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The Applicability of Environmental Protection Exceptions to WTO-Plus Obligations: In View of the *China – Raw Materials* and *China – Rare Earths* Cases

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Abstract

Recently, two disputes involving China's WTO-plus obligations have attracted great attention: *China – Raw Materials* and *China – Rare Earths*. In *China – Raw Materials*, China resorted to WTO environmental protection exceptions to justify its violation of the export duty elimination obligation outlined in paragraph 11.3 of the Protocol on the Accession of the People's Republic of China, which is clearly a WTO-plus obligation. However, China's recourse was rejected by the panel and then by the Appellate Body, as will probably happen in *China – Rare Earths*. This article looks into the interpretation and finding of the applicability matter in the DSB reports in *China – Raw Materials* and further discusses the general applicability issue of environmental protection exceptions to the violation of WTO-plus obligations. As rebuttal to the DSB reports, this article argues that omissions or silence in paragraph 11.3 do not necessarily mean rights waiver, especially when the right involved is the essential right to justify the violation pursuant to environmental protection exceptions provided in Article XX(b) and (g) of the GATT. Also, it is illogical to refer to GATT generally when the WTO-plus obligation in paragraph 11.3 does not have any corresponding rules in GATT. More generally, with consideration of the nature of the environmental protection exceptions in Article XX and the conclusion process of the Protocol, as well as with consideration of the sustainable development objective of the WTO and the politically sensitive matters concerned in *China – Raw Materials*, China should not be deprived of the right to defend its violation of the export duty obligation in *China – Raw Materials*. Although the discussion in this article is mainly based on China's WTO-plus obligations, its reasoning may also be extensively applied to that of other acceding members if suitable.

Key words

China; natural resources; WTO-plus obligations; environmental protection

1. Introduction

China acceded to the World Trade Organization (WTO) in 2001 after it had made a remarkable number of commitments in 15-year-long bilateral and multilateral

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negotiations with incumbent members.[1] These accession commitments are mainly contained in the Protocol on the Accession of China ('the Protocol') and the Report of the Working Party on the Accession of China ('the WPR').[2] Some of the accession commitments are detailed illustrations of already existent rules in WTO package agreements, while a significant number of the accession commitments are deeper commitments or China-specific commitments[3] which go beyond the existing rules in WTO covered agreements. The latter commitments are referred to as China's WTO-plus obligations[4] or WTO-minus rights,[5] which are binding provisions in China's Protocol and WPR that mandate more stringent requirements on China or allow less favourable treatment to China than those stipulated in the covered agreements of the WTO.

Of the 30 cases in which China is respondent, there are 24 disputes in which the complainants take the Protocol provisions as part of the legal basis for their

1 According to Article XII of the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement) and customary practices, WTO incumbent members have broad mandate to negotiate the terms of entry with acceding members. However, as the WTO Secretariat observed, 'Perhaps the most striking thing about WTO Article XII is its brevity. It gives no guidance on the "terms to be agreed", these being left to negotiations between the WTO members and the applicant. Nor does it lay down any procedures to be used for negotiating these terms, these being left to the individual Working Parties to agree'; see WTO Secretariat, Technical Note on the Accession Process (Secretariat Note), WT/ACC/7/Rev.2, 1 November 2000, at 6–7. The brevity is the root of the great varieties in accession protocols and their content. For detailed discussion about China's prolonged accession process, see R. Bhala, 'Enter the Dragon: An Essay on China's WTO Accession Saga', (2000) 15 *American University International Law Review* 1469, at 1480–1530.

2 The Protocol consists of eleven pages of concessions, nine annexes, and is in total 103 pages, while the WPR consists of 343 paragraphs, part of which are integrated into the Protocol. Paragraph 1.2 of the Protocol clearly provides, 'This Protocol, which shall include the commitments referred to in Paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement'. Therefore, all the commitments in the Protocol and those commitments contained in the paragraphs referred to in paragraph 342 of the WPR are binding concessions and commitments on China in the same way as are those obligations in the WTO covered Agreements.

3 For example, commitments to accord national treatment to foreign investors and foreign-invested enterprises in respect of all factors and conditions of production and sales, commitments to allow special safeguard measures against Chinese textiles and clothing, commitments to allow other members to take China as a non-market economy in anti-dumping and countervailing investigations, etc.

4 The term 'WTO-plus obligation' is used by the WTO Secretariat in WTO official documents, e.g. Technical Note on the Accession Process; see WTO Secretariat, Secretariat Note on Accession, WT/ACC/7/Rev.2, 1 November 2000, at 6. For a detailed introduction to the major WTO-plus obligations China undertakes in the Protocol and the WPR, see J. Y. Qin, '"WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol', (2003) 37(3) *Journal of World Trade* 483, at 491–509. Now the term 'WTO-plus obligation' is also widely used in academic articles.

5 WTO-minus provisions are used to describe those provisions in the Protocol which allow other WTO members to deviate from standard WTO rules and specifically cover China on certain issues, such as special safeguards, non-market economy status in anti-dumping and countervailing investigations, special quotas against textile and clothing products, and so on. Strictly speaking, WTO-minus provisions are different from WTO-plus provisions. WTO-minus provisions do not impose extra obligations on China like WTO-plus provisions do, but only put China in a less favourable position when certain rules of WTO covered agreements are applied. Therefore, the discussion of availability of environmental protection exceptions rarely relates to WTO-minus provisions, because WTO-minus rights are often made use of by other WTO members and there are no extra obligations involved. This article thus only analyses the availability issue of environmental protection exceptions in the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) to China's WTO-plus obligations. And if the availability issue indeed involves WTO-minus provisions in future, the reasoning and conclusions of this article can also be extended to WTO-minus provisions in the Protocol, because the nature of WTO-minus provisions and WTO-plus provisions are both specific commitments in the Protocol, separate from the GATT and the GATS.

arguments.[6] This high probability of involvement lies in the nature of the Protocol as an inherently incomplete contract between members[7] and 'the most one-sided trade deal in history'.[8] Recently, two of the 24 disputes have attracted great attention: *China – Raw Materials*[9] and *China – Rare Earths*.[10]

These two cases are quite similar. They both relate to China's export restraints on raw materials, though covering different types of raw materials. The export restraints concerned in both these cases are export duties, export quotas, minimum export price requirements, export licensing requirements, and additional requirements and procedures in connection with the administration of the quantitative restrictions. Furthermore, the General Agreement on Tariffs and Trade 1994 ('the GATT') obligations and the Protocol commitments against which the aforementioned export restraints are accused of being inconsistent are very similar.[11] While the Dispute Settlement Body (DSB) has adopted the report on *China – Raw Materials*, *China – Rare Earths* is still in the Panel process. And *China – Rare Earths* is attracting even more attention than *China – Raw Materials*, as the world now seems to be ushering in a 'Rare Earths Age'.[12] This article only discusses the WTO-plus obligation in these two disputes, China's commitment to generally eliminate export duties made in paragraph 11.3 of the Protocol, especially focusing on the applicability of GATT environmental protection exceptions to this WTO-plus obligation.

There are quite a few environmental protection-related articles in WTO covered agreements.[13] But the environmental protection exceptions only refer to Article XX(b) and (g) of the GATT, and to Article XIV(b) of the General Agreement on Trade in Services (the GATS). Environmental protection exceptions are of great importance, because they signify the dynamic balance between trade and environment within the WTO framework.

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6 Detailed information is available at www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (visited 17 February 2013).

7 There are a number of contributory factors to this incompleteness, such as China's lack of WTO regime knowledge and negotiation capacity, asymmetrical information settings, the unpredictable effect of specific terms and commitments, unforeseen contingencies, and so on. Also see S. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (2009), at 1–2.

8 These words are borrowed from former US President Clinton; see ibid. The Protocol indeed contains a large number of special provisions that elaborate, expand, modify, or even deviate from rules in existing WTO covered agreements and it concerns quite a few unique and fundamental aspects of China's trade governance regime, so it is cited very frequently in cases against China. See C. Manjiao, 'China's Participation in WTO Dispute Settlement over the Past Decade: Experiences and Impacts', (2012) 15(1) *Journal of International Economic Law* 29, at 32.

9 *China – Measures Related to the Exportation of Various Raw Materials* (*China – Raw Materials*), DS394/395/398.

10 *China – Measures Related to the Exportation of Rare Earths Tungsten, and Molybdenum* (*China – Rare Earths*), DS431/432/433.

11 Besides Arts. VIII, VIII:1, VIII:4, X, X:1, X:3, XI, and XI:1 of the GATT 1994 and Paras. 1.2, 5.1, 5.2, 8.2, and 11.3 of the Protocol which are referred to by the complainants in *China – Raw Materials*, complainants in *China – Rare Earths* additionally refer to Art. VII of the GATT 1994 and para. 7.2 of the Protocol.

12 The term 'Rare Earths Age' was used by the US National Research Council due to the worldwide exponentially expanded application of rare earths on the one hand and the ensuing international trade block of rare earths on the other hand; see National Research Council, *Minerals, Critical Minerals, and the U.S. Economy* (2008), at 19.

13 For example, Art. XX(b) and Art. XX(g) of GATT, Art. XIV(b) of GATS, Art. XXVII of TRIPS Agreement, Art. V(2)(c) of SCM Agreements, and the preambles to TBT and SPS agreements.

In *China – Raw Materials*, China resorted to Article XX(g) to defend its export duty measures on refractory-grade bauxite and fluorspar, and resorted to Article XX(b) to defend its export duty measures on magnesium scrap, manganese scrap, zinc scrap, coke, magnesium metal, manganese metal, and silicon carbide. These two recourses were both rejected by the Panel and the Appellate Body with non-applicability findings. It is foreseeable that China will resort to environmental protection exceptions in the *China – Rare Earths* case if its export duty measures are found to be against paragraph 11.3 again, so the applicability matter really deserves research.

