

# The WTO Disputes on Chinese Natural Resources and the EU Litigation Strategy in the Light of the Lisbon Treaty

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**Abstract:** On 23 July 2012, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) established a single panel to examine the complaints brought by the United States, the European Union and Japan against the Chinese export restrictions on rare earth elements (REEs), tungsten and molybdenum. The controversy is very sensitive for at least three series of reasons: a) the economic and strategic relevance of the materials involved in the dispute (rare earths being essential, in particular, for high-tech, information, military, and green industry); b) the difficult balance to find between mining and trading REEs while protecting the environment and thus respecting the principle of sustainable development enshrined in the Preamble of the Agreement establishing the WTO; c) the challenging task of defining the relation of the WTO-plus obligation to eliminate export duties, characterizing China's accession to the Marrakech system, with the multilateral public policy exceptions clause enshrined in GATT Article XX.

In this essay, we intend to offer a presentation of the above listed salient aspects of the *China – Rare Earths* controversy in the light of the recent *China – Raw Materials* case. In particular, we will concentrate on the necessity, for the Geneva jurisdictional pillar, to revisit the highly problematical conclusions reached last January by the Appellate Body (AB) on the applicability of GATT Article XX to China's WTO Accession Protocol (AP). We are, in fact, convinced that the new mineral trade dispute may be positively –and durably–settled only if the under regulated area of WTO law on export restrictions is adequately addressed also at political level: and such a target may, of course, be considerably fostered, inspired and supported by a well-balanced interpretative activity of the WTO judiciary. Consequently, we will try in this essay to propose a different perspective on the way in which GATT public policy exceptions and China's Accession Protocol should be connected, grounding our suggested interpretative approach on each of the hermeneutic elements for treaty interpretation codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.

Finally, we will devote the last part of our essay to suggest that a litigation strategy entirely devoted to assess Chinese export restrictions on rare earth from the point of view of their alleged discriminatory and protectionist nature should be followed by the European Union in order to properly implement the principles of free and fair trade, sustainable development, and the commitment to the promotion of multilateral solutions to common problems, now codified in the Lisbon Treaty to guide the international action of Europe.

**Key words:** Rare Earths, WTO Appellate Body, China's WTO Accession Protocol, Treaty Interpretation, GATT Article XX, Principle of Sustainable Development, European Union, Treaty of Lisbon

**Summary:** I. Introduction. II. Facts of the new WTO dispute: the strategic relevance of rare earth elements for high-tech industry, the global monopoly of China and the supply difficulties for the manufacturing countries. III. Reactions of the manufacturing countries and industries to Chinese export restrictions. IV. Legal basis of the WTO complaints. V. Beijing defence. VI. The applicability of GATT Article XX to China's Accession Protocol in the *China – Rare Earths* case: the need to overcome the negative interpretative result of the *China – Raw Materials* case. VII. The unfortunate conclusions of the Appellate Body in the *China – Raw Materials* case on the applicability of GATT Article XX to Paragraph 11.3 of China's WTO Accession Protocol. VIII. Effects of the AB conclusions. IX. Suggestions for a different interpretative approach. 1. The text of Paragraph 11.3 of China's Accession Protocol and the Note to Annex 6. 2. The silence of Paragraph 11.3 of China's Accession Protocol in the light of the principle of good faith. 3. The silence of Paragraph 11.3 of China's Accession Protocol in the light of its context. 4. Extending the relevant context to the

Preamble of the WTO Agreement and interpreting the silence of Paragraph 11.3 in light of the object and purpose of the WTO system. 5. The principle of permanent sovereignty over natural resources and Article 31(3)(c) of the Vienna Convention. 6. Supplementary means of interpretation: the circumstances of the conclusion of China's Accession Protocol and the subsequent practice of States. X. Looking for diplomatic settlements: China and a *de iure condendo* global solution on exports of natural resources. XI. Assessing the EU litigation strategy in the light of the Lisbon Treaty principles for the EU international action: the need to change.

## I. Introduction

On 23 July 2012, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) established a single panel to examine the complaints brought by the United States, the European Union and Japan against the Chinese export restrictions on rare earth elements (REEs), tungsten and molybdenum.<sup>1</sup> The controversy is very sensitive for at least three series of reasons: a) the economic and strategic relevance of the materials involved in the dispute (rare earths being essential, in particular, for high-tech information, military, and green industry); b) the difficult balance to find between mining and trading REEs while protecting the environment and thus respecting the principle of sustainable development enshrined in the Preamble of the Agreement establishing the WTO; c) the challenging task of defining the relation of the WTO-plus obligation to eliminate export duties, characterizing China's accession to the Marrakech system, with the multilateral public policy exceptions clause enshrined in GATT Article XX.

In this essay, we intend to offer a presentation of the above listed salient aspects of the *China – Rare Earths* controversy in the light of the recent *China – Raw Materials* case.<sup>2</sup> In particular, we will concentrate on the necessity, for the Geneva jurisdictional pillar, to revisit the highly problematical conclusions reached last January by the Appellate Body (AB) in on the applicability of GATT Article XX to China's WTO Accession Protocol (AP). We are, in fact, convinced that the new mineral trade dispute may be positively – and durably- settled only if the under regulated area of WTO law on export restrictions is adequately addressed also at political level: and such a target may, of course, be considerably fostered, inspired and supported by a well-balanced interpretative activity of the WTO judiciary. Consequently, we will try in this essay to propose a different perspective on the way in which GATT public policy exceptions and China's Accession Protocol should be connected, grounding our suggested interpretative approach on each of the hermeneutic elements for treaty interpretation codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.<sup>3</sup>

Finally, we will devote the last part of our essay to suggest that a litigation strategy entirely devoted to assess Chinese export restrictions on rare earth from the point of view of their alleged discriminatory and

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<sup>1</sup> *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for the Establishment of a Panel by the United States*, WT/DS431/6, 29 June 2012; *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for the Establishment of a Panel by the European Union*, WT/DS432/61, 29 June 2012; *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for the Establishment of a Panel by Japan*, WT/DS433/6, 29 June 2012. See G. ANDORNINO, *La controversie sulle "terre rare" si globalizza*, in *Orizzonte Cina*, Luglio 2012, pp. 2-3; *Disputes Roundup: Australian Plain Packaging Faces Third Challenge; Rare Earths Panel Established*, in *Bridges Weekly Trade News Digest*, 25 July 2012; also WTO Press Release, *Panel Established on China's Rare Earths Exports*, 23 July 2012.

<sup>2</sup> Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012; Panel Report, *China – Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)*, WT/DS394/R and Corr.1, WT/DS395/R and Corr.1, WT/DS398/R and Corr.1, adopted 22 February 2012 as modified by Appellate Body Report (WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R). For an analysis of the *China – Raw Materials* dispute see E. BARONCINI, *La politica cinese sulle esportazioni dinanzi al sistema di risoluzione delle controversie dell'OMC: il report del Panel nel caso China – Raw Materials*, in *Cuadernos de Derecho Transnacional*, Vol. 3, No. 2 (2011), pp. 203-248, <http://www.uc3m.es/cdt>; E. BARONCINI, *Obblighi WTO-Plus, tutela dell'ambiente, della salute e preservazione delle risorse naturali: il Report del Panel nel caso China – Raw Materials*, in *Diritto comunitario e degli scambi internazionali*, 2011, pp. 627-678; J.H.J. BOURGEOIS, *China and the WTO Dispute Settlement Mechanism*, in *Opinio Juris in Comparatione*, 2011, Vol. 2, Paper 2, pp. 25 ff.; J.F. DEMEDEIROS, *Global Trade Law – China's Export Restraints Found to Be Inconsistent with its Obligations as a Member of the World Trade Organization – China-Measures Related to the Exportation of Various Raw Materials*, WT/DS384/R, WT/DS395/R, WT/DS398/R, (July 5, 2011), in *Suffolk Transnational Law Review*, 2011, pp. 101-117; J.Y. QIN, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, in *Chinese Journal of International Law*, 2012, pp. 237-246; S.E. ROLLAND, *China-Raw Materials: WTO Rules on Chinese Natural Resources Export Dispute*, in *Asil Insights*, Vol. 16, Issue no. 21, 19 June 2012.

<sup>3</sup> *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, in *UNTS*, Vol. 1155, p. 331.

protectionist nature should be followed by the European Union in order to properly implement the principles of free and fair trade, sustainable development, and the commitment to the promotion of multilateral solutions to common problems, now codified in the Lisbon Treaty to guide the international action of Europe.

## **II. Facts of the new WTO dispute: the strategic relevance of rare earth elements for high-tech industry, the global monopoly of China and the supply difficulties for the manufacturing countries**

Having unique heat resistant, magnetic and phosphorescent properties, rare earths are critical ingredients for many high-tech information, military and green industrial goods -including medical equipment, lasers, laptops, cellular phones, flat screens and displays (LED, LCD, plasma), wind turbines, engines for electric and hybrid vehicles, energy-efficient bulbs, aircraft, satellite, and missile guidance systems.

In spite of their name, REEs are not rare, but widespread in the earth's crust. Their production, however, is almost exclusively concentrated in the People's Republic of China (PRC). In fact, Beijing currently extracts between 95 to 97 percent of REE world's supply,<sup>4</sup> providing also for the successive stages in the mining industry –i.e. smelting, separating and refining. China therefore holds the firm and undisputed global monopoly of rare earths. Such overall supremacy on these strategic supplies has been realized in particular in the last two decades,<sup>5</sup> as in 1990 PRC produced only 27% of REE total world output<sup>6</sup>: China overexploited its natural resources –amounting only at 30 percent of world rare earth reserves- exporting them also at cut-rate prices, with the consequence of driving out foreign competition, as third countries' mining plants frequently chose to close because of the too high costs brought about by the very demanding environmental and labour legislations imposed by industrialized States.<sup>7</sup>

While high-tech industries based in the US, the EU and Japan became particularly vulnerable to Beijing mineral policy,<sup>8</sup> China started suffering because of the environmental degradation and resource depletion provoked by its REE overexploitation. The Asian Country therefore began, in the second half of the last decade, to limit rare earth exports, with the intention of reducing mining without cutting supplies to its domestic downstream factories –which, on the contrary, Beijing aims at developing and strengthening, incentivizing foreign companies in investing on and transferring know-how to Chinese industries.

The supply difficulties faced by the most technologically advanced non-Chinese companies in obtaining Beijing natural resources significantly worsened in 2010, following the intensification of the diplomatic dispute between Japan and China on the sovereignty over the Diaoyu or Senkaku Islands.<sup>9</sup> Subsequent to the imprisonment by the Japanese authorities of the captain of a Chinese vessel fishing in the waters of the disputed Islands,<sup>10</sup> China decided a marked 40% reduction on exports of rare earths.<sup>11</sup> Such a move once more negatively affected the REE global supply market, with a very sharp increase of the prices

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<sup>4</sup> *Times Topics – Rare Earths*, *The New York Times*, 13 March 2012.

<sup>5</sup> It is very famous the Deng Xiao Ping's 1992 assertion that "the Middle East has oil; China has rare earth" reported *inter alia* by C. MAY, *Is America About to Become Even More Dependent on China? The Case for Domestic Rare Earth Elements (REEs) Exploration and Excavation*, National Policy Analysis No. 608, May 2010.

<sup>6</sup> See P.K. TSE, *China's Rare-Earth Industry, US Geological Survey Open-File Report 2011–1042*, at p. 2.

<sup>7</sup> On these aspects see E. BARONCINI, *La politica cinese sulle esportazioni dinanzi al sistema di risoluzione delle controversie dell'OMC: il report del Panel nel caso China – Raw Materials*, in *Cuadernos de Derecho Transnacional*, 2011, pp. 203-248, <http://www.uc3m.es/cdt/>; ID., *Obblighi WTO-Plus, tutela dell'ambiente, della salute e preservazione delle risorse naturali: il Report del Panel nel caso China – Raw Materials*, in *Diritto comunitario e degli scambi internazionali*, 2011, pp. 627-678.

