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Reports of the Appellate Body

CHINA – MEASURES RELATED TO EXPLORATION OF VARIOUS RAW MATERIALS

(WT/DS394/AB/R; WT/DS/395/AB/R; WT/DS398/AB/R)
(Circulated on 30 January 2012)

Parties:

Appellant/Appellee: China
Other Appellant/ Appellee: United States (US)
European Union (EU)
Mexico
Third Participants: Argentina, Brazil, Canada, Chile, Colombia, Ecuador, India, Japan, Korea, Norway, Saudi Arabia, Turkey and Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

Appellate Body Division:

Ramirez-Hernandez (Presiding Member), Hillman (Member), Oshima (Member)

I. BACKGROUND

This appeal concerns issues of law and legal interpretations developed in the Panel Reports, *China – Measures related to the Exportation of Raw Materials*¹ (“Panel Reports”) and challenged by China, the US, the EU and Mexico. The Panel was established on complaints of the US, the EU and Mexico (“complainants”), to consider the consistency of certain measures imposed by China on exportation of certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous and zinc (“raw materials), with Articles VIII:1(a), VIII:4, X:1, X:3(a) and XI:1 of the *General Agreement on Tariffs and Trade* (“GATT 1994”), the *Protocol on the Accession of the People’s Republic of China* (“China’s Accession Protocol”), and the *Report of the Working Party on the Accession*

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**This issue can also be accessed online at <http://wtocentre.iift.ac.in/DisputeAnalysis.asp> . Queries and comments are most welcome and may be directed to disputes_cws@iift.ac.in.

¹ WT/DS394/R (the US Panel Report); WT/DS395/R (the EU Panel Report) and WT/DS398/R (the Mexico Panel Report), 15 August 2011

of China (“China’s Accession Working Party Report”).

The complainants challenged four kinds of restraints imposed by China on the exportation of raw materials before the Panel, namely:

- (i) Export duties,
- (ii) Export quotas,
- (iii) Export licensing, and
- (iv) Minimum export price requirements.

Additionally, certain aspects of China’s allocation and administration of export quotas, export licenses and minimum export prices, as well as the alleged non publication of certain export measures, were also challenged by the complainants. The key rulings of the Panel are:

- (a) *With regard to export duties*: China’s measures were inconsistent with Paragraph 11.3 of China’s Accession Protocol and China could not invoke exceptions under Article XX to justify measures found to be inconsistent with Paragraph 11.3 of China’s Accession Protocol. Article XX could be applied only to violations of the GATT 1994, unless specifically incorporated into a non-GATT provision or instrument.
- (b) *With regard to export quotas*: China’s imposition of the quotas on certain forms of raw materials were inconsistent with Article XI:1 of the GATT 1994. Further, export quota on one form of bauxite, the ‘refractory-grade bauxite’, were not justified under Article XI:2(a) of the GATT 1994, as the export quota had not been ‘temporarily applied’ in order to ‘prevent or relieve a critical shortage’ of refractory grade bauxite within the meaning of the said Article. China had also not demonstrated that its export of refractory-grade bauxite, coke, and silicon carbide were justified under Article XX(b) or (g) of the GATT 1994.
- (c) *With regard to China’s administration and allocation of its export quotas*: Export performance and minimum registered capital requirements imposed by China on the allocation of certain export quotas were inconsistent with China’s ‘trading rights’ obligations under its Accession Protocol and Accession Working Party Report. Further, China’s allocation of export quotas through the use of an ‘operation capacity’ criterion violated Article X:3 of the GATT 1994 and its failure to publish promptly the total amount and procedure for allocation of export quotas for zinc violated Article X:1 of the GATT 1994.
- (d) *With regard to China’s export licensing system*: While the export licensing system in place for certain forms of raw materials was not *per se* inconsistent with China’s obligations under Article XI:1 of the GATT 1994, the export licensing authorities’ discretion to request undefined ‘other’ documents or materials from enterprises applying for such licenses, created uncertainty and constituted export restriction prohibited under Article XI:1.

Notices of Appeal were filed by China on 31 August 2011 and the US, EU and Mexico on 6 September 2011 in relation to the Panel Reports.

II. KEY ISSUES AND APPELLATE BODY FINDINGS

A. Article 6.2 DSU: Panel’s Terms of Reference

Whether the Panel was wrong in finding that Section III of the complainants’ panel requests complied

with the requirement in Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”)?

China argued before the Appellate Body that Section III of the complainants’ panel requests, captioned ‘Additional Restraints Imposed on Exportation’ did not comply with the requirements of Article 6.2 of the DSU. China argued that the panel requests failed to provide a ‘brief summary of the legal basis of the complainant sufficient to present the problem clearly’. Hence the Panel was wrong in holding the contrary, with the exception of the complainants’ claims under Article X:1 of the GATT 1994, regarding the non-publication of the total amount and procedure for the allocation of the zinc export quota. The Panel had concluded that with the exception of one claim of the EU, the *panel requests as clarified by the complainants’ first submissions* provided sufficient connection between the measures listed in Section III and the listed claims of violations.