No article of the Marrakesh Agreement Establishing the World Trade Organization ('the WTO Agreement'), including Article XII which is entitled 'Accession', expressly provides for the relationship between Accession Protocols and WTO covered agreements. Nor do Ministerial Conference or General Council give any authoritative interpretation of the relationship. Therefore, it is still uncertain whether or not environmental protection exceptions in Article XX of the GATT and Article XIV of the GATS can be resorted to as a defence for inconsistency with WTO-plus obligations. But the Panel and the Appellate Body have to answer this question by treaty interpretation in DSB cases. *China – Raw Materials* and *China – Rare Earths* will surely be showcases of the extent to which WTO-plus obligations might constrain China's environmental policy considerations within the WTO framework. This article discusses the applicability of environmental protection exceptions to WTO-plus obligations with these two cases as starting point.

There are some published articles on WTO-plus obligations and related disputes in DSB in which the applicability issue has been discussed. Professor Julia Ya Qin has published a series of articles, which have greatly inspired the writing of this article. Professor Qin suggests three working principles in the interpretation of WTO-plus obligations and gives a general affirmative answer to the applicability of Article XX of the GATT with simple analysis.[14] In a commentary article on *China – Publications and Audiovisual Products*,[15] Professor Qin considers the Appellate Body's affirmative ruling on the availability of GATT Article XX(a) to paragraph 5.1 of the Protocol as a welcome development in WTO jurisprudence, and believes the legal reasoning and announced criterion in that case are potentially capable of a broader application.[16] After the *China – Raw Materials* decision, Professor Qin specially offers insights into the WTO decision on export duty elimination commitments and criticizes the narrow textualist approach and the negative assumption from the textual silence of paragraph 11.3. Professor Qin further suggests in that article that the textual silence should be interpreted in good faith by taking the sustainable-development objects of the WTO Agreement as general guidance and by taking the negotiation and

14 J. Y. Qin, 'The Challenge of Interpreting "WTO-Plus" Provisions', (2010) 44(1) *Journal of World Trade* 127.
15 *Appellate Report China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, adopted* 19 January 2010, DS363.
16 J. Y. Qin, 'Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence: A Commentary on the China – Publications Case', (2011) 10 *Chinese Journal of International Law* 271.

conclusion process of the Protocol as a supplementary means of interpretation.[17] In another comment on the Panel Report of *China – Raw Materials*, the author generally supports the non-applicability decision, but also mentions the contradiction between the two-tier membership structure of the WTO and the fairness principle of the WTO which is not addressed by the Panel.[18] There are still articles which support and explain the non-applicability decision in *China – Raw Materials*.[19] As for *China – Rare Earths*, one article declares China has a much better chance of successfully defending its export duty measures with GATT environmental protection exceptions if the exceptions are available.[20] Another article analyses China's possible defences of environmental protection exceptions in *China – Rare Earths*, and it concludes it is still difficult for China to successfully defend its export restraints, though China's Article XX defences are likely to be more robust than in *China – Raw Materials*.[21] This article focuses on applicability issues and introduces new arguments. In the rebuttal section, this article uses DSB-decided cases to explain why omission itself is not decisive and suggests restrictive interpretation in deciding right waiver, and compares and contrasts in detail the involved obligations in different paragraphs of the Protocol and the WPR to rebut the illogical contextual interpretation in *China – Raw Materials*. In section 4, this article shows the significance of rare earths export restraints for environmental protection using the latest data, and then sets out reasons for an affirmative applicability ruling in treaty interpretation, politics, and the WTO itself respectively. This article argues that the linkage between export duty measures and China's regulation of trade in rare earths meets the criterion set in *China – Publications and Audiovisual Products*. The DSB should completely and properly apply all of the necessary interpretation elements in the Vienna Convention on the Law of Treaties (VCLT), and take into consideration the politically sensitive nature of environmental protection interests for China, the inherent values of the WTO, and the balance between free trade and environmental protection in a broader background.

This article will proceed as follows. Section 2 briefly introduces main findings on applicability issues in DSB reports on *China – Raw Materials*. Section 3 then points out deficiencies in the reports and further discusses reasonable interpretation of applicability issues in that case by means of text, context, and objective interpretation. Section 4 proceeds to examine the applicability matter in *China – Rare Earths*. On the basis of the analysis in section 3, in combination with the Chinese rare earths

17 J. Y. Qin, 'The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties: A Commentary on the China – Raw Materials Case', (2012) 11 *Chinese Journal of International Law* 237.

18 J. F. DeMedeiros, 'Case Comment: China's Export Restraints Found to Be Inconsistent with Its Obligations as a Member of the World Trade Organization', (2012) 35 *Suffolk Transnational Law Review* 203.

19 S. B. Keating and R. Bhala, 'When Are Rare Earths Raw Materials? Emerging GATT–WTO Jurisprudence on Export Restraints', (2013) 19(1) *International Trade Law and Regulation* 1; M. Matsushita, 'Export Controls of Natural Resources and the WTO/GATT Disciplines, (2011) 6 *Asian Journal of WTO and International Health Law and Policy* 281.

20 B. Gu, 'Mineral Export Restraints and Sustainable Development: Are Rare Earths Testing the WTO's Loopholes?', (2011) 14(4) *Journal of International Economic Law* 765.

21 R. Jebe, D. Mayer, and Y. Lee, 'China's Export Restrictions of Raw Materials and Rare Earths: A New Balance between Free Trade and Environmental Protection?', (2012) 44 *George Washington International Law Review* 579.

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regulation regime, this section offers insights into the reasons for availability of environmental protection exceptions to export duty obligations in paragraph 11.3. Section 5 concludes the article.

2. Findings on the applicability of environmental protection exceptions to China's WTO-plus obligations in *China – Raw Materials*

China – Raw Materials was brought to the DSB by the United States, the EC, and Mexico in 2009. The complainants identified 40 specific Chinese export restraint measures, including export duty measures, on nine types of raw materials and claimed these measures were inconsistent with Articles VIII, VIII:1, VIII:4, X, X:1, X:3, XI, XI:1 of the GATT and China's commitments under paragraphs 1.2, 5.1, 5.2, 8.2, and 11.3 of the Protocol. The obligation to generally eliminate export duties committed in paragraph 11.3 of the Protocol is a typical WTO-plus obligation, because no WTO covered agreements prohibit export duty measures.

After the Panel found that China's export duty measures violated its commitments in paragraph 11.3 of the Protocol, China resorted to Article XX of the GATT to justify its WTO-inconsistent export duty measures. Article XX is entitled 'General Exceptions' and its preamble states that 'nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures'. It is the words 'this Agreement' that make the applicability of Article XX to obligations outside the GATT an unsettled issue.

According to Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), existing provisions of WTO agreements shall be clarified 'in accordance with customary rules of interpretation of public international law'. Articles 31[22] and 32[23] of the VCLT are considered by the DSB as the required customary rules of interpretation and applied in DSB cases.[24] According to Article 31, a treaty shall be interpreted in good faith in accordance with the ordinary meaning of its terms in its context and in the light of its object and purpose. According to Article 32, recourse to supplementary means of interpretation, including the

22 The first Appellate Body report of the WTO made a timely proclamation for the purposes of the interpretation of WTO Agreements that the 'general rule of interpretation (Art. 31 of the VCLT) has attained the status of a rule of customary or general international law'; see Appellate Report United States – Standards for Reformulated and Conventional Gasoline, adopted 20 May 1996, WT/DS2/AB/R, at 15–16. All of the following Panel and Appellate Body reports follow this general rule in their interpretation.

23 Not long after introducing Art. 31 into the interpretation toolkit, the Appellate Body announced in *Japan – Alcohol* that 'Article 32 of the Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status [of customary or general international law]', see Appellate Reports *Japan – Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 9. Though not used very often, there are still cases in which the Panel and the Appellate Body use negotiation history to confirm or complement meaning resulting from the preliminary interpretation. For example, in Appellate Body *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted 6 November 1998, WT/DS58/AB/R, the Appellate Body referred to the negotiating history of Article XX to confirm its interpretation on the function of the chapeau in accordance with Article 32, at para. 157.

24 B. Mercurio and M. Tyagi, 'Treaty Interpretation in WTO Dispute Settlement: The Outstanding Question of the Legality of Local Working Requirements', (2010) 19(2) *Minnesota Journal of International Law* 275, at 298–9.

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negotiating history of the treaty and the circumstances of its conclusion, may be made if the interpretation resulting from Article 31 is still in ambiguity or absurdity.

The Panel and the Appellate Body in *China – Raw Materials* needed to make a decision on the applicability matter by interpretation in accordance with Articles 31 and 32 of the VCLT. This section introduces these relative findings.

2.1. Ordinary-meaning interpretation

As stipulated in Article 31 of the VCLT, the Panel and the Appellate Body first examined the ordinary meaning of the terms in paragraph 11.3 of the Protocol.

Paragraph 11.3 of the Protocol provides that 'China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994'.