<sup>8</sup> See K. BRADSHER, Stephanie CLIFFORD, *China Consolidates Grip on Rare Earths*, *The New York Times*, 16 September 2011; *WTO Suit Won't End China's Rare Earth Monopoly - Interview to Jeffery Green*, *The Critical Metals Report*, 17 April 2012, available at <http://www.theaureport.com/pub/na/13106>, accessed on May 2012.

<sup>9</sup> China calls the Islands Diaoyu, while Japan uses the name Senkaku. On the territorial dispute between the two Asian countries on the Diaoyu/Senkaku Islands see C. RAMOS-MROSOVSKY, *International Law's Unhelpful Role in the Senkaku Islands*, in *University of Pennsylvania Journal of International Law*, 2008, pp. 903-946.

<sup>10</sup> On the diplomatic incident of September 2010 see L. ZHU, *Chinese Practice in Public International Law: 2010*, in *Chinese Journal of International Law*, 2011, pp. 427-468, at 434-435; Note, *(In)Efficient Breach of International Trade Law: The State of the "Free Pass" after China's Rare Earths Export Embargo*, in *Harvard Law Review*, 2011, pp. 602-625.

<sup>11</sup> Japan alone accounts for 50% of China exports of rare earth elements. For a complete overview of the economic, policy and legal aspects of the rare earths issue see B. GU, *Mineral Export Restraints and Sustainable Development – Are Rare Earths Testing the WTO's Loopholes?*, in *Journal of International Economic Law*, 2011, pp. 765-805.

of rare earths at international level<sup>12</sup> that, combined with a considerable lowering of REE domestic costs, amounting on average to nearly half of international prices, also created significant competitive advantages for the Chinese manufacturing industry to the detriment of foreign competitors.<sup>13</sup> Many foreign producers, therefore, have been even induced and are still under a considerable pressure to move their operations – together with jobs, investments and technologies- in China, as carrying on manufacturing in the original seats is too expensive and uncertain because of the unreliability of Beijing REEs at reasonable prices.<sup>14</sup>

### III. Reactions of the manufacturing countries and industries to Chinese export restrictions

Manufacturing countries are trying to react to China's export restrictions of rare earths by (re)opening production sites on their territories or promoting the setting up of mines in other States. The site of Mountain Pass (California) –that had to close in 2002, after the leak of radioactive waste leading California to adopt stricter environmental standards, which made production costs too high- is thus active again. Other important factories have been opened on the east coast of Malaysia for treating rare earths imported from Australia, since in the northern State of Pahang legislation is more flexible than in the Anglo-Saxon country,<sup>15</sup> even if the Australian facilities have had to face opposition from the Malaysian residents on environmental grounds. Further projects of additional sites are being planned in South Africa, Brazil, Canada, Vietnam, Kazakhstan and Greenland, with Japan even considering the idea of offshore exploration for new rare earths' deposits.<sup>16</sup> In addition, high-tech industries are endeavoring to develop new techniques for saving REEs in the manufacturing process, for recycling already used rare earths, and for devising substitutes to such natural elements. However, the new researches are costly and just at their beginning, and remain largely insufficient even if combined with the efforts by the advanced economies to set up new mine plants of rare earths, equally requiring considerable time and funding.<sup>17</sup>

The US, the EU and Japan, in an unprecedented concerted action, also characterized by the fact that Tokyo for the first time is taking Beijing to the Geneva dispute settlement mechanism,<sup>18</sup> have therefore decided to introduce a WTO complaint, asserting that Chinese export restrictions are inconsistent with the General Agreement on Tariffs and Trade (GATT) 1994 and China's Accession Protocol to the WTO.<sup>19</sup> They are, in fact, very confident in a positive reaction by the Geneva judiciary, as the legal structure of the *China – Rare Earth* case is extremely similar to that of the *China – Raw Materials* case, where the WTO Appellate Body concluded that Chinese export restrictions on the 9 minerals and metals addressed in that controversy

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<sup>12</sup> For instance, the average export price of rare-earth oxides increased by 537% in 2011 compared to 2010. See J.M. FREEDMAN, *WTO to Investigate Chinese Curbs on Rare-Earth Exports*, *Bloomberg Businessweek*, 24 July 2012.

<sup>13</sup> See Memo/12/182, *EU Challenges China's Export Restrictions on Rare Earths*, Brussels, 13 March 2012.

<sup>14</sup> Cfr. the considerations of the European Union in WTO Press Release, *China Blocks Panel Requests by the US, EU and Japan on "Rare Earths" Dispute*, 10 July 2012.

<sup>15</sup> The [re]opening of mining sites by other WTO countries has already been considered as producing effective competition by the major Chinese rare earth producers. Inner Mongolia Baotou Steel Rare Earth Hi-Tech Co., the largest REE company in China, has declared to expect rivalry in the international market "as resource exploitation picks up in Australia and the United States." Cfr. MOFCOM Press Release, *Baotou Steel Rare-Earth Posts Hefty Profits*, 28 March 2012.

<sup>16</sup> Gareth Hatch, analyst at the research firm "Technology Metals Research," has declared that currently there are more than 400 rare-earth projects in 36 countries. See Z. YANG, *Should the World Panic about the China's Control on Rare Earth Export?*, in *USC Annenberg, School for Communication & Journalism*, 3 April 2012, available at <http://ascjweb.org/moneymarketsmedia/?p=566>, accessed in July 2012.

<sup>17</sup> C. BONTRON, *Peu d'alternatives au monopole chinois existent aujourd'hui*, in *Le Monde*, 20, July 2012, p. 6.

<sup>18</sup> Such a choice demonstrates how essential are REEs for the Japanese economy. More generally, commentators observed that the Tokyo attitude to avoid initiating disputes against China in the WTO may be due to a) the fact that many Beijing exports are currently produced by foreign-invested enterprises, with a strong presence of Japanese financing, b) the persistent bilateral trade surplus of Japan with China, and c) the deep influence of Confucianism, the doctrine considering litigation as a means of last resort. On these aspects see W. ZHUANG, *An Empirical Study of China's Participation in the WTO Dispute Settlement Mechanism: 2001-2010*, in *The Law and Development Review*, 2011, pp. 217-246, at p. 223. See also C. GILLISPIE, S. PFEIFFER, *An Interview with Yufan Hao and Jane Nakano: The Debate over Rare Earths – Recent Developments in Industry and the WTO Case*, *The National Bureau of Asian Research*, 11 July 2012.

<sup>19</sup> *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for consultations by the United States*, WT/DS431/1, 15 March 2012; *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for consultations by the European Union*, 15 March 2012, WT/DS432/1; *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Request for consultations by Japan*, WT/DS433/1, 15 March 2012. See EU Press Release, *EU Challenges China's Rare Earth Export Restrictions*, 13 March 2012; *US, EU, Japan Challenge China on Rare Earths*, in *Bridges*, 15 March 2012.

infringed the multilateral trade rules and could not be justified by any WTO public policy exceptions' clause.<sup>20</sup>

#### IV. Legal basis of the WTO complaints

The three complainants claim, *inter alia*, that the Chinese REE export regime involve many quantitative restrictions not respecting the duty to eliminate export quotas, enshrined in GATT Article XI:1, and that the administration of the export measures contravenes GATT Article X:3, as the PRC authorities would not apply the challenged disciplines in “a uniform, impartial and reasonable manner.”

In particular, the US, the EU and Japan argue that the Chinese export restrictions on rare earths infringe also a WTO-plus obligation -i.e. one of the stringent requirements significantly exceeding those accepted by the WTO original membership, undertaken by China, like all the new WTO Members, to gain access to the multilateral trade system. In fact, the export duties on rare earths, tungsten and molybdenum violate China's specific accession commitment to eliminate export tariffs codified at Paragraph 11.3 of the Accession Protocol,<sup>21</sup> as none of the elements considered in the WTO complaints is listed in Annex 6 of such Protocol, contemplating the ad hoc exceptions to the China's WTO-plus obligation.

#### V. Beijing defence

China claims that its export restrictions are perfectly “in line” with WTO rules,<sup>22</sup> in particular with the general exceptions clause of the GATT, i.e. Article XX. According to the official statements of the Ministry of Commerce (MOFCOM), Beijing rare earth policy “aims to protect resources and environment, and realize sustainable development,” therefore excluding any Chinese “intention of restricting free trade or protecting domestic industries through trade-distorting measures.”<sup>23</sup>

It must be underlined that, subsequent to the dispute in the *China – Raw Materials* case, where the Appellate Body concluded that GATT Article XX cannot be applied to justify violations of the WTO-plus obligation concerning the requirement to eliminate export *duties*, the Asian Country started to reframe and reformulate its rare earth mining policy constantly highlighting that the legal framework of the Chinese REE export regime is based on *quotas* –thus on measures which, if considered to violate GATT Article XI, may also be assessed to ascertain whether they are justifiable under GATT Article XX. Such export quotas are now conferred by the PRC authorities to the local companies mining, processing and distributing rare earths on the basis of their fulfillment of the severe standards fixed by the Chinese discipline. The Ministry of Commerce (MOFCOM) decides the amount and allocates the export quotas in batches, and twice per year.<sup>24</sup> On 11 November 2011, MOFCOM has also established the specific qualifications necessary to Chinese “producers” and “distributors” to be entitled to export quotas, qualifications that comprise the respect of environmental requirements for the mining and processing plants and the activities conducted therein,

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<sup>20</sup> For the indications on the AB Report in the *China - Raw Materials* case and the comments on the WTO judiciary findings in that dispute see *supra* footnote 2.

<sup>21</sup> Pursuant to which “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.” It is here to be remarked that within the general WTO system export tariffs are not bound, given that, on the basis of GATT Article II, the binding of tariffs applies only to tariffs on imports.

<sup>22</sup> See *Rare Earths Policy “in Line with WTO”*, in *China Daily*, 15 March 2012. See also *No Discrimination in Rare Earth Supply*, in *Xinhuanet.com*, 5 February 2012; *West's Rare Earth Accusation against China Unfair*, in *Xinhua*, 14 March 2012; MOFCOM Press Release, *Spokesman Comments on US, EU and Japan Requests to WTO About Setting Up A Panel on China's Export Measures*, 3 July 2012.

<sup>23</sup> See MOFCOM Press Releases, *China's Rare Earth Policy Justified*, 15 March 2012; *Earth Export Control at WTO*, 15 March 2012; *Comments by Head of MOFCOM Department Treaty and Law on US, EU and Japan Requests of Consultations on China Rare Earth Export Control at WTO*, 15 March 2012; *China to Properly Deal with Request for WTO Panel on Rare Earth: Spokesman*, 29 June 2012.

<sup>24</sup> The strategic nature of rare earths involve of course the competences of many other PRC authorities. *Inter alia*, at central level, they are the Ministry of Land and Resources, the Ministry of Industry and Information, the State Development Reform Commission, and the Ministry of Environmental Protection and the Ministry of Health. For the best presentation of the Chinese discipline on REE export regime see H.W. LIU, P. LYFOUNG, J. MAUGHAN, *WTO Rules, Export Quotas and Sustainable Development: The Case of China Rare Earths*, Trade and Investment Law Clinic Papers, Centre for Trade and Economic Integration, The Graduate Institute, Geneva, 2012.

together with the compliance with social security requirements, and the absence of infringements of a consistent series of Chinese regulations.<sup>25</sup>

Besides many new and articulated legislative measures, China has adopted two very significant policy documents, where it constantly stresses that the purpose of its rare earth legislation is implementing and complying with the principle of sustainable development, i.e. with the research of a proper equilibrium between economic activities and adequate environmental, conservation and health disciplines. In 2011 the State Council issued the “Guidelines on Promoting the Sustainable and Health Development of the Rare Earth Industry”<sup>26</sup>; and, in June 2012, the Information Office of the State Council published the White Paper “Situation and Policies of China's Rare Earth Industry.”<sup>27</sup> Both in the Guidelines and in the White Paper, China tightened and announced the further strengthening of its discipline on rare earth mining, dressing, smelting and separating technologies, asserting that the reinforcement of the national legal framework is absolutely necessary to appropriately deal with a) the conservation problems of the natural resources –if not controlled, it has been predicted that Chinese rare earth reserves could be exhausted in 15–20 years; and b) the enormous environmental damages in the Provinces where REE activities are concentrated –Baotou of Inner Mongolia and Liangshan of Sichuan, together with Ganzhou of Jiangxi Province.<sup>28</sup> In fact, rare earth minerals are naturally associated with many dangerous elements, like radioactive residues, large quantities of toxic and hazardous gases, making their mining and processing destructive for the soil and farmland –with landslides, clogged rivers and polluted aquifers.

