Proceedings of Business and Economic Studies, 2026, Volume 9, Issue 6
http://ojs.bbwpublisher.com/index.php/PBES
Online ISSN: 2209-265X
Print ISSN: 2209-2641

Review of China's Rare Earth Export Control Policy in International Law

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Abstract: As the leader of the global rare earth supply chain, China's export control policy has long been at the center of the legal game of international trade. Based on the historical evolution of rare earth export control measures in China and the World Trade Organization's "China Rare Earth Case" ruling as a logical starting point, this paper systematically examines the compliance of China's current rare earth control system under the framework of international law. It is found that after losing the case, China abandoned the pure means of export quotas and tariffs, and turned to a compound management and control mode centered on resource tax, environmental regulation, and the Export Control Law. Through text analysis and systematic explanation, this paper holds that the current measures have avoided the risk of direct violation of the General Agreement on Tariffs and Trade and the Protocol on China's Accession to the WTO to the maximum extent. Among them, the domestic regulation based on environmental protection has a strong defense space for compliance, while the item control under the Export Control Law faces the problem of proof of a national security exception. The essence of rare earth export control is the deep tension between national economic sovereignty and the principle of free trade. China should make good use of the policy space given by international law while adhering to the sovereignty of resources, and realize the paradigm shift from passive compliance to active shaping of rules.

Keywords: Rare earth export control; WTO rules; National security exception; China acceded to the Protocol; Legal warfare

Online publication: July 16, 2026

1. Introduction

Rare earth is known as an "industrial vitamin" and plays an irreplaceable role in strategic emerging industries such as new energy vehicles, permanent magnet materials, and national defense and military industry. China, which accounts for about 35% of the world's reserves, supplies more than 90% of the world's rare earth production, and has suffered huge resource consumption and environmental costs for a long time. In order to safeguard national resource security and the ecological environment, since the end of the 1990s, China has gradually established a rare earth export management system including export quotas, export tariffs, and export licenses. This system was suddenly tightened after 2009, which quickly triggered a strong rebound from WTO members such as the United States, Europe, and Japan. In 2012, it evolved into the world-famous "China Rare Earth Case" (DS431/432/433).

In 2014, the WTO Dispute Settlement Body ruled that China's export tariffs and quota measures on rare earths, tungsten and molybdenum violated many provisions of the 1994 General Agreement on Tariffs and Trade (GATT1994) and the Protocol on China's Accession, and could not invoke the environmental exception clause in Article XX of GATT as a defense. This case not only forced China to substantially adjust its rare earth export control policy, but also revealed the sharp conflict between resource sovereignty and multilateral trade rules in emerging economies.

After losing the case, China did not give up the control of rare earth resources, but carried out a sophisticated legal evasion and system reconstruction. From the cancellation of export tariffs and quotas, to the integration and promotion of resource taxes, and the strengthening of environmental protection verification, to the clarification of rare earth as "a specific mineral subject to protective mining by the state" in 2014, and to the promulgation of the Export Control Law of People's Republic of China in 2020, a brand-new rare earth control system that is more deeply embedded in the domestic regulatory framework has gradually taken shape.

So, has this carefully reconstructed control system successfully bypassed the "reef" of WTO rules? Under the current framework of international law, can it withstand a new round of legal challenges? This paper will conduct a comprehensive international review of the current rare earth export control policy from the two dimensions of history and norms, and explore the institutional game and future trend behind it.

2. System retrospection: The transformation from traditional trade tools to compound management and control system

To understand the present, we must first look back. The evolution of China's rare earth export control policy is a history of fierce collision, compromise, and remolding between national will and international trade rules.

2.1. Quota and tariff era and its legitimacy end

China's control over rare earths began in the late 1990s, with export quotas and export tariffs as the main tools. In 1998, China began to implement export quota license management for rare earths. Since 2003, the total quota has been continuously lowered, and it has been reduced to about 30,000 tons in 2012, which is nearly half of the peak period. In 2005, China canceled the export tax rebate for rare earths and imposed export tariffs, with the highest tax rate of 25%.

