

# **Legality of China's Export Rebate of Animal Products & Policy Implications for RTAs during COVID-19**

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## **2. Motivations**

Nowadays the international trading system is subject to an increased number of new trade restrictions and distortions, from tariff increases among major traders, to significant government support in key sectors amid COVID-19. It's worth mentioning in particular that China's Finance Ministry and The State Taxation Administration of China have announced on March 17 an increase in the tax rebate on exports of some 1500 products besides animal products.<sup>①</sup> It's just the new export tax rebate policy in Chinese animal products sector under criticism. The newspaper's original source is an April 6 report "[COVID-19: China Medical Supply Chains and Broader Trade Issues](#)" by the US Congressional Research Service for US federal legislators. Political and International Editor for The Sydney Morning Herald gave his opinion that "Chinese authorities' latest wildlife trade outrage is mindbogglingly reckless". Some trade experts claimed that it works as an export subsidy for Chinese, therefore "[illegal under SCM Article 3](#)".<sup>②</sup> What's more, applying an export subsidy to a domestically prohibited good would seem especially heinous as it compounds the moral transgression in allowing exports of domestically prohibited goods.

Our motivation is to review the challenge faced by China related to wildlife trade during COVID-19, to focus primarily on legality of China's rebate of animal products under SCM through WTO case study and normative analysis as well as literature review. Secondly, we will prove the legality and legitimacy of Chinese artificial bred wild animals under CITES. Our main contribution is to give proposal for appropriate Chinese rebate policy for animal production sector, as well as recommendation for provisions to be considered in future wildlife trade agreements during and post the COVID-19 crisis.

### **3.1. Overview of Chinese export policy in animal products sector: 1981-2020**

The evolution of China's export tax rebate policy can be divided into three stages: 1985–93, 1994–7, and 1998 to the present. The Chinese government began to implement the export tax rebate policy in April 1985. By 1991, the export subsidy (above the amount of export rebate) was abolished. In 1994, the government implemented a major tax system. It abolished the industrial and commercial standard

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<sup>①</sup> <https://insidetrade.com/content/april-2020-congressional-research-service-report-covid-19-china-medical-supply-chains-and?destination=node/168552>(Last visited on 15 June, 2020)

<sup>②</sup> Steve Charnovitz, [China's New SCM Violations and the Larger Implications](#). Available at: <https://worldtradelaw.typepad.com/ielpblog/> (Last visited on 15 June, 2020)

tax and introduced a new value-added tax (VAT). For export goods, the VAT was zero.<sup>①</sup> That is to say, export goods would get a 17 or 13 per cent VAT rebate in accordance with the tax rate paid.

The export tax rebate for endangered animals & their products has been cancelled since The Notice on Reduction of Export Tax Rebate Rate for Some Commodities was published in 2007.<sup>②</sup> From 31 August, 2017, the export tax rebate rate for primary animal products is 11%.<sup>③</sup> The export tax rebate rate for some Chinese goods besides animal products from November 1, 2018 is 10%.<sup>④</sup> The State Tax Administration of China has raised the export tax rebate rate of special animal skins to 13% from 20 March, 2020.<sup>⑤</sup> But according to formal statistics, monthly export chart of dead animals unfit for human consumption has declined 200% from April 2019 to April 2020.<sup>⑥</sup>

China has banned national trading of wild animals since January 30, 2020 until the novel coronavirus outbreak is brought under control. The World Wildlife Fund (WWF) welcomed China's temporary ban on wild animal trade. "China's decision to place a temporary ban on all wild animal trade underscores the need for greater public awareness about not just any associated threats to human health posed by illegal or unregulated wildlife trade, but also its impact on wild populations and on global biodiversity." "This health crisis must serve as a wake-up call for the need to end unsustainable use of endangered animals and their parts, as exotic pets, for food consumption and for their perceived medicinal value."<sup>⑦</sup>

However, China continues to encourage animal imports. According to the General Administration of Customs of China (GACC) on March 7, 2020, 14 kinds of animal and plant products from 7 countries have been newly approved for importation since February 1, 2020. These 14 animal and plant products include fish oil, fish meal, feed additives, etc.<sup>⑧</sup>

### **3.2. Policy Responses to Chinese export rebate policy of animal products during COVID-19**

Many countries have resorted to unilateral, protectionist and even hegemonic policies to China, which may cause turbulence and conflict in the current international trade order.

#### **3.2.1 America**

U.S.: Measures were taken to ensure the quality of imported food and to avoid novel Coronavirus transmission. Strengthened supervision over imports from China by taking a number of inspection measures, such as import screening, inspection, sampling

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<sup>①</sup> See China, State Administration of Taxation, 'Provisional Regulations of People's Republic of China', effective as of 1 Jan. 1994. (For small taxpayers, the VAT is six per cent.)

<sup>②</sup> <http://www.chinatax.gov.cn/chinatax/n810341/n810765/n812176/200706/c1194297/content.html>(Last visited on 16 June, 2020)

<sup>③</sup> [https://www.sohu.com/a/145404802\\_236988](https://www.sohu.com/a/145404802_236988)(Last visited on 16 June, 2020)

<sup>④</sup> <http://m.qqjjsj.com/show69a41242>(Last visited on 16 June, 2020)

<sup>⑤</sup> [https://www.sohu.com/a/382442111\\_764272](https://www.sohu.com/a/382442111_764272)(Last visited on 16 June, 2020)

<sup>⑥</sup> <http://www.ciedata.com/coding/05119990.html> (Last visited on 16 June, 2020)

<sup>⑦</sup> <https://www.foodsafetynews.com/2020/01/china-halts-trade-of-wild-animals-due-to-coronavirus-who-urges-food-safety-measures/> (Visited on 24 June, 2020)

<sup>⑧</sup> <http://www.biren01.com/fo/ofxt/193.iunm> ((Visited on 24 June, 2020))

and early warning since April 7, 2020. Title 50 of Electronic Code of Federal Regulations for Wildlife and Fisheries import and export is current as of June 26, 2020.