The Panel noted that, in contrast to paragraph 5.1 of the Protocol involved in *China – Publications and Audiovisual Products*,[25] paragraph 11.3 did not include any express reference to Article XX of the GATT, or to the GATT, or to the WTO Agreement generally.[26] The Panel further explained that, while it would have been possible to include a reference generally to the GATT, or the WTO Agreement, or specifically to Article XX of the GATT, WTO members evidently decided not to do so. Therefore, the deliberate choice of language providing for exceptions such as Annex 6 and Article VIII in paragraph 11.3, together with the omission of general references to the WTO Agreement, or to the GATT, or specific reference to Article XX, suggested that the WTO members and China did not intend to incorporate into paragraph 11.3 the defences set out in Article XX of the GATT 1994.[27]

The Appellate Body upheld the foregoing findings of the Panel.[28]

2.2. Contextual interpretation

China regarded the provision of paragraph 170 of the WPR as the context for interpreting paragraph 11.3,[29] which generally refers to WTO obligations.[30] But the Panel stated that paragraph 170 was not about China's specific obligations on export duties, because it was under subsection D, 'Internal polices affecting foreign trade in goods', and thus concerned 'all fees, charges, or taxes levied on imports and exports' internally. Instead the Panel took paragraphs 155 and 156 of the WPR as the context,

25 The introductory clause of para. 5.1 of the Protocol provides 'without prejudice to China's right to regulate trade in a manner consistent with *the WTO Agreement*'. The Appellate Body interpreted this clause to mean that the justifications of Art. XX of the GATT were incorporated into para. 5.1 by way of reference and China consequently could rely on this incorporation to invoke Art. XX as a defence for a violation of para. 5.1. See Appellate Report *China – Publications and Audiovisual Products*, adopted 19 January 2010 WT/DS363/AB/R, at Para. 230.

26 Panel Reports *China – Raw Materials*, circulated 5 July 2011, WT/DS394/R, WT/DS395/R and WT/DS398/R, at para. 7.124.

27 Ibid., at para. 7.129.

28 The Appellate Body upheld almost all the reasoning of the Panel, except for the interpretation of 'exceptional circumstances' in Annex 6; see Appellate Reports *China – Raw Materials*, adopted 22 February 2012, WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R, at paras. 278–291.

29 See, China's Second Written Submission, at paras. 165–166.

30 Para. 170 provides that 'upon accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with *its WTO obligations*, including Articles I, III:2 and 4, and XI:1 of the GATT 1994'.

which were under the section entitled 'Export regulations', but neither of paragraphs 155 and 156 referred, explicitly or implicitly, to the GATT or the WTO Agreement.[31] The Panel also cited paragraphs 164 and 165 of the WPR which concern the use of quantitative restrictions to make comparison with paragraph 11.3. Paragraphs 164 and 165 both made general reference to the WTO Agreement and they were taken as evidence to prove that the silence in paragraphs 155 and 156 was what WTO members and China evidently decided to keep.[32] The Appellate Body totally upheld the above findings of the Panel.[33]

The Panel then looked at paragraphs 11.1 and 11.2[34] of the Protocol in context. The Panel observed that the phrase 'in conformity with the GATT 1994' appeared in both paragraphs 11.1 and 11.2. Because paragraphs 11.1, 11.2, and 11.3 are three sequential sub-paragraphs, the Panel considered the difference in wording between paragraph 11.3 and paragraphs 11.1 and 11.2 as evidence of a deliberate choice made by China and the WTO members.[35] The Appellate Body also upheld the above reasoning of the Panel, and further stated that the differences in the subject matter and nature of the obligations covered by these provisions[36] support the interpretation that China may not have recourse to Article XX to justify a breach of this exclusive commitment under paragraph 11.3.[37]

2.3. Objectives-and-purposes interpretation

China argued that WTO members had an 'inherent right' to regulate trade, 'including using export duties to promote non-trade interests'[38] such as environmental protection interests in *China – Raw Materials*, which is one of the basic non-trade interests respected by the WTO.

The Appellate Body observed that the first recital of the preamble of the WTO Agreement did parallel the objective 'allowing for the optimal use of the world's resources in accordance with the objective of sustainable development' with other various trade and economic development objectives, but it concluded with the resolution 'to develop an integrated, more viable and durable multilateral trading system'. In the Appellate Body's view, as a whole, this language and structure in the preamble reflected the balance struck by WTO members between trade- and

31 Panel Reports *China – Raw Materials*, circulated 5 July 2011, WT/DS394/R, WT/DS395/R, and WT/DS398/R, at para. 7.143–5.
32 Ibid., at para. 7.146.
33 Appellate Reports *China – Raw Materials*, adopted 22 February 2012, WT/DS394/AB/R, WT/DS395/AB/R, and WT/DS398/AB/R, at paras. 293–298.
34 Para. 11.1 provides that 'China shall ensure that customs fees or charges applied or administered by national or sub-national authorities shall be in conformity with the GATT 1994', while para. 11.2 provides that 'China shall ensure that internal taxes and charges, including value-added taxes, applied or administered by national or sub-national authorities shall be in conformity with the GATT 1994'.
35 Panel Reports *China – Raw Materials*, circulated 5 July 2011, WT/DS394/R, WT/DS395/R, and WT/DS398/R, at para. 7.138.
36 Para. 11.3 deals with export duties and charges which arise exclusively from the Protocol, while paras. 11.1 and 11.2 deal with customs fees or charges and internal taxes and charges which are import measures also regulated by the GATT.
37 Appellate Reports *China – Raw Materials*, adopted 22 February 2012, WT/DS394/AB/R, WT/DS395/AB/R, and WT/DS398/AB/R, at para. 292.
38 China's Appellant Submission, at para. 208.

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non-trade-related concerns, but neither the objectives listed above, nor the balance struck between them, provided specific guidance on the question whether Article XX of the GATT 1994 was applicable to paragraph 11.3 of the Protocol.[39] So, without any textual reference to Article XX in paragraph 11.3, the Appellate Body still found there was no basis to justify export duty measures found to be inconsistent with paragraph 11.3 or with environmental protection exceptions in Article XX(b) and (g) of the GATT.

3. Rebuttal of the inapplicability findings in DSB reports

As stated above, both the Appellate Body and the Panel concluded that the environmental protection exceptions under Article XX were not available to justify export duty measures that are found to be inconsistent with China's obligations under paragraph 11.3. This section is devoted to a critique of the interpretation approach taken by the DSB and its findings.

3.1. Omission itself does not necessarily mean rights waiver

One of the main reasons for the Appellate Body and the Panel to arrive at the inapplicability conclusion is that there is no express reference to Article XX, or the GATT, or the WTO Agreement. However, omission does not necessarily mean rights waiver.

The case *US – Anti-Dumping and Countervailing Duties*[40] may be taken as a good example. In *US – Anti-Dumping and Countervailing Duties*, China claimed that the simultaneous imposition of anti-dumping duties and countervailing duties on the same products under non-market economy methodology were 'double remedies'. The Panel found that both Article 19.4 of the Agreement on Subsidies and Countervailing Measures[41] and Article VI:5 of the GATT,[42] which were taken as context to interpret Article 19.4, mentioned only the countervailing duty on imported products while making no reference to domestic subsidy. The Panel stated that the explicit terms in which the drafters addressed the issue in these provisions demonstrated that the drafters intended to make a distinction between subsidies granted with respect to the production or manufacture of goods, and subsidies granted with respect to the export of goods. So it was the common intention of the parties to address no prohibition on the imposition of 'double remedies' in respect of domestic subsidies.[43] It seems that the Panel interpreted omission or silence in domestic subsidy as a kind

39 Appellate Reports *China – Raw Materials*, adopted 22 February 2012, WT/DS394/AB/R, WT/DS395/AB/R, and WT/DS398/AB/R, at para. 305.

40 *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, DS379.

41 Art. 19.4 provides, 'No countervailing duty shall be levied on any *imported product* in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product'.

42 Art. 6.5 provides, **'**No product of the territory of any contracting party *imported into the territory of any other contracting party* shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or *export* subsidization'.

43 Panel Report *United States – Anti-Dumping and Countervailing Duties*, circulated 22 October 2010, WT/DS379/R, at paras. 14.107–14.120.

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of intentionally negative expression. However, the Appellate Body reversed this finding and considered the reasoning of the Panel to be 'rather mechanistic, *a contrario* reasoning'.[44] Although it admitted that omissions often had meaning, the Appellate Body further stated, 'omission, in and of itself, is not necessarily dispositive'.[45] Clearly, in the Appellate Body's opinion, omission itself is not decisive, and *a contrario* reasoning is not always suitable.

Another case, *EC – Hormone*, may be used to further explain the suitable interpretation approach. In *EC – Hormone*, disagreeing with the Panel's finding to read Article 3.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures as requiring members to harmonize their sanitary and phytosanitary measures by ensuring that those measures conform with international standards, guidelines, and recommendations, the Appellate Body stated,

> We cannot lightly assume that sovereign states intended to impose upon themselves more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation ... *language far more specific and compelling ... would be necessary.*[46]

Indeed this restrictive interpretation (*in dubio mitius* approach)[47] taken by the Appellate Body in *EC – Hormone* should be applied rather than the assumption from omission[48] taken in *China – Raw Materials*. The DSB should not impose obligations on a WTO member or deprive rights of a WTO member by assumption interpretation unless it is specifically provided. Furthermore, beyond the WTO framework, in general public international law, 'the principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states',[49] due to the voluntary nature of treaties.

China, as a sovereign state, intends to undertake less burdensome obligations. The approach of interpreting questionable provisions in favour of a country's sovereignty shall be taken when there is not explicit expression otherwise. Omission, in and of

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44 Appellate Report *United States – Anti-Dumping and Countervailing Duties*, adopted 25 March 2011, WT/DS379/AB/R, at para. 567.

45 The Appellate Body cited another Appellate Body Report in this point, see Appellate Reports *Canada – Certain Measures Affecting the Automotive Industry*, adopted 19 June 2000, WT/DS139/AB/R, WT/DS142/AB/R, at para. 138.

46 Appellate Reports *European Communities – Measures Concerning Meat and Meat Products*, adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, at para. 70.

47 This interpretative reasoning to interpret limitations to sovereignty narrowly in case of doubt is traditionally called restrictive interpretation, or, more descriptively, restrictive interpretation in favour of state sovereignty; see I. Brownlie, *Principles of Public International Law* (2008), at 635.

