

Comment on the Invocation of Article XX for Violation of Para.11.3 in China—Raw Materials

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ABSTRACT

The failure to mention the relationship between China's WTO-plus obligation in Paragraph 11.3 and the GATT 1994 does not mean the negotiators had meant to deny China the right to invoke Article XX of the GATT 1994. If that was the case, the intention would have been recorded in the Protocol and the Working Party Report. Contexts provided by the Working Party Report and provisions of the GATT 1994 and other provisions of the WTO Agreement prove that China cannot be denied the right to invoke Article XX. WTO-plus obligations are still integral parts of the WTO Agreement and the decision of the Panel and the AB in this case will lead to absurd results.

Keywords: WTO-Plus Obligations; Article XX; China's Accession Protocol

1. Introduction

China made many extra commitments when joining the World Trade Organization. They are known as the WTO-plus obligations, one example being Paragraph 11.3 of China's Accession Protocol (or "the Protocol"). In 2009, the United States, the European Communities and Mexico made a complaint before the Dispute Settlement Body of the WTO concerning China's use of export restraints on the exportation of various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and Zinc (the "raw materials"). The Final Reports of the Panel were circulated on July 5, 2011. All parties appealed and the Reports of the Appellate Body (or "AB") were adopted on February 22, 2012.

In its Final Reports, the Panel concludes that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3.¹ It is disappointing that the Appellate Body (or "AB") does not make any corrections but adopts exactly the same tone as the Panel. This means China will be deprived of its right to invoke Article XX, or maybe other exceptions provided by other WTO agreements, in issues concerning WTO-plus obligations. Although WTO cases are not binding for future disputes, they are quite influential and are always cited by later panels and appellate bodies. The decisions of the Panel and the Appellate body, therefore, left China in a very disadvantageous position. This article argues against

the decisions of the Panel and the AB from the following six aspects.

2. Must There Be an Expression Such as "Without Prejudice to China's Rights to Regulate Trade in a Manner Consistent with the WTO Agreement"?

According to the Panel, Paragraph 11.3 does not include an introductory clause such as that found in Paragraph 5.1, which refers generally to "without prejudice to China's rights to regulate trade in a manner consistent with the WTO Agreement".² The Appellate Body agrees with the Panel.³ That is to say, if such an expression existed, China would be able to invoke Article XX. Yet is it necessary to include an introductory clause such as that in Paragraph 5.1?

We are familiar with the idea that sometimes meanings are expressly spoken while sometimes meanings are implied. Para.11.3 belongs to the second case. It is true that the said expression does not appear in Para.11.3, but of course China shall regulate trade in a manner consistent with the WTO Agreement. This is self-evident because China is a member of the WTO. How can the opposite be true?

Though it is convenient if a direct context like that in Paragraph 5.1 can be found, it does not mean that without the same direct context, provisions in GATT 1994

¹Para. 7.159 of the Reports of the Panel.

²Para. 7.124 of the Reports of the Panel.

³Para. 304 of the Reports of the Appellate Body.

will not apply. For example, Paragraph 11.3 did not mention the National Treatment⁴ and the whole Protocol does not refer to the Most-Favored-Nation Treatment,⁵ but who will question the application of those fundamental principles of the GATT to this paragraph? Article XX, as well as the above fundamental principles, is not mentioned in particular because it is implied that the relevant part of the whole GATT 1994 will apply as a premise to the provisions of the Protocol. As will be mentioned later, provisions in China's Accession Protocol should be read together with corresponding provisions in other WTO agreements, and Paragraph 11.3 should be read together with the whole GATT 1994, including its Article XX.

The language in Paragraph 5.1 is not the only standard expression or the only way to empower a Member to invoke Article XX. China should not be denied the right to invoke Article XX because a certain paragraph has not adopted a certain wording.