The U.S. Centers for Disease Control and Prevention said there is a lot unknown about the newly emerged 2019 novel coronavirus ([2019-nCoV](#)) and how it spreads. There is no evidence to suggest animals or animal products imported from China pose a risk for spreading 2019-nCoV in the U.S., according to the agency's Jan. 29 update. The agency advised that due to poor survivability of coronaviruses on surfaces, there is likely very low risk of spread from products or packaging shipped over a period of days or weeks at ambient temperatures and there is no evidence to support transmission associated with imported goods.<sup>①</sup>

Canada: Importation Meat and meat products derived from swine of Chinese origin is not allowed; Only cooked poultry meat products from poultry of Chinese origin are allowed; Importation of processed meat products of Chinese origin is not allowed since Dec., 2019. <sup>②</sup>As of January 2019, commercial importers of certain foods require a valid Safe Food for Canadians (SFC) licence to import food into Canada. Other commercial importers will have until July 15, 2020, to comply with the Safe Food for Canadians Regulations (SFCR), but are advised to apply for a license as soon as possible to avoid disruptions.

### **3.2.2 Europe**

EU: There is Commission Decision of 20 December 2002 concerning certain protective measures with regard to the products of animal origin imported from China.<sup>③</sup>

UK: Products of animal origin which are imported from China must comply with specific health conditions. The following products can enter the UK providing consignments adhere to the following rules:

undergo pre-shipment checks for the presence of the illegal veterinary medicine chloramphenicol and nitrofurans and their metabolites;

accompanied by a signed declaration from the Chinese competent authority with the analytical check results.

Fishery products are all animal products derived from fish. Aquaculture is a type of fishery product that has been farmed. Consignments of aquaculture need to undergo pre-shipment checks for the presence of malachite green, crystal violet and their metabolites. Aquaculture must be accompanied by a signed declaration from the Chinese competent authority with the analytical results.

For full controls and a complete list of controlled products see the Commission Decision 2002/994/EC ([Opens in a new window](#)). The import restrictions for some poultry products from China remain in place due to the outbreak of avian (bird) flu.<sup>④</sup>

Russia: From 31 January, 2020, temporary restrictions will be imposed on live ticks, mites and nematodes from China and on the collection (specimens) of live insects,

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<sup>①</sup> <https://www.foodsafetynews.com/2020/01/china-halts-trade-of-wild-animals-due-to-coronavirus-who-urges-food-safety-measures/> ((Visited on 24 June, 2020))

<sup>②</sup> [file:///C:/Users/chere/AppData/Local/Temp/Rar\\$DIa15160.42710/CANADA%20Conditions%20for%20importing%20meat%20products%20from%20China%20-%20Canadian%20Food%20Inspection%20Agency.pdf](file:///C:/Users/chere/AppData/Local/Temp/Rar$DIa15160.42710/CANADA%20Conditions%20for%20importing%20meat%20products%20from%20China%20-%20Canadian%20Food%20Inspection%20Agency.pdf) ((Visited on 25 June, 2020))

<sup>③</sup> [EU Commission decision 202/994/EC https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32002D0994](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32002D0994) ((Visited on 25 June, 2020))

<sup>④</sup> <https://www.food.gov.uk/business-guidance/importing-high-risk-food-and-feed> ((Visited on 26 June, 2020))

animals and plants for scientific research, to restrict the entry into and transit through Russia. On January 30th temporary restrictions were imposed for a month on all kinds of exotic animals produced in China for viewing, including insects, arthropods, amphibians and reptiles. As well as live fish and aquatic animals, entering and transboundary transport through Russia. They are also requested to suspend the issuance of quarantine certificates for the above animal and plant products before March 1, 2020. When importing goods subject to animal and plant quarantine control, upon prior notice from the competent authorities of the exporting country, the receiving party of the goods is allowed to provide a copy of the animal and plant quarantine document accompanied by a letter of assurance from the receiving party of the goods, confirming receipt of the original and submitting it to the Russian Animal and Plant Health Supervision Agency.

### **3.2.3 Oceania**

Australia: On 9 April 2020, the Ministry of Industry of Australia issued Notice No. 53-2020, which was a temporary requirement for health certificates for imported animal products during the COVID-19. Due to the recent development of COVID-19, the express shipment has been greatly affected, and the importer cannot timely submit the original health certificate to the Australian border inspection agency. To ensure that goods are imported, the Australian Department of Agriculture allows importers to submit electronic copies of their certificates for official inspection and, in some cases, requires the competent authorities of the exporting country to verify the certificates. Australia will also hold importers liable for providing false certificates. The interim measure will last until July 1, 2020.

### **3.2.4 Asia**

In comparison with America or Europe, many Asian countries carry out beggarthy-neighbour trade policies according to Chinese export rebate policy of animal products during COVID-19.

India has stepped up quarantine efforts on agricultural and livestock products from China, requiring quarantine officials to stay at the port day and night, and send all relevant samples to laboratories for testing since March 17, 2020.

Turkey: Suspended imports from China including poultry, seafood, mollusks, animal fats and similar animal products since March 4, 2020.