The Appellate Body upheld China’s claims and rejected Panel’s ruling stating that:

- (i) Article 6.2 of the DSU sets out two key requirements that a complainant must satisfy in its panel request, namely:
 - a. Identification of the specific measure at issue, and
 - b. The provision of a brief summary of the legal basis of the complaint or the claims.

Together these two elements constitute the “matter referred to the DSB²”, so that if either is not properly identified, the matter would not be within the panel’s terms of reference. (Para. 219)

- (ii) In order to determine whether a panel request is sufficiently precise to comply with Article 6.2 of the DSU, a panel must scrutinize carefully the language used in the panel request on a *case-by-case* analysis. (Para. 220)
- (iii) *Submissions* by a party may be referenced in order to *confirm* the meaning of the *words used* in the panel requests, but the content of those submissions cannot have the effect of curing the failings of a deficient panel request. (Para. 220)
- (iv) Whether a panel request, challenging a number of measures on the basis of multiple WTO provisions, sets out a brief summary of the legal basis of the complaint sufficient to present the problem clearly may depend on whether it is sufficiently clear which ‘problem’ is caused by which measure or group of measures. (Para. 220)
- (v) Section III of the panel request contained an introductory paragraph stating in broad terms imposition of other restrains by China. The introductory paragraph was followed by five separate paragraphs in case of the US and Mexico and six paragraphs in case of the EU, setting out different allegations of violations relating to varied situations in which obligations under the WTO Agreements might not be satisfied, namely allegations relating to the administration of export quotas, allocation of export quotas etc. (Para. 222)
- (vi) As the Appellate Body found in *EC – Selected Customs Matters*³, a brief summary of the legal basis of the complaint as required by Article 6.2 of the DSU should “explain succinctly *how or*

² Dispute Settlement Body

³ Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006

why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question”. The complainants' panel requests in the present case, did not clarify which allegations of error pertained to which particular measure or set of measures identified in the panel requests. (Para. 226)

- (vii) The combination of a wide-ranging list of obligations together with 37 legal instruments ranging from China's Foreign Trade Law to specific administrative measures applying to particular products is such that it does not allow the “problem” or “problems” to be discerned clearly from the panel requests. Further, the complainants had not, in either the narrative paragraphs or in the final listing of the provisions of the covered agreements alleged to have been violated, provided the basis on which the Panel and China could determine with sufficient clarity what “problem” or “problems” were alleged to have been caused by which measures. Thus, the complainants had **failed to present the legal basis for their complaints with sufficient clarity to comply with Article 6.2 of the DSU**. (Para 231)
- (viii) The Appellate Body thus held:

“In the light of the failure to provide sufficiently clear linkages between the broad range of obligations contained in Articles VIII:1(a), VIII:4, X:1, X:3(a), and XI:1 of the GATT 1994, Paragraphs 2(A)2, 5.1, 5.2, and 8.2 of Part I of China's Accession Protocol, and Paragraphs 83, 84, 162, and 165 of China's Accession Working Party Report, and the 37 challenged measures, we do not consider that Section III of the complainants' panel requests satisfies the requirement in Article 6.2 of the DSU to provide ‘a brief summary of the legal basis of the complaint sufficient to present the problem clearly’.

Consequently, we *find* that the Panel erred under Article 6.2 of the DSU in making findings regarding claims allegedly identified in Section III of the complainants' panel requests. We therefore *declare moot and of no legal effect the Panel's findings* in paragraphs 8.4(a)-(d), 8.11(a)-(e), and 8.18(a)-(d) in respect of claims concerning export quota administration and allocation; paragraphs 8.5(a)-(b), 8.12(a)-(b), and 8.19(a)-(b) in respect of claims concerning export licensing requirements; paragraphs 8.6(a)-(b), 8.13(a)-(b), and 8.20(a)-(b) in respect of claims concerning a minimum export price requirement; and paragraphs 8.4(e) and 8.18(e) of the Panel Reports in respect of claims concerning fees and formalities in connection with exportation. In these circumstances, we have no basis to consider further the arguments raised by China in its appeal and by the complainants in their other appeals regarding these findings.” (Paras. 234 - 235)

B. Articles 7.1, 11 and 19.1 DSU: The Panel's Recommendations

Whether the Panel acted inconsistently with Articles 7.1, 11 and 19.1 of the DSU by recommending that China bring its export duty and export quota measures into conformity with its WTO obligations such that the ‘series of measures’ in force at the date of the Panel’s establishment do not operate to bring about a WTO inconsistent result?

China sought review of the Panel’s recommendations, to the extent they applied to ‘annual replacement measures’ adopted after the establishment of the Panel on 21 December 2009. China argued that the complainants had excluded such measures from the scope of the dispute and, hence, by making recommendations extending to such measures, the Panel acted inconsistently with its obligations under Article 7.1 of the DSU; failed to make an objective assessment of the matter under Article 11 of the DSU; and made recommendations on measures that were not part of the matter, inconsistently with Article 19.1

of the DSU.