Another relevant aspect of the new Beijing rare earth policy is the implementation of the strategy “large enterprises and large groups.” Indeed, as minerals can be mined in small quantities, there has been widespread private, illegal mining in China; and since such activities and private sales have always been difficult for PRC authorities to keep track of, smuggling mining and processing, performed out of any public control, have been a leading cause of environmental pollution and resource depletion. Consequently, by imposing an entrepreneurial structure based on large groups, the PRC aims at having a better control on the observance of the new strict domestic rare earth legislation.

In spite of the remarkable efforts undertaken by China to review and to present its export quantitative restrictions on REEs as an absolutely necessary feature of its rare earth policy -wholly focused on the principle of sustainable development- it is by no means sure that the current Beijing REE export quotas regime can be justified under GATT Article XX. Lit. b) and lit. g) of the GATT general exceptions clause require that the measures to be justified are proven to be “necessary to protect human, animal or plant life or health,” or “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” On the basis of the WTO case-law developed until now, it could be difficult to demonstrate that Chinese export quotas are “necessary,” as many specialists claim that less trade-restrictive, reasonably feasible alternatives are available.<sup>29</sup> Furthermore, there is a problem of evidence: since export quotas are defended as measures “necessary” or “relating to” the conservation of natural resources,” objective data have to show that such quantitative restrictions lower domestic production or consumption of rare earths. Available data, however, suggest that both Chinese production and consumption of rare earths have risen.<sup>30</sup>

## **VI. The applicability of GATT Article XX to China’s Accession Protocol in the *China – Rare Earths* case: the need to overcome the negative interpretative result of the *China – Raw Materials* case**

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<sup>25</sup> See the *2012 Rare Earth Export Quota Application Qualifications and Procedures*, issued on 11 November 2011 by MOFCOM.

<sup>26</sup> Cfr. *Some Suggestions of the State Council on Promoting the Sustainable and Healthy Development of Rare Earth Industry*, issued by the State Council, No. 12(2011), available in the website of the Baotou China Rare Earth Industry Forum, <http://www.creidf.com>. See also *China Issues Guidelines for Rare Earth Industry*, in *China Daily*, 20 May 2011.

<sup>27</sup> *Situation and Policies of China's Rare Earth Industry*, June 2012, available at the website of Xinhuanet.com [http://news.xinhuanet.com/english/business/2012-06/20/c\\_131665123.htm](http://news.xinhuanet.com/english/business/2012-06/20/c_131665123.htm).

<sup>28</sup> Cfr. *China “Building Up Rare Earth Reserves,”* in *Xinhuanet.com*, 16 July 2012.

<sup>29</sup> See H.W. LIU, P. LYFOUNG, J. MAUGHAN, *WTO Rules, Export Quotas and Sustainable Development: The Case of China Rare Earths*, Trade and Investment Law Clinic Papers, Centre for Trade and Economic Integration, The Graduate Institute, Geneva, 2012, and the doctrine and reports quoted therein.

<sup>30</sup> P.K. TSE, *China’s Rare-Earth Industry, US Geological Survey Open-File Report 2011–1042*.



As we have seen, the US, the EU and Japan also attacked the Chinese export duties imposed on various forms of rare earths, tungsten and molybdenum as they violate the obligation contemplated in Paragraph 11.3 of the Accession Protocol. The infringement of the WTO-plus obligation is very clear; and since none of the recalled materials is contemplated in the closed list of Annex 6 to the AP, concerning the ad hoc exceptions to Paragraph 11.3, the only way China has to avoid being condemned with reference to export duties on rare earths is to try to justify the violation of the WTO-plus obligation relying on GATT Article XX.

Beijing will thus have to argue, for a second time and at a very short temporal distance, the applicability of the GATT general exceptions' clause to Paragraph 11.3 of the Accession Protocol - a claim that, as already mentioned, was poorly rejected by the Appellate Body in the *China – Raw Materials* case.<sup>31</sup> The Asian Country will have to illustrate all the elements and the negative consequences not taken into consideration by the WTO judiciary in the *China – Raw Materials* case, duly stressing the notable weaknesses characterizing the legal reasoning of the Appellate Body, so as to persuade the panel established for assessing the Chinese export restrictions on REEs to revisit the regrettable AB conclusions on the legal issue here considered. It is, in fact, to be underlined that, as very recently reaffirmed in the *US-Clove Cigarettes* Report, “[i]nterpretations developed by panels and the Appellate Body in the course of dispute settlement proceedings are binding only on the parties to a particular dispute,”<sup>32</sup> for the WTO system does not contemplate the principle of *stare decisis*.<sup>33</sup> This does not mean that WTO precedents can be freely disregarded by a WTO judging body: the Geneva case-law has to be expression of the obligation to provide “security and predictability to the multilateral trading system” established by Article 3.2 of the DSU.<sup>34</sup> Such a need for consistency and certainty in the WTO dispute mechanism through the development of a settled jurisprudence (*jurisprudence constante*, or *ständige Rechtsprechung*)<sup>35</sup> on similar legal issues has been interpreted as requiring to be in presence of “cogent reasons”<sup>36</sup> in order to depart from previous, adopted, AB reports. This is the point of equilibrium identified by the WTO judiciary between the duty to ensure, through the dispute settlement mechanism, “security and predictability to the multilateral trading system” under Article 3.2 of the DSU and the obligation on panels of conducting an “objective assessment” of the matter before them pursuant to Article 11 of the DSU.

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<sup>31</sup> For an extensive analysis of the inadequacy of the AB decision on the relation between GATT Article XX and Paragraph 11.3 of China's Accession Protocol see E. BARONCINI, *The Applicability of GATT Article XX to China's WTO Accession Protocol in the Appellate Body Report of the China – Raw Materials Case: Suggestions for a Different Interpretative Approach*, in *China-EU Law Journal*, 2012, Online First, Digital Object Identifier (DOI) 10.1007/s12689-012-0010-4. See also E. BARONCINI, *An Impossible Relationship? Article XX GATT and China's Accession Protocol in the China – Raw Materials Case*, in *BIORES*, May 2012, pp. 18-22.

<sup>32</sup> Appellate Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/AB/R, adopted 24 April 2012, para. 258. For a comment see T. VOON, *The WTO Appellate Body Outlaws Discrimination in U.S. Flavored Cigarette Ban*, *Asil Insights*, 30 April 2012.

<sup>33</sup> On the role of precedent before international tribunals cfr. G. GUILLAUME, *Le precedent dans la justice et l'arbitrage international*, in *Journal de droit international*, 2010, pp. 685-703.

<sup>34</sup> “The dispute settlement system of the WTO is a central element in providing *security and predictability to the multilateral trading system*. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Article 3.2 of the DSU, emphasis added.

<sup>35</sup> See G. GUILLAUME, *The Use of Precedent by International Judges and Arbitrators*, in *Journal of International Dispute Settlement*, 2011, pp. 5-23, at p. 6.

<sup>36</sup> “It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. [...] This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB. [...] Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent *cogent reasons*, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.” Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (US – Stainless Steel (Mexico))*, WT/DS344/AB/R, adopted 20 May 2008, paras. 158 and 160, emphasis added.

Therefore, while WTO panels cannot disregard AB findings carelessly, they have, at the same time, to discontinue and diverge from previous, not persuasive conclusions of the Appellate Body when they reach the conviction -assessing the matter brought before them in good faith, as required by Article 31 of the Vienna Convention on the Law of Treaties- that there are new arguments and additional elements in the light of which a particular interpretative approach operated by the Appellate Body needs to be refined and /or revised. In the presence of “flaws” and “systemic difficulties with previous jurisprudence,”<sup>37</sup> we deem that there are “cogent reasons” imposing, on a general basis, to depart from adopted WTO precedents. With specific reference to the applicability of GATT Article XX to Paragraph 11.3 of the Accession Protocol, we are persuaded that revising the negative interpretation of the Appellate Body in the *China - Raw Materials* case so as to reach a hermeneutic result fully respectful of the object and purpose of the WTO –i.e. the possibility to justify the violation of the WTO-plus obligation to eliminate export duties on the basis of the GATT general exceptions clause- integrates a “cogent reason” to diverge from the recent unconvincing findings of the Appellate Body.

## **VII. The unfortunate conclusions of the Appellate Body in the *China – Raw Materials* case on the applicability of GATT Article XX to Paragraph 11.3 of China’s WTO Accession Protocol**

Having considered that the WTO judiciary has to revisit the unsatisfactory conclusions of the Appellate Body in the *China – Raw Materials* case concerning the applicability of GATT Article XX to the Accession Protocol, it is now necessary to illustrate the unconvincing findings of the WTO permanent tribunal before presenting our different interpretative approach.

As already hinted, pursuant to Paragraph 11.3 of the Protocol, “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.” While the latter concerns fees and charges imposed as payment for a service rendered, Annex 6 of the Protocol lists 84 products indicating for each of those goods the maximum export duty rate that Beijing may impose as export tariff. A Note to Annex 6 reaffirms that “the tariff levels included in this Annex are maximum levels which will not be exceeded,” pointing out that “China ... would not increase the presently applied rates, except under exceptional circumstances.” By also applying export duties to rare earths, China thus infringes Paragraph 11.3 of the Accession Protocol as none of the rare earths, object of the WTO complaints, is listed in Annex 6 of the China Protocol, contemplating the ad hoc exceptions to the China’s WTO-plus obligation.

In the *China – Raw Materials* case, the Appellate Body correctly reported that the Protocol has to be considered “an integral part” of the WTO Agreement, and thus interpreted in accordance with the customary rules of interpretation of public international law, as requested by Article 3.2. of the DSU.<sup>38</sup> It also duly recalled Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, pursuant to which “a treaty [has to] be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>39</sup> But then the WTO judiciary affirmed that GATT Article XX cannot be applied to Paragraph 11.3 of the Accession Protocol ignoring, in practice, those two essential elements of the WTO system, founding its conclusions on a debatable interpretation of the text of the WTO-plus obligation, an unconvincing consideration of a very limited context of Paragraph 11.3, and a superficial evaluation of the Preamble of the WTO Agreement.

In particular, in few lines, the Appellate Body concluded that the absence of indications, in the wording of the WTO-plus obligation, on the applicability of GATT Article XX, together with the lack of any introductory clause similar to that of Paragraph 5.1 of the Protocol –pointing out that the right to import and export goods has to be guaranteed to all enterprises established in China “[w]ithout prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement”- “suggest ... that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3

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<sup>37</sup> M. KOLSKY LEWIS, *Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement*, in *Stanford Journal of International Law*, 2012, pp. 1-45, at p. 34. On the role of precedent in the WTO dispute settlement system see also G. SACERDOTI, *Precedent in the Settlement of International Economic Disputes: the WTO and Investment Arbitration Models*, in Arthur A. ROVINE (ED.), *International Arbitration and Mediation - The Fordham Papers 2010*, Martinus Nijhoff Publishers, Leiden, Boston, 2011, pp. 225-246.

<sup>38</sup> Appellate Body Report, *China – Raw Materials*, para. 278.

