An Epic Mess: ‘Exhaustible Natural Resources’ and the Future of Export Restraints after the China — Rare Earths Decision

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Developing countries have often used export restraints to achieve varied objectives such as economic development and environmental protection even when export restraints are viewed as trade distortive and violative of the WTO norms. Therefore, developing countries face a complicated challenge on how to structure export restraint regimes that are WTO consistent and which allow domestic policy goals to be achieved. This article reviews the future of export restraints after the Rare Earths decision particularly in the context of existing WTO jurisprudence. The China — Rare Earths case contains valuable lessons for developing countries in designing their trade policies. The first lesson is that the case-by-case approach adopted in art XX (g) disputes in both the GATT and WTO eras is not just artificial but is proven to be skewed in favour of the complainants. The second lesson is that in absence of clear criteria no matter what policies are constructed to conserve exhaustible natural resources, the end result would be the same if the matter is litigated under the WTO dispute settlement system. Finally, if conservation measures are to be employed as a tool of trade policy, then the WTO member must use these sagaciously.

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