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국제학석사학위논문

**The Necessity of the WTO Multilateral Trade  
Agreement on Export Duty: Focusing on the Case  
of Chinese Export Restrictions**

수출관세에 대한 WTO 다자간 무역협정의 필요성:  
중국의 수출규제 사례를 중심으로

2018년 8월

서울대학교 국제대학원

국제학과 국제통상전공

양 지 성

**The Necessity of the WTO Multilateral  
Trade Agreement on Export Duty: Focusing  
on the Case of Chinese Export Restrictions**

A thesis submitted by

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In partial fulfillment of the requirements  
For the Degree of Master of International Studies

**Graduate School of International Studies  
Seoul National University  
Seoul, Republic of Korea**

August 2018

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## **The Necessity of the WTO Multilateral Trade Agreement on Export Duty:**

### **Focusing on the Case of Chinese Export Restrictions**

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## **ABSTRACT**

Under the World Trade Organization(WTO) regime, export restrictions are known to be under-regulated as it neither strictly regulate export duty nor apply commitments to all members. However, countries that newly joined the WTO are subject to the so-called ‘WTO-plus’ regulation. The need for multilateral trade agreement emerged as this imbalance in the system caused trade disputes among member countries. In the absence of legal clarity, many countries including China have frequently adopted export restrictions for various political and economic reasons. In particular, restrictions on minerals and rare earth elements led to trade disputes. When China joined the WTO in 2001, it agreed to the rules of the Protocol on the Accession. This paper seeks to find out what additional clauses were included in the protocol, and examine the WTO panel and appellate body rulings through the case analysis of two disputes, *China-Raw Materials* and *China-Rare Earths*. This paper suggests that the WTO multilateral trade agreement is necessary to resolve the fundamental problem of uneven trade obligation on export restrictions.

**Keywords:** Export restriction, export duty, WTO, China, raw materials, rare earth, WTO accession protocol

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## **I. Introduction**

Export restrictions refer to quantitative restrictions or additional taxes that a government applies to specific products. Despite the fact that import and export restrictions have the same motivation and effect, it is worth noticing that restrictions on export are relatively under-regulated in the World Trade Organization(WTO) system.

This paper aims to address two major issues. First, it evaluates the current WTO regime on export regulations and conducts a legal analysis through a case study approach. Next, it considers the implication of and recommendation on how to resolve the problem within the WTO framework.

China signed the Protocol on the Accession of the People's Republic of China when it joined the WTO in 2001. China's WTO accession protocol consists of a total of three parts and nine attachments. According to Section 1.2 of the Protocol, it is an integral part of the WTO agreement, and China must implement and comply with the specified additional WTO agreements. A part of the obligations was prohibiting export restrictions on a vast majority of items. The problem arises where there are no regulations for existing members to impose export restrictive measures, but the new members are faced with strict and broad commitments.

Over the past 17 years, there have often been WTO disputes involving China's accession protocol in which the Chinese government has been accused for imposing export restrictive measures. Among them are China's raw materials and rare earth elements. In those cases, provisions under China's accession protocol have been the main legal issue, and there is a high possibility of similar conflicts will continue to emerge in the future.

The imposition of China's export restrictions has been mainly focused on raw materials and resources where China is the largest producer in the world. In other words, other countries have no choice but to import from China. Therefore, China's export restriction measures had a critical impact on the partner countries.

For this reason, it is important to understand and analyze as the impact of such measures and how it will affect international trade order and security. Against this backdrop, this paper seeks to find out what additional WTO commitments China made in relation to the export restriction under the accession protocol, and the role the agreement played in WTO dispute cases in the panel and appellate body's decision making.

The use of WTO dispute cases is necessary for analyzing and identifying the accurate rules and commitments specified by the clause. In order to do so, we first look at the normative framework of WTO agreements

according to the types of export restrictions (III) and analyze the separate commitments related to the export restrictions in China's accession protocol (IV). Next, we would like to identify the WTO rulings on China's restriction on export of raw materials and rare earth elements (V). Finally, we are going to discuss the implications of and recommendations after China's defeat in the WTO.

## **II. Understanding the Role of Export Duty**

### **2.1 The Definition**

According to the Organization for Economic Cooperation and Development(OECD), export restrictions can be defined as all border measures operated through government regulations for the purpose of limiting export volume. The most common type of export restriction is export duty, which have the effect of reducing the volume of exports through an increase in export prices. Export quotas is another type of restriction that directly affect export volume, and export permits also have the same effect of reducing export set by the government.