<sup>39</sup> *Ibid.*



of China's Accession Protocol,<sup>40</sup> finding it "difficult to see how [the WTO-plus obligation] language could be read as indicating that China can have recourse to the provisions of Article XX of the GATT in order to justify imposition of export duties on products that are not listed in Annex 6 or the imposition of export duties on listed products in excess of the maximum levels set forth in Annex 6."<sup>41</sup>

Turning to the immediate context – Paragraph 11.1<sup>42</sup> and Paragraph 11.2<sup>43</sup> of the Protocol – the Appellate Body highlighted that Beijing guaranteed to WTO Members the application and administration of customs fees or charges and internal taxes and charges "in conformity with the GATT 1994," a phrase which is absent in Paragraph 11.3, specifically referred to the elimination of "taxes and charges applied to exports." Such silence, the AB argued, "further supports our interpretation that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3;" in fact, went on their reasoning, as China WTO-plus obligation "arises exclusively from China's Accession Protocol, and not from the GATT 1994, we consider it reasonable to assume that, had 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 Paragraph 11.3 or elsewhere in China's Accession Protocol."<sup>44</sup>

Finally, taking into consideration the WTO Preamble, the AB recalled that it contemplates various objectives, including "raising standards of living ... seeking both to protect and preserve the environment ... expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development," and ending with the resolution "to develop an integrated, more viable and durable multilateral trading system." Surprisingly, and without any further consideration or legal reasoning, the Appellate Body instantly affirmed that "none of the [considered] objectives, nor the balance struck between them, provides specific guidance on the question of whether Article XX of the GATT is applicable to Paragraph 11.3 of China's Accession Protocol"; and it is because of such asserted absence of "specific guidance," in light of Beijing "explicit commitment" to eliminate export duties and "the lack of any textual reference to Article XX" in the China WTO-plus obligation, that the Appellate Body concluded to "see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3."<sup>45</sup>

## VIII. Effects of the AB conclusions

The austere interpretative approach adopted by the Appellate Body in the *China – Raw Materials* case produces a series of negative consequences. First of all, it renders the WTO-plus obligation to eliminate export duties "immune"<sup>46</sup> from any GATT public policy exception, while even the pillars of trade liberalisation -the most-favoured nation clause, the principle of national treatment- may be derogated by domestic measures necessary or related to the protection of one or more of the non-trade values enshrined in the WTO general exceptions clauses. Furthermore, denying the applicability of GATT Article XX to the WTO-plus obligation to eliminate export duties signifies quite a severe additional burden to the already heavy "entry fee" paid by China for acceding to the WTO, thus raising "a serious constitutional issue in the WTO jurisprudence."<sup>47</sup> The asymmetry characterizing the WTO-plus commitments is thus aggravated, an asymmetry which it is very difficult to correct by amending the multilateral trade texts, as it is by no means clear which procedure should be followed to revise Accession Protocols, nor is it simple to satisfy the very demanding decisional mechanism -provided for by Article X of the WTO Agreement- should it be concluded that the WTO amending procedure has to be applied to modify WTO-plus obligations accepted by the WTO acceding Countries.

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<sup>40</sup> Appellate Body Report, *China – Raw Materials*, para. 291.

<sup>41</sup> Appellate Body Report, *China – Raw Materials*, para. 284.

<sup>42</sup> Pursuant to which "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*" (emphasis added).

<sup>43</sup> In this passage the Accession Protocol states 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*" (emphasis added).

<sup>44</sup> Appellate Body Report, *China – Raw Materials*, para. 293.

<sup>45</sup> Appellate Body Report, *China – Raw Materials*, para. 306.

<sup>46</sup> J.Y. QIN, *Reforming Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection*, March 2012, <http://ssrn.com/abstract=2030477>, at p. 10.

<sup>47</sup> M. MATSUSHITA, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources*, in *Trade, Law and Development*, 2011, pp. 267-295, at p. 287.

Moreover, the AB interpretation generates another “illogical result.”<sup>48</sup> Being barred from using export duties -even though customs duties are considered in the WTO system as the less distorting and the most transparent obstacle to trade, and thus the preferred tool to have recourse to by a WTO Member in need to apply a trade remedy- China is forced to resort to bans and quotas in order to pursue its national environmental, conservation and health policies. Bans and quotas, nevertheless, are severely trade-distorting measures: compelling Beijing to have recourse primarily to such non-tariff obstacles is a very perverse outcome of the AB Report, as the WTO judiciary seems to promote the most trade-obstructing and distorting measures, instead of encouraging the most adequate and less trade-hindering discipline for pursuing non-trade values.

What is worse, the impossibility to apply GATT Article XX to Paragraph 11.3 of China’s Accession Protocol appears to be in contrast with the principle of sustainable development codified in the Preamble of the WTO Agreement and the model of sustainable economic development pursued by the Geneva based multilateral trade system, where no trade liberalization commitment is absolute, but may be derogated, obviously respecting the requirements of the general exceptions clauses while pursuing the non-trade values therein contemplated.

## **IX. Suggestions for a different interpretative approach**

Having highlighted the serious undesirable consequences that the recent Geneva case-law provokes, it may be easily stated that the inability of the WTO judiciary to mitigate the inequity among WTO Members generated by the stand-alone export concessions leads to what Article 32(b) of the Vienna Convention defines as “a result which is manifestly absurd [and] unreasonable.”

Such inadequate scenario imposes an in-depth review of the difficult interpretative path that the Appellate Body has decided to embark on. It is, in fact, possible to define a connection between Paragraph 11.3 of the Protocol and Article XX capable of allowing China to invoke the GATT public policy exceptions for justifying derogations to the obligation to eliminate export duties beyond the goods listed and the limits contemplated in Annex 6 of the Protocol.

### **1. The text of Paragraph 11.3 of China’s Accession Protocol and the Note to Annex 6**

Starting with the text of Paragraph 11.3, it has to be underlined that while there is no reference to GATT Article XX, it is also accurate to note that in such part of the Accession Protocol there is no express exclusion of the possibility to invoke the GATT public policy exceptions. The improvident silence of the negotiators –who would surely had done a more appreciable job had they drafted a special discipline to directly define the link between the Protocol and the WTO Agreements- may not, in any way, be automatically transformed into the most stringent prohibition of having recourse to the GATT general exceptions clause.

Furthermore, the scope of the two *ad hoc* exceptions to the obligation to eliminate export duties expressly contemplated in Paragraph 11.3 of the Accession Protocol should be reconstructed just in light of the wording of that Paragraph: negotiators clarified that the severe WTO-plus discipline does not concern charges imposed as payment for a service rendered (GATT Article VIII), nor does it affect the 84 products listed in Annex 6 of the Protocol, as export duties may still be levied on those goods, within the limits of the export duty rates provided for in that Annex. These clarifications cannot be read as expressing China renouncement to the right to have recourse to GATT Article XX with reference to export duties -i.e. with reference to the right to impose export duties on products not contemplated in the list of Annex 6, or to exceed the export duty rates contemplated for the 84 products quoted in Annex 6- of course provided that all the requirements imposed by the GATT general exceptions clause are respected, *in primis* the condition that the extra export duties pursue one of the non-trade values contemplated in Article XX.

Undeniably there is also the Note to Annex 6 to take into consideration, pursuant to which “China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded,” and

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<sup>48</sup> See, with reference to the applicability of GATT Article XX to the SCM Agreement, R. HOWSE, *Climate Mitigation Subsidies and the WTO Legak Framework - A Policy Analysis*, IISD Paper, May 2010, at p. 17.

“that it would not increase the presently applied rates, except under *exceptional circumstances*.”<sup>49</sup> In our view, this is an additional obligation undertaken by China in the form of a standstill clause, concerning the 84 products of Annex 6: Beijing committed not to raise the export tariffs applied to the listed goods at the moment of its accession to the WTO, in case those tariffs were lower with reference to the maximum duty rates established by Annex 6, provided that “exceptional circumstances” did not occur. Once again, the expression of “exceptional circumstances” should not be considered as unequivocally implying China’s intention to eliminate or restrict its right to have recourse to GATT Article XX. As remarked by the European Union in its submission to the Appellate Body, “the Note to Annex 6 resembles to some extent the situation envisaged in Article XXVIII of the GATT 1994 and Article XXI of the GATS (Modification of Schedules), which deal with changes in tariff bindings and changes in the Services Schedules of Specific Commitments.”<sup>50</sup> In particular, the phrase “exceptional circumstances” of the Note could be approached to the “special circumstances” of GATT Article XXVIII:4, describing the procedure, applied principally under the 1947 multilateral system, for modifying or withdrawing a concession of a WTO Member Schedule at any time,<sup>51</sup> i.e. independently of the three-year period’s expiry normally required for changing a tariff binding.<sup>52</sup> GATT 1947 practice<sup>53</sup> concerning the meaning of such “special circumstances” does not reveal any detailed examination nor requirement for stringent and articulated grounds on which to base a successful request of renegotiations of tariff concessions. It was considered “inherent”<sup>54</sup> in the logic of Article XXVIII:4 that the “special circumstances” therein contemplated should also denote “an element of urgency,”<sup>55</sup> calling for a revision of some tariff commitments beyond the timing disciplined at paragraph 1 of GATT Article XXVIII because of “internal reasons which precluded delay.”<sup>56</sup> Pursuant to Article XVI:1 of the WTO Agreement,

<sup>49</sup> Emphasis added.

<sup>50</sup> Appellate Body Report, *China – Raw Materials*, footnote 558. On the GATT modifications of Schedules see A. HODA, *Tariff Negotiations and Renegotiations under the GATT and the WTO – Procedures and Practices*, Cambridge University Press, Cambridge, 2001, pp. 11 ff.; and, with reference also to GATS Schedules cfr. P. VAN DEN BOSSCHE, *The Law and Policy of the World Trade Organization – Text, Cases and Materials*, Cambridge University Press, Cambridge, 2008, pp. 401-428, and 490-493. The presentation of the discipline concerning the Schedules of WTO Members is also relevant to have a clear picture of these very technical multilateral trade aspects: see *Current Situation of Schedules of WTO Members*, available at [http://www.wto.org/english/tratop\\_e/schedules\\_e/goods\\_schedules\\_table\\_e.htm](http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm), accessed in May 2012.

<sup>51</sup> “The CONTRACTING PARTIES may, at any time, in special circumstances, authorize ... a contracting party to enter into negotiations for modification or withdrawal of a concession included in the appropriate Schedule annexed to this Agreement.” GATT Article XXVIII:4.

<sup>52</sup> “On the first day of each three-year period, the first period beginning on 1 January 1958 (or on the first day of any other period ... that may be specified by the CONTRACTING PARTIES by two-thirds of the votes cast) a contracting party (hereafter in this Article referred to as the ‘applicant contracting party’) may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest ... (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the ‘contracting parties primarily concerned’), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest ... in such concession, modify or withdraw a concession ... included in the appropriate schedule annexed to this Agreement.” GATT Article XXVIII:1.

<sup>53</sup> Currently, while paragraph 4 of GATT Article XXVIII has been maintained, WTO Members prefer to modify their Schedules under paragraph 5 of the same provision, allowing more relaxed conditions for changing their Schedules’ commitments provided they make an ad hoc reservation in this sense, and are ready to accept mirroring initiatives by those WTO Members with which they initially negotiated the concessions they intend to change.

<sup>54</sup> See the statement of the Representative of the United Kingdom reported in GATT/IC/SR.40, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 9 and 10 July 1958*, 21 July 1958, at p. 4.

