# *China — Measures Related to Exportation of Various Raw Materials, Report of the Appellate Body*

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## I Introduction

On 30 January 2012, the Appellate Body of the World Trade Organization ('WTO') published its decision in relation to *China — Measures Related to Exportation of Various Raw Materials*.[1] The dispute was between China and the United States, Mexico and the European Union ('EU') ('the complainants').[2] This case note examines the Appellate Body's findings on the applicability of art XX of the *General Agreement on Tariffs and Trade 1994*[3] as an exception to para 11.3 of the *Accession of the People's Republic of China*.[4] Although the appeal also raised issues concerning the *Understanding on Rules and Procedures Governing the Settlement of Disputes*[5] and the interpretation and application of arts XI(2)(a) and XX(g) of *GATT 1994*, a discussion of these issues is beyond the scope of this case note.

The Appellate Body's discussion of the applicability of art XX of the *GATT 1994* as an exception to para 11.3 of *China's Accession Protocol* provides much-needed guidance on whether the art XX exceptions may be invoked to exempt Members from obligations arising from agreements other than the *GATT 1994*. This case note argues that the Appellate Body took a somewhat limited textualist approach to this issue. The implications of such an approach are that there appears to be a presumption against Members relying on an exception under art XX of the *GATT 1994* unless the accession protocol explicitly provides for such a possibility. Accordingly, states currently negotiating their accession protocols and intending to exempt themselves from an obligation using art XX of the *GATT 1994* will need to make intentions clear in the text of the accession protocol itself.

## II Overview of the Dispute

The Panel was established in response to complaints by the complainants regarding measures China had imposed on the exportation of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc ('raw materials'). The

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1 Appellate Body Reports, *China — Measures Related to Exportation of Various Raw Materials*, WTO Docs WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (30 January 2012) ('*Appellate Body Report*').

2 Third parties to the dispute included Argentina, Brazil, Canada, Chile, Colombia, Ecuador, India, Japan, Korea, Norway, Saudi Arabia, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Turkey.

3 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*GATT 1994*').

4 *Accession of the People's Republic of China*, WTO Doc WT/L/432 (23 November 2001) (Decision of 10 November 2001) ('*China's Accession Protocol*').

5 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*DSU*').

measures China had imposed that were the subject of the complaints included: export duties, export quotas, export licensing arrangements, and minimum export price requirements. The complainants asked the Panel to consider the consistency of China's measures on raw materials with arts VIII(1)(a), VIII(4), X(1), X(3)(a) and XI(1) of the *GATT 1994*, *China's Accession Protocol* and the *Report of the Working Party on the Accession of China*.[6] The Panel found substantially in favour of the complainants. China's appeal to the Appellate Body concerned issues of law and legal interpretations developed in the Panel Reports, *China — Measures Related to the Exportation of Raw Materials*.[7]

For the purpose of this case note, the main point of contention was whether China had violated its obligations under para 11.3 of *China's Accession Protocol*, which obliges China to eliminate all taxes and charges applied to exports (subject to two exceptions described below). China's main argument was that it was not in breach of its obligations under para 11.3 because it was able to invoke an exception to these obligations under art XX of the *GATT 1994*. Article XX prescribes exceptions to the obligations that parties to the *GATT 1994* would otherwise be required to observe. The Appellate Body's central question with respect to this part of the dispute, then, was whether China could invoke art XX of the *GATT 1994* to exempt itself from an agreement other than the *GATT 1994*.

