De Bièvre et al.* (2017), pp. 411–425.

2 Driving Factors Behind Chinese Natural Resources Disputes

China is not the only country imposing export restrictions on raw materials.¹¹ Yet, several factors explain why WTO disputes have repeatedly targeted Chinese export restrictions. First, China's regime of export restrictions has not precedent in scope and coverage among resource-endowed WTO Members, at least for what concerns hard commodities. Second, among those such commodities are raw materials of mineral origin that are strategically important to key manufacturing sectors. Third, China is a global leading producer (if not the sole producer) of many of the restricted raw materials.

2.1 Pervasiveness of China's Regime on Export Restrictions

China's regime of export restrictions is pervasive and comprises both export duties and quantitative export restrictions. Both categories of measures are systematically applied on a wide range of commodities and overall administered by the Chinese Ministry of Commerce (MOFCOM).

The Ministry reviews and publishes every year in December a Tariff Implementation Plan, which contains the list of products to be subject to a new and/or adjusted export tax rate, in accordance with the Regulations on Import and Export Tariffs.¹² The number of HS 8-digit tariff lines subject to statutory export duties has been increasing in recent years, going from 95 HS 8-digit tariff lines in 2009 to 102 in 2015.¹³ According to latest data provided by the WTO Secretariat, moreover, China still maintained interim export duties (i.e. duties applied for a limited period) on 314 tariff lines at the HS 8-digit level in 2015.¹⁴ When imposed on items which are already subject to a statutory rate, interim export duties prevail and are normally lower, ranging from 0 to 35% compared with the 20–50% range of statutory export duties.¹⁵ In most cases, however, interim export taxes are applied on additional tariff

¹¹For a detailed description of the magnitude and the distinguishing features of the current wave of proliferating export restrictions on primary commodities, more generally, and on mineral resources, more specifically, see Espa (2015), pp. 8–34.

¹²The Regulations on Import and Export Tariffs came into force on 1 January 2004. See Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/300/Rev.1, 27 May 2014, p. 79.

¹³Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/264/Rev.1, 20 July 2012, p. 58; Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/300/Rev.1, 7 October 2014, p. 80; Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/342, 15 June 2016, p. 73.

¹⁴Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/342, 15 June 2016, p. 73.

¹⁵Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/342, 15 June 2016, p. 73.

lines items which are not subject to statutory export taxes.¹⁶ Based on this system, China still cumulatively subjects 4.1% of all tariff lines at the HS 8-digit level to export duties (including both statutory and interim duties).¹⁷ Such overall incidence has only slightly decreased since 2013, showing China's reluctance to phase out its export duties beyond what strictly necessary to ensure the implementation of the Appellate Body rulings in *China – Raw Materials* and *China – Rare Earths*.¹⁸

China also maintains the most comprehensive (and complex) system of export quotas among WTO Members. It is based on a series of measures consisting of basic framework legislation (the Foreign Trade Law), a set of implementing regulations aimed at governing the administration of the imports and exports (the Regulation on the Administration of the Import and Export of Goods), as well as specific annual measures indicating all products subject to export quotas for each year (the annual Export Licensing Catalogue) and the related annual quota amounts (the annual Export Quota Amounts).¹⁹ Both the Catalogue and the annual total amounts are formulated and announced by MOFCOM on 31 October of each year for the following year.²⁰ Exporters can apply for an export quota until 15 November of each year. Annual quotas are then generally allocated by 15 December and, in some cases, twice a year through a “first batch” and a “second batch” occurring in December and July, respectively. The allocation of quotas is done either directly or through a quota bidding system.²¹ In both cases, MOFCOM sets out general

¹⁶Interim duty rates may also be flanked by “special” duty rates which are mainly seasonal and substantially higher than interim duty rates. For instance, in 2013, thirteen HS 8-digit tariff lines were subject to a 75% special duty rate. Interim duty rates are revised from time to time, but are normally in place for many years and sometimes even decades. Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/199/Rev.1, 12 August 2008, p. 74.

¹⁷Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/342, 15 June 2016, p. 73.

¹⁸See *Espa* (2015), p. 83.

¹⁹For a thorough account of the functioning of China's export quota regime, see Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, adopted 5 July 2011 (hereinafter Panel Reports, *China – Raw Materials*), paras. 7.172–7.201.

²⁰Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/300/Rev.1, 27 May 2014, p. 81.

²¹In the former case, MOFCOM determines the total ceiling for quotas in light of a number of objectives, including the safety of the national economy, the protection of limited domestic resources, the development of national industries and the state of demand on the international and the domestic markets. MOFCOM also allocates the quotas directly or through local administrative authorities based on criteria that include export performance, the utilization ratio of the export quota, the business management/operation capacity of the applicant and its production scale. See China's Export Quota Administration Measures, Article 10 and Article 19, cited in Panel Reports, *China – Raw Materials*, paras. 7.177–7.178. In the latter case, any interested enterprise submits a bidding price and a bidding quantity to China's Export Quota Bidding Committee, which is established within MOFCOM and determines the quantity of the export quotas along with governing each step of the bidding procedure. China's Bidding Office determines the winning bidders by ranking all bids received from applicants in descending order (i.e. from the highest bid prices to the lowest) and matching them with the related bidding quantities until the total bidding

eligibility requirements for enterprises, which frequently vary depending on the nationality of the enterprises. Sector-specific eligibility requirements are also established and have often included prior export experience or export performance requirements.²² Often, foreign-invested enterprises are required to satisfy additional requirements.²³

According to the WTO Secretariat and the OECD, such a system still applied to almost 200 tariff lines at the HS 8-digit level, including more than 40 types or groups of minerals before the *China – Rare Earths* reports were adopted.²⁴ Similarly to what happened in the case of export duties, however, China has reluctantly eliminated the sole measures targeted by the Appellate Body rulings.²⁵

2.2 Criticality of Targeted Raw Materials

China's regime of export restrictions covers a wide range of raw materials of mineral origin that are essential to key manufacturing sectors such as construction, metallurgy, electronics and telecommunication, equipment manufacturing, transportation (including automotive, aeronautics, train and shipbuilding), chemicals, plastic and glass.²⁶ These sectors cover a predominant share of the total value added for the manufacturing sector.²⁷ Significantly, the economic importance of such materials is determined by their irreplaceability for the manufacture of new high-tech

quantity equals the annual total amount available for each product. See China's Export Quota Bidding Measures, Article 26, cited in Panel Reports, *China – Raw Materials*, paras. 7.187–7.199.