<sup>55</sup> *Ibid.*

<sup>56</sup> See the statement of the Representative of Australia reported in GATT/IC/SR.47, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 20 April 1960 (Subject Discussed: Article XXVIII:4 – Requests by Australia (GATT/AIR/190(SECRET) and GATT/AIR/191(SECRET))*, 29 April 1960, at p. 1. On the GATT 1947 practice concerning Article XXVIII:4 renegotiations see also GATT/IC/SR.25, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, 9 May 1956 (Subjects Discussed: 1. Request by the United Kingdom for Authority to Renegotiate Four Items in Schedules XIX; 2. Request by the United States for Authority to Renegotiate One Item in Schedule XX)*, 22 May 1956; GATT/IC/SR.40, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 9 and 10 July 1958 (Subjects Discussed: Requests by Australia and the United States for Authority to Enter into Re-negotiations)*, 21 July 1958; GATT/IC/SR.43, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 11 February 1959*, 17 February 1959; GATT/IC/SR.46, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 14 March 1960 (Subject Discussed: Article XXVIII:4 – Request by Australia (GATT/AIR/182 (SECRET))*, 22 March 1960; GATT/IC/SR.48, *Intersessional Committee – Summary Record of the Meeting Held at the Palais des Nations, Geneva, on 26 April 1960 (Subject Discussed: Article XXVIII:4 – Request by Australia (GATT/AIR/193 (SECRET))*, 6 May 1960; GATT/C/M/2, *Minutes of Special Meeting Held at the Palais des Nations, Geneva on Thursday, 5 January 1961 (Subjects*

according to which “the WTO shall be guided by the decisions, procedures and customary practices” of GATT,<sup>57</sup> the flexibility characterizing the described GATT 1947 practice should be applied to the evaluation of the existence of the “exceptional circumstances” justifying the modifications of the more rigorous China’s export tariffs of the 84 goods listed in Annex 6, thus avoiding any interference between the discipline of the Note to Annex 6 of China’s Accession Protocol and the content of GATT Article XX.<sup>58</sup>

## 2. The silence of Paragraph 11.3 of China’s Accession Protocol in the light of the principle of good faith

Having ascertained that the mere text of the WTO-plus obligation at issue does not require the non-applicability of GATT Article XX to Paragraph 11.3 of the China’s Accession Protocol, as it is *silent* on the point, the interpreter has to reconstruct the meaning of such *silence*. Pursuant to Article 31(1) of the Vienna Convention, such reconstruction has to be operated in “good faith,” the general principle permeating the entire interpretative process of an international agreement.<sup>59</sup> While it is difficult to give a definition of the very generic legal concept of good faith, it seems adequate to indicate that it expresses “a fundamental requirement of reasonableness,”<sup>60</sup> thus calling for an interpretative result which is honest and fair.<sup>61</sup> It has therefore to be underlined that GATT public policy exceptions have “systemic importance” within the multilateral trade system, as the WTO membership has expressly and constantly attributed to them prevalence over all GATT obligations on liberalization of trade.<sup>62</sup> Such systemic importance impedes to consider the silence of Paragraph 11.3 as a clear refusal of having recourse to the defence of GATT Article XX. It cannot reasonably –hence in good faith- be stated that the silence of the Accession Protocol indicates in the clearest way that China had the strongest intention to repudiate its right under GATT Article XX, whereas the other WTO Members were openly confident that Beijing would have agreed to such a most astonishing renounce. As the Appellate Body rightly remarked in the *Argentina – Footwear (EC)* case with reference to the omission, in the text of the Safeguard Agreement, of the “unforeseen developments” clause – a very important requirement for the application of trade defence measures, nevertheless present in GATT Article XIX, the provision devoted by the General Agreement to safeguards- “if they had intended to expressly omit this clause, the ... negotiators would and could have said so in the Agreement on Safeguards. [But] they did not.”<sup>63</sup> The WTO judiciary therefore considered the “unforeseen developments” clause as a requirement to be applied to the trade measures of the WTO Agreement on Safeguards, thus rejecting the

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*Discussed: 1. United States Request for Authority to Renegotiate under Article XXVIII:4; 2. Canadian Request for Authority to Renegotiate under Article XXVIII:4*, 16 January 1961; GATT/C/M/22, *Minutes of Meeting Held at the Palais des Nations, Geneva, on 25 September 1964 (Subjects Discussed: 1. Australian Schedule – Request under Article XXVIII:4; 2. New Zealand Schedule – Request under Article XXVIII:4)*, 12 October 1964; GATT/L/6326, *Article XXVIII:4 Renegotiations – Schedules LXXXI – Morocco*, 22 April 1988.

<sup>57</sup> It is remarked here that the procedures for renegotiations under Article XXVIII of the GATT 1994 are still those adopted in 1980 under the GATT 1947 system. See GATT/C/113, *Procedures for Negotiations under Article XXVIII – Guidelines Proposed by the Committee on Tariff Concessions*, GATT Council 10 November 1980, and GATT/C/113/Corr.1, *Procedures for Negotiations under Article XXVIII – Guidelines Proposed by the Committee on Tariff Concessions - Corrigendum*, GATT Council 10 November 1980.

<sup>58</sup> The confidentiality still distinguishing contemporary modifications and/or withdrawals under GATT Article XXVIII has to be likewise respected. See section 1 of the 1980 *Procedures for Negotiations under Article XXVIII* (GATT/C/113): “[a] contracting party intending to negotiate for the modification or withdrawal of concessions in accordance with the procedures of Article XXVIII, paragraph 1 -which are also applicable to negotiations under paragraph 5 of that Article- should transmit a notification to that effect to the secretariat which will distribute the notification to all other contracting parties in a *secret document* ... In the case of negotiations under paragraph 4 of Article XXVIII the request for authority to enter into negotiations should be transmitted to the secretariat to be circulated in a *secret document* and included in the agenda of the next meeting of the Council” (emphasis added).

<sup>59</sup> See R. GARDINER, *Treaty Interpretation*, Oxford University Press, Oxford, 2008, at pp. 147 ff.

<sup>60</sup> O. DÖRR, *Article 31 - General Rule of Interpretation*, in O. DÖRR, K. SCHMALENBACH (EDS.), *Vienna Convention on the Law of Treaties – A Commentary*, Springer-Verlag, Berlin-Heidelberg, 2012, pp. 521-570, at p. 548.

<sup>61</sup> See M. E. VILLIGER, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The “Crucible” Intended by the International Law Commission*, in E. CANNIZZARO (ED.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, pp. 105-122, at p. 109.

<sup>62</sup> See J.Y. QIN, *The Predicament of China’s “WTO-Plus” Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, (April 12, 2012), available at SSRN: <http://ssrn.com/abstract=2041227>, at p. 6.

<sup>63</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear (EC))*, WT/DS121/AB/R, adopted 12 January 2000, para. 88.



thesis that a silence on the coordination among WTO pieces of legislations could be considered as an illogic denial of any connection between agreements that are both “integral parts of the same treaty, the WTO Agreement.”<sup>64</sup>

Regrettably the Appellate Body in the *China – Raw Materials* case completely neglected any good faith reflection, nor did it consider the institutional feature of “single undertaking” characterizing the Marrakech Agreements and WTO Accession Protocols, which can all be qualified as “integral part” of the WTO Agreement. The AB Members, instead, went in the opposite direction, disconnecting China’s Accession Protocol from the other WTO Agreements, and inferring from the silence of Paragraph 11.3 an inexplicable renunciation to GATT public policy exceptions: “as 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 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 Paragraph 11.3 or elsewhere in China’s Accession Protocol.”<sup>65</sup>

### 3. The silence of Paragraph 11.3 of China’s Accession Protocol in the light of its context

“When the object of interpretation is the *absence* of a term” –in our case the absence of any express indication on the relationship between Paragraph 11.3 and the GATT- the implications of the lack of any phrasing have to “be interpreted *contextually*.”<sup>66</sup> In fact, in order to attribute the proper meaning to the silence of Paragraph 11.3 on the GATT, the hermeneutic activity has to go on applying all the criteria provided for by the customary rules of treaty interpretation of public international law codified in the 1969 Vienna Convention, given that, as effectively highlighted by the same WTO Appellate Body, “treaty interpretation is an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.”<sup>67</sup>

Unanswered issues are recurrent in international treaties, since it is difficult to draft texts characterized by comprehensiveness -a quality, moreover, very demanding to be achieved, and of course susceptible of being temporally limited.<sup>68</sup> The incomplete nature of international agreements may be due to “harassed negotiators or inattentive draftsmen,”<sup>69</sup> or carefully searched by treaty drafters, to provide the contracting parties with a flexible and lasting legal instrument, but also to arrange for the signatories an agreed text in spite of the lack of their complete convergence on the discipline for an issue of common interest. The interpreter is consequently faced with a very delicate activity when having to determine what silence signifies: as underlined always by the Appellate Body with reference to some provisions of the Anti-Dumping Agreement and the SCM Agreement, “the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement,” because such absence of indications cannot be considered as “exclud[ing] the possibility that the requirement was intended to be included by implication.”<sup>70</sup> Hence, the lack of any reference to GATT Article XX in Paragraph 11.3 of China’s Accession Protocol cannot be instantly deemed as prohibiting recourse to the GATT general exceptions’ clause: the interpreter has to consider the text of the WTO-plus obligation in light of all the interpretive rules of the Vienna Convention rules, since “the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept.”<sup>71</sup>

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<sup>64</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

<sup>65</sup> Appellate Body Report, *China – Raw Materials*, para. 293, emphasis added.

<sup>66</sup> See J.Y. QIN, *The Predicament of China’s “WTO-Plus” Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, (April 12, 2012), available at SSRN: <http://ssrn.com/abstract=2041227>, at p. 6, emphasis added.

<sup>67</sup> Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology (US – Continued Zeroing)*, WT/DS350/AB/R, adopted 19 February 2009, para. 268; see also para. 273.

<sup>68</sup> On the interpretation of silence in the WTO Agreements see I. VAN DAMME, *Treaty Interpretation by the WTO Appellate Body*, Oxford University Press, Oxford, 2009, pp. 110 ff.

<sup>69</sup> Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (US – Underwear)*, WT/DS24/AB/R, adopted 25 February 1997, para. 42.

<sup>70</sup> Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (US – Carbon Steel)*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, para. 65.

<sup>71</sup> *Brown v. Stott* [2003] 1 AC 681 at 703 (UK, Privy Council), quoted by R. GARDINER, *Treaty Interpretation*, Oxford University Press, Oxford, 2008, at p. 147, and J.Y. QIN, *The Predicament of China’s “WTO-Plus” Obligation to Eliminate Export*

Starting with the examination of the immediate context of the Protocol provision requesting China to eliminate export duties, –i.e. sections 1 and 2 of Paragraph 11- such context should be read keeping in mind that Paragraph 11.3 disciplines a WTO-plus obligation. It is thus only normal that the prescriptions there expressed –being *sui generis* and not reflecting the GATT fees, charges or internal taxes contemplated in Paragraph 11.1 and Paragraph 11.2 in order to reaffirm those traditional multilateral trade obligations with reference to the new WTO Member- are not accompanied by the expression “in conformity with GATT,” which characterizes the immediate context of the WTO-plus obligation at issue. The General Agreement does not contemplate any general obligation to eliminate export duties. Consequently, the absence in Paragraph 11.3 of the phrase “in conformity with GATT” should be attributed to the fact that China could not possibly be asked to implement its WTO-plus commitment “in conformity” with an obligation ... not established by the GATT for the original WTO membership! It has hence to be concluded that the immediate context of Paragraph 11.3 does not allow to sustain that China renounced to resort to GATT Article XX as a defence to justify derogations to its WTO-plus commitment.<sup>72</sup>

#### **4. Extending the relevant context to the Preamble of the WTO Agreement and interpreting the silence of Paragraph 11.3 in light of the object and purpose of the WTO system**

Extending the analysis of the context to the Preamble of the WTO Agreement, it is finally possible to impart a positive meaning to the silence of Paragraph 11.3 of the China Accession Protocol, a positive meaning that may be tested also in the light of the “object and purpose” characterizing the whole WTO multilateral trade system, codified in the already recalled WTO Preamble. Far from being the final target of the Marrakech Agreements, trade liberalization is conceived and regulated within the WTO system as a tool “to rais[e] standards of living,” constantly to be pursued “allowing for the optimal use of the world’s resources,” and “in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.”<sup>73</sup> Trade liberalization commitments are consequently disciplined in the Geneva based multilateral system not as absolute duties and prohibitions, impossible to derogate, but as obligations which may be overcome to pursue the non-trade values contemplated in many WTO rules, in particular in the general exceptions clauses, respecting all the requirements and the equilibrium among conflicting needs and concerns expressed by those multilateral provisions. The attention devoted by the WTO Preamble to environmental protection and the optimal use of natural resources, together with the explicit acknowledgement of the principle of sustainable development evidently reveal that the signatories of the multilateral trade agreements chose a model of economic development capable of being sustainable, i.e. constantly conjugated with the respect of the environment and social progress.<sup>74</sup> Since the WTO Preamble

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*Duties: A Commentary on the China-Raw Materials Case*, (April 12, 2012), available at SSRN: <http://ssrn.com/abstract=2041227>, at pp. 5-6.