3. Which Is Better, to State Directly That Article XX Will Not Apply or to Imply That Article XX Will Not Apply?

In the Panel's view, were GATT Article XX intended to apply to Paragraph 11.3 of China's Accession Protocol, language would have been inserted to suggest this relationship.⁶ Yet, the opposite is more likely true: if China and the negotiating Members intend to prevent China from invoking Article XX, they would have said so. Nowhere in the Protocol says that China cannot invoke Article XX because the negotiators have no such intention. Otherwise, it would have been stated clearly. It is hard to imagine that the Members would have left unmentioned such an important intention if it had been agreed on. One may say nothing of the kind is mentioned because there is an omission or because it had never been intended this way or because in the negotiation China and the other Members were clear of the existence of other WTO agreements and understood that China's rights to regulate trade in a manner consistent with the WTO Agreement will not be prejudiced, including its invocation of Article XX of the GATT 1994. But one cannot say that the failure to mention China's right to invoke Article XX is because it has been agreed that China cannot invoke Article XX: again, if this is true, if it is agreed that China cannot invoke Article XX, it would have been stated so clearly instead of left it unmentioned.

China made lots of WTO-plus obligations when joining the WTO [1], it is not reasonable to ask China, or any other Accessing Member, to insert in every paragraph such expressions as that in Para. 5.1 so as to invoke

Article XX or any other exceptions or rights. For one thing, it will make the wording of the Protocol repetitive and redundant; for another, it is impossible to repeat all the relevant provisions of the WTO agreements in every single paragraph of the Protocol. And if the negotiating parties did intend to prevent China from invoking the exception clauses, they would have stated so expressly to eliminate any doubt. It is far more feasible and possible to do this than to list repeatedly every relevant provision.

Besides, Paragraph 14 of the Working Party Report says that the Working Party "reviewed the foreign trade regime of China. The discussions and commitments resulting therefrom are contained in paragraphs 15 - 342 below and in the Protocol of Accession..., including the annexes." That is to say, the Working Party Report is a record of the "discussions and commitments" resulting from the review of the foreign trade regime of China. It is possible that if Article XX had been mentioned in the discussions, it would have been recorded in the Report. Since Article XX does not appear in the Report, probably it has never come up in the negotiation and therefore it is farfetched to say that this shows Article XX is not accessible to China.

4. Context Provided by Paragraph 170⁷ and Other Provisions of China's Working Party Report

4.1. Context Provided by Paragraph 170

The Panel refuses to use Paragraph 170 as a context for Para. 11.3 because, in the Panel's view, Paragraph 170 does not refer to China's specific obligations on export duties; it refers to "charges and taxes levied on imports and exports".⁸ But, charges and taxes levied on exports must include export duties. Otherwise, at least Annex 6 (entitled Products Subject to *Export Duty*) could not have become the exceptions of Paragraph 11.3 (entitled Taxes and Charges Levied on Imports and Exports) and Article VIII does not need to exclude import and export duties from "all fees and charges". It is only meaningful to exclude a subcategory from a general subcategory if that subcategory belongs to the general category. Paragraph

⁷China's Working Party Report, Title IV (Policies Affecting Trade in Goods), Part D (INTERNAL POLICIES AFFECTING FOREIGN TRADE IN GOODS", subpart 1 (Taxes and Charges Levied on Imports and Exports): 170. 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, and that it would also implement such laws and regulations in full conformity with these obligations. The Working Party took note of this commitment.

⁸Para. 7.141 of the Reports of the Panel. Also, the Panel says, "Paragraph 170 is permissible and authorises China to use such charges or taxes so long as they respect Articles I, III:2 and III:4 and XI:1 of GATT 1994," but we notice this understanding is different from the original statement of Paragraph 170.

⁴Article III of the GATT 1994.

⁵Article I of the GATT 1994.

⁶Para. 7.154 of the Reports of the Panel.

11.3 does not mention “export duties” but only “taxes and charges applied to exports”, yet the Panel finds no difficulty in determining that the application of temporary export duties is inconsistent with Paragraph 11.3 of China’s Accession Protocol.⁹ Doesn’t the Panel admit by deciding so that export duties are taxes and charges applied to exports? Therefore, Paragraph 170 of the Working Party Report is a relevant paragraph to Paragraph 11.3 of the Protocol.