This combination of "quantity restriction and high tariff" is extremely fragile in international trade law. Paragraph 1 of Article XI of GATT, the cornerstone rule of WTO, clearly requires that "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences 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" [1]. The export quota implemented by China directly violates the quantitative restriction ban.

Even more deadly, in Article 11, paragraph 3 of the Protocol on the Accession of the People's Republic of China, China made a promise of "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT" [2]. The 84 taxable products listed in Annex 6 do not contain any rare earth products. This means that China's act of imposing export tariffs on rare earths not only violates GATT rules, but also directly violates its WTO commitments, leaving little room for defense.

2.2. Normative Interpretation of "China Rare Earth Case"

"China Rare Earth Case" is the first key to understanding the current policy. In this case, China invoked Article XX "General Exceptions" of GATT as a defense. Its core argument is that rare earth belongs to exhaustible natural resources, and the mining and smelting process has caused serious environmental pollution, so the export restriction measures are related to "protecting exhaustible natural resources" (item g) and "protecting human, animal and plant life or health" (item b), which is justified.

The logic chain of the WTO Appellate Body's ruling is clear and cold, and it "holds a negative attitude towards China's invocation of GATT general exception defense" [3]. First of all, "the expert group agrees with China's view that "every WTO member can design protection policies according to general international law and the principle of permanent sovereignty of the country over natural resources embodied in the United Nations and other international documents" [4]. It does not deny that rare earths are "exhaustible natural resources," but also recognizes the importance of protecting the environment. The crux of the problem lies in the requirement of the "hat clause" in Article XX, that is, the implementation of measures "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" [5].

The Appellate Body found that China's parallel restrictions on domestic rare earth mining and consumption were obviously insufficient. For example, although the total control index of rare earth mining in China has been set, it has far exceeded the actual output for many years, which does not constitute an effective constraint in essence; At the same time, downstream enterprises have low environmental access threshold, and a large number of primary products with high pollution and high energy consumption are supplied to the domestic market, but the export is strictly restricted. This huge gap between internal and external control makes it difficult to justify the environmental protection goal of export restrictions, which is finally recognized as "disguised restrictions on international trade" and also constitutes "unreasonable discrimination." Therefore, China lost the case in an all-round way, and the direct reason for losing the case was that "it could not invoke the exception clause of GATT as a defense" [6].

The norm of this case is of far-reaching significance. It does not deny a country's sovereign right to protect the environment and resources, but puts forward extremely high requirements for goodwill and consistency in the way this right is exercised. Simply "blocking" exports on the border, while domestic production and consumption are not restrained, is recognized as a kind of "disguised trade protectionism" in international law.

2.3. The logic of policy reconstruction in the post-WTO era.

After the ruling, China quickly adjusted its strategy. On January 1st, 2015, China canceled the 16-year-old rare earth export quota system, and on May 1st of the same year, all export tariffs on rare earth products were canceled. An era is over. Instead, it is a more sophisticated and internalized control system, including resource tax reform, environmental regulation strengthening, industry concentration upgrading, and legal weapon upgrading.

The first is the resource tax reform. In 2015, China changed the rare earth resource tax from specific quantity to ad valorem, which greatly increased the tax burden, and applied it uniformly throughout the country, treating imported and domestic ores equally.

Secondly, environmental regulation is strengthened. Taking the opportunity of the revision of the Environmental Protection Law, the environmental protection access threshold of rare earth mining and smelting separation enterprises was greatly improved, and the Emission Standard of Rare Earth Industrial Pollutants was promulgated. In fact, the total output of the industry was reduced through domestic regulations such as eliminating backward production capacity and strict pollutant discharge permits.

Third, the concentration of the industry has increased. By promoting the integration of the six major rare earth groups, the mining right certificate will be centralized, and strict "total mining control index" and "total smelting separation control plan" will be implemented. On the surface, this move is an internal management of domestic production and does not directly target international trade. However, due to the high proportion of rare earth production in China, domestic production control will inevitably have a spillover effect of tightening global supply.

