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Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection

Julia YA QIN*

The current World Trade Organization (WTO) regime on export restraints comprises two extremes: at one end is the near-complete freedom to levy export duties enjoyed by most Members, which renders the WTO discipline on export restrictions largely ineffective; at the other end, the rigid obligations imposed on several acceding Members prohibiting the use of export duties for any purpose. The recent WTO ruling in China-Raw Materials has only solidified the latter extreme. This article seeks to expose the irrationality of the current regime, especially the problems created by the rigid obligations of the several acceding Members. It contends that such obligations deprive these Members of their ownership right to claim a larger share of their natural resources for domestic use and of an effective tool for managing environmental externalities associated with the resource products exported. The virtual immutability of such obligations is at odds with the principle of permanent sovereignty over natural resources. To rectify these problems, this article proposes integrating all stand-alone export concessions into General Agreement on Tariffs and Trade (GATT) schedules, which would provide the acceding Members with the policy space and flexibility available under the GATT. It is also submitted that the key to gaining support from developing countries for the establishment of a system-wide discipline lies in the recognition of legitimate functions of export duties. Rather than pushing for their elimination, the WTO should aim to regulate export duties in the same manner as its regulation of import duties.

1 INTRODUCTION

The recent WTO dispute in *China-Raw Materials*[1] has exposed a highly irrational aspect of the world trade system. On the one hand, the WTO Agreement does not require its Members to limit the use of export duties, which renders its general

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[1] Appellate Body Reports, *China–Measures Related to the Exportation of Various Raw Materials,* WT/DS394, 395, 398/AB/R, 30 January 2012 (Appellate Body Reports); Panel Reports, WT/DS394, 395, 398/R, 5 July 2011 (Panel Reports).

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discipline on export restrictions ineffective. On the other hand, China and a few other Members – all of which are developing countries – are bound by the strictest obligations on export duties. Included as part of the terms of their accession to the WTO, these obligations are considered permanent, not amenable to change, and according to the rulings in *China-Raw Materials,* not entitled to any public policy exception if they do not explicitly refer to such exceptions contained in the GATT, the main WTO agreement regulating import and export tariffs.

The result is a highly imbalanced and inequitable state of affairs, especially insofar as trade in natural resources is concerned. At the one extreme, the absence of an effective WTO discipline on export restrictions leaves many economies, both developed and developing, vulnerable to shortage and price fluctuations in the supply of raw materials. In an era of globalized supply chains, the lack of security and stability in access to raw materials poses serious risks to numerous industries and businesses. At the other extreme, the 'ironclad' discipline imposed on the selected acceding Members takes away the right of these countries to use export duties as a legitimate tool for economic development, for they are not allowed to keep a greater share of their natural resources for domestic use and instead must sell their resource-based products to all domestic and foreign purchasers on an equal basis. Furthermore, should these countries fail to implement proper environmental standards in the production process, resulting in artificially low prices of raw materials, they may not use export taxes to address the negative environmental externality. If these countries choose to 'subsidize' domestic industries with cheap raw materials, they are required by WTO law to do the same for competing foreign industries, even though they must ultimately bear the consequences of environmental degradation at home.

It should be obvious that such a state of affairs is undesirable and indefensible as a matter of principle for the WTO system, whose objectives include substantial reduction of tariffs, elimination of discriminatory treatment and achieving the optimal use of the world's resources and sustainable development through protecting and preserving the environment in a manner consistent with the respective needs and concerns of its Members at different levels of economic development.[2] The systemic issues underlying the WTO regime on export restrictions, however, did not attract much attention until more recently when global demand soared for natural resources and resource-based products.[3] The

[2] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter the WTO Agreement], Preamble.

[3] See World Trade Organization, World Trade Report 2010: Trade in Natural Resources (hereinafter, WTO Report on Resource Trade), available at www.wto.org. The report is the most comprehensive study on the subject to date.

China-Raw Materials case and the subsequent disputes over China's export restrictions on rare earths[4] have pushed these issues to the forefront of WTO studies.[5]

This article seeks to accomplish two things: first, exposing the irrationality of the current WTO regime on export restrictions, especially the legal problems stemming from the ironclad rules imposed on the few acceding Members; second, proposing that all export duty obligations under the WTO be brought into the GATT framework as the first step towards rationalizing the regime. The rest of the article will proceed as follows. Section 2 explains the current WTO regime on export restraints and how it has resulted in four tiers of Members in terms of their rights and obligations. Section 3 examines the functions of export duties and the implications of the current regime for sovereignty over natural resources, economic development and environmental protection. Section 4 sets forth concrete proposals to rationalize the regime. Section 5 concludes.

2 THE IRRATIONAL WTO REGIME ON EXPORT RESTRAINTS

2.1 Curious absence of GATT discipline on export tariffs

Import and export restrictions are both barriers to trade. Hence, the world trade system set out to regulate both of them. The general scheme of the GATT is to eliminate all forms of import and export restrictions other than duties, taxes and other charges (Article XI), and to conduct tariff negotiations to reduce the general level of tariffs on both imports and exports by creating tariff bindings (Article XXVIII*bis*). In other words, GATT chose tariffs over quantitative restrictions as the lawful means of restricting imports and exports, and called for future negotiations to gradually reduce the level of both import and export tariffs. In addition, all import and export tariffs and charges must be applied on a non-discriminatory basis (Article I) and administered in a transparent and reasonable manner (Article X).

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4 On 13 March 2012, the US, the EU and Japan launched formal WTO disputes over China's export restrictions on rare earths. *China–Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (*China–Rare Earths*), DS431(US), DS432 (EU), DS433 (Japan), at http://www.wto.org/english/news_e/news12_e/dsrfc_13mar12_e.htm.

5 Recent studies include the following: Baris Karapinar, *Export Restrictions and the WTO Law: How to Reform the 'Regulatory Deficiency'*, 45 J. World Trade 1139 (2011); Mitsuo Matsushita, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources,* 3 Trade, L. & Dev. 267 (2011); Bin Gu, *Mineral Export Restraints and Sustainable Development – Are Rare Earths Testing the WTO's Loopholes?* 14 J. Int'l Econ. L. 765 (2011).

The parallel between GATT regulations of import and export restrictions, however, does not go much further.[6] While GATT contains a detailed framework for binding import tariffs and protecting the bindings from erosion, it sets out no specific obligation to bind export tariffs. In the ensuing decades, the world trading system has successfully concluded eight rounds of negotiations, leading to substantial reductions in tariff and non-tariff barriers on imports. Yet, no similar negotiation has ever been conducted to reduce export tariffs and barriers. Other than the few exceptions discussed below, WTO Members remain free to levy duties on the export of any products. Because tariffs and quantitative restrictions are functionally the same in their effects on trade, Members can easily resort to tariffs to achieve the goal of export restriction. As a result, GATT Article XI discipline on export restrictions has largely been rendered ineffective.[7]

This curious loophole in the system is attributable to a number of factors. On the whole, the lack of focus on export restrictions reflects the mercantilist assumption among trading nations that exports are more desirable than imports.[8] The result is a system that is preoccupied with the access to markets (import restrictions), rather than the access to supply (export restrictions).[9] Historically, access to raw materials and other natural-resource-based products did not pose a major problem. Many resource-exporting countries were economies that lacked industrial capacity and relied on selling primary commodities for income.[10] The main issues for them were unstable demand and price fluctuations in the commodity markets and the need to diversify their economies away from primary commodities.[11] When export restrictions were occasionally discussed during the GATT era, the contracting parties were unable to agree on how to approach the

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6 Other GATT provisions concerning export restrictions include Articles VII (customs valuation), VIII (fees and formalities), XIII (nondiscriminatory administration of quotas), XIV (exception to Article XIII), XVII (state trading), XX (general exceptions), XXI (security exceptions) and XXVIII (modification of schedules).

7 An export duty set at a prohibitively high level would have the same effect as an export ban, hence might be challenged as such under GATT Article XI.

8 Claude Barfield, *Trade and Raw Materials—Looking Ahead*, presentation at the Conference on the EU's Trade Policy and Raw Materials Brussels (Sept. 29, 2008). http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140919.pdf.

9 For a detailed discussion, see Melaku Geboye Desta, *The Organization of Petroleum Exporting Countries, the World Trade Organization, and Regional Trade Agreements,* 37 J. World Trade 523-551 (2003).

10 Hence, historically the major industrial countries 'could reasonably assume that no impediment would ever be placed to their free access to other people's resources'. Statement of the Representative of Canada on Feb. 22, 1977, GATT Doc. MTN/FR/W/6 (Mar. 10, 1977), 1. Credit is due to Lorand Bartels for pointing to this source.

11 These issues were fully recognized at the inception of the GATT. See Havana Charter for an International Trade Organization, UN Doc. E/Conf. 2/78 (1948), Chapter VI. Inter-Governmental Commodity Agreements, Article 55 Difficulties relating to Primary Commodities. See also GATT Article XXIX (relation to the Havana Charter).

issue.[12] Some more advanced resource-exporting economies wanted to link negotiations over export restrictions to those over import restrictions affecting resource-based industrial products.[13] Others, representing the perspective of less developed economies, insisted that two of the guiding principles in reassessing the GATT export disciplines would be 'the sovereignty of States over their natural resources' and 'the need for developing countries to utilize their resources for their development in the most optimal manner as considered appropriate by them'.[14]

In more recent years, the global demand for resource products has outpaced supply, thanks in no small part to the rapid industrialization of developing economies, especially large countries such as China and India.[15] The rising demand in a world of finite supplies has caused widespread anxiety over the security in access to natural resources. Against this backdrop, the world has seen increasing uses of export restraints on resource products, mainly by developing countries.[16] In response, the European Union (EU), the US and several other WTO Members have circulated various proposals calling for reform of WTO rules on export restrictions.[17] Yet, such proposals have received a 'cool response' from developing country members.[18] With the collapse of the Doha Round, the prospect for negotiating a new multilateral discipline on trade in natural resources remains dim.

2.2 Export duty commitments under the WTO agreement

The lack of an effective GATT discipline on export restraints notwithstanding, a small number of WTO Members have made commitments on export duties. They fall under two categories: (1) commitments made under the GATT; and (2) commitments under the WTO accession protocols.

12 The issue of export restrictions was discussed in both the Tokyo Round and the Uruguay Round with no result. See GATT Document, Export Restrictions and Charges, Background Note by the Secretariat, MTN/GNG/NG2/W/40 (Aug. 8, 1989).

13 GATT, Communication from Delegation of Canada, MTN/FR/W/21 (Mar. 30, 1979); Statement by the Delegation of Australia, MTN/FR/W/22 (Apr. 6, 1979).

14 GATT, Statement by the Delegation of India, MTN/FR/W/23 (Apr. 6, 1979).

15 For trends in natural resource trade, see WTO Report on Resource Trade, *supra* n. 3, at 54-59. Despite growing demand from China and India, developed countries remain the leading importers of natural resources. As of 2008, the largest resource importers were the US (15.2%), Japan (9.1%), China (8.6%), Germany (6%), South Korea (4.7%), France (3.9%) and India (3.5%). *Id.* at 59.

16 See WTO Report on Resource Trade, *supra* n. 3, at 116-119.

17 E.g., Communication from the European Communities, *Market Access for Non-Agricultural Products: Revised Submission on Export Taxes,* TN/MA/W/101 (Jan. 17, 2008); Communication from Chile; Costa Rica; Japan; Republic of Korea; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Ukraine and the US, *Market Access for Non-Agricultural Products: Enhanced Transparency in Export Licensing,* TN/MA/W/15/Add.4/Rev.7 (Nov. 23, 2010). See Karapinar, *supra* n. 5, at 1149-50.

18 Karapinar, *id.* at 1150.

2.2[a] *Export Duty Commitments under the GATT*

Despite the lack of a detailed framework for binding export duties, there were at least two known cases of export duty concessions in GATT history. The first was a concession on export duties on tin ore and tin concentrates, made in the early years of the GATT by the United Kingdom in respect of the Malayan Union.[19] The second is the concession made by Australia in the Uruguay Round in 1994. In exchange for certain import commitments from the European Communities, Australia agreed not to impose any export duty on certain iron ore, titanium ore, zirconium ore, coal, peat, coke, refined copper, unwrought nickel, nickel oxide, and lead waste and scrap.[20] In both cases, the concessions were set out in the tariff schedules annexed to the GATT.

