

THREE LESSONS ON THE CONSTRUCTION OF EXPORT CONTROLS UNDER WTO LAW

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Export controls are gradually emerging as a source of contention within the World Trade Organisation ('WTO') law. Resource-exporting developing countries are increasingly finding it difficult to reserve the use of commodities and mineral resources for domestic purposes and downstream development due to the obligations imposed by the General Agreement on Tariffs and Trade ('GATT') framework and WTO law. The problem is further exacerbated by the unclear guidelines and the overwhelming import-orientation of the provisions regulating international trade within the GATT/WTO framework. This article synthesises three important lessons that can be gleaned by policymakers from GATT/WTO jurisprudence in the construction of export controls in order to avoid a hostile response from other WTO Members concerned about equitable and free access to resources. The article argues that, as things stand today, GATT provisions leave little room for policymakers to prefer budding domestic sectors. Any preferential policies that seek inward diversion of resources will most likely attract a challenge in the WTO Dispute Settlement Body.

I INTRODUCTION

The World Trade Organisation ('WTO') system presents a rather peculiar face when the dichotomy between import controls and export controls is explored. The WTO system regulates both forms of control, yet the overwhelming orientation of the General Agreement on Tariffs and Trade ('GATT')/WTO framework is import-focused. With imports, the GATT negotiators set out to cut barriers on imports except for duties and taxes (under GATT art XI), supplemented by the conduct of systematic trade negotiations to determine bound tariff levels (under art XXVII bis). The same scheme was then replicated, although in less specific terms, for export controls. Thus, future rounds of multilateral trade negotiations were expected to reduce both import and export tariffs following GATT fundamentals under art I (on non-discriminatory treatment) and art X (transparent and reasonable application of tariffs). In short, the assumption was (and still is) that all GATT norms applicable to imports will be extended to exports as well. Resultantly, GATT arts XIII (on the administration of quotas), XX (general

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exceptions to GATT/WTO obligations), and XXI (exceptions on security grounds) will apply mutatis mutandis to export controls.

The GATT negotiators devoted all of their energies towards devising a framework that bound import tariffs. However, no such framework exists for binding export controls. The same position was maintained throughout all rounds of multilateral trade negotiations, leading to a significant reduction in tariff levels.

Export controls pose several structural and systemic challenges for countries that seek to use them. First, there are no export-specific GATT/WTO norms that can guide users on legitimate construction. On paper, it seems that WTO Members have a free rein to impose export controls. Secondly, GATT discipline on export controls does not distinguish between export tariffs and export restrictions in that these measures are genetically the same, and prohibitively high tariffs are the equivalent of an export ban. Hence, some commentators view as questionable the effectiveness of GATT art XI.¹ Thirdly, the WTO system is organised to reflect concerns about access to market and reduction of market barriers. Little attention has been devoted to access to supply, which is reflected in the distinct lack of regulatory disciplines on export controls.² This issue reflects industrial transition and shifting economic capacities of trading nations that previously focused on the export of primary resources but which are now increasingly climbing the ladder of domestic value addition. While GATT Contracting Parties were initially mindful of the inevitable industrial transition,³ no consensus was achieved during earlier rounds of multilateral trade negotiations due to disagreements on sovereignty over natural resources and trade commitments.⁴ In hindsight, leaving the issue of

¹ Julia Ya Qin, 'Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection' (2012) 46(5) *Journal of World Trade* 1147, 1150; Mitsuo Matsushita, 'Export Controls of Natural Resources and the WTO/GATT Disciplines' (2011) 6(2) *Asian Journal of WTO & International Health Law & Policy* 281, 288; John H Jackson, William J Davey and Alan O Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economics* (West Group, 3rd ed, 1995) 946.

² Baris Karapinar and Kateryna Holzer, 'Legal Implications of the Use of Export Taxes in Addressing Carbon Leakage: Competing Border Adjustment Measures' (2012) 10(1) *New Zealand Journal of Public International Law* 15, 17.

³ The earliest reflection of the inevitable need for diversification in the export baskets of trading nations comes in the form of art 55 of the *Havana Charter* for the establishment of an International Trade Organisation. See UN Conference on Trade and Employment (Havana, Cuba), UN Doc E/Conf. 2/78 (1948) (21 November 1947–24 March 1948) <https://www.WTO.org/english/docs_e/legal_e/havana_e.pdf>.

⁴ The GATT Secretariat recognised these difficulties in a background note during the Uruguay Round. See *Export Restrictions and Charges*, GATT Doc MTN/GNG/NG2/W/40 (8 August 1989). At para 6, we see the explicit admission by the Secretariat that importing countries were interested in securing access to supplies, while exporting countries expressed their dissatisfaction on grounds of sovereignty over their natural resources or due to lack of parallel restrictions on imports.

export controls unresolved proved to be an error on the part of the GATT Contracting Parties because many developing countries (eg South Korea, Malaysia, China and India) later graduated to higher value-added sectors and, in doing so, became a competitive threat to developed countries.

Rising use of export tariffs by developing countries⁵ resulted in import-dependent developed economies in the European Union ('EU') renewing calls for reform of the export controls discipline within the GATT/WTO framework.⁶ However, the reform proposals received no support from resource-exporting developing countries. Note that these proposals pre-dated the two WTO disputes involving China⁷ that illustrate the growing insecurity of advanced economies in accessing raw materials for value-added manufacturing.

From initial concerns that were mostly ignored or swept under the carpet, export controls have begun to assume a different posture in the multilateral trading system. The motivations have evolved beyond base concerns of sovereignty over natural resources to include environmental conservatism, sustainability and assurance of guaranteed supply to domestic consumers. The latter consideration, for example, is illustrated through the measures adopted by the Australian Government in 2017 to ensure diversion of adequate gas supply by multinational corporations engaged in mining, extraction, refinement and export of liquefied natural gas from Australia to Asian economies.⁸

Paragraph 13 also reveals that there was no consensus on export restrictions being considered an urgent issue during the Tokyo Round, even when developing countries voiced their concern over the attempts to link export and import controls. Paragraph 15 further sheds light on Australia, Canada and India's aims to balance exports and imports, especially in the light of the need to ensure adequate supplies for the development of domestic industries.

⁵ See generally WTO, *Trade in Natural Resources World Trade Report* (2010) [1-252] <https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report10_e.pdf>.

⁶ European Communities ('EC') made a submission in which it argued for a 'revised approach' that would 'represent a shift from a general prohibition of export taxes, albeit with exceptions based on GATT rules, to the establishment of rules on transparency and predictability based on WTO objectives, concepts and principle'. Under this approach, the EC suggested notification by the WTO members of the introduction of any new, or the modification of existing, export taxes, along with the binding of export taxes on non-agricultural products (which includes natural resources) in the WTO Members schedule of concessions at a negotiated level. See European Communities, *Market Access for Non-Agricultural Products: Revised Submission on Export Taxes*, WTO Doc TN/MA/W/101 (17 January 2008) [9].

⁷ Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc WT/DS431/AB/R (7 August 2014) ('China—Rare Earths'); Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Doc WT/DS394/AB/R (30 January 2012) ('China—Raw Materials').

⁸ The stated measure is referred to as the Australian Domestic Gas Security Mechanism ('ADGSM') and is enforced through a threat of export quotas unless gas companies divert a pre-determined proportion of their output for domestic use in order to stabilise local price levels. See, generally, Australian Government, Department of Industry, Innovation and Science, *Australian Domestic Gas*

This article represents a synthesis of WTO jurisprudence on export controls. By extracting the insights harvestable from different Appellate Body and panel reports, the article highlights three lessons that policymakers and trade officials can learn from the development of the GATT/WTO jurisprudence on export controls.

The article does not adopt a reform-oriented position.⁹ Instead, it focuses on clarifying and elucidating the actual lessons that policymakers can learn from the extant WTO jurisprudence on export controls. Policymakers can then adapt the lessons to gauge the effectiveness and feasibility of any proposed export-control

Security Mechanism (1 July 2017) <<https://www.industry.gov.au/regulation-and-standards/regulating-australia-resource-projects/australia-domestic-gas-security-mechanism>>.

⁹ Suggestions for reform remain in suspended animation until WTO Members achieve a consensus going forward — a difficult proposition indeed given the current hostility in the global trading climate due to United States ('US')–China tensions. Nevertheless, there are several commentators such as Julia Ya Qin, Mitsuo Matsushita, Alejandro Gonzalez Arreaza and Baris Karapinar who have offered suggestions for reforming the area. Qin calls for streamlining the WTO/GATT framework on export controls by eliminating the distinction between acceding countries and the original GATT contracting parties. See, eg, Qin (n 1) 1147–90. Matsushita advocates general reform of the WTO disciplines on export controls during the multilateral trade negotiations or, alternatively, adopting an informal approach within the Committee of Trade in Goods by agreeing how to moderate the use of export controls. Even though an informal approach would be non-binding, Matsushita argues that it will inform the conduct of dispute settlement panels and the Appellate Body in interpreting various GATT provisions on export controls. See, eg, Mitsuo Matsushita, 'Export Control of Natural Resources: WTO Panel Ruling in the Chinese Export Restrictions of Natural Resources' (2011) 3(2) *Trade, Law And Development* 267; see also Matsushita (n 1) 281–312. In a well-argued recent contribution to the area, Arreaza highlights WTO's cold response to China's claim of absolute sovereignty over its natural resources. Arreaza calls for a reformed interpretation of terms such as 'sustainability' and 'conservation' in the light of the need of developing countries to determine their own policies rather than be dictated by GATT/WTO norms. See Alejandro Gonzalez Arreaza, 'Natural Resource Sovereignty and Economic Development in the WTO in light of the Recent Case Law involving Raw Materials and Rare Earths' (2017) 26 (3) *Review of European, Comparative and International Environmental Law* 266. Baris Karapinar extensively examines the regulatory effects of export controls in his calls for reform. He emphasises the effects of export controls on price levels and the accessibility of natural resources in the pre-*China–Raw Materials* period. He suggests reform on the Chinese end of the spectrum, keeping in view the 'nature of environmental externalities': 'China's Export Restriction Policies: Complying with "WTO plus" or Undermining Multilateralism' (2011) 10(3) *World Trade Review* 389 ('China's Export Restriction Policies'). Additionally, Karapinar suggests revision in GATT art XI to provide analytical measures or working criteria to define the 'essentialness of a product'. He further suggests the introduction of 'clearer regulation' on export duties applied across the membership in order to address complications resulting from WTO-plus commitments of the acceding members similar to Qin's recommendations referred to above. See Baris Karapinar, 'Defining the Legal Boundaries of Export Restrictions: A Case Law Analysis' (2012) 15(2) *Journal of International Economic Law* 443 ('Defining the Legal Boundaries of Export Restrictions'). Karapinar also proposes tariffication of all export restraints but advocates flexibility for environmental considerations, including optimisation through Carbon export taxes. See Baris Karapinar, 'Export Restrictions and the WTO Law: How to Reform the Regulatory Deficiency?' (2011) 45(6) *Journal of World Trade* 1139, 1149–55.

measures. It will further enable a contrast against any indirect welfare costs and benefits as a result of restraining exports.