## III Appellate Body's Findings on the Applicability of art XX of the *GATT 1994*

### A *Was Para 11.3 of* China's Accession Protocol *'Specific and Circumscribed'*?

China submitted that the Panel had erred in its finding that China did not have recourse to the exceptions contained in art XX of the *GATT 1994* in order to justify a violation of its export duty commitments in para 11.3 of *China's Accession Protocol*.[8] In support of its argument, China contended that the Panel had erred in its determination that there was no textual basis in *China's Accession Protocol* for invoking art XX in defence of a claim under para 11.3.[9] The Panel's finding, in China's view, was based on the erroneous assumption that the absence of language expressly granting the right to regulate trade in a manner consistent with art XX means that there was never any intention that China should be able to avail itself of such a right.[10]

The complainants, on the other hand, sought the Appellate Body to uphold the Panel's finding that China was not able to invoke art XX as an exception to the obligations contained in *China's Accession Protocol* para 11.3. The complainants argued that para 11.3 is 'specific and circumscribed' and only provides for two exceptions, neither of which includes a reference to art XX of the *GATT 1994*.[11] The EU further argued that, while a

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6 *Report of the Working Party on the Accession of China*, WTO Doc WT/ACC/CHN/49 (1 October 2001) ('*China's Accession Working Party Report*').

7 Panel Reports, *China — Measures Related to the Exportation of Various Raw Materials*, WTO Docs WT/DS394/R, WT/DS395/R, WT/DS398/R (5 July 2011) ('*Panel Report*').

8 China's appellant's submission [168] (citing *Panel Report* [7.158], [7.159], [8.2](b)–(c), [8.9](b)–(c), [8.16](b)–(c)) cited in *Appellate Body Report* [273] n 545.

9 China's appellant's submission [190] cited in *Appellate Body Report* [274] n 546.

10 *Appellate Body Report* [274].

11 Ibid [276].

WTO Member can incorporate the art XX exceptions into another WTO agreement, the basis for doing so is the text of incorporation, rather than art XX itself.[12]

The Appellate Body began its analysis of this question by examining arts 31 and 32 of the *Vienna Convention*,[13] which set out rules for interpreting international treaties. The Appellate Body then turned to the text of para 11.3 of *China's Accession Protocol*.[14] In so doing, the Appellate Body found that the terms of para 11.3 allowed for only two exceptions to the obligation to 'eliminate all taxes and charges applied to exports': (1) unless such taxes and charges are 'specifically provided for in Annex 6 of [*China's Accession Protocol*]'; or (2) where such taxes and charges are 'applied in conformity with the provisions of art VIII of *GATT 1994*'.[15]

With respect to the first exception, the Appellate Body found that, except for yellow phosphorus, none of the raw materials at issue in the dispute were listed in annex 6 of *China's Accession Protocol*.[16] The second exception is discussed directly below. In finding that neither of the exceptions were applicable, the Appellate Body essentially confirmed the complainant's contention that para 11.3 of *China's Accession Protocol* was 'specific and circumscribed'. Accordingly, the Appellate Body found against the notion that China had an implied right to invoke art XX of the *GATT 1994* as an exception to its obligations under para 11.3.

China contended that 'a substantive overlap' existed between the scope of the exceptions set out in annex 6 and art XX of the *GATT 1994*.[17] The Appellate Body dismissed such an argument on the basis that it was difficult to reconcile why annex 6 would set out a list of 84 products exempted from the general obligation set out at para 11.3 if it had been intended that China could additionally rely on art XX of the *GATT 1994* as a more general exception.[18]

## B *Paragraph 11.3's Cross-Reference to Art VIII of the* GATT 1994

A further argument that China raised to justify the use of the art XX exception was that para 11.3 of *China's Accession Protocol* cross-references art VIII of the *GATT 1994*. China reasoned that para 11.3 requires that export taxes and charges be applied in conformity with art VIII of the *GATT 1994*.[19] By extension, China argued, if China's export taxes and charges violated both para 11.3 and art VIII of the *GATT 1994*, China would be able to invoke an exception under art XX of *GATT 1994* to justify the breach.[20] This is because any violation of a *GATT 1994* article (including art VIII) could potentially be justified by an exception in art XX of the *GATT 1994*. However, the Appellate Body rejected China's argument on the grounds that art VIII expressly excludes export duties, which were at issue

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12 European Union's appellee's submission [54] cited in *Appellate Body Report* [276] n 548.