2.2[b] *Export-Duty Commitments under Accession Protocols*

After the establishment of the WTO, a number of acceding countries have been asked to undertake special commitments on export duties as part of the terms of their accession. Of the twenty-nine countries that have acceded to the WTO (or have completed their accession negotiations) thus far, nine have been required to do so. They are the following: Mongolia (1997), Latvia (1999), Croatia (2000), China (2001), Saudi Arabia (2005), Vietnam (2007), Ukraine (2008), Montenegro (2012) and Russia (2012).[21]

The scope and nature of the accession commitments on export duties vary widely.[22] At one end of the spectrum is Croatia, which merely promised to 'apply export duties only in accordance with the provisions of the WTO Agreement'.[23]

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19 GATT Analytical Index, Art. II, 73-74 (citing the United Kingdom Schedule XIX, Section D (Malayan Union) to the effect that 'The products comprised in the above item shall be assessed for duty on the basis of their tin content; the rate to be levied on such tin content being the same as the rate chargeable on smelted tin, *Provided* that the rate of duty on this item may exceed the rate chargeable on smelted tin in the event that and so long as the United States of America subsidised directly or indirectly the smelting of tin in the United States').

20 Australia's Uruguay Round Goods Schedules, AUS1-201 through AUS1-204, available at http://www.wto.org/english/thewto_e/countries_e/australia_e.htm. Products subject to the export duty concessions are indicated with note (1), which states as follows: 'There shall be no export duty on this product. (EC).' The concessions were evidently made to the EC. By virtue of the most-favoured-nation clause, they apply to all other WTO Members as well. Special thanks to Amy Porges for identifying this information.

21 At the time of this writing, the accessions of Montenegro and Russia have been approved by the WTO. They are expected to become WTO Members during 2012, after the completion of relevant domestic ratification processes.

22 The accession packages of the acceding countries are available at http://www.wto.org/english/thewto_e/acc_e/acc_e.htm.

23 Report of the Working Party on the Accession of Croatia to the World Trade Organization, WT/ACC/HRV/59 (June 29, 2000), para. 101. Croatia confirmed that it did not impose any export duty at the time, but its government retained the authority to impose export duties 'in

Since the WTO Agreement does not contain any provision to limit the use of export duties, this commitment amounts to nothing substantive. At the other end is Montenegro, which has promised not to apply or reintroduce any export duties.[24] Close to this end is China, which made a sweeping commitment to 'eliminate all taxes and charges applied to exports' except for eighty-four products and to bind the export duties on all eighty-four products at specific rates.[25] In a similar vein, Latvia undertook to abolish all export duties on products listed in its accession protocol (which are certain wood products, metal scraps and antiques) except for specific antiques.[26] The other countries agreed to eliminate or reduce export duties on specific products only. Thus, Mongolia agreed to eliminate, within ten years of its accession, export duties on raw cashmere.[27] Saudi Arabia undertook not to impose any export duty on iron and steel scrap.[28] Vietnam promised to gradually reduce the rates of export duties on a number of ferrous and non-ferrous scrap metals.[29] And Ukraine committed to reduce and bind the rates of export duties in accordance with a detailed schedule on a variety of oil seeds, live cattle and hides, and ferrous and non-ferrous scraps.[30] The most extensive product-specific commitments have been made by Russia, which has agreed to bind export duties on more than 700 tariff lines.[31]

The commitments of the acceding countries are set out in their respective protocols of accession. Pursuant to Article XII of the WTO Agreement, a country may accede to the WTO Agreement 'on terms to be agreed between it and the WTO'. Because the acceding Member will benefit from the access to the markets of other WTO Members that were liberalized through previous negotiation rounds, it is expected to reciprocate by opening up its own market. Thus, the terms

exceptional cases for the protection of exhaustible natural resources, or to ensure essential materials to the domestic industry and to prevent shortages in domestic supply.' *Id.* at para. 100. Paragraph 100, however, is not legally binding as it was not incorporated into the accession protocol of Croatia. See *id.* at para. 225.

24 Report of the Working Party on the Accession of Montenegro to the World Trade Organization, WT/ACC/CGR/38 (Dec. 5, 2011), para. 132.

25 Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 10, 2001), para. 11.3; Annex 6.

26 Report of the Working Party on the Accession of Latvia to the World Trade Organization, WT/ACC/LVA/32 (Sept. 30, 1998), para. 69; Annex 3.

27 Report of the Working Party on the Accession of Mongolia, WT/ACC/MGN/9 (June 27, 1996), para. 24.

28 Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, WT/ACC/SAU/61 (Nov. 1, 2005), para. 184.

29 Report of the Working Party on the Accession of Viet Nam, WT/ACC/VNM/48 (Oct. 27, 2006), para. 260 and Table 17. Vietnam provided a list of 43 products subject to export duties but stated that it did not consider the imposition of export duties as inconsistent with WTO rules. *Id.* at para. 257 and Table 16.

30 Report of the Working Party on the Accession of Ukraine to the World Trade Organization, WT/ACC/UKR/152 (Jan. 25, 2008), para. 240, and Table 20(b).

31 See *infra* text at n. 58.

to be negotiated in accession focus heavily on market access, that is, reduction in tariff and non-tariff barriers on imports, in the acceding country. However, since Article XII does not place any limit on the 'terms' to be negotiated, the WTO has developed a practice of demanding concessions from the acceding country that go well beyond market access. The result is a whole slew of Member-specific obligations, ranging from those which are commercial in nature, such as export duty commitments, to those that would require systemic reforms at home.[32] These obligations are known as 'WTO-plus', for they exceed the requirements of the multilateral WTO agreements. The country subject to the largest number of WTO-plus obligations is China.[33]

The Member-specific obligations of the acceding Members are enforceable under WTO law, as each of the protocols of accession declares itself as 'an integral part' of the WTO Agreement, which is a 'covered agreement' for the purpose of WTO dispute settlement.[34] Apart from enforceability, however, it remains unclear how exactly the Member-specific obligations are 'integrated' into the WTO Agreement.

2.2[c] *Legal Issues Raised by the Stand-Alone Export Duty Commitments*

The export duty commitments undertaken in the accession protocols raise at least two major issues in WTO law: (a) whether these commitments are entitled to the general exceptions available under the GATT; and (b) whether these commitments can ever be modified or withdrawn.

2.2[c][i] Availability of GATT Exceptions to Export Duty Commitments

Whether a Member-specific commitment under the accession protocol is entitled to the policy exceptions provided for in the relevant WTO agreements, such as GATT Articles XX (general exceptions) and XXI (security exceptions), raises a systemic question on the relationship between different legal instruments within the framework of the WTO Agreement.[35] Insofar as China's accession protocol is

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[32] For a general survey and analysis of such obligations within the WTO system, see Steve Charnovitz, *Mapping the Law of WTO Accession,* in Merit E. Janow, Victoria Donaldson & Alan Yanovich (eds.), *The WTO: Governance, Dispute Settlement & Developing Countries* ch. 46 (Juris Publishing 2008).

[33] See generally Julia Ya Qin, '*WTO-Plus' Obligations and Their Implications for the WTO Legal System – An Appraisal of the China Accession Protocol,* 37 J. World Trade 483 (2003).

[34] See e.g., China's Accession Protocol, para. 1.2.

[35] For historical reasons, the WTO treaty structure is exceedingly complex and the relationship between provisions of different WTO agreements is not always explained in the treaty language. It remains unclear, for example, whether the GATT general exceptions should apply to the various other WTO agreements on trade in goods, such as the agreements on anti-dumping measures and

concerned, the Appellate Body has taken a strict textualist approach, according to which the applicability of GATT general exceptions to a particular accession commitment hinges on whether there is an explicit textual link between them. Thus, in *China–Publications,* the Appellate Body held that China may invoke GATT Article XX to defend the violation of its trading-rights commitments set out in paragraph 5.1 of China's accession protocol, because the introductory phrase of paragraph 5.1 provides such a textual link (stating that the trading-rights commitments are 'without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement').[36] By contrast, in *China-Raw Materials,* the Appellate Body rejected the applicability of GATT Article XX to China's export duty commitments, because it could not find a similar textual link in paragraph 11.3 of its accession protocol.[37] 'In the light of China's explicit commitment contained in paragraph 11.3 to eliminate export duties and the lack of any textual reference to Article XX of the GATT 1994 in that provision', the Appellate Body concludes, 'we see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with paragraph 11.3'.[38]

The Appellate Body's ruling has serious implications not only for China, but also for other acceding Members that have undertaken export duty commitments. Of these Members, Mongolia, Latvia, Saudi Arabia and Montenegro all undertook to eliminate export duties on all or specific products, but none of them included in their commitments an express reference to the GATT exceptions. As a result, none of these countries will be entitled to invoke the policy exceptions of GATT Articles XX and XXI to justify a departure from such commitments. By contrast, Vietnam, Ukraine and Russia did include an express reference to GATT in the text of their respective export duty commitments.[39] Rather than eliminating export duties, these three countries agreed to bind export duties on specific

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subsidies. When this question arose in disputes, the Appellate Body avoided answering it directly. See Appellate Body Reports, *United States – Measures Relating to Shrimp from Thailand* (DS343), *United States – Customs Bond Directive for Merchandise Subject to Antidumping/Countervailing Duties* (DS345), WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008, paras. 304-319.

36 Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (21 December 2009), paras. 229-233.

37 Appellate Body Reports, para. 291. It also attaches significance to the fact that para. 11.3 expressly refers to GATT Art. VIII but not other GATT provisions. *Id.* at para. 303.

38 *Id.* at para. 306.

39 Vietnam's commitment provides that 'Viet Nam would apply export duties, export fees and charges, as well as internal regulations and taxes applied on or in connection with exportation in conformity with the GATT 1994.' Report of the Working Party on the Accession of Viet Nam, *supra* n. 29, para. 260. Ukraine's accession protocol states that with respect to the products subject to the export duty commitments, 'Ukraine would not increase export duties, nor apply other measures having an equivalent effect, unless justified under the exceptions of the GATT 1994.' Report of the Working Party on the Accession of Ukraine, *supra* n. 30, para. 240. For the Russia case, see Section 2.2[d].

products only.[40] It is also worth noting that all three countries have concluded their accession packages after the issue of legal justification arose with respect to China's export duty commitments.[41]

The strict textualist approach taken by the Appellate Body, regrettably, has led to an irrational and undesirable result in the WTO system. The general exceptions of GATT Articles XX and XXI are designed to safeguard important public policies and non-trade values from being infringed by the obligations to liberalize trade. They apply to all GATT obligations, ranging from tariff concessions to the elimination of all quantitative restrictions and the fundamental principles of most-favoured-nation (MFN) treatment and national treatment. By holding the export duty commitments immune from the GATT policy exceptions, the Appellate Body has effectively turned these trade-liberalization commitments into more 'sacred' obligations than the most fundamental principles of the WTO. From a policy standpoint, the Appellate Body's ruling sends a powerful message: without an express textual reference, individual trade-liberalization obligations will be interpreted to trump public policy and non-trade values under WTO law.

The Appellate Body's decision indicates that it views each accession protocol as a self-contained agreement, independent from the rest of the WTO Agreement, and that the relationship between a specific accession commitment and another WTO agreement can only be established through an express reference in the text of that specific accession commitment. This view, however, is highly problematic.[42] Unlike other legal instruments annexed to the WTO Agreement, WTO accession protocols are not devoted to a single subject matter, such as trade in goods, services, investment measures or intellectual property rights. Instead, the accession protocol sets out the terms of accession for a country that cover subjects across the entire spectrum of the WTO Agreement. As a result, the special commitments of the acceding country cannot be understood independently of the general disciplines set out in the multilateral WTO agreements. The export duty commitments are such an example – they are inherently related to GATT disciplines on customs tariffs and export restrictions. A sensible interpretive

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[40] See Appendix 1.

