

# ***Environmental Protection under Free Trade***

## ***--Analysis of China's Rare Earth Resources Export Restriction Case***

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**Abstract:** With the rapid development of today's society and economy, the exploitation and utilization of natural resources and the environment are also intensifying in various countries, and China is no exception. In order to realize the socialist modernization power, China's economic development can not be delayed, for the use of rare earth resources and the protection of attention is also essential, in this context, in 2012, the United States, the European Union, Japan v.China to WTO dispute settlement mechanism, on China's rare earth resources and other raw materials export restrictions on the lawsuit, so that a "war of defense of rare earths Since then, a "rare earth defense war" has been launched, in the case of The General Agreement on Tariffs and Trade 1994 (GATT1994) Article 20 of the general exceptions to environmental protection regulations can be invoked to apply, became the main focus of controversy in the case. Meanwhile, under the conditions of WTO trade freedom rules, how China coordinates its domestic policies and improves the environmental protection measures for natural resources is also an issue worth thinking about.

**Keywords:** Rare Earth, GATT1994 Article20, Freedom of Trade, Natural Resource Conservation

## **1. Introduction**

The rare earth resources referred to in this case are rare earth elements, also known as rare earth metals, which have important uses in various industrial smelting, petrochemical, military and other fields, and are strategic resources of considerable importance. China as a large country of rare earth resources, is also the world's largest exporter of rare earth resources, accounting for 23% of the world's rare earth reserves, providing more than 90% of the world's production, while Russia, the United States, Australia, and other major rare earth owning countries, the production of virtually nil,[1] these countries are very dependent on imports of rare earth resources to maintain the country's high-tech industries and the development of the manufacturing industry, and the source of its imports of a considerable part of the A considerable part of their import sources come from China. However, in recent years, China's increasing exploitation of rare earth resources has led to a drastic reduction in the stockpile of rare earth resources and environmental pollution problems caused by the exploitation process. As a result, China began to restrict the mining and export of rare earth resources in 2006, which became the trigger for the WTO lawsuit filed by the U.S., Europe and Japan. In the course of the litigation, the question of whether China can invoke Article 20 of The General Agreement on

Tariffs and Trade 1994 (GATT 1994) has become the core of the dispute, and the deep-rooted conflict between the free trade regime and the environmental protection of natural resources is also being staged. This article will analyze the case of China's export restriction on rare earth resources, and discuss the application of Article 20 of GATT 1994, knowledge of the Article, and how China can protect the natural resources and the environment in the future in the international community that advocates free trade.

## 2. Review of the main case

In order to protect rare earth mineral resources and various non-renewable raw materials and the environment, China has introduced a series of policies and measures since 2006 to restrict the export and exploitation of rare earth resources and raw metals, lowering export quotas and raising export tariffs. Prior to this case, in 2009, the United States, the European Union, and Mexico filed a lawsuit with the WTO Dispute Settlement Mechanism (DSM) regarding China's export restrictions and tariffs on raw metal resources, claiming that China had violated a number of WTO obligations, and requesting that the export restrictions be lifted.[2] And shortly after the conclusion of the case, in March 2012, by the United States, the European Union, Japan on China's export restrictions on rare earth resources to the WTO dispute settlement mechanism, requesting the establishment of a panel of experts to adjudicate, in March 2014, the panel of experts in the first instance reached the results of the ruling, ruled that China's removal of export restrictions and tariffs on rare earth resources. in April 2014, China appealed, and in August of the same year, the WTO appealed and upheld the ruling that China's export and tariff measures on rare earth resources were inconsistent with the WTO rules and violated the obligations of the agreement signed during its accession to the WTO, thus bringing the curtain down on the rare earths case.[3] This "rare earth defense war" unfortunately ended in failure.

## 3. Core issues of the case

In this case, the application of the general exception for environmental protection in Article 20 of GATT 1994 has become the focus of controversy, with much of the initial panel and appeal proceedings centering on whether China could invoke the provision.

