Fifteen Years On: Has China Implemented WTO Rulings? – A Perspective on Trade in Goods

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Abstract

The article discusses China's implementations of the rulings of the World Trade Organisation (WTO) during its 15-year membership in the WTO by focusing on disputes involving trade in goods. It argues that in general China's implementation in the disputes has been timely and satisfactory. However, issues such as lack of transparency in practice, rapid regulatory development, and inclined use of protectionist instruments to pursue chosen policy objectives have made China's implementation in the individual cases much less significant than the need for continuous efforts to monitor China's application of amended WTO-illegal measures in practice and its introduction of new measures, and to push China to make public information relating to decision-making by responsible administrative authorities. It also argues that China's implementation in these cases is unlikely to be the end of the long-standing disputes over China's intended protection of its major and sensitive industries. Thus, it will remain a formidable task for stakeholders to continue to observe China's engagement with the WTO dispute settlement system.

1. Introduction

China has been a member of the World Trade Organisation (WTO) for fifteen years. The 15-year anniversary in 2016 is not only interesting for that is exactly the number of years China devoted to negotiating its accession to the GATT/WTO[1], but also significant being an opportune moment to reflect on both China's engagement with the multilateral trading system and the impacts of the WTO membership on China's economic reforms and development. This article aims to contribute to the (anticipated) upcoming discussions of China and the WTO around the 15th anniversary by analysing China's implementation of the decisions of WTO tribunals.

Since China's entry into the WTO, there have been wide concerns about, and hence close monitoring over, issues such as China's implementation of its accession commitments[2], its participation in the WTO Doha Round negotiations[3], its engagement with the WTO dispute

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1 There is a sheer volume of publications on China's negotiations for accession to the WTO, see, for example, Sylvia Ostry, "WTO Membership for China: To Be and Not To Be – Is That the Answer" in D.Z. Cass *et al.* (eds.) *China and The World Trading System: Entering the New Millennium* (New York: Cambridge University Press, 2003) 31-39; Yongzheng Yang, "China's WTO Accession: The Economics and Politics" (2000)34(4) *Journal of World Trade* 77-94; Esther Lam, *China and the WTO: A Long March Towards the Rule of Law* (Kluwer Law International, 2009) at 45-84.

2 See, for example, Ling Ling He & Razeen Sappideen, "Reflections on China's WTO Accession Commitments and Their Observance" (2009)43(4) *Journal of World Trade* 847-871.

3 See, for example, Chin Leng Lim & Jiangyu Wang, "China and Doha Development Agenda" (2010)44(6) *Journal of World Trade* 1309-1331; Henry Gao, "From the Doha Round to the China Round: China's Growing Role in WTO Negotiation" in Toohey, Picker & Greenacre (eds), *China in the International Economic Order: New Directions and Changing Paradigms* (New York: Cambridge University Press, 2015) 79-97.

settlement mechanism[4], and its compliance with rulings of WTO tribunals[5]. However, most of the previous publications appear to have been deliberately distanced from exploring whether the measures China took to implement WTO rulings have fully achieved WTO-consistency. For example, while Ji and Huang provided an overview of China's involvement in WTO disputes and records of compliance by 2010, they did not offer a detailed discussion of the compliance measures adopted by China in these disputes.[6] As an exception, Webster took a closer look at the timeliness and quality of China's WTO compliance; however, his analysis focused on only three disputes (not including the most recent ones) and did not discuss China's compliance measures in detail.[7]

By September 2015, China has been a respondent in 33 WTO disputes involving 21 different matters.[8] These disputes can be generally divided into 4 categories, including trade in goods, trade in services, trade-related intellectual property rights (IPRs), and trade remedies (i.e. disputes over anti-dumping and/or countervailing investigations). The table below lists these disputes in the four categories and shows the duration of the disputes from request for consultation (RFC) to mutually agreed solution (MAS) or implementation as notified by the parties to the WTO Dispute Settlement Body (DSB).

Item	Case Title	Complainants	Duration and Resolution
Trade in Goods			
1.	*China – VAT on Integrated Circuits*[9]	US (DS309)	18 March 2004 (RFC) – 5 October 2005 (MAS)
2.	*China – Auto Parts*[10]	EC (DS339) US (DS340) Canada (DS342)	30 March 2006 (RFC) – 31 August 2009 (implementation)
3.	*China – Taxes*[11]	US (DS358) Mexico (DS359)	2 February 2007 (RFC) – 19 December 2007 (MAS with the US); 7 February 2008 (MAR with Mexico)
4.	*China – Publications and Audiovisual Products*[12]	US (DS363)	10 April 2007 (RFC) – 23 March 2012 (Implementation relating products other than films); 9 May 2012 (MAS on films)

4 See, for example, Henry Gao, "Taming the Dragon: China's Experience in the WTO Dispute Settlement System" (2007)34(4) *Legal Issues of Economic Integration* 369-392; Marcia Don Harpaz, "Sense and Sensibilities of China and WTO Dispute Settlement" (2010)44(6) *Journal of World Trade* 1155-1186; Bryan Mercurio and Mitali Tyagi, "China's Evolving Role in WTO Dispute Settlement: Acceptance, Consolidation and Activation" in C. Herrmann & J.P. Terhechte (eds.) *European Yearbook of International Economic Law*, Vol. 3 (2012), 89-123; Lisa Toohey, "China and the World Trade Organization: The First Decade" (2011)60(3) *International and Comparative Law Quarterly* 788-798. Also see Matthew Kennedy, "China's Role in WTO Dispute Settlement" (2012)11(4) *World Trade Review* 555-589 (discussing China's impacts on the WTO dispute settlement mechanism). For a very interesting reflection on the experience of the Chinese government in dealing with WTO disputes, see Guohua Yang, "China in the WTO Dispute Settlement: A Memoir" (2015)49(1) *Journal of World Trade* 1-18.

5 See, for example, Wenhua Ji & Cui Huang, "China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective" (2011)45(1) *Journal of World Trade* 1-37; Timothy Webster, "Paper Compliance: How China Implements WTO Decisions" (2014)35(3) *Michigan Journal of International Law* 525-578.

6 See above n 5, Ji & Huang, "China's Experience in Dealing with WTO Dispute Settlement".

7 See above n 5, Webster, "How China Implements WTO Decisions WTO Decisions".

8 The WTO member information page of China provides a list of WTO disputes involving China, see https://www.wto.org/english/thewto_e/countries_e/china_e.htm

9 *China – Value-Added Tax on Integrated Circuits*, WT/DS309. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds309_e.htm

10 *China – Measures Affecting Imports of Automobile Parts*, WT/DS339, WT/DS340, WT/DS342. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds339_e.htm

11 *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358, WT/DS359. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds358_e.htm (US); https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds359_e.htm (Mexico).

5.	*China – Grants, Loans and other Incentives*[13]	US (DS387) Mexico (DS388) Guatemala (DS390)	19 December 2008 (RFC) – 19 December 2009 (MAS with all complainants)
6.	*China – Raw Materials*[14]	US (DS394) EU (DS395) Mexico (DS398)	23 June 2009 (RFC) – 28 January 2013 (implementation)
7.	*China – wind power equipment*[15]	US (DS419)	22 December 2010 (RFC) No panel was established for the dispute. No MAS was notified to the WTO.
8.	*China – Rare Earths*[16]	US (DS431) EU (DS432) Japan (DS433)	13 March 2012 (RFC) – 20 May 2015 (Implementation)
9.	*China – Auto and Auto-Parts (US)*[17]	US (DS450)	17 September 2012 (RFC) No panel was established for the dispute. No MAS was notified to the WTO.
10.	*China – Apparel and Textile Products*[18]	Mexico (DS451)	15 October 2012 (RFC) No panel was established for the dispute. No MAS was notified to the WTO.
11.	*China — Demonstration Bases*[19]	US (DS489)	11 February 2015 (RFC) – ongoing
Trade in Services			
4a	The *China – Publications and Audiovisual Products* case (DS363) also involves disputes over Chinese measures affecting trade in services.		
12.	*China – Financial Information Services*[20]	EC (DS372) US (DS373)	3 March 2008 (RFC) – 4 December 2008 (MAS with all complainants)

[12] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm

[13] *China – Grants, Loans and Other Incentives*, WT/DS387, WT/DS388, WT/DS390. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds387_e.htm. The summary of the case by the WTO Secretariat states that no notification of MAS has been provided to the WTO. However, observers have reported that the dispute has been resolved by MAS between China and each of the three complaining members. See above n 5, Ji & Huang, "China's Experience in Dealing with WTO Dispute Settlement", at 23.

[14] *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394, WT/DS395, WT/DS398. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm

[15] *China – Measures Concerning Wind Power Equipment*, WT/DS419. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds419_e.htm. The summary of the case by the WTO Secretariat does not show the progress of the dispute after consultation or how this dispute was resolved. The USTR reported that the dispute was resolved by China's removal of the subsidy programs in dispute, see https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/june/china-ends-wind-power-equipment-subsidies-challenged

[16] *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431, WT/DS432, WT/DS433. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm

[17] *China – Certain Measures Affecting the Automobile and Automobile-Parts Industries*, WT/DS450. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds450_e.htm. The summary of the case by the WTO Secretariat does not show the progress of the dispute after consultation or how this dispute was resolved. However, the USTR has reported that China and the US have been discussing further steps that China may take to address the US' concerns, see USTR, "2014 Report to Congress on China's WTO Compliance", at 32, available at: https://ustr.gov/sites/default/files/2014-Report-to-Congress-Final.pdf

[18] *China – Measures Relating to the Production and Exportation of Apparel and Textile Products*, WT/DS451. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds451_e.htm. The summary of the case by the WTO Secretariat does not show the progress of the dispute after consultation or how this dispute was resolved. However, it was reported that instead of continuing the proceedings, Mexico is negotiating with China to open the Chinese market to tequila and pork. See Daniela Gomez-Altamirano, "China – Mexico Trade Disputes: Fear of Competition?" in Dan Wei (eds) *Settlements of Trade Disputes between China and Latin American Countries* (Heidelberg: Springer, 2015) 131-145 at 138.

[19] *China – Measures Related to Demonstration Bases and common Service Platforms Programmes*, WT/DS489. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds489_e.htm. The dispute is currently at the stage of establishment of a dispute panel the request for which has been lodged by the US on 9 April 2015.

		Canada (DS378)	
13.	*China – Electronic Payment Services*[21]	US (DS413)	15 September 2010 (RFC) – 23 July 2013 (Implementation)
Trade-related IPRs			
14.	*China – IPRs*[22]	US (DS362)	10 April 2007 (RFC) – 19 March 2010 (Implementation)
Trade remedies			
15.	*China – Certain Iron and Steel Fasteners*[23]	EU (DS407)	7 May 2010 (RFC) No panel was established for the dispute. No MAS was notified to the WTO.
16.	*China – GOES*[24]	US (DS414)	15 September 2010 (RFC) – ongoing
17.	*China – X-Ray Equipment*[25]	EU (DS425)	25 July 2011 (RFC) – 26 February 2014 (implementation by terminating the contested anti-dumping duty and initiating a re-investigation)
18.	*China – Broiler Products*[26]	US (DS427)	20 September 2011 (RFC) – 22 July 2014 (Implementation)
19.	*China — Autos (US)*[27]	US (DS440)	5 July 2012 (RFC) – December 2013 (implementation by terminating the contested anti-dumping and countervailing duties)
20.	*China – HP-SSST*[28]	Japan (DS454) EU (DS460)	20 December 2012 (RFC Japan); 13 June 2013 (RFC EU) – ongoing
21.	*China — Cellulose Pulp*[29]	Canada (DS483)	15 October 2014 (RFC) – ongoing

[20] *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS372, WT/DS373, WT/DS378. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds372_e.htm

[21] *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds413_e.htm

[22] *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm

[23] *China – Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union*, WT/DS407. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds407_e.htm. The summary of the case by the WTO Secretariat does not show the progress of the dispute after consultation or how this dispute was resolved. The reason that the EU did not continue the proceedings appears to be that in its final determination of the anti-dumping investigation, China's Ministry of Commerce (MOFCOM) found a much lower dumping margin (i.e. 6.1%) than the provisional dumping margin (i.e. 16.8%) for KAMAX-Werke Rudolf Kellermann GMBH & Co. KG, being the only cooperative exporter subject to the investigation. MOFCOM's provisional determination and final determination are accessible at: http://www.mofcom.gov.cn/article/b/c/200912/20091206690755.shtml and http://www.mofcom.gov.cn/aarticle/b/g/201009/20100907137383.html. (in Chinese) An unofficial translation of the determinations can be found here: www.tdlawyers.com/dfile.php?id=79 (pp. 11-13) and www.tdlawyers.com/dfile.php?id=85 (pp. 4-6)

[24] *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds414_e.htm. The dispute is currently at the stage where an arbitrator has issued decisions on a "reasonable period of time" for China to implement the DSB recommendations and rulings.

[25] *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds425_e.htm

[26] *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds427_e.htm

[27] *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds440_e.htm. The USTR reported that China terminated the antidumping and countervailing duties at issue before the circulation of the Panel report on 23 May 2014, see https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2014/May/WTO-Case-Challenging-Chinese-Antidumping-Countervailing-Duties-US-Made-Automobiles

[28] *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WT/DS454; *Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds454_e.htm (Japan) and https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds460_e.htm (EU). The panel report on the dispute was circulated in February 2015 and was appealed by the parties.

Table 1: China as a respondent in the WTO dispute settlement system

The article will focus on the disputes over China's measures affecting trade in goods and amongst these disputes, on the ones in which China adopted measures to implement the decisions of the WTO tribunals. As highlighted in the table, there are four such disputes, namely, *China – Auto Parts*, *China – Publications and Audiovisual Products*, *China – Raw Materials*, and *China – Rare Earths*. The other completed disputes relating to trade in goods, which were resolved without involving the WTO adjudication and implementation process, will not be discussed in the article.[30] Nor will the disputes in the other three categories be discussed in the article; however, the author aims to do so in separate publications.

The article is organised as follows. Sections 2-4 will analyse each of the four disputes identified above starting with an overview of the background of the disputes, which will be followed by a summary of the decisions of WTO panels and the Appellate Body. The sections will then discuss the measures that China adopted to comply with the WTO rulings, including whether full compliance has been achieved and the implications for China and other WTO members. Section 5 concludes.

2. *China - Autos*

2.1 Background

Since China's launch of the "opening-up and reform" policy in 1978, the auto industry has been treated as one of the essential drivers of China's economic reforms and growth. In order to bolster the development of the auto industry, the Chinese government introduced various measures at different development stages of the industry including many protectionist instruments such as high import tariffs and quotas.[31] Despite the efforts, the industry remained to be underdeveloped and vulnerable to foreign competition prior to China's WTO accession, hence the wide concerns about China's commitments to open up the sector.[32] Upon its WTO entry, China committed to progressively remove the import quotas by 2005 and cut auto tariffs from as high as 100% to 25% and tariffs on auto parts "from an average of 23.4% to an average of 10%" by 2006.[33] However, due to its low level of development, the industry was unlikely to be ready for intense foreign competition once the quotas phased out and the tariffs significantly lowered, and hence that some other forms of protection were required.[34] The *China – Auto* dispute arose exactly in such a context as China had resorted to other forms of protection attempting to mitigate the impacts that the WTO-driven market opening imposed on the domestic auto industry.