Following this Introduction, the article presents three succinct ‘lessons’ in Parts II, III and IV, respectively. The First Lesson builds upon the much-debated ‘necessary’ and ‘essential’ criteria found within the GATT art XX exceptions. The outcomes of recent disputes in the WTO reinforce the historical trend that WTO Members tend to view export controls as exceptional. Thus, WTO Members are inclined to couch their use of export controls within the confines of the exceptions found under GATT art XX. The Second Lesson derives principally from China’s peculiar actions in the export-control space. Since China is under WTO-plus obligations due to its Accession Protocol, policymakers can ignore the China-specific outcomes of decisions such as *China–Rare Earths* and *China–Raw Materials*, but they will have to understand the implications of GATT, art XI:2(a), which specifically deals with the rights of WTO Members to enact export or import restrictions during times of shortage. The discussion here especially highlights the semantic distinction drawn by the WTO Appellate Body in *China–Raw Materials* between the terms ‘short supply’ and ‘shortage’. The Third Lesson features a brief discussion of the notion of sovereignty of WTO Members over their natural resources, especially concerning the diversion of resources to assist in downstream development. It is argued that WTO pays lip service to the ideals of assisting developing countries in developing higher value-added sectors and that the WTO Members are required to achieve ‘balance’ between oft-competing imperatives of environmental conservation, sustainability and free trade. Resultantly, the downstream developmental agenda featuring inward diversion of finite resources pursued by developing countries may fail to take off simply due to the requirement imposed by the chapeau of GATT art XX and the requirement under art XX(g) to make the restrictions effective in conjunction with restrictions on domestic consumption. Part V of the article concludes.

II THE FIRST LESSON: DECIPHER THE ‘NECESSARY’ AND ‘ESSENTIAL’ CRITERIA BEFORE ENACTING EXPORT CONTROLS

For a WTO Member to construct measures that *prima facie* derogate from the GATT norms, it must justify its measures under general exceptions (GATT art XX) or security exceptions (GATT art XXI). The general exceptions under GATT art XX do not make the task of policymakers easy. GATT/WTO jurisprudence uses terms such as ‘necessary’, ‘essential’ and ‘related to’ in order to establish the causal connection between the derogatory measures and the general exceptions.

The term ‘necessary’ has been considered mostly in the context of import regulations in WTO disputes. Before *China–Rare Earths* and *China–Raw Materials*, the discussion of ‘necessity’ and ‘necessary’ shows a systematic pushing of boundaries by the dispute settlement panels and the Appellate Body. The

standards established in the disputed regulation of imports were later debated in *China–Rare Earths* and *China–Raw Materials* in connection with China's export controls. It is at this stage that we learn that the application of standards previously developed for import regulations can also be applied for export controls.

The application, however, is not straightforward because a review of GATT/WTO disputes demonstrates that the terms 'necessary', 'essential' and 'related to' each harbour varying weights and sub-themes. At the higher end of the scale rests 'necessary' and 'essential', while the term 'related to' is considered relatively easier to satisfy.¹⁰

A *The General Treatment of 'Necessary'*

In the pre-WTO era, the interpretation of the term 'necessary' was obtuse. For example, in *United States–Section 337*,¹¹ the dispute settlement panel adopted a twofold position. First, the panel stated that a GATT-inconsistent measure would not be deemed 'necessary' if a reasonable alternative measure that is not GATT-inconsistent existed. Secondly, if GATT-consistent measures were not available, the imposing GATT Contracting Party had to employ measures that posed the least degree of inconsistency with other GATT provisions.¹² Greater clarity began to emerge in the WTO era.

The case that clarified the meaning of 'necessary' post-WTO is *Korea–Beef*,¹³ where Australia and the United States challenged Korea's measures on the importation, distribution and retailing of beef. In this dispute, Korea attempted to argue under GATT art XX(d) that its measures were 'necessary' to 'secure compliance' with its domestic retail and unfair competition laws. The panel found that Korea had failed to demonstrate that the measures were 'necessary' within the meaning of GATT art XX(d). Korea appealed the finding. The Appellate Body in its report viewed the term 'necessary' as potentially covering a scale ranging from 'indispensable' or 'absolute necessity' on the one hand, and 'making a contribution to' on the other hand.¹⁴ The Appellate Body was more inclined to rate

¹⁰ Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law: Text, Materials and Commentary* (Hart Publishing, 2nd ed, 2012) 383–7.

¹¹ See, generally, GATT Panel Report, *United States–Section 337 of the Tariff Act of 1930*, GATT Doc L/6439–36S/345 (7 November 1989) ('*US–Section 337*').

¹² Ibid [5.26].

¹³ Appellate Body Report, *Korea–Various Measures on Beef*, WTO Docs WT/DS161, DS169/AB/R (11 December 2000) ('*Korea–Beef*').

¹⁴ Ibid [161].

‘necessary’ at the ‘indispensable’ end of the scale rather than the end of ‘making a contribution to’.

By way of contrast, the Appellate Body in *Korea–Beef* stated that the ‘relating to’ requirement under GATT art XX(g) is more flexible than the ‘necessary’ requirement under GATT Article XX(d). The Appellate Body cited the past acceptance of the measures in *United States–Gasoline*¹⁵ based on a ‘substantial relationship’ between fuel control measures and conservation of clean air.¹⁶ Similarly, the Appellate Body also accepted measures in *United States–Shrimp* based on the finding that such measures were ‘reasonably related to’ the conservation of sea turtles.¹⁷ In *Korea–Beef*, however, the Appellate Body upheld the panel’s finding that the Korean law in question was a ‘disproportionate measure not necessary to secure compliance with the Korean law’ and hence unjustified under GATT art XX(d).¹⁸

Overall, the gist of the Appellate Body’s decision in *Korea–Beef* for current purposes is that the term ‘necessary’ within the meaning of GATT art XX(d) requires a weighing and balancing of several factors. Such factors include the contribution of the compliance measure in enforcing the law in question, the importance of common interests or values protected by the law, and the impact of the law on ‘imports or exports’.¹⁹ Note that the Appellate Body recognised that laws could have a restrictive trade effect on both imports and exports, even though the case in question concerned import controls only.

Another case that added to the development of the term ‘necessary’ was *EC–Asbestos*.²⁰ The case involved French laws banning totally the use of asbestos fibers, which laws were challenged by Canada on the grounds that: (i) the laws discriminated against Canadian asbestos in favour of locally produced substitute products; and (ii) safe handling of asbestos through revised regulatory standards could achieve a similar purpose to the trade-restrictive measures adopted by France.²¹ The European Communities (‘EC’) in defence of French laws relied on an

¹⁵ Appellate Body Report, *US–Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (20 May 1996) [22] (‘*US–Gasoline*’).

¹⁶ Appellate Body Report, *Korea–Beef*, WTO Docs WT/DS161, DS169/AB/R (n 13) [161] n 104.

¹⁷ Ibid, referring to Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (6 November 1998) (‘*US–Shrimp*’) [119]–[121].

¹⁸ WTO Panel Report, *Korea–Various Measures on Beef*, WTO Docs WT/DS161, DS169/R (31 July 2000) [675], referred to by Appellate Body Report, *Korea–Beef*, WTO Docs WT/DS161, DS169/AB/R —(n 13) [174].

¹⁹ Appellate Body Report, *Korea–Beef*, WTO Docs WT/DS161, DS169/AB/R (n 13) [164].

²⁰ Appellate Body Report, *European Communities–Measures Affecting Asbestos and Asbestos Containing Products*, WTO Doc WT/DS135/AB/R (5 April 2001) (‘*EC–Asbestos*’).