### **2.2 The Economic Implications**

There are several motivations for the government to impose export restrictions, but the economic purpose seems to be the most significant. Export tax can be imposed and collected as a measure to increase government revenues. In contrast to domestic taxes such as income and land taxes, it is relatively easy to impose and collect. In particular, export tax is often imposed by the government of developing countries because of their weak tax resistance.

The economic effect of export tax depends on the scale of impact on the trading partners. And this in turn depends on whether the tax levied by the exporting countries make a real difference in the price of the global market for the particular product of concern. Nevertheless, the imposition of export tax will inevitably widen the gap between the final prices of domestic companies and those with overseas production bases. As a result, domestic companies gain a competitive edge. This is also known as the *infant-industry argument*. In other words, it provides initial incentives and preparation periods for the development of the domestic industry. In this sense, export tax has the same effect as a subsidy to domestic industries and companies, providing an artificial competitive advantage.

### **III. The Agreement on Export Duty under the WTO**

The WTO is an international organization that aims to achieve trade liberalization by lowering tariffs and eliminating non-tariff barriers, and all WTO members are obligated to fulfill their commitments. However, the WTO agreement is mostly focused on regulations on import barriers, with few separate regulations governing export barriers. This chapter aims to examine and analyzes the provisions in the GATT 1994 that can be applied to the export restrictive measures.

#### **3.1 The Absence of WTO Disciplines on Export Duty**

Article XI of GATT is a key clause on export restrictions in WTO agreements. However, the agreement prohibits only the use of quantitative restrictions on exports and imports. In other words, the imposition of export duty is not discussed under the GATT Article XI, and is not prohibited by these provisions.

Since the GATT regime, the international trade system has prepared regulations on import tariffs through eight rounds of multilateral negotiations, but it has failed to establish a regulatory framework on export tax. While the

WTO regime succeeded in lowering tariffs and non-tariff barriers to imported goods, no efforts were made to reduce or abolish export taxes. Essentially, imposing tariffs or quantitative restrictions on export items would have hurt the price competitiveness of domestic products, and it would have been unnecessary for rival countries to try to stop the export tax.

As a result, the existing WTO members have been relatively free to impose export taxes. In fact, the effect of imposing tariffs and quantitative restrictions on trade are the same in terms of their functional aspects. Therefore, despite the availability of Article XI of GATT, since the members could easily impose export tax to achieve their goals, this provision is arguably ineffective to regulate export restrictions.

Another problem is that the items subject to the export restriction will have a significant impact on the partner countries when they are considered to be a potentially depleted raw materials or natural resources. Geographically, countries with abundance of raw materials and natural resources are developing countries. In contrast, developed countries are importing goods that add technology to those raw materials and natural resources from developing countries. For example, Korea depends heavily on the importation of raw materials and natural resources, which are the ingredients of major products that Korea exports. If the exporting countries of the ingredients decide to impose



restrictive measures against Korea, the impact will be significant as there are not many alternatives.

Furthermore, as unique resources such as rare earth elements become more important for technological advancement, developing countries have increased the use of restrictions on those products, and developed countries such as the European Union(EU) and the United State(US) are trying to address the issue to the global society. However, since developing countries have been showing a cool response to these proposals, the discussions on export restrictions seems to continue at a bilateral level than and multilateral.

### **3.2WTO rules on Export Quantity Restrictions**

Article XI:1 of GATT<sup>1</sup> provides general provisions for the prohibition of quantity limits on imports and exports. According to the text, the establishment of import and export quotas are prohibited, as well as a wide range of government measures to restrict import and export. Thus, the members of WTO are committed to set domestic rules within the scope of GATT Article XI:1.