Finally, the legal weapons are upgraded. Rare earth is further defined from "mineral resources" to "specific minerals that are protected by the state," and the highest-ranking domestic legal basis for its export control is provided in the Export Control Law.

The essence of this transformation lies in the shift from rough border measures to fine domestic supervision, "making clear that the purpose of control measures is environment, resource protection and sustainable development, and reasonably explaining the internal relationship between this measure and the above-mentioned goals it hopes to achieve" [6]. This strategy largely circumvents the strict regulation of border measures by WTO rules, but it also leads the compliance dispute to the more complicated deep water area of international law.

3. An analysis of the compliance of the current control system with international law

Whether the current system can stand the test needs to analyze its three legal pillars step by step: multilateral rules of the WTO, national security issues under the Export Control Law, and national responsibility issues in international law.

3.1. Re-examination of the compliance of WTO multilateral trade rules

3.1.1. Resource tax and domestic environmental regulation: The potential boundary of trade restriction dispute

As far as resource tax is concerned, because domestic and imported rare earths are levied equally, it conforms to the requirement of "national treatment" in Article III, paragraph 2 of GATT, that is, imported products are not directly or indirectly levied with domestic taxes exceeding those of similar domestic products. Therefore, the pure resource tax itself is more difficult to challenge in the WTO.

The focus of the dispute lies in environmental regulation and industry integration measures. These measures belong to domestic control measures, which do not directly regulate trade on the surface, but if their design or implementation imposes a heavier burden on export products than domestic sales products, or there is de facto discrimination, they may still be considered as violating Article III, paragraph 4 (on national treatment of domestic laws and regulations) or Article XI, paragraph 1 of GATT.

The real legal battlefield lies in the environmental exception of Article XX of GATT. Compared with the "China Rare Earth Case" period, China's policy situation today is essentially different: its control logic has changed from border export restrictions to domestic production and consumption restrictions covering the whole industrial chain. This means that it is very likely that China will successfully meet the "relevance" premise of Article XX (g) and (b) on the protection of exhaustible natural resources and human, animal and plant life or health.

The key challenge still lies in the test of the "hat clause." At present, China must be able to prove that there is no fundamental imbalance between its restrictive effect on global rare earth supply and its protective effect on domestic industries through environmental regulation and total control. This requires extremely solid factual evidence to prove that domestic regulations are true, effective, and strictly enforced, rather than a "green coat" to restrict exports and support downstream industries. For example, has strict environmental enforcement really shut down a lot of domestic production capacity? Is the total control index significantly lower than the domestic market demand, thus constituting a disguised supply restraint? This is the core of fact review in any potential litigation in the future.

3.1.2. Prohibition of quantitative restrictions and export licensing procedures: the trap of procedural justice

Although China has abolished export quotas, it still retains export license management. According to the Export Control Law, the state implements a licensing system for the export of controlled items. Under the framework of the WTO, the export license itself is not prohibited, but its procedures must conform to Articles VIII (Fees And Formalities Connected With Importation And Exportation) and X (publication and implementation of trade regulations) of GATT and the principles of the Agreement on Import Licensing Procedures (although it is mainly aimed at imports, its procedural justice spirit can be applied by analogy).

Specific requirements include: the procedure should be simple, transparent and predictable; All relevant information should be published; Audit standards should be objective; Processing time shall not be unreasonably delayed; The application shall not be refused because of minor errors in the documents. If China uses the export license as a disguised and discretionary tool to restrict the export quantity, such as arbitrarily refusing approval on the grounds of unclear "national interests" or "industrial policies," setting up a cumbersome and opaque examination and approval process, or applying discriminatory treatment to different enterprises, it will easily be considered as constituting de facto export restrictions, and then violating the first paragraph of Article XI of GATT.