²¹ WTO Panel Report *European Communities–Measures Affecting Asbestos and Asbestos Containing Products*, WTO Doc WT/DS135/R (18 September 2000) [3.380]–[3.381], [3.394].

interpretation of the term ‘necessary’ under GATT art XX(b), which enables a WTO Member to adopt measures ‘necessary’ to protect human, animal or plant life. The Appellate Body’s analysis focused on interpreting ‘reasonably available’ alternatives in order to decide the question of ‘necessity’.²² The Appellate Body stated that, since controlled use of asbestos had not been scientifically demonstrated as effective, the standard set by France to achieve its health objectives could not be met. Hence, there were no ‘reasonably available’ alternatives that France could adopt. Accordingly, the EC had demonstrated that France’s measures were necessary to protect human health under GATT art XX(b).²³

For export controls, the development of WTO jurisprudence does not stop at *EC–Asbestos*. Instead, the standard of ‘necessary’ is expected to be reinforced through an ‘effectiveness’ criterion as well. In *EC–Tariff Preferences*,²⁴ ‘necessary’ was interpreted in the context of GATT art XX(b). The EC attempted to defend the preferential treatment it extended to certain countries under the ‘Drug Arrangements’ of the Generalised System of Preferences (‘GSP’) scheme. The EC measure was held to be in violation of the most-favoured-nation (‘MFN’) obligations under GATT art I(1).²⁵ The EC justified the scheme because it promoted ‘development of alternative economic activities to replace illicit drug production and trafficking’ and, hence, the measures fell within the scope of GATT art XX(b).²⁶ The dispute settlement panel disagreed and stated that the scheme was developmental, with an emphasis on the promotion of sustainable development in developing countries, which would mean that the EC’s defence under GATT art XX(b) was invalid. The panel further considered the question of ‘necessity’, even when it had discounted the EC’s defence.²⁷ The panel cited the declining utility of GSP schemes due to global tariff reduction under WTO obligations, along with a lack of monitoring and compliance mechanisms for measuring the ‘effectiveness’ of the GSP scheme and the availability of fewer trade-restrictive options.²⁸ The panel concluded that the Drug Arrangements part of the EC GSP schemes was not ‘necessary’ to protect human life or health.²⁹ The valuable lesson for

²² Appellate Body Report, *EC–Asbestos*, WTO Doc WT/DS135/AB/R [170], [173]–[175].

²³ Ibid [174]–[175].

²⁴ Appellate Body Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R (7 April 2004) (‘*EC–Tariff Preferences*’).

²⁵ Ibid [191].

²⁶ WTO Panel Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (1 December 2003) [4.92]–[4.99].

²⁷ Ibid [7.211], citing Appellate Body Report, *Korea–Beef*, WTO Docs WT/DS161, DS169/AB/R (n 13) [161].

²⁸ WTO Panel Report, *EC–Tariff Preferences*, WTO Doc WT/DS246/R (n 24) [7.219]–[7.223].

²⁹ Ibid [7.223].

policymakers from *EC–Tariff Preferences* is that if a country adopts export controls and then seeks to justify it under the ‘necessary’ standard, the measures must be proven as useful to the achievement of the stated goals. The second observation that policymakers must consider is that GATT art XX(b) cannot be used for justifying a developmental agenda because the panel distinguished between the use of ‘necessary’ under a sustainability imperative and the importance of a stated measure to achieve a goal.

The term ‘necessary’ received further treatment in *Brazil–Retreaded Tyres*,³⁰ where the subject was Brazil’s ban and penalties on importing, marketing and dealing with retreaded tyres. Brazil’s regional trading partners in the Mercosur regime received exemptions. Brazil cited the ‘necessary’ argument under GATT art XX(b) and (d). The case illustrates the acknowledgement by the WTO that WTO Members have the right to determine the level of protection according to their public policy.³¹ The Appellate Body endorsed the panel’s finding that the import ban on retreaded tyres could be provisionally justified.³² The panel ‘weighed and balanced’ the contribution of the import restrictions in the context of the stated objective of the Brazilian policy. After considering the alternatives suggested by the EC, the panel stated that the suggested measures did not constitute ‘reasonably available’ alternatives to the import restrictions.³³ The Appellate Body in *Brazil–Retreaded Tyres* further noted that even where the contribution of the measure is not immediately observable, the measure could still be considered ‘necessary’.³⁴ In doing so, the WTO seems to be endorsing a position where the expectation is that the imposing Member has already undertaken a comparative analysis of the measure in the light of possible, less-trade-restrictive alternatives. At the same time, the complaining WTO Member is allowed to identify possible less-trade-restrictive measures that the responding Member could have taken. The Appellate Body’s observation in *Brazil–Retreaded Tyres* encourages policymakers to closely scrutinise factors that contribute to the overall objective of the restrictive trade measure.

The term ‘necessary’ was also debated in *China–Publications and Audio-visual Products* in the context of GATT art XX(a). The subject of the dispute revolved around measures concerning the importation and distribution of

³⁰ Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007) (*‘Brazil–Retreaded Tyres’*).

³¹ Ibid [210].

³² Ibid [212].

³³ Ibid [145], [157], [211], citing WTO Panel Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/R (12 June 2007) [7.159].

³⁴ The responding member can do so on the basis of both ‘quantitative’ or ‘qualitative’ projections. See Appellate Body Report, *Brazil–Retreaded Tyres*, WTO Doc WT/DS332/AB/R (n 30) [151].

publications and audio-visual entertainment products.³⁵ *China–Publications and Audio-visual Products* sheds light on an important insight that is later cited in *China–Raw Materials* as well, namely, that trade restrictiveness and necessity of measures have an inverse relationship, whereby the less restrictive the effect of the impugned measure, the greater the likelihood that it will be determined as ‘necessary’.³⁶ According to the Appellate Body, the imposing Member must demonstrate in its defence that the design of the impugned measure had assessed factors relevant to its ‘necessity’, which were then weighed and balanced against its restrictiveness.³⁷

The cases discussed above did not involve export controls. Nonetheless, the important message for policymakers is the understanding that the WTO has of the term ‘necessary’, which can be used to justify non-GATT-compliant measures. To summarise, the ‘necessary’ standard is based on multiple considerations that places the burden of proof upon the imposing WTO Member. These considerations include: (i) the importance of the interests or values at issue; (ii) the contribution of the measure to the objective pursued; (iii) the trade restrictiveness of the measure; and (iv) the availability of the WTO-consistent or less-trade-restrictive alternative measures. The following section discusses developments after *China–Publications and Audio-visual Products*, which shed light on the treatment of the term ‘necessary’ within the specific context of export controls.

B ‘Necessary’ versus ‘Relating to’ in the Construction of Export Controls

The cases discussed in the previous section preceded *China–Raw Materials* and *China–Rare Earths*. The findings in those two cases shed a different light on the jurisprudential treatment of ‘necessary’ under GATT art XX (b) and (d) and ‘relating to’ under GATT art XX(g).

In *China–Raw Materials*, the Appellate Body noted that China did not appeal the determination by the panel of the question of export quotas by China on certain raw materials as ‘necessary’ under GATT art XX(b).³⁸ Earlier, the panel considered the argument for China that export restrictions were ‘necessary’ because they facilitated the shift from primary production (highly polluting) to

³⁵ See, generally, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009) (*‘China–Publications and Audio-visual Products’*).

³⁶ *Ibid* [310].

³⁷ *Ibid*.

³⁸ Appellate Body Report, *China–Raw Materials* (n 7) [6] n 20.

secondary production (less polluting), and further because higher export duties will lower production rates (hence reducing pollution rates).³⁹ China cited pollution as being harmful to the health of its populace. Exceptional measures under GATT art XX(b) therefore became ‘necessary’.⁴⁰ China used *Brazil–Retreaded Tyres* to justify its measures in the light of Appellate Body comments that complex public-health challenges can sometimes only be tackled by adopting measures that may comprise multiple ‘interacting measures’. Therefore, ‘necessary’ could contribute to one of the objectives cited under GATT art XX(b).⁴¹ For the complainants, China’s measure served a different purpose of diverting raw materials for use by domestic industries.⁴²

In arriving at its decision, the panel in *China–Raw Materials* transplanted standards developed in *Korea–Beef*, *Brazil–Retreaded Tyres* and *United States–Gambling*. It stated that an environmental-protection measure or a public-health measure could not be rejected by merely pointing to a WTO-consistent or a less-trade-restrictive measure unless it is practicable or feasible for the imposing Member while providing the specified level of protection.⁴³ The panel further noted that China had selectively provided a public-health and environmental-protection explanation for export restraints on some products but not for export restraints on others.⁴⁴ The panel was at pains to explain that China cannot rely on the mere mention of the importance of controlling pollution resulting from production and export of resources in its national laws. Following a review of the language used in various rules and regulations regarding the resources sector, the panel observed that the laws did not indicate how the control of exports would contribute to decreasing pollution as part of a comprehensive environmental framework.⁴⁵ The panel found that the laws reviewed did not mention export measures as forming a part of the comprehensive environmental framework and neither did they contribute to the fulfilment of stated environmental objectives.⁴⁶ Instead, the panel noted, the indications were that China had put in place no corresponding measures for the domestic sector and had claimed that developing

³⁹ WTO Panel Report, *China–Measures Related to the Exportation of Various Raw Materials*, WTO Doc WT/DS394/AB/R (5 July 2011) (‘WTO Panel Report, *China–Raw Materials*’) [7.470].

⁴⁰ *Ibid* [7.471], [7.474]–[7.475].

⁴¹ *Ibid* [7.475].

⁴² *Ibid* [7.483], [7.499].

⁴³ *Ibid* [7.492].

⁴⁴ *Ibid* [7.496]. On inquiry, China’s response was that it offered justification for export controls where argument and evidence satisfied the terms of the particular provision. China further argued that it could not be required to justify each measure that was alleged as inconsistent with WTO norms.

⁴⁵ *Ibid* [7.510]–[7.511].