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[29] *China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*, WT/DS483. For an official summary of the case, see https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds483_e.htm. A dispute panel was composed on 27 April 2015.

[30] Some of the earlier cases have been discussed in previous publications, see for example above n 5, Ji & Huang, "China's Experience in Dealing with WTO Dispute Settlement"; above n 4, Mercurio and Tyagi, "China's Evolving Role in WTO Dispute Settlement". The resolution of the disputes after 2010 has been summarised in FN 15, 17 and 18 above.

[31] Generally see Eric Harwit, "The Impact of WTO Membership on the Automobile Industry in China" (2001)167 *The China Quarterly* 655-670. For a discussion of the other policy instruments that China adopted to promote its auto industry, see Wan-Wen Chu, "How the Chinese Government Promoted a Global Automobile Industry" (2011)20(5) *Industrial and Corporate Change* 1235-1276.

[32] See above n 31, Harwit, "The Impact of WTO Membership on the Automobile Industry in China", at 660-670.

[33] See Ching Cheong & Ching Hung Yee, *Handbook on China's WTO Accession and Its Impacts* (World Scientific Publishing, 2003) at 227-228.

[34] See Raj Bhala & Won-Mog Choi, "China's First Loss" (2011)45(2) *Journal of World Trade* 321-347 at 325.

2.2 The measures

The dispute involved three measures that China introduced just before the phase-out of the auto quotas and the reduction of the auto and auto parts tariffs to the lowest committed levels. The measures included[35]:

1. *Policy on Development of Automotive Industry* (issued by the National Development and Reform Commission (NDRC) in 2004) ("NDRC Policy 2004");
2. *Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles* (issued by the General Administration of Customs (GAC), the NDRC, the Ministry of Finance (MOF) and the Ministry of Commerce (MOFCOM) in 2005) ("Administrative Rule 2005"); and
3. *Rules on Verification of Imported Automobile Parts Characterized as Complete Vehicles* (issued by the GAC in 2005) ("GAC Rule 2005").

The NDRC Policy 2004, which replaced the previous auto industry policy published in 1994, set forth general guidelines for the promotion of China's auto industry in the new economic environment particularly post China's WTO accession. The Administrative Rule 2005 and the GAC Rule 2005 contained detailed rules and procedure that implemented the NDRC policy. The key aspects of the measures in dispute were as follows:

- the measures required that imported auto parts be subject to a 25% charge (i.e. an amount equivalent to the import tariff applicable to complete vehicles) if the parts were used in the production/assembly of complete vehicles for domestic sales and were characterised as complete vehicles;
- the key thresholds for determining whether imported auto parts should be characterised as complete vehicles included (1) a volume threshold which concerned the importation of major auto parts for the making of a vehicle with the parts constituting 60% or more of the content of the vehicle, and (2) a value threshold which referred to the value of the imported parts in a complete vehicle accounting for "60% or more of the total price of that vehicle";[36] and
- the assessment procedure involved a preliminary self-evaluation by auto manufacturers who produce complete vehicles using imported auto parts, and subsequently a review by the GAC if the self-evaluation concluded that the auto parts should not be characterised as complete vehicles. If the conclusion of self-evaluation was the opposite (i.e. that imported auto parts should be characterised as complete vehicles), the relevant vehicle models must be registered with the GAC before the importation of the auto parts.

The charge was payable by auto manufacturers after complete vehicles have been produced using imported auto parts. However, the charge did not apply to auto parts manufacturers or suppliers who were not also auto manufacturers.

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[35] The description of the measures was mainly based on the WTO panel report and the Appellate Body Report on the dispute, see *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R and Add.1 and Add.2, (Panel Report adopted 12 January 2009, as upheld (WT/DS339/R), and as modified (WT/DS340/R, WT/DS342/R) by Appellate Body Report); WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, (Appellate Body Report adopted 12 January 2009).

[36] See above n 35, *China – Autos*, panel report, para. 7.32; Appellate Body Report, para. 114.

The measures provided an exemption for the so-called Complete Knock Down (CKD) and Semi Knock Down (SKD) kits[37] if auto manufacturers who import the kits declared them as complete vehicles and paid the applicable customs duties (i.e. 25%) at the time of importation. However, if the manufacturers did not do so, then the kits, like the other auto parts, would be subject to the 25% charge and the administrative procedures described above.

2.3 WTO findings of violations

A threshold issue for the WTO tribunal was whether the charge in question is an "internal charge" subject to Article III:2 of the GATT or an "ordinary customs duty" subject to Article II:1 of the GATT. Both the panel and the Appellate Body ruled that the charge should be characterised as an "internal charge" such that Article III:2 should apply.[38] Having resolved the preliminary issue, it was not difficult for the panel to find a violation of the GATT national treatment (NT) rule codified in Article III:2, 1st sentence (amongst the other GATT NT provisions). The measures were discriminatory because they distinguished between domestic and imported auto parts on the basis of their origin and subjected the latter, but not the former, to the 25% charge.[39] In addition, the tribunal also found that the administrative requirements mandated by the measures including the volume and value thresholds contravened GATT Article III:4 (i.e. the GATT NT rule dealing with internal non-fiscal measures) on the grounds that the requirements, which were applicable to imported auto parts only, created "a disincentive for auto manufacturers to use imported auto parts" as opposed to domestic ones, and hence that the former were less favourably treated.[40] China defended the measures under GATT Article XX(d), contending that they were necessary to secure compliance with a valid interpretation of its domestic tariff schedule for motor vehicles which allows the treatment of imported auto parts having the essential character of a motor vehicle as a complete vehicle.[41] However, China failed to provide sufficient evidence to support its defence, hence failing to persuade the panel that the measures were designed to prevent circumvention of the higher customs duty applicable to complete vehicles (i.e. 25%) as opposed to the lower rate applicable to auto parts (i.e. 10%).[42] The panel's findings under Article XX(d) were not appealed.

In relation to the CKD and SKD kits, China made a specific commitment under paragraph 93 of the *Report of the Working Party on the Accession of China* (*Work Party Report*)[43] by confirming that if China creates tariff lines for CKD and SKD kits, the applicable tariff rates will not go beyond 10%. The panel found that in its 2005 tariff schedule, China created separate tariff headings for CKD and SKD kits and therefore that the imposition of the 25% charge was a breach

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[37] The Chinese measures did not define CKD / SKD kits. However, the parties generally agreed that while CKD kits refer to "all, or nearly all, of the auto parts and components necessary to assemble a complete vehicle", SKD kits "refer to partially assembled combinations of parts that can be used to manufacture a whole vehicle". See above n 35, *China – Autos*, panel report, paras. 7. 640-7.644.

[38] The tribunal's lengthy analysis of this issue addressed all of the controversial points raised by the disputants. The key indicator of how the charge should be characterised, as observed by the panel and upheld by the Appellate Body, seems to be whether the application of the charge is triggered by an internal factor separate from importation. See above n 35, *China – Autos*, panel report, para. 7.128-7.207; Appellate Body Report, para. 141-176. For a discussion of the tribunal's rulings on this score, see Jasper Wauters & Hylke Vandenbussche, "China – Measures Affecting Imports of Automobile Parts" (2010)9(1) *World Trade Review* 201-238 at 213-220; above n 34, Bhala & Choi, "China's First Loss", at 334-340.

[39] See above n 35, *China – Autos*, panel report, paras. 7.214-7.223; Appellate Body Report, paras. 183-186.

[40] See above n 35, *China – Autos*, panel report, paras. 7.234-7.272; Appellate Body Report, paras. 187-195.

[41] See above n 35, *China – Autos*, panel report, para. 7.285.

[42] See above n 35, *China – Autos*, panel report, paras. 7.301-7.365.

[43] *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49 (1 October 2001).

of that commitment.[44] This finding was rejected by the Appellate Body because it was premised on the panel's erroneous treatment of the charge as an "ordinary customs duty" while both the panel and the Appellate Body had found it to be an "internal charge".[45] Thus, the imposition of the 25% charge (being an internal charge) cannot violate China's commitment on tariff treatment of CKD and SKD kits.

2.4 China's implementation and an appraisal

Having lost the dispute on all but one fronts, China agreed with the complaining parties a reasonable period of time for implementation, that is, to correct the WTO-inconsistencies found by the WTO tribunal by 1 September 2009.[46] In the DSB meeting on 31 August 2009, China notified that it had fully implemented the WTO rulings by promulgating new measures to "stop the implementation of the relevant provisions of" the NDRC Policy 2004 and to repeal the Administrative Rule 2005.[47] China, however, did not provide further details of these new measures.

China's implementation measures included the following:

1. *Policy on Development of Automotive Industry 2009*[48] ("NDRC Policy 2009"). The new policy revised the NDRC Policy 2004 by repealing six articles (including Articles 52, 53, 55-57, and part of Article 60) under Section 11 titled "Administration of Importation". In essence, Articles 55-57 provided general guidelines for the determination of whether imported auto parts should be characterized as a complete vehicle. Articles 53 and 60, respectively, mandated auto manufacturers using imported auto parts for production of complete vehicles to report to the responsible authorities and pay the applicable customs duties, and the authorities to formulate detailed rules to implement the policy. By ceasing the operation of these provisions, the revised policy removed the regulatory basis for the introduction of the 25% charge on imported auto parts and the accompanying administrative requirements;
2. *Decision on Repealing the Administrative Rules on Importation of Automobile Parts Characterized as Complete Vehicles*[49], which repealed the Administrative Rule 2005 in its entirety; and
3. Announcement No. 58 of the GAC in 2009[50], which repealed the GAC Rule 2005.

Accordingly, China complied with the WTO rulings on time by abolishing all of the measures that were found to be in violation of WTO rules. In the report to the US Congress on China's

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[44] See above n 35, *China – Autos*, panel report, paras. 7.742-7.758.

[45] See above n 35, *China – Autos*, Appellate Body report, para. 245.

[46] *China – Measures Affecting Imports of Automobile Parts*, Agreement under Article 21.3(b) of the DSU, WT/DS342/15 (3 March 2009).

[47] WTO, DSB Minutes of Meeting, WT/DSB/M/273 (6 November 2009) at 21.

[48] *Qi Che Chan Ye Fa Zhan Zheng Ce*, promulgated by the Ministry of Industry and Information Technology (MIIT) and NDRC Decree No. 10 on 15 August 2009, effective on 1 September 2009.

[49] *Guan Yu Fei Zhi Gou Cheng Zheng Che Te Zheng De Qi Che Ling Bu Jian Jin Kou Guan Li Ban Fa De Jue Ding*, promulgated by the GAC, the NDRC, the MOF, and the MOFCOM Decree No. 185 on 28 August 2009, effective on 1 September 2009.

[50] *Hai Guan Zong Shu Er Ling Ling Jiu Nian Di Wu Shi Ba Hao*, promulgated by the GAC on 31 August 2009, effective on 1 September 2009.

WTO compliance in 2009, the US Trade Representative (USTR) also acknowledged China's full implementation of the WTO rulings in the dispute.[51]

There are many reasons that could explain China's timely and full compliance. First, as a recently acceded and the largest developing country member of the WTO, China's reputation was at stake. The *China – Auto* case was the first WTO dispute in which China went through the panel and the appellate stages as a respondent and was required to implement WTO rulings. Full implementation was desirable for China to dispel "previous suspicions and doubts as to whether China would behave well when confronted with negative international adjudicatory outcomes."[52] Further, given that the measures in question were in clear violation of one of the fundamental principles of the WTO, the risk of losing reputation and confidence of other WTO members in China's role in the multilateral trading system would be very high if China were to resist implementation of the rulings.

Second, China's auto industry had developed very fast during the period when the measures were in place such that the measures became no longer necessary by the time that China had to remove them. For decades, the development of China's auto industry has been based on various forms of import-substitution policy aiming at building the manufacturing capacity of, and attracting investment in, the industry.[53] The measures in the *China – Auto* dispute served exactly those policy objectives by encouraging the use of domestically-made auto parts (as opposed to imported ones) for the production of complete vehicles. However, from the introduction of the measures in May 2004 to the removal of them in September 2009, China's auto industry had over five years to restructure and grow under the protection of the discriminatory measures. By 2008, China's auto industry became the second largest worldwide in terms of production volume and continued to expand in 2009 despite the global economic downturn.[54] Given these achievements, the measures became dispensable especially when they were widely known to be in conflict with China's international obligations.

Third and more importantly, the measures have also become inappropriate to the further development and growth of China's auto industry. The NDRC Policy 2009 reiterated the development goals of the auto industry as being to facilitate the restructuring of the industry to promote efficiency, to enhance its international competitiveness, and to satisfy the increasing demands of consumers for motor vehicles. These goals could not be achieved through the discriminatory and protectionist measures as protection would be detrimental to the efficiency and competitiveness of the industry as well as to the interests of consumers[55]. Therefore, the WTO rulings against these measures became a timely external force for the Chinese government to counteract domestic resistance to further economic reforms of the auto industry.

Finally and despite the view in point three above, other forms of protectionist measures could be easily invented when necessary. For example, in December 2011, China imposed anti-dumping

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[51] USTR, "2009 Report to Congress on China's WTO Compliance", at 20, available at https://ustr.gov/sites/default/files/2009%20China%20Report%20to%20Congress.pdf.

[52] See above n 5, Ji & Huang, "China's Experience in Dealing with WTO Dispute Settlement", at 16.

[53] See above n 31, Chu, "How the Chinese Government Promoted a Global Automobile Industry", at 12-15; above n 38, Wauters & Vandenbussche, "China – Measures Affecting Imports of Automobile Parts", at 237.

[54] See Tang, Rachel, "The Rise of China's Auto Industry and Its Impact on the US Motor Vehicle Industry", Congressional Report Service, November 16, 2009, at 2-3.

[55] See above n 38, Wauters & Vandenbussche, "China – Measures Affecting Imports of Automobile Parts", at 233 (observing that the measures in dispute mainly affected Chinese consumers).

and countervailing duties on certain automobiles imported from the US.[56] Having been challenged by the US in the WTO, China terminated the duties in December 2013 before the panel report finding against it was circulated.[57] Given China's voluntary compliance, this case is likely an example of China utilizing the WTO dispute settlement system to buy time for the domestic auto manufacturers protected by the duties. In 2012, China was challenged again by the US for granting various forms of export subsidies to its auto industry.[58] It appears that the subsidies are still in place as China and the US are negotiating a mutually acceptable solution to the dispute.[59] In addition to the challenged measures, there are many other measures currently in effect or being introduced that might have adverse impacts on foreign auto makers. One of the latest examples, as identified by the USTR, has been the measures introduced by the Chinese government to help the local industry build the technological capabilities and production capacity for new energy vehicles (NEVs).[60] As these measures inherently mandate technology transfer to Chinese manufacturers and provide financial support to the NEVs sector, they are likely to adversely affect foreign auto enterprises and pose WTO-legality issues.[61] Since January 2015, China has introduced at least another 5 measures relating to NEVs at the central government level.[62] These regulatory activities suggest that the Chinese government would not be hesitant to introduce new measures in support of the development goals and needs of the auto industry and that the WTO-consistency of the measures is unlikely to be a deciding factor on whether they should be introduced.