<sup>72</sup> For this aspect see also H. SCHLOEMANN, *China – Raw Materials – Some Observations*, Power Point Presentation, ICTSD/WTO Advisors, Talking Disputes Vol. 2 - *The China – Raw Materials Case*, Geneva, 20 July 2011.

<sup>73</sup> See the Preamble of the WTO Agreement.

<sup>74</sup> The WTO Appellate Body has defined sustainable development as a concept that “has been generally accepted as integrating economic and social development and environmental protection” (Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, footnote 107). For another very effective description of the tridimensional character of sustainable development see the formula expressed at paragraph 6 of the Copenhagen Declaration on Social Development, adopted at the 1995 World Summit for Social Development: “[w]e are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people” (*Copenhagen Declaration on Social Development*, available at <http://actrav.itsilo.org/actrav-english/telearn/global/ilo/law/wssd.htm>, accessed on April 2012). Finally, attention should be reserved to what stated by the *International Law Association (ILA)* in the New Delhi Declaration on sustainable development, where such Association has expressed “the view that the objective of sustainable development involves a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations” (*ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2 April 2001, in *International Environmental Agreements: Politics, Law and Economics*, 2002, pp. 211-216, at p. 212). On the principle of sustainable development see in the doctrine U. BEYERLIN, *Sustainable Development*, in *Max Planck Encyclopedia of Public International Law*, <http://www.mpepil.com>; A. COSBEY, *A Sustainable Development Roadmap for the WTO*, IISD, Geneva, 2009; F. FRANCONI, *Sviluppo sostenibile e principi di diritto internazionale nell’ambiente*, in P. FOIS

informs all the covered agreements –hence also Accession Protocols as integral parts of the WTO system– the meaning of Paragraph 11.3 has to be construed in order to be a coherent expression and articulation of the principles therein enshrined, and a proper implementation of the model of sustainable economic development therein shaped.

It follows that the text –and the silence– of Paragraph 11.3, considered in the light of the context of the WTO Preamble, and the object and purpose of the WTO treaty system, unequivocally indicates that China, while accepting the WTO-plus obligation to eliminate export duties, did not relinquish its right to regulate trade in a manner that promotes conservation of natural resources, environmental protection and public health also through the adoption of export tariffs, should these measures prove to be the most appropriate tool to realize its legitimate public policy purposes.

It may therefore be concluded that GATT Article XX is applicable to the WTO-plus obligation accepted by China to eliminate export duties. In fact, attributing this meaning to the silence of Paragraph 11.3 of the Accession Protocol is the only interpretative outcome capable of being in harmony with the principles and the model of sustainable economic development promoted by the WTO system, which, in our view, provide “specific guidance” to the treaty interpreter applying all the hermeneutic criteria expressed by the international customary rules on the interpretation of treaties.

## 5. The principle of permanent sovereignty over natural resources and Article 31(3)(c) of the Vienna Convention

In addition, the applicability of GATT Article XX to Paragraph 11.3 of China’s Accession Protocol is confirmed if the international customary law principle of permanent sovereignty over natural resources<sup>75</sup> is duly taken into consideration, hence applying the principle of systemic integration as required by Article 31(3)(c) of the Vienna Convention, according to which a treaty interpreter, when reading the provision of an agreement, has to take into account “any relevant rules of international law applicable in the relations between the parties.”<sup>76</sup> In fact, any international agreement does not live in a legal vacuum,<sup>77</sup> but must be interpreted “against the whole background of international law”<sup>78</sup> which is binding for the contracting parties

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(ED.), *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell’ambiente*, Editoriale scientifica, Napoli, 2007, pp. 41-61; G.P. SAMPSON, *The WTO and Sustainable Development*, United Nations University, New York, 2005; ID., *The WTO and Sustainable Development: A Reply to Robertson*, in *World Trade Review*, 2008, pp. 467-471; N. SCHRIJVER, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, in *RCADI*, 2007, Vol. 329, pp. 219-412; G. VAN CALSTER, *The Law(s) of Sustainable Development*, SSNP Series, 2008, in [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1147544](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147544).

<sup>75</sup> On this principle cfr. N.J. SCHRIJVER, *Permanent Sovereignty over Natural Resources*, in *Max Planck Encyclopedia of Public International Law*, <http://www.mpepil.com>; V. ZAMBRANO, *Il principio di sovranità permanente dei popoli sulle risorse naturali tra vecchie e nuove violazioni*, Giuffrè, Milano, 2009. The customary nature of the principle of permanent sovereignty over natural resources has also been asserted by the International Court of Justice: see ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, in *ICJ Reports*, 2005, p. 168, para. 244.

<sup>76</sup> On the principle of systemic integration and the Vienna Convention on the Law of Treaties see, *inter alia*, D. FRENCH, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, in *International & Comparative Law Quarterly*, 2006, pp. 281-314; U. LINDERFALK, *Who are the “Parties”?: Article 31 Paragraph 3 (c) of the 1969 Vienna Convention and the “Principle of Systemic Integration” Revisited*, in *Netherlands International Law Review*, 2008, pp. 343-364; C. McLACHLAN, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, in *International & Comparative Law Quarterly*, 2005, pp. 279-320.

<sup>77</sup> “International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms.” A/CN.4/L.702, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Conclusions)*, Report of the Study Group of the International Law Commission, 18 July 2006, para. 1.

<sup>78</sup> M.E. VILLIGER, *Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the Case-Law of the European Court of Human Rights*, in J. BRÖHMER, R. BIEBER, C. CALLIESS, C. LAGENFELD, S. WEBER, J. WOLF, (EDS.), *Internationale Gemeinschaft und Menschenrechte - Festschrift für Georg Ress*, Carl Heymanns Verlag, Köln/Berlin/München, 2005, pp. 317- 330. For a further analysis on the application of the principle of systemic integration in the ECHR system see W. KARL, “Just Satisfaction” in *Art 41 ECHR and Public International Law – Issues of Interpretation and Review of International Materials*, in A. FENYVES, E. KARNER, H. KOZIOL, E. STEINER (EDS.), *Tort Law in the Jurisprudence of the European Court of Human Rights*, de Gruyter, Berlin/Boston, 2011, pp. 345-387, at pp. 356 ff.



and applicable in their relations, in order to attribute to its provisions a meaning that is harmonious and coherent with such relevant international law.<sup>79</sup>

As it is well known, the principle of permanent sovereignty over natural resources has been initially formulated by the General Assembly of the United Nations as the right of States “freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development,”<sup>80</sup> further clarified as a right also “of peoples” which must be exercised by the interested countries for the “well-being” of their population,<sup>81</sup> and subsequently qualified as a right including “[i]n order to safeguard [natural] resources” the entitlement of each State to carry out “effective control over them and their exploitation with means suitable to its own situation.”<sup>82</sup> In particular, always within the UN system, the permanent sovereignty over natural resources has been considered as a basic human right under international law –since all peoples have been recognized the right “for their own ends [to] freely dispose of their natural wealth and resources”<sup>83</sup> - and consequently as a right of the States which is inextricably linked to the “responsibility”<sup>84</sup> to properly manage those resources, so that each country has to responsibly exercise sovereignty when dealing with natural resources in the best interest of its population.

Whereas the content of the principle at issue is under constant evolution –in fact, the extent of the power countries may exercise in the management of their natural wealth is relentlessly considered by an always growing number of international law instruments regarding the duty of States to sustainably use natural resources in order to preserve them from extinction through adequate conservation policies<sup>85</sup> - a stable feature of such principle is the “permanent” character of the sovereignty on natural resources. This sovereignty, in the words of the UN General Assembly, is “inalienable,”<sup>86</sup> meaning that a State cannot perpetually derogate from “the essence of its sovereign rights over natural resources,” but only accept “a partial [restraint] on the exercise of its sovereignty in respect of certain resources in particular areas for a specified and limited period of time.”<sup>87</sup> Therefore, when having to attribute a meaning to the silence of Paragraph 11.3 with reference to its relationship with GATT Article XX, such silence cannot be interpreted as an overall and eternal abdication by China to dispose of its national resources by using export duties under the GATT general exceptions clause. A similar determination, in fact, would be in sharp contrast with the international customary law principle of permanent sovereignty over natural resources, which preclude a State to limit forever and unconditionally its right to dispose of its national wealth.<sup>88</sup>

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<sup>79</sup> On the interpretation of WTO Agreements against the background of other international law see I. VAN DAMME, *Treaty Interpretation by the WTO Appellate Body*, Oxford University Press, Oxford, 2009, at pp. 355 ff. See also the considerations expressed by the Study Group of the International Law Commission on the fragmentation of international law with specific reference to WTO adjudicators: “when elucidating the content of the relevant rights and obligations, WTO bodies must situate those rights and obligations within the overall context of general international law (including the relevant environmental and human rights treaties).” In fact, while it is true that “[t]he jurisdiction of most international tribunals is limited to particular types of disputes or disputes arising under particular treaties (...) [a] limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties,” with the consequence that “WTO covered treaties are creations of and constantly interact with other norms of international law.” A/CN.4/L.682, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, 13 April 2006, paras. 170 and 45.

<sup>80</sup> UN General Assembly, *Right to Exploit Freely Natural Wealth and Resources*, 21 December 1952, A/RES/626.

<sup>81</sup> UN General Assembly, *Permanent Sovereignty Over Natural Resources*, 14 December 1962, A/RES/1803, para. 1.

<sup>82</sup> UN General Assembly, *Declaration on the Establishment of a New International Economic Order*, 1 May 1974, A/RES/S-6/3201, para. 4(e).

<sup>83</sup> See Articles 1.2 of the UN Covenant on Civil and Political Rights (done in New York, 16 December 1966, in *UNTS*, Vol. 999, p. 171) and of the UN Covenant on Economic, Social and Cultural Rights (done in New York, 16 December 1966, in *UNTS*, Vol. 993, p. 3).

<sup>84</sup> See UN General Assembly, *Charter of Economic Rights and Duties of States*, 12 December 1974, A/RES/29/3281, Article 7.

<sup>85</sup> For the consequences of international agreements and soft law documents regarding conservation, preservation and sustainability issues on the principle of permanent sovereignty over natural resources see U. BEYERLIN, V. HOLZER, *Conservation of Natural Resources*, in *Max Planck Encyclopedia of Public International Law*, <http://www.mpepil.com>.

<sup>86</sup> See UN General Assembly, *Permanent Sovereignty Over Natural Resources*, 14 December 1962, A/RES/1803, para. 11 of the Preamble; UN General Assembly, *Declaration on the Establishment of a New International Economic Order*, 1 May 1974, A/RES/S-6/3201, para. 4(e); UN General Assembly, *Charter of Economic Rights and Duties of States*, 12 December 1974, A/RES/29/3281, Article 1.

<sup>87</sup> See N.J. SCHRIJVER, *Sovereignty Over Natural Resources*, Cambridge University Press, Cambridge, 1997, at p. 264.

<sup>88</sup> To use the words of George Abi-Saab, former member of the Appellate Body, “sovereignty is the rule and can be exercised at any time ... limitations are the exception and cannot be permanent, but limited in scope and time.” G. ABI-SAAB, *Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order*, in UN Doc.

## 6. Supplementary means of interpretation: the circumstances of the conclusion of China's Accession Protocol and the subsequent practice of States

As already underlined, the highly questionable findings of the Appellate Body led to an interpretative result that, using the wording of Article 32 of the Vienna Convention, may be qualified as “manifestly absurd or unreasonable.”<sup>89</sup> Pursuant to such provision, supplementary means of interpretation may be brought into the hermeneutic process of a treaty text -and silence- to clarify its meaning. Unfortunately, another peculiar feature distinguishing the accession process of China to the WTO is that, up to now, there is no notice of accessible official records of the negotiations of the Protocol, with the consequence that one of the two types of the supplementary means of interpretation expressly mentioned by Article 32 of the Vienna Convention – i.e. that of the preparatory works, or *travaux préparatoires*- is not available in the case under consideration.<sup>90</sup> However, paying due attention to the “circumstances of the conclusion” of China's Accession Protocol, the other auxiliary interpretative tool explicitly recalled by Article 32, may provide the treaty interpreter with further elements once again endorsing the appropriateness of considering GATT Article XX applicable to Paragraph 11.3 of the Accession Protocol, as we have tried to demonstrate in the previous paragraphs.