Philippines: Temporary ban on imports of poultry and wild birds and their products from China since March 4, 2020.

South Korea: Temporary ban imports from China of wild animals, including snakes, bats, raccoons, badgers and civets, which may transmit the coronavirus since March 4, 2020.

Indonesia: Temporary ban on imports of live animals from China since March 4, 2020. Novel Coronavirus test is required for importing mammals and pets from Hong Kong, China.

Philippine: Temporary ban imports of poultry and wild birds and their products from China since April 7, 2020.

### 3.2.5 Africa

Egypt: The Egyptian Food Safety Authority has announced a ban on onion imports from China and tightened controls on all food imports from Asian countries, including increased cooperation with multiple agencies (mainly quarantine agencies) and increased inspections of all imports and exports. The head of Egypt's food safety authority stressed that his agency would inspect more than 14 agricultural products, mainly potatoes, oranges and peanuts.

Mauritius: Since 3 February, 2020, Mauritius has decided to embargo some goods exported to Mauritius from Hong Kong Special Administrative Region of China, Taiwan region of China and Southern China. The prohibited goods are as follows : (1) Live animals and fish (2) Chilled, frozen and dried seafood, including fish products such as fish and oyster sauce (3) Chilled, frozen and dried meat (4) wool (5) animal hair (6) animal feed, including fish feed.<sup>①</sup>

In principle, the WTO members can't implement or maintain import prohibitions or restrictions as these are quantitative restrictions on trade under GATT Article 11(1). However, GATT Article 11(2) allows temporary import restrictions on any agricultural or fisheries product, necessary to the enforcement of governmental measures which operate to restrict the quantities permitted to be produced of any animal product. In addition, GATT Article 20 permits members adopt or enforce trade measures necessary to protect human, animal or plant life or health as long as such measures would not constitute a means of arbitrary or unjustifiable discrimination between countries.

However, In addition to pandemic issues, the world is beset by serious crises of trust and threats to the international rules and order. Some long-standing international norms and ethics that have been widely recognized and observed are now abandoned and betrayed. Countries should address the legitimate concerns of other countries while pursuing their own interests, and respect the security of other countries while safeguarding their own security.

### 3.3 Legality of China's export rebate policy of animal products under International Law

The export tax rebate policy in Chinese animal product sector is under hot dispute, as it is claimed that it works as an export subsidy and constitutes China's New SCM violation because a bounty on exports is illegal per se under SCM Article 3 of the World Trade Organization (WTO).<sup>②</sup> On the contrary, China's subsidy policy complies with WTO rules and should not be attacked.

Subsidies are a very sensitive legal issue in International Trade Law. Subsidies can distort trade flows if they give an artificial advantage to exporters or import-competing industries. <sup>③</sup>

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<sup>①</sup> <http://www.govmu.org/English/News/Pages/Coronavirus-Ban-on-importation-of-live-animals-and-products-of-animal-origin-from-China.aspx> (Visited on 28 June, 2020)

<sup>②</sup> Steve Charnovitz, China's New SCM Violations and the Larger Implications. <https://worldtradelaw.typepad.com/ielpblog/> (Visited on 30 June, 2020)

<sup>③</sup> WTO Secretariat, World Trade Report 2006: Exploring the Links between Subsidies, Trade and the WTO (WTO, 2006) xxii, available at: [www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report6\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report6_e.pdf) (Visited on 3 July,

### **3.3.1. Basic requirements of WTO Law on export subsidy and implication**

#### **i. Text analysis of export tax rebate system provisions in GATT1994**

GATT Article 6 (4), Article 16 annotations and Annex 9 ‘comments and supplementary provisions’, affirmed the legitimacy of the export tax rebate system as a whole, as the export tax rebate itself does not cause countervailing measures. Their differences can be summarized in the following two aspects:

First, the exemption of duties or domestic taxes on export goods, or the refund of such duties or domestic taxes not exceeding the amount already collected, shall not be regarded as a subsidy. A Countervailing duty shall not be imposed on a member solely on the ground that the export commodity has been exempted or refunded from taxes paid on the domestic consumption of the same commodity.

Secondly, for the essence of export tax rebate, it is not export subsidy. Although it is a fiscal act of the government and only provided for export commodities, with special nature, the export tax rebate does not confer benefits to export enterprises, not based on their export performance, let alone having nothing to do with incentives. In the case of ‘Suspension of Tariff Settlement by the United States’, the working group reviewed the Japanese government's exemption of domestic consumption tax on export commodities and pointed out in its report that ‘The Japanese tax practice in dispute fully conforms to the provisions of GATT, its definite interpretation and practice. They also agreed that if countervailing duty is imposed, the levy of that duty will violate the provisions of GATT, including Article 6 (4) and the interpretation of Article 16.

#### **ii. Text analysis of the provisions of export tax rebate system in SCM**

As defined in Article 3.1(a) of the SCM, export subsidies are subsidies contingent upon export performance. The meaning of ‘contingent’ in this provision is ‘conditional’ or ‘dependent for its existence on something else’.<sup>①</sup> Pursuant to footnote 4 of the SCM, a subsidy is contingent de facto upon export performance:

When the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

Therefore, the SCM allows members to provide rebates on export duties as long as the rebate does not exceed the full extent of the duty imposed. Thus, in contrast to other trade policies such as export subsidies, VAT rebates are permitted by the SCM as long as they have neutral effects on exports and imports.