In the end, it should be noted that the WTO rulings in the dispute were limited in several aspects. The rulings did not prevent China from imposing different tariff rates on autos and auto parts or from maintaining the rule of interpreting its tariff schedule in a way that characterizes imported auto parts as a complete vehicle so as to avoid circumvention of the higher customs duty applicable to complete vehicles. Nor were the rulings intended to restrain China's capacity to pursue the policy objective of combating tariff circumvention through other means. It was just China's use of the discriminatory charge and administrative requirements in pursuit of that objective that was unacceptable to the WTO tribunal. Accordingly, the WTO rulings in *China – Autos* merely touched upon a very specific area of regulation in China's auto industry. Given the pace of regulatory development in the industry, China's implementation in the single case has become increasingly less significant over time than the need for close and constant monitoring of newly-introduced measures.

3. *China – Publications and Audio-visual Products*

3.1 Background

China has a long history of restricting trading rights – including the right to import and export goods – to a handful of state-owned enterprises (SOEs) prior to the commencement of its

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[56] See above n 27, *China — Autos (US)*.
[57] See above n 27, *China — Autos (US)*.
[58] See above n 17, *China – Auto and Auto-Parts (US)*.
[59] See above n 17, *China – Auto and Auto-Parts (US)*.
[60] See above n 17, USTR, "2014 Report to Congress on China's WTO Compliance", at 93-95.
[61] Ibid.
[62] China Automotive Review, "Laws & Regulations", available at http://www.chinaautoreview.com/pub/CARList.aspx?ID=6 (visited 28 August 2015).

economic reforms in 1978.[63] While the reforms led to significant liberalisation of trading rights[64], China maintained an 'examination and approval' or licensing system under which only entities which satisfied certain licensing criteria may be authorised as a foreign trade operator (FTO) and engage in import and export activities.[65] The licensing system had the effect of restricting the number and type of FTOs and consequently the volume of imports.

3.1.1 China's WTO commitments on trading rights

In negotiating accession to the WTO, China made commitments to liberalizing trading rights. These commitments are contained mainly in Articles 5.1 and 5.2 of the *Protocol on Accession of the People's Republic of China* (*Accession Protocol*)[66], and Paragraphs 83 (d) and 84(a) & (b) of the *Working Party Report*. According to Article 5.1 of the *Accession Protocol*, China has a general obligation to progressively liberalize trading rights within three years after accession, that is, to ensure that after 11 December 2014, *all* enterprises in China are entitled to import and export *all* goods except for those listed in Annex 2A[67]. This general obligation is reconfirmed in Paragraphs 83(d) and 84(a) of the *Working Party Report*. Further, under Paragraphs 84(a) and 84(b) of the *Working Party Report*, China specifically agrees to eliminate "its system of examination and approval of trading rights" and confine all requirements for obtaining trading rights to "customs and fiscal purposes only". Paragraph 84(a) of the *Working Party Report* further clarifies that those who should be entitled to trading rights include "all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members". For foreign enterprises and individuals, including sole proprietorships of other WTO Members, China is required to grant trading rights "in a non-discriminatory and non-discretionary way" (Paragraph 84(b) of the *Working Party Report*). Article 5.2 of the *Accession Protocol* sets out a general requirement of national treatment, preventing China from treating foreign enterprises and individuals "including those not invested or registered in China" less favourably than "enterprises in China with respect to the right to trade".

3.1.2 China's implementation of WTO commitments on trading rights

Shortly before the implementation deadline by 11 December 2004, China undertook a fundamental overhaul of its trading rights mechanism by replacing the licensing system with a registration system. Under the registration system, trading rights are granted automatically to any enterprises, institutions or individuals as long as these entities are registered with the MOFCOM or its local branches or designated bodies.[68] Application for registration is no longer subject to the strict criteria applied under the licensing system but only need to provide basic information, such

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63 Nicholas R. Lardy, *Integrating China into the Global Economy* (The Brookings Institution, 2002) at 40.

64 Ibid., at 41-42. (noting that prior to China's WTO accession, the Chinese government had authorized 35,000 firms of all types to engage in foreign trade).

65 Xin Zhang, *International Trade Regulation in China: Law and Policy* (Hart Publishing, 2006) at 26-32. These licensing criteria mainly included threshold requirements for registered capital, export performance and prior experience, and limitations on the scope of imports and exports.

66 *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001).

67 Goods listed in Annex 2A of the *Accession Protocol* will continue to be subject to state trading. Specifically, only those SOEs set out in the Schedule of that Annex can engage in the importation of grain, vegetable oil, sugar, tobacco, crude oil, processed oil, chemical fertilizer, and cotton (Annex 2A1), and the exportation of tea, rice, corn, soy bean, tungsten ore and certain tungsten products, coal, crude oil, processed oil, silk, cotton, cotton yarn, certain woven cotton products, antimony, and silver (Annex 2A2).

68 *Foreign Trade Law of the People's Republic of China*, promulgated on 12 May 1994 by the 7th Meeting of the 8th Standing Committee of National People's Congress of the PRC, effective 1 July 1994; revised on 6 April 2004, effective 1 July 2004, Articles 8-9; Dui Wai Mao Yi Jing Ying Zhe Bei An Deng Ji Ban Fa (*Measures for the Filing and Registration of Foreign Trade Operators*), promulgated by MOFCOM Order No. 14 on June 25, 2004, effective July 1, 2004, Articles 2-4.

as copies of business license and organization code; proof of asset and funding is also required in case of foreign-invested enterprises (FIEs) and sole proprietors.[69] As a general principle, applications will be processed within 5 working days.[70]

The establishment of a registration system for the grant of trading rights marked China's liberalization of trading rights in accordance with its WTO commitments.[71] Shi Guangsheng, the Minister of Commerce during China's WTO accession negotiation, remarked that one of the most significant changes in the regulation of trading rights has been the transformation from a long-standing 'examination and approval' system to a registration system.[72] Shi also observed:

> From 1st July 2004 to 31st January 2005, 38,000 foreign trade dealers put up their file for registration all over the country. Currently, 170,000 domestically-funded enterprises have trading rights which, coupled with 230,000 foreign-invested enterprises, adds up 400,000 businesses enjoying trading rights.[73]

Thus, China seems to have implemented its commitments on trading rights timely and satisfactorily. In the report to the US Congress on China's WTO compliance in 2007, the USTR was also generally satisfied with China's implementation except for the remaining restrictions on the right to import certain cultural products.[74] It was these restrictions that triggered the *China – Publications and Audio-visual Products*[75] dispute.

3.2 The measures & WTO findings of violations

The dispute concerned a number of Chinese administrative regulations and departmental rules which continued to restrict the right to import reading materials, audiovisual products, sound recordings, and films for theatrical release to certain SOEs, prohibiting other entities such as FIEs from engaging in the importing activities. These restrictions had significant impacts on the growing US content industry which was keen to "engage the huge potential market in China".[76] The main Chinese measures included:[77]

1. *Regulations Guiding the Orientation of Foreign Investment 2002*[78] (issued by the State Council) (Foreign Investment Regulation 2002);
2. *Catalogue of Industries for Guiding Foreign Investment 2007*[79] (issued by the NDRC and the MOFCOM) (Catalogue 2007);

[69] See above n 68, MOFCOM Order No. 14, Article 5.
[70] See above n 68, MOFCOM Order No. 14, Article 6.
[71] See above n 65, Zhang, *International Trade Regulation in China,* at 31.
[72] Shi, Guangsheng, "Introduction: Working Together for a Brighter Future Based on Mutual Benefit" in Henry Gao and Donald Lewis (ed), *China's Participation in the WTO* (London: Cameron May, 2005) 15-22 at 16.
[73] Ibid.
[74] USTR, "2007 Report to Congress on China's WTO Compliance", at 16-17, available at https://ustr.gov/sites/default/files/asset_upload_file625_13692.pdf.
[75] *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Panel Report adopted 19 January 2010 as modified by the Appellate Body Report); WT/DS363/AB/R (Appellate Body Report adopted 19 January 2010).
[76] Elanor A., Mangin, "Market Access in *China – Publications and Audiovisual Materials*: A Moral Victory with a Silver Lining" (2010)25(1) *Berkeley Technology Law Journal* 279-310 at 281-282.
[77] The listed measures are only those affecting trading rights and hence trade in goods. As mentioned in the table in the Introduction, this dispute also involved a number of Chinese measures that affected trade in services. These measures are not considered in this article.
[78] *Zhi Dao Wai Shang Tou Zi Fang Xiang Gui Ding*, Decree No. 346, promulgated on 11 February 2002, effective on 1 April 2002.

3. *Several Opinions on the Introduction of Foreign Capital into the Cultural Sector 2005*[80] (issued by the Ministry of Culture (MOC), the State Administration of Radio, Film and Television (SARFT), the General Administration of Press and Publication (GAPP), the NDRC, and the MOFCOM) (Several Opinions 2005);
4. *Regulations on the Management of Publications 2001*[81] (issued by the State Council) (Publications Regulation 2001);
5. *Regulations on the Management of Audiovisual Products 2001*[82] (issued by the State Council) (Audiovisual Products Regulation 2001);
6. *Rules for the Management of the Import of Audiovisual Products 2002*[83] (issued by the MOC and the GAC) (Audiovisual Products Importation Rule 2002);
7. *Rules for the Management of Chinese-Foreign Contractual Joint Ventures for the Sub-Distribution of Audiovisual Products 2004*[84] (issued by the MOC and the MOFCOM) (Audiovisual (Sub-)Distribution Rule 2004);
8. *Regulations on the Management of Films 2001*[85] (issued by the State Council) (Film Regulation 2001); and
9. *Provisional Rules on Entry Criteria for Operating Film Enterprises 2004*[86] (issued by the SARFT and the MOFCOM) (Film Enterprise Rule 2004).

All of these measures were found by the WTO tribunal to be inconsistent with China's trading rights commitments summarised in section 3.1.1 above.

3.2.1 *Foreign Investment Regulation 2002 & Catalogue 2007*

The *Foreign Investment Regulation 2002* provides guidelines for foreign investment in China and mandates competent departments of the State Council to formulate a detailed catalogue to guide foreign investment and to be used as one of the bases for examining and approving foreign-invested projects and the establishment of FIEs[87]. The regulation classifies foreign-invested projects into four categories – "encouraged", "restricted", "prohibited" and "permitted", and requires the catalogue to list foreign-invested projects falling within the first three categories, with those not listed deemed to be "permitted". Pursuant to the regulation, a catalogue was issued in 2002 and subsequently revised periodically. The *Catalogue 2007*, under the heading "Catalogue of Prohibited Foreign Investment Industries", listed "publication, distribution and *importation* of books, newspapers and periodicals" (Article X.2), and "publication, manufacturing and *importation* of audiovisual products and electronic publications" (Article X.3).

[79] *Wai Shang Tou Zi Chan Ye Zhi Dao Mu Lu*, Order No. 57, promulgated on 31 October 2007, effective on 1 December 2007.
[80] *Guan Yu Wen Hua Ling Yu Yin Jing Wai Zi De Ruo Gan Yi Jian*, Order No. 19, promulgated and effective on 6 July 2005.
[81] *Chu Ban Guan Li Tiao Li*, Decree No. 343, promulgated on 25 December 2001, effective on 1 February 2002.
[82] *Yin Xiang Zhi Pin Guan Li Tiao Li*, Decree No. 341, promulgated on 25 December 2001, effective on 1 February 2002.
[83] *Yin Xiang Zhi Pin Jin Kou Guan Li Ban Fa,* Order No. 23, promulgated on 17 April 2002, effective on 1 June 2002.
[84] *Zhong Wai He Zuo Yin Xiang Zhi Pin Fen Xiao Qi Ye Guan Li Ban Fa*, Order No. 28, promulgated on 8 December 2003, effective on 1 January 2004.
[85] *Dian Ying Guan Li Tiao Li*, Decree No. 342, promulgated on 25 December 2001, effective on 1 February 2002.
[86] *Dian Ying Qi Ye Jing Ying Zi Ge Zhun Ru Zan Xing Gui Ding*, Order No. 43, promulgated on 10 October 2004, effective on 10 November 2004.
[87] Under the regulation, FIEs include Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and wholly foreign-owned enterprises.

The panel found that the *Foreign Investment Regulation 2002* and the *Catalogue 2007*, working together, had the effect of prohibiting FIEs from engaging in the importation of the goods in question into China, and hence were in violation of China's commitments to liberalising trading rights by allowing all entities to import these goods.[88] The panel's rulings were not appealed.

3.2.2 *Several Opinions 2005*

The *Several Opinions 2005* provides general guidance for the introduction of foreign capital into the cultural sector. Article 4 stipulates that "foreign investors' setting up and operating … films import … companies" and "foreign investors' investing in the business of importing books, newspapers and periodicals, and … audiovisual products and electronic publications" shall be prohibited.

This provision was found by the panel to be in breach of China's commitments to liberalise trading rights as it effectively directed "relevant agencies to ensure, through promulgation of appropriate rules, that no" FIEs in China can lawfully import all of the covered goods.[89] The panel's rulings were not appealed.

3.2.3 *Publication Regulation 2001*

The *Publications Regulation 2001* applies to publishing activities conducted within the territory of China, including the importation of publications into China. Publications cover all of the subject goods except films for theatrical release. Article 41 of the regulation stipulates:

- the business of importing publications shall be operated by "publications import entities" (PIEs) approved in accordance with the regulation;
- no entity or individual, without approval, may engage in the business of importing publications; and
- entities wishing to engage in the importation of newspapers and periodicals shall be designated by the publication administration department of the State Council (which is the GAPP in practice).

Article 42 sets out seven criteria for approving the establishment of PIEs, including applicants shall:

1) have a name and articles of association;
2) be a wholly SOE and possess a sponsoring unit and its competent agency at the higher level recognized by the GAPP;
3) have a well-defined scope of business;
4) have an organizational structure which meets the needs of its scope of publications importation business and professionals who have the necessary job qualifications stipulated by the State;
5) have the fund which meets the needs of its scope of publications importation business;
6) have a fixed business site; and
7) satisfy other conditions prescribed by laws and administrative regulations and by the State.

In addition to the aforesaid criteria, the approval of the establishment of a PIE shall also conform to the State plan for the total number, structure and distribution of PIEs.

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[88] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.348-7.352.
[89] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.372-7.374.

Article 43 provides that applications for the establishment of PIEs shall be examined and approved by the GAPP.

