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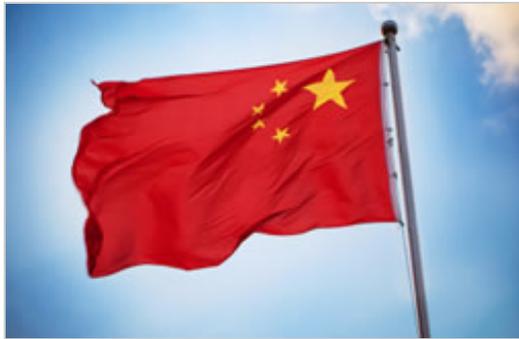
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China-Raw Materials: WTO Rules on Chinese Natural Resources Export Dispute

By Sonia E. Rolland



Introduction

In February 2012, the World Trade Organization (“WTO”) adopted the Appellate Body and panel reports on the *China—Raw Materials*^[1] dispute brought by the EU, Mexico, and the United States against Chinese export restrictions and export taxes on bauxite, coke, fluorspar, magnesium, manganese, silicon carbide,

silicon metal, yellow phosphorus, and zinc. The decisions offer some first impressions on the intersection between WTO law, a WTO member government’s ability to regulate trade in its natural resources, and public international law norms regarding sovereignty of natural resources.

The panel and the Appellate Body in *China—Raw Materials* made three sets of important findings. First, they provided guidance on how exceptions to the General Agreement on Tariffs and Trade (“GATT”) prohibition on export restrictions relate to general international law principles regarding sovereignty over natural resources. Second, they clarified the relationship between China’s Accession Protocol and the GATT, particularly finding that China could not invoke GATT exceptions with respect to certain accession commitments that exceeded basic GATT disciplines. Third, they confirmed that the complainants could challenge temporary but renewable measures by China that operated jointly with other measures to restrict exports.

Overview of the Dispute

The GATT generally prohibits WTO members from taking measures that restrict their exports in particular through quantitative restrictions (Article XI:1) and fees and formalities on trade (Article VIII). However, a number of exceptions are available for certain measures, certain objectives (e.g., the protection of human, animal, plant life and health, the conservation of natural exhaustible resources,^[2] and safeguarding the balance of payments^[3]), and certain products (e.g., defense equipment,^[4] gold, or silver^[5]).

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In addition to those obligations, China committed to even more stringent liberalization when it joined the WTO in 2001, in particular by agreeing to eliminate all taxes and charges related to exports, except for a number of listed materials and for measures taken in conformity with GATT Article VIII (fees corresponding to a service rendered).[6] China restricted exports of certain raw materials by imposing export duties, quotas, licensing, and minimum price requirements with a complex set of legislative and regulatory measures from 1994 to 2010.[7] The United States, the EU, and Mexico challenged the measures before the WTO, and the WTO established a panel in 2009. Eleven other WTO members—including both developed and developing countries—made submissions to the panel, and seven WTO members made submissions to the Appellate Body.[8] The panel found against China on nearly every aspect of the claim, and both China and the complainants appealed. The Appellate Body confirmed most of the panel’s conclusions, confirming that no exception would excuse China’s export restrictions or export taxes.

Specific Legal Issues

The present analysis focuses on the two main issues in the *China—Raw Materials* case: the rights available under the WTO to a member to limit the export of its natural resources and to foster its economic development based on those resources, and the applicability of GATT exceptions to obligations undertaken in a member’s Accession Protocol.

Sovereignty, the Regulation of Exports of Natural Resources, and Economic Development Arguments

In *China—Raw Materials*, China forcefully argued that it had a general inherent right to regulate trade and that as a developing country it had the right to regulate the export of its natural resources as a matter of sovereignty.[9] China cited to specific provisions of the GATT as legal bases to derogate from its general obligations not to restrict exports of the raw materials. The panel and the Appellate Body focused on a textual interpretation of the GATT and China’s Accession Protocol to conclude that neither China’s general arguments nor its specific defenses would succeed.

Well-established international law norms regarding sovereignty over natural resources loomed large in China’s arguments. China argued that as part of its right to exercise its sovereignty over its natural resources, it could impose the export restrictions on the raw materials at issue.[10] The intersection of WTO rules and other rules of public international law has been explored in prior cases and literature but the argument regarding sovereignty over natural resources was one of first impression for the WTO panel and the Appellate Body. China contended that it could restrict exports of the raw materials under GATT Article XX(g), which allows members to take measures “relating to the conservation of exhaustible natural resources” because the materials are a finite, non-renewable natural resource.[11] In its interpretation of the term “conservation,” the panel construed the WTO agreements in light of relevant rules of international law with reference to the Vienna Convention on the Law of Treaties. The panel recalled the landmark decisions by the Permanent Court of International Justice, including the *S.S. Wimbledon* case, to frame the norm as an expression of state sovereignty. It also referred to the United Nations General Assembly Resolution 1803 (*Permanent Sovereignty Over Natural Resources*) and Resolution 626 (*Right to Exploit Freely Natural Wealth and Resources*), defining the states’ permanent sovereignty over natural resources as the ability for states to “freely use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development.[12] However, although the panel recognized that the principles

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of sovereignty in general, and sovereignty over natural resources in particular, should be taken into account in the interpretation of WTO exceptions, it ultimately found that China's exercise of sovereignty over its natural resources did not allow it to derogate from the commitments it had undertaken under the WTO system. Specifically, the panel and the Appellate Body both found that in joining the WTO, China had agreed to exercise its sovereign right to regulate trade and its natural resources in a manner consistent with China's WTO obligations.[13]