⁴⁶ *Ibid* [7.511]–[7.512].

downstream sectors would help the Chinese economy by reducing reliance on high-pollution primary activities.⁴⁷

The panel further pointed out that if China's argument were accepted, then restrictions could be justified based on economic growth, which contravenes the intent of GATT art XX(b).⁴⁸ The panel noted that export restrictions reduce the production of polluting resources, but the effect of such restrictions is that the domestic downstream sector gains access to an additional amount of resources.⁴⁹ In this context, the panel contended that China's arguments were tenable only where data on pollution for iron and steel production by the domestic downstream sector is produced for comparison, which China had not provided.⁵⁰ The panel concluded that China's export restrictions did not materially contribute to the overall objective of reducing pollution for the purpose of protecting human, animal or plant life under GATT art XX(b).⁵¹

An additional argument made by China that should be of interest to policymakers is the 'social cost' of primary production. China justified its export controls by arguing that environmental regulations are insufficient to counteract the damage caused by mining operations. China claimed that the imposition of export controls countervails the low production costs and export price of resources that otherwise cause pollution. China stated that the production and extraction costs do not consider the damage to the environment.⁵² The panel, however, observed that while export controls made exports expensive, it correspondingly made the resources cheaper for domestic users, thereby stimulating, rather than reducing, the consumption of polluting resources.⁵³

The panel questioned the utility of export restraints as a policy tool to address environmental damage. It stated that production generated by goods consumed domestically is in no way less than goods consumed overseas. The issue, therefore, 'is the production itself and not the fact that it is traded'.⁵⁴ If this argument is considered, the implication is that China, being the producer of the polluting resources, is expected to bear the burden of the pollution regardless of whether the consumption is by a foreign or domestic producer, while the foreign producer gains access to cheap resources without bearing the burden of pollution.⁵⁵ Export controls can be a feasible method to counteract environmental

⁴⁷ Ibid [7.514].

⁴⁸ Ibid [7.515]–[7.516].

⁴⁹ Ibid [7.534].

⁵⁰ Ibid.

⁵¹ Ibid [7.538].

⁵² Ibid [7.585].

⁵³ Ibid [7.586].

⁵⁴ Ibid.

⁵⁵ Qin (n 1) 1172–4; see also Karapinar, 'China's Export Restriction Policies' (n 9) 401–3.

damage because they raise the costs of production and trade in countries where institutional regulation is weak.⁵⁶ Quotas cannot be used for the same purpose because of the uncertain link between export prices and quotas.⁵⁷

In *China–Rare Earths*, the primary issue was how China’s export controls ‘related to’ the conservation of ‘exhaustible natural resources’ under GATT art XX(g). China had attempted to argue that in assessing whether a measure ‘relates to’ conservation, the design and structure of the measure must be examined, which entails an empirical study of the actual effects of the trade-restrictive measure (eg export control).⁵⁸ In response, the Appellate Body endorsed an objective methodology based on a case-by-case approach originally adopted by the dispute settlement panel.⁵⁹ The panel’s approach to the determination of the compliance of a measure with GATT art XX(g) involved a two-step process whereby a ‘holistic assessment’ of the challenged measure related to conservation is undertaken in the first instance, which is then made effective in conjunction with restrictions on domestic consumption.⁶⁰

The Appellate Body stated that an objective methodology, rather than an empirical review of actual effects, must be adopted in order to counteract any uncertainty that may arise if the measures are justified according to the ‘related to’ requirement based on the study of actual effects or the occurrence of subsequent events.⁶¹ In support of its reasoning, the Appellate Body referred to the *United States–Gasoline* decision, where it was observed that GATT art XX(g) does not provide for empirical testing in order to satisfy the ‘related to’ requirement.⁶² However, the Appellate Body also clarified that dispute settlement panels are not precluded from considering empirical evidence if causation can be shown to confirm the effects of the challenged measures.⁶³ In essence, the test for measures ‘related to’ conservation of ‘exhaustible natural resources’ involves a determination on a case-by-case basis through ‘scrutiny of the factual and legal context in a given dispute’.⁶⁴ The point for policymakers’ attention here is that empirical evidence and post-facto case studies can, at best, be used as a supplementary tool but not as the exclusive method to meet the ‘related to’ requirement within GATT art XX(g).

⁵⁶ Qin (n 1) 1172–4.

⁵⁷ Ibid.

⁵⁸ Appellate Body Report, *China–Rare Earths*, WTO Doc WT/DS431/AB/R (n 7) [5.108].

⁵⁹ Ibid.

⁶⁰ Ibid, citing WTO Panel Report, *China–Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc WT/DS431/R (26 March 2014) [7.363].

⁶¹ Appellate Body Report, *China–Rare Earths*, WTO Doc WT/DS431/AB/R (n 7) [5.112].

⁶² Ibid.

⁶³ Ibid [5.113].

⁶⁴ Ibid.

C *Interpreting ‘Essential’*

One possible justification for the imposition of export controls is the relieving of general or local shortages of materials. GATT art XX(j) reflects the flexibility afforded to WTO Members to adopt derogatory measures to relieve market shortages. The connector used in GATT art XX(j) is ‘essential’, which appears distinct from the ‘related to’ requirement under GATT art XX(g) and the term ‘necessary’ in GATT art XX(a), (b) and (d). The distinction, however, is superficial because standards used in the interpretation of ‘necessary’ are transplanted within the interpretation of ‘essential’.

In *India–Solar Cells*,⁶⁵ India attempted to defend its solar subsidies and domestic content requirements (‘DCRs’) by claiming that the challenged measures were ‘essential’ to secure and distribute products that were in short supply (solar cells and modules) in order to meet India’s growing energy needs. *India–Solar Cells* was the first case that featured the use of GATT art XX(j).⁶⁶ Hence, the dispute settlement panel and the Appellate Body’s treatment of ‘essential’ can provide policymakers with an indication of how essentiality will be interpreted in future disputes.

Predictably, the Appellate Body preferred to adopt a safe approach in explaining the meaning of ‘essential’. It did so by recalling past jurisprudence on ‘necessary’ under GATT art XX(d). The Appellate Body then laid the groundwork for extending the ‘necessary’ requirement and replicating it under the badge of ‘essential’. According to the Appellate Body, the ‘design’ and ‘necessity’ factors under GATT art XX(d) are also relevant *mutatis mutandis* under GATT art XX(j).⁶⁷ The WTO Member attempting to erect export controls must satisfy the ‘design’ element by identifying the relationship between the measures and ‘acquisition or distribution of products in general or local short supply’.⁶⁸ The question of ‘essential’ is only triggered once the ‘design’ element is demonstrated because, according to the Appellate Body, if the measure in question is incapable of achieving the aim of ‘acquisition or distribution of products in general or local short supply’, then it is not justified under GATT art XX(j).⁶⁹

In deciding the meaning of ‘essential’, the Appellate Body acknowledged that the disputing parties disagreed on the basic meaning of that term. In resolving the impasse, the Appellate Body stated that ‘necessary’ is closer in

⁶⁵ Appellate Body Report, *India–Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc WT/DS456/AB/R (16 September 2016) (*‘India–Solar Cells’*).

⁶⁶ *Ibid* [5.58].

⁶⁷ *Ibid* [5.60].

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

meaning to 'indispensable' as compared to simply 'contributing to'.⁷⁰ Since the word 'essential' is defined as 'absolutely indispensable or necessary', the Appellate Body noted that the word is as close to the "indispensable" end of the continuum as the word 'necessary'.⁷¹ The Appellate Body then moved to endorse a replication of the same process of 'weighing and balancing' a series of factors used in the 'necessity' analysis under GATT art XX(d) for interpreting 'essential' under GATT art XX(j).⁷²

This position is further reinforced through the Appellate Body's reliance on notable WTO cases such as *Korea–Beef* and *United States–Gambling*, where the 'necessity' standard was originally developed. The question of essentiality and necessity are accordingly similar in that they both require assessment of the extent to which the adopted measures contribute to the 'acquisition or distribution of products in general or local short supply', consideration of the relative importance of the societal interests that the measure protects, and the trade-restrictiveness of the challenged measure.⁷³ The Appellate Body further noted that a comparison between the challenged measure and reasonably available alternative measures must then be undertaken.⁷⁴

D *Lesson Learnt?*

In constructing export controls, 'necessary' and 'essential' rest on an identical pedestal. Policymakers must carefully balance their aims in controlling exports before attempting a justification exercise under GATT art XX. Herein lies a great difficulty for policymakers. The justification or defence of a measure is necessitated only when a WTO challenge is mounted by the aggrieved WTO Member opposing the measure. Policymakers, therefore, may have to self-test and anticipate possible oppositional arguments if a foolproof export control regime must be designed around GATT art XX grounds. Here it may be useful to mention that the decision to defend measures under GATT art XX is a deliberate choice. If a WTO Member consciously proceeds down the path of GATT art XX while designing its export control policies, then the standards of 'necessary' and 'essential' assume central importance. If, however, a WTO Member designs a policy that does not leverage off the exceptional grounds under GATT art XX, the defence of the policy must lie elsewhere. The standards of 'necessary' and 'essential' fade into the distance.

⁷⁰ Ibid [5.62].

⁷¹ Ibid.

⁷² Ibid [5.63].

⁷³ Ibid.

⁷⁴ Ibid.

III THE SECOND LESSON: LEARN SELECTIVELY FROM CHINA'S EXPERIENCE

Recent WTO cases involving Chinese export controls on natural resources present additional lessons for policymakers. However, the lessons from China's jousting with raw materials and rare-earth-importing countries at WTO must be learnt selectively. First and foremost, policymakers must understand that China has a unique operating environment within the WTO due to its Accession Protocol. Under the terms of the Accession Protocol, China is obligated to eliminate the use of export tariffs and, further, it cannot rely on exceptions under GATT art XX to modify or alter export tariff structures.⁷⁵ Interestingly, China is not alone in being subject to such terms of accession to the WTO: Mongolia, Latvia, Saudi Arabia and Montenegro are under similar conditions.⁷⁶

⁷⁵ See, generally, *Protocol on the Accession of the People's Republic of China*, WTO Doc WT/L/432 (10 November 2001) [11.3], Annex 6 (the 'Accession Protocol'). Various commentators have analysed the effects of accession protocols on late entrants to the WTO alongside the link between China's export controls and its standing under GATT art XX. See eg, Karapinar, 'China's Export Restriction Policies' (n 9) 394, 401–5; Karapinar, 'Defining the Legal Boundaries of Export Restrictions' (n 9) 457–61; Qin (n 1) 1151–7. See, further, Eric W Bond and Joel Trachtman, 'China–Rare Earths: Export Restrictions and the Limits of Textual Interpretation' (2016) 15(2) *World Trade Review* 189, 191–7; see also the detailed discussion by Ilaria Espa, 'The Appellate Body Approach to the Applicability of Article XX GATT in the Light of China–Raw Materials: A Missed Opportunity?' (2012) 46(6) *Journal of World Trade* 1399, 1402–9, 1411–13.