48 The Panel stated, 'it is reasonable under these circumstances to *assume* that, were GATT Art. XX intended to apply to Paragraph 11.3 of China's Accession Protocol, language would have been inserted to suggest this relationship', which assumed that the omission led to the waiver of the right to have recourse to GATT Art. XX. See Panel Reports *China – Raw Materials*, circulated 5 July 2011, WT/DS394/R, WT/DS395/R, and WT/DS398/R, at para. 7.154.

49 See R. Jennings and A. Watts (eds.), *Oppenheims' International Law*, Vol. 1 (1992), at 1278. To further explain the application of the principle of *in dubio mitius*, R. Jennings and A. Watts state,

> If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or which involves less general restrictions upon the parties.

itself, is not specific and compelling enough as a waiver of the right to recourse to general exceptions, and the assumption that the absence of reference language means that China and other members intended to deprive China of its right to recourse to general exceptions at conclusion time is erroneous.

Furthermore, whether or not something is implied in the silence also depends on what the something is.[50] In *China – Raw Materials*, the something implied by the Panel and the Appellate Body is general exceptions which, pursuant to GATT, can be taken as defences for the violation of all the other GATT obligations on trade liberalization. As the Appellate Body stated in *China – Publications and Audiovisual Products*, the WTO Agreement and its annexes discipline the exercise of each member's inherent power to regulate trade, and WTO members' regulatory measures may be WTO-consistent in one of two ways, either by complying with affirmative obligations of the WTO Agreement and its annexes, or by justifying the contravention under an applicable exception.[51] Thus general exceptions are so significant for all the members that they should not be insulated from China's commitments by the inference from silence in paragraph 11.3.

3.2. Silence is understandable because there are no corresponding export duty elimination rules in the WTO Agreement

The other main reason for the Panel and the Appellate Body to arrive at the inapplicability conclusion is that paragraph 11.3 contains no reference to other provisions of the GATT except for Article VII, while WTO members have on occasion incorporated GATT Article XX or generally the GATT into other covered agreements or concessions by cross-reference. However, it is not reasonable to compare export duty commitments with other obligations and concessions mentioned in the reports in this way.

Export duty concessions arose exclusively from the Protocol. This fact was repeatedly affirmed by the Panel and the Appellate Body in *China – Raw Materials*.[52] Since there is no general obligation for the elimination of export duties in the GATT,[53] it is thus illogical to refer to the GATT generally in Article 11.3. In *China – Raw Materials*, the Panel and the Appellate Body compared paragraph 11.3 of the Protocol with paragraphs 5.1, 11.1, and 11.2 of the Protocol and paragraphs 164 and 165 of the WPR. But commitments made in those paragraphs are all quite different

50 R. Gardiner, *Treaty Interpretation* (2008), at 145.

51 Appellate Report *China – Publications and Audiovisual Products*, adopted 19 January 2010 WT/DS363/AB/R, at paras. 222–223. Some scholars read it as that exceptions set out in Art. XX are 'inherently' available to members to justify a derogation of a WTO obligation, and further arrive at the conclusion that the availability of such policy exceptions can only be contracted away by explicit treaty provisions rather than mere silence. See J. Pauwelyn, 'Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report in China – Audiovisuals', (2010) 11(1) *Melbourne Journal of International Law* 119, at 128–33; Qin, *supra* note 16, at 293–4.

52 Similar expressions can easily be found in the Panel Reports and the Appellate Body Reports, such as Panel Reports *China – Raw Materials*, circulated 5 July 2011, WT/DS394/R, WT/DS395/R, and WT/DS398/R, at para. 7.138; Appellate Reports *China – Raw Materials*, adopted 22 February 2012, WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R, at paras. 292–298.

53 Principally, WTO members are not required to eliminate export duties. See M. Matsushita, T. J. Schoenbaum, and P. C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy* (2006), at 593–4.

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from that in paragraph 11.3, because they all have corresponding provisions in the WTO Agreement.

First, paragraphs 11.1 and 11.2 deal with general customs fees or charges and general internal taxes and charges respectively, which are both a kind of repeat and emphasis of already existent obligations in the GATT rather than concessions to any WTO-plus obligations, so it is normal to provide for 'in conformity with the GATT 1994' in these two paragraphs. Furthermore, paragraphs 11.1 and 11.2 are quite concise in language, while the GATT has more detailed provisions on the application and administration of customs fees or charges and general internal taxes and charges.[54] Therefore the expression 'in conformity with the GATT 1994' is really necessary to make the content of the concessions in paragraphs 11.1 and 11.2 more certain, given that all the relevant obligations in the GATT are incorporated into these two paragraphs in this way and then can be taken if necessary to help interpret these two paragraphs. On the contrary, the export duty concession arose exclusively from the Protocol, which has no corresponding obligation in the GATT, so it is illogical for paragraph 11.3 to make general reference to the GATT.

The only GATT article mentioned in paragraph 11.3 is Article VIII. However, Article VIII, which is entitled 'Fees and Formalities Connected with Importation and Exportation', as the Appellate Body stated, 'expressly excludes export duties'.[55] So paragraph 11.3 should be read in two parts: on the one hand, all of the export taxes should be eliminated unless specifically provided for in Annex 6 (Products Subject to Export Duty) of the Protocol; on the other hand, all of the export charges, not export taxes, should be eliminated unless applied in conformity with the provisions of Article VIII of the GATT. As for export duty concessions, there is absolutely no reference to the GATT, and this is thus logically in conformity with the above reasoning.

Second, the Panel and the Appellate Body also compared paragraphs 155 and 156 of the WPR, which were considered as the corresponding paragraphs to paragraph 11.3 of the Protocol, with paragraphs 164 and 165 of the WPR which concern the use of quantitative restrictions on exportation.[56] But, as noted earlier, because export duty concessions are exclusive to the Protocol, normally paragraphs 155 and 156 should not contain general reference to 'the WTO Agreement' like paragraphs 164 and 165 whose main content is a detailed emphasis of already existent obligations in WTO covered agreements.

Additionally, in accordance with paragraph 1.2 of the Protocol and paragraph 342 of the WPR, not all of the paragraphs in WPR are incorporated into the Protocol and then have not become an integral part of the WTO Agreement.[57] Paragraphs 155,

54 Typically, GATT Art. I and Art. VIII are on the application and administration of customs fees or charges, while GATT Art. III is on the application and administration of internal taxes and charges. Besides, there are still more articles related to these obligations in the GATT.

55 Appellate Reports *China – Raw Materials*, adopted 22 February 2012, WT/DS394/AB/R, WT/DS395/AB/R, and WT/DS398/AB/R, at para. 289.

56 Paras. 164 and 165 are mainly concerned with the export licence which is provided in Arts. VIII, XI, and XIII of the GATT.

57 See *supra* note 2.

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156, and 164 are not contained in paragraph 342, so they are not equal to paragraph 11.3 in legal status, and thus it is not suitable to use these paragraphs by way of comparison to help interpret paragraph 11.3.

Third, although paragraph 5.1 and paragraph 11.3 are both concerned with WTO-plus obligations, there are still differences between them in their relations with the GATT. Export duty commitments in paragraph 11.3 arise exclusively in paragraph 11.3,[58] while right-to-trade commitments in paragraph 5.1 have much closer relations with WTO covered agreements.[59] Paragraph 5.1 of the Protocol and paragraphs 83 and 84 of the WPR target China's examination and approval system on the right to trade, which were considered by the Working Party on the Accession of China to be in violation of existing WTO obligations.[60] Paragraphs 5.1, 83, and 84 also make reference to Article III of the GATT 1994, schedule of commitments of GATS, import licensing, Agreement on Technical Barriers to Trade (TBT), and Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), quite differently from paragraph 11.3 of the Protocol which cites only Article VIII of the GATT. Right-to-trade commitments in paragraph 5.1 are classified as WTO-plus obligations on the grounds that China promises in paragraph 5.1 to progressively liberalize the availability and scope of the right to trade to all enterprises in China within three years after accession except for those goods listed in Annex 2A to the Protocol. This is much more than the GATT Article XVII obligation which only generally requires members to allow state trading upon notification. But as for the right to trade itself, it is something also dealt with by the covered agreements of the WTO. Therefore, it is natural for paragraph 5.1 to contain language 'without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement' to avoid leakage in citing already existent WTO rules.[61] Conversely, this is not the case for export duty commitments, which arise exclusively in paragraph 11.3, so it is also natural for paragraph 11.3 to make no reference to the WTO Agreement.

The fact that China's obligations to eliminate export duties arise exclusively from the Protocol was taken by the Panel and the Appellate Body as the reason for negative assumption.[62] However, this fact can also be taken as the reason for no reference to

58 Current WTO covered agreements do not impose the obligation of export duty elimination on members. In the Doha Round, members have also deleted export duties from non-agriculture market access negotiation. See the Negotiating Group on Market Access, 'Fourth Revision of Draft Modalities for Non-Agricultural Market Access', 6 December 2008, TN/MA/W/103/Rev.3, www.wto.org/english/tratop_e/markacc_e/namachairtxt_dec08_e.doc (visited 16 October 2012).

59 As the Appellate Body stated, 'We see the obligations assumed by China in respect of trading rights, which relate to traders, and the obligations imposed on all WTO members in respect of their regulation of trade in goods, as closely intertwined'. See Appellate Report *China – Publications and Audiovisual Products*, adopted 19 January 2010, WT/DS363/AB/R, at para. 226.

60 Para. 80 of the WPR.

61 There is another view which takes this general reference text in para. 5.1 as a logical error. It states, 'since State trading monopolies are permitted under the GATT, China's right to maintain such monopolies is necessarily prejudiced by its trading rights commitments', so it is illogical to stipulate 'without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement'. See Qin, *supra* note 16, at 296–7.