²²See, e.g. the requirements established for exporters of bauxite, coke, fluorspar, silicon carbide and zinc, detailed in Panel Reports, *China – Raw Materials*, paras. 7.177–7.186 and paras. 7.198–7.201. See also the requirements imposed on exporters of rare earth elements, molybdenum and tungsten described in Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R, adopted 26 March 2014 (hereinafter Panel Reports, *China – Rare Earths*), paras. 7.204–7.235.

²³Morrison WM and Tang R (2012), China's rare earths industry and export regime: economic and trade implications for the United States, US Congressional Research Service (CRS) Report for Congress, 30 April 2012, <https://fas.org/sgp/crs/row/R42510.pdf> (last accessed 15 January 2018).

²⁴Fliess et al. (2014), p. 13; Trade Policy Review Body, *Report by the Secretariat*, WT/TPR/S/342, 15 June 2016, p. 73.

²⁵At first, the Chinese government seemed determined not to bring its regime into compliance with the Appellate Body recommendations. See Espa (2015), p. 328.

²⁶For a detailed description of the most common end-uses of mineral resources subject to export restrictions by the Chinese government, see Korinek and Kim (2010), pp. 123–130. More detailed profiles covering the main end-use markets of each material were prepared by the European Commission. See European Commission (2014) Report on critical raw materials for the EU: non-critical raw materials profiles, http://www.catalysiscluster.eu/wp/wp-content/uploads/2015/05/2014_Critical-raw-materials-for-the-EU-2014.pdf (last accessed 15 January 2018).

²⁷Espa (2015), p. 58.

applications, including clean energy technology equipment and, more generally, a variety of environmentally friendly technologies.²⁸

Not surprisingly, such critical minerals and metals are the most intrusively affected by China's regime of export restrictions compared to other categories of commodities. In particular, the highest export duty rates imposed by China are the ones applied on minerals and metals, more generally, and on the critical minerals and metals targeted by the WTO raw materials disputes, more specifically.²⁹ Interestingly, China also frequently resorts to progressive taxation, namely taxing ores and concentrates higher than oxides and semi-processed and processed products.³⁰ *Mutatis mutandis*, the same holds true for China's export quotas, which have not only mainly targeted minerals and metals but also been gradually tightened along the years, both in terms of absolute value and as a percentage of total Chinese production.³¹

All these elements have made China's export restrictions instrumental to promoting local downstream processing industries, in apparent contradiction to the goals of environmental protection and resource protection consistently purported by the Chinese government before the WTO adjudicators.³² Chinese domestic production and exports of higher value-added intermediate products have in fact systematically expanded in coincidence with the use of mineral export restraints.³³ This has been possible due to the combination of the price depression effect induced on restricted materials in the Chinese market compared to world market levels and the comprehensive industrialization programmes launched by the Chinese government in recent years.³⁴ Among them, the Twelfth and Thirteenth National Five-Year Plans (2011–2015 and 2016–2020, respectively) have targeted the expansion of many industries that avail themselves of restricted minerals and metals (namely, iron/steel and non-ferrous metals, construction, equipment manufacturing, shipbuilding and automotive) in addition to boosting leading-edge manufacturing sectors (including, energy conservation and environmental protection, new generation information technology, biotechnology, high-end manufacturing equipment, new energy and materials and new-energy vehicles), which again comprise large raw material-

²⁸See Espa (2015), pp. 56–58.

²⁹See Espa (2015), pp. 77–80.

³⁰OECD Inventory on export restrictions on Industrial Raw Materials, https://qdd.oecd.org/subject.aspx?Subject=ExportRestrictions_IndustrialRawMaterials (last accessed 20 January 2018).

³¹A striking example in this respect is the evolution of the allocated export quotas imposed on rare earth elements, which went from 59,643 metric tons in 2007 through 49,990 metric tons in 2008 to 30,259 metric tons in 2010. Although the number of total allocations always remained within the range of 30,000–31,000 metric tons until 2014, from 2011 the list of products covered by the quota was updated to include various ferro-alloys that were not covered before. This *de facto* reduced the 2011 rare earths export quota by as much as 30%. See Espa (2015), pp. 91–92.

³²Espa (2015), pp. 114–115.

³³Korinek and Kim (2010), pp. 118–119; Price and Nance (2010), p. 91; Fung and Korinek (2014), p. 19.

³⁴Wu (2017), pp. 673–691.

using downstream firms.³⁵ The Plans have furthermore been followed-up by a number of sector-specific plans aimed at imposing targeted objectives for the reinforcement of “national champions” in different industries, including the raw materials industry.³⁶

In conclusion, although China has consistently denied that export restrictions were implemented with a view to lowering the price of domestic raw materials as part of its industrial policy, such instruments have often played a crucial role in the development and/or the expansion of strategic industrial sectors instead of disincentivising Chinese mining production as predicted by theoretical economic models.³⁷

2.3 Magnitude of the Economic Effects of China’s Export Restrictions

China is the world’s leading producer of many of the raw materials of mineral origin subject to export restrictions.³⁸ It also remains or has until recently been the sole producer of a number of targeted raw materials (e.g. rare earth elements).³⁹ This is not solely due to the geographical concentration of mineral resources, as in most cases the global distribution of reserves is much more widely dispersed than the Chinese dominance in world’s mine production would suggest.⁴⁰ It is also a reflection of decades-long mine dismantling processes in relatively-abundant countries, including advanced economies such as Australia, Canada and the US, which resulted from a combination of Chinese dumping practices dating back to the 1970s, economic considerations related to the cost-effectiveness of expanding production capacity during a prolonged time of low commodity prices lasted until the mid-2000s and the increasing regulatory costs associated with compliance with environmental regulations.⁴¹

As one of the largest exporters of critical minerals and metals, China can affect world supply and drive up world prices through the use of export barriers, in addition

³⁵ Wu (2017), pp. 686–687.