⁷⁶ For reference, see *Report of the Working Party on the Accession of Mongolia to the World Trade Organization*, WTO Doc WT/ACC/MGN/9 (27 June 1996) [24]; *Report of the Working Party on the Accession of Latvia to the World Trade Organization*, WTO Doc WT/ACC/LVA/32 (30 September 1998) [69], Annex 3; *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, WTO Doc WT/ACC/SAU/61 (1 November 2005) [184]; *Report of the Working Party on the Accession of Montenegro to the World Trade Organization*, WTO Doc WT/ACC/CGR/38 (5 December 2011) [132]. For a discussion of the general implications for China and other WTO Members under WTO-plus obligations in export duties under their respective Accession Protocols, see Espa (n 75) 1411–12. See also Qin (n 1), who classifies WTO Members into four tiers. The first tier of WTO Members has complete freedom to restrict exports through tariffs. The second tier consists of Australia and Russia, which are under obligations not to impose export controls on specific products in excess of the rates specified in their respective GATT schedules. The third tier includes the transition economies of Ukraine and Vietnam, which are under obligations to bind export tariffs under their Accession Protocols but are permitted to invoke GATT art XX exceptions. The fourth tier includes late entrants such as Mongolia, Latvia, China, Saudi Arabia and Montenegro, which are under an obligation to eliminate the use of export controls and tariffs under their respective Accession Protocols but are not entitled to rely on GATT art XX exceptions to derogate from their obligations. The third- and fourth-tier countries cannot modify or withdraw their export duty concessions: 1161–6. Qin further analyses the Russian Model of accession to the WTO whereby Russia managed to integrate its export duty commitments within the GATT framework, enabling it to avoid issues faced by China due to the standalone effect of the Accession Protocol: *ibid* 1160–1.

The decision in *China–Raw Materials* specifically tackled China’s art XX defence for justifying a breach of its obligations under para 11.3 of the Accession Protocol. The Appellate Body endorsed the panel’s decision that there was no legal basis for China’s invocation of exceptions under GATT art XX in order to justify inconsistency with para 11.3.⁷⁷ In reaching this conclusion, the panel stated that there was a deliberate choice of language providing for exceptions in para 11.3, coupled with an omission of general reference to the WTO Agreement or the GATT 1994, which meant that in acceding to the WTO, China did not intend to incorporate the GATT art XX defence into para 11.3.⁷⁸ Hence, the effect *China–Raw Materials* is that accession protocols and WTO-plus commitments thereunder are viewed as self-contained agreements that can only be linked to the broader WTO framework if there are specific textual references in the accession instrument.⁷⁹ Since the majority of WTO Members are under no such WTO-plus commitments, China’s textual challenges under its accession commitments can be ignored by most policymakers when constructing export controls.

However, the policymakers must nevertheless sift through the contents of *China–Raw Materials* to determine which parts are China-specific and which parts are of general application. It is the latter that informs a WTO-compliant structuring of export controls or, indeed, any GATT-derogatory measure under arts XI:2, XX or XXI. Additionally, cases preceding *China–Raw Materials* provide further guidance to policymakers on the use of GATT art XI:2(a) and (b) (the more commonly used provisions). Arguments accompanying the First Lesson in Part II above have already discussed China’s purported use of GATT art XX exceptions. The following section will focus on lessons that can be drawn concerning the construction of export controls under GATT art XI:2(a) or (b).

A *Earlier GATT/WTO Jurisprudence*

Briefly, GATT art XI:2(a) enables WTO Members to enact temporary export restrictions to prevent or relieve critical shortage of food or other essential materials. At its heart, GATT art XI:2(a) legitimises the use of quotas in certain limited circumstances even when they are phased out in favour of tariff-based control of imports and exports. On the other hand, art XI:2(b) is facilitative in its

⁷⁷ Appellate Body Report, *China–Raw Materials*, WTO Doc WT/DS431/AB/R (n 7) [307].

⁷⁸ WTO Panel Report, *China–Raw Materials*, WTO Doc WT/DS394/AB/R (n 39) [7.129, 7.140]; Appellate Body Report, *China–Raw Materials*, WTO Doc WT/DS431/AB/R (n 7) [293]. See, further, *Espa* (n 75) 1403–7.

⁷⁹ See, eg, discussion on the relation between China’s Accession Protocol in the context of GATT art XX in Bond and Trachtman (n 75) 191–5.

outlook in that it allows a WTO Member to apply classifications, grading rules or marketing regulations. Raj Bhala describes art XI:2(b) as an ‘administrative exception of general interest’ without which WTO Members will be exposed to art XI:1 prohibition.⁸⁰ Between the two, art XI:2(a) deals explicitly with exports, while art XI:2(b) covers both imports and exports.⁸¹ Resultantly, for the construction of export controls, art XI:2(a) may be more relevant than the administratively focused art XI:2(b).

Three cases from GATT/WTO dispute settlement jurisprudence precede the *China–Raw Materials* case. These are *Canada–Salmon*,⁸² *Japan–Semiconductors*⁸³ and *Argentina–Bovine Hides*.⁸⁴ A brief detour is worthwhile here to understand earlier GATT/WTO jurisprudence on the issue. The first case, *Canada–Salmon*, featured Canada’s measures to conserve fishery resources and did not feature GATT art XI:2(a). Instead, the dispute centred around GATT art XI:2(b) and GATT art XX(g).⁸⁵ Canada defended its measures under GATT art XX(g) by claiming that fisheries were an exhaustible natural resource and that the measures were designed for conservation purposes. The United States, in opposition, claimed that the measures violated GATT art XI and were camouflaged by Canada to favour the domestic processing sector, which disadvantaged sectors in the United States.⁸⁶ In deciding the case, the dispute settlement panel stated that for a measure to fall within the scope of GATT art XX(g) it must satisfy the ‘related to’ requirement for conserving ‘exhaustible natural resources’.⁸⁷ The panel further stated that trade measures would only be able to satisfy the requirement of ‘made effective in conjunction with’ if such measures had the primary aim of making the trade restrictions effective.⁸⁸ Upon closer inspection of the Canadian restrictions, the panel noted that the trade measures covered species of fish that were not subject to export controls.

Furthermore, export control measures were found to restrict foreign processing industries and did not correspondingly restrict the domestic

⁸⁰ Raj Bhala, *International Trade Law: An Interdisciplinary, Non-Western Textbook* (Volume 1) (LexisNexis, 4th ed, 2015) 729.

⁸¹ Ibid.

⁸² See, generally, GATT Panel Report, *Canada–Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc L/6268–35S/98 (22 March 1988) GATT BISD 35S/98 (‘*Canada–Salmon*’).

⁸³ See, generally, GATT Panel Report, *Japan–Trade in Semiconductors*, GATT Doc L/6309–35S/116 (4 May 1988) GATT BISD 35S/116 (‘*Japan–Semiconductors*’).

⁸⁴ Panel Report, *Argentina–Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (19 December 2000) (‘*Argentina–Bovine Hides*’).

⁸⁵ See, generally, GATT Panel Report, *Canada–Salmon*, GATT Doc L/6309–35S/116 (n 82).

⁸⁶ Ibid [3.11].

⁸⁷ Ibid [4.6].

⁸⁸ Ibid.

processors. Accordingly, the panel concluded that the primary aim of the measures was not conservation of salmon fish within the meaning of GATT art XX(g).⁸⁹ Regarding GATT art XI:2(b), the Canadian argument was that the export prohibitions were necessary to maintain quality standards on unprocessed salmon and herring. The panel, however, observed that export prohibitions covered even those categories of salmon and herring that met the applicable standards, which meant that the export prohibitions were not considered 'necessary'.

Additionally, the panel noted that the drafting history of GATT art XI:2(b) suggests that export restrictions were intended to further the marketing of a commodity by spreading supplies of the restricted product over a more extended period.⁹⁰ The panel stated that accepting Canada's argument would have entailed giving a new meaning to the term 'marketing regulation', which, in turn, would expand the original scope of the provision beyond its purpose. Hence, the export prohibitions were not justifiable under GATT art XI:2(b).⁹¹

The second case that involved export controls from the GATT era was *Japan–Semiconductors*.⁹² In that case, Japan imposed export controls based on price following the 1986 Voluntary Export Restraint ('VER') concluded between Japan and the United States on the export of dynamic random-access memory ('DRAM') chips. Under the VER, the Japanese government further directed the exporters to maintain a certain price level for export of semiconductors to third-party importer countries. The EC (one of the importing economies of Japanese semiconductors) viewed the Japanese government's specification of minimum export price as a breach of GATT art XI. Japan justified its measure by arguing that the price guidance was merely advice, and that it should not be construed as a legal order. The dispute settlement panel rejected this argument and stated that the minimum price levels were a governmental measure if effectively implemented. Therefore, the measure breached GATT art XI.⁹³

In the third case on export control (*Argentina–Bovine Hides*), Argentinean bovine hide export measures were the subject of challenge by the EC because these measures were a breach of GATT arts XI and X:3(a).⁹⁴ The EC argued that the constitution of a governmental committee to consider export control quotas over bovine hides breached GATT art XI.

It was further argued that the participation of the bovine industries in the committee would result in a prohibitive effect on exports, thereby violating the stipulations of fair and equitable treatment of export and import controls under

⁸⁹ Ibid [4.7].