However, export tax rebate and subsidy are two completely different systems, the former refund or reduction of indirect tax to the amount already collected or applied does not grant benefits to exporters, a practice permitted by the WTO; The latter provides an advantage to exporters. It distorts the international trade order and is strictly restricted by WTO rules.

Export rebate system and subsidy have close relation, can promote import and export. In practice, export tax rebate receives increasing attention in terms of

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2020)

<sup>①</sup> See AB Report, Canada-Aircraft, para. 166. See also Panel Report, Australia-Automotive Leather II, para.9.55.

stimulating exports as permitted by the WTO. But in some countries, export tax rebate and export subsidy are intertwined, which leads to the misunderstanding of export tax rebate. Some countries are trying export subsidy in the name of export tax rebate. The export tax rebate exceeds the indirect tax actually included in the export product and is actually granted to the exporter benefits, so constitute export subsidies. It has caused trade friction between exporting and importing countries and has even been sued by the DSB. It can be seen that the export tax rebate system is a widely adopted tax preference system for the WTO rules but at the same time there are risks of abuse. Therefore, further analysis will be made below to clarify the relationship between the export tax rebate system and subsidies.

### **iii. WTO Case of Tax Rebate Issue concerning China**

The first case is China Value-added Tax on Integrated Circuits.<sup>①</sup> In March 2004, the US initiated dispute settlement proceedings against China over the VAT rebate system for integrated circuits. The US has proposed that China impose a statutory VAT on imports of integrated circuits, while imposing most of the VAT rebate on domestic production of similar products. The United States believes that China's practice is inconsistent with the GATT and the GATS on National Treatment Principle.

The subject of this dispute stems from the Circular Regarding Issuance of Certain Policies Concerning the Development of the Software and Integrated Circuit Industry issued by the State Council of the PRC on June 24, 2000 (hereinafter “Circular No. 18”)<sup>②</sup>. The focus of attack on China's unfair trade policies are the value-added tax ("VAT") rebate programs as applied in the IC industry and as provided for in Circular No. 18, together with its subsequent legislations.<sup>③</sup> The US considers that these measures are inconsistent with the obligations of China under Articles I and III of the GATT1994, the Protocol on the Accession of the PRC(WT/L/432), and Article XVII of the GATS.

Finally, China agreed to amend or revoke the measures at issue to eliminate the availability of VAT refunds on ICs produced and sold in China and on ICs designed in China but manufactured abroad by 1 Nov, 2004 and 1 Sept, 2004 respectively.

The second case is Certain Measures Granting Rebates, Reductions or Exemptions from Taxes and Other Payments.<sup>④</sup> On February 2, 2007, the United States announced the WTO for consultation on measures of China to reduce and refund taxes and other payments (hereinafter referred to as “taxes and other payments”). Us accuse of China based on three aspects. First, China gives tax credits and exemptions for enterprises purchasing domestic products, thus makes domestic products more popular. Secondly, China is inconsistent with Article 3 of the SCM by giving tax deductions and exemptions to some specific export enterprises. Furthermore, to the extent the

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<sup>①</sup> China-Value-added Tax on Integrated Circuits, WT/DS309/1 (March 23, 2004)

<sup>②</sup> [http://www.gov.cn/gongbao/content/2000/content\\_60310.htm](http://www.gov.cn/gongbao/content/2000/content_60310.htm) (Visited on 7 July, 2020)

<sup>③</sup> See Testimony of Anne Craib, Director, International Trade and Government Affairs, Semiconductor Industry Association (SIA), Before the U.S.-China Economic and Security Review Commission Hearing on China's WTO Compliance and U.S. Monitoring Efforts (2/5/04), at [https://www.sia-online.org/downloads/testimony\\_china\\_040205.pdf](https://www.sia-online.org/downloads/testimony_china_040205.pdf) (last visited on 7 July, 2020); SIA, Written Testimony for the House Ways and Means Committee Hearing on United States-China Economic Relations and China's Role in the Global Economy, at [https://www.sia-online.org/downloads/testimony-china\\_103103.pdf](https://www.sia-online.org/downloads/testimony-china_103103.pdf) (Oct. 31, 2003) (last visited on 7 July, 2020).

<sup>④</sup> China-Certain Measures Granting Rebates, Reductions or Exemptions from Taxes and Other Payments, WT/DS358/1 (19 December, 2007).

measures accord imported products treatment less favorable than that accorded “like” domestic products, they appear inconsistent with Article 3(4) of the GATT 1994 and Article 2 of the TRIMs Agreement. The measures also appear not to comply with China’s obligations under paragraphs 7.2-7.3 and 10.3 of Part I of its Accession Protocol (WT/L/432), as well as paragraph 1.2 of Part I of its Accession Protocol.

Later Mexico made similar claims on similar grounds. On November 29, 2007, China signed memoranda of understanding with the United States and Mexico: no longer implement the policy of exempting workers and staff from paying price subsidies for foreign-invested enterprises; with the implementation of the new Enterprise Income Tax Law, other income tax incentives have been or will be abolished; The policy of VAT rebate on the purchase of domestic equipment does not constitute the WTO Subsidies.<sup>①</sup> China has amended a number of laws and regulations.