The panel found that

- insofar as Articles 41 and 42 granted the right of importing the covered goods to wholly SOEs only – hence excluding all other enterprises or individuals from the right, the provisions went against China's trading rights commitments;[90]
- the approval condition in relation to suitable organization and qualified personnel set out in Article 42(4) and the additional requirement of conformity with the State plan were "not maintained for fiscal or customs purposes" (as envisaged in paragraph 84(b) of the *Working Party Report*). Since all enterprises (other than wholly SOEs) that "do not satisfy these two conditions cannot obtain the right to import the relevant products", the application of the two conditions together with the operation of Article 41 deprived all enterprises in China other than wholly SOEs of trading rights;[91] and
- with respect to the importation of newspapers and periodicals, the "designation" of PIEs (contemplated by Article 41) was not automatic and, in the absence of any criteria for "designation", the GAPP had the discretion in granting the rights of importing those products. As a result, China failed to grant trading rights to FIEs in a non-discretionary way, in violation of paragraph 84(b) of the *Working Party Report*.[92]

It is worth noting that the panel did not rule on the legitimacy of the approval conditions listed in Article 42 as such. Moreover, the panel rejected the US claim that FIEs could never satisfy these conditions.[93] Accordingly, the panel's rulings have suggested that the application of conditions for the granting of trading rights does not by itself amount to violations of China's commitments on trading rights. The panel's rulings were not appealed.

3.2.4 *Audiovisual Products Regulation 2001 & Audiovisual Products Importation Rule 2002*

The *Audiovisual Products Regulation 2001* governs the activity of importing audiovisual products such as audio tapes, video tapes, records, audio and video CDs, etc. Article 5 of the regulation creates a licensing system only allowing licensed entities to conduct the activity of importing these products. Article 27 stipulates that the importation of finished audiovisual products shall only be conducted by a "finished audiovisual products import entity" designated by the MOC. Without designation, no entity or individual shall engage in the business of importing finished audiovisual products.

The panel found that Article 27 contravened China's commitments to grant trading rights to FIEs "in a non-discretionary way" as the designation process is not automatic and is not based on any written criteria such that the MOC "enjoys discretion as to whom to designate".[94] In relation to Article 5, China claimed that it applies to the importation of audiovisual products intended for publication (as opposed to finished audiovisual products).[95] Accepting China's claim, the panel

[90] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.397-7.401.
[91] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.410-7.411.
[92] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.436-7.438.
[93] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.422-7.424.
[94] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.631-7.633.
[95] Before the panel, China argued that its trading rights commitments do not apply to Article 5 which regulates services not goods, i.e. "the service of licensing – the licensing of copyrights for the publication of copies of audiovisual content".

found a similar violation (as the one with respect to Article 27) due to the lack of automatic licensing, process for applying and obtaining license, and criteria guiding the granting of license.[96]

The *Audiovisual Products Importation Rule 2002* provides detailed rules which implement the *Audiovisual Products Regulation 2001*. As such, Articles 7 and 8 of the rule, respectively, replicate the licensing requirement for the import of audiovisual products used for publication and the designation system for the import of finished audiovisual products. Therefore, the panel found that the two provisions violated China's commitments in the same way as Articles 5 and 27 of the regulation did.[97]

The panel's findings above were upheld by the Appellate Body.[98]

3.2.5 *Audiovisual (Sub-)Distribution Rule 2004*

The *Audiovisual (Sub-)Distribution Rule 2004* was also a specific rule that implements the *Audiovisual Products Regulation 2001*. It applies to the establishment of Chinese-foreign contractual enterprises for the purpose of engaging in the sub-distribution of audiovisual products within the territory of China. Article 21 of the rule prohibits Chinese-foreign contractual enterprises from conducting the business of importing audiovisual products into China. This was easily found by the panel to be in breach of China's commitments on trading rights,[99] a finding that was not appealed.

3.2.6 *Film Regulation 2001 & Film Enterprise Rule 2004*

The *Film Regulation 2001* and the *Film Enterprise Rule 2004* are essentially in the same structure and substance in relation to trading rights as the *Audiovisual Products Regulation 2001* and the *Audiovisual Products Importation Rule 2002*, imposing the same licensing and designation mechanisms on the importation of films for theatrical release into China. Specifically, Article 5 of the regulation and Article 3 of the rule prohibit entities without license to import films. Article 30 of the regulation and Article 16 of the rule only allow film import entities designated by the SARFT to engage in the business of importing films.

In its claims, the US did not attempt to establish the inconsistencies of Article 5 of the regulation and Article 3 of the rule.[100] It is possible that the US did not do so deliberately as China had confirmed that licenses are granted through the designation process[101] which therefore should be the target of the dispute. In relation to Article 30 of the regulation and Article 16 of the rule which create the designation requirement, the panel found they enable the SARFT to grant the right to import films by discretion, in violation of China's commitments to grant trading rights in

This argument was rejected by the panel. Sided with the US, the panel found that "audiovisual products intended for publication that are the subject of the US claim – tangible master copies – are goods for the purposes of China's trading rights commitments." On appeal, the Appellate Body upheld the panel's finding that China's trading rights commitments were applicable to Article 5 of the *Audiovisual Products Regulation 2001* and consequently, upheld the panel's findings of the corresponding violations. See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.646-7.652; Appellate Body Report, paras. 203-204.

[96] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.655-7.657.

[97] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.679-7.690.

[98] See above n 75, *China – Publications and Audiovisual Products,* Appellate Body Report, para. 204.

[99] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.703-7.704.

[100] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.562, 7.586.

[101] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.562, 7.586.

a non-discretionary fashion.[102] Further, the panel found that the designation requirement had the effect of depriving FIEs, foreign enterprises not registered in China and foreign individuals of trading rights on the following grounds: (1) the requirement was "not applied merely to ensure compliance with customs or fiscal requirements"; (2) it was "not applied to allow any and all entities to import films", but would result in a limited number of importers; and (3) in practice, only one Chinese SOE was designated.[103] On appeal, the Appellate Body upheld the panel's findings.[104]

3.2.7 *China's defence under Article XX(a)*

Instead of contesting the panel's findings of the violations above, China defended its measures under Article XX(a) as serving the objective of maintaining an effective and efficient content review mechanism which ensures that imports do not contain content that could have negative impacts on public morals.[105] The defence did not prevail as China failed to substantiate that the measures are "necessary" for the pursuit of the objective. As the panel and the Appellate Body found, some of the measures did not materially contribute to the protection of public morals and further, there was a less-trade-restrictive alternative means that China could employ to attain the objective.[106] In particular, the tribunal found that the objective could well be achieved if the Chinese government takes the responsibility of conducting content reviews of goods imported by FIEs and other non-state entities.[107]

3.3 China's implementation and an appraisal

By agreement with the US, China was expected to implement the WTO rulings by 19 March 2011. [108] Since mid-January 2011, China started notifying the DSB the status of its implementation.[109] Upon the expiry of the implementation deadline, China did not manage to

[102] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.569-7.571, 7.594.
[103] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.575-7.576, 7.597-7.599.
[104] See above n 75, *China – Publications and Audiovisual Products,* Appellate Body Report, para. 200.
[105] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, para. 7.713. There was a threshold issue of whether Article XX(a) is applicable to violations of China's *Accession Protocol*. While the panel assumed its applicability (para. 7.754), the Appellate Body found that the contested measures had "a clearly discernable, objective link to China's regulation of trade in the relevant products", and therefore, that "China may rely upon the introductory clause of paragraph 5.1 of its *Accession Protocol* and seek to justify these provisions" under Article XX(a) (para. 233). For further discussions of the issue, see Paola Conconi & Joost Pauwelyn, "Trading Cultures: Appellate Body Report on *China-Audiovisuals*" (2011)10(1) *World Trade Review* 95-118; Frieder Roessler, "Comment: Appellate Body Ruling in China-Publications and Audiovisual Products" (2011)10(1) *World Trade Review* 119-131.
[106] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.824-7.911; Appellate Body Report, paras 269-337.
[107] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.889-7.900; Appellate Body Report, paras 322, 327-331. The panel found that the alternative means could make an equivalent contribution to the accomplishment of the objective and tended to be less-trade-restrictive than the measures at issue. It also found the means to be "reasonably available" on the grounds that the Chinese government had been responsible to finance the content review activities, and in any event, could "lessen any burden by charging appropriate fees" from any import entities requesting content reviews. On appeal, the Appellate Body rejected China's argument that the application of this alternative means would result in undue administrative, financial and technical burdens including "tremendous restructuring" and the creation of "a new, multilevel structure for content review within the Government", training and assignment of a large number of qualified content reviewers to numerous locations, as well as "a completely upgraded electronic communications system to perform efficiently such an electronic review". It observed that China failed to substantiate that the changes that it may be required to make in applying the alternative means would result in undue burdens.
[108] *China – Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products*, Agreement under Article 21.3(b) of the DSU, WT/DS363/16 (13 July 2010).
[109] *China – Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products*, Status Report by China, WT/DS363/17 (14 January 2011).

complete the implementation process due to the complexity and sensitivity involved but reiterated its intention to continue the process to achieve full WTO-compliance.[110] On 12 March 2012, China reported to the DSB that it "has ensured full implementation of the DSB's recommendations and rulings, except those concerning film for theatrical release."[111] With respect to films, China and the US reached a Memorandum of Understanding (MOU) to temporarily resolve the disputes at issue.[112]

China's implementation measures included the following:

1. *Catalogue of Industries for Guiding Foreign Investment 2011*[113] (Catalogue 2011);
2. *Regulations on the Management of Publications 2011*[114] (Publications Regulation 2011);
3. *Regulations on the Management of Audiovisual Products 2011*[115] (Audiovisual Products Regulation 2011);
4. *Rules for the Management of the Import of Audiovisual Products 2011*[116] (Audiovisual Products Importation Rule 2011); and
5. *Rules on the Administration of the Publications Market 2011*[117] (Publication Market Administration Rule 2011)

3.3.1 *Catalogue 2011*

As shown in section 3.2.1, the panel found that Articles X.2 & X.3 of the *Catalogue 2007* (in conjunction with Articles 3 & 4 of the *Foreign Investment Regulation 2002*) deprived FIEs of trading rights. The *Catalogue 2011* made the following amendments:

> **Catalogue of Prohibited Foreign Investment Industries**:
> Article X.2: "publication~~, distribution and importation~~ of books, newspapers and periodicals";
> Article X.3: "publication, manufacturing ~~and importation~~ of audiovisual products and electronic publications".

By removing the business of importing the subject goods from the 'prohibited category', the revised measure no longer deprives FIEs of the relevant trading rights. With these changes made to the catalogue, it is unnecessary for China to make any amendments to the *Foreign Investment Regulation 2002*.

3.3.2 *Publications Regulation 2011*

As shown in section 3.2.3, the panel found a number of violations in the *Publications Regulation 2001* which restricted trading rights to wholly SOEs (Articles 41 and 42(2)), imposed approval conditions relating to suitable organization and qualified personnel (Article 42(4)) and State plan

[110] *China – Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products*, Status Report by China - Addendum, WT/DS363/17/Add.2 (15 March 2011).
[111] *China – Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products*, Status Report by China - Addendum, WT/DS363/17/Add.14 (13 March 2012).
[112] *China – Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products*, Joint Communication from China and the United States, WT/DS363/19 (11 May 2012).
[113] Order of the NDRC and the MOFCOM (No. 12), promulgated on 24 December 2011, effective on 30 January 2012.
[114] Decree of the State Council (No. 594), promulgated and effective on 19 March 2011.
[115] Decree of the State Council (No. 595), promulgated and effective on 19 March 2011.
[116] Order of the GAPP and the GAC (No. 53), promulgated and effective on 6 April 2011.
[117] Order of the GAPP and the MOFCOM (No. 52), promulgated and effective 25 March 2011.

(Article 42), and enabled the designation of the right to import newspapers and periodicals by discretion (Article 41). All of these violations were corrected by the revised regulation, which deleted the condition that trading rights can be granted to wholly SOEs only and the State plan requirement, amended the condition on suitable organization and qualified personnel, and replaced the designation system with an approval system. The changes made are shown below:

> Article 41
> The business of importing publications shall be conducted by Publication Importing Entities approved in accordance with the Regulation. ~~Entities wishing to engage in the importation of newspapers and periodicals shall be designated by the publication administration department of the State Council.~~ Without having been so approved, no entities or individuals shall engage in the business of importing publications.
>
> Article 42
> Applicants for approval of the establishment of Publication Importing Entities shall:
> 1) have a name and articles of association;
> 2) ~~be a wholly state-owned enterprise and~~ possess a sponsoring unit and its competent agency at the higher level which are recognized by the publication administration department of the State Council;
> 3) have a well-defined scope of business;
> 4) ~~have an organizational structure which meets the needs of its scope of publications importation business and professionals who have the necessary job qualifications stipulated by the State;~~ be competent to perform the preliminary content review of import publications;
> 5) have the fund which meets the needs of its scope of publications importation business;
> 6) have a fixed business site;
> 7) satisfy other conditions prescribed by laws and administrative regulations and by the State.
>
> ~~In addition to the aforesaid criteria, the approval of the establishment of a Publication Importing Entity shall also conform to the State plan for the total number, structure and distribution of Publication Importing Entities.~~

Accordingly, the revised regulation has formally removed the violations found by the panel. It appears that all entities and individuals may now apply for the establishment of a publication import entity in accordance with the amended conditions set forth in Article 42. The GAPP will need to review applications on the basis of these conditions, and therefore no longer has the discretion that it enjoyed under the designation system in granting the right to import newspapers and periodicals.

3.3.3 *Audiovisual Products Regulation 2011 & Audiovisual Products Importation Rule 2011*

As shown in section 3.2.4, the panel found that Articles 5 and 27 of the *Audiovisual Products Regulation 2001* and Articles 7 and 8 of the *Audiovisual Products Importation Rule 2002* had the effect of allowing the competent Chinese regulators to designate trading rights in a discretionary manner. The implementation measures made the following amendments:

> ***Audiovisual Products Regulation 2011***
>
> Article 5
> The State shall apply a licensing system for the publication, production, duplication, import, wholesale, retail ~~and rental~~ of audiovisual products; no entities and individuals, without the necessary license, shall engage in the publication, production, duplication, import, wholesale, retail ~~and rental~~ of audiovisual products.

Article 27
The importation of finished audiovisual products shall only be conducted by a Finished Audiovisual Products Importing Entity ~~designated~~ approved by the ~~culture~~ publication administration department of the State Council. Without having been so ~~designated~~ approved, no entity or individual shall engage in the business of importing finished audiovisual products.

Audiovisual Products Importation Rule 2011

Article 7
The State shall apply a licensing system for ~~the importation of audiovisual products.~~ the establishment of Finished Audiovisual Products Importing Entity.

Article 8
Only Finished Audiovisual Products Importing Entities ~~designated~~ approved by the ~~MOC~~ GAPP shall engage in the importation of finished audiovisual products; without having been so ~~designated~~ approved, no entity or individual shall engage in the business of importing finished audiovisual products.