On appeal, the Appellate Body says that the language in the title to subsection D and in Paragraph 169 suggests that Paragraph 170 is concerned with “internal policies”. Subsection D is indeed titled “Internal Policies Affecting Foreign Trade in Goods”. However, sometimes a subject may be put under two subsections and the drafters have to choose to put it under one. That does not mean it is one thing but not the other. Para. 170 is such a case. It could have been put easily under Subsection C (1) entitled “Customs Tariffs, Fees and Charges for Services Rendered, Application of Internal Taxes to Exports”. It is put under Subsection D because the question in Para.169 concern only imports but not exports. The classification is arranged according to the concerns of the other Members but not answers of China. To answer the Members’ concern, China had made more promises, promises not limited to imports but including both imports and exports. Placing it under Subsection D does not make fees, charges or taxes levied on imports and exports exclude imports and exports duties.

Paragraph 170 is relevant and it says that “China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and export would be in full conformity with its WTO obligations”. This satisfies the requirement of the Panel,¹⁰ and the challenged measures should be able to invoke Article XX. Also, although Paragraph 170 only mentioned “in full conformity with its WTO obligations”, it is hard to imagine that a Member is willing to take all the obligations of an agreement while waiving all the rights. It is wrong to come to a conclusion like this. Again, if it was the case, to avoid future disputes, China and the negotiating Members would have said so clearly in the Protocol or Working Party Report. The expression “in full conformity with its WTO obligations” should also imply that China can enjoy all the rights of a WTO Member while performing its obligations.

4.2. Can Paras. 155 and 156 of the Working Party Report Be Used as a Context of Para. 11.3

While Paragraph 170 is a proper context for Para. 11.3, it is not proper to use Paras.155 and 156 as such. First, according to Para. 342 of the Working Party Report and

⁹Para. 7.107 of the Reports of the Panel.

¹⁰Para. 7.138 of the Reports of the Panel.

Paragraph 1.2 of the Protocol, Paras.155 and 156 are not an integral part of the WTO Agreement and do not form part of the explicit commitments covered by China’s Accession Protocol.¹¹ Second, exactly because they have the same content as Para.11.3, they are just a repetition of Para.11.3 and shed no more light on the intentions of the negotiators.

4.3. Can China’s Export Duty Commitments Be Incorporated into China’s GATT 1994 Schedule?

It is surprising that the Panel should suggest that China and the WTO Members could have incorporated China’s export duty commitments into China’s GATT 1994 Schedule.¹² In general, a WTO member’s schedule is a list of commitments on market access (bound tariff rates, access to services markets).¹³ It is about imports but not exports. Each Member’s schedule consists of four parts:¹⁴ Most-favored-nation or MFN concessions, maximum tariffs to goods from other WTO members; preferential concessions (tariffs relating to trade arrangements listed in GATT Article I); concessions on non-tariff measures (NTMs); and specific commitments on domestic support and export subsidies on agricultural products. China’s export duty commitments do not belong to any of these four parts and therefore cannot be included in China’s GATT 1994 Schedule.

5. Context Provided by Other Provisions of the GATT 1994 and Other Provisions of the WTO Agreements

5.1. How to Understand “The Agreement” in Article XX of the GATT 1994

Article XX provides that “nothing in this Agreement should be construed to prevent the adoption or enforcement” of certain measures and the Panel says the reference to “this Agreement” suggests that the exceptions therein relate only to the GATT 1994, and not to other agreements.¹⁵ However, the Panel should realize that different ways can be used to interpret a legal provision and sometimes, “the words mean something other than what they appear to mean”. For example, the First Amendment of the US Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”, but “even the most ardent strict constructionist understands that the amend-

¹¹Para. 7.145 of the Reports of the Panel.

¹²Para. 7.140 of the Reports of the Panel.

¹³http://www.wto.org/english/othertwto_e/glossary_e/glossary_e.htm, last visited: September 20, 2012.

¹⁴http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm, last visited: September 20, 2012.

¹⁵Para. 7.153 of the Reports of the Panel.

ment also applies to the President or the courts [2].”

The Panel itself expands the interpretation of a provision. In Paragraph 7.138, the Panel observes the phrase used in Paragraphs 11.1 and 11.2 of the Protocol is “in conformity with the GATT 1994” and in the same paragraph, the Panel thinks this language equals to “in conformity with WTO obligations”.¹⁶

Therefore, although “this Agreement” refers to the General Agreement on Tariffs and Trade, it should also include later documents concerning tariffs and trade as long as they are integral parts of the WTO Agreement.