The significance of the second case lies in this tendency that China, as a country with Non-Market Economy, has begun to be formally used as a subsidy by the defendant, and its exemplary role cannot be underestimated. As to the core legal issue whether the countervailing law can be applied in Non-Market Economy countries, there are still great divergence among academics previously. Some scholars believe that it is a simple way to exclude non-market economy countries from the anti-subsidy law, which also leads to the obstruction of the domestic industry in seeking the anti-subsidy theory.<sup>②</sup> Some scholars also believe that if the countervailing law is not applied to all aspects of national technology production, it is equivalent to thinking that countervailing can be used for subsidies that exist little in market economy countries, but not for subsidies that exist in non-market economy countries, which is illogical.<sup>③</sup> Some other scholars believe that the government and the producer of non-market economy countries are essentially the same economy, so it is difficult to distinguish between dumping and subsidy, and it is unreasonable to apply the two laws simultaneously.<sup>④</sup>

This report is not intended to explain the concrete definition of “Non-Market Economy”(NME), which may trigger another controversial argument. China spent four years fighting for market-economy status since Article 15 of the Protocol on the Accession of the PRC expired in 2016. On 9 March 2017, China requested the establishment of a panel concerning certain provisions of the EU regulation pertaining to the determination of normal value for NME countries in anti-dumping proceedings involving products from China. But China didn’t provide effective argument to the WTO before the deadline, then the authority for establishment of the Panel lapsed as of 15 June, 2020. Foreign media said that “China has lost a landmark dispute with the European Union”, which opens the door for the EU to retaliate against China with tariffs that may also benefit the US.

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<sup>①</sup> <http://www.chinalawinfo.com/wto/wtojdaldetail.asp?jidalid=20>

<sup>②</sup> George J. Spak, *Georgetown Steel Corp. v. United States, Applying the Countervailing Duty Law to Imports from Non-market Economy Countries*, Law and Policy in International Business, Vol.18, 1986.

<sup>③</sup> Robert H. Lantz, *The Search for Consistency: Treatment of Non-market Economics in Transition under United States Antidumping and Countervailing Duty Laws*, American University of International Law and Policy, Vol.10, 1995.

<sup>④</sup> Robert Franklin Hoyt, *Implementation and Policy: Problems in the Application of Countervailing Duty to Non-market Economy Countries*, University of Pennsylvania Law Review, Vol.36, 1988.

Since 2007 the US and EU have carried out countervailing investigations and levied countervailing duties against China. Even in 2020, both the US and EU have enacted new export subsidy law specifically for China.

First, Removal of Rule Designating Developing and Least-Developed Country Designations Under the Countervailing Duty Law of USTR<sup>①</sup> announced cancellation of WTO preferential treatment for 25 economies, including PRC since 10 Feb, 2020. This means that the US trade with China in the future no longer applies “Special and Differential Treatment” but according to the standards of developed countries. It also means China will face tougher penalties for its trade with the US. Then the US enacted Neutralizing Unfair Chinese Export Subsidies Act of 2020<sup>②</sup> on 11 Feb, 2020. “In many areas China has long since ceased to be a developing country. Therefore, the same international trade rules must apply to China as to Germany or the EU.” “We must therefore achieve a reversal of the burden of proof for corresponding WTO proceedings,” demands Ulrich Ackermann, head of the VDMA Foreign Trade Association. “The instrument must be sharpened and every non-notified subsidy must automatically be classified as market-distorting - combined with the possibility of countermeasures,” demands the head of the VDMA Foreign Trade Association.<sup>③</sup>

Secondly, the EU released White Paper on levelling the playing field as regards foreign subsidies to protect the EU internal market on 17 June, 2020 in the current context of the COVID-19 crisis. The financial contribution consists in preferential tax treatment or fiscal incentives such as tax credits according to EU White Paper.<sup>④</sup> Some experts comment that Brussels forges new weapons to shield EU market from China.<sup>⑤</sup> Spokesperson of Chinese Mission to the EU answered questions concerning EU White Paper on Foreign Subsidies on 18 June, 2020, showing Chinese position to subsidies is crystal clear, namely, following the WTO rules and China's commitments made on its accession to the WTO.<sup>⑥</sup>

To sum up, neither does the WTO prohibit the application of anti-subsidy rules to Non-Market Economy countries, nor does the Protocol on the Accession of the PRC specify that other members should not take countervailing measures against China. In the future, China will face increasing countervailing pressure, and the issue of VAT rebate may still be the heel of Achilles, which is worth deep discussion.

### **3.3.2 Compliance of Chinese export policy for animal production under CITES**

China joined CITES as early as 1981, however, the provisions of international treaties need the cooperation and promotion of domestic laws of member countries. On

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<sup>①</sup> US Federal Register/Vol. 85, No. 27/Monday, February 10, 2020.

<sup>②</sup> <https://www.congress.gov/bill/116th-congress/house-bill/5846/text?r=12&s=1> (Visited on 10 July, 2020)

<sup>③</sup> Trade policy with China must be reoriented, 16 Jan, 2020. <<http://www.industrysourcing.com/article/trade-policy-china-must-be-reoriented>> (Visited on 10 July, 2020)

<sup>④</sup> EU White Paper on levelling the playing field as regards foreign subsidies, COM (2020) 253 final, Brussels, 17.6.2020.

<sup>⑤</sup> <https://www.politico.eu/article/brussels-eu-china-weapons-shield-market/> (Visited on 9 July, 2020)

<sup>⑥</sup> <http://www.chinamission.be/eng/fyrjh/t1789662.htm> (Visited on 9 July, 2020)

November 8, 1988, the Wildlife Protection Law of PRC<sup>①</sup> was formulated and promulgated. The Act specifically protects land wildlife by completely banning endangered species under CITES National Class I and II protection, as well as endangered species under CITES Appendix I and II (such as tiger bones, pandas, rhino horns and Tibetan antelopes). In 2006, the State Council promulgated the Regulations of the People's Republic of China on Administration of Import and Export of Endangered Wild Animals and Plants<sup>②</sup> in order to strengthen administration of import and export of endangered wildlife and their products, protect and rationally utilize wildlife resources, and fulfill the CITES in good faith. The Regulation is of epoch-making significance in the history of China's endangered species trade and brings China's wildlife import and export directly into the CITES trade system.