The US, EU and Mexico argued that the Panel’s recommendations were correct and in accordance with the DSU. The US and Mexico stated that without such recommendations, trade measures imposed in part through annually recurring legal instruments could never be successfully challenged through WTO dispute settlement. The EU added that this was not the proper forum to determine the scope of China’s compliance obligations and China should follow the procedures provided under Article 21 of the DSU in order to identify the same.

The Panel proceedings and findings:

The Panel had found that the export restrictions alleged by the complainants were not introduced through a single legal instrument, but rather resulted from the application of several measures operating together. For each product, this group of measures or ‘*series of measures*’ consisted of standing framework legislation and implementing regulations, as well as specific legal instruments identifying the individual export duty or quota imposed on a specific product during a particular timeframe, usually one year. It should also be noted that the Appellate Body has used the term ‘series of measures’, to describe collectively the entire hierarchy of legal instruments applicable to each product and not any specific legal instrument setting out an export quota amount or export duty rate taken in isolation.

While the framework legislation and implementing regulations remained in effect, certain of the legal instruments setting out an export quota amount or an export duty rate identified by the complainants in their panel requests expired or were replaced during the course of the Panel proceedings.

The parties disagreed as to whether the Panel should consider the series of measures as it existed in 2010, including the specific measures setting out export duty rates or quota amounts for each product in 2010, or the series of measures as it existed at the time of the Panel’s establishment in 2009, including the 2009 export duty rates and quota amounts. (Para. 243)

Before the Panel, China recognized that the Panel could make findings on 2009 measures specifying export quota and duty levels, but nevertheless argued that it ‘would serve no purpose’ for the Panel to rule on measures that have ceased to exist since they no longer violated WTO obligations or nullified or impaired benefits. For their part, the complainants argued that the Panel should make findings on the legal situation prevailing on the date of the establishment of the Panel. They asserted that the Panel ‘should not consider the claims as addressing the 2010 measures’, and requested that the Panel not “make any findings and recommendations on any of the 2010 measures invoked by China”. (Paras 243 - 44)

After considering the parties’ arguments, the Panel held the following:

- (i) The Panel would make findings on all of the series of measures in effect in 2009, including specific measures setting out export duties and export quotas that had expired during the course of the Panel proceedings.
- (ii) The Panel also clarified that it would not make findings on the specific measures assigning export duty rates and quota levels for 2010 in the light of the request of the complainants not to make findings on such measures.
- (iii) The Panel further specified that it would make findings and recommendations relating to the export quotas and export duties on the basis of “the series of measures comprised of the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific measure imposing export duties or export quotas in force at the date of the Panel’s establishment.”

- (iv) The Panel added that it would not make recommendations on expired measures, unless there was clear evidence that such measures had an ongoing effect.
- (v) The Panel expressed the view that, because the measures operating to impose export duties and export quotas included measures of an annually recurring nature, its approach would ensure that these measures did not “evade review”. (Para. 247)

The Appellate Body proceedings and findings:

China argued before the Appellate Body that the complainants had decided to exclude 2010 measures from the dispute, thereby ‘breaking the chain of measures subject to dispute settlement’. In these circumstances, by making recommendations extending to measures specifying export duty rates and quota amounts for 2010, China claimed that the Panel acted inconsistently with Article 7.1, 11 and 19.1 of the DSU.

The US and Mexico submitted that China had not understood the Panel’s recommendations correctly, as the Panel had not made recommendations on measures on which it had not made findings and did not make recommendations on the basis of the measures that were outside of its terms of reference. The Panel had made findings and recommendations on the series of measures in force at the date of Panel establishment. The EU also argued on similar lines stating that the Panel did not explicitly refer to ‘2010 replacement measures’ in its recommendations.

The Appellate Body noted that China’s appeal regarding the Panel’s recommendations rested on the proposition that the Panel made recommendations on a ‘series of measures’ that extended into the future and included the 2010 measures. The summary of main findings of the Appellate Body is provided below:

- (i) A panel is required, under Article 7 of the DSU, to examine the “matter” referred to the DSB by the complainant in the request for the establishment of a panel, and to make such findings as will assist the DSB in making recommendations. The language in a complainant's panel request is therefore important because a panel's terms of reference are governed by the request for establishment of a panel. Article 19.1 of the DSU establishes a link between a panel's finding that “a measure is inconsistent with a covered agreement”, and its recommendation that the respondent “bring the measure into conformity”. (Para. 251)
- (ii) The complainants did not use the words “series of measures” to describe the object of their challenge. However, they did identify the specific measures that, collectively, compose China's legal system for the imposition of export duties and export quotas in their panel requests. The complainants further clarified that the Panel should not consider their claims as addressing measures adopted after the establishment of the Panel, and the Panel had correctly described the object of the complainants' challenge. (Paras. 253 - 254)
- (iii) The Panel did not err in setting out to make recommendations on the “series of measures” imposing export duties or export quotas in force at the date of the Panel's establishment. The question remained whether the recommendations that the Panel made regarding the series of measures in force in 2009 had consequences for the measures imposing specific export duty rates and quota levels for 2010, or indeed any existing or subsequent measures imposing export duties or quotas on these products. (Paras. 255-56)
- (iv) China is wrong in alleging that the Panel in making recommendations extending to the measures imposing specific export duty rates and quota amounts in 2010, with respect to a "series of measures" as it existed at the time the Panel was established, cannot have

consequences for measures adopted in 2010 or thereafter, through the effect of the recommendation made by the Panel or the Appellate Body after adoption by the DSB. (Para. 259)