⁹⁰ Ibid [4.3].

⁹¹ Ibid.

⁹² See, generally, GATT Panel Report, *Japan–Semiconductors*, GATT Doc L/6309–35S/116 (n 83).

⁹³ Ibid [50], [54], [102]–[117], [132].

⁹⁴ Panel Report, *Argentina–Bovine Hides*, WT/DS155/R (n 84) [3.1], [3.2].

GATT art X:3(a). The EC succeeded in convincing the panel on this last argument. The panel held that since the Argentinean bovine hide industries had an interest in preventing or reducing exports, allowing participation would be against the fair, objective and neutral process in international trade contrary to GATT art X:3(a).

Regarding the EC claim on breach of GATT art XI, the panel stated that allowing domestic industry representatives on the governmental committee does not amount to a prohibition or restriction of exports and, therefore, there was no violation of GATT art XI.⁹⁵

The three cases just discussed briefly summarise the general application of GATT art XI and the overall application of fairness and equal treatment in the execution of GATT commitments under art XI. The following section examines insights from China's justification of its export controls under GATT art XI.

B Harvestable Insights from the China–Raw Materials Case

Policymakers in most WTO Member countries may ignore the China-specific parts of *China–Raw Materials* as inapplicable due to the effect of China's Accession Protocol to the WTO. What the policymakers cannot ignore, however, are key messages that will affect the future interpretation of export control disputes, especially where the temporary application of measures and relief of critical shortage is concerned.

In *China–Raw Materials*, China appealed the panel's finding that China had not demonstrated that the export quotas in question were temporarily applied or for the purpose of relieving a critical shortage.⁹⁶ In its report, the panel pointed out that any restriction under GATT art XI:2(a) must be of limited duration because, otherwise, WTO members could resort indistinguishably to GATT art XI:2(a) art Article XX(g) to relieve problems of exhaustible natural resources.⁹⁷ The panel noted that Chinese measures on bauxite had been in place for a decade and there was no indication of their withdrawal until the reserves were depleted.⁹⁸ Hence, the panel concluded, China's export quotas were not applied temporarily

⁹⁵ Ibid [11.22]–[11.35], [11.43], [11.55].

⁹⁶ Appellate Body Report, *China–Raw Materials*, WTO Doc WT/DS431/AB/R (n 7) [308], referring to WTO Panel Report, *China–Raw Materials*, WTO Doc WT/DS394/AB/R (n 39) [7.355].

⁹⁷ Appellate Body Report, *China–Raw Materials*, WTO Doc WT/DS431/AB/R (n 7) [309], [333], referring to WTO Panel Report, *China–Raw Materials*, WTO Doc WT/DS394/AB/R (n 39) [7.256]–[7.258].

⁹⁸ Appellate Body Report, *China–Raw Materials*, WTO Doc WT/DS431/AB/R (n 7) [339], referring to WTO Panel Report, *China–Raw Materials*, WTO Doc WT/DS394/AB/R (n 39) [7.350].

within the terms of GATT art XI:2(a).⁹⁹ On appeal, China focused on the panel's interpretation of 'temporarily applied' and 'critical shortages'.

The Appellate Body explained that the term 'temporarily' in GATT art XI:2(a) means a measure applied to bridge a 'passing need', or measures applied in the interim.¹⁰⁰ The term 'critical shortage' in GATT art XI:2(a) was contrasted and distinguished by the Appellate Body with 'general or local short supply' within GATT art XX(j). The Appellate Body stated that, due to use of the term 'critical', GATT art XI:2(a) envisaged shortages that are more narrowly circumscribed than those falling within the meaning of GATT art XX(j). Otherwise, the meaning of 'shortage' and 'short supply' would be the same.¹⁰¹ The Appellate Body report specified that what makes a shortage 'critical' is how 'essential' a product is for a WTO member/exporting economy, along with the characteristics of that product.

Regarding the meaning of 'critical' the Appellate Body also explained that the notion of 'criticality' includes consideration of points in time where the conditions no longer remain 'critical'.¹⁰²

Responding to China's argument that the panel erroneously found GATT arts XX(g) and XI:2 to be mutually exclusive, the Appellate Body availed itself of the opportunity to distinguish the two provisions. GATT art XX provides exceptional measures to justify GATT-inconsistent measures, while art XI:2 mandated elimination of quotas except in the instances mentioned in sub-para (a)–(c).¹⁰³ The Appellate Body's view was that the language of art XI:2 indicated that the scope of the obligation not to impose quotas was limited by subpara (a). Hence, where art XI:2(a) is satisfied, there will be no scope for applying art XX because no obligation existed.¹⁰⁴ In the following paragraphs, the Appellate Body endorsed the panel's view that arts XI:2(a) and XX(g) were intended to address different situations and, therefore, must mean different things.¹⁰⁵ However, even though the reach of the provisions is different, there may be instances where they operate simultaneously in order to conserve a resource that is classified as 'exhaustible' and 'critical' at the same time.¹⁰⁶ The Appellate Body went on to uphold the panel's conclusion that China failed to demonstrate that export quotas were

⁹⁹ Appellate Body Report, *China–Raw Materials*, WTO Doc WT/DS431/AB/R (n 7) [311], referring to WTO Panel Report, *China–Raw Materials*, WTO Doc WT/DS394/AB/R (n 39) [7.350].

¹⁰⁰ Appellate Body Report, *China–Raw Materials*, WTO Doc WT/DS431/AB/R (n 7) [323].

¹⁰¹ *Ibid* [324]–[325].

¹⁰² *Ibid*.

¹⁰³ *Ibid* [334].

¹⁰⁴ *Ibid*.

¹⁰⁵ Appellate Body Report, *China–Raw Materials*, WTO Doc WT/DS431/AB/R (n 7) [336], referring to WTO Panel Report, *China–Raw Materials*, WTO Doc WT/DS394/AB/R (n 39) [7.300].

¹⁰⁶ Appellate Body Report, *China–Raw Materials*, WTO Doc WT/DS431/AB/R (n 7) [337].

‘temporarily applied’ under GATT art XI:2(a) to either prevent or relieve a ‘critical shortage’.¹⁰⁷

C *Lesson Learnt?*

China-specific findings in *China–Raw Materials* can safely be ignored by most policymakers as inapplicable. However, the Appellate Body’s treatment of themes such as ‘temporarily applied’ and ‘critical shortages’ is particularly relevant to the construction of any short-term sector-development policies utilising inward diversion of finite natural resources based on the ‘shortage’ narrative. The Appellate Body is effectively endorsing an approach that requires proving exhaustibility and critical importance purely from a conservation point of view and not a developmental one.

IV THE THIRD LESSON: ENACTING EXPORT CONTROLS FOR ESTABLISHING DOWNSTREAM SECTORS FINDS LITTLE SUPPORT WITHIN THE WTO

The WTO may appear to encourage downstream development within the economies of its developing and least-developed country members. Most notably, GATT art XVIII:4(a) and (b) allow temporary deviation for economies that are in early stages of development. The term ‘early stages of development’ is interpreted expansively to include countries that are undergoing a process of industrialisation to move forward from commodities and primary production.¹⁰⁸ Similar acknowledgement appears in GATT art XXXVI:4, which specifically refers to the need to grant favourable and acceptable market access conditions to ‘exportation of a limited range of primary products’ from ‘less-developed contracting parties’. GATT art XXXVI:5 advocates for ‘increased access’ for

¹⁰⁷ Ibid [344], [362(d)(i)]. Following the outcome in *China–Raw Materials*, GATT art XI was again debated, albeit on a less specific scale with reference to exports, in *Argentina–Measures Affecting the Importation of Goods*, WTO Doc WT/DS438/AB/R (15 January 2015) (*‘Argentina–Import Measures’*). In this dispute, the Appellate Body explained that if a measure imposes a trade restriction on imported goods in such a manner that it exceeds what is ‘necessary’ to achieve the authorised objective behind a trade restriction, then such a restriction violates GATT art XI:1: [5.221]).

¹⁰⁸ See, eg, WTO Analytical Index, ‘GATT 1994–Article XVIII (Jurisprudence)’ (1.2 Text of Notes Ad Article XVIII) 6–7 <https://www.WTO.org/english/res_e/publication_e/ai17_e/GATT1994_art18_jur.pdf>.

processed and manufactured products of particular export interests to less-developed contracting parties.

Note, however, two points regarding these provisions. First, the meaning of 'primary products' is similar to that of 'primary commodity' referred to in art 56:1 of the Havana Charter.¹⁰⁹ Secondly, the language of GATT arts XVIII and XXXVI envisions market access granted by developed economies to imports from less-developed contracting parties. The provisions do not directly deal with export controls or quotas that allow a developing country or a less-developed contracting party to divert critical raw materials inwardly. Qin observes that the GATT pt IV provisions on Trade and Development are all designed to extend improved market access facilities for primary and processed products originating from developing countries or less-developed contracting parties.¹¹⁰ She also comments that while special and differential treatment provisions under various GATT/WTO agreements do exist, none of them cover the use of export controls to kickstart development of downstream sectors.¹¹¹

The starting basis of the argument in this section is thus: despite showing a willingness to assist developing countries in economic advancement and diversification, the GATT/WTO system remains moored in the shallows of import tariffs and market access while ignoring the developmental dimensions of export controls.

A Adaption of the 'Essential to' or 'Necessary' Criteria to Assist in the Development of Downstream Sectors

Since trade and development provisions within the GATT/WTO framework are import-oriented, developing countries face an uphill mission in seeking to justify the use of export controls to divert critical raw materials inwardly. Short of reform in the WTO, some strategies may work if the WTO paradigms are not unduly disturbed.