Article 9
Applicants for approval of the establishment of a Finished Audiovisual Products Importing Entity shall:
1) have a name and articles of association;
2) possess a sponsoring unit and its competent agency at the higher level which are recognized by the GAPP;
3) have a well-defined scope of business;
4) be competent to perform the preliminary content review of import audiovisual products;
5) have the fund which meets the needs of its scope of audiovisual products importation business;
6) have a fixed business site;
7) satisfy other conditions prescribed by laws and administrative regulations and by the State.

Article 10
The application for the establishment of a Finished Audiovisual Products Importing Entity shall be lodged to the GAPP. An 'Audiovisual Products Publication Permit' shall be issued to the applicant, who shall then obtain a business licence from the Industry and Commerce Bureau, and fulfill other formalities set forth in laws and regulations governing foreign trade.

Accordingly, the implementation measures replaced the designation requirement with an approval requirement and set out specific criteria and procedure for the granting of the right to import finished audiovisual products. The GAPP now must follow these criteria and procedure in approving the establishment of a finished audiovisual products import entity. Notably, these criteria are exactly the same as the ones that the GAPP need to consider in granting the right to import publications (e.g. newspapers and periodicals).

However, it appears that the inconsistency found in relation to the import right of audiovisual products used for publication, i.e. Article 5 of the *Audiovisual Products Regulation 2001*, has not been corrected. It can be argued that the licensing requirement in Article 5 (as amended by the *Audiovisual Products Regulation 2011*) still applies to the granting of the right to import audiovisual products used for publications. However, the criteria and procedure added for the approval of the right to import finished audiovisual goods do not seem to be applicable to determinations of whether a license should be granted for the importation of audiovisual products used for publications. Therefore, it remains the case that the Chinese government may still

exercise discretion in deciding who shall be granted the right to import such goods (e.g. tangible master copies).

3.3.4 *Publication Market Administration Rule 2011*

Article 45 of the *Publication Market Administration Rule 2011* repealed the *Audiovisual (Sub-)Distribution Rule 2004*, thereby correcting the breach found in relation to Article 21 of the earlier rule. As a result, Sino-foreign contractual joint ventures are not *a priori* excluded from the right to import audiovisual products. An application for the right to import audiovisual products need to follow the relevant rules set forth in the *Audiovisual Products Regulation 2011* and the *Audiovisual Products Importation Rule 2011*, as discussed in section 3.3.3 above.

3.3.5 *Several Opinions 2005*

As shown in section 3.2.2, Article 4 of the *Several Opinions 2005* was found to have the effect of depriving FIEs of trading rights. However, China did not make any amendments to the measure while it claimed before the DSB that full compliance has been achieved. One explanation for China's claim is that China believed that given the amendments made to the other measures, it was unnecessary to amend the *Several Opinions 2005*. According to China, the measure is not a statutory law, or an administrative regulation, or a departmental rule but "merely an internal guideline for the formulation and improvement of implementation procedures by the authorities competent in the cultural sectors concerned".[118] Under Chinese law, the *Several Opinions 2005* should, however, be considered as a departmental rule or policy document jointly promulgated by several responsible departments of the State Council and hence, as the panel found, having a general application.[119] As such, it is subordinate to administrative regulations issued by the State Council and to more recent departmental rules which should prevail to the extent of any inconsistencies.[120] Therefore, China may have taken the position that as the revised measures (being administrative regulations or later departmental rules) have removed restrictions on *who* may apply for the right to import the subject goods except for films, Article 4 of the *Several Opinions 2005* should no longer be applied both as a matter of law and practice. On this score, Webster has argued that China has failed to implement the WTO rulings as in practice local governments and agencies may likely have continued to follow the *Several Opinions 2005*.[121] This argument has missed the fact that it is the GAPP, not the local governments or agencies, that is responsible to review and approve applications for the establishment of import entities for the importation of the goods. This is clearly specified in Article 43 of the *Publications Regulation 2011*[122] (in relation to publications), Article 27 of the *Audiovisual Products Regulation 2011* and Article 10 of the *Audiovisual Products Importation Rule 2011*[123] (in relation to audiovisual goods). Following the promulgation of the implementation measures, the GAPP has also updated

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[118] See above n 75, *China – Publications and Audiovisual Products,* Panel Report, paras. 7.181-7.182, 7.189, 7.198. China made this argument at the panel stage. However, the panel rejected the argument, ruling that the *Several Opinions 2005* did constitute a "measure" within the meaning of Article 3.3 of the DSU because it "is an act taken by the organs of the state … [and therefore] is attributable to China", and it "sets forth rules or norms intended to have general and prospective application".

[119] See *Legislation Act of the People's Republic of China (Legislation Act)*, adopted at the 3rd Session of the 9th National People's Congress on March 15, 2000, Article 72.

[120] See above n 119, *Legislation Act*, Articles 79, 83.

[121] See above n 5, Webster, "How China Implements WTO Decisions WTO Decisions", at 567.

[122] Article 43 provides that anyone who wishes to establish a publications importation unit shall apply to the publication administration department of the State Council (i.e. GAPP) and obtain a license.

[123] See section 3.3.3 above.

its official website applying the approval criteria and procedure contemplated in these measures.[124] This suggests that in practice all entities should be entitled to submit an application to the GAPP for approval in accordance with the revised criteria and procedure, and hence that Article 4 of the *Several Opinions 2005* has effectively ceased operation to the extent that it prohibits FIEs from trading rights. The reason why the *Several Opinions 2005* is still being followed at local level is because the measure contains many other important rules regulating foreign investment in China's culture sector which local governments and agencies are required to apply. Certainly, even if China were to make any changes to the *Several Opinions 2005*, it does not need to repeal the measure entirely but merely need to delete the wording "business of importation" in Article 4 of the measure, hence leaving the measure in effect. In short, the fact that local governments have continued to apply the measure does not mean that the single provision on trading rights has been applied in practice; this is especially so if one considers the fact that local governments are fully aware of the conflict between the provision and the revised measures at the higher hierarchy.

3.3.6 *Film Regulation 2001 & Film Enterprise Rule 2004*

The two measures applicable to films were left untouched. As noted above, China concluded an MOU with the US in exchange for a temporary settlement of the disputes over films, that is, the US not to challenge China's implementation of the WTO rulings regarding films until 2017. In the deal, China agreed to relax film quotas for 'enhanced format films' (such as 3D and IMAX films), and to provide an increased share of revenue for US film producers and more liberalised distribution rights for local enterprises.[125] While the deal has led to enhanced market access and revenue-sharing for US film makers in the world's second largest film market[126], the restrictions on trading rights remain in place. It is expected that in 2017 the two countries may negotiate another deal for China to further open its market for US films,[127] indicating a likely extension of the implementation periods. This is probably desirable for both countries – while China certainly does not want to open the trading rights to non-state entities, the US could get a better and exclusive market access out of a bilateral deal which liberalisation of trading rights may not provide. Accordingly, the US may not genuinely push for China's implementation but rather use it as a bargaining chip to continue to open the Chinese market for its film makers. A consequence of this would be that the trading rights on films will continue to be confined to very few SOEs and no other entities will be entitled to engage in film importation within the territory of China.

3.3.7 An overall evaluation of China's implementation

The *China – Publications and Audio-visual Products* dispute challenged one of the most sensitive sectors of China – the culture industry. It is sensitive not only because the sector has been treated as an essential segment of China's economic reforms and development[128], but more importantly it

[124] This website is in Chinese: http://www.gapp.gov.cn/govservice/1978/195983.shtml (an English version of the website does not seem to be available)

[125] See above n 112, Joint Communication from China and the United States.

[126] See Genevieve Koski, "What U.S. films did China import this year, and way?", DISSOLVE (22 October 2014), available at: https://thedissolve.com/news/3701-hollywood-in-china/

[127] See Clifford Coonan, "China Film Import Quota Will Open Up in 2017", The Hollywood Reporter (16 April 2014), available at: http://www.hollywoodreporter.com/news/china-film-import-quota-increase-696708

[128] See generally Xiaolu Chen, *China's Cultural Industries in the Face of Trade Liberalization: An Analytical Framework of China's Cultural Policy* (Master thesis, The Ohio State University, 2009), available at: https://etd.ohiolink.edu/!etd.send_file?accession=osu1253553429&disposition=inline

contains and conveys fundamental social values and political interests.[129] Therefore, it is not surprising that China "has deliberately chosen not to liberalise the right to import these special goods regardless of the likely violations of its WTO obligations."[130] It is therefore likely that China's implementation of the WTO rulings in the dispute may not quickly lead to full liberalisation of the right to import cultural goods. Indeed, the revised measures have formally lifted the restrictions on trading rights and installed specific criteria and procedure for the approval of the right to import cultural goods except for films (and arguably also for audiovisual products used for publications). However, the practical effect of the revisions is difficult to assess.[131] For example, while the GAPP published the approval criteria and procedure in accordance with the revised measures on its official website, it has not made public any information about the approved entities and the reasons why an application is approved or rejected. This makes it virtually impossible to monitor whether all entities have been allowed to file applications and whether applications have been assessed objectively based on the statutory criteria rather than discretionary and arbitrary standards. Post implementation, the most glaring issue, therefore, has been the lack of transparency in relation to the acceptance and examination of applications by the GAPP. Short of such information, it is hard to conclude whether China has implemented the WTO rulings in practice although the revised measures have corrected the WTO-inconsistencies on their face.

In this connection, it must be noted that the WTO rulings have effectively left flexibilities for China to maintain an "approval" system in relation to the right to import the cultural goods. The tribunal did so apparently to give deference to China's right to undertake content reviews. However, under the "approval" system, the grant of trading rights is unlikely to be automatic. Since the authorities have long granted the trading rights to certain SOEs only, they may well be inclined to doing the same by utilizing the flexibilities embedded in the approval criteria. For instance, the condition that an applicant shall have articles of association may not fit in the situation of individuals and sole proprietorships. The conditions that an applicant shall have the capacity of performing preliminary content review and sufficient fund to conduct the business of importation (including the content review of imports) may be utilized to exclude private entities and FIEs from becoming an import entity. Politically speaking, the risk of granting a FIE or private entity or individual the right to import the cultural goods may be too high for the approval authorities and their responsible officers if content reviews are not conducted properly such that goods which should have not been imported enter into the Chinese market.

In sum, the WTO rulings have successfully pushed China to reform its laws restricting trading rights in relation to cultural goods. This is a positive step toward the dismantling of the monopolization of trading rights by state-owned enterprises in the long run. However, how applications for import right are examined in accordance with the criteria, how many and who have been and will be approved are matters worth continuous observation. Given the significance

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[129] See, for example, Jingxia Shi & Weidong Chen, "The 'Specificity' of Cultural Products versus the 'Generality' of Trade Obligations: Reflecting on 'China – Publications and Audiovisual Products'" (2011)45(1) *Journal of World Trade* 159-186 at 161 (observing that cultural goods "serve as essential instruments in disseminating government policy and shaping public opinion"); above n 75, Mangin, "Market Access in *China – Publications and Audiovisual Materials*", at 302-303 (observing that China's restrictions on trading rights served to "combat perceived cultural colonialism" and "regulate the cultural content its population consumes").

[130] See Ross Buckley & Weihuan Zhou, "Navigating Adroitly: China's Interaction with the Global Trade, Investment, and Financial Regimes" (2013)9(1) *University of Pennsylvania East Asia Law Review* 1-40 at 14.

[131] See Julia Ya Qin, "Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence – A Commentary on the *China – Publications* Case" (2011)10(1) *Chinese Journal of International Law* 271-322 at 281.

and sensitivity of the sector, it would be unwise to expect that the law changes will have immediate impacts on practice. Rather, it is certain that China will continue to strictly enforce the censorship of cultural imports, hence making it uncertain whether the liberalization of trading rights would bring enhanced market access for foreign cultural goods. While the WTO rulings may lead to an increase in the number of import entities of cultural goods, the goods to be imported must have the same quality so as to satisfy content reviews of the Chinese government.[132] Accordingly, the rigor of China's censorship in the cultural sector may continue to effectively limit the volume of cultural imports.[133]

4. *China – Raw Materials & China – Rare Earths*

4.1 Background

Prior to the commencement of the 1978 economic reforms, China's rigid control over trade in goods involved not only imports but also exports. The quantity and price of exports, amongst others, were predominantly subject to central planning.[134] Since the economic reforms, China unilaterally and gradually liberalised its exportation mechanism by significantly relaxing trading rights, export licensing and quotas, pricing, and the allocation of foreign exchange, so as to promote the transformation of the planning-based system to a market-oriented system. Further, various forms of incentives – such as value-added tax rebates and duty drawbacks – were introduced to promote export trade.[135] The reforms led to explosive export growth and diversification[136] and shaped the export-based growth model of China.

Despite the reforms, export controls were not completely abandoned before China's entry into the WTO. Significantly, China maintained export restrictions such as duties and quotas on selected commodities, particularly "minerals such as tungsten, antimony, and tin and certain rare earths for which China was a major or even the major source of world supply."[137] In the negotiations of China's WTO entry, existing members had serious concerns about China's use of restrictions on exports[138] and successfully pushed China to undertake to eliminate all such restrictions with limited exceptions. Upon accession, China committed to abide by the general rules on export restrictions under the GATT and a range of "WTO-plus" rules under its accession documents, mainly including:

- **Export Quota Commitments**: not to impose any "restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other

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[132] See above n 129, Shi & Chen, "The 'Specificity' of Cultural Products versus the 'Generality' of Trade Obligations", at 171.

[133] See above n 105, Conconi & Pauwelyn, "Trading Cultures: Appellate Body Report on *China-Audiovisuals*", at 108.

[134] The description of China's export trade mechanism before its WTO accession was based on above n 63, Lardy, *Integrating China into the Global Economy*, at 30, 46-55.

[135] For a discussion of other trade promotion measures, see above n 65, Zhang, *International Trade Regulation in China,* at 253-269.

[136] See above n 63, Lardy, *Integrating China into the Global Economy*, at 55-57; Thomas Rumbaugh & Nicolas Blancher, "China: International Trade and WTO Accession", IMF Working Paper No. 04/36 (1 March 2004) at 3-7.

[137] See above n 63, Lardy, *Integrating China into the Global Economy*, at 47. For export statistics of some of the selected commodities between 2002 and 2008 the year before the *China – Raw Materials* dispute, see Baris Karapinar, "China's Export Restriction Policies: Complying with 'WTO Plus' or Undermining Multilateralism" (2011)10(3) *World Trade Review* 389-408 at 395-397.

[138] Generally see above n 33, Cheong & Yee, *Handbook on China's WTO Accession and Its Impacts*, at 63-65.

measures … on the exportation or sale for export of any product" (Article XI:1 of the GATT);

- **Export Duties Commitments**: to "eliminate all taxes and charges applied to exports unless specifically provided in Annex 6 of this Protocol" (Article 11.3 of the *Accession Protocol*). Annex 6 includes 84 tariff items covering commodities such as certain raw materials and rare earths to which a bound export duty rate from 20% to 50% applies; and
- **Trading Rights Commitments**: to eliminate restrictions on the right to export goods particularly any export performance and prior experience and minimum capital requirements (Article 5.1 of the *Accession Protocol* and paragraphs 83(a), 83(b), 83(d) & 84(a) of the *Working Party Report*); and to grant trading rights in a non-discretionary and non-discriminatory manner (Article 5.2 of the *Accession Protocol* and paragraph 84(b) of the *Working Party Report*).