[41] The EU, the US and Japan had raised the issue with China on the legal justification for its export duties on raw materials long before the *China-Raw Materials* case was initiated. See e.g., WTO Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol on the Accession of the People's Republic of China, *Questions from the European Communities to China,* G/C/W/538 (Nov. 8, 2005); *Questions from the United States to China,* G/C/W/560 (Nov. 6, 2006); *Questions from the European Communities to China,* G/C/W/568 (Nov. 17, 2006); *Questions from Japan to China,* G/C/W/586 (Nov. 2, 2007). Hence, the issue had become known by the time Vietnam, Ukraine and Russia finalized their accession packages in 2006, 2008 and 2011, respectively,

[42] For a more detailed critique, see Julia Ya Qin, *The Predicament of China's 'WTO-Plus' Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case,* 11 Chinese J. Int'l Law 237 (2012).

approach, therefore, should treat these GATT provisions, as well as the policy exceptions available to them, as part of the relevant treaty context for the export duty commitments.[43]

Key to the narrow textualist approach of the WTO judiciary is an assumption that each term of the accession protocol was carefully negotiated and drafted, and that any omission of an explicit reference to another WTO agreement was a 'deliberate choice' by the parties.[44] Thus, the Appellate Body considered it 'reasonable to assume that, had there been a common intention to provide access to GATT Article XX in this respect, language to that effect would have been included in paragraph 11.3 or elsewhere in China's Accession Protocol'.[45] This 'reasonable' assumption, however, disregards the political reality of accession negotiations. Unlike WTO multilateral negotiations, in which diverse interests among Members can be expected to provide the checks and balances necessary to produce carefully drafted rules, WTO accession is a process in which the applicant country must negotiate against the entire incumbent membership, through both bilateral and multilateral procedures.[46] In such a process, whether a particular term was well negotiated and carefully drafted would depend not only on the bargaining power of the applicant in specific negotiations, but also on the level of legal sophistication and competence of its negotiation team and the quality of its domestic decision-making process. Given the typical lack of experience on the part of the acceding country, loosely drafted terms of accession are common.[47]

2.2[c][ii] Non-adjustability of Export Duty Commitments

Another major issue arising from the export duty commitments undertaken under the accessions is the lack of flexibility of these commitments. None of the existing WTO accession protocols mentions the possibility of amendment. Hence, whether an accession protocol is amendable, and if so how it should be amended, remain unclear as a matter of WTO law. One view holds that the terms of accession are pre-conditions for the WTO membership of the acceding country and as such cannot be renegotiated once the accession is completed. According to this view, all

[43] For a systemic treatment of the topic, see Julia Ya Qin, *The Challenge of Interpreting 'WTO-Plus' Provisions,* 44 J. World Trade 127 (2010). For an excellent critique of the narrow textualist approach adopted by the Appellate Body, see Henrik Horn & Joseph Weiler, *European Communities–Trade Description of Sardines: Textualism and Its Discontent*, in H. Horn & P. Mavroidis (eds.), *The WTO Case Law of 2002*, at 248 (Cambridge U. Press 2005).

[44] Panel Reports, para. 7.129.

[45] Appellate Body Reports, para. 293.

[46] The problem of political imbalance in WTO accession negotiations is well known. See e.g., Kent Jones, *The Political Economy of WTO Accession: the Unfinished Business of Universal Membership.* 8 World Trade Rev. 279-314 (2009).

[47] See Qin, *supra* n. 33, at 515-16, for examples in China's accession protocol.

accession terms are permanent and immutable, except for the market access commitments incorporated into the schedules of GATT and the General Agreement on Trade in Services (GATS), which can be adjusted according to the GATT and GATS procedures respectively. The only way the acceding country can escape the terms of its accession is to withdraw from the WTO altogether.

An alternative view sees the terms of accession as supplemental to the multilateral WTO agreements, and as such superseding inconsistent WTO provisions when applied to the acceding country. In accordance with this view, the Member-specific commitments contained in the accession protocol are integrated organically into the WTO rule system and can be amended in the same way as other provisions of the WTO Agreement. Given the extreme difficulty in amending a WTO provision,[48] however, revising the terms of accession is practically impossible. In theory, the WTO can also adopt a separate procedure for the amendment of accession protocols,[49] but in practice it is doubtful that any acceding country would be willing and able to engage the WTO membership in the negotiation of this issue. As a result, the terms of accession are fixed without a realistic chance for revision.

In the context of the export duty commitments, this inflexibility contrasts sharply with the ample opportunities for adjustment of import duty concessions of an acceding country. By virtue of being formally incorporated into the GATT, the tariff bindings of the acceding Member can be renegotiated in accordance with a number of GATT provisions, including Article XXVIII (modification of schedules), Article XVIII:7 (promoting infant industries by developing countries), Article XXIV:6 (formation of a customs union) and Article II:6 (adjustment of specific duties due to currency revaluation). The principal provision for tariff renegotiation is Article XXVIII. Under this provision, a WTO Member may modify or withdraw a concession included in its GATT schedule by entering into agreement with Members with which the concession 'was initially negotiated' and other Members which have 'a principal supplying interest', subject to consultation with any other Member determined by the WTO to have 'a substantial interest' in

48 Pursuant to Art. X of the WTO Agreement, any amendment that would alter the rights and obligations of the Members shall take effect upon acceptance by two thirds of the Members. Because 'acceptance' means that the Members must comply with their respective domestic legal procedures for approval of a treaty amendment, which for some Members would require ratification by legislature, amendment to a WTO provision is extremely difficult. To date, the only formal amendment to an annex of the WTO Agreement that has been adopted by the General Council is the 2005 amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Amendment of TRIPS Agreement, WT/L/641 (Dec. 8, 2005). This amendment has not yet taken effect because it has not received acceptance by two thirds of the Members.

49 See Qin, *supra* n. 43, at 134-35.

the concession.[50] Such modification or withdrawal can be done every three years ('open season' renegotiation).[51] The Member seeking modification is expected to offer compensatory adjustment so as to maintain a general level of reciprocal concessions not less favourable to trade than that provided for prior to the renegotiation. However, if no agreement can be reached, the Member is nonetheless free to modify or withdraw the concession, in which case other interested Members will be free to withdraw substantially equivalent concessions.[52] In addition to the open season, the WTO may, at any time in special circumstances, authorize a Member to enter into negotiations for modification or withdrawal of a scheduled concession, subject to specific procedures and conditions.[53] All modifications and withdrawals shall be applied on a MFN basis to all Members of the WTO.

The right of a Member to modify or withdraw a concession is absolute, in that it is not dependent on an agreement being reached with other Members.[54] In practice, dozens of Members, including all major trading nations, have invoked the right to modify their concessions under Article XXVIII.[55] Tariff concessions are modified or withdrawn under Article XXVIII generally to afford additional protection to industry or agriculture.[56] A similar right is provided for the modification and withdrawal of services concessions under the GATS.[57]

The flexibility built into the GATT and GATS schedules is ultimately beneficial for trade liberalization. Knowing that a concession may be withdrawn if necessary, WTO Members are more inclined to make new concessions. This

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[50] GATT Art. XXVIII:1 and Ad Article XXVIII.

[51] The first three-year period began on 1 Jan. 1958 and the latest one on 1 Jan. 2012. Pursuant to Article XXVIII:5, a Member may, by advance notice to the WTO, reserve the right to renegotiate its concessions throughout the duration of the next three-year period.

[52] GATT Art. XXVIII:3.

[53] GATT Art. XXVIII:4. In GATT practice, approval of request for authorization under Art. XXVIII:4 had become a routine matter. Anwarul Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO, Procedures and Practices* 88 (Cambridge U. Press 2001).

[54] Hoda, *id.* at 16. Although, in such cases, other Members may retaliate by withdrawing substantially equivalent concessions, such retaliation has been rare in practice. The rare use can be ascribed to the fact that renegotiations were generally successful and that the retaliatory withdrawals must be made on an MFN basis. See Hoda, *id.* at 95-97.

[55] During the GATT era (until 30 March 1994), more than 40 Members made a total of 270 requests to modify their concessions, and each such request may range from one tariff item to an entire schedule. See GATT Analytical Index, Art. XXVIII, Tables. Since the establishment of the WTO in 1995, there have been 34 requests to enter into renegotiations under GATT Art. XXVIII. See WTO: Goods Schedules–Current Situation of Schedules, at www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm.

[56] Hoda, *supra* n. 53, at 91, 107. Other common reasons were rationalization or simplification of tariffs, introduction of new tariff nomenclature and conversion from specific to ad valorem tariffs.

[57] GATS Art. XXI (Modification of Schedules).

rational aspect of the system, however, is completely lost in the case of the stand-alone export duty commitments under the accession protocols.

2.2[d] *The Russia Model*

The Russian accession has broken new ground in the legal treatment of export duty commitments. Unlike other acceding countries, Russia has successfully negotiated its export duty commitments within the GATT framework, thus avoiding the issues arising from the stand-alone commitments discussed above.

Specifically, Russia has created a new 'Part V–Export Duties' in its GATT Schedule,[58] detailing products of more than 700 tariff lines that are subject to the maximum rate of export duties ranging from 0% to 50% or to specific duties determined by complex formulae. According to the Working Party Report on Russia's accession, Russia will implement, from the date of accession, its tariff concessions and commitments contained in Part V of its schedule, 'subject to the terms, conditions or qualifications' set forth therein.[59] Part V of the Russia Schedule begins with this statement:

> The Russian Federation undertakes not to increase export duties, or to reduce or to eliminate them, in accordance with the following schedule, and not to reintroduce or increase them beyond the levels indicated in this schedule*, except in accordance with the provisions with GATT 1994.* (emphasis added)

Thus, Russia has explicitly reserved the right to do the following: (i) invoke all applicable GATT exceptions with respect to its export duty concessions, and (ii) amend Part V of its schedule in accordance with applicable GATT provisions.

A question remains as to whether Article XXVIII, the principal GATT provision on the modification of schedules,[60] applies to Part V of the Russia Schedule. Article XXVIII clearly contemplates modification of import concessions, as it refers to the Members with 'a principal supplying interest' in a concession (along with the Members with which a concession was 'initially negotiated' and those 'with a substantial interest' in the concession).[61] It is noteworthy that Part V of the Russia Schedule does not include a column indicating which Members will have 'initial negotiating rights' (INR) in the event of renegotiation of a specific concession according to Article XXVIII.[62] However,

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[58] GATT Schedule CLXV – The Russian Federation (the Russia Schedule).

[59] The Report of Working Party on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70 (Nov. 17, 2011), para. 638.

[60] *Supra* text at nn. 51-53.

[61] *Supra* text at n. 50.

[62] A column of INR is included in the part for import tariff concessions of the Russia Schedule. See the Russia Schedule, Part I.

INR is not indicated in all import concessions,[63] and the absence of INR does not affect the absolute right of a Member to modify or withdraw its concessions under Article XXVIII.[64] The said Article, which is titled 'Modification of Schedules', applies to 'a concession' that is 'included in the appropriate Schedule annexed to this [GATT] Agreement'.[65] Part V of the Russia Schedule clearly falls within this definition. Other than the references to 'a principal supplying interest', the mechanism set out in Article XXVIII can be used for both import and export concessions.[66] The focus on the renegotiation of import concessions in this Article is indicative of the historical fact that export concessions were not being negotiated at the time; but it does not necessarily mean that the drafters intended to exclude export concessions from the coverage of Article XXVIII.[67] As noted above, the GATT set out to regulate both import and export restrictions. And Article XXVIII*bis* (*Tariff Negotiations*) specifically recognizes the importance of conducting negotiations 'directed to the substantial reduction of the general level of tariffs and other charges on imports and exports'.[68] Thus, from a systemic perspective, the principle and rationale underlying Article XXVIII should be equally valid and applicable to export concessions. It remains to be seen, however, whether this understanding will be contested.

2.3 The four tiers of WTO members

As a result of the varying arrangements, there are now effectively four tiers of WTO Members in terms of their rights and obligations concerning export restraints. The first tier, which currently counts more than 140 Members, enjoys nearly complete freedom to restrict exports, so long as the restriction is in the form of export duty or taxes.[69] The second tier, consisting of Australia and Russia, has the obligation not to levy export duties on specific products in excess of those set forth in their respective GATT schedules, but retains the full range of rights under the GATT with respect to their commitments. The third tier comprises

[63] See Hoda, *supra* n. 53, at 12-13.
[64] *Supra* text at n. 54.
[65] Article XXVIII:1.
[66] In the context of export concessions, the equivalent to the concept of 'a principal supplying interest' would be 'a principal purchasing interest'.
[67] A parallel argument was made by Matsushita with respect to the question of whether export duty concessions are within the scope of GATT Art. II:1. See Matsushita, *supra* n. 5, at 274.
[68] GATT Art. XXVIII*bis*, para. 1.
[69] A Member's ability to apply export taxes may be subject to domestic constraints. The US, for example, may not levy taxes on exports under its Constitution. See U.S. Const. Art. I, § 9, cl. 5 ('No tax or duty shall be laid on articles exported from any state.'). The provision originated in the concern of the southern states, whose economies relied heavily on exports, that the new Federal government would be able to tax their exports in favour of the states that did not export. For detailed treatment of the topic, see Eric Jensen, *The Export Clause,* 6 Fla. Tax Rev. 1 (2003).

Ukraine and Vietnam, which have the obligation to bind export tariffs under their respective accession protocols, but may invoke GATT exceptions to justify a breach of such obligation. The fourth tier consists of Mongolia, Latvia, China, Saudi Arabia and Montenegro. These countries have the obligation to eliminate the use of export tariffs under their respective accession protocols, but may not invoke GATT exceptions to justify a departure from such obligation. Neither the third-tier or fourth-tier Members have the right to modify or withdraw their export duty concessions. The situation of the four tiers of WTO Members is summarized in Appendix 1.