On the other hand, Article XI:2 of GATT includes provisions for

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<sup>1</sup> “General Elimination of Qualitative Restriction”

exceptional circumstances where export ban or quantitative restrictive measures are allowed. Article XI: 2(a) states that a temporary ban on exports or restrictions on exports is permitted to prevent or mitigate a critical shortage of food products or essential to exporters.<sup>2</sup> In addition, Article XI: 2(b), in international trade, acknowledges a measure to limit the quantity of goods exported, if necessary to apply standards and regulations for classification, rating and sale of products.<sup>3</sup>

### **3.3 Other Relevant WTO Provisions: Exception Provisions**

While the implementations of measures to limit exports through quantity restrictions may be allowed in the case of Article XI: 2, the Article XX also justify certain situations. Of the exceptions provided in Article XX, the most frequently invoked ones are those set forth in (b) and (g).<sup>4</sup>

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<sup>2</sup> The provisions of Paragraph 1 of this Article Shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party

<sup>3</sup> The provisions of Paragraph 1 of this Article Shall not extend to the following:

(b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade

<sup>4</sup> Article XX General Exception

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

Two requirements must be met in order for the actions in question in connection with Article XX: (b) to be recognized as necessary to protect the life or health of humans, animals or plants. First, the policy objective of the measure should fall into the category of protecting the life and health of humans, animals or plants, and should be the measure necessary for protection. This judgment is interpreted strictly by the WTO panel and the appellate body.

With regard to Article XX: (g), it shall be a natural resource from which the object protected by the measure can be depleted, and the measure shall be related to the preservation of the natural resources. It then determines whether these measures are valid in conjunction with restrictions on domestic production or consumption. In addition, in order for the measure to meet the requirements of Article XX: (g), the measure should not only apply to imported goods but even-handed to domestic production and consumption.

After examination of Article XX: (g), review whether the actual application of the measure meets the requirements of the Chapeau of Article XX, and shall be recognized as such only when the requirements are met. After examination of Article XX, the exception may be finally accepted if the measure meets the requirements of the Chapeau of Article XX.

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(b) necessary to protect human, animal or plant life or health;

(c) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

Finally, if the measure restricting exports through quantity restriction meets the requirements of Article XXI, it can be seen as an exception regarding security. Article XXI enable members to adopt necessary steps to ensure their own security interests and the security of the international community. It is an exception that allows justification for violation of GATT standards for security reasons.

## **IV. Uneven Trade-liberalization Commitments on Export Duty**

As previously discussed, GATT 1994 does not prohibit the imposition of tax on exports. To put it in another way, WTO members cannot, in principle, impose a quantity limit on exports under the provisions of GATT 1994 Article XI, but they can impose a limit on export taxes.

However, newly acceded members of WTO have agreed to the protocol that removes or restricts export duty while negotiating with existing members to join the WTO. For example, China is committed to abolishing export tax on all items except 84 items. It may maintain the export tax on those items listed in Annex 6, but will bear the obligations to reduce them. Russia and Ukraine are also obligated to reduce export tax according to its individual accession protocol.

While most new WTO members are obligated to legal commitments associated with export restricting measures to eliminate or lower export tax as stated in the accession protocol, such a protocol cannot be made general. While there were discussions on export restrictions including export tax during the negotiation of membership by most new member countries, and given that the

outcome of this negotiation was reflected in the accession protocol, concerns over the imbalance in the commitments among WTO member countries could be raised in the future.

#### **4.1 The Accession Protocol of the WTO**

According to Article 12.1 of the Marrakesh Agreement, countries seeking to join the WTO must be subject to conditions agreed with the WTO. However, Article 12 of does not state what the terms are. It can be assumed that countries that wish to join the WTO and enjoy the benefits of lower tariffs and non-tariff barriers among the members will have to pay the corresponding price. As part of such conditions, many WTO members, like China, have joined the WTO after agreeing to those unnecessary additional commitments not in the GATT provisions, such as the abolition of export tax.

If you look at the individual accession protocol of WTO member countries in relation to export restrictions, among countries that have joined the WTO since 1995<sup>5</sup> have separate commitments for export tax. But the scope of commitments is very wide. For example, Croatia has the lowest level of

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<sup>5</sup> Mongolia(1997), Latvia(1999), Croatia(2000), China(2001), Armenia(2003), Cambodia(2004), Saudi Arabia(2005), Vietnam(2007), Ukraine(2008), Montenegro(2012), and Russia(2012)

commitment to export restriction. In fact, Croatia's WTO accession protocol states that it is simply aligned to the WTO agreements. However, since the WTO agreement does not include provisions on export tax, Croatia has not promised to abolish or reduce export tax.

Some countries promised to eliminate export duty on certain goods. In the case of Mongolia, for example, the government agreed to abolish tax on cashmere fabrics within 10 years. Saudi Arabia promised to abolish imposing export taxes on iron and steel scrap, while Vietnam agreed to lower export taxes for iron and nonferrous scrap metals. In Russia, certain products have the broadest range and impose export taxes on more than 700 items.