62 As para. 292 of the Appellate Report reads that China's obligation to eliminate export duties arises exclusively from China's Accession Protocol, and not from the GATT 1994, we consider it reasonable to assume that, had

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the WTO Agreement in paragraph 11.3, because there are no corresponding rules to make references, which is different from the conditions of paragraphs 5.1, 11.1, and 11.2. The comparison made by the Panel and the Appellate Body is unreasonable and thus the further negative conclusion based on the comparison is unacceptable.

3.3. It is the preamble to the WTO Agreement that affirms the environmental protection interest of members

The Appellate Body recognized the significance of the environmental protection interests of members and actually accepted environmental protection as an essential element of the sustainable-development objective. The Appellate Body used them for object-and-purpose interpretation which is stipulated in Article 31 of the VCLT, but still denied China's recourse right in Article XX(b) and (g) of the GATT, with the argument that the preamble provides no specific guidance on the applicability question when paragraph 11.3 has no textual reference to Article XX.[63]

Undoubtedly, the preamble to the WTO Agreement, by its nature, is general, so the broad objects in the preamble can never provide specific guidance on the applicability of the environmental protection exceptions in Article XX to paragraph 11.3 obligations. It is definitely a misunderstanding of the role of 'object and purpose' in treaty interpretation to seek specific guidance from the object rather than in the light of the object, while Article 31 of the VCLT stipulates interpreting 'in the light of' object and purpose.[64] And as discussed previously, it is illogical to make textual reference to the GATT or the WTO Agreement generally when export duty commitments in paragraph 11.3 have no corresponding rules in the GATT or the WTO Agreement, while Article XX has never been textually referred to in the Protocol.

In accordance with paragraph 1.2 of the Protocol, each of the commitments in the Protocol should be an integral part of the WTO Agreement. The WTO Agreement, including the Protocol, thus disciplines the exercise of China's inherent power[65] to regulate trade by requiring China to comply with the obligations it has assumed. However, it is the preamble to the WTO Agreement that affirms its sustainable-development objective and the environmental protection interests of members, which are essential elements of sustainable development.[66] The preamble can be deemed as a declaration of the inherent right for all members to balance their environmental protection interests and trade obligations, including those obligations undertaken in the Protocol.

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there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in para. 11.3 or elsewhere in China's Accession Protocol.

63 Appellate Reports *China – Raw Materials*, adopted 22 February 2012, WT/DS394/AB/R, WT/DS395/AB/R, and WT/DS398/AB/R, at para. 305.

64 See Qin, *supra* note 17, at 231.

65 This inherent power stems from sovereignty, which is also affirmed by the DSB. See Appellate Report *China – Publications and Audiovisual Products*, adopted 19 January 2010 WT/DS363/AB/R, at para. 222.

66 The concept of 'sustainable development' has been generally accepted as integrating economic and social development and environmental protection. See G. Handl, 'Sustainable Development: General Rules versus Specific Obligations', in W. Lang (eds), *Sustainable Development and International Law* (1995), 35. Also see World Commission on Environment and Development, *Our Common Future* (1987), at 43.

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The free-trade doctrines indeed underpin the WTO.[67] But the WTO regime also respects the trade regulation sovereignty of its members, and leaves some issues, such as environmental protection, public morals, and culture, to members' internal domestic policy, mainly in the form of general exceptions in the GATT Article XX and the GATS Article XIV. General exceptions preserve the fundamental rights of a member to safeguard important public policies and non-trade values from being infringed upon by its obligations under the WTO. Therefore, general exceptions apply to all of the GATT and GATS obligations, including even the basic rules of general most-favoured-nation treatment (MFN) and national treatment (NT). The supreme status of general exceptions is based on its nature as the last resort of members within the WTO framework, which maintains the delicate balance of the whole WTO regime. Environmental protection exceptions, including Article XX(b) and Article XX(g) of the GATT and Article XIV(b) of the GATS, are the essential parts of the aforementioned general exceptions and thus enjoy the supreme status. Furthermore, environmental protection exceptions relate directly to the sustainable-development objective of the WTO Agreement. China is thus entitled to take into consideration its environmental protection interests when it performs its commitments in the Protocol, and further resort to environmental protection exceptions to justify its violation of commitments in the Protocol. Only this systematic interpretation conforms to the objective of developing 'an integrated, more viable and durable multilateral trading system'.[68] The DSB shall not ignore the WTO's multiple objectives in promoting the comprehensive welfare of the world in its interpreting activity, including the applicability issue here.

In conclusion, it is understandable and logical that paragraph 11.3 does not make general references to the GATT or the WTO Agreement, because there is no corresponding obligation provided in the WTO Agreement. Furthermore, because the extremely significant rights of recourse to GATT Article XX are concerned, the silence of paragraph 11.3 shall not be simply assumed as a rights waiver. As an integral part of the WTO Agreement, the Protocol should be interpreted in the light of the sustainable-development objective of the WTO Agreement according to which China has the inherent right to consider environmental protection interests in performing commitments in the Protocol. Textual references are not necessary for the application of environmental protection exceptions, and China should not be deprived of the recourse right because of the omission in paragraph 11.3.

4. The applicability of environmental protection exceptions to WTO-plus obligations in *China – Raw Materials*

The United States, the European Union (EU), and Japan requested consultations with China about its export restraints on various forms of rare earths, tungsten, and molybdenum, very soon after the adoption of DSB reports on *China – Raw*

67 See N. Goldstein, *Globalization and Free Trade* (2007), at 8–11.
68 The fourth paragraph of the preamble to Agreement Establishing the World Trade Organization.

Materials.[69] This *China – Rare Earths* case refers to materials falling under no less than 212 eight-digit Chinese Customs Commodity Codes and over 30 measures. The DSB established a single panel to examine this dispute on 23 July 2012 and then the director-general composed the panel on 24 September 2012 as requested by the three complainants. Insofar as export duty measures are concerned, they are claimed to be inconsistent with paragraph 11.3 of the Protocol. Undoubtedly, if the export duty measures are found to contravene paragraph 11.3, China will attempt to justify its export duty measures using again the environmental exceptions in Article XX; this approach has already been rejected once by the Panel and the Appellate Body in *China – Raw Materials*.

As noted earlier, China's predicament stems from its special commitment to eliminate export duties. Different from quantitative restrictions on exports, export duties are principally permitted by the WTO, and all the efforts to restrict export duties have been confronted with resistance from WTO members, because some members regard the flexibility to restrict exports as an essential right for maintaining sovereignty over natural resources and for developing domestic downstream industries.[70] However, China did make commitments on export duties in the Protocol as part of the conditions for its accession to the WTO. Then, like the condition in *China – Raw Materials*, whether or not China can resort to environmental protection exceptions to defend its export duty measures on rare earths is critical for China.

Section 3 of this article discussed some questionable points in the DSB Report on *China – Raw Materials* and concluded that China should not be deprived of its inherent right to resort to environmental protection exceptions to defend its exclusive commitments made in the Protocol. This section attempts to further analyse points other than the applicability matter in *China – Raw Materials* discussed in section 3.

4.1. Export duties and environmental protection interests in *China – Rare Earths*

In *China – Raw Materials*, there are close and genuine relations between China's export duty measures and its environmental protection interests.

Trade liberalization is the major goal of the WTO regime. But natural resources trading is based on a pre-distorted trade structure. Developing countries have long exported minerals; developed countries have long imported them, even though some of those developed countries, including the United States, have abundant mineral reserves within their own territories.[71] The rare-earths trade typically follows this structure.

China has been the biggest exporter of rare earths for a long time. As the EU asserted, 'China accounts for 97 percent of world production of rare earths, 91 percent of global production of tungsten and 36 percent of global production of

69 The DSB reports on *China – Raw Materials* were adopted on 22 February 2012, while the consultation was initiated on 13 March 2012.
70 Qin, *supra* note 17, at 239.
71 Gu, *supra* note 20, at 765–8.

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molybdenum'.[72] Statistically, about 30–36 per cent of rare-earths resources and reserves lie in China,[73] but China supplies approximately 95 per cent of global demand.[74] Conversely, the United States, Japan, and the EU are all great importers and Japan absorbs half of China's export.[75] China's viable reserves of rare earths are limited. As indicated by the Chinese government, China's reserves of medium and heavy rare earths have severely decreased with the stark disproportion of reserve and supply, and will be exhausted in 15–20 years if not controlled.[76] In a mineral-competitive world, China definitely has the incentive to take measures to protect its exhaustible natural resources, among which export restrictions play a big role. Rare earths, tungsten, and molybdenum, the minerals involved in *China – Raw Materials*, are all among the ten strategic minerals listed by Chinese government.[77] China has taken compound measures to restrict exports of these minerals ever since 2001,[78] including export duties. At the minimum, export duty measures seemingly coincide with the objective of Article XX(g) of the GATT,[79] whose goals are to conserve exhaustible natural resources.

Another important reason for export restraints is the desire for environmental protection. The procedures for mining and processing rare earths are highly energy consuming and polluting. Rare earths concentrate radiation, which is harmful to people's health, and residues from rare-earths mining are damaging to local environments.[80] The environment and ecosystems around mining areas in China have been severely deteriorated by disorderly exploitation of rare earths, and local inhabitants have thus had to be relocated. For example, according to the report of the State Environmental Protection Administration of China published in April 2012, in Ganzhou alone, which is rich in rare earths and tungsten, there are 302 deserted rare-earths mines, 191 million tons of mining tailings, and 97.34 square kilometres of destroyed mountain forest, and the estimated cost for contamination control is an astonishing RMB38 billion.[81] China has adopted export restraints with the intention of reducing these risks to human, animal, or plant life or health arising from the

72 D. Pruzin, 'WTO Director-General Appoints Panelists to Rule on China Rare Earths Complaints', (2012) 29 *International Trade Reporter*, at 1584.