The four-tier membership creates unequal rights and obligations among Members. While the scope of trade-liberalization commitments may vary from country to country, the rights of WTO Members to invoke public policy exceptions and modify their commitments according to certain procedures should be kept uniform as a matter of principle. The current irrational state of affairs results from the ad hoc rule-making in the WTO accession regime. It is regrettable that the WTO judiciary is apparently unable and unwilling to mitigate the situation.[70]

3 POLICY IMPLICATIONS OF THE WTO EXPORT-DUTY REGIME

3.1 The role of export duties

From a historical perspective, countries have applied export duties for a variety of reasons. Besides generating revenue for the government, export duties can be used to smooth out the volatility of export earnings, soften the impact of rapidly rising world prices in the domestic market, counter escalating tariffs in importing countries and promote a fairer distribution of income by taxing the windfall gains of exporters.[71] In case a country controls a large share of the world supply of a particular material, the levy of export duties can raise the price of the material in international markets, thereby improving the terms of trade for the country.[72]

In addition, export duties may be used to pursue policy objectives that cannot be pursued under WTO law by non-tariff means. In particular, the freedom to levy export duties allows a country to promote domestic downstream industries and

[70] See *supra* text at n. 43.
[71] WTO Report on Resource Trade, *supra* n. 3, at 127.
[72] The terms of trade refer to the relative price on world markets of a country's exports as compared to its imports. In the case of resource trade, a relatively small number of countries endowed with scarce resources may be able to maximize their national economic welfare by limiting the supply to the rest of the world. When this happens, the terms of trade and economic welfare of the importing countries will worsen by the same amount. Hence, an export tax motivated by this purpose is referred to as a 'beggar-thy-neighbour' policy. See WTO Report on Resource Trade, *supra* n. 3, at 12.

conserve exhaustible natural resources and protect the environment in a manner inconsistent with the requirements of GATT Article XX. The legitimacy of these functions is discussed below.

3.2 Export duties and economic development

Export duties tend to lower the domestic prices of raw materials and raise their foreign prices. Hence, a country can use export duties to promote and protect its domestic industries utilizing the raw materials. For developing countries, especially those that are overly dependent on the export of primary commodities, promoting domestic processing and downstream industries can be an effective way to diversify their economies and to 'climb up the value chain'. It is for this reason that many developing countries regard export tariffs as a legitimate tool for economic development.[73]

The legitimacy of export duties as a tool for economic development stems ultimately from the principle of sovereignty over natural resources. Accordingly, the discussion on export restraints and economic development ought to begin with an exploration of this principle.

3.2[a] *The Sovereign Right to Use Natural Resources for Economic Development*

A nation's right to use and exploit its natural resources for economic development is implicit in its sovereignty over natural resources. As acknowledged by the Panel in *China-Raw Materials,* state sovereignty over natural resources is a principle of international law that allows states to 'freely use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development'.[74]

In exercising its sovereign right to natural resources, a nation may wish to reserve a larger share of such resources for use by its domestic industries, rather than sell them to foreign users. Because manufactured products are typically more valuable than primary commodities, developing downstream industries can help an economy move away from reliance on exports of resources and build up high value-added sectors as its anchor. History has shown that export restraints on raw materials are an effective means of promoting economic development. One of the well-known historical examples is the export ban imposed by Henry VII on English wool in the late fifteenth century, which induced a shift of wool textile

[73] WTO Report on Resource Trade, *supra* n. 3, at 184.

[74] Panel Reports, para. 7.380 (quoting UN General Assembly, *Right to Exploit Freely Natural Wealth and Resources,* 21 December 1952).

production from Flanders and Burgundy to England, thus enabling the start of the industrial revolution.[75] Today, such a policy would be condemned for its 'beggar-thy-neighbour' effect. There is, however, an important distinction between import restrictions used to 'beggar thy neighbours' and export restraints on resource materials: the latter is a policy designed to take advantage of one's natural endowment, in the exercise of one's ownership rights.

The subject of sovereignty and trade is discussed extensively in legal scholarship. Responding to new issues of globalization, recent studies tend to focus on changes in the State's power to control and regulate domestic activities affecting trade.[76] The topic of sovereignty over natural resources is rarely discussed in such a context. It is notable that the WTO's World Trade Report 2010 did cover the topic, but dealt with it as an issue more relevant to foreign investment law than WTO law.[77] In *China-Raw Materials,* China argued that the GATT exception for the conservation of exhaustible natural resources should be interpreted in a manner that recognizes a Member's sovereign rights over natural resources.[78] That argument, however, was dismissed by the Panel with a brief statement that 'Members must exercise their sovereignty over natural resources consistently with their WTO obligations.'[79] As a result, the broad implications of the sovereign right over natural resources for WTO law have been left unaddressed.

The concept of 'permanent sovereignty over natural resources' evolved as a new principle of international law in the post-war era within the United Nations (UN).[80] The claims were initially motivated by the efforts of newly independent and other developing nations to secure the economic benefits arising from the exploitation of natural resources within their territories. In the decolonization period, the principle became associated with the right of colonial peoples to self-determination and with human rights. The emphasis on the purpose of the principle was subsequently placed on promoting national economic development. The famed UN Declaration on Permanent Sovereignty Over Natural Resources

75 Clyde V. Prestowitz, *Export Restraints: The Key to Getting Rich,* Foreign Policy Magazine (July 7, 2011). Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* 19-21 (Anthem Press 2002).

76 See e.g., John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge U. Press 2006). For a collection of essays written by prominent authors, see Shan, Simon & Singh (eds.), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008).

77 *Supra* n. 3, at 177-179 (noting that there is no provision in the WTO that speaks directly to the issues of ownership of natural resources or the allocation of natural resources between states and foreign investors).

78 Panel Reports, para. 7.364.

79 *Id.* at para. 7.381. The Panel also reasoned that the ability to enter into the WTO Agreement is a 'quintessential example of the exercise of sovereignty'. *Id.* at para. 7.382.

80 For a comprehensive treatment, including the history of the principle, see Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge U. Press 1997).

declared as follows: 'The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.'[81]

One distinct attribute of the sovereign right to natural resources is its status as a basic human right under international law. According to the two Covenants on Human Rights (International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights): 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.'[82] 'Nothing' in the two Covenants 'shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'.[83] Furthermore, the UN also recognizes 'the right to development' as 'an inalienable human right' and that the realization of such right requires 'the exercise of their inalienable right to full sovereignty over all their natural wealth and resources'.[84] The notion that the sovereign right to natural resources belongs to peoples – hence a human right – is an exceedingly powerful one. It suggests that the State is merely the representative of its citizens in exercising this right and that the State has the duty to exercise such right diligently and in the best interest of its population.

Another distinct feature of the sovereignty over natural resources is its 'permanency'. The permanent character implies that the right to dispose freely of natural resources can always be regained, notwithstanding contractual obligations to the contrary.[85] A State can and should regain this right if, due to changed circumstances, its contractual obligations have become so onerous that they were manifestly against the interest of its people.[86] As Abi-Saab, a former member of the Appellate Body, once put it, 'sovereignty is the rule and can be exercised at any

[81] U.N. G.A. Res. 1803(XVII), ¶ 1 (Dec. 14, 1962).

[82] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (16 Dec. 1966), Art. 1.2; International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (16 Dec. 1966), Art. 1.2.

[83] International Covenant on Civil and Political Rights, Art. 47; International Covenant on Economic, Social and Cultural Rights, Art. 25.

[84] *Declaration on the Right to Development,* U.N. G.A. Res. 41/28 (Dec. 4, 1986), Art. 1.

[85] See Schrijver, *supra* n. 80, at 263.

[86] *Id.* at 264 (concluding that 'it is now commonly accepted that the principle of permanent sovereignty precludes a State from derogating from the essence of the exercise of its sovereign rights over natural resources', but a State may by agreement freely entered into accept 'a partial limitation on the exercise of its sovereignty in respect of certain resources in particular areas for a specified and limited period of time').

time' and 'limitations are the exceptions and cannot be permanent, but limited in scope and time'.[87]

It is clear that the sovereign rights over natural resources are granted to peoples on the basis of territorial sovereignty rather than a principle of sharing the world's resources.[88] Since natural resources are unevenly distributed geographically, the notion of permanent sovereignty solidifies the unequal situations between nations that are rich in natural endowment and those that are not. Although in modern international law the States also have a duty to cooperate with each other and to promote international development, so far 'it has proven to be impossible to share the benefits of natural-resources exploitation on an international basis'.[89] Issues involving the exploitation and disposal of natural resources tend to evoke strong emotions, especially in developing countries with colonial pasts. People tend to instinctively view such issues as a matter of national sovereignty and are particularly jealous of their rights as the owner of natural wealth.

3.2[b] *WTO Constraints on the Sovereign Right to Dispose Freely of Natural Resources*

A nation's claim to a larger share in the distribution of its natural resources, however, is subject to the international obligations it voluntarily undertakes.[90] By entering into the WTO Agreement, a sovereign nation accepts the limitations imposed by the WTO on the exercise of its right to the free disposal of its natural resources. The most significant of such limitations is GATT Article XI:1, which prohibits a Member from using any quantitative or other non-tariff means to restrict exports.[91] While this prohibition is subject to various exceptions, none of them can be used for the purpose of promoting domestic industries.

To be specific, Articles XI:2(a) and (b) allow the imposition of export restrictions 'temporarily applied' to relieve critical shortages of foodstuffs or other essential products, or necessary to the application of standards or regulations for the classification, grading or marketing of commodities. Articles XX(g), (h), (i) and

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87 *Id.* at 263 (quoting Abi-Saab, *Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order*, in U.N. Doc. A/39/504/Add.1, Oct. 23, 1984).

88 *Id.* at 386.

89 *Id.*

90 In a globalized economy, a state's right to freely dispose of its natural resources is constrained by a growing body of complex rules governing global economic relations. For specific constraints on sovereign rights over natural resources, see Schrijver, *supra* n. 80, at 306-395.

91 The Article XI prohibition applies to a natural resource only to the extent that it may be traded. It is generally accepted that WTO rules generally do not regulate natural resources before they are extracted or harvested. Accordingly, restrictions on production of resources are not considered to be inconsistent with Article XI. See WTO Report on Resource Trade, *supra* n. 3, at 162.

(j) authorize the adoption of measures 'relating to the conservation of exhaustible natural resources if such measure are made effective in conjunction with restrictions on domestic production or consumption'; or measures 'undertaken in pursuance of obligations under any intergovernmental commodity agreement'; or 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 government stabilization plan', provided that 'such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry'; or measures '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 Members 'are entitled to an equitable share of the international supply of such products'. All the Article XX exceptions must also meet the conditions of non-discrimination set out in its chapeau.

The understanding that none of the GATT exceptions is designed to promote a domestic industry was explicitly confirmed from the early days of the trading regime. A 1950 Report of the Working Party on 'The Use of Quantitative Restrictions for Protective and Other Commercial Purposes' concluded as follows:

> [The GATT] does not permit the imposition of restrictions upon the export of a raw materials in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means.[92]

There have been only a handful of disputes involving export restrictions in the GATT/WTO history.[93] As was typical, the defendant country was accused of using export restrictions to protect its downstream producers at the expense of their foreign competitors. For instance, in *Canada-Salmon,* the United States claimed that Canada's regulations prohibiting the export of unprocessed salmon and herring were a clear violation of Article XI, designed to protect Canadian processors and promote Canadian jobs at the expense of foreign processors.[94] Canada defended its measure by invoking Article XI:2(b), which allows export restrictions necessary to maintain product standards, and Article XX(g), which excuses measures relating to the conservation of exhaustible natural resources, but failed on both counts.

The recent WTO ruling in *China-Raw Materials* also confirms that GATT Article XX may not be used to justify a policy that is primarily aimed at domestic

92 GATT Analytical Index, Art. XX(i), 547.

93 See GATT Analytical Index, Art. XI, and WTO Analytical Index, GATT Art. XI.

94 See GATT Panel Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268, adopted 22 March 1988, GATT Basic Instruments and Selected Documents (BISD), 35S/98, paras. 3.11, 3.29, 3.33.

economic development. In this case, China openly admitted that its export restraints are aimed at promoting domestic downstream industries, although its main argument was that the development of downstream industries would help improve the environment in the long run.[95] China invoked Article XX(g) to defend its position. In addressing China's defence, the Panel referred to Article XX(i) as an immediate context for Article XX(g), which allows restrictions on exports of domestic materials necessary to ensure supply to a domestic processing industry, but requires that the restrictions do not increase protection of such domestic industry and do not depart from the principle of non-discrimination. In the Panel's view, Article XX(g) should not be interpreted to allow a Member to do indirectly what Article XX(i) prohibits directly. In conclusion, 'WTO Members cannot rely on Article XX(g) to excuse export restrictions adopted in aid of economic development if they operate to increase protection of the domestic industry.'[96]

3.2[c] *Tariffs Remain the Only Lawful Means of Restricting Exports for Developmental Purpose*

The world trade regime has long recognized the need for 'positive efforts' designed to ensure that developing countries benefit from trade for their economic development.[97] To this end, GATT Article XVIII *Government Assistance to Economic Development* allows a Member to deviate from certain GATT obligations in order to promote infant industries.[98] GATT Part IV *Trade and Development* specifically recognizes the need for developing countries to diversify the structure of their economies and avoid an excessive dependence on the export of primary products.[99] However, the provisions concerning infant industries focus on import restrictions only.[100] The efforts offered under GATT Part IV to accommodate the need of developing countries to diversify their economies also

[95] China argued that the imposition of export restrictions would allow China to develop its economy in the future. 'The reason for this is that export restraints encourage the domestic consumption of these basic materials in the domestic economy. Consumption of the basic materials at issue by downstream industries…, and the consequent additional production and export of higher value-added products, will help the entire Chinese economy grow faster and, in the longer run, move towards a more sophisticated production bundle, away from heavy reliance on natural resource, labor-intensive, highly polluting manufacturing. This move towards higher-tech, low-polluting, high value-added industries, in turn, will increase growth opportunities for the Chinese economy, generating positive spillovers beyond those to firms directly participating in these markets.' Panel Reports, para. 7.514 (quoting China's comments).