³⁶ Espa (2015), pp. 114–115.

³⁷ According to standard economic theory, the domestic price decline induced by export restrictions should in turn generate a reduction in domestic production. Fung and Korinek (2014), p. 15. Yet, a substantial body of literature has pointed to contradicting evidence when it comes to assessing the adequateness of export restrictions as environmental tools. For an overview of this literature, see Espa (2015), pp. 119–122.

³⁸ China’s dominance in global mining production was thoroughly assessed. Espa (2015), pp. 58–61.

³⁹ Wu (2017), pp. 678–680.

⁴⁰ Korinek and Kim (2010), p. 108.

⁴¹ See, e.g. Gu (2011), p. 774; Wu (2017), p. 686.

to artificially lowering domestic prices.⁴² As a result, import-dependent countries are exposed to severe competitiveness losses without readily being able to rely on alternative suppliers or indigenous production capacity. With a view to understanding the magnitude of such resulting competitive disadvantage, the OECD has specifically assessed the impact of a number of export restrictions applied by China on various minerals and metals including coke, rare earth elements and, more generally, several materials that China predominantly produces worldwide. In the case of coke, China's export restrictions created a substantial contraction of Chinese exports and a corresponding price differential of 241 USD per metric ton between world prices and Chinese domestic prices.⁴³ This translated into a cost advantage of almost 145 USD per metric ton for Chinese steel producers over foreign companies, equal to more than 20% of the international market price for carbon steel.⁴⁴ China's export restrictions on rare earth elements have also caused great distortions in the world market, creating a de facto dual pricing regime whereby Chinese rare earth processors were paying 31% less than their foreign competitors in 2008.⁴⁵ Access to supply was also compromised for foreign consumers after China tightened quota levels below global demand in 2009.⁴⁶ Similar effects on Chinese on downstream producers and foreign competitors were induced by China's export regime on tungsten articles.⁴⁷

In light of the foregoing, other relatively well-endowed countries such as Australia and the US have resumed production of critical mineral resources, but they are still dwarfed by Chinese production due to the lagged response of supply in the mining sector.⁴⁸ US- and EU-based companies dependent on restricted inputs have started relocating manufacturing facilities to China in order to circumvent the economic impact of China's export restrictions and thus remain competitive with Chinese downstream firms.⁴⁹ Yet, the threat of manufacturing jobs loss is a scenario that both the US and the EU cannot afford at a time where economic stagnation is leaving them vulnerable to anti-trade political rhetoric. Not surprisingly, they have opted for the judicial option within the multilateral trading system to protect their national economic interests.

⁴²Fung and Korinek (2014), p. 17.

⁴³Price and Nance (2010), p. 91.

⁴⁴Price and Nance (2010), p. 91.

⁴⁵Korinek and Kim (2010), pp. 118–119; Fung and Korinek (2014), p. 31.

⁴⁶Gu (2011), p. 768.

⁴⁷European Commission (2010) Annex V to the report of the Ad-hoc Working Group on defining critical raw materials, <https://ec.europa.eu/growth/tools-databases/eip-raw-materials/en/community/document/annex-v-report-ad-hoc-working-group-defining-critical-raw-materials> (last accessed 22 January 2018).

⁴⁸Even if mining companies decide to increase investment, actual capacity expansion requires at least 5 years and sometimes even decades to become operational due to decision and implementation lags. Korinek and Kim (2010), p. 104; Peeling et al. (2010), p. 159.

⁴⁹Wu (2017), p. 687.

3 China-Specific WTO Obligations on the Export Side

As shown above, China's extensive regime of export restrictions, matched with its dominance in mine production, plays a big role in explaining the series of raw materials disputes brought at the WTO. Another important part of the story, however, is arguably played by the comprehensiveness of China-specific obligations on the export side.

3.1 China's WTO Obligations on the Use of Export Duties

China's WTO obligations on the use of export duties were assumed by virtue of paragraph 11.3 of its Accession Protocol⁵⁰ and the related provisions of its Working Party Report.⁵¹ According to paragraph 11.3:

China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.

Annex 6 to China's Accession Protocol, labelled "Products Subject to Export Duty", lists 84 HS 8-digit products for which maximum levels of export duty are provided. With respect to these commitments, a Note to Annex 6 clarifies:

China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected Members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.

Among the 84 products listed in Annex 6 are mostly mineral raw materials, from iron and ferro-alloy metals to non-ferrous metals and industrial minerals.⁵² The bound export duty rate ranges from 20% to 40%. Significantly, however, China's maintains

⁵⁰Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001.

⁵¹See paragraphs 155 and 156 of China's Working Party Report, WT/ACC/CHN/49, 1 October 2001. These paragraphs fall under Section C "Export Regulations" and deal solely with China's specific obligation to eliminate export duties. Paragraph 155 reads: "taxes and charges should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Draft Protocol." Paragraph 156 confirms: "China noted that the majority of products were free of export duty, although 84 items, including tungsten ore, ferrosilicon and some aluminium products, were subject to export duties."