- (v) Pursuant to Article 19.1 of the DSU, when a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring its measure into conformity with that agreement. While a *finding* by a panel concerns a measure as it existed at the time the panel was established, a *recommendation* is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations that arise after the adoption of a panel and/or Appellate Body report by the DSB. As the Appellate Body noted in *US – Continued Zeroing*⁴, “it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments”. (Para 260)
- (vi) The Panel had rightly recommended that China bring its measures into conformity with its WTO obligations, such that the “series of measures” did not operate to bring about a WTO inconsistent result. The fact that the Panel directed its findings and recommendations at the legal situation prevailing in 2009 did not mean that China has no compliance obligations with respect to the Panel's findings. (Para. 264)
- (vii) “Expired” Measures: The Panel in its ruling had been concerned about making recommendations on what is viewed to be ‘expired’ measures. The Appellate Body noted that previous panels have made *findings* on expired measures in some cases and declined to do so in others. In the present dispute however, China took issue with the *recommendations* made by the Panel, and *not with its findings* on particular measures. The Appellate Body noted that contrary to the Panel’s approach in this dispute, the Appellate Body in *US – Upland Cotton*, had indicated that the fact that a measure has expired ‘may affect’ what recommendation a panel may make and it was not suggested therein that a panel was precluded from making recommendation on such a measure. (Para. 264)
- (viii) Thus, the Appellate Body did not agree with China that the Panel had acted inconsistently with its obligations under Article 7.1 of the DSU and China’s claim under Articles 11 and 19.1 of the DSU being consequential in nature were not evaluated by the Appellate Body. (Para 266)

C. Applicability of Article XX

Whether the Panel erred in finding that China may not have recourse to the exceptions contained in Article XX of the GATT 1994 in order to justify a violation of China’s export duty commitment contained in Paragraph 11.3 of China’s Accession Protocol?

The Panel had rejected China’s argument that it had recourse to the exceptions in Article XX of GATT 1994, to justify a violation under Paragraph 11.3 of China’s Accession Protocol. The Panel had observed that Paragraph 11.3 did not contain any express reference to Article XX of the GATT 1994, or to provisions of the GATT 1994, more generally. In doing so, the Panel drew a contrast between text of Para 11.3 and the language contained in Paragraph 5.1 of China’s Accession Protocol, where there was a specific reference to China’s right to regulate trade in a manner consistent with the WTO Agreement and

⁴ Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009

which was examined in *China – Publications and Audiovisual Products*.⁵

China alleged before the Appellate Body that there were various errors in the Panel’s analysis and hence the same should be reversed. According to China, the Panel erred in stating that there was no textual basis in China’s Accession Protocol for it to invoke Article XX in defence of a claim under Paragraph 11.3. In China’s view, the Panel’s finding that Paragraph 11.3 excluded recourse to Article XX of the GATT 1994 was based on the Panel’s erroneous assumption that the absence of language expressly granting the right to regulate trade in a manner consistent with Article XX meant that China and other Members intended to deprive China of that right. Moreover, China argued that WTO Members have an “inherent right” to regulate trade, “including using export duties to promote non-trade interests”. It should however be noted that China did not request the Appellate Body to reverse the Panel’s finding that China failed to demonstrate that the export duties at issue in this dispute are justified under Article XX of the GATT 1994. China also relied on the wording of Paragraph 170 of China’s Working Party Report to support its position that China had only assumed a ‘qualified’ obligation to eliminate export duties and hence is entitled to have recourse to Article XX of GATT 1994.

The US, the EU and Mexico supported the Panel’s finding that Article XX of the GATT 1994 could not be invoked to justify export duties that were inconsistent with Paragraph 11.3 of China’s Accession Protocol. The US and Mexico also noted that the text in Paragraph 11.3 was in sharp contrast to the text in Paragraph 5.1 of China’s Accession Protocol. Further, the EU submitted that WTO Members could ‘incorporate’ Article XX of the GATT 1994 into another WTO agreement if they so wished, but the legal basis for applying that provision to another agreement would be the text of incorporation and not Article XX itself. (Para. 276)

The Appellate Body noted that Paragraph 1.2 of China’s Accession Protocol stated that the Protocol shall be an integral part of the WTO Agreement. The Appellate Body also stated that the customary rules of interpretation of public international law, as codified in Article 31 and 32 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”) were, pursuant to Article 3.2 of the DSU, applicable in this dispute. The Appellate Body mentioned, in particular, Article 31(1) of the Vienna Convention that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Paragraph 11.3 of China’s Accession Protocol

Paragraph 11.3 of China’s Accession Protocol requires China to “eliminate all taxes and charges applied to exports” unless *one of the following* conditions is satisfied:

- (i) such taxes and charges are "specifically provided for in Annex 6 of China’s Accession Protocol; or
- (ii) such taxes and charges are "applied in conformity with the provisions of Article VIII of the GATT 1994.