[96] *Id*. at para. 7.386. China did not appeal the Panel's ruling on this issue.

[97] *Supra* n. 2.

[98] GATT Art. XVIII:4(a) and (b); Sections A, C and D.

[99] GATT Articles XXXVI:4 and 5.

[100] See GATT Art. XVIII:14.

focus exclusively on the improvement of market access and conditions for the primary and processed products from these countries.[101] While numerous other WTO agreements contain provisions granting special and differential treatment to developing countries, none of them is concerned with the use of export restrictions as a means for economic development.

Therefore, under the existing WTO agreements, tariffs remain the only lawful means for restricting exports for the purpose of promoting domestic industries. Except for the several acceding Members, WTO Members are still free to claim a larger share in the distribution of their resources through export restraints, so long as the restraints take the form of duties, not quantitative or other non-tariff measures. In other words, export duties have been preserved, by default under WTO law, as the only legitimate tool to exercise a Member's sovereign right to freely dispose of its natural resources.

It should also be noted that although levying export duties on raw materials can have the same economic effect as providing subsidies to domestic downstream industries, export restraints do not fall within the meaning of a subsidy under the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[102] Some may consider this situation as a loophole in the system.[103] At a more fundamental level, however, it would be problematic to subject export tariffs on resource materials to the WTO subsidy discipline, considering that export duties are the only legitimate means available under WTO law for Members to exercise their sovereign right to natural resources for the purpose of developing domestic industries.

3.2[d] *Implications for the Several Acceding Members*

By undertaking to eliminate or bind export duties at specific rates, the several acceding Members have accepted a derogation of their sovereign right to the free disposal of their natural resources. The degree of derogation varies depending on the terms of accession for a particular country. In the case of China, Montenegro and Latvia, their obligation to eliminate export duties on all, or substantially all, products means that they have essentially forgone the right to use export restraints for developmental purposes. For Mongolia and Saudi Arabia, the constraint is limited to a single category of products. As for Vietnam, Ukraine and Russia, their rights to use export duties for developmental purposes are curtailed

[101] GATT Art. XXXVIII:2(a).

[102] See Panel Report, *United States–Measures Treating Export Restraints as Subsidies,* WT/DS194/R, adopted 23 August 2001, para. 8.75.

[103] See the EU proposal on export taxes, *supra* n. 17 (stating that 'when used for industrial or trade policy purposes, export taxes can serve as indirect subsidization of processing industries and influence international trading conditions of these goods').

to the same extent as their export-duty bindings. Except for Russia, none of the acceding countries have the right to revise their export concessions.[104]

It is, however, legally problematic not to provide the several acceding Members with the right to modify or withdraw their export duty commitments. As previously noted, due to the uncertainty surrounding the amendment of accession protocols, the stand-alone commitments on export duties are de facto permanent obligations of the acceding Members. Short of withdrawing from the WTO, these countries have no readily available means to adjust these commitments under WTO law. Insofar as raw materials are concerned, the lack of a clear right on the part of a WTO Member to modify or withdraw its export concessions is at odds with the principle of permanent sovereignty over natural resources.[105]

3.3 Export duties and environmental protection

A resource-producing country may wish to restrict the export of raw materials in order to conserve exhaustible natural resources and reduce environmental damage associated with their production. Both purposes are recognized as legitimate by the WTO, which declares sustainable development and environmental protection as part of its objectives.[106] To justify an export ban or other quantitative restrictions imposed for environmental purposes, the resource-producing country may invoke the pertinent provisions of GATT Article XX. Over time, Article XX jurisprudence has evolved significantly towards a more environment-friendly position.[107] In principle, it has been established that a Member has the right to determine the level of environmental protection as it deems appropriate, provided that the right is exercised in a non-discriminatory manner. Yet, as explained below, the non-discrimination requirement can also get in the way of environmental interests. And it is in this context that export duties have a positive role.

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[104] See Appendix 1.

[105] *Supra* text at notes 85-87.

[106] *Supra* n. 2.

[107] The change is well summarized by a group of WTO experts as follows: '[I]n the GATT days, assessment of the appropriateness of public policy exceptions were made primarily in terms of trade considerations, with a view to ensuring that such exceptions caused as little disruption of trade as possible.' In contrast, nowadays 'trade considerations are only one part of the reckoning, with much more emphasis on the public policy aim.' Patrick Low, Gabrielle Marceau & Julia Reinaud, *The Interface between the Trade and Climate Change Regimes: Scoping the Issue* (2010), at 33, available at *http://www.wto.org/english/res_e/reser_e/climate_jun10_e/background_paper3_e.pdf.*

3.3[a] *Partial Conservation and Incremental Improvement*

Under GATT Article XX(g), a WTO Member may adopt export restrictions for the purpose of conserving exhaustible natural resources if the restrictions 'are made effective in conjunction with restrictions on domestic production or consumption'. Article XX(g) has been interpreted to require that the measures in question be 'primarily aimed' at the conservation and that there is 'even-handedness' between the restrictions imposed on domestic and foreign producers respectively.[108] A measure falling within Article XX(g) must, in addition, satisfy the requirement of the chapeau of Article XX that it is 'not 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'.[109]

As an alternative, a Member can impose export duties to achieve the same goal, free from the constraints of Article XX. This 'freedom' is valuable to a resource-producing country because it affords the country with a great deal of flexibility in designing its environmental policies. For example, a country may wish to reduce the consumption of a particular raw material to conserve an exhaustible natural resource, but is also concerned with job loss in domestic industries depending on the raw material as input. The country then may decide to impose an export duty on the raw material without similarly taxing domestic consumption. In this case, the measure may not be highly effective for conservation purposes since the export duties would lower the domestic price of the material, which in turn might stimulate domestic consumption. However, the country can still achieve a degree of conservation as long as the increase in domestic consumption caused by the export levy does not completely offset the reduction in foreign consumption. Such a policy, if implemented through export quotas, would conflict with the non-discrimination requirements of Article XX.

In essence, the ability to levy export duties allows a resource-producing country to pursue a partial conservation policy that discriminates against foreign users. One may view export duties as a policy tool that provides the resource-producing country with the flexibility to protect and preserve the environment 'in a manner consistent with their respective needs and concerns at

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[108] Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted 20 May 1996 (*US–Gasoline*), 18-19, 20-21.

[109] In theory, the chapeau language can be interpreted to allow differential treatment between countries where different conditions prevail. In practice, the Appellate Body has not focused on the element of 'conditions' in its interpretation of the chapeau. For a critique of this interpretive approach, see Julia Ya Qin, *Managing Conflicts Between WTO and RTA Rulings: Reflections on the Brazil-Tyres Case,* in Pieter Bekker, Rudolf Dolzer & Michael Waibel (eds.), *Making Transnational Law Work in the Global Economy: Essays in Honor of Detlev Vagts* 601-29 (Cambridge U. Press 2010).

different levels of economic development'.[110] Ultimately, the resulting discrimination against foreign users can only be justified by the permanent sovereignty of the country over its natural resources.

3.3[b] *Managing Negative Externalities*

Production of raw materials is often highly polluting to the local environment. When a resource-producing country does not have adequate environmental standards in place, the resource products can be sold cheaply without reflecting the true cost of production. The mispriced goods provide a commercial benefit to all purchasers, domestic and foreign; but the negative environmental externalities may have to be absorbed by the resource-producing country alone. When this happens, the resource-producing country is effectively subsidizing foreign consumers at the expense of environmental degradation at home. An export duty, set at a proper level, can correct the mispricing and offset the potential subsidy to the importing countries.

It is important to note that the negative environmental externalities cannot be easily addressed by the Article XX exceptions due to their non-discrimination requirements. As acknowledged by the WTO Report on Resource Trade, 'the principle of non-discrimination may constrain the ways in which a WTO Member can impose measures designed to manage externalities'.[111] Take *China-Raw Materials* for example. In this case, China invoked Article XX(b) to justify its export restrictions on a number of 'energy-intensive, highly polluting, resource-based products' (hereinafter 'EPR' products), including coke, magnesium, manganese and silicon carbide. China argued that its export restrictions are necessary because environmental regulations alone cannot fully address the environmental damage caused by EPR production. Without export restrictions, China argued, EPR export prices would be too low with respect to the social cost of production of EPRs, as they would not take into account the environmental costs of such production.[112]

The Panel disagreed. In its view, export restrictions generally do not internalize the social environmental costs of EPRs' production in the domestic economy, because export restrictions reduce the domestic prices of EPRs and therefore stimulate, instead of reducing, further consumption of polluting EPR products. According to the Panel, export restrictions are not an efficient policy to address environmental externalities when such externalities derive from domestic

110 *Supra* n. 2.
111 WTO Report on Resource Trade, *supra* n. 3, at 169.
112 Panel Reports, para. 7.585.

production rather than exports or imports. 'This is because generally the pollution generated by the production of the goods consumed domestically is not less than that of the goods consumed abroad. So the issue is the production itself and not the fact that it is traded.'[113] Thus, the Panel interpreted the necessity standard of Article XX(b) as requiring equal treatment between domestic and foreign interests in this situation.[114]

The Panel's reasoning, however, ignores an important dimension of the situation: it may be fundamentally unfair to require China to absorb the negative externality generated by the production of the raw materials to be consumed abroad. When the prices do not fully reflect the environmental costs of production, China is effectively 'subsidizing' *all* consumers with the mispriced materials. When EPR products are sold domestically, their full environmental costs will be borne by the Chinese society, which must live with the consequences of environmental degradation caused by EPR production. Such costs may or may not be shared equitably within the society, but they will have to be absorbed eventually by China as a nation. In contrast, when EPR products are sold to foreign consumers, the uncompensated portion of the environmental costs will also be borne by China, as the environmental damage caused by EPR production is typically confined to the region of production. In this situation, foreign consumers benefit from the low-priced materials without ever having to pay for their full environmental costs. The net effect is a 'subsidy' or a transfer of wealth from China to the importing countries of EPR products.

The issue here is not whether the resource-producing country can require foreign consumers to pay for their fair share of the environmental costs – as it certainly can – but how. In theory, the most effective way to manage the negative externalities should be to address the problem at the source, that is, to raise the prices of EPR products through stricter enforcement of environmental standards and/or high taxes on EPR production. However, in practice, it can be much more difficult to implement production control than export control, especially in large developing countries that lack the proper institutional capacity to enforce production rules uniformly.[115] In such situations, export duties may be the single most effective and efficient way to compensate for negative externalities generated by the EPR products consumed abroad.[116] This policy tool, however, is no longer available to China and other acceding Members that have given up the right to

[113] *Id.* at para. 7.586.

[114] The Panel's finding under Art. XX(b) was not appealed.

[115] See Karapinar, *supra* n. 17, at 1152.

[116] By contrast, export quota is not an effective means for correcting the mispricing of EPR products sold abroad, due to its indirect and uncertain relationship with the price of exports. This would be the case whether or not the export quota is implemented in conjunction with restrictions on domestic production (i.e., in a non-discriminatory manner consistent with GATT Article XX).

impose export duties. To comply with its WTO obligations, China must either find a way to raise the prices of EPR products across the board, or continue to subsidize foreign users with mispriced EPR products. In any event, it will not be allowed to sacrifice the environment for the benefit of its domestic industries only; instead, the bounty of cheap EPR products must be shared equally among domestic and foreign consumers, irrespective of how the environmental costs are allocated.