13 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980);.*Appellate Body Report* [278].

14 *Appellate Body Report* [279]–[280].

15 Ibid [280].

16 Ibid [282].

17 China's appellant's submission [216] cited in *Appellate Body Report* [30] n 70.

18 *Appellate Body Report* [284].

19 China's appellant's submission [224] cited in *Appellate Body Report* [289] n 563.

20 China's appellant's submission [224] cited in *Appellate Body Report* [289] n 565.

in this matter.[21] Therefore, since China could not invoke art VIII of the *GATT 1994*, the Appellate Body held that China could not, by extension, invoke art XX as an exception.

## C *China's 'Inherent Right' to Regulate Trade*

Finally, China submitted that it had an 'inherent right' to regulate trade in a manner that promotes conservation and public health.[22] To that end, China reasoned that *China's Accession Protocol* and *China's Accession Working Party Report* contain no language showing that China 'abandon[ed]' its inherent right to regulate trade; rather, its accession commitments indicate an intention to retain this right.[23] China extended such reasoning by asserting that the Panel's interpretation of para 11.3 turned inherent rights into '*acquired* rights'.[24] The complainants responded by agreeing that WTO Members have an inherent right to regulate trade, but that the accession commitments made upon entering the WTO represent rules that constrain that right.[25]

In response to China's argument, the Appellate Body noted, as had the Panel,[26] that other WTO Members had included explicit cross-references to art XX of the *GATT 1994* in their agreements, but China had omitted to do so.[27] In particular, the Appellate Body placed emphasis on the fact that para 11.3 of *China's Accession Protocol* expressly refers to art VIII of the *GATT 1994*, but does not contain any reference to any other *GATT 1994* provision.[28] In this way, the Appellate Body distinguished the present case from its former decision, *China — Publications and Audiovisual Products*.[29] In this former decision the Appellate Body had found that China could invoke art XX(a) to justify provisions found to be inconsistent with China's trading rights commitments under *China's Accession Protocol* and *China's Accession Working Party Report*.[30] The basis of distinguishing these two cases was that the material provision concerning this issue in *China — Publications and Audiovisual Products* contained the phrase '[w]ithout prejudice to China's right to regulate trade in a manner consistent with the *WTO Agreement*',[31] whereas para 11.3 of *China's Accession Protocol* contained no such language.[32]

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21 *Appellate Body Report* [290].

22 China's appellant's submission [275] (quoting Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009) ('*China — Publications and Audiovisual Products*') [124]).

23 China's appellant's submission [286] cited in *Appellate Body Report* [300] n 580.

24 China's appellant's submission [291] (emphasis in original) cited in *Appellate Body Report* [300] n 581.

25 Joint appellees' submission of the United States and Mexico [142] (citing Appellate Body Report, *China — Publications and Audiovisual Products* [222] cited in *Appellate Body Report* [301] n 584).

26 *Panel Report* [7.153].

27 *Appellate Body Report* [303].

28 Ibid.

29 *China — Publications and Audiovisual Products*, above n 22.

30 *Appellate Body Report* [304].

31 *China — Publications and Audiovisual Products* [221] quoted in *Appellate Body Report* [304].

32 *Appellate Body Report* [304].

## IV Discussion

### A *The Appellate Body's use of the* Vienna Convention

Despite the fact that the Appellate Body began its analysis of the question of the applicability of art XX of the *GATT 1994* to para 11.3 of *China's Accession Protocol* with an examination of arts 31 and 32 of the *Vienna Convention*, it arguably fell short of a full application of the general rule of interpretation. That is, the Appellate Body's examination of *China's Accession Protocol* only included the text of para 11.3 and annex 6 of that Protocol, and art VIII of the *GATT 1994*, which are cross-referenced in that paragraph. The Appellate Body's analysis of these provisions was limited to a purely textualist approach that required an explicit link between *China's Accession Protocol* and art XX of the *GATT 1994*.