Annex 6 of China’s Accession Protocol titled “Products Subject to Export Duty” sets out a table listing 84 different products and a maximum export duty rate for each product. Except for yellow phosphorus, none of the raw materials at issue in this dispute is listed in Annex 6 of China’s Accession Protocol.

Following the table, Annex 6 also includes the following text (the “Note to Annex 6”):

⁵ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010

“China confirmed that the tariff levels in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under *exceptional circumstances*. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution”.

In China's view, by allowing China to adopt otherwise WTO-inconsistent export duties in ‘*exceptional circumstances*’, China and other WTO Members have demonstrated a shared intent that China is permitted to have recourse—whether directly or indirectly—to the ‘exceptional circumstances’ set forth in Article XX to justify such duties. The US and Mexico, on the other hand argue that the second and third sentences of the Note to Annex 6 imposed a further obligation upon China, that in the event that the applied rate for any of the 84 products listed in Annex 6 is less than the maximum rate, China can raise the applied rate only in ‘exceptional circumstances’ and only after consulting with the affected Members. The key conclusions of the Appellate Body are provided below:

- (i) It is difficult to see how the language in Annex 6 could be read as indicating that China can have recourse to the provisions of Article XX of the GATT 1994 in order to justify imposition of export duties on products that are *not* listed in Annex 6 or the imposition of export duties on listed products in excess of the maximum levels set forth in Annex 6. (Para. 284)
- (ii) The third sentence of the Note to Annex 6 further supports the view that the “exceptional circumstances” referred to in the Note to Annex 6 are ones that, if shown to exist, would allow China to increase applied tariffs up to the maximum tariff levels set out in Annex 6 for the products listed. Thus, the Note to Annex 6 does not in any way suggest that China could invoke Article XX of the GATT 1994 to justify the imposition of export duties that China had committed to eliminate under Paragraph 11.3 of China's Accession Protocol. (Para. 285)
- (iii) There is nothing in the Note to Annex 6 that would allow China to: (i) impose export duties on products not listed in Annex 6; or (ii) increase the applied export duties on the 84 products listed in Annex 6, in a situation where “exceptional circumstances” have not “occurred”. Thus, the Panel erred to the extent it found that China's failure to consult with other WTO affected Members prior to the imposition of export duties on raw materials not listed in Annex 6 is inconsistent with its obligations under Annex 6. (Para 287)
- (iv) China argued that the reference to Article VIII in Paragraph 11.3 confirmed the availability of Article XX of the GATT 1994. China argued that Paragraph 11.3 required that export taxes and charges be applied in conformity with the provisions of Article VIII of GATT 1994. If they were, the measures would violate both Paragraph 11.3 and Article VIII. In such a scenario, a measure that violated Article VIII of the GATT 1994, may be justified under Article XX of the GATT 1994. The Appellate Body however noted that Article VIII covered all *fees and charges* of whatever character imposed on or in connection with importation or exportation, which expressly *excluded export duties* that were at issue in the present matter. Therefore, Article XX could not be invoked to justify export duties, which are not regulated under Article VIII. (Para. 289)
- (v) The Appellate Body agreed with the Panel that the language in Paragraph 11.3 expressly referred to Article VIII, but left out reference to other provisions of the GATT 1994, such as Article XX. Additionally, there was no language in Paragraph 11.3 similar to that found in Paragraph 5.1 of China's Accession Protocol – ‘without prejudice to China's right to regulate

trade in a manner consistent with the WTO Agreement’, which was interpreted by the Appellate Body in *China – Publications and Audiovisual Products*⁶. Thus, this suggested that China may not have recourse to Article XX to justify breach of its commitment to eliminate export duties under Paragraph 11.3 of China’s Accession Protocol. (Para. 291)

Paragraph 11.1 and 11.2 of China’s Accession Protocol

Paragraph 11.2 of China’s Accession Protocol states that China shall ensure that ‘customs fees or charges’ applied or administered by national or sub-national authorities, shall be in conformity with the GATT 1994. Paragraph 11.2 further stipulates that China shall ensure that ‘internal taxes and charges’ applied or administered by national or sub-national authorities shall be in conformity with GATT 1994. The Appellate Body noted that given the references to the GATT 1994 in Paragraphs 11.1 and 11.2 and the absence of a reference to the GATT 1994 in Paragraph 11.3, further supported the interpretation that China may not have recourse to Article XX to justify a breach of its commitment under Paragraph 11.3. (Para. 293)

Paragraph 170 of China’s Accession Working Party Report

China relied on the wording of Paragraph 170 of China’s Working Party Report to support its position that China had assumed a ‘qualified’ obligation to eliminate export duties, and is entitled to have recourse to Article XX of GATT 1994 to justify export duties inconsistent with Paragraph 11.3 of China’s Accession Protocol.