In fact, as underlined by the most authoritative doctrine, the circumstances of the conclusion of international agreements “include the political, social and cultural factors –the *milieu*- surrounding the treaty conclusion,”<sup>91</sup> that, together with the economic conditions characterizing the subjects participating to the negotiations, allow “to determine the reality of the situation which the parties wished to regulate by means of the treaty.”<sup>92</sup> Such supplementary mean of interpretation therefore permits to take into consideration the historical and the factual circumstances in which WTO accession negotiations occurred for identifying the proper meaning to attribute to the silence of Paragraph 11.3 on the question of whether GATT Article XX may be invoked as a defence for breaching the WTO-plus obligation to eliminate export duties. Reconstructing the circumstances in which Beijing negotiated its WTO Accession Protocol distinctly reveal that China did not have sufficient knowledge, expertise and experience in multilateral trade law and diplomacy: the acceptance of a treaty text such as that of the Protocol, with many lacunae and inaccurate provisions, can be explained only in the light of the political reality of an inadequate level of technical sophistication and competence on the Chinese side, beyond the fact that the Beijing Protocol was the first accession instrument to be heavily marked by so many, unprecedented, WTO-plus rules. It is thus difficult to imagine that China, questioned during the accession negotiations on whether it intended to completely renounce to the applicability of GATT Article XX to Paragraph 11.3, would have agreed on such an unreasonable and groundless request. Equally, it is not easy to envisage the incumbent WTO Members to advance such an arrogant claim “as there is absolutely no systemic or policy reason to deny the applicability of [GATT] exceptions to the export-duty commitments.”<sup>93</sup>

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A/39/504/Add.1, 23 October 1984, quoted in N.J. SCHRIJVER, *Sovereignty Over Natural Resources*, Cambridge University Press, Cambridge, 1997, at p. 263.

<sup>89</sup> On this provision of the 1969 Vienna Convention on the Law of Treaties see Y. LE BOUTHILLIER, *Article 32 – Supplementary Means of Interpretation*, in O. CORTEN, P. KLEIN (EDS.), *The Vienna Conventions on the Law of Treaties – A Commentary*, Oxford University Press, Oxford, 2011, Vol. I, pp. 841-863; O. DÖRR, *Article 32 - Supplementary Means of Interpretation*, in O. DÖRR, K. SCHMALENBACH (EDS.), *Vienna Convention on the Law of Treaties – A Commentary*, Springer-Verlag, Berlin-Heidelberg, 2012, pp. 571-586; U. LINDERFALK, *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, Dordrecht, 2007, at pp. 235 ff.; L. SBOLCI, *Supplementary Means of Interpretation*, in E. CANNIZZARO (ED.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, pp. 145-163; M.E. VILLIGER, *The 1969 Vienna Convention on the Law of Treaties: 40 Years After*, in *RCADI*, 2009, Vol. 344, pp. 125 ff; ID., *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The “Crucible” Intended by the International Law Commission*, in E. CANNIZZARO (ED.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, pp. 105-122.

<sup>90</sup> J.Y. QIN, *The Challenge of Interpreting “WTO-Plus” Provisions*, in *Journal of World Trade*, 2010, pp. 127-172, at p. 140.

<sup>91</sup> M.E. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, Leiden, 2009, at p. 445.

<sup>92</sup> I. SINCLAIR, *The Vienna Convention on the Law of Treaties – Second Edition*, Manchester University Press, Manchester, 1984, at p. 141.

<sup>93</sup> J.Y. QIN, *The Predicament of China's “WTO-Plus” Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, (April 12, 2012), available at SSRN: <http://ssrn.com/abstract=2041227>, at p. 8.

Another supplementary means of interpretation recognized by the International Law Commission<sup>94</sup> and by the doctrine,<sup>95</sup> that of the “subsequent practice of States” (in the case at issue of States when drafting and accepting new WTO Accession Protocols), further confirm what we have just inferred from the circumstances of the conclusion of the China’s accession instrument. In fact, Vietnam, Ukraine and Russia – having concluded their accession packages after the issue of the applicability of GATT Article XX to China’s Accession Protocol emerged within the WTO membership-<sup>96</sup> inserted in their accession instruments a clear reference to the GATT with the intention of explicitly establishing the applicability of the general and security exceptions clauses to the WTO-plus obligations enshrined in their Protocols.<sup>97</sup> No case is reported of any aversion to such new provisions by the incumbent WTO membership, that predictably refrained from openly and publicly demanding new Members to give up to their rights to have recourse to public policy exceptions clauses, a move that would have been not only largely unpopular, but also wholly irreconcilable with the already illustrated object and purpose of the WTO system.

## **X. Looking for diplomatic settlements: China and a *de iure condendo* global solution on exports of natural resources**

In the most optimistic previsions, the panel report on the high-profile *China – Rare Earths* dispute is expected by late summer 2013,<sup>98</sup> a time-space likely to be extended in case of appellate proceedings, and to which the WTO granted period for implementation should be added.

Of course, the preferred DSU option of reaching an amicable settlement of the controversy has always to be kept in mind and looked for by the disputants;<sup>99</sup> in this respect, some US politicians have already suggested that Chinese authorities could be particularly sensitive to the claimants’ requests and willing to a prompt settlement of the case under the threat of “US efforts to block Chinese-funded mining projects in the United States as well as World Bank financing for Chinese mining projects.”<sup>100</sup>

<sup>94</sup> Document A/5809, *Report of the International Law Commission Covering the Work of its Sixteenth Session, 11 May-24 July 1964*, in *YILC*, 1964, vol. II, at p. 204; Document A/CN.4/186 and Add.1-7, *Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special*

*Rapporteur*, in *YILC*, 1966, Vol. II, p. 98.

<sup>95</sup> M.K. YASSEN, *L’interprétation des traités d’après la Convention de Vienne sur le droit des traités*, in *RCADI*, 1976, Vol. 151, at pp. 52 and 80.

<sup>96</sup> Starting from 2005, there are official WTO records documenting the thorny interpretative issue of the applicability of GATT Article XX to China’s Accession Protocol. For instance, within the WTO Committee on Market Access and in front of the WTO Council for trade in goods, the United States asked China to explain how Beijing intended to have recourse to GATT Article XX, as the Chinese representative claimed that *Zhōngguó* had the right to restrict the importation or exportation of products to protect public morals, public interest and national security, quoting the general exceptions clause of the General Agreement. See G/MA/W/78, Committee on Market Access, *China’s Transitional Review Mechanism - Communication from the United States*, 15 September 2006, para. 1; G/C/W/560, *Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol on the Accession of the People’s Republic of China (“China”) - Questions From the United States to China*, 6 November 2006, para. 4.

<sup>97</sup> “The representative of Viet Nam confirmed that Viet Nam would apply export duties, export fees and charges, as well as internal regulations and taxes applied on or in connection with exportation in conformity with the GATT 1994” (WT/ACC/VNM/48, *Accession of Viet Nam - Report of the Working Party on the Accession of Viet Nam*, 27 October 2006, para. 260); “[t]he representative of Ukraine confirmed that ... Ukraine would reduce export duties in accordance with the binding schedule contained in Table 20(b). He also confirmed that, as regards these products, Ukraine would not increase export duties, nor apply other measures having an equivalent effect, unless justified under the exceptions of the GATT 1994” (WT/ACC/UKR/152, *Report of the Working Party on the Accession of Ukraine to the World Trade Organization*, 25 January 2008, para. 240); “[t]he Russian Federation undertakes not to increase export duties, or to reduce or to eliminate them, in accordance with the following schedule, and not to reintroduce or increase them beyond the levels indicated in this schedule, except in accordance with the provisions with GATT 1994” (GATT Schedule CLXV, *The Russian Federation*, Introductory Note).

<sup>98</sup> See *Disputes Roundup: Australian Plain Packaging Faces Third Challenge; Rare Earths Panel Established*, in *Bridges Weekly Trade News Digest*, 25 July 2012.

<sup>99</sup> As provided for by Article 3.7 of the DSU, pursuant to which “[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.” On the importance of diplomatic settlements of WTO controversies see E. BARONCINI, *The WTO Dispute Settlement Understanding as a Promoter of Transparent, Rule-Oriented, Mutually Agreed Solutions - A Study on the Value of DSU Consultations and their Positive Conclusion*, in P. MENGOZZI (ED.), *International Trade Law on the 50<sup>th</sup> Anniversary of the Multilateral Trade System*, Giuffrè, Milano, 1999, pp. 153 – 302.

<sup>100</sup> “These two steps would get China’s attention right away and force them [sic] to reconsider their [sic] unfair practices.” Statements of the US Senator Charles Schumer, reported in J.T. AREDDY, S. REDDY, *Trade Fight Flares on China Minerals*, in *The Wall Street Journal*, 13 March 2012.

In case WTO proceedings go on, because a diplomatic solution cannot be arrived at, in our view China should concentrate on three fronts. At judicial level, as we tried to demonstrate in the preceding paragraphs, Beijing has the possibility to overturn the very unfortunate findings of the Appellate Body in the *China – Raw Materials* case on the non-applicability of GATT Article XX to Paragraph 11.3 of the Accession Protocol, showing that such an interpretative result is incompatible with the very object and purpose of the WTO system, i.e. that of promoting a model of economic development which is sustainable, and thus also respectful of the “optimal use of the world’s resources,” as clarified by the Preamble of the WTO Agreement.<sup>101</sup> On the internal side, China should continue -even with greater determination- to reform its rare earth industrial policy in order to upgrade technology and the environmentally friendly management of the economic sector, investing also to remedy the environmental degradation inflicted to some parts of the PRC territories in the last decades of overexploitation. Finally, at international political level, Beijing should show leadership, and take the lead for devising an ad hoc legal solution at WTO level, multilaterally regulating exports for the entire WTO membership.

Such new set of international rules defining a common WTO export regime should, at the same time, a) re-establish an equilibrium between original WTO Members and new acceding Members -the former having no duty to eliminate export duties, the latter under the obligation to eliminate or significantly reduce them- and b) strike a balance between the interests of importing countries – essentially, to avoid shortage and price fluctuations in the supply of raw materials- and those of the exporting countries –to maintain sovereignty on, and thus control and preserve, their natural resources, also guaranteeing low prices for domestic needs with the purpose of advancing their industrialization process.

## **XI. Assessing the EU litigation strategy in the light of the Lisbon Treaty principles for the EU international action: the need to change**

After the analysis undertaken in the previous paragraphs, we are at last in the position to assess the law enforcement strategy of the European Union in the WTO cases on Chinese raw materials and rare earths export restrictions. In fact, the Lisbon Treaty, entered into force on 1 December 2009, now codifies some core values and principles which have to be respected and promoted by Europe while developing its international action.<sup>102</sup> Therefore, Article 3, para. 5, TEU states that “[i]n its relations with the wider world, the Union shall ... contribute to ... the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade,” while Article 21 TEU declares that the European Union “shall promote multilateral solutions to common problems [and] ... work for a high degree of cooperation in all fields of international relations [also] in order to: ... f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, ... to ensure sustainable development.” If assessed in the light of the reported TEU provisions, it seems that the litigation strategy chosen by Europe of arguing, before the WTO judging bodies, the non-applicability of GATT Article XX to China Accession Protocol does not respect the values and principles which have to characterize the EU international action on the basis of the Lisbon Treaty.