In comparison with the penalties for violations of similar laws in the US, India or UK, the penalties for violation of the Wildlife Protection Act in China are very heavy, with the maximum sentence of death imposed since 1988. The Amendment (VIII) to the Criminal Law of PRC, which took effect on May 1, 2011, amended the crime of smuggling precious animals and animal products, and adjusted the statutory punishment to fixed-term imprisonment of not more than five years, imprisonment of not less than five years but not more than ten years, imprisonment of not less than ten years or life imprisonment, and abolished the death penalty.

The Wildlife Protection Law of China 1988 (revised in 2016) also prohibits the import, export, re-export, and possession of endangered species without authority. Import permits are required for Appendix I but not Appendix II species. Article 3 of the law states that wildlife of China is regarded as a national resource and provides that: “the state safeguards the lawful rights and interests of organizations and individuals engaged in the protection of wildlife and related activities, including scientific research and captive breeding, according to the law.” Since the catastrophe of the SARS epidemic in 2003 may have been caused by consumption of the civet cat, the Standing Committee of the National People's Congress made major amendments to the Wildlife Protection Law on August 28, 2004. These elaborate amendments translate many of the provisions of the International Wildlife Protection Treaties that prohibit the sale and consumption of animals used in food and medical products into domestic law for the first time. China's top legislature discussed revision of existing Wildlife Protection Law of China on May, 2020. The WWF put forward the following recommendations for the roll-out and enforcement of the law. First, upgrading the objectives of the Wildlife Protection Law. Secondly, expanding the protection coverage of the Law. Thirdly, adopting rigorous wildlife utilization standards. Fourthly, reinforcing the protection of aquatic wild animals. Last but not the least, specifying the penalties.<sup>③</sup>

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<sup>①</sup> The Wildlife Protection Law of the People's Republic of China, adopted on November 8, 1988, has been amended four times, on August 28, 2004, August 27, 2009, July 2, 2016 and October 26, 2018.

<sup>②</sup> Regulations of the People's Republic of China on Administration of Import and Export of Endangered Wild Animals and Plants, promulgated by Order No. 465 of the State Council on April 29, 2006, and amended in accordance with the Decision of the State Council on amending and Repealing Certain Administrative Regulations on March 19, 2018. Full text Available at: [http://www.gov.cn/gongbao/content/2006/content\\_320600.htm](http://www.gov.cn/gongbao/content/2006/content_320600.htm) (Last visited on 15 June, 2020)

<sup>③</sup> <https://www.worldwildlife.org/press-releases/china-s-top-legislature-to-discuss-revision-of-existing-wildlife->

However, Article 14.1(a) of CITES expressly reserves the right of Member States to take “stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof”.<sup>①</sup> This Article also authorizes the use of unilateral economic sanctions by way of trade restrictions or trade bans (embargoes) against other States,<sup>②</sup> as long as these are compatible with general principles of International Law and requirement of Customary International Law. The concept of sanctions lies at the centre of the debate on the effectiveness or even the existence of International Law.<sup>③</sup>

EU Member States enforced a strict import ban against Indonesia for all species listed on CITES Appendix II in 1991-1995. Former US President Clinton announced trade sanctions against Taiwan for trade in Endangered Species under the Pelly Amendment on 11 April, 1994.<sup>④</sup> The one-year trade sanctions have cost Taiwan as much as \$300 million. Even though Chinese artificial bred wild animals policy is legal and legitimate under CITES, it is not impossible for China's wildlife trade to be subject to unilateral trade sanctions again under the COVID-19 outbreak in 2020. But no country should create havoc by launching ill-considered and arbitrary trade wars or undermining the international rule of law. Trade Disputes and trade-related pandemic issues should be settled through dialogue and consultation on an equal footing and with the maximum sincerity and patience.

Anyway, the comment that “the COVID-19 outbreak began from a wet market in Wuhan, China is notorious for its illegal wildlife trade”<sup>⑤</sup> is quite a slander without any scientific basis. As Abraham Lincoln said, “You can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time”. The Novel Coronavirus Pneumonia Emergency Response Epidemiology Team in Wuhan, China reported vital surveillances of the epidemiological characteristics of **COVID-19** to **have unknown origin** as of 11 Feb, 2020. On 20 January, 2020 National Infectious Diseases Law of China was amended to make COVID-19 a Class B notifiable disease and Frontier Health and Quarantine Law of China was amended to support the COVID-19 outbreak response effort. Scientists are doing research on the proximal origin of COVID-19.<sup>⑥</sup>The WHO is still looking for the origin of the virus.<sup>⑦</sup>After all, origin of novel coronavirus still hangs in the air.<sup>⑧</sup>

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[protection-law](#) (Visited on 15 July, 2020)

<sup>①</sup> CITES, Article XIV.1(a).

<sup>②</sup> See Jean Combacau, Sanctions, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 4 (Elsevier, 2000), at 311.

<sup>③</sup> Id.

<sup>④</sup> Dee Myers, Sanctions Announced against Taiwan for Trade in Endangered Species, 5 Department of State Dispatch 222 (1994).