Paragraph 170 of China’s Accession Working Party Report is referenced in Paragraph 342 of China’s Accession Working Party Report and is therefore, by virtue of Paragraph 1.2 of China’s Accession Protocol, incorporated into the Protocol. Paragraph 170 falls under subsection D of China’s Accession Working Party Report, which is entitled “Internal Policies Affecting Foreign Trade in Goods”; subsection D(1) is titled “Taxes and Charges Levied on Imports and Exports”. Paragraph 170 provides in relevant part:

“The representative of China confirmed that upon accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994”

China pointed to the identical language in the title of the subsection under which Paragraph 170 falls, and that of Section 11 of China’s Accession Protocol.

The Appellate Body however, rejected China’s submissions and noted that Paragraph 170 of China’s Accession Working Party Report is of limited relevance in interpreting Paragraph 11.3 of China’s Accession Protocol. In particular, Paragraph 170 did not shed much light on China’s commitment to eliminate export duties. Instead, it is Paragraphs 155 and 156 of China’s Accession Working Party Report, found in the section titled “*Export Regulations*”, that deal with China’s commitments with respect to the elimination of export duties. The language of Paragraph 155 is very similar to that found in Paragraph 11.3 of China’s Accession Protocol, and provides that taxes and charges applied exclusively to exports “should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Draft Protocol”. (Para. 299)

⁶ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010

China’s Right to Regulate Trade

China argued that, "like any other state", it enjoyed the right to regulate trade in a manner that promoted conservation and public health. Referring to the Appellate Body Report in *China – Publications and Audiovisual Products*,⁷ China pointed out that such a right to regulate trade is an “inherent right”, and “not a ‘right bestowed by international treaties such as the WTO Agreement’”.

The US and Mexico highlighted that, contrary to China's claims, the Panel “nowhere suggested” that WTO Members abandoned their right to regulate trade in entering the WTO. They asserted that the Appellate Body Report in *China – Publications and Audiovisual Products* recognized that, because WTO Members have an inherent right to regulate trade, it was necessary in the context of the WTO agreements to agree on rules that constrain that right. The EU argued that China exercised its inherent right to regulate trade when it completed the accession process and became a Member of the WTO. According to the EU, the provisions of the covered agreements and China's Accession Protocol in fact ‘delineate’ China's exercise of its inherent and sovereign right to regulate trade.

The Appellate Body rejected China’s claim and upheld the Panel ruling stating that in the present case, it attached significance to the fact that Paragraph 11.3 of China's Accession Protocol expressly referred to Article VIII of the GATT 1994, but did not contain any reference to other provisions of the GATT 1994, including Article XX. (Para. 303)

Further, China had also referred to the language contained in the preambles of the *WTO Agreement*⁸, the GATT 1994, and the *Agreement on the Application of Sanitary and Phytosanitary Measures*, *Agreement on Technical Barriers to Trade*, the *Agreement on Import Licensing Procedures*, the GATS, and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* to argue that the Panel distorted the balance of rights and obligations established in China's Accession Protocol by assuming that China had “abandon[ed]” its right to impose export duties to promote fundamental non-trade-related interests, such as conservation and public health. (Para. 305)

The Appellate Body however rejected this argument of China and held that based on the language, it understood the *WTO Agreement*, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns. However, none of the objectives listed above, nor the balance struck between them, provided specific guidance on the question of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol. (Para. 306)

Conclusion

In conclusion, the Appellate Body stated that in accordance with Article 3.2 of the DSU, it had applied the customary rules of interpretation of public international law, as codified in the *Vienna Convention*, to hold that China’s argument of recourse to the provisions of Article XX of the GATT 1994 to justify export duties were inconsistent with Paragraph 11.3 of China's Accession Protocol. (Para. 307)

D. Article XI:2(a) of the GATT 1994

Whether the Panel erred in its interpretation and application of Article XI:2(a) of the GATT 1994, and in its assessment of the matter under Article 11 of the DSU, when it found that China’s export quota on

⁷ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010

⁸ Marrakesh Agreement Establishing the World Trade Organization

refractory-grade bauxite is not ‘temporarily applied’ to prevent or relieve a critical shortage?

China argued before the Appellate Body that the Panel had erred in its interpretation and application of Article XI:2(a) of the GATT 1994, and acted inconsistently with Article 11 of the DSU. The Panel had held that China failed to demonstrate that the export quota was ‘temporarily applied’ or there was a ‘critical shortage’ of refractory-grade bauxite in China within the meaning of Article XI:2(a) of GATT 1994.

The Panel further observed that China's restriction on exports of refractory-grade bauxite had already been in place for at least a decade with no indication of when it would be withdrawn and every indication that it will remain in place until the reserves have been depleted. On this basis, the Panel found that China's export quota could not be considered “temporarily applied” to address a critical shortage within the meaning of Article XI:2(a). The Panel also considered that the requirement that measures be applied “temporarily” contextually informed the notion of “critical shortage”. The Panel reasoned that, if there was no possibility for an existing shortage ever to cease to exist, it would not be possible to “relieve or prevent” it through an export restriction applied on a temporary basis. The Panel added that the temporal focus of “critical shortage” as interpreted by the Panel “seems consistent with the notion of ‘critical’, defined as ‘of the nature of, or constituting, a crisis’”. (Paras. 318 - 319)