73 See www.cs-re.org.cn/modules.php?name = News&file = article&sid = 320 (visited 19 August 2012).

74 See J. Korinek and J. Kim, 'Export Restrictions On Strategic Raw Materials and Their Impact on Trade and Global Supply' (2009) OECD Trade Policy Working Paper No. 95, at 19–20, www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_oecd2_e.pdf (visited 19 August 2012).

75 See www.mofcom.gov.cn/aarticle/ae/ah/201011/20101107247803.html (visited 19 August 2012).

76 The Ministry of Commerce of China (MOFCOM), 'China's Rare Earths Reserve Will Be Used up in 20 Years', news.xinhuanet.com/mil/2010–10/17/c_12668271.htm (visited 19 August 2012).

77 MOFCOM, 'Ten Rare Metals Are Put into Consideration for Strategic Stockpiles', www.mofcom.gov.cn/aarticle/o/dh/201011/20101107226067.html (visited 20 August 2012).

78 See United States Department of Energy, 'Critical Materials Strategy', www.energy.gov/news/documents/criticalmaterialsstrategy.pdf (visited 20 August 2012), at 32.

79 Many documents declare this resources conservation objective. For example, the Ministry of Land and Resources has expressly stated in its notifications that the purpose of planned mining is to conserve and to reasonably use China's superior resources.

80 The United States, once the world's leading rare-earths producer, now rarely mines rare earths, largely because of environmental and cost concerns. See '"Rare Earths" Fears Spur US Review', *Financial Times*, www.ft.com/cms/s/o/ofdd6c48-c990–11df-b3d6–00144feab49a.html#axzz18WR9D8wL (visited 20 August 2012).

81 See business.sohu.com/20120420/n341085748.shtml (visited 20 August 2012).

chaotic mining of these resources,[82] and protecting human, animal, or plant life is a recognized interest of members in Article XX(b).

Comparatively, Article XX defences are even more significant for China, and the probability of succeeding in recourse to environmental exceptions in *China – Rare Earths* must be higher than that in *China – Raw Materials*. Not only does China state its environmental protection purposes explicitly and repeatedly in its recent legal documents, but additionally China has already taken comprehensive domestic measures together with export regulation measures to minimize environmental and health effects, including the six types of alternative measures discussed in the Panel Report of *China – Raw Materials*. Generally, the package of measures serving environment protection objectives at the same time has three prongs – regulating mining, restricting mining, and supply and demand, which includes export supply and demand. Differing from the condition in *China – Raw Materials*, there is evidence showing that China is imposing actual restrictions on the domestic production, supply of, and demand for rare earths in line with conservation and environmental protection objectives,[83] and that these restrictions are well implemented and having an obvious effect.[84] Export restraints, including export duties, which are important components of the Chinese government's environmental policies to regulate export supply and demand, were referred to as the easiest and most effective way to conserve a mineral by some delegates in the GATT 1947 drafting negotiations.[85] Due to the serious conditions in China, including the sharp decrease of viable reserves and already existent terrible environmental damage, export duties, as part of the compound measures, must be implemented together with domestic production, and restrictions must be used to suppress the continuing deterioration. More importantly, unlike the condition in *China – Raw Materials*, China is unable to realize its environmental protection interests without export restraints, since now approximately 60 per cent of its output is exported overseas and world demand is still growing. Therefore, export restraints are necessary. Export restraints must be imposed parallel to domestic restraints, and only then can the balanced application of these two kinds of restraint lead to the environmental protection outcome. Furthermore, among various existing export restraint measures challenged in *China – Raw Materials*, export duties are considered to be more transparent,[86] and thus more

82 Regulations clearly state their objective of human, animal, and plant life health protection in their preambles. See, e.g., the Circular Regarding Promotion of Sustainable and Healthy Development of Rare Earths Industries (State Council (2011)12) and the National Standards Regarding Emissions of Rare Earths Industrial Pollutants (Ministry of Environmental Protection of China (2011)5).

83 There are quite a few new legal documents and policies on domestic rare earths mining, production, and supply restrictions. See, e.g., State Council, 'Situation and Policies of China's Rare Earth Industry' (June 2012); Accession Requirements for Rare Earths Industry (Ministry of Industry and Information Technology (2012) 33).

84 See Jebe, Mayer, and Lee, *supra* note 21, at 637–8. For example, there are continuous environmental inspections on rare-earths producers, along with mineral exploitation regulating campaigns, to ensure the effectiveness of those restrictions.

85 See GATT Doc. E/PC/T/A/PV/25 (1947), at 29.

86 Qin, *supra* note 14, at 158.

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acceptable,[87] than those quantitative export restrictions such as export quotas. It is unfair and ridiculous to reject environmental protection exceptions recourse for export duty measures only because of the elimination of export duties as a WTO-plus obligation in the Protocol. But the recourse is available to quantitative restraints measures because the elimination of quantitative restraints is an obligation stipulated in the GATT. This different treatment may provide an impetus for China to move from export duty measures to quantitative restriction measures, which is not the transfer the WTO and its members desire.

In conclusion, export restraint measures relate closely and genuinely to environmental protection in *China – Raw Materials*, and export duty measures are an essential part of the compound measures taken by China to realize the environmental protection objective. In comparison with the conditions in *China – Raw Materials*, the claims in Article XX are even more important to China, and China has stronger reasons to impose export duties in *China – Raw Materials* with the intention of protecting the environment. China should be given the chance to use Article XX(b) and Article XX(g) to defend its export duty measures, although its export duty measure may still finally fail to fulfil the elements of environmental protection exceptions.

4.2. The applicability of environmental protection exceptions to WTO-plus obligations in *China – Rare Earths*

As discussed in section 3, the interpretative approach taken by the DSB and its findings of inapplicability in *China – Raw Materials* are unreasonable and unacceptable, and cannot be taken as grounds to deprive China of its inherent right to resort to environmental protection exceptions to defend the exclusive commitments made in the Protocol. In *China – Raw Materials*, this recourse right shall be respected.

First, export duty measures have a clearly discernible, objective link with China's regulation of trade in rare earths, tungsten, and molybdenum.

The discernible, objective link criterion was set out in *China – Publications and Audiovisual Products* by the Appellate Body as the critical criterion to decide the applicability of Article XX exceptions to commitments in the Protocol and the WPR.[88] The phrase 'in a manner consistent with the WTO Agreement' in the preamble of paragraph 5.1 is the direct reason to constitute such a linkage between the measures at issue and the regulation of trade in goods in *China – Publications and Audiovisual Products*, but it does not mean textual reference is necessary to establish the linkage. Conversely, the necessary objective link can be established through careful scrutiny of the nature, design, structure, and function of a measure, in conjunction with the

87 About one-third of members of the WTO imposed export duties on some products, including the United States and Canada. See C. Barfield, 'How to Address the Issue of Measures Restricting Exports of Raw Materials', trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140944.pdf (visited 27 February 2013).

88 The Appellate Report reads, 'whether China may, in the absence of a specific claim of inconsistency with the GATT 1994, justify its measure under Article XX of the GATT 1994 must in each case depend on the *relationship between the measure* found to be inconsistent with China's trading rights commitments, on one hand, *and China's regulation of trade in goods*, on the other hand'; see Appellate Report *China – Publications and Audiovisual Products*, adopted 19 January 2010 WT/DS363/AB/R, at para. 229.

regulatory context within which the measure is situated.[89] As noted in section 3, without any corresponding provision for export duties in the GATT or the WTO Agreement, it is not reasonable to require textual reference to specific provisions of the GATT or general reference to the GATT or the WTO Agreement in paragraph 11.3. Furthermore, export duty measures undoubtedly form part of a broader regime regulating trade in rare earths, tungsten, and molybdenum, and help realize China's trade regulation target on these strategic materials. The nature, design, structure, and one of the functions of export duty measures is to regulate and restrict the exporting of rare earths, tungsten, and molybdenum, and there is surely a close relationship and objective link between export duty measures and trade regulation.

Second, the sustainable-development objective recognized in the preamble to the WTO Agreement may be taken as the basis for China's recourse to environmental protection exceptions.

Constituting a kind of positive response to the establishment of a sustainable-development principle in the international community, the WTO regime and WTO judiciary have taken into account substantial considerations of the environmental protection interests of members. Even though the Panel and the Appellate Body insist on the strict interpretation of 'this agreement', the sustainable-development objective and environmental protection interests recognized in the preamble to the WTO Agreement can still be taken as grounds for China's recourse to the environmental protection exceptions in Article XX. Because it is explicitly provided in paragraph 1.2 of the Protocol that each of the commitments in the Protocol shall be an integral part of the WTO Agreement, and also because it is the preamble of the WTO Agreement that affirms the sustainable-development and environmental protection interests of members, and parallels these non-trade values with trade liberalization, China, as a WTO member, is entitled to balance its environmental protection interests and trade obligations and further resort to environmental protection exceptions to justify its violation of commitments on trade liberalization in the Protocol. Here environmental protection exceptions in Article XX are considered to be a kind of description of members' minimum environmental protection interests stated in the preamble to the WTO Agreement. Export restrictions were considered to be permitted for the preservation of scarce natural resources by delegates in the drafting meetings for Article XX(g).[90] Furthermore, the finite natural resources concerned in *China – Raw Materials*, such as rare earths, tungsten, and molybdenum, are undoubtedly those kinds of natural resource on which, since the 1940s, the drafting parties of GATT 1947 mainly aimed to reserve rights to impose export restrictions, by means of Article XX(g).[91] Additionally, due to the high energy consumption and polluting in the procedures

89 This approach is also set in *China – Publications and Audiovisual Products* by the Appellate Body; see Appellate Report *China – Publications and Audiovisual Products*, adopted 19 January 2010 WT/DS363/AB/R, at para. 230.