<sup>⑤</sup> <https://www.indiatimes.com/news/india/not-just-wuhans-wet-markets-illegal-wildlife-trade-is-a-thriving-business-too-time-we-end-it-513150.html> (Visited on 15 July, 2020)

<sup>⑥</sup> Kristian G. Andersen, Andrew Rambaut, W. Ian Lipkin, Edward C. Holmes & Robert F. Garry, The Proximal Origin of SARS-CoV-2, *Mature Medicine*, Vol.26, pp.450-452, 2020.

<sup>⑦</sup> <https://www.who.int/zh/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---10-july-2020>(Visited on 16 July, 2020)

<sup>⑧</sup> By GT staff reporters Source: Global Times Published: 2020/2/29 0:38:40  
<http://www.globaltimes.cn/content/1181122.shtml> (Visited on 16 July, 2020)

#### 4.1 Proposal for appropriate Chinese export policy for animal production sector

Just as statements from the US congressional committees revealed, each WTO member enjoys a sovereign right to decide its own system of taxation within the parameters of its international obligations.<sup>①</sup>

According to OECD Policy Responses to Coronavirus<sup>②</sup>, in the midst of significant uncertainty, there are at least two things China can do: 1) boost confidence in trade and global markets by improving transparency about trade-related policy actions and intentions; 2) avoid making things worse, through unnecessary export restrictions and other trade barriers.

The General Administration of Customs (GACC) intends to optimize and improve the current import and export food management system. “The Administrative Measures on import and Export Food Safety (Consultation Draft)” (hereinafter referred to as the Draft), which is open to public consultation for comments on June 12, 2020. The deadline for comments is July 11, 2020. The “Draft” intends to make provisions on the general requirements of Chinese import and export food safety supervision, food import and export management, and corresponding measures and legal liabilities. If the “Draft” is officially released and implemented, Chinese import and export food safety supervision will undergo major changes. We combined with the “Draft” to interpret the possible changes in future Chinese imported and export food supervision.<sup>③</sup>

However, since COVID-19 may have close connection with wildlife, and the animal product list doesn’t clarify whether these animals are artificial breeding or wild-capture, the increase in export tax rebate can really alleviate some of the burden of export enterprises, but it can’t fundamentally solve the problem. Therefore, **our team suggests that one way China could minimize the risk of violating GATT rules as well as CITES is to exclude wild animal products from the Product List**, because GATT rules permit the tax to be levied on imports and rebated on exports, which leads to political support for the VAT among exporters and producers of import-competing products. On 15 April, 2020 China Biodiversity Conservation and Green Development Foundation (CBCGDF) sent an official letter to both the Ministry of Finance and the State Taxation Administration, suggesting to adjust “the Product List for Increasing Export Tax Rebate Rate” to exclude some animal products from the food catalog.<sup>④</sup>

Under the WTO law, the nature of direct tax reduction and indirect tax reduction is quite different. One country's export refund of the indirect tax already paid on the product or a reduction or exemption of the indirect tax payable on the export product shall not be deemed as subsidy, unless it exceeds the amount paid or payable. A country's exemption from direct taxes related to exports would be considered financial subsidy, and it is prohibitive subsidy commonly. In essence, it's easy to tell the significant difference export tax rebate and direct tax exemption have. But in form,

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<sup>①</sup> H.R. REP. No. 106-845, at 9, 15 (2000).

<sup>②</sup> <https://www.oecd.org/coronavirus/en/policy-responses> (Visited on 18 July, 2020)

<sup>③</sup> <http://www.biren01.com/fo/ofxt/196.iunm> (Visited on 18 July, 2020)

<sup>④</sup> <http://www.cbcdgdf.org/NewsShow/4854/12076.html> (Visited on 18 July, 2020)

China's export tax rebate regulations and other tax incentives mixed together. This not only leads to misunderstanding of China's export tax rebate system, but also affects its stability and effectiveness.

To summarize, China's current export tax rebate system is to reduce or refund indirect tax, and the tax rebate rate is lower than the tax rate. It's different from subsidies. In fact, the Chinese government does not feature the VAT rebates concerned as a form of subsidy. But the above cases show that China's export tax rebate system is not perfect, one, from the form above said, the export tax rebate related provisions and direct tax relief related provisions mixed together, causing misunderstanding. Second, the legal system of export tax refund is not perfect, and the regulations between the central and local governments are not uniform. Problems arose in the international execution. The United States, the EU and other countries were severely impacted by the current pandemic crisis, with large-scale business failures and high unemployment. To cope with this situation, the Chinese government has continuously raised the export tax rebate rate, hoping to stimulate China's export growth and maintain China's overall economic growth. At the same time, in order to reduce the impact of domestic enterprises in the pandemic crisis, and also to smooth the domestic political crisis of confidence, the US and the EU have frequently questioned the nature of China's export tax rebates and launched intensive anti-subsidy investigations and trade investigations into China's export products. The problem of trade friction is aggravated. China will encounter increasing countervailing pressure, and the problem of VAT rebate subsidy may still be countervailing. Therefore, on the one hand, we need to return exports in accordance with the provisions of the WTO. The tax system is adjusted to avoid the prohibitive provisions. On the other hand, some countries abuse WTO rules and set up trade barriers, we should also strive to use the rules to protect the rights and interests of the country.