The Appellate Body upheld the Panel’s conclusion that China had not demonstrated that its export quota on refractory-grade bauxite was ‘temporarily applied’, within the meaning of Article XI:2(a) to either prevent or relieve a ‘critical shortage’ and hence the Panel had not acted inconsistently with its duty under Article 11 of the DSU (Para 344). The summary of main findings of the Appellate Body is provided below:

- (i) Article XI:2 refers to the general obligation to eliminate quantitative restrictions set out in Article XI:1 and stipulates that the provisions of Article XI:1 “shall not extend” to the items listed in Article XI:2. Article XI:2 must therefore be read together with Article XI:1.
- (ii) Both Article XI:1 and Article XI:2(a) of the GATT 1994 refer to “prohibitions or restrictions”. The term “prohibition” is defined as a “legal ban on the trade or importation of a specified commodity”. The second component of the phrase “export prohibitions or restrictions” is the noun “restriction”, which is defined as “a thing which restricts someone or something, a limitation on action, a limiting condition or regulation”, and thus refers generally to something that has a limiting effect. (Para. 319)
- (iii) Article XI of the GATT 1994 is entitled “General Elimination of Quantitative Restrictions” the use of the word “quantitative” in the title of the provision informs the interpretation of the words “restriction” and “prohibition” in Article XI:1 and XI:2. It suggests that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported. (Para. 320)
- (iv) The term “temporarily” in Article XI:2(a) of the GATT 1994 is employed as an adverb to qualify the term “applied”. The word “temporary” is defined as “lasting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need”. Thus, when employed in connection with the word “applied”, it describes a measure applied for a limited time, a measure taken to bridge a “passing need”. (Para. 323)
- (v) The term “critical shortage” from the dictionary meaning of the two terms involved, refers to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point. (Para. 324)

- (vi) An evaluation of whether a particular measure satisfies the requirements of Article XI:2(a) necessarily requires a *case-by-case* analysis taking into consideration the nexus between the different elements contained in Article XI:2(a). (Para. 328)

- (vii) Relation between Article XI:2(a) and Article XX (g) GATT 1994:

China alleged that the Panel erroneously found Article XI:2(a) and Article XX(g) to be mutually exclusive, and that this finding was a significant motivating factor for the Panel's erroneous interpretation of the term 'temporarily' in Article XI:2(a). The Appellate Body however ruled that it did not understand the Panel to have found that these provisions were mutually exclusive. Rather, the Panel sought to confirm the result of its interpretation, and stated that the interpretation preferred by China would be inconsistent with the principle of effective treaty interpretation. (Para. 333)

Further, the Appellate Body did not agree with China that the Panel had indicated that a shortage of an exhaustible non-renewable resource cannot be 'critical' within the meaning of Article XI:2(a). The Panel noted instead, correctly in the Appellate Body's view, that the reach of Article XI:2(a) is not the same as that of Article XX(g), adding that these provisions are "intended to address different situations and thus must mean different things". Articles XI:2(a) and XX(g) have different functions and contain different obligations. Article XI:2(a) addresses measures taken to prevent or relieve "critical shortages" of foodstuffs or other essential products. Article XX(g), on the other hand, addresses measures relating to the conservation of exhaustible natural resources. The Appellate Body did not exclude that a measure falling within the ambit of Article XI:2(a) could relate to the same product as a measure relating to the conservation of an exhaustible natural resource. It would seem that Article XI:2(a) measures could be imposed, for example, if a natural disaster caused a "critical shortage" of an exhaustible natural resource, which, at the same time, constituted a foodstuff or other essential product. Moreover, because the reach of Article XI:2(a) is different from that of Article XX(g), an Article XI:2(a) measure might operate simultaneously with a conservation measure complying with the requirements of Article XX(g). (Para. 337)

- (viii) China had also made two separate claims alleging that the Panel had failed to make an objective assessment of the matter pursuant to Article 11 of the DSU. China alleged that the Panel had failed to assess the evidence properly in relation to export restrictions of China which were annually reviewed and renewed. The Appellate Body ruled that the Panel's reasoning indicated that the Panel's finding was not, as was challenged by China, based on mere assumption that the restriction would remain in effect until depletion of reserves. Rather, they were on the basis of evidence indicating that the measure had been in place for at least a decade. Further, the Appellate Body found that the Panel had not employed internally inconsistent or incoherent reasoning and hence the Panel did not fail to conduct an objective assessment of the matter pursuant to Article 11 of the DSU. (Paras. 338-343)
- (ix) The Appellate Body thus upheld the Panel's conclusion that China did not demonstrate that its export quota on refractory-grade bauxite was 'temporarily applied' within meaning of Article XI:2(a) of the GATT 1994, to either prevent or relieve a 'critical shortage'. (Para. 344)

E. Article XX(g) of the GATT 1994

Whether the Panel erred in interpreting the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994 to require that the purpose of the export restriction be to ensure the effectiveness of restrictions on domestic production and consumption?