5.2. Other Agreements of the WTO

The Panel says that TRIMs has incorporated, by cross-reference, the provisions of Article XX of the GATT 1994 into it and that other WTO agreements such as GATS, TRIPS, the TBT and the SPS agreements all include their own flexibilities and exceptions.¹⁷ Again, the Appellate Body agrees.¹⁸ Can China’s Protocol incorporate Article XX like the TRIMs?

One difference between China’s Accession Protocol and the other agreements is that TRIMs, or TRIPS, or the TBT or the SPS agreements concern only one subject and it is possible for them to have their own exceptions and flexibilities while China’s Accession Protocol, on the other hand, including all the fields mentioned in the above TRIMs, TRIPS, TBT and SPS agreements. Just as “there are no general umbrella exception in the Marrakesh Agreement”,¹⁹ it is impossible to put a general umbrella exception in China’s Accession Protocol. Since it is not possible to add every applicable provision of the WTO agreements into every paragraph of an accession protocol either, the only reasonable way is to read relevant part of the Protocol together with the relevant WTO agreements.

6. How to Understand This Extra Obligation of China against the WTO Agreement?

The fact is the Protocol left unsaid the relationship between China’s WTO-plus obligations and the WTO agreements. In absence of such a statement, how should we understand the extra obligation of China in Para.11.3 against the GATT 1994?

First it is important to remember, as admitted by the

Panel, that WTO Member’ Accession Protocols are integral parts of the WTO Agreement.²⁰ The fact that Paragraph 11.3 does not include the language “in conformity with WTO obligations”²¹ does not mean that China does not need to comply with other WTO obligations and complying with the obligation in Para.11.3 does not relieve China from its other obligations under the GATT 1994. Therefore, Paragraph 11.3 is not an independent and self-complete paragraph but one more article or provision of the GATT 1994 and should be read together with all the other provisions of the GATT 1994, including Article XX. For the same reason, all other WTO-plus obligations should also be regarded as one more article of and be read together with the related agreements.

As noticed by the Panel that in China—Publications and Audiovisual Products, the Appellate Body did not discuss the systemic relationship between provisions of China’s Accession Protocol and those of the GATT 1994, within the WTO Agreement²² but instead interpreted the language contained in the introductory clause of Paragraph 5.1 of China’s Accession Protocol. However, if the Panel infers from this that as to the relationship between China’s Accession Protocol and Article XX, every provision of the Protocol need to be examined separately to decide whether Article XX applies to each of them, the Panel would have severed the whole package of WTO Agreement into irrelevant parts: If each paragraph of an agreement is to be read separately, how can we say we treat the agreements as an integral body? Instead, what should be done is to read provisions of the WTO agreements on a certain issue together. For example, Para.11.3 concerns with tariffs, and then it should be read together with the General Agreement on Tariffs and Trade 1994.

Nowhere in the Protocol mentions the dispute settlement but all parties agree that WTO Members can initiate WTO dispute settlement proceedings on the basis of a claim of violation of China’s Accession Protocol. Why? It is because the Protocol constitutes “an integral part of the WTO Agreement”. As such, the Protocol becomes part of a “covered agreement” for the purpose of the Dispute Settlement Understanding [1]. If a provision must be mentioned to be applied, doesn’t that mean the WTO Members cannot initiate dispute proceedings on the basis of China’s Accession Protocol?

If a paragraph of the Protocol cannot be read together with the relevant parts of the WTO agreements, how can one say it is an integral part of the WTO Agreement? If China’s Protocol is an integral part of the WTO Agreement, and if Paragraph 11.3 cannot be read together with the GATT 1994, what shall it be read together with?

¹⁶Para.7.138 of the the Reports of the Panel. The Panel observes that the phrase “in conformity with the GATT 1994” does not appear in Paragraph 11.3. In addition, the fact that Paragraph 11.3 does not include the language “in conformity with WTO obligations” (which appears in Paragraphs 11.1 and 11.2) can only be understood to reflect agreement at the time of China’s accession that since China’s export duties commitments arose exclusively from China’s Accession Protocol, Article XX would not apply to such commitments.

¹⁷Para. 7.153 of the Reports of the Panel.

¹⁸Para. 303 of the Appellate Body Reports.

¹⁹Para. 7.150 of the Reports of the Panel.

²⁰Para. 7.112-115 of the Reports of the Panel.

