



UiO • **PluriCourts** – The Legitimacy of the International Judiciary
University of Oslo

Trade and sustainability Cases concerning export of raw materials before the WTO

Rule of Law, Governance and Open Society: China-Nordic Dialogue
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Trade and sustainability

- Achieving mutual supportiveness or allowing countries to pursue relevant policies
- The WTO preamble:
 - **while allowing** for the **optimal use** of the world's resources **in accordance with** the objective of **sustainable development**
- A passive (not proactive) approach
- Primacy of trade liberalization within the WTO
 - To the extent of conflict, policies to promote sustainability is depending on general exceptions
 - Is there a broad scope for conflict?

China's WTO commitments

- China's accession negotiations – the history of export controls
 - 1992: 48.3 % of export subject to export licensing
 - 1999: 9.5 % of export subject to export licensing
 - Foreign Trade Law: protection against shortage of supply and exhaustion of natural resources
- Commitments under the Protocol of Accession
 - Export restrictions would be eliminated unless they could be justified under the WTO Agreement or the Protocol of Accession
 - Annex 6 to the Protocol set out lawful export duties
 - Limitation on the use of state trading enterprises

General exceptions regarding trade in goods

- GATT art. XX
 - a) Public morals
 - b) Human, animal or plant life or health
 - g) Exhaustible natural resources
 - h) Restrictions in pursuance of obligations under any intergovernmental commodity agreement
 - i) Export restrictions in the interest of domestic processing industries
 - j) Export restrictions on products of short supply

The «raw materials» cases

- Brought by the US, EU and Mexico in 2009,
- Concerned a number of minerals for which China was a leading producer
- Main arguments:
 - Cause scarcity and higher prices in international markets
 - Favour Chinese producers
- Panel findings
 - Constituted violation of commitments in Accession Protocol
 - Could not be justified under GATT art. XX since not applicable
- The Appellate Body essentially confirmed these findings
- Compliance reported by the end of 2012

The and «rare earth» cases

- Brought by the US, EU and Japan in 2012
- Temporary export duty and export restrictions for 2012 imposed on rare earth, tungsten and molybdenum
 - Not disputed that they were in violation of Accession Protocol
- China asked the panel to reconsider the applicability of art. XX and not follow the AB decision in the raw materials cases
 - The panel found against China, but with a dissenting panelist
 - Concluded that restrictions could not have been justified under XX(b) and (g)
- The Appellate Body essentially confirmed the panel findings
- Compliance reported in 2015, but remained unclear

The new set of «raw materials» cases

- Brought by the US and EU in 2016
- Concerns export duties on a new set of raw materials, and based on the Accession Protocol
- Is currently under consultations

Is the WTO harming exporting countries?

- Eliminate the right export restrictions and duties in the best manner
- Might some export restrictions and duties be needed from a sustainability perspective?
 - Promote infant industries
 - Proximity between extraction and processing
 - The balance of costs and benefits to local communities
- The need for flexibility in phasing out export restrictions and duties
 - Co-ordinate with the introduction of compensatory measures
 - The availability of compensatory measures

Is the WTO favoring importers of raw materials?

- The fate of «commodity agreements»
- Tariff escalation: discouraged but not prohibited
- General System of Preferences: providing flexibility to raw materials importers vis-à-vis developing countries
- Subsidies to processing industries
- Countervailing duties and anti-dumping duties: trade remedies to the advantage of raw materials importing countries