### 3.1. Feasibility of China's invocation of article 20 of GATT 1994 in the present case

Firstly, from a realist perspective, the primary pursuit of States is their own security and power. In the case of the dispute over rare earth materials, this perspective can be used to explain the competitive behavior displayed by States in securing access to these vital resources. Rare earth elements are integral to many high-tech products and are important to a nation's economic security and military technology, and state competition for these resources reflects a behavior based on power and security considerations. The competition for national power is manifested in the control of and access to rare earth resources, which is directly related to their position in the global science and technology race. Whereas China protects its natural resources and environment by restricting exports of rare earths, it also maintains control over this critical resource in this way, thereby increasing its bargaining power and influence in the international arena. This strategy is consistent with the basic assumption of realism that states will use a variety of means in the pursuit of their own security and interests.[4]

Secondly, China and the United States, Europe and Japan, which initiated the litigation, are all trade subjects of the World Trade Organization, and the object of the case is the export quota restriction on rare earth resources and tariffs, which are subject to the provisions of the WTO rules, and of course, to the provisions of Article 20 of the GATT1994. Moreover, in order to invoke Article 20 of GATT1994 as a defense, the defending party needs to consider whether the disputed measures or acts have the qualification to invoke the exceptions to the defense, and thus need to meet the

following two conditions: first, the disputed measures or acts belong to the general exceptions in the sub-rule; second, the disputed measures or acts need to meet the first paragraph of Article 20 of GATT1994. China's restrictive measures on rare earth exports meet these prerequisites and are therefore also eligible to invoke paragraphs (b) and (g) of the article as a defense.[5]

Furthermore, in the present case, the reason why China has restricted the export of rare earth resources is to protect China's sovereignty over natural resources and the natural environment, while safeguarding legitimate trade interests. In the process of exploiting rare earth resources, the pollution and harm to the surrounding environment is persistent, due to the rare earth is a large number of radioactive metals, its pollution of various environmental resources and the health of the people around the impact is very serious, the introduction of restrictions on the export of rare earths will be able to reduce the exploitation of rare earth resources, to protect the lives and health of the people, which are in line with the necessity of the requirements of GATT 1994, Article 20 (b), and therefore it is feasible to invoke this Article.[6]

Finally, as rare earth resources are non-renewable natural resources, China's export restrictions have led to a significant reduction in the output of rare earth resources, effectively protecting the quantity of rare earths. Not only that, China has also imposed restrictions on the domestic production and use of rare earths, which is consistent with the requirements of article 20 (g) of GATT 1994, and therefore it is feasible to invoke this provision in the defense.

### **3.2. Differing views of the Panel and the Appellate Body on China's invocation of article 20 of GATT 1994**

Even though China argued the feasibility of invoking article 20 of GATT 1994 on the basis of the facts during the course of its pleadings and appeals, the Panel and the Appellate Body still held a different opinion on the matter. In the first instance, the Panel argued that a series of measures taken by China did not satisfy the specific requirements of paragraph (b), pointing out that in order to invoke paragraph (b), it was necessary to prove that the measures taken for the protection of people's health were irreplaceable, and that the tariff-raising measures taken by China were not the only means to do so, and that other measures could be used to safeguard the health of human beings, animals and plants. Therefore, China should not apply the content of paragraph (b) in its defense.[7]

With regard to China's invocation of paragraph (g), the Panel also noted that China had not adduced strong evidence that it had also restricted the exploitation and use of rare earth resources domestically, nor had it proved that it had restricted the use of rare earth resources by domestic enterprises, and that some small and medium-sized enterprises had been utilizing rare earths more frequently as a result of China's export tax rebate policy, which was contrary to the goal of protecting the environment, and that, therefore, paragraph (g) could not be invoked as a defence.

During the appeal process, China also argued that the Panel did not review the evidence on the issue of China's restrictive measures not being on a par with its domestic counterparts, but instead came to a conclusion directly, in the hope that the Appellate Body would be able to overturn the Panel's conclusions. However, the Appellate Body found that China's allegation that the Panel made its determination solely on the basis of an unsupported source was not the focus of the case, but rather on whether China's export restrictions could be subject to the exceptions clause, and that China did not have strong evidence that its restrictions on rare earths were applied domestically at the same time, and therefore rejected China's request for leave to appeal and affirmed the original decision.[8]

In fact, however, the reasoning of the Panel and the Appellate Body is also characterized by a number of irrationalities. When interpreting the provisions, they did not analyze the objective facts and the purpose of the case in the light of the actual situation, but rather interpreted the textual meaning of the provisions themselves, which resulted in the loss of China's rights and interests that really needed to be protected by the exceptions. As a developing country and a post-accession member

of the WTO, China's rights and obligations under the WTO rules are different from those of the Plaintiffs, who are the original members, and China's obligations are not balanced with the rights it enjoys, and its corresponding obligations are even higher than those of the Plaintiffs. In this case, the Panel and the Appellate Body did not combine China's actual situation and the exception clause to find that China's trade obligations should be consistent with those of the original member, which made the decision unfair. For developing countries and new members of the WTO, they have assumed far more obligations than the original members, and if their legitimate interests are no longer effectively protected by the WTO rules, it is tantamount to violating the principles and purposes of the WTO, and depriving the equality and fairness under the framework of the WTO of its essential significance.[9]