⁵²Out of 84 listed products, only 4 are fishery products or products of animal origin. See Annex 6 to China's Protocol of Accession.

export duties on a range of mineral raw materials which far outnumbers the listed products.⁵³

Whether China can still lawfully maintain such export duties and, if so, under which conditions, depends on the level of flexibility built in paragraph 11.3 of its Accession Protocol and the related Working Party Report provisions. In *China – Raw Materials*, the Appellate Body affirmed that a combined reading of paragraph 11.3, Annex 6 and the Note to Annex 6 indicates that China must not impose export duties other than those falling within the scope of a specific set of exceptions: those covered by GATT Article VIII⁵⁴ and those applied in conformity with Annex 6. In its view, this implies that (1) China cannot apply export duties on products not listed in Annex 6;⁵⁵ (2) the “exceptional circumstances” provided for in the Note to Annex 6 cannot be invoked to impose export duties on non-listed products;⁵⁶ (3) in the case of the 84 listed products, China can increase the applied export duties only up to the maximum rate set out in Annex 6⁵⁷ by invoking the “exceptional circumstances” exception provided for in the Note to Annex 6, but only insofar as it fulfils the prior consultation requirement.

The Appellate Body also found that paragraph 11.3-inconsistent export duties are not subject to Article XX GATT defences in *China – Raw Materials* and *China – Rare Earths*. It considered in particular that the unavailability of Article XX GATT stems from (1) the fact that China’s export duty commitments were assumed under an individual accession protocol provision, paragraph 11.3, rather than being negotiated as export duty concessions directly incorporated within the GATT framework and (2) the fact that paragraph 11.3 of China’s Accession Protocol does not exhibit an “objective link” to the GATT flexibilities, mainly in the form of an express reference to the GATT Agreement or to the WTO Agreement, more generally, or to Article XX GATT itself, more specifically.⁵⁸

The Appellate Body made clear that ascertaining the existence of a discernible “objective link” to any GATT flexibilities requires a case-by-case analysis of individual accession protocols provisions, having due regard to the specific language

⁵³In addition, the export duties applied on all listed products are set already at the maximum bound rate indicated under Annex 6, but the listed products are by far outnumbered by the mineral products restricted at the exportation. Espa (2015), pp. 150–151. See also Sect. 2.1 above.

⁵⁴The Appellate Body clarified that the export duties regulated under paragraph 11.3 of China’s Accession Protocol do not fall within the scope of Article VIII GATT. Appellate Body Reports, *China – Raw Materials*, para. 290.

⁵⁵Appellate Body Reports, *China – Raw Materials*, para. 284.

⁵⁶Appellate Body Reports, *China – Raw Materials*, para. 284.

⁵⁷Appellate Body Reports, *China – Raw Materials*, para. 285. This is because the word “furthermore” in the second sentence of the Note to Annex 6 was interpreted by the Appellate Body to mean that the obligation contained in the second and third sentences of the Note (i.e. the exceptional circumstances requirement and the consultation requirement) are “in addition to China’s obligation under the first sentence not to exceed the maximum tariff levels provided for in Annex 6.” Appellate Body Reports, *China – Raw Materials*, para. 287.

⁵⁸For a thorough analysis of the Appellate Body’s reasoning and its systemic implications, see Espa (2015), pp. 194–208.

of the provision taken in its context and in light of the purpose of the WTO Agreement, as well as to the specific circumstances of the case (including the measure(s) at issue and the nature of the alleged violation)⁵⁹; yet, it follows from its reasoning on the limits inherent to the way paragraph 11.3 of China's Accession Protocol was drafted that China would also be prevented from renegotiating its export duty commitments in accordance with GATT-specific procedures available to duty concessions.⁶⁰

3.2 *China's WTO Obligations on the Use of Export Quantitative Restrictions*

As regards its use of export quotas and, more generally, quantitative types of export restrictions, China's obligations arise exclusively from the GATT. As it is known, the Agreement outlawed any type of quantitative restrictions on exports as per Article XI:1, which reads:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Contrary to what happens in the case of export duties, this general elimination obligation applies across the board to all WTO Members and is indeed a cornerstone of the overall GATT architecture.⁶¹ Accordingly, it has been consistently interpreted in a broad manner in GATT/WTO case law.⁶² WTO dispute settlement bodies have in particular made clear that the scope of Article XI:1 does not solely cover formal quantitative restrictions, such as quotas, but also any types of "restrictions", irrespective of their legal status or their de jure or de facto nature, as long as they have a limiting or restrictive effect on the volume of exports.⁶³

⁵⁹ Appellate Body Reports, *China – Rare Earths*, para. 5.74.

⁶⁰ The classical way for members to renegotiate their tariff concessions is the deconsolidation procedure under Article XXVIII GATT. For a more detailed explanation, see Espa (2015), pp. 202–204.

⁶¹ Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, 19 November 1999, as modified by Appellate Body Report, WT/DS34/AB/R, 22 October 1999, DSR 1999:VI, p. 2363, para. 9.63.

⁶² At the time of writing, out of the seven cases that have dealt specifically with quantitative restrictions on exports under Article XI:1 GATT, all the measures challenged were considered to fall within the meaning of "prohibitions or restrictions...on the exportation". For a thorough analysis of Article XI:1 GATT jurisprudence on the export side, see Espa (2015), pp. 169–175.

⁶³ In *China – Raw Materials*, in particular, the Panel clarified that "the very *potential* to limit trade constitute[s] a 'restriction' within the meaning of Article XI:1 of the GATT 1994." Panel Reports, *China – Raw Materials*, para. 7.1081 (original emphasis).

Against this backdrop, it is unambiguous that any of the quantitative export restrictions applied by the Chinese government, a fortiori those export quotas challenged at the WTO, unambiguously fall under the remit of Article XI:1 GATT.⁶⁴ It is also undisputed, however, that China could seek justification for such measures, just like any other WTO Member, by invoking the GATT exceptions relevant to mineral export restraints—in contrast to what happens for its paragraph 11.3-inconsistent export duties.