In addition to subsidizing foreign consumers, mispricing of EPR products on a long-term basis may induce the migration of dirty industries to the developing countries that do not enforce proper environmental regulations.[117] The shift in production of rare earths provides such an example. The Mountain Pass Mine in the United States used to be the world's largest producer of rare earths, but it closed its mining operations in 2002, amid environmental concerns and cut-rate competition from China.[118] For decades, China mined and processed rare earths with little environmental protection, leaving vast toxic waste sites, as well as cancer and birth defects among residents and animals.[119] The lax environmental policy combined with low-cost labour made China's rare earths extraordinarily cheap, driving out competition from other countries.[120] As a result, China now supplies more than 95% of the global demand, even though it has only 30% of the world's known reserves.[121]

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[117] See John Wilson, Tsunehiro Otsuki & Mirvat Sewadeh, *Dirty Exports and Environmental Regulation: Do Standards Matter to Trade?* World Bank Policy Research Working Paper No. 2806 (Mar. 2002) (finding that more stringent environmental standards imply less net exports of pollution intensive industries, and that environmental legislation has a more dramatic effect on net exports in Organisation for Economic Co-operation and Development (OECD) countries than in non-OECD countries), available at http://ssrn.com/abstract=636089.

[118] See Martin Zimmerman, *California mine regains lust,* Los Angeles Times (Oct. 14, 2009); Andrew Restuccia, *Troubled mine holds hope for US rare earths industry,* Washington Independent (Oct. 25, 2010) (available at http://washingtonindependent.com/101462/california-mine-represents-hope-and-peril-for-u-s-rare-earth-industry).

[119] See Allison Jackson (AFP), *China pays price for world's rare earths addiction* (Apr. 30, 2011) (available at www.google.com/hostednews/afp/article/ALeqM5gcxkj7mOtDf2Kv3DHxC2KFkRKy7g); Asia Sentinel, *China's Rare Earths Mining Catastrophe,* (June 21, 2011) (available at www.asiasentinel.com); Keith Bradsher, *The Fear of Toxic Rerun*, N.Y. Times (June 29, 2011).

[120] From 1990 to 2005, China's rare earths exports increased nearly tenfold, and their export prices dropped by 50%. Zhongxinwang, *Rare earths sold at the price of dirt? China should insist on export control over rare earths* (July 7, 2011) (in Chinese) (available at http://edu.chinanews.com/cj/2011/07-07/3163654.shtml).

[121] Of the world's known reserves, China has the largest share (30%), followed by the US (13%), Australia (5%), and India (2.5%). Jane Korinek & Jeonghoi Kim, *Export Restrictions on Strategic Raw Materials and Their Impact on Trade and Global Supply,* 45 J. World Trade 255, 271 (2011). For a comprehensive report on China's rare-earth industry and policy, see Pui-Kwan Tse, *China's Rare-Earth Industry, U.S. Geological Survey Open-File Report* 2011–1042 (2011) (available at http://files.eesi.org/usgs_china_030011.pdf).

3.4 IMPACT OF WTO RULINGS IN *CHINA-RAW MATERIALS*: THE CASE OF RARE EARTHS

While the dispute in *China-Raw Materials* was pending, a new controversy broke out over China's export restrictions on rare earths. The issues involved are essentially the same as those in *China-Raw Materials*, but the stakes are higher because rare earths are critical inputs to many high-tech products, including smartphones, computers, hybrid vehicles and energy-saving lightings. *China-Raw Materials* has thus become a test case for the rare earths dispute.[122] The WTO rulings, however, have met with certain responses from China that highlight the problems discussed in the previous sections.

3.4[a] *Background of the Rare Earths Controversy*

As noted above, China's exports of rare earths has increased tenfold since 1990.[123] The rapid expansion in production is quickly depleting China's rare earths deposits. According to the Ministry of Commerce, China's medium and heavy rare earths may last from fifteen to twenty years at the current rate of production, possibly requiring imports in the future.[124] To conserve resources, China began to apply export quotas on rare earths in 1998, but the quotas allocated each year were more than sufficient to cover foreign demand.[125] In July 2010, however, China suddenly slashed the export quotas by 40%.[126] Two months later, it briefly halted shipping of rare earths to Japan over a territorial dispute.[127] These events prompted an outcry from the US, Japan and the EU, the world's largest importers of the minerals. In addition to quotas, China also introduced a 10% export tax on rare earths in 2006, which has since increased to 15–25%.[128] Despite their strategic importance, rare earths are not among the eighty-four products on which China may levy export duties in accordance with its accession protocol.[129]

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122 See generally Gu, *supra* n. 5.

123 *Supra* n. 120.

124 Bloomberg News, *China Rare Earths to Last 15-20 Years, May Import* (Oct. 16, 2010) (available at http://www.businessweek.com/news/2010-10-16/china-rare-earths-to-last-15-20-years-may-import.html).

125 Korinek & Kim, *supra* n. 121, Table 13. China's practice did not give rise to protest from importing countries in the early years, even though the quota clearly violated GATT Art. XI and it was questionable whether they met the conditions of the environmental exceptions under Art. XX.

126 Reuters, *China cuts 2010 rare earth export quotas 40 pct-paper* (Aug. 11, 2010) (available at http://af.reuters.com/article/metalsNews/idAFTOE67A03H20100811).

127 Keith Bradsher, *Amid Tension, China Blocks Vital Exports to Japan,* N.Y. Times (Sept. 22, 2010).

128 *Export tax to be raised on rare earths*, People's Daily (Dec. 15, 2010) (available at http://english.peopledaily.com.cn).

129 *Supra* n. 25.

China maintains that its export restraints on rare earths are imposed for conservation and environmental purposes consistent with WTO rules, even though domestic consumption has not been similarly restricted. The rulings in *China-Raw Materials* have exposed the vulnerability of China's position. On March 13, 2012, the US, Japan and the EU launched formal WTO disputes with China, challenging its export restrictions on rare earths.[130] It remains to be seen whether China can successfully defend itself in this case.

3.4[b] *Government and Public Responses*

Following the release of the Panel decision in *China-Raw Materials* to the parties in April 2011, China began to shift its rare-earths strategy visibly. In a new policy document issued in May 2011, the central government laid out the basic principles for the development of the rare-earths industry.[131] While reaffirming the policy of export restrictions, the document emphasizes the government's resolve to control the production of rare earths. The production control will be carried out by various means, including cracking down illegal mining, enforcing environmental regulation and raising resource taxes, but above all, it will be carried out by mandatory State planning and consolidation of the industry.[132] The government will compel mergers and acquisitions of small and medium-sized producers, typically private companies, and let a few large state-owned enterprises (SOEs) dominate the field.[133]

Thus, in anticipation of a new WTO challenge, China has decided to place the rare-earths industry under a firmer State control. The large SOEs will be able to set prices and choose to sell their products to domestic producers rather than export. Although China's accession protocol requires the Chinese government to ensure that all its SOEs will 'make purchases and sales based solely on commercial considerations' and that other WTO Members will 'have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions',[134] it will be very difficult to monitor SOE activities given the lack of transparency in their operations.

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[130] *Supra* n. 4.

[131] State Council, *Several Opinions on the Promotion of Sustaining and Healthy Development of the Rare Earths Industry*, Guofa [2011], No. 12, May 10, 2011.

[132] At present, there are more than 300 rare-earth producers; and the goal is to reduce that number to around 20. See Tse, *supra* n. 121.

[133] China permits Sino-foreign joint ventures to engage in the production and export of rare earths. It appears there are a dozen or so such joint ventures. Tse, *supra* n. 121.

[134] Report of the Working Party on the Accession of China, WT/MIN(01)/3 (Nov. 10, 2001), para. 46, which paragraph was incorporated into China's Accession Protocol.

Since the release of the Appellate Body's report, China has expressed its strong disagreement with the WTO ruling.[135] Meanwhile, the Chinese press has indicated that the government will obey the ruling but will find other 'non-tariff and non-quota' ways to avoid WTO constraints.[136]

The rare-earths controversy and the WTO ruling in *China-Raw Materials* have been widely reported in China. The case has aroused strong nationalistic feelings, and public opinion overwhelmingly supports the export restrictions.[137] In the view of many, China must 'fight the battle' to protect its strategic resources from the grab of Western powers.[138] 'Free trade' may not override the fundamental rights of a nation.[139] And 'the rest of the world has to realize that China cannot go on sacrificing its environment for the benefit of other countries'.[140] The WTO ruling is therefore perceived as unfair, exposing the WTO as an organization lacking an understanding of the problems of developing countries.[141]

In this context, it was also reported in the Chinese media that while suing China for export restrictions on raw materials, the EU and the US have been simultaneously levying anti-dumping duties on some of the very materials involved in their WTO complaints.[142] The incoherence in the EU and US trade policies provides further evidence for the belief that the WTO complaints against China's export restrictions are unjustified.[143]

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[135] See BNA WTO Reporter, *U.S., EU and Mexico Urge China to Lift Export Restrictions in Wake of WTO Ruling,* 23 February 2012 (reporting that China told the Dispute Settlement Body that the Appellate Body and Panel rulings are improper and will risk creating an unsustainable two-tiered system where new Members do not have the same right to promote fundamental societal interests as established Members).

[136] See Zhongcaiwang, *WTO Claims 'Victory', China's Battle to Defend Rare Earths Is Ready to Be Set Off,* Feb. 4, 2012 (in Chinese), at http://www.cfi.net.cn/p20120204000308.html.

[137] In an online poll conducted soon after the case of *China-Raw Materials* was filed at the WTO, nearly 90% of the people responded support China's restriction on the export of strategic resources. Huanqiuwang, *Nearly 90% of Netizens Vote in Favor of China's Restrictions on the Export of Strategic Materials,* June 14, 2009 (in Chinese), at http://world.huanqiu.com/roll/2009-06/487700.html.

[138] See e.g., WANG Junzhi, *China's Battle to Defend Rare Earths,* (China Economics Press 2011) (in Chinese); Hexun, *China sets off the battle to defend rare earths* (in Chinese) (available at http://news.hexun.com/2010/xitu/index.html).

[139] Xinhua.net, *China's export restriction on rare earths is consistent with WTO rules* (May 21, 2011) (available at http://news.xinhuanet.com/politics/2011-05/21/c_121441790.htm).

[140] Mei Xinyu, *WTO Ruling Not End of Road for China,* China Daily (July 20, 2011) (available at www.chinadaily.com.cn).

[141] There is also a call for China to fight for the revision of 'the unequal clause' in its accession protocol. *Id.*

[142] See Xinhua, *A regrettable WTO ruling* (July 6, 2011) (available at http://news.xinhuanet.com). Since 2008, the EU has imposed an anti-dumping duty of 25.8% on certain coke imported from China. Council Regulation (EC) No. 239/2008 of 17 March 2008. The US currently maintains anti-dumping duties on magnesium, coke and silicon metal from China. Source: USITA, http://web.ita.doc.gov. See also Daniel Ikenson, *Economic Self-Flagellation: How US Antidumping Policy Subverts the National Export Initiative,* Cato Institute Trade Policy Analysis no. 46 (May 31, 2011).

[143] See e.g., Ye Tan, *China's export restriction on rare earths is justified and reasonable* (July 8, 2011) (in Chinese) (available at http://www.ibtimes.com.cn/articles/20110708/xitu-chukou.htm).

In sum, while the WTO decision may prompt China to tighten environmental regulations across the board, it has also met with two responses that are undesirable from a systemic perspective of the WTO. First, the move to increase the State control in the resource sector goes in the opposite direction from the market-oriented economic reform that WTO accession is supposed to promote. The result may give rise to more serious conflicts between China and other Members, as the issues of SOEs are among the hardest to address under WTO law. Second, the WTO ruling has triggered nationalistic reactions from the Chinese. The negative image ensuing from the WTO ruling may well undermine public support for initiatives to liberalize trade in the future.

China's predicament, of course, stems from its sweeping accession commitments on export duties – most other WTO Members will not be similarly constrained.[144] But its ultimate disadvantage lies in the lack of any realistic chance to adjust such commitments. If its export duty commitments could be modified in a manner similar to its import duty commitments, China would have some policy space to adjust the level of its resource exports. In that event, the government might not be compelled to resort to non-market means to avoid WTO constraints, and the public might not be so concerned since the stake would not be as high.

4 THE ROAD TO REFORM

The China case highlights one side of the problem in the existing WTO export duty regime: the stand-alone obligations imposed on the selected acceding Members are so rigid that they may backfire. The other side of the problem, of course, is the complete lack of obligation to limit the use of export duties on the part of most WTO Members. The system is badly in need of reform.

4.1 Establishing a system-wide discipline on export duties

4.1[a] *Reaffirm the Need for Regulating the Use of Export Duties*

The world trade system has long recognized that export duties 'often constitute serious obstacles to trade' and that negotiations should be directed to 'the substantial reduction of the general level of tariffs and other changes on imports and exports'.[145] Today, the need for a system-wide discipline on export duties is

[144] This fact, however, has rarely been mentioned in the public discourse in China. Apart from the difficulty in explaining the technical details of WTO rules, the government may not be keen on publicizing the WTO-plus obligations it has undertaken.