On the other hand, Montenegro, one of the countries with the broadest range of commitments to abolish export taxes, says it will not apply any export tariffs or create new ones. And for China, it has promised to eliminate all taxes and penalties except for 84 items. China can see that it has a very unfavourable commitment to the abolition of export taxes compared to other new countries such as Russia.

#### **4.2 China's WTO Accession Protocol**

Section 11.3 was introduced in the protocol because there were concerns among WTO members over the export tax imposed by the Chinese

government. According to the protocol, China must eliminate any export duty or charge on any item other than the 84 items listed in Annex 6. In other words, Annex 6 can be applied under exceptional circumstances to allow export tax.

Annex 6 specifically specifies the maximum permissible export tax for 84 items. Annex 6 notes that the current specified export tax rate cannot be increased except in exceptional circumstances. The exceptional situation here should be demonstrated by China, which applies only to the items specified in Annex 6, not to items not listed in Annex 6. Therefore, the export tax rate cannot be increased and imposed on the basis of exceptional circumstances but not equal to 84 items in Annex 6.

Annex 6 also imposes the following conditions on the case where exceptional circumstances require an increase in export tax on the items in Annex 6. The Chinese government requires consultations in advance with countries that will be affected by China's export tax hike to find mutually acceptable solutions. However, it is very vague that the two countries will not be able to take measures to increase their export tax unless they accept the agreement in advance. Thus, with regard to Annex 6, there may be arbitrary interpretations depending on the positions of China and WTO members, which could lead to future conflicts.

Annex 6 sets out the maximum export tax standard for 84 items, so that



export tax rate can only be lowered annually. According to China's raw material dispute, it was accused for imposing temporary export taxes between 10 and 40 percent for each natural resource, particularly on items other than those listed in China's WTO accession protocol.

China's WTO accession protocol 1.2 states that the individual provisions listed in the WTO Working Group report are the commitments agreed by China.

## **V. Legal Analysis of the Dispute Settlements at the WTO**

There exist uneven trade liberalization commitments among WTO member countries. Under the current regime, member countries are obliged to commit to different standards depending on the date of accession. With regards to export restrictions, while most countries have freedom to enforce export controls, newly acceded countries have a system to tightly regulate and monitor export-related policies.

### ***5.1 China-Raw Material***

This chapter will focus on the facts of the China-Raw Material case and on the WTO's decisions. The panel and the appellate body made it clear that based on China's WTO accession protocol part I: 11.3, China's export restriction on raw materials cannot be justified under the GATT XX.

#### **5.1.1 Brief introduction of the case**

The European Union, Mexico, and the United States challenged Chinese export restrictions on nine categories of industrial raw materials –

bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide, yellow phosphorus, and zinc. These raw materials are used in everyday life as well as in technological process. The complainants argued that the four measures of export restrictions imposed on the raw materials were in violation of WTO rules: export taxes, export quota, minimum export price requirements, and export licensing requirements. The complainants claimed that there are over 32 specific measures in which China has imposed to restrict export. The countries argued that China's export restriction has caused scarcity, and pushed up the price of raw materials in the international market while providing a stable supply of low-cost raw materials to local industries.

In July and September 2009, the parties had two rounds of negotiations but failed to reach an agreement. The United States, European Union, and Mexico requested the panel to be installed under Article 6 of the DSU on the WTO Dispute Settlement Body(DSB). The complainants have argued that China's measure on raw materials are inconsistent with GATT 1994 VIII:1(a), X:1, and XI:1, as well as China's WTO accession protocol part I: 1.2, 5.1, 8.2, 11.3.

### **5.1.2 Legal Analysis**

### **5.1.2.1 China's WTO Accession Protocol**

According to Part I: 11.3 of the WTO accession protocol, China has agreed to eliminate all export taxes, except for the products listed in Annex 6. Annex 6 specifically sets out export tax rates for 84 products. For example, Yellow Phosphorus (HS No. 28047010) has 20%, which means that the export tax for that particular product must not exceed 20%. According to Part I: 8.1 of the accession protocol, China is also committed to notifying export restrictive measures to the Council for Trade in Goods. The Chinese government must make sure that the process and procedures for managing export permits, licensing and quotas are in accordance with the WTO accession protocol.