Several GATT exceptions have been invoked by China to defend its export quotas as measures allegedly forming an integral part of comprehensive environmental and/or conservation strategies ultimately seeking to fulfil “sustainable economic development” goals.⁶⁵ In *China – Raw Materials*, China sought justification for the export quotas imposed on refractory-grade bauxite under Article XI:2 (a) GATT, which shelters Article XI:1-inconsistent export prohibitions or restrictions that are “temporarily applied to prevent or relieve critical shortages of food-stuffs or other products essential to the exporting contracting party.”⁶⁶ In *China – Raw Materials* and *China – Rare Earths*, China invoked both Article XX(b) GATT, which covers measures that are “necessary to protect human, animal or plant life or health” and Article XX(g) GATT, which provides justification for measures “related to the conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁶⁷ In the latter case, however, its strategy has gradually shifted towards focusing on the conservation exception due to the higher evidentiary burden entailed by the necessity test incorporated into Article XX(b) GATT.⁶⁸

Up until now, China has consistently refrained from considering other general exceptions more directly relating to industrial needs. Article XX(i) GATT, in particular, allows to justify measures “involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan.” Article XX (j) GATT shelters those measures that are “essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products . . .”. It remains to be seen whether

⁶⁴A variety of export restrictive measures have been considered to fall within the remit of Article XI:1 GATT in existing WTO case law, from export quotas through non-automatic export licensing schemes to minimum export prices. For a complete overview, see Espa (2015), pp. 169–172.

⁶⁵For a description of how export restrictions have served both industrial and environmental goals, see Sects. 2.2 and 2.3.

⁶⁶Appellate Body Reports, *China – Raw Materials*, paras. 323–337.

⁶⁷As it is known, measures falling under one of the listed exceptions must also meet the test of the chapeau to Article XX GATT, which requires that they not be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”

⁶⁸For a broader discussion, see Espa (2015), pp. 209–213.

China will change its defensive strategy in *China – Raw Materials II* in light of the ambivalent rationale of its Article XI:1 GATT-inconsistent export quotas.⁶⁹

4 Assessing China’s Regulatory Autonomy to Impose (Mineral) Export Restraints

The analysis of the obligations binding upon China with respect to the use of export restrictions has shown that China has undertaken uniquely stringent export duty commitments in the context of its accession, both with regards to their scope and coverage and to their level of *inflexibility*. As explained below, such commitments leave it with minimal margin of manoeuvre to lawfully use export duties, irrespective of what their rationale may be, as compared to other resource-endowed WTO Members. China is thus left with the harder task to seek justification for GATT-inconsistent, yet more trade-distortive types of export restrictions, such as export quotas, under Article XX GATT.

4.1 Regulatory Autonomy to Impose Export Duties

When looking at China’s export duty commitments as arising from paragraph 11.3 of its Accession Protocol and interpreted in recent WTO jurisprudence, China’s regulatory autonomy to introduce (mineral) export restraints appears severely limited for two main reasons.

First, the scope and coverage of its obligations are extensive. China shall abstain from imposing export duties on any products except for the 84 HS 8-digit tariff lines listed in Annex 6 to the Protocol and, even in this case, it can only increase its applied rate up to the maximum duty rate indicated in Annex 6 of its Accession Protocol insofar as “exceptional circumstances” occur and after consulting with affected Members. The Appellate Body has not yet interpreted the expression “exceptional circumstances” so it remains open to question whether it is intended to refer to (any of the) GATT flexibilities. Based on the principle of effective interpretation, however, it seems very unlikely that it could be considered to overlap with Article XX GATT.⁷⁰

As such, China’s obligations are unprecedented among resource-endowed Members, be it WTO Members exclusively bound by standard GATT disciplines or newly acceded WTO Members that have assumed country-specific export duty

⁶⁹Espa (2015), pp. 111–118.

⁷⁰According to the principle of effective interpretation, all applicable provisions of a treaty should be interpreted in a way so as to give effect to all of them without rendering them useless, redundant or irrational. See Van Damme (2009).

commitments in their accession protocols. The former group of countries, which includes all original WTO members and 23 out of the 35 newly acceded members, are in fact under no obligation to either eliminate or reduce export duties as per Article XI:1 GATT, although they do remain free to negotiate export duty concessions on a voluntary basis following the same procedure envisaged for import tariffs under Article II:1(b) GATT.⁷¹ To date, however, Australia is the only Member that has engaged in such practice, although by means of including very targeted export duty concessions in its Schedule.⁷² All other Members exclusively bound by GATT obligations, including large world suppliers of raw materials, can thus lawfully introduce and/or maintain export duties, irrespective of whether they use them for developmental purposes or for GATT Article XX-consistent purposes.

Paragraph 11.3 of China's Accession Protocol not only goes much further than standard GATT disciplines, but also has a much broader scope than the export duty commitments assumed by most other newly acceded Members, including any of the resource-endowed countries among such Members. At the moment of writing, in particular, 12 other members (Mongolia, Latvia, Croatia, Saudi Arabia, Vietnam, Ukraine, the Russian Federation, Montenegro, Lao People's Democratic Republic, Tajikistan, Kazakhstan and Afghanistan, in order of accession) have assumed country-specific obligations on the use of export duties in the context of their accession,⁷³ but only Montenegro and Tajikistan have abided by general elimination obligations, albeit mitigated by a list of export tariff bindings in the case of the latter, similarly to China.⁷⁴ They are however neither large suppliers in the international market of minerals and metals nor have they imposed any export restrictions on such

⁷¹Once included in GATT schedules, export duty concessions are binding and legally enforceable by virtue of Article II:1(a) and Article II:7, and could be subject to the deconsolidation procedure under Article XXVIII. For a more detailed explanation, see *Espa (2015)*, pp. 131–135.