#### 4. Impacts and insights of the case outcome for China

The case ended in China's defeat, and the impact of the ruling on the trade of China's related industries is also huge. Following the ruling in the case, China lifted all restrictions on rare earth exports in 2015, and the most intuitive impact of the lifting of the policy has been on the production and export of rare earth resources. According to data from China's General Administration of Customs, after the abolition of the measures, the export volume of rare earth resources has risen sharply, which also led to a short-term imbalance between supply and demand, and the price also fell significantly during the same period, and China has an important position in the international rare earth trade market, the price drop will inevitably have a significant impact on the rare earth industry in other countries.[10]

The renewed opportunity for the unrestricted export of rare earth resources has also caused considerable damage to the domestic environment. The uncontrolled exploitation of rare-earth resources has not only led to a drastic reduction in quantity, but has also led to increasing irreversible damage to the natural environment in the vicinity of the minerals, with a consequent deterioration in the quality of life of the people around them and an impact on their lives and health. This runs counter to the scientific concept of development, which is part of China's basic policy, and is not conducive to sustainable development, thus greatly jeopardizing the country's long-term interests.

Of course, China can also learn many lessons from the loss of this case, which will shed some light on China's future development in this area. Firstly, China has learned more about the understanding and application of Article 20 of GATT 1994, and after understanding the harsh conditions and strong evidence required to invoke the exception clause, it is believed that China will be more prepared in future litigation, and will be more explicit and straightforward in terms of proof, and it has also learned about the habit of mind and the interpretation of the article by the Panel and the Appellate Body. These are all valuable lessons.

Furthermore, China will have a lot of inspiration for the formulation and implementation of the relevant measures in the future, and when formulating the corresponding measures, it will also compare the contents of the articles under the WTO rules in a more detailed manner, fully integrate with the actual situation, so that the measures can be put into practice, so as to realize the comprehensive coordination between the domestic policies and the current WTO trade rules, avoid the misunderstanding of other countries about the relevant measures of , which will give rise to unnecessary disputes, and at the same time revise and improve the corresponding laws and regulations that do not conform to the WTO rules, so as to reduce the adverse consequences in the future.

#### 5. Conclusion

With the global advocacy of trade freedom, developing countries such as China need to pay more attention to balancing the relationship between trade and economic development and environmental pollution control in order to achieve sustainable development. The most effective way is to introduce

better and more advanced laws to control the problem of environmental pollution and damage, as well as to prevent the unrestricted exploitation of non-renewable natural resources, and under this premise, attention should be paid to international standards, to prevent the corresponding laws and regulations from conflicting with international rules.

## References

- [1] Ma, L. (2013). *Adjustment Strategies for China's Rare Earth Export Quota and Tariff System - Taking the Current Rare Earth Case as a Background*. *Science and Management*, 33(6), 77.
- [2] World Trade Organization. (2014). *China -- Measures related to the exportation of various raw materials*. Retrieved from [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds394\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm)
- [3] World Trade Organization. (2014). *China - Measures related to the exportation of rare earths, tungsten, and molybdenum*. Retrieved from [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds431\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm)
- [4] Morgenthau, H. J. (2014). *A realist theory of international politics*. in *The realism reader* (pp. 53-59). Routledge.
- [5] Jiang, Z. (2016). *The Application of Article 20 of GATT 1994 to China's Export Restrictive Measures*. *China Youth Politics Institute*, 7.
- [6] Zhang, L., Jiang, B., et al. (2020). *Toxicity of rare earth elements: An overview on human health impact*. *Frontiers in Chemistry*, 8, 570.
- [7] World Trade Organization. (2012). *China -- Measures related to the exportation of various raw materials (DS394/DS395)*. Retrieved from [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds394\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm)
- [8] World Trade Organization. (2014). *Dispute Settlement Body, Summary of the meeting on August 29, 2014*. Retrieved from [https://www.wto.org/english/news\\_e/news14\\_e/dsb\\_29aug14\\_e.htm](https://www.wto.org/english/news_e/news14_e/dsb_29aug14_e.htm)
- [9] Li, X. (2013). *On the Application of Article 20 of the GATT: The Case of China's Raw Material Export Restrictive Measures as a Perspective*. *Dalian Maritime University*, 15.
- [10] China Rare Earths Online. (n.d.). *Rare Earths WTO Litigation Defeat and Implications*. Retrieved from [http://www.cre-ol.com/\\_d276352934.htm](http://www.cre-ol.com/_d276352934.htm)