As we have tried to demonstrate *supra*, the AB report rejecting the application of the GATT general exceptions’ clause to the WTO-plus provision to eliminate export duties is highly problematic as it seems in open contradiction with international treaty-law interpretation. It creates a very awkward rule of “*jus cogens*”: in practice, Paragraph 11.3 of China Accession Protocol cannot be derogated to protect and promote the non-trade values enshrined in Articles XX or XXI of the GATT 1994. Therefore, because of the AB bizarre interpretation, the WTO-plus obligation to eliminate export duties has for China the same legal value of peremptory norm attributed by the international legal system to the prohibition of torture or the prohibition of genocide: and such a situation pushes China towards export *quantitative* restrictions concerning minerals and metals to pursue its policies of preservation of natural resources and environmental

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<sup>101</sup> On the environmental friendly approach now characterizing the Marrakech system, as represented by the new explicit WTO objective of sustainable development, codified in the Preamble of the WTO Agreement, see G. MARCEAU, J. WYATT, *Trade and the Environment: The WTO's Efforts to Balance Economic and Sustainable Development*, in R. TRIGO TRINDADE, P. HENRY and C. BOVET (EDS.), *Economie Environnement Ethique, de la responsabilité sociale et sociétale, Liber Amicorum Anne Petitpierre-Sauvain*, Schulthess, Zurich, Bâle, Genève, 2009, pp. 225-235.

<sup>102</sup> On the values and principles guiding the EU external action see E. BARONCINI, S. CAFARO, C. Novi, *Le relazioni esterne dell'Unione europea*, Giappichelli, Torino, 2012.

and health protection. What is worse, the recent WTO Appellate report has provoked a “certain” irritation to Beijing, rightly convinced that the WTO reconstruction of the relation between the GATT public policy exceptions and the WTO-plus obligation to eliminate export duties unacceptably heightens the already worrying asymmetry of obligations penalizing the membership of new WTO acceding Members. These consequences, due also to the EU litigation strategy, run counter the general purposes of the Lisbon Treaty to “promote multilateral solutions to common problems,” thus making such strategy incompatible with the recalled principle, put at the basis of the EU international action. For the time being, in fact, China reacted by going “unilateral,” favoring export *quantitative* restrictions, the most negative measures for the multilateral trade system, instead of cooperating to find a smooth solution to the management of raw materials and rare earths, and thus moving away from the definition of common rules for a well-adjusted administration of finite natural resources.

In addition, pleading against the applicability of GATT Article XX to China Accession Protocol is in conflict with the principle of sustainable development enshrined in the WTO Preamble, as well as in the Lisbon Treaty, requiring the European Union to “contribute ... to the sustainable development of the Earth,” and to “help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.”<sup>103</sup> In fact, arguing that export duties can never be used by China to implement its conservation policy for raw materials and rare earths runs counter the principle of sustainable development as it deprives Beijing of an important tool to pursue some of the non-trade values contemplated in GATT Article XX while not excessively hindering and distorting international trade.

Moreover, the EU litigation strategy opposing the applicability of the GATT public policy exceptions to China Accession Protocol is incoherent with the duty to “seek to develop relations and build partnerships with third countries” for promoting common goals and values, always required by Article 21 TEU. Beijing reacted with crossness to the AB report, thus jeopardizing a collaboration with Europe on the crucial issue of access and management of natural resources. But, above all, the EU, by not focusing its litigation strategy on the substantive aspects of the Chinese export restrictions, i.e. alleged protectionism and discrimination in the *China – Raw Materials* and *China – Rare Earths* cases, is losing an important opportunity to request Beijing to be consistent in all the delicate issues of equilibrium between free trade and environmental protection, in particular in the fight against climate change. As it is very well known, China is highly critical of the EU aviation emission trading scheme (ETS),<sup>104</sup> the discipline developed by the Union in order to reduce CO<sub>2</sub> emissions, and involving any airline company having a flight landing or taking off from a European airport,<sup>105</sup> claiming, *inter alia*, that such EU Aviation ETS has illegitimate extraterritorial effects, infringes WTO law and also the ICAO (International Civil Aviation Organization) system.<sup>106</sup> Of course, the EU would have much more political and logical strength against China in defending the EU unilateral climate change measure also in the light of the principle of sustainable development if Brussels did not argue, within the WTO dispute settlement mechanism, that Beijing can never justify a breach of its WTO-plus obligation to eliminate export duties in order to implement its conservation policies. The opening of China to sustainability in trade issues within the WTO cases involving raw materials and rare earths should have been welcomed by the European Union, in order to request Beijing to be coherent when faced by EU unilateral measures, like the EU Aviation ETS, and thus ready to consider the EU climate change disciplines in the light of the principle of sustainable development. Finally, devoting all its litigation efforts to analyze the restrictive Chinese disciplines –both tariff and non-tariff export restrictions- under the severe

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<sup>103</sup> Article 21, para. 2, lit. f), TEU.

<sup>104</sup> See e.g. J. WATTS, *Chinese Airlines Refuse to Pay EU Carbon Tax*, *The Guardian*, 4 January 2012.

<sup>105</sup> Directive no. 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ 2009 L8/3. On this very important piece of EU legislation concerning climate change cfr. J. SCOTT, L. RAJAMANI, *EU Climate Change Unilateralism*, in *EJIL*, 2012, pp. 469-494.

<sup>106</sup> L. BARTELS, *The WTO Legality of the Application of the EU's Emission Trading System to Aviation*, in *EJIL*, 2012, pp. 429-467; J. FABER, L. BRINKE, *The Inclusion of Aviation in the EU Emissions Trading System*, ICTSD Global Platform on Climate Change, Trade and Sustainable Energy, Issue Paper No. 5, September 2011; B. MAYER, *Case C-366/10, Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change*, *Judgment of the Court of Justice (Grand Chamber) of 21 December 2011*, in *CML Rev.*, 2012, pp. 1113-1140; P. MANZINI, A. MASUTTI, *The application of the EU ETS system to the aviation sector: from legal disputes to international retaliations?*, in *Air & Space Law*, 2012, pp. 307-324; J. MELZER, *Climate Change and Trade – The EU Aviation Directive and the WTO*, in *JIEL*, 2012, pp. 111-156.

requirements for justification demanded by GATT Article XX would help Beijing in revising and setting up a more appropriate national legislation, with reference to the mining of natural resources, as China would be allowed to use both tariff and non-tariff instruments.

It has also to be taken into consideration that the EU's opposition to the applicability of the GATT public policy exceptions to China's WTO plus obligation is inconsistent with its proposal for a new WTO Agreement on Export Taxes within the non-agricultural market access (NAMA) negotiations of the Doha Round. The European Union, in fact, considers that paragraph 16 of the Doha Declaration -pursuant to which WTO Members have agreed "to reduce or as appropriate eliminate tariffs, including the reduction or elimination of tariff peaks, high tariffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries"<sup>107</sup> - includes in the Doha negotiating mandate also export taxes, export tariffs and export non-tariff barriers, as paragraph 16 of the DDA makes no reference as to whether tariffs and non-tariff barriers "are imposed on imports or exports."<sup>108</sup> Since export taxes are more and more frequently used by major supplier countries at prohibitive levels, making those export taxes equivalent to export quantitative restrictions or prohibitions, with distortive effects on global commodity trade and indirect subsidization of the processing industries of the WTO Members imposing export duties, the EU has proposed an *ad hoc* WTO Agreement on export taxes to eliminate unfair advantages and distortions.<sup>109</sup> In its proposal, the EU sets as final aim of the new WTO Agreement the elimination of export taxes, nevertheless allowing developing countries and least-developed WTO Members to maintain, within certain limits, export taxes "provided that such export taxes and their maximum levels are listed in Members' schedules of commitments."<sup>110</sup> The EU thus suggests to treat export duties of the two categories of WTO Countries like import duties, binding their maximum amount in an *ad hoc* schedule of commitments. The EU proposed Agreement requests, in order to maintain export taxes, a "necessity test" -i.e. that export taxes "are necessary, in conjunction with domestic measures, to maintain financial stability, to satisfy fiscal needs, or to facilitate economic diversification and avoid excessive dependence on the export of primary products"<sup>111</sup> - and an "adverse effects test" -meaning that export taxes do not have to "adversely affect international trade by limiting the availability of goods to WTO Members in general or by raising world market prices of any goods beyond the prices that would prevail in the absence of such measures."<sup>112</sup> Furthermore, export taxes may be maintained only provided that they do not cause "serious prejudice to the interests of developing country Members."<sup>113</sup>

In its proposed new WTO Agreement, the EU clearly states that the duty to eliminate export taxes "shall not prevent ... any Member from applying export taxes in accordance with the rules applicable under GATT Article XX (General Exceptions) and Article XXI (Security Exceptions)."<sup>114</sup> Such negotiating option is consequently in open contrast with the litigation strategy the EU opted for in the *China – Raw Materials* and *China – Rare Earths* cases, and reveals a sort of "schizophrenic" EU attitude on the WTO availability of public policy exceptions for justifying export duties.<sup>115</sup> Such attitude is very far from the above illustrated Lisbon Treaty values and principles for the EU external relations. The constructive and cooperative approach which should characterize the EU global trade governance does not, of course, mean that the Union has to abstain from using the WTO dispute settlement mechanism. In parallel with what the same DSU asks for, when starting a WTO complaint and arguing a case before a panel or the Appellate Body in Geneva, the EU has always to exercise its judgment as to whether and how "action under these procedures would be fruitful."<sup>116</sup> The legal arguments for discussing a WTO dispute have thus to be chosen so as "to secure a

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<sup>107</sup> WT/MIN(01)/DEC/1, *Ministerial Declaration Adopted on 14 November 2001*, 20 November 2001.

<sup>108</sup> TN/MA/W/103/Rev.3/Add.1, *Textual Report by the Chairman, Ambassador Luzius Wasescha, on the State of Play of the NAMA Negotiations – Addendum*, 21 April 2011, at p. 69.

<sup>109</sup> TN/MA/W/11/Add.6, *Market Access for Non-Agricultural Products – Negotiating Proposal on Export Taxes – Communication from the European Communities*, 27 April 2006.

<sup>110</sup> Article 2 of the *WTO Agreement on Export Taxes – Core Disciplines*, in TN/MA/W/11/Add.6, cit.

<sup>111</sup> Article 3, para. 1, lit. a), of the *WTO Agreement on Export Taxes – Core Disciplines*, in TN/MA/W/11/Add.6, cit.

<sup>112</sup> Article 3, para. 1, lit. b), of the *WTO Agreement on Export Taxes – Core Disciplines*, in TN/MA/W/11/Add.6, cit.

<sup>113</sup> *Ibid.*

<sup>114</sup> Article 5, lit. b), of the *WTO Agreement on Export Taxes – Core Disciplines*, in TN/MA/W/11/Add.6, cit.

<sup>115</sup> Cfr. C.H. WU, *Access to Raw Materials: The EU's Pursuit of Trade Disciplines on Export Control*, in B. VAN VOOREN, S. BLOCKMANS, J. WOUTERS (EDS.), *The EU's Role in Global Governance – The Legal Dimension*, Oxford University Press, Oxford, 2013, pp. 178-192.

<sup>116</sup> Article 3, para. 7, DSU.

positive solution to a dispute,” aware that the multilateral trade system has a clear preference for “a solution mutually acceptable to the parties.”<sup>117</sup> We therefore hope that the EU adjusts its litigation strategy on the current *China – Raw Materials* and *China – Rare Earths* disputes, focusing on the substance –i.e. the alleged protectionism and discriminatory nature of the Beijing export restrictions- instead of engaging in sterile sophistries which have no raison d’être. Thoroughly and constructively debating, within the WTO dispute settlement mechanism, on how Chinese health and conservation measures have to be revised in order to be justified under the GATT public policy exceptions will help Beijing in better achieving its non-trade value purposes, fostering the “raw materials diplomacy” and reinforcing the “dialogue ... with emerging resource-rich economies such as China,” which are one of the pillars of the EU Raw Materials Initiative.<sup>118</sup>

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<sup>117</sup> *Ibid.*

<sup>118</sup> COM(2008) 699 final, *Communication from the Commission to the European Parliament and the Council – The Raw Materials Initiative- Meeting our Critical Needs for Growth and Jobs in Europe*, 4.11.2008, at p. 6. See also COM(2011) 25 final, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Tackling the Challenges in Commodity Markets and on Raw Materials*, 2.2.2011.