⁷²Australia has negotiated export duty concessions on a set of 11 HS 8-digit tariff lines (namely, iron ore, titanium ore, zirconium ore, coal, peat, coke, refined copper, unwrought nickel, nickel oxide, and lead waste and scrap) by means of inserting an ad-hoc mandatory note in Section 2 of Part I of its Schedule on "MFN [most-favoured nation] import tariff commitments on non-agricultural products." The note states: "There shall be no export duty on this product." Australia's Uruguay Schedule, AUS1-201 through AUS1-204.

⁷³See *Espa (2017)*, pp. 368–370.

⁷⁴Tajikistan committed to eliminate all export duties except those admitted by Table 9 of its Working Party Report or applied in conformity with Article VIII GATT, while omitting reference to Article XX GATT or any other general reference to the GATT 1994 or the WTO Agreement. Montenegro committed not to introduce any export duty without negotiating the incorporation of explicit or implicit references to Article XX flexibilities. Other newly acceded Members, such as Latvia, Mongolia and Saudi Arabia, promised to eliminate only the export duties applied on a limited number of products. The other newly acceded Members committed to phase down and bind the export duties applied on a specific list of products (for instance, Vietnam and Kazakhstan). For a thorough analysis, see *Espa (2015)*, pp. 202–204.

materials susceptible to influence world prices and/or supply.⁷⁵ The one key resource-endowed Member, which did accept to phase down and/or eliminate export duties on more than 700 tariff lines, the Russian Federation, committed to do so by means of negotiating export duty *concessions* in a new, specific part (Part V “Export Duties”) of its GATT Schedule.⁷⁶ Accordingly, its obligations are directly incorporated into the GATT framework and thus grant access to GATT-specific exceptions and adjustment procedures applicable to duty concessions.

This consideration leads to the second reason, namely that China’s obligations on export duties are *inflexible*. As discussed above, such inflexibility stems from the “objective link” approach developed by the Appellate Body to assess the availability of GATT flexibilities to violations of export duty commitments contained in individual accession protocol provisions, which do not incorporate GATT flexibilities.⁷⁷ Here again, China is not the only newly acceded Member that has assumed export duty commitments through such legal technique, but it is the only large raw materials supplier among them.⁷⁸

The unparalleled stringency of China’s export duty commitments makes it particularly vulnerable to WTO disputes as they cannot be derogated from or modified a priori, at least insofar as the Appellate Body confirms the soundness of its “objective link” approach.⁷⁹ On this point, it is worth-noting that, although the WTO legal system is not based on the principle of *stare decisis*, at least two considerations suggests that the Appellate Body will hardly revert its reasoning. First, the Appellate Body arguably conceived the “objective link” approach as a general guiding framework for assessing the relationship between the provisions of post-1994 accession protocols, on the one hand, and the WTO Agreement and/or the Multilateral Trade Agreements annexed thereto, on the other hand. In this sense, it seemed inspired by the broader goal to properly situate accession protocols within the overall WTO legal framework more than just merely deciding on the availability of Article XX GATT to violations of paragraph 11.3 of China’s Accession Protocol.⁸⁰ Second, in *China – Rare Earths* China did raise four allegedly novel legal arguments with a view to seek the reversal of the Appellate Body’s finding in *China – Raw Materials*, which revolved around: (1) the interpretative value of the WTO’s fundamental environmental objectives, as stated in the Preamble of the Marrakesh Agreement; (2) the meaning of textual silence in paragraph 11.3; (3) the existence of an “intrinsic relationship” between paragraph 11.3 and the GATT 1994 and, (4) the

⁷⁵See OECD Inventory on Export restrictions on Industrial Raw Materials, https://qdd.oecd.org/subject.aspx?Subject=ExportRestrictions_IndustrialRawMaterials (last accessed 20 January 2018).

⁷⁶See Espa (2015), pp. 156–159.

⁷⁷See Sect. 3.1.

⁷⁸Espa (2015), pp. 204–208.

⁷⁹The extent to which China’s obligations could be renegotiated seems to depend on whether paragraph 11.3 of its Accession Protocol itself can be amended. China’s accession protocols (as all other accession protocols), however, do not contain any amendment provisions and therefore the matter is still far from settled. Qin (2012), p. 1157.

⁸⁰See Espa (2015), pp. 204–206.

interpretation of the term “nothing in this Agreement” in the chapeau of Article XX GATT.⁸¹ In examining each argument, however, the Panel did not conduct a *de novo* determination but merely aimed at discerning whether they presented “cogent reasons” for departing from the prior Appellate Body report and concluded that this was not the case.⁸² Although this finding was not appealed, the Appellate Body similarly confirmed the soundness of the approach endorsed in *China – Raw Materials* by stating: “[w]e also see no reason to revisit the ruling of the Appellate Body in *China–Raw Materials*.”⁸³

In light of the above, it seems unlikely that a new set of challenges against China’s export duties will result in a different outcome given the extremely narrow policy space left to China under paragraph 11.3 of its Accession Protocol. As shown by the evolution of China’s defensive strategy under Article XX GATT along the various raw materials disputes, however, this level of *inflexibility* has induced China to use more trade-distortive, but GATT-inconsistent, export quantitative restrictions when seeking to address legitimate concerns coming under one of the public policy goals recognised under GATT general exceptions with a view to seek justification under Article XX GATT.

4.2 Regulatory Autonomy to Impose Export Quotas

China’s regulatory autonomy to use (mineral) export restraints covered under Article XI:1 GATT can be assessed by way of testing the extent to which China may successfully defend export restrictions on the basis of available GATT exceptions. As mentioned above, the exceptions relevant to mineral export restraints are Article XI:2(a), the general “environmental” exceptions (Article XX(b) and (g)) and the general “industrial” exceptions (Article XX(i) and (j)).⁸⁴

While the latter exceptions have never been interpreted by WTO case law,⁸⁵ the reach of Article XI:2(a) GATT and the general “environmental” exceptions have recently been explored in *China – Raw Materials* and *China – Rare Earths*.⁸⁶

As to the shortage of supply exception under Article XI:2(a), the Appellate Body narrowly interpreted this provision in *China – Raw Materials* and identified three

⁸¹Panel Reports, *China – Rare Earths*, paras. 7.62–7.104.