Unlike China's timely implementation of most of its accession commitments, the progress on the removal of export restraints on certain commodities has been notoriously slow. As noted by the USTR, since its entry into the WTO, "China has continued to impose restraints on exports of raw materials, including export quotas, related export licensing and bidding requirements, minimum export prices and export duties".[139] After years of attempts to solve this issue via diplomatic channels without a success, the US initiated two consecutive WTO proceedings against China, namely, *China – Raw Materials* in 2009 (where the US was joined by the EU and Mexico) and subsequently *China – Rare Earths* in 2012 (where the US was joined by the EU and Japan).

4.2 China – Raw Materials

4.2.1 The measures & WTO findings of violations

The *China – Raw Materials* dispute[140] concerned China's imposition of four types of export restraints – including export duties, export quotas, export licences and minimum export prices – on a wide range of raw materials including bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc. At the panel stage, a total of 40 measures were identified by the complaining members, which impose the above-mentioned export restraints or regulate the allocation and administration of export quotas.[141]

Export Duties

The operation of China's export duty system is generally based on three measures, including the *Customs Law 1987*[142], the *Regulation on Import and Export Administration 2001*[143], and a tariff implementation program published annually setting out export duties on certain goods applicable

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[139] See above n 51, USTR, "2009 Report to Congress on China's WTO Compliance", at 38-39. For a comprehensive discussion of China's rare earth industry and export regime, see Wayne M. Morrison and Rachel Tang, "China's Rare Earth Industry and Export Regime: Economic and Trade Implications for the United States", Congressional Research Service (30 April 2012).

[140] The description of the measures was mainly based on the WTO panel report and the Appellate Body Report on the dispute, see *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, (Panel Report adopted 22 February 2012, as modified by Appellate Body Report); WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, (Appellate Body Report adopted 22 February 2012).

[141] See above n 140, Panel Report, *China – Raw Materials*, para. 2.4.

[142] Adopted on 22 January 1987 by the 19th Meeting of the 6th Standing Committee of National People's Congress of the PRC, effective on 1 July 1987; revised and effective on 8 July 2000.

[143] Promulgated by the State Council Decree No. 332 on 31 October 2001, effective on 1 January 2002.

in the corresponding calendar year. Accordingly, the tariff implementation program was at the core of the dispute. As the *2009 Tariff Implementation Program*[144] was in effect at the time of the establishment of the panel, the panel decided to rely on the 2009 program instead of the *2010 Tariff Implementation Program*[145] published just after the panel was established despite China's claim that the 2010 program should be the basis of the panel's decisions and recommendations.[146] Set out below are the export duties imposed on the relevant raw materials under the 2009 program in comparison with the duties set out in the 2010 program and the bound rates to which China committed under Annex 6 of the *Accession Protocol*.

	2009 Program	**2010 Program**	**Annex 6 of the AP**
1. Yellow phosphorous	20% (+ 50% special duty which was removed by the *Adjustment of Export Tariffs Circular* since 1 July 2009)[147]	20%	20%
2. Bauxite including: Refractory clay; Aluminium ores and concentrates; Aluminium ash residues	15%; 15%; 10%	No export duty	Not listed (e.g. no export duty)
3. Coke	40%	40%	Not listed (e.g. no export duty)
4. Fluorspar including: met-spar; acid-spar	15%	15%	Not listed (e.g. no export duty)
5. Magnesium including: magnesium metal; unwrought magnesium; magnesium waste and scrap	10%	10%	Not listed (e.g. no export duty)
6. Manganese including: manganese ores and concentrates; unwrought manganese waste and scrap and powder	15%; 20%	15%; 20%	Not listed (e.g. no export duty)
7. Silicon metal	15%	15%	Not listed (e.g. no export duty)
8. Zinc including: zinc waste and scrap; hard zinc spelter; other zinc ash and residues	10%	10%	Not listed (e.g. no export duty)

Table 2: China's export duties on raw materials 2009 & 2010

Based on the 2009 program, the panel concluded that China had imposed export duties on each of these products in violation of its obligations under Article 11.3 of the *Accession Protocol*.[148] The panel's findings were not appealed. It is clear from the table above that the violations remained under the 2010 program which continued to impose the export duties on the goods (other than yellow phosphorous and bauxite) while China committed not to do so.

China's main defence was based on GATT Article XX(g) and XX(b).[149] As in the *China – Publications and Audiovisual Products* case, this triggered the threshold question of whether Article XX is applicable to violations of the *Accession Protocol*, i.e. Article 11.3 in this present

144 Issued by State Council Tariff Policy Commission, Notice No. 40 [2008], effective on 1 January 2009.
145 Issued by State Council Tariff Policy Commission, Notice No. 28 [2009], effective on 1 January 2010.
146 See above n 140, Panel Report, *China – Raw Materials*, para. 7.53.
147 See above n 140, Panel Report, *China – Raw Materials*, paras. 7.69-7.71. The 50% special duty was removed by *Circular on the Adjustment of Export Tariffs on Certain Commodities* (issued by State Council Tariff Policy Commission, No. 6, on 19 June 2009).
148 See above n 140, Panel Report, *China – Raw Materials*, para. 7.105.
149 See above n 140, Panel Report, *China – Raw Materials*, para. 7.108.

case. The panel undertook a careful analysis of this issue and ruled that Article XX is not applicable in this case due to the lack of textual and contextual basis for such an application; the ruling was upheld by the Appellate Body.[150]

Export Quotas

Compared with export duties, China's export quotas system is much more complex. The regulatory framework includes the following basic measures:

- *Foreign Trade Law 2004*, which confers MOFCOM the authority to impose export quotas to limit or prohibit the exportation of goods for specific purposes such as protecting national security, public interest, human health or the environment, etc.[151]
- *Regulation on Import and Export Administration 2001* and *Export Quota Administration Measures 2002*[152] which implement the *Foreign Trade Law 2004* setting out detailed rules on, for example, the allocation and administration of quotas; and
- a catalogue of export quotas formulated and published by MOFCOM in collaboration with the GAC on an annual basis.

Under the *2009 Export Licensing Catalogue*, bauxite, coke, fluorspar, silicon carbide, and zinc were subject to export quotas – while the quotas on coke and zinc were allocated directly by MOFCOM based on certain performance-related criteria, quotas on the other goods were allocated via a bidding system.[153] Accordingly, MOFCOM also publishes various measures specifying the quota application procedures (i.e. for coke export) and the quota bidding procedures.[154] Exporters who have been allocated export quotas then need to apply for an export quota license for Customs clearance at the time of exportation.[155] As summarised by the panel, the export quotas allocated to the subject goods in 2009 were 930,000 tonnes on bauxite, 550,000 metric tonnes on fluorspar, 216,000 tonnes on silicon carbide, 13,092,000 metric tonnes on coke, and nil on zinc.[156]

China's imposition of export quotas on these goods was easily found by the panel to be inconsistent with Article XI:1 of the GATT which, in the panel's view, "is to explicitly forbid Members from maintaining a restriction made effective through a prohibition or quota on the exportation of any product."[157] China did not contest the panel's findings of inconsistencies but

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[150] See above n 140, Panel Report, *China – Raw Materials*, paras. 7.124-7.159; Appellate Body Report, paras. 279-307. For a discussion of this issue, see Julia Ya Qin, "The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties: A Commentary on the *China – Raw Materials Case*" (2012)11(2) *Chinese Journal of International Law* 237-246 at 239-244 (criticizing the WTO tribunal's strict textual interpretative approach to this issue); Ilaria Espa, "The Appellate Body Approach to the Applicability of Article XX GATT in Light of *China – Raw Materials*: A Missed Opportunity" (2012)46(6) *Journal of World Trade* 1399-1424 (arguing that the Appellate Body's interpretative approach to this issue is too rigid to accommodate the interests of members to protect "the fundamental values of conservation and public health"); Bin Gu, "Applicability of GATT Article XX in *China – Raw Materials*: A Clash within the WTO Agreement" (2012)15(4) *Journal of International Economic Law* 1007-1031 (identifying other contextual basis in support of an interpretation that Article XX should apply).

[151] See above n 68, *Foreign Trade Law*, Articles 14, 16.

[152] *Measures for the Administration of Export Commodities Quotas*, issued by the Ministry of Foreign Trade and Economic Cooperation Order No. 12 on 20 December 2001, effective on 1 January 2002.

[153] See above n 140, Panel Report, *China – Raw Materials*, paras. 7.176-7.178.

[154] See above n 140, Panel Report, *China – Raw Materials*, paras. 7.180-7.201. The separate measures for the application and allocation of export quotas for coke are necessary because the *Export Quota Administration Measures 2002* does not apply to it.

[155] See above n 140, Panel Report, *China – Raw Materials*, para. 7.174.

[156] See above n 140, Panel Report, *China – Raw Materials*, paras. 7.216-7.217.

[157] See above n 140, Panel Report, *China – Raw Materials*, para. 7.207.

sought to justify the export quotas on refractory-grade bauxite under Article XI:2(a) which allows temporary applications of export restrictions "to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member."[158] In considering China's defence, while the panel observed that refractory-grade bauxite (as an intermediate product for the production of iron and steel) was currently "essential" to China, it was not persuaded that the application of the quotas was merely temporary to address a critical shortage as the quotas had been in place for over a decade.[159] Accordingly, the panel found that the export quotas were not justifiable under Article XI:2(a), a finding subsequently upheld by the Appellate Body.[160]

As an alternative defence, China also argued that the export quotas on refractory-grade bauxite were justifiable under Article XX(g) which allows the imposition of export restrictions for the purpose of conserving exhaustible natural resources. China's argument failed as the panel found that no equivalent or even-handed restrictions were applied to domestic production or consumption and hence the export quotas did not serve the claimed conservation goal.[161] On appeal, the Appellate Body modified the panel's application of the 'even-handedness' test but did not review the panel's ultimate findings which China did not challenge.[162]

In addition, China invoked Article XX(b) claiming that the use of export quotas on coke and silicon carbide served the protection of human health and the environment.[163] Again, the panel dismissed China's defence. In relation to the declared environmental objective, the panel found that the evidence before it seems to suggest that the measures served "the economic goal of moving the products in question up the value chain" rather than the protection of the environment.[164] As far as the protection of human health is concerned, the panel held that China failed to establish that the measures made a material contribution to the objective or that the other existing measures that China had adopted for the objective "cannot be used in lieu of applying export restrictions."[165] These findings were not appealed.

Trading Rights, Allocation and Administration of Quotas & Minimum Export Price

In addition to the export duties and quotas, the contested measures were also found to have imposed various other forms of export restrictions in breach of China's WTO obligations. These included:

- violations of China's commitments to liberalising trading rights[166], as China imposed certain prior export performance and minimum registered capital requirements on the allocation of quotas to coke, bauxite, fluorspar and silicon carbide;[167]
- violations of Article X:3(a) of the GATT, as China allowed authorities to refuse the grant of export quotas to entities without "operation capacity" but did not provide any

158 See above n 140, Panel Report, *China – Raw Materials*, para. 7.227.
159 See above n 140, Panel Report, *China – Raw Materials*, paras. 7.307-351.
160 See above n 140, Panel Report, *China – Raw Materials*, para. 7.353; Appellate Body Report, paras. 318-344.
161 See above n 140, Panel Report, *China – Raw Materials*, paras. 7.411-7.468.
162 See above n 140, Appellate Body Report, paras. 359-361.
163 See above n 140, Panel Report, *China – Raw Materials*, para. 7.470. The panel also considered, *arguendo*, whether the export duties applied to certain scrap products, coke, magnesium metal, manganese metal and silicon carbide were justifiable under Article XX(b) and found against China.
164 See above n 140, Panel Report, *China – Raw Materials*, paras. 7.512-7.514.
165 See above n 140, Panel Report, *China – Raw Materials*, paras. 7.525-7.591.
166 See above n 140, Panel Report, *China – Raw Materials*, paras. 7.665-7.670. See sections 3.1.1 and 4.1 above for a summary of China's commitments on trading rights.
167 See above n 140, Panel Report, *China – Raw Materials*, paras. 7.658-7.659.

definition or guidelines for the application of this criterion, hence posing a real risk of "unreasonable and non-uniform administration of this criterion";[168]

- a violation of Article X:1 of the GATT, due to the failure of the Chinese government to publish the annual allocation of export quota for zinc; [169] and
- violations of Article XI:1 of the GATT, as China, through a series of measures, enforced a minimum export price requirement by imposing penalties on exporters and licensing entities, which constituted a restriction on the exportation of the subject goods.[170]

Instead of challenging the panel's findings of violations above, China skilfully appealed the panel's inclusion of all of the 37 measures concerned into its terms of reference. The Appellate Body sided with China, finding that the panel should not have made the findings above in relation to these measures as the complainants have "failed to present the legal basis for their complaints with sufficient clarity to comply with Article 6.2 of the DSU."[171] The practical consequences of the Appellate Body's ruling are two-folds: first, the WTO-legality of these measures remains to be subject to the review of the Appellate Body, and second, in this present case China did not need to implement the panel's rulings against these measures.

4.2.2 China's implementation

China reached an agreement with each of the complainants that it was to bring the measures at issue into compliance with the relevant WTO rules by 31 December 2012.[172] On 18 January 2013, China notified that it had fully implemented the WTO rulings through the following measures[173]:

- *2013 Tariff Implementation Program*[174], issued by the GAC on 28 December 2012; and
- *2013 Catalogue of Goods subject to Export Licensing Administration*[175], issued by the MOFCOM and the GAC on 31 December 2012.

Under these two measures which took effect on 1 January 2013, the export duties and quotas applied to the covered raw materials were removed. The complaining members were generally satisfied with China's implementation, although all of them expressed an intention to continue to monitor China's regulation of export trade in case China may reintroduce these export restrictions or may have maintained in place other restrictions. [176]

Compared with the huge efforts that the WTO tribunal had to make in adjudicating the consistencies of all of the measures in dispute, China's implementing the WTO rulings appeared to be a considerably easier task. Thanks to the Appellate Body's dismissal of the panel's findings on the 37 measures to the extent of their regulation of trading rights, allocation and administration of export quotas and export prices, China eventually needed to revise 2 out of 40 challenged measures only. Moreover, both of the measures that China was required to amend are temporary

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[168] See above n 140, Panel Report, *China – Raw Materials*, paras. 7.679-7.756.
[169] See above n 140, Panel Report, *China – Raw Materials*, paras. 7.798-7.807.
[170] See above n 140, Panel Report, *China – Raw Materials*, paras. 7.1066-7.1082.
[171] See above n 140, Appellate Body Report, *China – Raw Materials*, paras. 221-235.
[172] *China – Measures Related to the Exportation of Various Raw Materials*, Agreement under Article 21.3(b) of the DSU, WT/DS394/18; WT/DS395/17; WT/DS398/16 (30 May 2012).
[173] *China – Measures Related to the Exportation of Various Raw Materials*, Status Report by China, WT/DS394/19/Add.1; WT/DS395/18/Add.1; WT/DS398/17/Add.1 (18 January 2013).
[174] Promulgated by the General Administration of Customs, Order No. 63 [2012].
[175] Promulgated by the General Administration of Customs and the Ministry of Commerce, Order No. 97 [2012].
[176] WTO Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/328 (22 March 2013) at 9-12.

measures which are updated annually anyway. Therefore, the legislative work and process involved in the implementation of the WTO rulings in this case was much simpler than that involved in the previous disputes. However, given the significance and sensitivity of the goods and the policy goals involved in the dispute, the WTO rulings and China's implementation of the rulings could have far-reaching implications, which are discussed in section 4.4 below.