If the strategy for developers and policymakers is to view downstream development as exceptional, then the justification for export controls under WTO law must also come from the exceptions discipline found in GATT art XX. Since the 'essential to' or 'necessary' standards are linked to the interpretation of exceptions under GATT art XX, any strategy for fostering a new downstream

¹⁰⁹ Article 56:1 of the *Havana Charter* defines 'primary commodity' to mean 'any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade'. See, further, GATT Analytical Index, 'Article XXXVI: Principles and Objectives-Para 4', 1057 <https://www.WTO.org/english/res_e/publications_e/ai17_e/GATT1994_art36_GATT47.pdf>.

¹¹⁰ Qin (n 1) 1169.

¹¹¹ Ibid.

sector (based on restricting exports) must satisfy the exceptional circumstances enumerated within GATT art XX, which is a problematic proposition indeed.

With some creative adaptation, policymakers may be tempted to satisfy the ‘necessary’ or ‘essential to’ criteria. For example, one possibility is to construct an argument based on environmental protection (GATT art XX(b) using the ‘necessary’ criteria). Another possibility is alleviating the local shortage of products (GATT art XX(j) using the ‘essential to’ criteria). Both strategies have been unsuccessfully attempted by China and India, respectively, in two different cases: *China–Raw Materials* and *India–Solar Cells*. Both cases manifest a strong desire by two influential and highly populated developing countries seeking to reinforce, develop and maintain downstream industries linked to the renewable energy sector.¹¹²

In *China–Raw Materials*, China’s argument played upon the link between export restrictions and economic growth through the transition to higher value-added sectors.¹¹³ In China’s view, the temporary diversion of resources through export controls could assist in targeting innovators, as the export controls could be designed with a phase-out period when innovators are ready to enter the market.¹¹⁴ The panel, however, was not convinced, and it is here in particular that policymakers in developing countries should take note. The panel surmised that, in implementing developmental policies using export controls, innovators engaging in new activities must be the primary beneficiaries as opposed to followers or emulators.¹¹⁵ In doing so, the panel noted that China’s export restrictions did not distinguish between innovators and emulators, and that China failed to provide sufficient evidence that restricting exports of raw materials would necessarily foster China’s economic growth.¹¹⁶ Therefore, the construction of export controls on materials that are ‘necessary’ for domestic growth must be such that it will satisfy the standard of protection for ‘human,

¹¹² The correlation between China’s development of its wind turbine sector and restrictions on certain raw materials and rare earths is well-established. See, eg, Umair Ghori, ‘An Epic Mess: “Exhaustible Natural Resources” and the Future of Export Restraints after the *China–Rare Earths* Decision’ (2015) 16(2) *Melbourne Journal of International Law* 398, 418–25. In India’s case, it attempted to justify the policy of extending feed-in tariffs to solar power developers that sourced their components from local manufacturers. In doing so, India took the defence that the measures were ‘essential to’ procurement of products in local short supply (see the discussion in Part IIC of this article). The overarching aim of the Indian government was to encourage development of a domestic solar panel industry. See, eg, discussion in Umair Ghori, ‘Reverse Permissibility’ in the Renewable Energy Sector: Going Beyond the *US–India Solar Cells* Dispute’ (2018) 8(2) *Asian Journal of International Law* 322, 339–46.

¹¹³ WTO Panel Report, *China–Raw Materials*, WTO Doc WT/DS394/AB/R (n 39) [7.543]–[7.544]. China also quoted a study that found in favour of export sophistication externalities. See, generally, Ricardo Hausmann, Jason Hwang and Dani Rodrik, ‘What You Export Matters’ (2007) 12(1) *Journal of Economic Growth* 1.

¹¹⁴ WTO Panel Report, *China–Raw Materials*, WTO Doc WT/DS394/AB/R (n 39) [7.546].

¹¹⁵ Ibid [7.545].

¹¹⁶ Ibid [7.545], [7.546], [7.548]–[7.550].

animal or plant life or health' while, at the same time, encouraging innovators. The findings from *China–Raw Materials* must also be considered in the light of *EC–Tariff Preferences*, where justification of the 'necessary' standard required proof of the effectiveness of measures in achieving the stated objectives. Accordingly, adaptation of the 'necessary' standard under GATT art XX(b) in justifying export controls, or indeed any other trade discrimination measure, has not met with much success in the past.

In *India–Solar Cells*, India attempted to encourage the development of a domestic sector through government procurement and incentivisation strategy. Note here that the dispute did not concern export controls but rather Indian DCRs that were in breach of GATT art III:4 and WTO Agreement on Trade-Related Investment Measures ('TRIMS') art 2.1. The case is important because of the 'essential to' justification under GATT art XX(j) argued by India. India justified its DCRs as 'essential' for relieving general or local short supply of solar cells and modules. However, that argument failed. The Appellate Body considered 'essential' to be a virtual extension of the 'necessary' standard under GATT art XX(d).¹¹⁷ In the future, some WTO Members may be tempted to enact export control policies based on the 'essential to' criterion, much like what India did, but with improvements. Such Members may view inward diversion based on export controls as 'essential to' achieving the goal of industrial self-sufficiency by seeking to eliminate 'general or local short supply'. Note, however, that the 'essential to' criterion comes with an extensively developed application standard that makes creative adaptation by a WTO Member a difficult proposition.

With 'necessary' and 'essential to' being closely linked in their applications and conceptual bases, the task of policymakers of any WTO Member becomes extremely complicated. WTO jurisprudence does not clarify the legitimate use of export controls from an exceptional point of view. It only highlights the application criteria through cases such as *Korea–Beef*, *Brazil–Retreaded Tyres*, *China–Raw Materials* and *China–Rare Earths*. Hence, the question of legitimacy were a WTO Member to enact export controls as a response to community demands for employment in a new domestic sector or for re-routing critical raw materials to support domestic downstream industries remains unanswered.

Even when a developing country, under the aegis of WTO, terms establishment of advanced downstream sectors as 'essential' or 'necessary' to achieve economic self-reliance, the political-economic understanding of 'essential' or 'necessary' is quite different from the jurisprudential understanding of the same under WTO. A synthesis of dispute settlement decisions under the ambit of 'necessary' shows that any derogatory measure adopted by a WTO Member must not only be applied in a non-discriminatory manner, it must also be demonstrated as effective to achieve the stated aim, while

¹¹⁷ Appellate Body Report, *India–Solar Cells*, WTO Doc WT/DS456/AB/R (n 65) [5.63].

being the least trade-restrictive measure after considering other available means to achieving the same aim. Nowhere in the jurisprudence do we observe an endorsement of a developmental agenda allowing a WTO Member to control exports in order to foster a domestic sector, notwithstanding the lip service paid in GATT arts XVIII:4(a), XXXVI:4 and XVIII:14, or the comments by the panel in *China–Raw Materials* that environmental conservation and economic development need not be mutually exclusive.¹¹⁸

B *The Sovereignty Argument*

The argument of sovereignty over natural resources is not new.¹¹⁹ Since by virtue of being part of the comity of nations WTO Members have an inherent right to exploit their natural resources, the argument for controlling exports and inward diversion of resources through export controls seems deceptively simple. The outcomes of *China–Raw Materials* and *China–Rare Earths* underscore the limited right of most WTO Members to reserve or manage their commodities. The limited rights are a product of a ‘give and take’ process that WTO Member countries ostensibly engaged in for availing themselves of increased market access on an MFN basis and other benefits from free trade. While incoming Members can negotiate an Accession Protocol to customise their trading profile within the WTO, China’s experience has shown that Accession Protocols create a parallel regime of obligations that may prove to be more onerous than originally believed.

In the construction of export controls, WTO disciplines only allow tariffs to be employed and not export quotas or non-tariff barriers. One view is that enacting export controls may give domestic sectors an advantage similar to that of a subsidy. However, this issue was settled in *United States–Export Restraints*, where the subject of the dispute was a complaint by Canada alleging that certain

¹¹⁸ WTO Panel Report, *China–Raw Materials*, WTO Doc WT/DS394/AB/R (n 39) [7.381].

¹¹⁹ In the post-World War II reconstruction and decolonisation phase, the first acknowledgments of sovereignty over natural resources came via the UN General Assembly Resolutions 523 (VI) and 626 (VII). The former resolution recognised the right of states to determine the use of their natural resources in order to achieve economic advancement, while the latter resolution acknowledged freedom of states to exploit natural wealth and resources. Both resolutions are general expressions of sovereignty over resources. However, the most direct acknowledgment on the point comes through UN General Assembly Resolution 1803 (XVII), which is specifically titled the ‘Declaration on Permanent Sovereignty over Natural Resources’. See, further, Manjiao Chi, ‘Resource Sovereignty in the WTO Dispute Settlement: Implications of *China–Raw Materials* and *China–Rare Earths*’ (2015) 12(1) *Manchester Journal of International Economic Law* 2; Arreaza (n 9) 266–75; Stephan Hobe, ‘Evolution of the Principle on Permanent Sovereignty over Natural Resources: From Soft Law to a Customary Law Principle?’, in Marc Bungenberg and Stephan Hobe (eds), *Permanent Sovereignty over Natural Resources* (Springer, 2015) ch 1.

export measures on the part of the United States were in the nature of a financial contribution within the meaning of art 1.1(a) of the WTO Agreement on Subsidies and Countervailing Measures ('ASCM').¹²⁰ Both disputants agreed that export restraints could confer a benefit. The panel therefore felt the need to resolve the dispute by systematically deconstructing the definition of 'financial contribution' within the ambit of art 1.1(a)(1) of the ASCM in order to decide the issue.¹²¹ In interpreting the meaning of 'financial contribution', the panel noted that the negotiating history of the provision evinced an intention on the part of the negotiators to ensure that not all government measures that conferred benefits could be deemed as subsidies.¹²² The upshot of the dispute was that any measures that incidentally increase the supply levels could not necessarily be construed as providing a benefit or a financial contribution within the meaning of art 1.1(a)(1) of the ASCM. Therefore, in arriving at a decision, the panel rejected the approach that since an export restraint causes an increase in domestic supply levels of the restrained commodity, it is effectively equivalent to a situation where a government expressly entrusts or directs a private body to supply that commodity domestically.¹²³ The panel did, however, acknowledge that export restraints, in certain situations, could constitute a financial contribution that may violate the precepts of the ASCM. On this occasion, the panel declined to find that the export restraints violated art 1.1(a)(1).¹²⁴ Hence, the panel rejected Canada's argument under art 1 of the ASCM and held that the United States law in question was not in violation of the ASCM.¹²⁵

Note that the finding of the *United States–Export Restraints* case indicates that the WTO is adopting a case-by-case approach to any future disputes where the issue of financial contribution is being debated. Even though the scope of the ASCM is conceptually different from the concept of export controls, overlap in a future dispute cannot be ruled out. Any future dispute settlement panel finding that a WTO Member's trade restrictions on exports are conferring a financial contribution to domestic industries will open new avenues of debate on the WTO accepting permanent sovereignty of its Members over their natural resources and the extent to which governments of WTO Members can assist their domestic sectors.