⁸²Panel Reports, *China – Rare Earths*, para. 7.115.

⁸³Appellate Body Reports, *China – Rare Earths*, para. 5.65.

⁸⁴For a more detailed account, see Espa (2015), pp. 208–209.

⁸⁵Even so, the potential of “industrial” Article XX exceptions to justify mineral export restraints is considered to be quite limited inasmuch as they target very specific situations of emergency. Espa (2015), pp. 221–223.

⁸⁶Although such an interpretation and application of Article XX(g) GATT was given by the Appellate Body in the context of two disputes involving China, the same approach is likely to apply with regards to any WTO Member imposing mineral export restraints due to the fact that Article XI:1 is a standard GATT rule generally applicable across-the-board. See Sect. 3.2.

main requirements to be met cumulatively: first, the “temporarily applied” requirement, which demands that the restrictions or prohibitions be limited in time; second, the “critical shortage” requirement, which refers to deficiencies that amount to a situation of decisive importance or that reach a vitally important or decisive stage; third, the “essentialness” requirement, which requires that the product be important or necessary or indispensable to a particular Member have due regard to the particular circumstances faced by that Member at the time when it applies the restriction or prohibition.⁸⁷ In essence, Article XI:2(a) GATT cannot be invoked to justify export restrictions responding to situations of physical scarcity and/or exhaustibility of essential mineral resources (that is, situations of *permanent* shortages),⁸⁸ hence making it arguably unlikely for Chinese measures to pass the three-tier test.

The odds of convincing the Appellate Body are similarly not good in the case of mineral export restraints purportedly used for “environmental” purposes. As shown in *China – Raw Materials* and *China – Rare Earths*, in particular, the Appellate Body made clear that mineral export restraints are difficult to justify because environmental externalities and depletion risks derive from domestic mine production rather than exports.⁸⁹ In the same vein, it warned against invoking the principle of sustainable development and the principle of sovereignty over natural resources as pretexts to shelter export restrictions under the conservation exception when they are rather used as instruments of industrial policy.⁹⁰

Although condemning China’s export restrictions in both disputes, the WTO adjudicators did elaborate on the space left to WTO Members for sustainable natural resources management, with particular reference to Article XX(g) GATT.⁹¹ They did so by shedding light on the relationship between “conservation” under Article XX(g), sustainable development and permanent sovereignty over natural resources. They accepted that the term “conservation” in Article XX(g) incorporated the notion

⁸⁷For a thorough analysis, see Espa (2015), pp. 180–185.

⁸⁸For more details, see, among others, Howse R and Josling T (2012) Agricultural export restrictions and international trade law: a way forward, International Food and Agricultural Trade Policy Council (IPC) Position Paper, http://www.agritrade.org/Publications/documents/Howse_Josling_Export_Restriction_final.pdf (last accessed 25 January 2018), p. 14.

⁸⁹Espa (2015), pp. 209–213.

⁹⁰Espa (2015), pp. 214–221.

⁹¹China’s strategy has progressively focussed on advocating for an evolutionary interpretation of the conservation exception under Article XX(g) in light of the principle of sustainable development and the principle of sovereignty over natural resources. In particular, it invoked the latter to sustain that China’s “... right to ‘manage the supply’ of exhaustible natural resources is inherent to its sovereignty over exhaustible natural resources, which [...] allows resource-endowed Members to ‘freely use and exploit their natural wealth and resources. . . for their own progress and economic development’.” Panel Reports, *China – Rare Earths*, para. 7.457. In addition, it argued that the principle of sustainable development, as enshrined in the Preamble of the WTO Agreement, informs the interpretation of the conservation exception as to allow Members to “adopt measures, including export quotas, that foster the sustainable development of their domestic economies consistently with general international law and WTO law.” Panel Reports, *China – Rare Earths*, para. 7.457.

of exercising rights over natural resources in the interests of a Member's economic and sustainable development, and accordingly recognised the right of WTO Members to design their conservation programmes based on "their own assessment of various, sometimes competing, policy considerations and in a way that responds to their own concerns and priorities."⁹² However, they clarified that, while "conservation" policies may take sustainable economic development into account, measures that have a "sustainable economic development" objective, such as supply management, cannot be pursued under the rubric of "conservation" within the meaning of Article XX(g) GATT.⁹³ In other words, Article XX(g) cannot be "stretched" into an exception protecting measures that pursue industrial policy goals.⁹⁴ This conclusion lies in the premise that the exercise of sovereignty over natural resources cannot be intended to enable Article XX(g) to allow a WTO Member to allocate the available stock of a product between foreign and domestic consumers because, once extracted and in commerce, natural resources are subject to WTO law.⁹⁵

Accordingly, several factors were taken into consideration by the WTO adjudicators to condemn China's measures. First, albeit forming part of China's comprehensive conservation policy, China's export quotas lacked the requisite close and genuine connection with the conservation goal inasmuch as they burdened foreign consumers while reserving a supply of low-price raw materials to domestic downstream industries.⁹⁶ Second, the design and structure of China's export quotas system were not even-handed in the sense required by Article XX(g) in as much as the extraction, production and export quotas were applied "at different dates, on different products, and denominated in different values without any apparent coordination among them",⁹⁷ and the domestic caps were set at levels which were lower than the expected demand for the period during which they were intended to apply.⁹⁸

All this notwithstanding, the Appellate Body did admit that "Article XX(g) of the GATT 1994 does not exclude, a priori, export quotas or any other type of measures from being justified by a WTO Member pursuing the conservation of an exhaustible

⁹²Panel Reports, *China – Rare Earths*, para. 7.459.