It is necessary to review whether the Chinese measure is in violation of Part I: 8.2 of the accession protocol. According to Part I: 8.2, foreigners, foreign companies, and foreign-funded companies should not be given less favorable treatment than other individuals and companies regarding the export licensing and quotas. However, the Chinese domestic law gives itself the authority to manage both imported and exported products where necessary. Due to this law, foreigners, foreign companies and foreign-funded companies have a chance to be arbitrarily treated unfavorably. This is an issue of concern whether it is a violation of China's WTO accession protocol.

### **5.1.2.2 GATT 1994**

GATT Article XX sets out general exceptions to GATT I, III, and XI. In particular, GATT XX: (g) allows for an exceptional situation where the preservation of natural resources that may be depleted, given that the measure is not arbitrary or unjustifiably discriminatory. In order for the Chinese measure on raw material to comply with WTO rules, three conditions of (g) should be satisfied: (1) natural resources must be under which the resource can be depleted, (2) its export restriction measures must be related to the preservation of natural resources, and (3) such measures must be taken for domestic production or consumption. Next, such measures (1) should not be voluntary discrimination (2) may not be an unjustified discrimination (3) nor should the disguised restrictions on international trade be constructed under the three conditions of the chapeau of Article XX.

To prevent abuse of GATT XX general exceptions, there is a burden for a country that invokes restrictive measures to demonstrate its compliance with the WTO rules. In this case, China has a duty to prove that the measures were imposed to preserve natural resources that is at risk of depletion. China has also argued that export quotas and export taxes are necessary for the protection of people's health, but they were unable to show that the imposition of export restrictive measures can contribute to pollution and human health. One must be

able to demonstrate that such measures can be directly related to human health. In fact, anything could affect and harm nature and the environment. Therefore, scientific and clear evidence should be provided to prove whether such restrictions are directly related to human health and life.

### **5.1.3 WTO Decisions**

#### **5.1.3.1 Panel's Decision**

The panel ruled that China's imposition of the export tax is inconsistent with its WTO accession protocol and that export quota is also inconsistent with WTO rules. The panel also stated that China's WTO accession protocol statement does not allow China to invoke the general exception of GATT 1994 Article XX in order to justify an export tax.

China has claimed that imposing export taxes and quotas can be justified as they are directly related to the preservation of scarce natural resources for raw materials. However, China could not show that it had adopted such measures in conjunction with restrictions on domestic production or consumption of raw materials to preserve raw materials. The panel said that China seems to have entered the right direction on the way to establish a system

to justify export quotas under WTO rules, but that the framework should also be valid for domestic production.

China also claimed that the imposition of export tax and quota were necessary for the protection of the health of its citizens. However, China has not demonstrated a causal relationship that export taxes and quotas can lead to a reduction in pollution in the short or long term, and therefore contribute to improving human health.

### **5.1.3.2 Appellate Body's Decision**

The appellate body supported the panel's ruling that there is no evidence to allow such measures in violation of accession protocol using the GATT 1994 Article XX. In supporting the panel's decision, the appellate body reviewed part I: 11.3 of the accession protocol, and ruled against China to eliminate export taxes as stated in the agreement.

According to the appellate body, China was unable to show that export quota on Bauxite was "temporarily applied" with a purpose to prevent or reduce "critical shortage".<sup>6</sup> The temporarily applied prohibition or restrictive measures justifiable in the GATT XI: 2(a) should only be applied under a passing need to

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<sup>6</sup> GATT XI: 2(a): Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortage of foodstuffs or other products essential to the exporting contracting party.

overcome extraordinary conditions. The appellate body agreed with the panel's decision that such restrictions should be “a limited duration and not indefinite”.<sup>7</sup> Given the evidence provided by China, the Appellate Body ruled that China's export taxes and quotas have not been temporarily applied to prevent and relieve critical shortages.

However, the Appellate Body disagreed with the panel that the purpose of the measures should be "made effective in conjunction with" domestic production and consumption.<sup>8</sup> Unlike the panel's ruling, the Appellate Body stated that GATT XX:(g) does not imply the necessity to comply with the measures home and abroad.

### **5.1.3.3 Aftermath**

In case of China's raw material case, both parties informed that they have reached an agreement with the DSB. The Chinese Commerce Ministry and the Customs Office openly reported the procedures and implementation related

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<sup>7</sup> [www.wto.org](http://www.wto.org): The Appellate Body agreed with the Panel that such a restriction must be of a limited duration and not indefinite. Moreover, the Appellate Body found that the term “critical shortages” refers to those deficiencies in quantity that are crucial and of decisive importance, or that reach a vitally important or decisive stage.