China alleged that the Panel erred in its interpretation of the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994. China maintained that the Panel read this phrase to mean that, in order to be justified under Article XX(g), a challenged measure must satisfy two cumulative conditions:

- (i) First, it must "be applied jointly" with restrictions on domestic production or consumption; and
- (ii) Second, the "purpose" of the challenged measure must be to *make effective* restrictions on domestic production or consumption.

China argued that the first element of this interpretation is consistent with the ordinary meaning of the phrase "made effective in conjunction with", but that the second is not. China requested the Appellate Body to reverse the erroneous second element of the Panel's interpretation. China did not, however, appeal the Panel's ultimate conclusion that China's export quota on refractory-grade bauxite was inconsistent with Article XI of the GATT 1994 and not justified under Article XX(g).

The Appellate Body reversed the finding of the Panel and upheld China's appeal on the issue stating that nothing in the text of Article XX(g) suggested that, in addition to being "made effective in conjunction with restrictions on domestic production or consumption", a trade restriction must be aimed at ensuring the effectiveness of domestic restrictions, as the Panel had found. Instead, the Appellate Body ruled that that Article XX(g) permitted trade measures relating to the conservation of exhaustible natural resources if such trade measures worked together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource. The Appellate Body sought guidance from the finding of the Appellate Body in *US – Gasoline*⁹, where the Appellate Body had found that there was *no additional requirement* to prove that the conservation measure must be primarily aimed *at making effective* certain restrictions on domestic production or consumption. (Paras. 356 - 361)

III. DISPUTE NOTES ON SELECT ISSUES

- Sources of International Law: The Appellate Body in its analyses has mainly relied on treaty text (viz. GATT 1994, China's Accession Protocol and DSU) and the previous relevant Working Party/ Panel / Appellate Body Reports. The Appellate Body has also relied on the *Vienna Convention* to refer to the customary rules of interpretation as codified in Articles 31 and 32 for interpretation of certain issues.
- Paragraph 11.3 of China's Accession Protocol and recourse to Article XX, GATT 1994: The Appellate Body gave prime importance to the text of Article 11.3 of China's Accession Protocol while holding that Article XX of GATT 1994 was not an available defence to China for its violations under Paragraph 11.3.

Following the approach adopted by the Panel, the Appellate Body examined specific paragraphs in China's Accession Protocol, for instance, Paragraphs 11.1, 11.2 as well as Paragraph 5.1 to conclude that there were instances within China's Accession Protocol itself, where a specific reference to China's right to regulate or its obligation to ensure general conformity with either GATT 1994 or the WTO Agreement was mentioned. This omission in Paragraph 11.3 and a reference to only Article VIII of GATT, excluded the recourse to Article XX for China's violations under Article XX.

⁹ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996

It would be also helpful to refer to the text of Paragraph 1.2 of China’s Accession Protocol, which states that “*the WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement*”.

Thus, China’s rights arising under the WTO Agreement are subject to not just the WTO Agreement as rectified, amended or otherwise modified before the date of accession, but also to the text of its Accession Protocol itself, which is a part of the WTO Agreement. The Appellate Body’s ruling has now made it abundantly clear that an acceding party’s rights under the WTO Agreement have to be evaluated in light of its specific terms of accession. The Appellate Body does not preclude the recourse to Article XX in all situations. Its findings are limited to China’s violations under Paragraph 11.3 because of the precise language of the said paragraph. This approach also appears to be in conformity with the Appellate Body’s Report in *China – Publications and Audiovisuals Products*¹⁰, where it was held that China may rely upon the introductory clause of paragraph 5.1 of its Accession Protocol and seek to justify its action under Article XX of the GATT, because of the language of the said paragraph.

Further, as was argued by the EU, while the WTO Members can ‘incorporate’ Article XX of the GATT 1994 to another WTO Agreement if they so wish, the legal basis for applying that provision to another agreement would be the ‘very text of incorporation’ and not Article XX itself, since the latter is limited by its express terms to the GATT 1994. Thus, going forward, it would not be surprising to see countries, which are seeking accession to the WTO, paying even closer attention to the wording of their instruments of accession, in an effort to keep references to GATT 1994 and the WTO Agreement generally worded and if possible, ensure specific mention of recourse to Article XX of GATT 1994.

- Paragraph 11.3 of China’s Accession Protocol and recourse to Article XX, GATT 1994: An interesting issue that arises under Paragraph 11.3 is whether recourse to Article XX is available to China in relation to imposition of *fees and charges*, as opposed to *export duties*, which were measure at issue here. In the present dispute, China had argued before the Appellate Body that Paragraph 11.3 of the Accession Protocol required export taxes and charges to be applied in conformity with Article VIII of GATT 1994. Thus, according to China, since any violation of Article VIII GATT may be justified under Article XX of GATT 1994, it could be concluded that violation of Paragraph 11.3 of China’s Accession Protocol may be justified by recourse to Article XX. The Appellate Body did not rule on the issue as it held that Article VIII excluded *export duties* which were the measure at issue in the present case. The Appellate Body however, did note that “the fact that Article XX *may* be invoked to justify those fees and charges regulated under Article VIII did not mean that it could also be invoked to justify export duties, which are not regulated under Article VIII”.

¹⁰ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010