3.2. Export Control Law and the dilemma of citing Article XXI of GATT "National Security Exception"

This is perhaps the most subversive and controversial field at present. The Export Control Law, implemented in 2020, takes "safeguarding national security and interests" as the primary legislative purpose, and extends the scope of controlled items to "technical data related to items," and can impose severe penalties ranging from fines and credit punishment to criminal responsibility on violators.

This law provides a solid domestic legal basis for rare earth export control, but if we want to be completely immune in international law, we must successfully invoke GATT Article XXI "Security Exception." This article allows members to take any actions they think necessary to protect "basic security interests," including actions related to "fission and fusion substances or substances derived from these substances" and "trade in weapons, ammunition and war materials," as well as actions taken under "other emergencies in international relations."

Rare earths are undoubtedly highly related to "security interests" because of their key applications in national defense industries such as missile guidance, lasers, radar, and advanced alloys. However, there are two major challenges in invoking Article XXI:

First, the self-judgment boundary of "basic security interests." For a long time, members have retained great discretion in the determination of "basic security interests," and WTO expert groups have always upheld judicial restraint. However, the report of the expert group on "Ukraine v. Russia's transportation restriction case" "(DS512) broke the myth of "complete self-judgment," and held that the expert group had the right to examine the goodwill of the members in invoking this clause and whether the measures were reasonably related to the claimed security objectives. This means that if China fully resorts to the national security exception, it may face WTO review.

Second, the non-discrimination and necessity of the measures are controversial. The United States, the European Union, Australia and other countries with rare earth resources are making great efforts to build a "de-China" rare earth supply chain. In this context, if China's regulation is shaped as a tool of economic coercion aimed at a specific country or enterprise, it may be successfully refuted by the other side, thinking that it is not a "necessary" action to protect "basic security interests," but serves geo-economic competition.

Therefore, although the "hard shell" of the national security exception provides a huge space for the game, there are still legal risks if it is completely dependent on it. A more prudent strategy is to stratify the control measures under the Export Control Law: for heavy rare earths such as dysprosium and terbium, which are directly used in cutting-edge national defense weapons, security exceptions can be firmly invoked; For a wide range of light rare earth and permanent magnet materials, it is more dependent on domestic regulatory reasons such as environmental and resource protection to build a "composite defense" system.

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3.3. Normative tension and reconciliation between permanent sovereignty of national resources and free trade obligations

Jumping out of the WTO micro-rules, from the macro perspective of public international law, rare earth export control touches the cornerstone principle conflict of international law.

On the one hand, the Resolution on Permanent Sovereignty of Natural Resources adopted by the United Nations General Assembly in 1962 and a series of subsequent international documents confirmed that countries and people enjoy inalienable permanent sovereignty over their natural resources. Managing the exploitation and export of rare earth as a strategic resource is the inherent connotation of a country's sovereignty.

On the other hand, the exercise of this sovereignty is not without any restrictions. When a country voluntarily accepts the obligation of trade liberalization by joining the WTO and other international treaties, it constitutes a partial self-restriction on the exercise of its sovereignty. The core of the problem is not whether there is a restriction, but the boundary and intention of the restriction.

The reconciliation point of this tension lies in the principle of "goodwill." When a country exercises its resource sovereignty, it must fulfill its treaty obligations in good faith. This means that its control measures must have real and non-protectionist domestic policy objectives, such as real environmental protection, security concerns or intergenerational equity of resources, rather than just seeking unfair competitive advantages for domestic industries, let alone being used as a random geopolitical weapon. China's policy defense must be strictly anchored on these legitimate goals widely recognized by the international community, and be rigorously and verifiably demonstrated.

4. From passive compliance to active shaping: China's path choice

Looking at the past is to look far into the future. In the "key mineral era" where global green transformation and competition among big countries interweave, it is impossible for China to return to the simple role of "compliance" and must become the active shaper of rules.