Actually, the Chinese government is sending early warning information to the affected enterprises as well as providing targeted consulting services. It has also strengthened communication and coordination with trading partners to create an enabling environment for bilateral trade and economic cooperation.<sup>①</sup> And Customs of China will closely monitor, collect and analyze external restrictions on China's imports and exports due to the epidemic outbreak, and publish relevant information in a timely manner. Import and export businesses will be provided with tailor-made consultation services.<sup>②</sup>

#### **4.2 Recommendation for provisions in future wildlife trade agreements**

Trade agreements -even a very deep-integration arrangement like the EU-are not a binding constraint on beggar-thy-neighbour policies.<sup>③</sup> The danger of beggar-thy-neighbour policies is that you are also your neighbour's neighbour. In the long run, the solution is to create an appropriate multilateral and regional forum to resolve overlap

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<sup>①</sup> <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2328> (Visited on 18 July, 2020)

<sup>②</sup> <http://english.customs.gov.cn/Statics/8f0f8824-ee2-492b-ace6-77d84bf12f1f.html> (Visited on 18 July, 2020)

<sup>③</sup> Richard E. Baldwin and Simon J. Evenett, COVID-19 and Trade Policy: Why Turning Inward Won't Work, London: Centre for Economic Policy Research Press, 2020.

and conflicts between International Trade Law and International Environment Law. The problem is partially due to the fact that trade agreements historically have been negotiated by trade representatives, whereas multilateral environment treaties have remained the domain of environment experts.

#### **4.2.1 Principles of sustainable wildlife development**

**Principles of sustainable wildlife development** should dominate negotiation and conclusion of future wildlife trade agreements, especially implementation in developing countries whose external trade shocked by COVID-19.

Principle 1: Developing a comprehensive wildlife-caring trade policy/strategy.

Principle 2: Drafting concrete and understandable legislation in a participatory way.

Principle 3: Providing for international cooperation where multinational decision-making and coordination are needed.

Principle 4: Protecting wildlife from harmful processes and negative impacts of trade measures.

Principle 5: Regulation of both national and international wildlife trade implementation and law enforcement.

#### **4.2.2 Operational guidelines**

**Reasonable Operational guidelines** for future wildlife trade agreements include commitments to the proper implementation and enforcement of multilateral environmental agreements, as well as provisions aiming to protect biodiversity and reduce illegal wildlife trade through information exchange on strategies, policy initiatives, active plans, etc.

Guideline 1: Recognizing the need for a governing framework consistent with International Trade/Environment Law, wildlife trade should be sufficiently empowered and supported by rights to be responsible and accountable for sustainable wildlife development.

Guideline 2: International, national policies, laws and regulations that distort markets which undermine conservation and sustainable use of biodiversity, should be identified and removed or mitigated, with potentially far-reaching implications especially for developing countries.

Guideline 3: Sustainable wildlife goals and practices should avoid or minimize adverse impacts on trade liberalization,

Guideline 4: Supportive policies, laws and regulations should be applied at the appropriate platforms of wildlife trade governance and there are effective linkages between these platforms.

#### **4.2.3 Model FTAs analysis**

Take EU-Vietnam FTA(EVFTA)<sup>①</sup> ratified on 8 June, 2020 for example. It marks a new era in intergovernmental cooperation between the EU and Vietnam on animal welfare and wildlife protection. Although there were very limited animal welfare provisions, it does offer a chance for the EU to provide technical assistance and capacity building to advance farm animal welfare in Vietnam. In addition, it includes provisions that can help support government's efforts to curb the trade in wildlife

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<sup>①</sup> <https://www.hsi.org/news-media/eu-vietnam-trade-agreement-ratified-by-vietnam/> (Visited on 20 July, 2020)

products, to tackle the scourge of wildlife trafficking.

The Cooperation and Capacity Building Chapter of the EVFTA states that “the Parties agree to cooperate on animal welfare as necessary, including technical assistance and capacity building for the development of animal welfare standards.” The Trade and Sustainable Development Chapter of the EVFTA includes commitments to the proper implementation and enforcement of multilateral environmental agreements, as well as provisions aiming to protect biodiversity and reduce illegal wildlife trade through information exchange on strategies, policy initiatives, programmes, action plans, etc. It also includes a commitment to enhance cooperation to increase species protection through the proposal of new CITES listings.

Another double-face example is CPTPP, whose former TPP is a gold standard FTA negotiated by the US and 11 other countries so described as “NAFTA on Steroids”. TPP is the first RTA to prohibit some of the most harmful fisheries subsidies, including those that contribute to overfishing. TPP not only contains measures to combat wildlife trafficking, reinforcing international commitments to address these challenges, but also requires enhanced actions to stop criminal networks from illicit trade in endangered species. TPP even gives corporations the power to attack other TPP countries’ environmental laws in international tribunals, threatening bans on hydrofracking and other dangerous practices. However, TPP needs to mesh with Sustainable Development Goal especially between developed and developing countries.<sup>①</sup> One NGO even said, “Unless we can stop TPP, it will expand the rainforest destroying Malaysian palm oil trade-at the expense of orangutans and other wildlife!”<sup>②</sup> What’s more, Japan won unexpected leadership in TPP negotiations since the US withdrawal from the TPP through foreign policy and trade law.<sup>③</sup>

Trade negotiations can be a cumulative process as each trade agreement builds on those that have been concluded. Trade officials tend to start from the model of the most recent and highest-level agreement, especially model provisions for trade in times of crisis and pandemic in regional and other trade agreements. Trade negotiators simultaneously explore new grounds by introducing legal innovations and exploiting known territories by adopting existing norms. Our analysis suggests that, even as the regime grows in the number and length of agreements, there are exploratory and exploitative processes at work.<sup>④</sup> Future regional and other wildlife trade agreements where model provisions thought to be developed might be incorporated, as well as to policy measures and commitments already undertaken by some countries in response to the COVID-19 crisis.

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