90 See, eg, GATT Doc. E/PC/T/A/PV/25 (1947), at 29–30; GATT Doc. E/PC/T/A/PV/30 (1947), at 6; GATT Doc. E/PC/T/C.II/QR/PV/5 (1946), at 79.

91 Discussion in its drafting meetings mainly focused on 'raw materials', 'minerals', and their products, though biological resources were also mentioned. See GATT Doc. E/PC/T/C.II/QR/PV/5 (1946), at 30, 79; GATT Doc. E/PC/T/A/SR/40(1) (1947).

for mining and processing rare earths, tungsten, and molybdenum, and the high percentage of exports of these natural resources, export restrictions are essential for the protection of human, animal, and plant life or health stipulated in Article XX(b).

Furthermore, it is worth mentioning that members enjoy the inherent right to protect and preserve the environment in a manner consistent with their respective needs and concerns at different levels of economic development, which is also declared in the first recital of the preamble of the WTO Agreement. China is entitled to choose the measures to protect the environment, and then try to justify the measures found to be inconsistent with its commitments in the Protocol with environmental protection exceptions, including its export duty commitments. At the minimum, the exceptions should be available, no matter what is the result of recourse.

Third, taking into consideration the nature of environmental protection exceptions and the conclusion process of the Protocol, China should not be deprived of the right to resort to environmental protection exceptions due to omission or silence in paragraph 11.3. General exceptions are to ensure that a member's commitments under the WTO framework do not hinder its pursuit of important public policies and non-trade values, so the right to resort to general exceptions shall not be easily assumed to be waived on the basis of omission or silence. Insofar as environmental protection exceptions are concerned, they are not only explicitly contained in Article XX and thus considered to be two of the supreme reserved public policies of members, but they also intertwine with the commonly accepted principle of permanent sovereignty over natural resources in general public international law.[92] It is the very nature of environmental protection exceptions that necessarily decides that China's recourse right to these exceptions cannot be deprived without explicit waiver.

Paragraph 11.3's silence on its relations with GATT may be explained in several ways, but one of the reasons may rest in its negotiation process. The Protocol is mainly accumulated from bilateral negotiations between China and 36 incumbent members which claimed to negotiate with China in the accession process. Unlike the GATT and WTO multilateral negotiations, in which diverse interests among members could be expected to provide the checks and balances necessary to produce carefully drafted rules, in the bilateral accession negotiations, whether a particular term was well negotiated and carefully drafted would depend not only on the bargaining power of the negotiation parties, but also on the level of legal sophistication and competence of their negotiation teams and the quality of their domestic decision-making processes.[93] Unfortunately, due to a lack of complete understanding of the WTO framework or adequate legal capacity in negotiation, plus the eagerness to be a member of the WTO, China accepted quite a few loosely drafted provisions and terms in the Protocol, including paragraph 11.3. Because of the supreme significance of the

92 According to this principle, nations have permanent sovereignty to freely dispose of natural resources for domestic economic development. Although a nation may voluntarily undertake international obligations to restrict the exercise of this right, just as Abi-Saab once put it, 'sovereignty is the rule and can be exercised at any time' and 'limitations are the exceptions and cannot be permanent, but limited in scope and time'. See Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order, UN Doc. A/39/504/Add.I (1984).

93 See Qin, *supra* note 17, at 232–3.

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environmental protection exceptions, it is not difficult to imagine that if parties had explicitly discussed whether the export duty commitments should be entitled to a recourse right to general exceptions in accession negotiations, China would have firmly insisted on the recourse right, and the insistence would not have been opposed by incumbent members, as there is absolutely no systemic or policy reason to deny the applicability of these exceptions to China's export duty commitments.[94] The inclusion of explicit references to Article XX or general references to the GATT and the WTO Agreement in subsequent acceding members' export duty commitments[95] are probably drafting improvements learned from China's recourse problem, and act as strong evidence to prove the willingness and acceptance of both acceding and incumbent members to allow for the recourse to Article XX to justify the violation of export duty commitments. The omission must come from negligence in negotiation, so this deficiency shall not lead to negative consumption.

Fourth, the right to restrict exports of natural resources has already been involved in politically sensitive areas, and China's fundamental public policies in resource conservation and environmental protection need to be respected.

China, as a WTO member, must accept all the WTO covered agreements which have already governed broad areas of domestic economic activity, including areas traditionally regarded by most countries as among the most sensitive.[96] In addition, as an acceding member, China has undertaken even broader commitments in its lengthy and complex accession documents, and thus increasingly faces legal challenges in politically sensitive areas rooted in its WTO-plus obligations, such as censorship policy,[97] economic sovereignty over the export of natural resources, and environmental protection interests.[98] China is in the high range of adherence to WTO rules,[99] and also implements DSB reports quite well.[100] But it is not difficult to anticipate that the *China – Raw Materials* case will be another great challenge. On

94 Similar opinion can be found ibid., at 234–5.

95 See, e.g., the WTO Working Party Reports on the Accession of Ukraine and Russia.Ukraine promised to apply export duties only to the goods listed in Table 20(a) and to reduce export duties in accordance with the binding schedule contained in Table 20(b), with an explicit plus reference to exceptions 'unless justified under the exceptions of the GATT 1994'. See Report of the Working Party on the Accession of Ukraine to the World Trade Organization, WT/ACC/UKR/152, at para. 40. Russia also promised to reduce its export duties according to Table 32 the Working Party on the Accession of Russia to the World Trade Organization. Russia confirmed to apply its export duty commitments 'in conformity with the WTO Agreement' and to administer its export tariff rate quotas 'in a manner that is consistent with the WTO Agreement and in particular the GATT 1994 and the WTO Agreement on Import Licensing Procedures'. See Report of the Working Party on the Accession of Russia to the World Trade Organization, WT/ACC/RUS/70, at para. 638. Russia acceded to the WTO on 16 December 2011, when the *China – Raw Materials* case had attracted great world intention and China had already been refused recourse to environmental protection exceptions by the Panel on the ground that there was no textual reference to the GATT or the WTO Agreement.

96 See P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005), at 77–90.

97 In *China – Publications and Audiovisual Products*, China defended that its restrictions on entities permitted to import publication and audiovisual products were necessary for the government to efficiently carry out its content review and censorship policy and were then necessary to protect public morals, which is one of the general exceptions provided in Article XX (a) of the GATT.

98 *China – Raw Materials* and *China – Rare Earths* both involve these sensitive areas.

99 It is clearly shown in trade policy review reports conducted by the WTO Trade Policy Review Body. See, e.g., Secretariat, Trade Policy Review Report 20 July, WT/TPR/S/264/Rev.1.

100 China has implemented all the DSB reports in which China are respondents without any further disputes about implementation, even in those cases concerning politically sensitive measures. See also S. E. Kreps and

the one hand, the right to dispose freely of natural resources not only is a state sovereignty right, but also has been recognized as a basic human right for all peoples.[101] Therefore, to deprive China the right to resort to the natural resources conservation exception in Article XX(g) for the violation of its export duty commitments[102] would be likely to incur ultra-nationalist reactions from the public, especially when export duties are arguably an area of 'under-regulation' or 'regulatory deficiency' in general WTO law[103] and when those forms of export restraint on minerals are commonly taken by other WTO members.[104] On the other hand, both the Chinese government and the public have been aware of the environmental harm surrounding natural resource mining and processing, and Chinese citizens have increasingly taken collective action to fight against those anti-environment projects.[105] The increasing environmental protection awareness has sparked the desire of the Chinese government to introduce a series of comprehensive export and domestic control measures,[106] among which export duties are quite essential.[107] The Article XX(b) right recognizes WTO members' legitimate non-economic policy goal to protect human, animal, and plant life or health,[108] and to deprive China of the right to invoke Article XX(b) as a defence in *China – Rare Earths* thus could have catastrophic consequences for China which may provoke even greater protest from the public.

WTO members are motivated by their self-interest,[109] so the WTO may have its members effectively observe its rules only if WTO members can internalize both the costs and the benefits of their behaviour.[110] In this regard, depriving China of this right would also produce a major challenge to the WTO. China indeed needs the rules-based WTO system to secure its rights to market access for exports, but in

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A. C. Arend, 'Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes', (2006) 16(33) *Duke Journal of Comparative & International Law* 331, at 383–6.

101 1966 International Covenant on Civil and Political Rights, Arts. 1.2 and 47; 1966 International Covenant on Economic, Social and Cultural Rights, Arts. 1.2 and 25.

102 P. L. Hsieh, 'China's Development of International Economic Law and WTO Legal Capacity Building', (2010) 13(4) *Journal of International Economic Law* 997, at 1031.

103 B. Karapinar, 'China's Export Restriction Policies: Complying with "WTO Plus" or Undermining Multilateralism', (2011) 10(3) *World Trade Review* 389, at 392–4.

104 J. Korinek and J. Kim, 'Export Restrictions on Strategic Raw Materials and Their Impact on Trade and Global Supply', (2009) OECD Trade Policy Working Paper No. 95, www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_oecd2_e.pdf (visited 22 August 2012), at 6.

105 For example, on 28 July 2012, nearly 100,000 citizens of Qidong city (subordinated to Nantong) joined the protest march against the drainage tube project of OJI Paper Group which had already been approved by Nantong municipal government to locate in Qidong.

106 China continuously introduces new measures with the purpose of environmental protection. See M. Schofield, '2011 Review: Environment', (2011) 1105 *Tax Journal* 21, at 23.