4.3 China – Rare Earths

4.3.1 The measures & WTO findings of violations

The *China – Rare Earths* dispute[177], initiated only three months after China's implementation of the WTO rulings on *China – Raw Materials*, arose out of almost identical facts and issues as those in the previous case except that the goods in question became rare earths[178], tungsten, and molybdenum. The complainants again identified around 40 Chinese measures challenging[179]

- the imposition of export duties on the subject goods as being inconsistently with Article 11.3 of the *Accession Protocol*;
- the imposition of export quotas as being in violation of GATT Article XI:1 and China's commitments in relation to non-automatic export licensing and export restrictions under paragraphs 162 and 165 of the *Working Party Report*; and
- the allocation and administration of export quotas as being in breach of China's commitments to liberalising trading rights.

Like in the previous case, China's defence was predominantly based on Articles XX(b) and XX(g) of the GATT.

In relation to the export duties, the key measures at issue were the *2012 Tariff Implementation Program*[180] and the 2012 *Tariff Implementation Plan*[181] which imposed export duties ranging from 5% to 25% on 58 rare earths products, 15 tungsten products, and 9 molybdenum products.[182] As none of these products are listed in Annex 6 of China's *Accession Protocol*, the panel found that China's imposition of the export duties on them was in breach of its obligations under Article 11.3 of the *Accession Protocol*.[183] China's use of Article XX to justify the violations was again rejected by the panel and the Appellate Body which maintained their position in *China – Raw*

[177] The description of the measures was mainly based on the WTO panel report and the Appellate Body Report on the dispute, see *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R, (Panel Report adopted 29 August 2014, as modified by Appellate Body Report); WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, (Appellate Body Report adopted 29 August 2014).

[178] The panel summarised ""Rare earths" is the common name for a group of 15 chemical elements in the periodic table with atomic numbers 57 to 71. These elements are part of the so-called "lanthanide group", composed of: lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium and lutetium. Two other rare earth elements are included in the scope of this dispute, namely, scandium (atomic No. 21) and yttrium (atomic No. 39)." See above n 175, Panel Report, *China – Rare Earths*, para. 2.3.

[179] See above n 175, Panel Report, *China – Rare Earths*, paras. 2.8-2.14.

[180] Promulgated by the General Administration of Customs Circular No. 27 on 9 December 2011, effective on 1 January 2012.

[181] Promulgated by the General Administration of Customs Circular No. 79 on 23 December 2011, effective on 1 January 2012.

[182] See above n 175, Panel Report, *China – Rare Earths*, para. 7.46.

[183] See above n 175, Panel Report, *China – Rare Earths*, paras. 7.47-7.48.

Materials that Article XX is not applicable to obligations contemplated in Article 11.3 of the *Accession Protocol*.[184]

With respect to export quotas, the regulatory framework at issue was similar to that in *China – Raw Materials* except that the measures allocating the quotas became the *2012 Export Licensing Catalogue*[185] and the *2012 Export Quota Amounts*[186]. Under these measures, the goods concerned were all subject to export quota licensing administration with quota shares directly allocated by MOFCOM.[187] Once the allocation of quotas has been determined, MOFCOM publishes documents detailing the receiving entities and their quota shares typically twice a year. In 2012, the total quotas assigned on the subject goods were 30,996 tonnes for rare earths, 18,967 tonnes for tungsten and tungsten products, and 40,862 tonnes for molybdenum and molybdenum products.[188] As China did not dispute that the imposition of the export quotas was in breach of GATT Article XI:1 and paragraphs 162 and 165 of the *Working Party Report*, the panel found such violations in favour of the complainants.[189] In defence, China argued that the export quotas were imposed for the conservation of rare earths, tungsten and molybdenum. The panel dismissed China's defence as China failed to substantiate that the export quotas related to the conservation of the natural resources, that the discrimination caused by the operation of the quotas to the detriment of foreign users of the subject goods was justifiable in light of the declared objective, and that the less-trade-restrictive alternative measures proposed by the complainants were not reasonably available for the pursuit of the objective.[190] On appeal, while the Appellate Body again questioned the panel's interpretation of the 'even-handedness' test[191], it upheld the panel's ultimate findings.

Finally, the disputes over China's breach of its trading rights commitments centred on the various eligibility criteria applied to the administration and allocation of the export quotas, including:

- export performance, utilization rate of export quotas, operation capacity of applicants, production scale, and resource status etc. as contemplated in Article 19 of the *Export Quota Administration Measures 2002*; and
- export performance and prior export experience and/or minimum registered capital requirements as specified in the *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*[192], the *2012 First Batch Rare Earth Export Quotas (Supplement)*[193], the *2012 Application Qualifications and Procedures for Molybdenum*

[184] See above n 175, Panel Report, *China – Rare Earths*, paras. 7.62-7.115; Appellate Body Report, para. 5.73. On appeal, China only challenged one of the findings of the panel on the applicability of Article XX; the Appellate Body upheld the panel's finding. For further criticism of the tribunal's rulings, see Julia Ya Qin, "Judicial Authority in WTO Law: A Commentary on the Appellate Body's Decision in *China – Rare Earths*" (2014)13 *Chinese Journal of International Law* 639-651; Elisa Baroncini, "The *China – Rare Earths* WTO Dispute: A Precious Chance to Revise the *China – Raw Materials* Conclusions on the Applicability of GAT Article XX to China's WTO Accession Protocol" (2012)4(2) *Cuadernos de Derecho Transnacional* 49-69.

[185] *Notice on "2012 Export Licensing Management Commodities List"*, promulgated by the Ministry of Commerce and the General Administration of Customs Notice No. 98 on 30 December 2011, effective on 1 January 2012.

[186] *Notice on "2012 Export Quota Amounts for Agricultural and Industrial Products"*, promulgated by the Ministry of Commerce Notice No. 71 on 31 October 2011, effective on 1 January 2012.

[187] See above n 175, Panel Report, *China – Rare Earths*, para. 7.209.

[188] See above n 175, Panel Report, *China – Rare Earths*, paras. 7.213-7.215; 7.222-7.223; 7.228-7.229.

[189] See above n 175, Panel Report, *China – Rare Earths*, para. 7.200.

[190] See above n 175, Panel Report, *China – Rare Earths*, paras. 7.363-7.970.

[191] See above n 175, Appellate Body Report, *China – Rare Earths*, paras. 5.123-5.141.

[192] Promulgated by the Ministry of Commerce, No. 77 on 11 November 2011.

[193] Promulgated by the Ministry of Commerce, No. 618 on 16 May 2012.

Export Quotas[194], and the *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*[195].

As the export performance, prior export experience, and minimum registered capital criteria are exactly the ones that China committed to remove under its accession documents, the panel had no difficulty in finding them in breach of paragraphs 83(a), 83(d), 84(a), and 84(b) of the *Working Party Report*.[196] In addition, since rare earths and molybdenum are not listed under Annex 2A2 of the *Accession Protocol* as an exception to China's obligation to liberalise the right to export under Article 5.1 of the *Accession Protocol*, the eligibility criteria applicable to them were also found to be inconsistent with Article 5.1 as they had the effect of confining the grant of trading rights to some but not all enterprises.[197] China did not dispute the panel's findings of inconsistencies but requested the panel to consider the justifiability of the breaches of paragraphs 83 and 84 of the *Working Party Report* under Article XX(g). While the panel agreed with China as a threshold matter that Article XX applies to the two paragraphs, it found that China failed to provide sufficient evidence to prove that the criteria satisfy the legal requirements of Article XX(g).[198] China did not appeal the panel's findings.

4.3.2 China's implementation and an appraisal

As agreed with the complainants, the reasonable period of time for China to implement the WTO rulings was due on 2 May 2015.[199] In the DSB meeting on 20 May 2015, China notified that it had fully implemented the WTO rulings through the following measures[200]:

- the *2015 Catalogue of Goods Subject to Export Licensing Administration*, published by the MOFCOM and the GAC (Announcement No. 94) on 31 December 2014 and effective on 1 January 2015 (2015 Catalogue); and
- the *Notice on Adjusting Export Tariffs of Some Products*, published by the State Council Customs Tariff Commission (Circular No. 3) on 14 April 2015 and effective on 1 May 2015 (2015 Notice).

The 2015 Notice abolished export duties on 84 tariff items including all of the goods in dispute. As the notice does not set out an expiry date, it will remain effective until it is repealed by a later measure which may or may not reintroduce the export duties. Therefore, while China has achieved WTO-compliance by removing the export duties for 2015, this current state can be easily changed in subsequent years. This makes it essential to monitor China's tariff implementation programs published on an annual basis.

The 2015 Catalogue removed rare earths, tungsten, and molybdenum from the list of products subject to export quota licensing administration and placed them under the general export licensing system. This means that the goods at issue are not subject to export quotas and hence that entities do not need to apply for the allocation of export quotas. Under the general export licensing system, an applicant will need to be a FTO (which is generally approved based on

[194] Promulgated by the Ministry of Commerce, No. 79 on 11 November 2011.
[195] Promulgated by the Ministry of Commerce, No. 1131 on 26 December 2011.
[196] See above n 175, Panel Report, *China – Rare Earths*, paras. 7.1001-7.1005.
[197] See above n 175, Panel Report, *China – Rare Earths*, paras. 7.1009-7.1012.
[198] See above n 175, Panel Report, *China – Rare Earths*, paras. 7.1025-7.1045.
[199] *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, Agreement under Article 21.3(b) of the DSU, WT/DS431/16; WT/DS432/14; WT/DS433/14 (10 December 2014).
[200] WTO Dispute Settlement Body, Minutes of Meeting, WT/DSB/M/361 (13 July 2015) at 18.

registration[201]) and submit the relevant MOFCOM approval documents and export contracts in order to obtain an export license.[202] The 2015 Catalogue further removed the requirement of MOFCOM approval documents, leaving export contracts the only documentation that an applicant needs to provide. Upon receipt of an application, the authorities must issue the license within 3 days.[203] In the DSB meeting where China notified its compliance with the WTO rulings, the US was concerned that the general licensing system "could potentially act as an export restriction".[204] This concern is misplaced. The licensing system on the subject goods, as it currently stands, is essentially a registration-based system under which export licenses are granted automatically. As such, it does not appear to have any restrictive effects on the volume of export of the goods. The issues relating to China's implementation are elsewhere. First, for at least a decade, export quotas on the subject goods have been allocated to limited numbers of enterprises. For example, in 2014, the number of entities that obtained quotas to export the subject goods was 28 for rare earths, 13 for tungsten and tungsten products, and 25 for molybdenum and molybdenum products.[205] Further, as a specified exception to China's trading rights commitments, tungsten will continue to be subject to state trading. Thus, it is likely that only these enterprises will continue to be the applicants for license to export the subject goods, thereby limiting the volume of exports in practice. Second, under the *Foreign Trade Law 2004* and the *Export Quota Administration Measures 2002*, the authority to re-impose the export quotas remains in the hands of MOFCOM. It is, therefore, possible that MOFCOM may, at its own discretion, reintroduce some or all of the export quotas for the objectives specified in these laws.[206] It follows that China's compliance with the WTO rulings may turn out to be temporary and that close monitoring of the MOFCOM measures which allocate export quotas annually is necessary.

China did not notify any compliance measures in relation to the violations of its trading rights commitments. This is unnecessary. In relation to the criteria set out in Article 19 of the *Export Quota Administration Measures 2002* (e.g. export performance which applies to the allocation of export quotas), they no longer apply to the grant of license to the export of the subject goods for the goods are no longer subject to quotas. For all of the other WTO-illegal measures applied to the allocation of export quotas on the subject goods, they had expired before the tribunal's rulings were adopted by the DSB. Compared with the quota allocation system, the general licensing system does not seem to mandate the authorities to apply similar criteria (e.g. export performance and prior export experience and minimum registered capital requirements) in determining whether to grant an export license. Therefore, with the abolition of the export quotas and the expiry of the contested measures, China has automatically achieved WTO-consistency on trading rights. However, since the applicability of the criteria is dependent on whether goods are subject to export quotas, the criteria are most likely to be re-imposed once export quotas on the goods are re-introduced.

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201 See section 3.1 above.

202 Huo Wu Chu Kou Xu Ke Zheng Guan Li Ban Fa [*Measures for the Administration of License for the Export of Goods*], promulgated by the MOFCOM Order No. 11 on 7 May 2008, effective on 1 July 2008, Articles 10 & 11.7.

203 Ibid., Article 19.

204 See above n 200, WT/DSB/M/361, at 18.

205 *Notice on Publishing State-Managed Trade Enterprises Exporting Tungsten, Antimony and Silver, and Enterprises Exporting Rare Earths, Indium, Molybdenum and Stannum and Notifying the First Batch Export Quotas*, published by the MOFCOM, No. 1012, on 13 December 2013, available at: http://www.mofcom.gov.cn/article/b/e/201312/20131200424659.shtml

206 See above n 151.

4.4 Implications of WTO rulings and China's implementation

China – Raw Materials and *China – Rare Earths* are significant in many aspects. They are the first group of cases where WTO tribunals comprehensively adjudicated and substantially clarified the legal issues relating to export restraints particularly China's general obligations on export quotas and 'unique' obligations on export duties and their justifiability under the general exception clause of the GATT. They involved goods among the most commercially, strategically and politically important not only to China but all countries globally. They dealt with some of the most fundamental and sensitive issues relating to states economic sovereignty over natural resources and prerogative rights to prevent the depletion of these resources and protect the environment. Put the legal issues aside, the rulings of the WTO and China's implementation of the rulings have far-reaching implications.

China has maintained various forms of export restraints over raw materials and rare earths for decades. While the restrictions were initially imposed to drive up world prices and hence China's earnings from the sale of these goods[207], they have arguably evolved into one of the policy prescriptions for China to pursue more advanced strategic goals such as safeguarding the security of exhaustible natural resources and protecting the environment and human health. As the world's largest producer and exporter of rare earths supplying over 95% of global demand, China has had an imminent and serious risk of running out of rare earths reserves and hence an urgent task to prevent that from happening.[208] Further, years of mining and over-exploitation at the sacrifice of the environment has also made environmental protection and sustainable development one of the policy priorities of the nation.[209] This is not to say that the measures in the two disputes are free of any protectionist elements. As correctly identified by some observers, another notable objective of the measures is to maintain low price of the raw materials at home so as to confer a substantial input-cost advantage to major domestic downstream manufacturers of steel, semiconductors, solar products, etc.[210] Accordingly, the export restrictions served a mix of objectives – while they, at least to some extent, contribute to the protection of the environment and the preservation of natural resources, they are imposed to 'subsidize' the development of major domestic downstream industries. These objectives were correctly discerned by the WTO tribunals in both cases. While the tribunals' rulings on whether the export restraints are related or necessary to achieve the declared conservation and environmental goals remain legally controversial[211], the rulings convey policy implications for China.