[145] GATT Art. XXVIII *bis,* para. 1. The provision was added to the General Agreement during the review session of 1954-55. See GATT Analytical Index, Art. XXVIII *bis*.

greater than ever. With the emergence of global supply chains and rapid industrialization in the developing world, many economies have become dependent on the import of raw materials and intermediate goods.[146] Yet, in the meantime, the use of export tariffs has proliferated, especially on resource products. According to WTO statistics, 11% of world trade in natural resources, and 5% of total world trade, is now covered by export taxes.[147] More than thirty countries are among the main users of export taxes in natural resources, all of which are developing nations.[148] The trend is expected to continue, as the global demand for resource products continues to outpace their supply, and the development of alternative resources takes time.

Unconstrained use of export duties creates uncertainty and unpredictability in global trade. More seriously, export restraints increase tension in international relations and can provoke retaliation. In some countries, the mounting pressure for access to raw materials has already turned resource trade into a matter of 'high politics' of national security.[149] The increasing use of export restrictions on agricultural products has also raised the grave concern for food security in recent years.[150] The lack of an effective WTO discipline on export restraints, therefore, may develop into a risk of political instability in the world.

In short, it is time for the WTO to reaffirm the need for regulating the levy of export duties. Having an effective WTO discipline on export restraints should benefit developed and developing countries alike. Many developing nations are not resource-rich, and very few are endowed with all the natural resources necessary for economic advancement. A system-wide discipline can provide a high degree of security and transparency in the access to the world's resources for all.

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[146] For example, about 70% of all imports to the EU in 2007 were intermediate goods headed for transformation there. Peter Mandelson, Speech, *The Challenge of Raw Materials* (Trade and Raw Materials Conference, Brussels, Sept. 29, 2008) (available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/467&type=HTML).

[147] WTO Report on Resource Trade, *supra* n. 3, at 116-117.

[148] *Id.* Figure 30, at 119. The figure does not include Russia, which was not a WTO Member at the time, but a major exporter of natural resources and a heavy user of export taxes. See Mandelson, *supra* n. 146 (noting that when Russia imposed an export duty of 50% on scrap aluminum, which 'has all but wiped out trade in this metal').

[149] Mikkal Herberg, *Introduction to NBR Special Report No. 31, Asia's Rising Energy and Resource Nationalism: Implications for the United States, China and Asia-Pacific Region* 3 (2011).

[150] A survey by the Food and Agricultural Organization (FAO) of the UN found that twenty-five developing countries imposed a ban or increased taxes on the export of agricultural products in recent years. *Price Volatility in Food and Agricultural Markets: Policy Responses*, Policy Report jointly issued by FAO, IFAD, IMF,OECD, UNCTAD, WFP, the World Bank, the WTO, IFPRI and the UN HLTF (June 2, 2011), para. 37. Available at http://www.ifad.org/operations/food/documents/g20.pdf. See also Thomas J. Schoenbaum, *Fashioning a New Regime for Agricultural Trade: New Issues and Global Food Crisis,* 14 J. Int'l Econ. Law 593 (2011).

4.1[b] *Regulate Export Duties in the Same Way as Import Tariffs, Taking into Account their Legitimate Functions*

To garner the support of major developing country Members, the new WTO discipline needs to acknowledge the legitimate functions of export duties. However, the major proposals tabled within the WTO to date have generally opposed the use of export duties for industrial policy or trade purposes.[151] This stance has been carried to an extreme by the WTO ruling in *China-Raw Materials,* which effectively prohibits several acceding Members from using export duties for any purpose.

Thus, at least in the context of accession, the WTO has chosen to regulate export duties more strictly than import duties. With respect to import duties, WTO law continues to recognize them as a legitimate means of protecting domestic industries. Even after eight rounds of tariff negotiations, most WTO Members still maintain extensive uses of import duties, albeit the average rates of duty have decreased significantly. All import tariff bindings are entitled to public policy exceptions and may be modified or withdrawn on a regular basis. Moreover, developing countries are given extra flexibility in the use of import duties and are not required to make concessions inconsistent with their 'development, financial and trade needs'.[152] In contrast, the WTO has required selected acceding countries, all of which are developing economies, to abolish export duties altogether or to eliminate export duties on numerous products. Their export duty concessions are fixed as stand-alone obligations, without the benefit of policy exceptions (unless specifically provided otherwise in the accession protocol) or a realistic chance for adjustment.

Is this harsher treatment of export duties warranted, however? From an economic standpoint, export duties do not produce greater trade-distorting effects or welfare loss than import tariffs.[153] It is true that due to uneven geographical distribution of natural resources, a small number of countries may control the world's supply of a particular material; consequently, when a major supplier

[151] See Communication from the European Communities, *Market Access for Non-Agricultural Products: Negotiating Proposal on Export Taxes,* TN/MA/W/11/Add.6 (Apr. 27, 2006) (proposing the elimination of export duties by all Members); and the revised EU proposal on export taxes, *supra* n. 17 (proposing a less strict approach than the 2006 proposal).

[152] *Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries (The Enabling Clause)*, GATT Doc. L/4903 (Nov. 28, 1979), BISD 26S/203 (1980), para. 5.

[153] The sum of welfare loss generated by export duties should be the same as that generated by import tariffs, albeit the distributional effects of the two may differ. Notably, in the case of export duties, consumer loss may spread across multiple countries, whereas in the case of import tariffs consumer loss concentrates in the single importing country. For a detailed study on the economic implications of export taxes, see Roberta Piermartini, *The Role of Export Taxes in the Field of Primary Commodities* (WTO Publications 2004) (available at https://www.wto.org/english/res_e/booksp_e/discussion_papers4_e.pdf).

country levies a heavy duty or suddenly changes its levy on the export of a resource material, it may cause special difficulties for all the importing countries relying on its supply. This problem, however, concerns the level and the predictability of export duties, rather than the use of export duties per se, and it can be adequately addressed by the binding of duties and by the strengthening of transparency requirements on export levies.[154] In this context, it is also relevant to note that as the owner of its natural wealth, the resource-producing country may rightfully seek 'rents' from the sale of its resources to other countries.[155] In contrast to rents in manufactures or services, which can be bid away by expanding production elsewhere, the rents on depleting natural assets are intrinsic to the scarcity of global natural resources.[156] Such rents therefore properly belong to the country in which the resource endowment is located.

As discussed in detail above, export duties have a number of distinct functions that should be recognized as legitimate.[157] In light of these functions of export duties, especially their utilities for developing countries, WTO disciplines should not treat export duties more harshly than import duties. Instead of requiring their elimination, the WTO should acknowledge the legitimate uses of export duties, aiming to strike a balance between the interests of importing countries and exporting countries through tariff bindings. The negotiation and regulation of export tariff bindings may follow the same GATT norms governing import tariff bindings, taking into account the special features of resource trade. In short, export duties can and should be regulated in the same way as import duties under WTO law.

4.2 Bringing all stand-alone export concessions into GATT

As previously analysed, the stand-alone export duty obligations of the acceding Members are problematic for both legal and policy reasons. From a legal viewpoint, the lack of right to modify or withdraw export duty commitments is at odds with the principle of permanent sovereignty over natural resources under international law. The unavailability of public policy exceptions to the export duty commitments cannot be explained by any WTO principles. Within the system, the stand-alone obligations create multiple tiers of Members, causing fragmentation of WTO law. As can be observed in the case of China, the rigid stand-alone obligations may backfire – causing the country to resort to less transparent means to achieve the same goal.

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154 See the EU proposal on export taxes, *supra* n. 17.

155 Resource deposits typically carry rents, as the value of output well exceeds the cost of production. Paul Collier & Anthony J. Venables, *International Rules for Trade in Natural Resources* (WTO Staff Working Paper ERSD-2010-06, Jan. 2010) (available at www.wto.org).

156 *Id.*

157 See Section 3.

The stand-alone obligations are contractually agreed between the WTO and the individual acceding countries. The fact that the obligations have been accepted by the acceding Member, however, does not justify maintaining such a seriously flawed arrangement.[158] Instead, the WTO should acknowledge that the arrangement is flawed and be prepared to rectify the situation.

4.2[a] *Create 'Part V' of GATT Schedules for the Acceding Members*

A principled solution to the problem of stand-alone export duty commitments is to bring all of them into the GATT framework. At present, each WTO Member has a 'Schedule of Concessions and Commitments' annexed to the GATT.[159] Each GATT Schedule consists of four parts: Part I lists MFN concessions, Part II preferential concessions, Part III concessions on non-tariff measures and Part IV the specific commitments made during the Uruguay Round on domestic support and export subsidies on agricultural products.[160] In the case of Russia, as noted above, a new Part V has been created to list its extensive concessions on export duties.[161]

Following the Russian example, a 'Part V' could be added to the GATT schedules of the acceding Members to record their export duty commitments set out in the accession protocols. It would be straightforward to record all the bindings at specific rates, as in the case of Vietnam, Ukraine, Latvia (specific antiques) and China (eighty-four products).[162] For the commitments to eliminate export duties, a conversion to 0% would be required. This would not be hard in the case of Mongolia, Saudi Arabia and Latvia, as their commitments to eliminate duties concern a small number of products only. As for China and Montenegro, whose commitments to eliminate export duties are across the board, the recording might be done by reference to the relevant provisions of the accession protocol. Thus, Part V of the GATT Schedule for China could simply provide as follows: 'See the commitments in paragraph 11.3 and Annex 6 of the Accession Protocol.'[163]

Procedurally, there is a question concerning the proper mechanism for incorporating 'Part V' under the GATT schedules of the acceding Members. Since

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158 See *supra* text at n. 46 regarding the political reality of accession negotiations.
159 The schedule is binding on the Member by virtue of GATT Art. II:7, which states: 'The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.'
160 Hoda, *supra* n. 53, at 19.
161 See Section 2.2[d].
162 See Appendix 1.
163 This technique has already been used in Part IV of China's GATT Schedule, which incorporates China's commitments on agricultural subsidies by reference to 'related commitments in the Working Party Report'. See GATT Schedule CLII, People's Republic of China.

the accession protocols do not provide for the incorporation of export duty commitments into the GATT schedules, it can be argued that such a move would require an amendment to the accession protocols. If this view prevails, there would be serious doubts regarding the feasibility of the incorporation, given the legal uncertainty surrounding the revision of accession protocols.[164]

It is important to note, however, that adding Part V to a GATT schedule is a matter of amending the GATT schedule, which is legally distinct from amending the accession protocol. Technically, any amendment to a GATT schedule shall require the unanimous consent of all WTO Members, since the schedule constitutes an integral part of GATT Article II.[165] Yet, an early GATT decision has clarified that the rates of duty contained in the schedules were meant to be maximum rates only; therefore, a reduction in the rate of duty on a product below the rate set forth in a schedule would not require unanimous consent.[166] In practice, Members have relied on internal GATT procedures to record unilateral, bilateral and plurilateral concessions.[167] Thus, should India declare that it would make a unilateral commitment to bind its export duties on ten mineral products at 20%, the WTO would be able to accommodate this trade-liberalizing move by recording the commitment in India's GATT Schedule (possibly by adding Part V to it). Since India's export duties are currently 'unbound', the new concessions would be considered a modification of its current GATT schedule. By the same token, insofar as the existing GATT schedules are concerned, the export duty commitments of the acceding Members would all be new concessions and therefore could be accommodated in the same fashion.[168]

The substantive issue here, of course, is whether the incorporation of the export duty commitments into the GATT schedules will prejudice the interests of other WTO Members. The incorporation would not change the scope of the existing export duty commitments. What would be changed is the rigidity of the commitments. As already explained, the lack of rights on the part of the acceding countries to invoke GATT policy exceptions and to adjust their commitments is problematic as a matter of fundamental WTO principles and may be challenged as inconsistent with the principle of permanent sovereignty over natural resources. The very purpose of incorporating the export duty commitments into the GATT is to cure this defect.

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164 See Section 2.2[c][ii].

165 See GATT Art. XXX; Art. X:2 of the WTO Agreement.

166 GATT Analytical Index, Art. II, 101 (quoting the GATT decision on 9 August 1949, BISD Vol. II/11).

167 Hoda, *supra* n. 53, at 117 (citing the 1980 GATT decision on *Procedures for Modification and Rectification of Schedules of Tariff Concessions* (L/4962)).