107 For a more detailed discussion on the effect of export duties, see R. Piermartini, 'The Role of Export Taxes in the Field of Primary Commodities', www.wto.org/english/res_e/booksp_e/discussion_papers4_e.pdf (visited 22 August 2012).

108 All states, including WTO members, undertake the responsibility to ensure the right to health and life of their nationals and to safeguard a healthy environment in the world today, which is the background for the introduction of Article XX(b) exception. See T. Meron, *The Humanization of International Law* (2006), at 451.

109 A. O. Sykes, 'International Law', in A. M. Polinsky and S. Shavell (eds), *Handbook of Law and Economics*, Vol. 1, (2007), at 757–68.

110 For more analysis on the observance and breach choice, see Harvard Law Review Association Note, '(In)efficient Breach of International Trade Law: The State of the "Free Pass" after China's Rare Earths Export Embargo', (2011) 125(2) *Harvard Law Review* 602, at 604.

the meantime the WTO also needs China to be a truly global and effective system.[111] Export duty commitments would be the most special obligation within the WTO system if they are held to be immune from environmental protection exceptions, and the rejection would probably arouse public resistance in China against the WTO. At the very least, China should be given the chance to resort to environmental protection exceptions, because it would be much more acceptable even if its defence using environmental protection exceptions fails in the end.

Finally, in addition to all of the above arguments, there is still broader background for an affirmative finding on the recourse right.

It is observed that the WTO judiciary has interpreted GATT Article XX broadly and in a manner more sensitive to the environment.[112] It is worthy of mention that all of these changes in the WTO judiciary take place against the macro background that environmental protection interests have been highly respected and commonly recognized in the international community. Within the WTO regime, textually, unlike the preamble of GATT 1947, the first recital of the preamble to the WTO Agreement clearly recognizes the objective of sustainable development, and specifically mentions optimal use of the world's resources and environmental preservation in a manner consistent with members' respective needs and concerns at different levels of economic development. At the macro level, the sustainable-development principle has been established worldwide. The United Nations (UN) Conference on Environment and Development (UNCED) held in 1992 is the benchmark for the establishment of the sustainable-development principle and the five documents adopted in the UNCED – the Rio Declaration on Environment and Development, Agenda 21, the UN Framework Convention on Climate Change, the UN Convention on Biological Diversity, and the Statement of Principles for the Sustainable Management of Forests – all contain provisions about sustainable development. Just as the director-general of GATT, Arthur Dunkel, explicitly acknowledged in his presentation in 1992 UNCED, trade is not an end in itself but rather a means to an end – which is environmentally sustainable economic development.[113] Thus, the changes taking place in the WTO regime and the WTO judiciary are a realistic response to the aspirations of the international community in sustainable development and environmental protection rather than fortuitous events.[114] Certainly, this is not and it will not be a temporary phenomenon.

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111 Just as Mike Moore, the director-general of the WTO in 2001, said, 'With China's Membership, the WTO will take a major step towards becoming a truly world organization. The near-universal acceptance of its rules-based system will serve a pivotal role in underpinning global economic cooperation'. See also J. H. Jackson, 'The Impact of China's Accession on the WTO', in D. Z. Cass, B. G. Williams, and G. Barker (eds.), *China and the World Trading System: Entering the New Millennium* (2003), at 24–5.

112 C. Tran, 'Using GATT, Art. XX to Justify Climate Change Measures in Claims under the WTO Agreements', (2010) 27 *Environmental and Planning Law Journal* 346, at 349–54.

113 It comes from Arthur Dunkel's preliminary presentation on 11 June 1992 to 1992 UNCED. See E. B. Weiss, 'Environment and Trade Partners in Sustainable Development: A Commentary', (1992) 86(4) *American Journal of International Law* 728, at 728.

114 In late September 2012, United Nations Conference on Trade and Development (UNCTAD) announced a new forum to meet biannually to address increasing disputes involving conflicts between global trade rules and environmental measures adopted at the national level.

The changes that have taken place in the WTO regime and the WTO judiciary have become a favourable background for China's recourse to environmental protection exceptions, while trade restraints necessary to ensure environmentally sustainable development are more likely to be respected in the WTO judiciary by resorting to environmental protection exceptions.

However, despite having taken into account greater consideration of environmental protection, the WTO has still been criticized for favouring resource-intensive production methods instead of promoting a growth model conducive to sustainable development.[115] Within the WTO framework, just as stated in the preamble to the WTO Agreement, trade and environmental policies are mutually supportive, and policies in favour of sustainable development should be encouraged, especially for those developing members whose economy and society are in transition.[116] Further, trade and the environment are an essential topic in the Doha Round negotiation,[117] with the purpose to 'deliver a triple-win in terms of trade, environment and development'.[118] In this regard, as a developing member, China's efforts towards sustainable development and environmental protection should be encouraged, and China should not be deprived of the chance to justify its violation of export duty commitments purely because they are WTO-plus obligations in the Protocol.

5. Conclusion

For historical reasons, the WTO treaty structure is exceedingly complex and the relationship between the provisions of different WTO agreements is not always clear. This is partly the reason for the uncertainties in applicability of environmental protection exceptions to WTO-plus obligations.

Without explicit provision on the applicability issue, the DSB still has to give answers in submitted cases. However, the interpretation practices of the DSB are inconsistent and not always acceptable. This article has pointed out deficiencies in the DSB reports on *China – Raw Materials*, and further set out reasons for an affirmative decision on the applicability issue in *China – Raw Materials*.

Furthermore, in the even more elementary sense, the two-tier membership structure and the less-than-equal status of acceding members contradict the equality values of the WTO which are the intrinsic philosophy underlying the WTO regime and the universal moral values solidifying self-interest-driven members. The two-tier membership means that WTO members are clearly divided into two groups, original

115 P. Lamy, 'The WTO's Contribution to Global Governance', in G. P. Sampson (eds), *The WTO and Global Governance: Future Directions* (2008), 42. An introduction of academic criticism can also be found in R. Jebe, D. Mayer, and Y. Lee, 'China's Export Restrictions of Raw Materials and Rare Earths: A New Balance between Free Trade and Environmental Protection?', (2012) 44 *George Washington International Law Review* 579, at 584–5.

116 P. Milkias, *Developing the Global South* (2010), at 136–7.

117 Draft Ministerial Declaration, 14 November 2001, WT/MIN(01)/DEC/W/1, docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/min01/DECW1.doc (visited 26 August 2012), at para. 31.

118 Report by the Chairman of Committee on Trade and Environment in Special Session, Ambassador M. A. J. Teehankee to the Trade Negotiation Committee, 21 April 2011, TN/TE/20, docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/tn/te/20.doc (visited 26 August 2012), at paras. 13–14.

members and acceding members. Original members only undertake obligations in covered agreements with a single undertaking whose purpose is to create equal conditions for competition in trade. However, acceding members, in addition to the obligations in covered agreements, have to endure tortuous accession negotiations and thus often have no choice but to agree to undertake additional substantive obligations and accept less favourable treatments. All of the acceding members are put in such difficult positions, with the differences only in degree, so generally we can say that acceding members have a less-than-equal status.[119] Those WTO-plus obligations and WTO-minus rights are clearly not reciprocal but discriminatory by nature and are conceptually and institutionally problematic in the light of the equality values of the WTO, and thus further lead to the fragmentation of WTO rules among different members and destroy the equal-competition legal platform which the WTO aims to construct and maintain. Furthermore, this two-tier membership structure and the less-than-equal status of acceding members present conceptual challenges to the rule of law of the WTO and the underlying values and principles of the WTO. When there is no solution found in the stipulated rules of the WTO, as an indication of judicial activism, the DSB may take a systematic and multifaceted approach that is conducive to the coherence and integrity of the WTO legal system and the WTO intrinsic values to replace the seemingly neutral, strict textualist approach currently employed. Restrictive interpretation, as a value-orientated interpretation approach, may be used as an additional interpretation approach to supplement customary interpretation rules in the VCLT when there is still uncertainty.

China, as an acceding member, was pressed to accept exceptionally unfavourable, non-reciprocal, and asymmetric terms of membership, with many non-standard terms and deficiencies in the Protocol. There is the choice before the DSB to either take advantage of those vague terms and deficiencies in non-reciprocal WTO-plus obligations in an uncompromising manner, or to treat China as an equal pillar of this global system, and thus gradually attempt to mitigate the discrimination in those WTO-plus obligations in a flexible manner. As for the applicability matter, if a restrictive interpretation approach is taken, because of the contradictory nature of WTO-plus obligations to the intrinsic values of the WTO and the fundamental nature of environmental protection exceptions, in order to safeguard the equilibrium of rights and obligations and the end values of the WTO, China should not be deprived of the basic and essential right to resort to environmental protection exceptions to justify its violation of WTO-plus obligations unless there is an explicit waiver.

In an age of growing interdependence, it is in the interests of all the members to construct a more balanced and mutually beneficial trade relationship among members, which is also crucial for the long-term development and integrity of the WTO. Environmental protection exceptions are designed to preserve the fundamental right of a member to safeguard its environmental protection non-trade values, which are an essential bottom line for each member. Therefore to deprive

119 Here the term 'less-than-equal Member' is borrowed from an article of Xiaohui Wu, see X. Wu, 'No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization', (2011) 10 *Chinese Journal of International Law* 227, at 239.

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China of this critical right would make its WTO-plus obligations the most 'sacred' obligations in the WTO framework,[120] which would arouse intense opposition from China and possibly from other acceding members. An operational middle route is thus necessary. This article attempts to push a change in the approach to interpretation. Although the discussion of applicability in this article is mainly based on China's WTO-plus obligations, its reasoning may also be extensively applied to the obligations of other acceding members if suitable.

120 Here the word 'sacred' is borrowed from an article of Julia Yaqin, see Qin, *supra* note 17, at 234.

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