The only context to which the Appellate Body had reference was a one-paragraph examination of paras 11.1 and 11.2[33] and a discussion of para 170 of *China's Accession Protocol*,[34] to which it was directed by China's submissions. However, the Appellate Body failed to consider *China's Accession Protocol* and *China's Accession Working Party Report* as a whole and 'in the light of [their] object and purpose', as prescribed by art 31(1) of the *Vienna Convention*. In this way, it fell short of applying its own guidance in *EC — Chicken Cuts*,[35] that '[i]nterpretation pursuant to the customary rules codified in art 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components'.

### B *The Question of Sovereignty*

The Appellate Body's treatment of limited natural resources in the decision as ordinary goods, like manufactured products, is also somewhat unsettling. This is particularly the case given the primary importance of a Member retaining sovereignty over its natural resources, of which raw materials form a part. The idea that natural resources have an elevated status beyond that of ordinary goods is recognised in the *International Covenant on Civil and Political Rights*[36] and the *International Covenant on Economic, Social and Cultural Rights*.[37] Although it did not invoke either of these instruments, China raised the issue of its sovereignty over areas of trade that promote conservation and public health.[38] However, the Appellate Body implicitly agreed with the complainants' contention that such sovereignty was conditioned by its textual commitments prescribed in *China's Accession Protocol*. While the Appellate Body's position here is unsurprising, it overestimates the degree of power and agency that a Member may have upon acceding to the WTO.

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33 Ibid [293].

34 Ibid [294]–[299].

35 Appellate Body Report, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts,* WTO Docs WT/DS269/AB/R and WT/DS286/AB/R (12 September 2005) [176].

36 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 1.2 and 47 ('*ICCPR*').

37 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) arts 1.2 and 25 ('*ICESCR*').

38 *Appellate Body Report* [300].

### C *The Implications of the Appellate Body's Textualist Approach*

As was recognised by the Appellate Body, the outcome of *China — Raw Materials* provides a sharp contrast to its former *China — Publications and Audiovisual Products* decision, which also examined *China's Accession Protocol* and *China's Accession Working Party Report*. As discussed above, the locus of the difference between these two Appellate Reports lies in the language of their material provisions. An analysis of the different findings in the two reports suggests that an explicit textual reference to art XX of the *GATT 1994* is required in order for a country to rely upon it.

This suggests, in turn, that there is a presumption against the availability of an art XX exception unless the text of an accession protocol explicitly provides for the availability of that exception. Accession protocols should be clearly drafted so that each clause that may need it includes an explicit textual right to resort to art XX of the *GATT 1994*. It may be counter-argued that it is possible to amend an accession protocol after it has been accepted by WTO Members. Indeed, in the case of *China's Accession Protocol*, the fact that para 1.2 of it provides that the Protocol 'shall be an integral part' of the *Marrakesh Agreement Establishing the World Trade Organization* suggests that *China's Accession Protocol* may be amended pursuant to the procedure of amendment set out in *GATT 1994*. In practice, however, it would be logistically difficult, if not impossible, for China to negotiate and effect such an amendment.

## V Conclusion

The *Appellate Body Report* in *China — Raw Materials* finally settled the question of whether art XX of the *GATT 1994* is available in relation to agreements outside the *GATT 1994*. The answer is that such exceptions may only be invoked where the material clauses explicitly permit this. The implication is that, in the absence of such textual links, there is a presumption against invoking art XX. In coming to this conclusion, the Appellate Body applied a decidedly textualist approach with limited regard to the context of *China's Accession Protocol* or the object and purpose of that instrument as a whole, despite the guidance provided by art 31 of the *Vienna Convention*. The result is that states considering acceding to the WTO would be well-advised to bear such a presumption in mind when drafting their accession protocols.