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[207] See above n 63, Lardy, *Integrating China into the Global Economy*, at 47.

[208] See, for example, Liu Ying, "The Applicability of Environmental Protection Exceptions to WTO-Plus Obligations: In View of the *China – Raw Materials* and *China – Rare Earths* Cases" (2014)27(1) *Leiden Journal of International Law* 113-139 at 128-129; Han-Wei Liu and John Maughan, "China's Rare Earths Export Quotas: Out of the *China – Raw Materials* Gate, But Past the WTO's Finish Line?" (2012)15(4) *Journal of International Economic Law* 971-1005 at 972; Ruth Jebe, Don Mayer & Yong-Shik Lee, "China's Export Restrictions on Raw Materials and Rare Earths: A New Balance Between Free Trade and Environmental Protection?" (2012)44 *The George Washington International Law Review* 579-642 at 586-591.

[209] See, for example, the Central People's Government of the PRC, "Outline of the 11th Five-Year Plan for National economic and Social development", available at http://www.gov.cn/ztzl/2006-03/16/content_228841.htm; "Outline of the 12th Five-Year Plan for National economic and Social development", available at http://www.gov.cn/2011lh/content_1825838.htm.

[210] See Marco Bronckers & Keith Maskus, "*China – Raw Materials*: A Controversial Step Towards Evenhanded Exploitation of Natural Resources" (2014)13(2) *World Trade Review* 393-408 at 402-404.

[211] See, for example, above n 208, Ying, "The Applicability of Environmental Protection Exceptions to WTO-Plus Obligations"; Jebe, Mayer & Lee, "China's Export Restrictions on Raw Materials and Rare Earths".

First, contrary to some commentators' view that the WTO rulings are too rigid to leave room for export quotas to survive the legal scrutiny of Articles XX(b) and XX(g),[212] it is submitted that the rulings do not constitute a *de facto* ban on the use of export restrictions for environmental or conservation objectives. As both the panel and the Appellate Body have observed, "Article XX(g) … does not exclude, *a priori*, export quotas or any other type of measure from being justified by a WTO Member pursuing the conservation of an exhaustible natural resource".[213] This observation applies to Article XX(b) as well. Thus, the rulings are better understood as limited to the effect that given the current state of China's regulations and law enforcement in pursuing the declared objectives, export restrictions especially export quotas are not a WTO-justifiable instrument in that pursuit. Policy objectives and policy instruments used for the pursuit of the objectives are interrelated and mutually-supportive. While a declared level of protection warrants the use of certain policy instruments, the chosen instruments reflect and provide justifications of the genuineness of the protection level. Consistent with existing WTO jurisprudence, the WTO rulings in the two disputes did not accept the level of protection declared by China at its face value but examined the genuine level of protection by exploring China's regulatory framework in its entirety as to its effectiveness of combating pollution and natural resources depletion. It turned out that the framework, as it currently stands, is ineffective to achieve the claimed level of protection given the problems relating to, such as, low resource tax, poor enforcement of production quotas, etc.[214] Evidence is also available to show that despite China's regulatory efforts and the imposition of export restraints, the production and consumption of rare earths have been on the rise in recent years due to illegal extraction and production and lax enforcement.[215] These suggest that the actual level of protection that China sought to achieve at the time of the disputes was lower than the declared level and hence did not warrant the use of export quotas being one of the most trade-restrictive instruments. However, the tribunals did not rule out the possibility that export quotas may become a necessary instrument to achieve the objectives. Rather, the rulings have left the room for doing so as long as China's regulatory framework has been strengthened and duly enforced showing a genuine intention to achieve a higher level of protection which necessitates the use of export quotas. In other words, the higher the genuine level of protection and the more rigid and effective of domestic regulations in coping with environmental and conservation problems, the fewer alternative means may be effective to achieve that level of protection and hence the more likely export quotas are to become necessary. In this connection, it must be noted that it is unnecessary for China to have exhausted all possible policy instruments before it can resort to export quotas. Nor does China need to provide concrete figures on how much contributions export quotas actually make to the objectives. In *Brazil – Tyres*, Brazil's import ban successfully passed the scrutiny of Article XX(b) because the ban had become one of the key elements of the entire Brazilian scheme to reduce waste tyres.[216] In endorsing the justifiability of the ban, the Appellate Body treated qualitative reasoning as sufficient evidence and did not consult any quantitative evidence relating to the actual contribution of the ban to the chosen objective. Further, despite the fact that there were other alternative measures that Brazil could have employed, the Appellate Body found those measures

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[212] See above n 208, Liu and Maughan, "China's Rare Earths Export Quotas", at 1002-1003.
[213] See above n 175, Appellate Body Report, *China – Rare Earths*, para. 5.162.
[214] See above n 137, Karapinar, "China's Export Restriction Policies: Complying with 'WTO Plus' or Undermining Multilateralism", at 401-403.
[215] See above n 208, Liu and Maughan, "China's Rare Earths Export Quotas", at 994.
[216] *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Appellate Body Report adopted 17 December 2007) paras.153-154.

to be complementary to the import ban and were unable to attain the same level of protection as the ban.[217] The same logic applies here. Thus, for China to re-introduce the export quotas, it would be sufficient as long as China can establish *qualitatively* that the quotas have become an essential or even indispensable element of a comprehensive regulatory scheme which is designed and effective to significantly reduce the extraction of rare earths and pollution. Quantitative evidence is often not available until after a measure has been formulated and implemented for some time.

Second, the WTO rulings in the cases have the effect of pushing China to accelerate domestic regulatory reform and strengthen law enforcement with an aim to establish a more comprehensive and effective mechanism for environmental protection and conservation of natural resources. The continuous efforts of the Chinese government to pursue these objectives in at least the past decade and yet the fragmented regulatory framework and ineffective law enforcement[218] is a strong sign of considerable domestic resistance to the economic reforms of the rare earths industry. Compliance with WTO obligations, thus, becomes a useful political lever to overcome the domestic pressure. In addition to eliminating export restraints, the Chinese government has carried on its regulatory efforts and is currently formulating measures aiming to strengthen domestic production quotas and the industry entry criteria, to combat illegal extraction and distribution, and to increase resource taxes, to name a few.[219] The introduction of these measures would undoubtedly contribute to the creation of a comprehensive regulatory scheme for environmental protection and conservation of natural resources, and hence to the use of export quotas in a WTO-consistent manner.

Of course, it is not to submit that China should resort to export quotas when the quotas become justifiable under the WTO general exceptions. From economic perspectives, to deal with a domestic externality or domestic policy objective, a domestic measure addressing the externality or the objective at its source is superior to a trade measure in most cases.[220] Trade measures – export quotas or export duties in our case – tend to be sub-optimal as they create inefficiencies in global resource allocation and production and economic benefits for domestic interest groups.[221] Given China's reliance on export-oriented growth, China also has a strong interest in avoiding the use of export restraints which could "create additional volatility in global markets and damage global welfare."[222] It follows that China should try not to use export restraints in the pursuit of the objectives if it has other domestic alternative means equally effective at its disposal. However,

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[217] Ibid., paras.172-174.

[218] See above n 208, Liu and Maughan, "China's Rare Earths Export Quotas", at 995-998; above n 137, Karapinar, "China's Export Restriction Policies: Complying with 'WTO Plus' or Undermining Multilateralism", at401-403.

[219] See, for example, *Notice on the Reform of Taxes on Rare Earths, Tungsten and Molybdenum Based on Their Prices*, promulgated by the Ministry of Finance and the State Administration of Taxation, No. 52, on 30 April 2015, effective on 1 May 2015. The measures subject to amendments include, for example, *The Access Conditions of the Rare Earths Industry*, promulgated by the Ministry of Industry and Information Technology, No. 33, on 6 August 2012; *Provisional Administrative Measures on Mandatory Plans on Production of Rare Earths*, promulgated by the Ministry of Industry and Information Technology, No. 285, on 13 June 2012. In addition, the State Council is currently drafting "Regulations on the Management of Rare Metals". For some good policy recommendations, see Brigid Gavin, "Sustainable Development of China's Rare Earth Industry within and without the WTO" (2015)49(3) *Journal of World Trade* 495-516.

[220] See Bhagwati, Jagdish N., "The Generalized Theory of Distortions and Welfare" in Jagdish N. Bhagwati *et al.* (eds.) *Trade balance of payments and growth: papers in International Economics in Honor of Charles P. Kindleberger* (Amsterdam London: North-Holland Publishing Co., 1971) 69-90; Corden, Max W., *Trade Policy and Economic Welfare* (Oxford: Clarendon Press, 2nd ed., 1997).

[221] See above n 208, Liu and Maughan, "China's Rare Earths Export Quotas", at 975.

[222] See above n 137, Karapinar, "China's Export Restriction Policies: Complying with 'WTO Plus' or Undermining Multilateralism", at 405.

when export restraints become necessary for China's pursuits, export duties are an economically preferable instrument than export quotas as they are more transparent and less trade-restrictive. In this connection, the WTO tribunals made a fundamental mistake in the two disputes in denying China's right to invoke Article XX to justify the use of export duties to pursue the environmental and conservation objectives. This denial has not only created irrational and unjustifiable asymmetry in terms of policy spaces available to China as opposed to those to all other members, and in the case of China, also in terms of policy justifications available for export duties as opposed to those for all of the other instruments.[223] But more significantly, it has made it impossible for China to use export duties for any legitimate regulatory purposes, thereby 'incentivizing' China to resort to the least efficient and most trade-restrictive-and-distortive means, namely, export quotas for these purposes. Practically speaking, export duties have been one of the policy instruments prevalently used by WTO members for various policy objectives ranging from revenue-raising and food security to environmental protection and conservation of natural resources.[224] The WTO tribunals' rejection of China's right to use export duties for the same policy objectives has undoubtedly constituted unjustified encroachment on China's domestic autonomy. From an institutional perspective, "[d]enying a member the mere right to invoke generally accepted public policies reflects badly on an organisation like the WTO, and tarnished its legitimacy", as Bronckers and Maskus have sharply and rightly pointed out.[225] Certainly, the WTO tribunals have misplaced the focus which should have been on whether contested measures can pass muster the legal requirements of Article XX, not whether Article XX should be made available to a particular policy instrument employed by a particular member country. Losing the right to choose export duties, it is likely that China will re-impose export quotas in explicit or hidden forms when trade measures become necessary for the pursuit of its policy objectives. Given the temporary nature of the Chinese measures which institute export quotas on an annual basis, the re-introduction of export quotas time and again may put interested WTO members into a never-ending litigation circle.

As noted earlier, China's export mechanism – mainly including licensing requirements, export quotas, export duties, price controls – has been one of the major concerns of some WTO members (e.g. the US) since China's entry into the WTO. The two disputes witnessed a great effort of these members attempting to challenge China's goods exportation regulatory framework as a whole. Such an attempt has failed as the WTO tribunals' findings of inconsistencies have touched upon several annually-updated measures only and hence have left intact China's major legislations on export trade. Given the ongoing concerns of these WTO members on China's export trade mechanism, another WTO case on similar issues in one or two-year time should not be a surprise.

[223] See above n 210, Bronckers & Maskus, "*China – Raw Materials*: A Controversial Step Towards Evenhanded Exploitation of Natural Resources", at 399-402; above n 184, Baroncini, "The *China – Rare Earths* WTO Dispute", at 58-59.

[224] See Jeonghoi Kim, "Recent Trends in Export Restrictions on Raw Materials" ch 1 in *The Economic Impact of Export Restrictions on Raw Materials*, OECD Trade Policy Studies (16 November 2010), at 15-20.

[225] See above n 210, Bronckers & Maskus, "*China – Raw Materials*: A Controversial Step Towards Evenhanded Exploitation of Natural Resources", at 402.

5. Conclusion

Reminiscent of China's 15-year negotiating marathon to join the WTO, China has now been a member of the WTO for 15 years. Since the commencement of China's membership, WTO member states, institutions and organisations, scholars and commentators, and other stakeholders have kept a close watch on China's engagement with the multilateral trading system. Through a detailed analysis of the four completed 'trade in goods' disputes including the WTO rulings against China and China's implementation of the rulings, the article finds that China has timely and satisfactorily revised almost all of the WTO-unlawful measures to achieve WTO compliance. This record of implementation is remarkable as in all of the cases China had to amend laws that may have significant impacts on some of its most important and sensitive sectors.

However, China's implementations of the rulings in these disputes are not without potential issues. First, where China has revised the measures in dispute such that the measures, on their face, are no longer in breach of WTO rules, the lack of transparency in terms of the application of the measures in practice remains to be a glaring issue. It is, therefore, necessary to continue to monitor the practice of the responsible Chinese authorities, and more importantly, to push China to mandate the authorities to make public the relevant information on decision-making. Second, where the WTO rulings have only touched upon certain temporary measures which are updated on a regular basis, it is not unlikely that China may reintroduce the WTO-illegal instruments when needed. Thus, continuous monitoring of the regularly-updated measures becomes necessary. Third, in all of the sectors involved in the disputes, the pace of regulatory change in China has been phenomenal. New measures, such as administrative regulations and departmental rules, may easily introduce certain protectionist elements so as to afford protection to these major and sensitive industries. Thus, dedicated efforts to the analysis of these measures and other measures being introduced are required to keep pace with China's regulatory development.

Generally speaking, the WTO tribunals have left flexibility for China to pursue its chosen policy objectives. The fact that China had to change the instruments that it had used to achieve these objectives suggests that certain less-trade-restrictive means were available given the genuine level of protection that China actually pursued at the time of the disputes. Further, that a more trade-restrictive means was used in the pursuit of a given policy objective suggests that China did not formulate its policy instruments in a way that reduces protectionist elements and impacts to the utmost extent. Unfortunately, it is likely that China is to continue such a practice not seriously taking into account the WTO-consistency of a measure at the time of its formulation and introduction if the measure is considered to be necessary for the attainment of a chosen regulatory purpose.

However, in denying China the right to use export duties for any legitimate regulatory purpose, the WTO tribunals' rulings in *China – Raw Materials* and *China – Rare Earths* are disappointing and fundamentally wrong as they 'encourage' China to resort to export quotas, the most trade-restrictive and least efficient measure, when trade measures become necessary for the pursuit of a given policy objective. Consequently, China's implementation of the WTO rulings in the two cases is unlikely to be the end of the long-standing disputes over China's goods export mechanism. Thus, it will remain a formidable task for stakeholders to continue to observe China's engagement with the WTO dispute settlement system.