²¹Para. 7.138 of the Reports of the Panel.

²²Para. 7.117 of the Reports of the Panel.

7. Denying China the Right to Invoke Article XX Will Lead to an Absurd Result

According to the Panel, the wording of Paragraph 11.3 precludes the possibility for China to invoke GATT Article XX²³; the Panel also says the exceptions in Paragraph 11.3 are those covered by Annex 6 and GATT Article VIII.²⁴ On appeal, the AB makes no argument but only quotes from the Panel's Reports. However, these decisions will lead to absurd results.

There should be no doubt that Article VIII is an article of the GATT 1944, and should there be a violation of Article VIII, a Member can invoke Article XX. From Para.11.3,²⁵ it can be inferred that if a measure is taken in conformity with the provisions of Article VIII²⁶ of the GATT 1994, there will be no violation of Paragraph 11.3. On the other hand, if a measure has violated Article VIII, it may have also violated Paragraph 11.3. Or, if a measure has violated Paragraph 11.3, it may also have violated Article VIII. In any case, we can imagine a scenario in which a measure violates both Article VIII and Para. 11.3.

If the reasoning of the Panel is correct, the result will be: if the complaint of a measure is made based on Paragraph 11.3, China could not invoke Article XX; however, if challenge to the measure is made based on Article VIII, China could invoke Article XX. But how can the same measure be able and unable to invoke Article XX at the same time?

The conclusion that China is not allowed to invoke Article XX based on the wording of Paragraph 11.3 will only encourage the complainants to deliberately narrow its legal bases for their complaints down to China's Accession Protocol and turn dispute settlements into a matter of legal techniques. To ensure the healthy development of the dispute settlement system, such manoeuvres should be prohibited.

Actually in China—Publications and Audiovisual Products, the Appellate Body has noticed this problem and said:

229 In our view, the introductory clause of paragraph 5.1 cannot be interpreted in a way *that would* allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating

²³Para. 7.158 of the Reports of the Panel.

²⁴Para. 7.126 of the Reports of the Panel.

²⁵Paragraph 11.3 says that: 3. China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.

²⁶We can certainly argue that a violation of Annex 6 enables China to invoke Article XX but to avoid further argument and since it is enough to do so, we will just concentrate on Article VIII to analyze the flaw in the Panel's reasoning.

to trade in goods that apply to the same or closely linked measures, and which set out obligations that are closely linked to China's trading rights commitments (emphasis added).

It can be seen from the above paragraph that the Appellate Body is against a Member's shopping of provisions probably because this kind of shopping smells of deliberateness and is not beneficial for avoiding disputes between the Members.

8. Conclusions

The fact that there lacks an expression like "without prejudice to China's rights to regulate trade in a manner consistent with the WTO Agreement" does not necessarily mean China cannot invoke Article XX just like the failure to mention the National Treatment and the MFN Treatment does not mean these fundamental principles of the GATT 1994 do not apply to Para.11.3. If the negotiators had meant to deny China the right to invoke the exception clauses of the WTO agreements, a much better way than implying the intention is for them to have stated so clearly. Para.170 of the Working Party Report is a relevant context and satisfies the requirements to invoke Article XX while Paras.155 and 156 are not proper contexts. Contexts provided by the GATT 1994 and other provisions of the WTO agreements also prove that China cannot be denied the right to invoke Article XX. China's WTO-plus obligations are integral parts of the WTO Agreement and denying China the right to invoke Article XX will lead to absurd results.

All protocols of accession for new members since 1995 (except China) consist of no more than two pages of standardized provisions that address necessary procedural and technical matters of the accession, while the China Protocol is not a standardized document consisting of a main text of 11 pages, nine annexes and 143 paragraphs incorporated by reference from the Working Party Report. Unlike other accession protocols, China's Protocol includes lots and lots of WTO-plus obligations [1]. It is simply not fair to ask a Member to shoulder more obligations and yet deprive it of the right to invoke exceptions clauses of the WTO agreements.

Paragraph 11.3 is one more article or provision of the GATT 1994, an extra provision that should be read together with what it has added to and should not be read alone. In the same way, other WTO-plus obligations of China should be read together with other relevant WTO agreements because they are integral parts of the WTO Agreement.

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