4.1. Dynamic compliance: Building a fact defense system based on "process"

The core of losing the case of China Rare Earth lies in the invalidation of the factual defense. The future legal battle is no longer just a dispute over the interpretation of laws and regulations, but also a dispute over data, evidence, and factual narration. China should build a dynamic and traceable "process compliance" system. This means that every domestic measure that may have a trade restriction effect, from the fines of environmental supervision, the list of mine closures, to the audit of energy consumption indicators of downstream enterprises, must be systematically collected, sorted out and made transparent to the international community, forming a complete and dense chain of evidence to prove that our restrictions are true, undifferentiated and non-discriminatory, and its primary purpose is to repair distorted domestic market failures and environmental hazards, rather than manipulate global prices. This is a grand and precise treatment project.

4.2. Game of rules: Actively participating in the formulation of key mineral trade rules

At present, the international governance system of "key minerals" is in an accelerated reconstruction period. The US-led "Mineral Security Partnership," the EU's "Key Raw Materials Act" and the resource nationalism legislation in Australia and Canada are all creating various forms of export control, investment review and industrial subsidies, many of which are in conflict with the core principles of the WTO, such as non-discrimination and prohibition of quantitative restrictions.

China should not just be a passive receiver of rules. On the one hand, in the WTO reform negotiations, we should unite with the vast number of developing countries to promote the clarification of the applicable standards of the environmental exception in Article XX of GATT, and clarify under what conditions the domestic control measures implemented to protect the exhausted natural resources and covering the whole process of production and consumption can be regarded as goodwill and compliance. On the other hand, in bilateral and regional free trade agreements, we can explore the formulation of a special chapter on "key mineral cooperation and security exceptions," and establish a clear and operable framework of international law rules to ensure reasonable control based on resource security and environmental sustainability, so as to make it a rule-based norm rather than a controversial exception.

4.3. Institutional interaction: Strengthening the coordination between domestic rule of law and international rule of law

The Export Control Law has been established, but its specific implementation still needs a lot of administrative regulations, rules, and control lists to fill in. When formulating these sub-norms, it is necessary to review compliance with international law. For example, are the criteria for determining the control list purely subjective security judgments or objective technical and threat assessment indicators? Are the procedures for license approval transparent and efficient enough and provide adequate relief channels? Is the severity of punishment for domestic violations balanced with the sanctions against foreign entities that try to violate export control, so as to avoid discriminatory review under the "hat clause"?

Internalizing the procedural justice spirit of international law into the operating gene of the domestic control system will not weaken the control efficiency, but will greatly enhance its international legitimacy and durability, making our control invincible when it encounters external challenges.

5. Conclusion

The evolution of China's rare earth export control policy is a profound portrayal of seeking a difficult balance between national resource sovereignty and the ideal of multilateral trade liberalization. From the simple and rude "quota plus tariff" in the early days, to the total loss of the "China Rare Earth Case," and then to the complex system with multiple regulations on environment, industry, and safety, China has demonstrated its strong institutional learning and adaptability.

From the perspective of international law, this new system is much more sophisticated in form: it avoids the rigid "red line" in Article XI of GATT and the Protocol on China's Accession to the WTO to the maximum extent. Domestic resource tax and environmental regulation have strong legitimacy under the principle of national treatment, but we should not be too optimistic about the "national security exception" clause on which the Export Control Law relies. The uncertainty in the interpretation and application of international law is still the biggest potential legal risk faced by China's rare earth control system.

Fundamentally speaking, the global legal game around rare earths is a deep conflict between the old liberal trade order and the emerging resource nationalism. Simple compliance is not enough to safeguard national interests. China's future path choice should be: while firmly safeguarding resource sovereignty and national security, it should honor its commitment to human common values such as environmental protection and intergenerational equity with high sincerity and precise governance, and turn every control practice into a solid accumulation of legal facts. In the end, relying on strict adherence to the domestic rule of law and active participation in the formulation of international rules, we will precipitate our own interests into universally recognized international rules and realize the fundamental role change from the "challenger" of the existing order to the "supplier" of legitimacy.

Funding

Project No: 2026 Elective Courses of General Education in Shenzhen Polytechnic University, Legal Conflict and Dialogue in the Era of Globalization.

Disclosure statement

The author declares no conflict of interest.

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