<sup>8</sup> GATT 1994 XX



to it. The report, the 2013 Catalogue of Goods Subject to Export Licensing Administration, consisted of statements that discard existing export taxes and export quotas. This went into effect on January 1, 2013, and China fully implemented the recommendations and decisions of DSB on the dispute.

## ***5.2 China-Rare Earth***

### **5.2.1 Brief introduction of the case**

China has steadily increased production of rare earth elements since 1985. The Chinese government increased investment in the corresponding industry, and improved technologies for separation of rare earth elements.

At first, Kim Ju-yeong (2011) mentioned the low export price based on China's strong regulations, saying, " Despite the fact that China is the largest producer of rare-earth products, production price has dropped due to excessive competition in China. Next, it refers to serious environmental pollution. Serious environmental problems are occurring as chemical treatments must be performed at the stage of extracting and separating rare earth elements. According to *Hurst and Cindy (2010)*, the overall wastewater generated by China's rare earth elements' industry is 10 million tons a year, and it is threatened by the inflow of Hwangha River and other water sources used by

about 15 million people.

Next is the surge in domestic demand. China's industrial development has led to a steady increase in domestic demand for rare earth elements, which has reached 59 percent of the world's consumption. Due to a decrease in China's reserves and growing demand in the high-tech products sector, China is likely to import rare earth elements by 2020.

Another factor is that it is the end of the era of external acquisition. Up until the 80s, China was short of foreign currencies. But now, China's foreign reserves are at the top of the list, meaning the days of securing foreign currency by using natural resources exports are over.

Finally, China's rare earth elements are being highlighted by its unlicensed developments, such as environmental pollution, overproduction, price hikes and smuggling. In addition, if China's domestic demand grows year after year, and its current export scale is maintained, it is likely that the rare-earth resources will be exhausted in the next 15-20 years, making it possible for China to convert from an exporting country to an importer. Under such circumstances, the government is implementing a policy of adjustment (restriction on exports, scaling up, and large-scale plan) for the rare-earth industry.

## **5.2.2 Legal Analysis**

Since GATT XI and Article 11.3 of the WTO accession protocol are considered major issues in the China-rare earth case, the two clauses are analyzed in more detail. And in China's raw material case, the panel and appellate body's decision to justify China's export restriction measures under Article GATT XX is not allowed under Article 11 of the WTO accession protocol.

### **5.2.2.1 China's WTO Accession Protocol**

The WTO accession protocol Part I 1.2 stipulates that it is an integral part of the WTO agreement. Part I section 11.3 states that China must remove all taxes and fines that apply to exports. In the case of China's raw material, Panel stated, based on the two provisions, China's export tax is inconsistent with China's agreement to join the protocol, and the export quota imposed by China on some raw materials is also inconsistent with WTO rules. The panel said that China's WTO accession protocol does not allow China to use the XX general exception of GATT 1994 to justify its measures that are inconsistent with WTO.

The appellate body supported the panel's ruling that there is no

evidence to allow the application of GATT 1994 XX to be made under Article 11.3 of the accession protocol. In supporting the panel's decision, the appellate body reviewed Section 11.3 of the accession protocol, which could not justify China's breach of duty to eliminate export taxation.

In China's WTO accession protocol, the relationship between the WTO agreement and the WTO accession protocol can be seen as an integral part of the WTO's Articles 1.2. In addition, in China's raw materials, Panel and appeals bodies have made Section 11.3 of the WTO accession protocol a priority over Article XX of the WTO agreement. In other words, if the panel and appellate body decide in the case of raw material in China that it is in violation of its accession protocol obligations, China cannot file a lawsuit based on the GATT agreement. Thus, the WTO accession protocol is an integral part of the WTO agreement, which takes precedence over the WTO's trade issues concerning China, and the relationship between the two should be regarded as a relationship between the special law and the general law. As recommended by the panel, the appeals body ruled that China would fulfill Section 11.3 of the WTO accession protocol to meet its export obligations and export quota measures with the WTO.