⁹³Panel Reports, *China – Rare Earths*, para. 7.460. The Panel reiterated that "measures adopted for the purpose of economic development . . . are not 'measures relating to conservation' but measures relating to industrial policy."

⁹⁴Panel Reports, *China – Rare Earths*, paras. 7.451–7.452 and 7.459–7.460.

⁹⁵Panel Reports, *China – Rare Earths*, para. 7.462. As noted by the panel in *China – Raw Materials*, "a State's sovereignty is also expressed in its decision to ratify an international treaty and accept the benefits and obligations that such ratification entails. In becoming a WTO Member, China has of course not forfeited permanent sovereignty over its natural resources, which it enjoys as a natural corollary of its statehood. Nor . . . has China or any other WTO Member 'given up' its right to adopt export quotas or any other measure in pursuit of conservation. China has, however, agreed to exercise its rights in conformity with WTO rules, and to respect WTO provisions when developing and implementing policies to conserve exhaustible natural resources." Panel Reports, *China – Rare Earths*, para. 7.270.

⁹⁶Panel Reports, *China – Rare Earths*, paras. 7.419–7.488.

⁹⁷Panel Reports, *China – Rare Earths*, para. 7.611.

⁹⁸Panel Reports, *China – Rare Earths*, para. 7.550.

natural resource.”⁹⁹ On a more practical level, however, the very nature of export restrictions as “measures that increase the cost of [a raw material] to foreign consumers but decrease their costs to domestic users” was considered in both *China – Raw Materials* and *China – Rare Earths* as “difficult to reconcile with the goal of conservation.”¹⁰⁰

5 Conclusion

The analysis of China’s WTO obligations on the export side, as interpreted by recent case law, shed light on China’s extreme vulnerability to WTO raw materials disputes, irrespective of whether it purports to use export restrictions to achieve “sustainable economic development” goals. This holds true with respect to export duties (that is, the only type of export restrictions otherwise available under standard GATT disciplines to achieve economic diversification goals), due to the uniquely stringent and inflexible export duty commitments assumed by China under paragraph 11.3 of its Accession Protocol;¹⁰¹ and, it also applies to the choice of quantitative types of export restrictions covered under Article XI:1 GATT, such as export quotas, including when introduced within the context of comprehensive environmental and/or conservation strategies.¹⁰² The Appellate Body has in particular made clear that a Member’s sovereign rights over its natural resources cannot be invoked to transform the conservation exception under Article XX(g), even if available, into an industrial policy exception meant to assist downstream processing industries.¹⁰³

Based on such developments, China is arguably left with basically no margin of manoeuvre to legitimately use export restrictions to achieve (even indirectly) economic diversification goals. This makes the outcome of the third raw materials dispute highly predictable and, moreover, it exposes China, at least in principle, to as many new, easy-to-win disputes as the pervasiveness of its export regime still allows. Otherwise said, until China will not dismantle its comprehensive, yet apparently WTO-inconsistent export regime, the weapon of litigation will always be readily available to affected Members. What is more, the criticality of many of the mineral raw materials that it restricts on the exportation, on the one hand, and its dominance in world’s mine production, on the other hand, render such scenario ever more concrete, especially in the context of the recently revived trade tensions

⁹⁹Appellate Body Reports, *China – Rare Earths*, para. 5.162.

¹⁰⁰Panel Reports, *China – Raw Materials*, para. 7.434; Panel Reports, *China – Rare Earths*, para. 7.541.

¹⁰¹See Sects. 3.1 and 4.1.

¹⁰²See Sects. 3.2 and 4.2.

¹⁰³See Sect. 4.2.

between China and advanced economies that are typically dependent on the importation of raw materials such as the US and the EU.¹⁰⁴

China's persistence in maintaining export duties and export restrictions, however, seems far to fade away against the threat of WTO litigation. Scholars have advanced different theories as to why this is so, with some attributing it, more generally, to Chinese disdain for a legal system it participates in as a rule-taker,¹⁰⁵ and other more specifically linking it to the lack of retrospective remedies in WTO law, which would give China a "free pass" for *temporary* breach".¹⁰⁶ While these theories certainly play some role in explaining China's behaviour, it is submitted that China's ill-concealed reluctance to get rid of its export regime also reflects a more "ideological" stance against what it feels it amounts to a permanent loss of regulatory autonomy to use export restrictions as legitimate developmental tools.¹⁰⁷ This applies in particular to the use of export duties owing to the uneven playing field created by the WTO accession regime on export duties, which contrasts with the paucity of commitments on the part of the vast majority of WTO Members, but also holds true with respect to the use of export quotas as an "inevitable" avenue to reserve the right to invoke relevant GATT flexibilities.¹⁰⁸

In conclusion, the outcome of and the approach espoused in recent WTO case law on mineral export restraints will continue to make China highly vulnerable to similar legal actions until its export regime is integrally dismantled. Yet, checkmating China through WTO litigation would arguably fail to move this goal much closer inasmuch as it could bring back into the spotlight the more general issue of policy space available to developing country Members after the enforcement of a proliferating number of (uneven) WTO-plus commitments and, accordingly, raise more general questions as to the overall legitimacy of a system that allegedly frustrates the developmental aspirations of its Members.

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¹⁰⁴ Wu (2017), pp. 673–675.

¹⁰⁵ Webster (2014), pp. 525–578.

¹⁰⁶ Wu (2017), pp. 683–688.

¹⁰⁷ Commodity exporting countries have consistently resisted any attempts at reinforcing international trade disciplines on export restrictions since the GATT era. See, e.g., Qin (2012), pp. 1180–1186.

¹⁰⁸ See Sects. 4.1 and 4.2.

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