¹²⁰ See, generally, Panel Report, *US–Measures Treating Export Restraints as Subsidies*, WTO Doc WT/DS194/R (29 June 2001) ('*US–Export Restraints*').

¹²¹ *Ibid* [8.21].

¹²² *Ibid* [8.65], [8.71]–[8.72].

¹²³ *Ibid* [8.75].

¹²⁴ *Ibid* [8.131], [9.1].

¹²⁵ *Ibid* [8.75], [8.131].

The broader message emerging from the *United States–Export Restraints* case on the one hand, and *China–Raw Materials* and *China–Rare Earths* on the other, is that the extent to which developing countries can assist domestic downstream sectors remains unclear. Every instance of a WTO Member deciding to divert a valuable, finite resource in-house cannot automatically be termed as WTO-inconsistent because, quite simply, it ignores the principle of permanent sovereignty of nations over their natural resources.

Any blanket insistence by the WTO dispute settlement panels extolling the virtues of compliance with WTO disciplines as the key to socio-economic development is not just simplistic; it also serves to restrict the developmental options for many WTO Members.¹²⁶ Many developing countries consider the colonial-era exploitation of their resources to be a particularly traumatic period of their history.¹²⁷ Asserting the right to dispose of national resources empowers the developing countries in charting their developmental trajectory. Moreover, strict adherence to trade liberalisation norms of the WTO conveniently ignores international instruments such as the Rio Declaration on Environment and Development ('RDED'). Under the RDED, Principle 2, the sovereignty of states extends to their rights to exploit their natural resources according to their environmental and developmental policy.¹²⁸ In addition to RDED, the Johannesburg Declaration 2002 acknowledges that sustainable development is composed of three pillars: economic development, social development and environmental protection.¹²⁹ Establishing downstream sectors can contribute to the creation of jobs, poverty alleviation and local utilisation of resources. Accordingly, developing countries should be free to exercise the option of enacting export controls under the principle of permanent sovereignty over natural resources, as well as the three pillars of sustainable development under the Johannesburg Declaration. However, the WTO law fails to look past the strict notion of conservation and sustainability imperatives and refuses to acknowledge the role of export controls in facilitating the economic development of its

¹²⁶ Note, however, that the restrictive view of sovereignty over natural resources finds approval in academic literature on international trade law. John H Jackson, for example, terms the traditional notion of absolute sovereignty of nations states over their resources as not only obsolete but also subservient to international treaty norms: 'Sovereignty–Modern: A New Approach to an Outdated Concept' (2003) 97 *American Journal of International Law* 782, 790.

¹²⁷ Arreaza (n 9) 267–8.

¹²⁸ See Nico J Schrijver, 'Fifty Years Permanent Sovereignty over Natural Resources: The 1962 Declaration as the *Opinio Juris Communis*', in Bengenberg and Hobe (n 119) ch 2, 21. See also Arreaza (n 9) 269.

¹²⁹ See, generally, World Summit on Sustainable Development, 'Johannesburg Declaration on Sustainable Development', UN Doc A/Conf.199/20 (4 September 2002) <<http://www.un-documents.net/jburgdec.htm>>.

Members. In this regard, Gonzalez Arreaza makes an interesting observation regarding the systematic flaw in the characterisation of ‘conservation’ of exhaustible natural resources under GATT art XX(g).¹³⁰ He notes that even where ‘conservation’ is interpreted broadly by taking into account the three pillars of sustainable development, the requirement of coupling the restrictions with equal restraints on domestic producers or exporters undermines the very purpose of export controls, which is to encourage downstream development.¹³¹

The outcomes of *China–Rare Earths* and *China–Raw Materials* clearly show that the WTO is not endorsing the right of developing countries to divert their resources for their own economic development, which effectively makes restricting domestic consumption, along with export restrictions, an impractical strategy.¹³²

C *Lesson Learnt?*

The limited acceptance of the principle of sovereignty over natural resources within the WTO means that in any future trade dispute the result will always be in favour of the complainant and against the countries adopting export controls for downstream development.¹³³ The current state of WTO law does not enable the construction of a country-specific strategy. Any resource, goods and commodities are all considered tradeable and, are therefore, subject to the GATT/WTO norms.

V CONCLUSION: SYNTHESISING THE THREE LESSONS

The arguments examined in this article show that the WTO rules on export controls are not sufficiently well developed to allow diversion of natural resources. The only measure available is a levy of higher export tariffs, which carries other consequences for the exporting economies. Adding to the confusion is the fact that the general regime of export controls discriminates between the majority of WTO Members and certain acceding WTO Members (such as Russia, China, Australia, Mongolia, Ukraine and Saudi Arabia) that are subject to WTO-plus obligations. The discrimination comes through the freedom accorded to regular WTO Members to enact export controls through tariffs in order to secure a greater share of resource production for domestic consumption, while acceding

¹³⁰ Arreaza (n 9) 273.

¹³¹ Ibid.

¹³² For example, in *China–Raw Materials* the panel did not follow China’s argument of absolute sovereignty and, instead, insisted on a more ‘balanced’ view, which called for striking an equilibrium between precepts of sustainability, sovereignty and trade liberalisation. See WTO Panel Report, *China–Raw Materials*, WTO Doc WT/DS394/AB/R (n 39) [7.277].

¹³³ Chi (n 119) 13–15; Arreaza (n 9) 273.

Members such as China, Saudi Arabia and Russia are under additional obligations imposed through their respective accession protocols. The effect of this institutionalised discrimination is the creation of multiple layers of varied rights, duties and commitments for WTO Members.

Another reinforcing layer of complexity and confusion emanates from past resistance by developing countries to enact regulatory disciplines limiting the use of export. This resistance has meant a continuation of the status quo, namely, limited direct provisions within the GATT/WTO disciplines on export controls and the selective interpretation of WTO jurisprudence.

The key to policymakers in developing countries understanding export controls lies in acknowledgment of the full-spectrum function of export controls. The understanding by policymakers of what export controls are meant to do under WTO law will help in achieving consensus on the regulation of export controls. Until then, the current state of affairs will likely continue. The continuation of the current regime may mean that policymakers will have to proceed cautiously while diverting resources domestically in order to develop downstream capabilities. The WTO, for its part, must also recognise that it is foolish to assume that resource-exporting developing countries will not be tempted to harness the potential of their commodities to set up value-added, downstream sectors. Policymakers from those WTO Members that are not under WTO-plus obligations are fortunate enough to enjoy the flexibilities of increasing export tariffs, while China and Russia (along with some other acceding members) remain under WTO-plus obligations to reduce or eliminate export tariffs. Hence, we see that China's attempts to graduate to higher, value-added sectors such as wind turbines were resisted in the WTO because the policymakers in resource-importing, developed countries anticipated China's competitive threat. The direction of WTO law on the issue of export controls needs reform in achieving an equilibrium between competing considerations such as sovereignty of states over their natural resources and the avoidance of the 'beggar-thy-neighbour' effect in international trade.

Policymakers in developing countries must also understand that export controls are not only important from a developmental perspective; they are also an important tool in managing negative externalities. Without recourse to export tariffs, the exporting economy is subsidising the importing economy, which gains access to cheaply priced imports while conveniently bypassing the environmental impacts.¹³⁴ The imposition of export tariffs allows for the offset of any negative externalities generated through mining, refinement and export of natural

¹³⁴ Qin (n 1) 36.

resources.¹³⁵ By requiring China, Russia and other acceding WTO Members not to impose export controls on natural resources, the WTO is mandating that the exporting economy shares its resources equitably with its trading partners while unilaterally bearing the costs and impact of environmental degradation.¹³⁶

Additionally, the WTO's jurisprudential focus remains on the promotion of liberalised trade to the exclusion of social development imperatives or developmental strategies, enabling graduation to higher value-added sectors. The WTO's rigid framing of progress looks at liberalised trade as the only avenue for socio-economic progress and the development of downstream sectors. One need not look past the cold shoulder given to the three pillars of sustainable development in China–Rare Earths to realise that construction of export controls to aid downstream development is a non-starter for most countries.

Furthermore, there are systemic barriers within the WTO that make adoption of an inward diversion strategy risky because, once the complainant countries bring the matter to the WTO, the dispute settlement panels are constrained to settle the dispute according to the extant GATT/WTO framework. Other considerations emanating from declaratory instruments such as the Paris Convention or the Johannesburg Principles are of secondary importance. Unless reforms streamlining the permissiveness and use of export controls are undertaken, the hands of policymakers in developing countries will remain tied, and the WTO will continue to rule in favour of free trade at the expense of other legitimate considerations.

¹³⁵ Ibid.

¹³⁶ Ibid.