168 The recording of these new concessions should be made only after approval by a WTO decision as explained below.

Considering that the incorporation would have practical implications for the terms of accession, it is recommended that a decision to approve the incorporation be taken by the WTO General Council following the same procedures for approving the terms of accession. In WTO practice, the decision to approve accession terms is taken under the Decision-Making Procedures Under Articles IX and XII of the WTO Agreement.[169] Pursuant to these Procedures, when dealing with matters 'related to accessions', the General Council will seek a decision by consensus in accordance with Article IX:1 of the WTO Agreement; where a decision cannot be arrived at by consensus, the matter will be decided by a two-thirds majority vote of all Members in accordance with Article XII:2 of the WTO Agreement. This process would afford WTO Members an opportunity to focus on the issues raised by export tariffs and to clarify their common intentions behind those accession commitments. Once the General Council adopts the decision, the export duty commitments of the acceding Member can be recorded in its GATT schedule as new concessions that modify its existing schedule.

In connection with the approval process, it would be desirable for the General Council to confirm that GATT Article XXVIII (Modification of Schedules) can be applied to Part V of the GATT schedules.[170]

4.2[b] *China Should Take the Lead in Reform*

To initiate the process, the several acceding Members need to make the request for incorporating their export concessions into the GATT schedules. China, being the first to face the legal consequences of such stand-alone commitments, should have the incentive to take the lead. The incorporation would give China the right to invoke GATT policy exceptions to justify departures from its export duty commitments. More importantly, in the long run, it would give China the right to renegotiate its scheduled concessions.[171] The chance to renegotiate such concessions in the future would provide China with the policy space desired to

[169] Adopted by the General Council on 15 November 1995, WT/L/93, 24 November 1995.

[170] See *supra* text at notes 60-66. Under Art. IX:2 of the WTO Agreement, the General Council has the 'exclusive authority to adopt interpretations' of the WTO agreements. This power has never been exercised in practice. To confirm the applicability of Art. XXVIII to Part V of the GATT schedule would not require the General Council to exercise this authority if it does not amount to an interpretation of Art. XXVIII.

[171] On the applicability of Art. XXVIII, see *supra* text at notes 60-66. Pursuant to Art. XXVIII, China would be expected to make compensatory adjustments in the renegotiation so as to maintain a general level of concessions no less favorable to trade than the status quo ante. The compensatory adjustment for the modification of a particular export duty commitment might take various forms, such as reductions in import duties on specific products, or commitments to cut domestic subsidies in specific sectors. If no agreement can be reached, the Members 'primarily concerned' and with 'a substantial interest' would be free to withdraw substantially equivalent concessions. The result of the Art. XXVIII process would be applied to all other WTO Members on an MFN basis. See *supra* text at notes 51-53.

address some of the systemic issues arising from *China-Raw Materials* and the rare-earths dispute.[172]

Bringing the stand-alone commitments into the GATT framework would be an important step towards the goal of establishing a system-wide discipline on export duties. The rigid obligations imposed on the selected acceding Members reflect a strong bias against the use of export duties as a tool for economic development. Their existence, therefore, cannot but discourage other developing country Members from joining the effort to curb export restraints. For foreign policy reasons, China has supported other developing countries in their resistance to the call for a system-wide discipline, despite the fact that its economy is heavily dependent on the import of resource materials.[173] This policy, however, is short-sighted. As discussed above, the broad and long-term interest of the developing countries lies in a system-wide discipline that strikes a proper balance between the need of the importing countries to secure access to resources and the need of the exporting countries to preserve the legitimate functions of export duties. If China desires to play a greater role in WTO rule-making, it should consider taking the lead in the reform of the current irrational system on export restraints.

5 CONCLUSIONS

The current WTO regime on export restraints is irrational and badly in need of reform. The absence of a general discipline on the use of export duties leaves global production chains vulnerable to instability and unpredictability in the supply of resource materials. And the lack of security in access to critical resources creates tension and can provoke retaliation in international relations. Yet, proposals to strictly limit the use of export duties have met continued resistance from developing country Members. Unable to effect a systematic change, the WTO has

[172] Both the EU and the US have resorted to the modification of schedules to resolve the underlying issues in WTO disputes after they lost in the disputes. In *EC-Chicken Cuts* (DS269, DS286), the EU, after initially complying with the WTO rulings, launched negotiations with Brazil and Thailand under GATT Art. XXVIII, seeking to change the tariff rates mandated by the WTO rulings. See Goliath Business News, *EU/Brazil/Thailand: EU Preparing to Introduce Quotas on Chicken Cuts* (Sept. 29, 2006), available at http://goliath.ecnext.com/coms2/gi_0199-7433324/EU-BRAZIL-THAILAND-EU-PREPARING.html. In *US-Gambling* (DS285), the US never complied with the WTO ruling; instead, it modified its scheduled commitment at issue through negotiations with several Members pursuant to GATS Article XXI. See USTR, *Statement on Internet Gambling* (Dec. 21, 2007) (available at www.ustr.org).

[173] China is one of the largest importers of resources in the world. See *supra* n. 15. To secure access to resources, China has been pursuing the strategy of foreign direct investment in resource-producing countries. For statistics, see Aaditya Mattoo & Arvind Subramanian, *A China Round of Multilateral Trade Negotiations* (Peterson Institute for International Economics Working Paper Series, WP 11-22, Dec. 2011), Table 5 and Figure 5.

nonetheless required a few acceding countries to make sweeping export-duty commitments. Such commitments are fixed as stand-alone obligations outside the GATT framework, thus depriving the acceding Members of the policy space and flexibility afforded by the GATT provisions. These country-specific rules have also resulted in incoherence in WTO law and have created multiple tiers of Members with unequal rights and obligations within the WTO system.

It is submitted here that the key to beginning reform of the current regime lies in the recognition of the legitimate functions of export duties. The lack of such recognition at the systemic level is the fundamental reason why ultra-rigid obligations on export duties have been imposed on the several acceding Members. It also explains why calls for a system-wide discipline on export duties have failed to garner wide support from developing country Members. Only when the legitimate roles of export duties are duly acknowledged can the developing countries be expected to take an interest in negotiating a general export-duty discipline.

Most critically, it is necessary for the WTO to acknowledge the role of export duties in promoting the economic development of resource-producing countries. The levy of export duties allows a resource-producing country to claim a larger share in the distribution of its natural resources for domestic use. History has shown that reserving scarce resources for use by domestic producers is an effective means for developing economies to climb up the value chain. Despite criticism that such a policy has a 'beggar-thy-neighbour' effect, it is nonetheless justifiable by the principle of permanent sovereignty over natural resources. Unlike other sovereign prerogatives, the sovereign right over natural resources, which includes the right to dispose of such resources freely for developmental purposes, has been recognized as a basic human right under international law. Although the exercise of such right is without prejudice to the treaty obligations a nation undertakes of its own free will, the WTO should take care to respect this fundamental principle of international law in the design of its trade disciplines. Since the GATT already prohibits the use of non-tariff measures to restrict exports for developmental purposes, the only legitimate means a WTO Member may employ to claim a larger share in the distribution of its natural resources is through export duties. Thus, when the WTO obligates a Member to eliminate export duties on resource products, as it has done with several acceding Members, it strips away the right of that Member to dispose freely of its natural resources for developmental purposes. When such obligations are made virtually immutable, as is the case with the several acceding Members, it amounts to permanent alienation of a Member's ownership right to claim a larger share of its natural resources for domestic use. Such an arrangement is arguably inconsistent with the concept of permanent sovereignty over natural resources.

It is also important for the WTO to acknowledge the role of export duties in managing environmental externalities. When the prices of resource products do not fully reflect their environmental costs, the resource-producing country is effectively 'subsidizing' the importing countries with mispriced resources at the expense of its own environment. In such a situation, export duties set at a proper level can offset negative externalities generated by the production of the resource products sold abroad. As shown in the case of China, when a Member loses the right to impose export duties, it is required, under the non-discrimination requirements of WTO law, to share the bounty of its mispriced resource products with all foreign users, even though their environmental costs are not similarly shared. While, in theory, the most efficient way to manage such environmental externalities is to fix the regulation of the production process, for those developing countries that lack the necessary institutional capacities (poor governance) to deal with the problem at the source, taxing exports at the border remains a most practical and effective means to address the problem.

In the light of legitimate functions of export duties and their special utility for developing countries, it should become clear that the rigid obligations imposed on the acceding Members to eliminate export duties on resource products are problematic as a matter of WTO law and policy. Rather than treating export duties as more objectionable trade barriers than import duties and pushing for their elimination, the world trade system should aim to create export tariff bindings at levels appropriate for individual Members, with the goal of striking a proper balance between the need of WTO Members to have a secure and predictable access to the world's resources, and the need of the resource-producing countries to control exports as a means of achieving sustainable economic development.

In the view of this author, fortunately, there exists a relatively simple, yet effective, way for the WTO to rectify this problematic state of affairs. That is, to incorporate all stand-alone commitments of the acceding Members on export duties into their respective GATT schedules. The Russia accession has already created the first-ever GATT schedule on export concessions. China and other acceding Members should follow the Russian precedent and request that their export duty commitments be similarly incorporated into their GATT schedules. The integration of the accession commitments into the GATT framework would provide the acceding Members with the policy space and flexibility available under the existing GATT provisions, thereby correcting part of the institutional bias and ensuring a greater degree of coherence and consistency within the WTO system. This integration would not change the content and scope of the export duty commitments, and therefore would not disturb the balance of rights and obligations negotiated under the accession protocols. Due to the separate legal

existence of GATT schedules, such integration would not raise the issue of amendment to the accession protocols, which remains surrounded by legal uncertainty. The creation of several new GATT schedules on export duties would regularize the practice for recording export duty commitments, which could help set the stage for future negotiations on the binding of export tariffs on a system-wide basis.

In sum, the world needs a sensible discipline on export restraints that can ensure secure and predictable access to resource products for all, while respecting the right of sovereign nations to reserve a larger share of their natural resources for the benefit of domestic industries, and the need of developing countries to use export duties for other legitimate purposes, such as managing environmental externalities. The world trade system can provide such a discipline by regulating export duties in the same way as it has regulated import duties for the past six decades. That is, to establish the binding of export duties according to the same principles and rules as those applied to import tariffs. The rigid obligations imposed on selected acceding Members do not conform to those norms. Bringing those obligations into the GATT framework would be a first step in the reform of the WTO discipline on export restraints.

Appendix 1 Status of Export Duty Obligations of WTO Members

	WTO Member (Year of Accession)	Obligation to Eliminate Export Duties	Obligation to Bind Export Duties at Specific Rates (including 0%)	Availability of GATT Policy Exceptions	Adjustability of Export Duty Obligations
1st Tier	140+ Members	No	No	n/a	n/a
2nd Tier	Australia[1]	Yes (on a dozen types of minerals)	No	Yes (GATT schedule)	Yes
	Russia (2012)[2]	No	Yes (over 700 tariff lines)	Yes (GATT schedule)	Yes
3rd Tier	Vietnam (2007)[3]	No	Yes (8 products)	Yes (specific reference to GATT)	No
	Ukraine (2008)[4]	No	Yes (over 70 types of products)	Yes (specific reference to GATT exceptions)	No
4th Tier	Mongolia (1997)[5]	Yes (on raw cashmere)	No	No	No
	Latvia (1999)[6]	Yes (on over 50 products)	Yes (specific antiques)	No	No
	China (2001)[7]	Yes (on all except 84 products)	Yes (84 products)	No	No
	Saudi Arabia (2005)[8]	Yes (on iron and steel scrap)	No	No	No
	Montenegro (2012)[9]	Yes (on all products)	No	No	No

1 Australia's Uruguay Round Goods Schedules, AUS1-201 through AUS1-204 (available at http://www.wto.org/english/thewto_e/countries_e/australia_e.htm).

2 The Working Party Report on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70 (Nov. 17, 2011), para. 638; GATT Schedule CLXV, The Russian Federation, Part V–Export Duties, WT/ACC/RUS/70/ADD.1 (Nov. 17, 2011).

3 Report of the Working Party on the Accession of Viet Nam, WT/ACC/VNM/48 (Oct. 27, 2006), para. 260 and Table 17.

[4] Report of the Working Party on the Accession of Ukraine to the World Trade Organization, WT/ACC/UKR/152 (Jan. 25, 2008), para. 240 and Table 20(b).

[5] Report of the Working Party on the Accession of Mongolia, WT/ACC/MGN/9 (June 27, 1996), para. 24.

[6] Report of the Working Party on the Accession of Latvia to the World Trade Organization, WT/ACC/LVA/32 (Sept. 30, 1998), para. 69; Annex 3.

[7] Protocol on the Accession of the People's Republic of China, WT/L/432 (Nov. 10, 2001), para. 11.3; Annex 6.

[8] Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, WT/ACC/SAU/61 (Nov. 1, 2005), para. 184.

[9] Report of the Working Party on the Accession of Montenegro to the World Trade Organization, WT/ACC/CGR/38 (Dec. 5, 2011), para. 132.