### **5.2.2.2 GATT 1994**

Clause 1 of GATT XIII provides for the general elimination of quantity limits as follows. “No prohibition or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.” In other words, the ban on quantity limits is extensive: first, the establishment of import quotas and export quotas is prohibited, and second, the government's measures to impose quotas are prohibited. Unlike other GATT rules, GATT XIII does not refer to laws or rules but to broader measures. Thus, the measure limiting imports or exports made by member countries falls under the application of GATT XI regardless of the legal status of such measures. In response, the panel accepted the opinion of the government and said that China's actions against a series of raw materials are subject to a ban on the export of goods or a restriction on the export of goods and accordingly to Article GATT XI: 1.

GATT XI: 2(a) states that “Export prohibitions or restrictions temporarily applied to prevent or relieve the critical shortage of foodstuffs or other products essential to the exporting contracting parties.” In short, China's

export quota for raw materials must be applied temporarily and under the critical shortage. China must prove that there is a critical shortage now and, it is also expected to continue in the future. In order to relieve a critical shortage, exporting countries can adopt it more easily than to prevent the shortages.

Thus, even in China's rare earth case, China's ban on exports of rare earth elements should be applied temporarily to prevent or relieve a significant shortage if it does not violate WTO agreements. Temporarily applied ban or restriction on exports in GATT XI: 2 (a) is a measure that is in passing need to provide relief under extraordinary circumstances. However, China's ban on exports of rare earth elements has been pointed out by the United States and EU since 2009 as a violation of WTO agreements and the WTO accession protocol, which means that such measures have been maintained for a long period of time in attempt to protect the environment and to prevent from depletion.

### **5.2.3 WTO Decisions**

#### **5.2.3.1 Panel's Decision**

In case of the China-Rare Earth case, China admitted that it would carry out export quota measures on its rare-earth products, but GATT Article 11

was subject to the exception of Article XX of the GATT. China, however, has proved to the countries that the measure on exports of rare earth products falls within the scope of GATT article 20 (g) or the failure of Article 20. The panel decided that China's measure on China's export quota of rare earth products violates Article 11 of GATT.

The countries also immediately called for the withdrawal of China's export tax measures, claiming that they violate Article 11, Article 3 of the protocol to remove all tariffs and measures on a series of products. In response, China, or its own, has claimed that these measures are justified in accordance with Article 20 (b) of GATT, an exception to "the protection of human life and health". The panel's decision, however, ruled that, as in the China-Raw Material case, it violated Article 11, Article 3 of the accession protocol without accepting China's claim to invoke the GATT Article 20 exception clause.

### **5.2.3.2 Appellate Body's Decision**

On March 26, 2014, China filed an immediate appeal against a panel ruling that was decided to lose the Chinese side. On August 6, 2014, the Appellate Body produced a report supporting the panel's decision, and DSB finally confirmed China's defeat. The report fully supported claims made by the United States, Japan, and the EU that China's ban on exports of rare earth

products violated WTO agreements. The appeals body pointed out that the Chinese government failed to prove that the export quota applied to various rare products was a legitimate measure and urged Beijing to comply with WTO regulations.

The WTO agreement made it clear that it cannot impose quantitative limits or tax measures on exports unless it is aimed at protecting resources and the environment. In response, the Chinese government expressed strong regret and insisted it would not give up its WTO rights in defending the right to impose export taxes to protect the environment. At the same time, however, it virtually accepted that it would improve its rights to natural resource consumption products to the extent that it does not fall short of WTO rules and will take steps to meet WTO demands.

### **5.2.3.3 Aftermath**

Similar to China's raw material case, the Chinese Customs Office took appropriate action to remove export taxes and quotas for rare earth. At first, the United States insisted that the implementation and procedures of China were insufficient, but on May 21, 2015, the two countries informed DSB that they had produced the agreed results.



## **VI. Implications for China's Export Restrictions**

### **6.1 The Necessity of Modifying GATT/WTO Discipline on Export Duty**

In the two previous cases, the WTO emphasized strict obligations and regulations for the newly acceded members regarding export restrictions. However, the problem arises where other member countries have no legal commitments on export duty.

According to WTO statistics, export duty is applied to 11 percent of the world's natural resource trade and to 5 percent of the total trade. Regulations on export duty must be addressed at the WTO because they can cause uncertainty and unpredictability in international trade. In addition, there is a growing interest and pressure for countries as resource trade has turned into a high-level of a political issue. It has, therefore, become a responsibility of the WTO to handle a risk of political instability. In short, the WTO should discuss the need to regulate export duty and its direction in order to enhance the accessibility, transparency, and safety of world resources trade.

The international trade system has recognized that export duty can be a serious barrier to trade and a potential threat to the economy as described above.

Hence, there will be trade negotiations that aims to move towards full liberalization of export duty. In essence, there should be a multilateral discipline that applies equally to all WTO member countries.

To be more specific, in response to how to regulate export restriction, export duty can and should be regulated in the same way as import duty. The previous cases of *China-raw materials* and *China-rare earths* showed that the WTO has strictly opposed and ruled against the imposition of an export duty. It is not appropriate to regulate export duty for acceding members of the WTO, when most members still maintain import duty. While seeking a universal agreement for all members, the WTO needs to consider that export duty is not to be treated more harshly than import duty. Moreover, it should always aim to find a balance between the interests of exporting and importing countries.

## **VII. Conclusion**

Over the past few years, the number of export restrictions imposed by resource producers has been increasing due to instability in international prices, increased demand, and limited supply. As a result, international concerns and disputes over export restrictive measures have arose. In this paper, we analyzed the rules of the current WTO regime regarding export restrictions and the additional provisions of the accession protocol to evaluate the issues regarding imbalance in commitments among WTO member countries.

The use of export bans or restrictive measures such as quotas are prohibited under Article 11 of GATT 1994. However, there is no regulation for export tax, despite the fact that two measures have the same effect. The bigger problem is that while there are no commonly applied export tax restrictions for WTO members, many of the newly acceded countries have agreed to the WTO accession protocol with strict obligations to eliminate or reduce export tax. Considering that export tax and export quota only differ in the form of a restriction and that they could eventually affect the international trade order, this paper argued that it is necessary for a multilateral agreement to regulate export duty.

According to the analysis of two dispute cases over export restrictions

and the decisions made by the panel and appellate body, the WTO has expressed its strict position on export restrictions. Given this viewpoint of the WTO, a multilateral agreement that sets out standard for export duty that is universal to all WTO members is necessary to resolve the problem of imbalance in commitments. With regards to its scope, export duty should be regulated in the same way as import duty, while finding the optimal solution for exporting and importing parties.

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## Abstract(Korea)

### 국문초록

세계무역기구(WTO) 체제 하에서 수출제한조치에 대한 규제는 명시되지 않았거나 비교적 부족한 영역으로 알려져 있다. 반면, WTO 출범 이후 가입한 국가들의 경우에는 가입의정서에 명시된 WTO 추가적 합의사항에 따라 강도 높은 규제의 대상이 되고 있다. 이러한 무역자유화의 불균형은 국가들의 자의적인 법적 해석으로 인해 각종 무역분쟁을 야기할 수 있기 때문에 WTO 다자간무역협정의 필요성이 대두되고 있다.

최근 중국을 포함한 많은 국가들이 다양한 목적으로 수출제한조치를 채택하는 사례가 발생하고, 그로 인해 WTO 분쟁으로 이어진 바 있다. 특히 광물 및 희토류에 대한 수출제한조치는 에너지 안보와 국제무역질서의 왜곡에 영향을 미칠 수 있기 때문에 앞으로도 통상 분쟁의 소지가 될 우려가 크다.

중국은 2001 년 WTO 에 가입하면서 가입의정서 규정에 합의하였다. 중국 가입의정서 제 1.2 항과 마라케시협정 제 12.1 조에 따르면, 중국은 가입의정서에 명시된 추가적 합의사항을 이행하고 준수하여야 한다. 따라서 본 논문은 수출제한조치와 관련된 두 분쟁(*China-Raw Materials* 와 *China-Rare Earths*)에 대한 사례분석을 통해 어떠한 추가 조항이 포함되었는지, 그리고 해당 사건의 WTO 판결내용을 파악하고자 한다. 그리고 두 사건의 실체적 쟁점이었던 수출세와

수출수량제한조치에 대한 중국의 가입의정서와 WTO 규범에는 차이가 있음을 분석하였다.

또한 궁극적으로 이러한 분쟁의 근본적인 문제를 해결하기 위해 WTO 다자간무역협정이 필요하다고 역설하며, 향후 어떻게 이 문제를 바라보고 대응해야 하는지에 대한 시사점을 제공하고자 한다.

주제어: 수출규제, 수출세, WTO, 중국, 원자재, 희토류, WTO 가입의정서

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