China also argued that the requirement that measures relating to the conservation of natural resources be taken in conjunction with domestic measures should be read in light of Part IV of the GATT on Trade and Development. In particular, China attempted to link the goal of economic diversification of GATT Article XXXVI:5 and its *Ad Note* to the interpretation of the domestic measures requirement. It argued that the domestic measures need not be the same as those imposed on foreigners to meet developing members' need to diversify its economy and foster its industrial development. In other words, "the WTO Agreement is not a commodity-sharing agreement." [14] The panel rejected this claim both on factual and legal grounds. It simply found Article XXXVI:5 to be inapposite to the interpretation of Article XX(g) and strongly suggested that it was doubtful whether there was a right to economic diversification in any case. [15] China's attempt to substantiate Part IV of the GATT—albeit unsuccessfully—is a noteworthy development, and it will be interesting to see whether China or other developing members will further pursue this strategy in future cases.

Availability of GATT Defenses for Commitments Under the Accession Protocol

This case is notable for its analysis of the relationship between China's Accession Protocol and its rights under the GATT. While China negotiated temporary exemptions from GATT rules for some of its measures, it also agreed to additional obligations in respect of other measures. Existing WTO members often ask for strong commitments from an acceding country, even commitments substantially stronger than their own. Because the WTO agreements, together with members' individual schedules of concessions and accession protocols, are all considered to be part of a "single undertaking" of rights and obligations, the issue arises whether exceptions and derogations available under the GATT, such as Article XX, may excuse breaches of commitments undertaken under China's Accession Protocol.

In addition to Article XX(g) discussed above, China relied on two other GATT exceptions to justify its export restrictions and export taxes. First, China asserted that the export quotas and duties on "scrap" (i.e., recycled) raw materials and certain raw materials were also justified as a measure necessary to protect public health under GATT Article XX(b) as their production is highly polluting, and China wanted to encourage a shift from the production of the primary materials to that of the recycled material, which is less polluting. [16] With respect to both Article XX arguments, the panel found that the exceptions were not available because they had not been incorporated by reference in the Accession Protocol, and even if they had been, China had not demonstrated that the measures satisfied the requirements of the exceptions. [17] Second, China claimed that the measures were justified because they "relieve[d] critical shortages of . . . other products essential to the exporting contracting party" as contemplated under GATT Article XI:2(a). [18]

With respect to Article XX(g), the panel was not persuaded that export quotas on bauxite and fluorspar related to the conservation of natural resources and met the other

requirements of Article XX(g). In particular, the panel cited the increased domestic consumption of these minerals, the decrease in their domestic prices (to the benefit of domestic production), and the increase in export prices as factual evidence that the disputed measures did not aim at the conservation of these materials.[19] China did not appeal this ruling.

The invocation of Article XX(b) in relation to pollution is not novel in WTO disputes.[20] The panel found, however, that China's measures did not amount to a comprehensive framework to fulfill the stated aim and the environmental objective.[21]

With respect to Article XI:2(a), China argued before the panel that Part IV of the GATT on "Trade and Development" provided context to justify a broad understanding of Article XI:2(a) as it applied to developing members.[22] The complainants, including Mexico, rejected the notion that Part IV would require interpreting Article XI differently for developed and developing members.[23] The panel agreed.[24] China did not appeal this ruling. Moreover, the panel and the Appellate Body found that, although bauxite was an "essential" resource to China within the meaning of Article XI:2(a), the measures taken to restrict exports were not temporary nor did they prevent or relieve a "critical shortage" within the meaning of the Article.[25] Although the Appellate Body pointed out that Article XX(g) and Article XI:2(a) were not necessarily mutually exclusive, thus casting doubts on the panel's reasoning in that respect,[26] the relationship between the two provisions remains an open question.

Even if the substantive provisions of the Article XX and XI:2 exceptions had been met, the panel and the Appellate Body found that the exceptions were not available because they had not been incorporated by reference in Paragraph 11.3 of China's Accession Protocol, which obligated China to eliminate export restrictions on the listed products. Referring to the terms of China's accession, as recorded in the Accession Protocol, the Appellate Body found that China had no legal basis to invoke Article XX in respect of the obligation on export taxes.[27] The Appellate Body contrasted this with other Protocol provisions that it read to allow a broader recourse to GATT exceptions.[28]

Conclusion

The *China—Raw Materials* case provides a cautionary tale for raw-material exporting countries as they negotiate WTO accession. It suggests that if an acceding country wishes to invoke GATT Article XX and other exceptions to manage its resource exports, it must ensure that its terms of accession expressly provide for such measures. More generally, the issue of the relationship between rights under general public international law, such as permanent sovereignty over natural resources, and WTO obligations continues to be a source of tension. The panel in *China—Raw Materials* confronted the issue explicitly, concluding that WTO obligations prevailed.[29]

After the Appellate Body ruling in the *China—Raw Materials* case, which was issued in March 2012, the EU, Japan, and the United States launched a new WTO dispute against China's export quotas on rare earths, tungsten, and molybdenum.[30] Like *China—Raw Materials*, this new dispute focuses on access to strategic inputs for global manufacturers. As the complaining parties and China litigate the new dispute, they will draw on the experience and rulings in the *China—Raw Materials* case.

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Endnotes:

[1] Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R (circulated Jan. 30, 2012) (complainant United States); WT/DS395/AB/R (complainant European Union), WT/DS398/AB/R (complainant Mexico) [hereinafter Appellate Body Report]; and Panel Reports WT/DS394/R, WT/DS395/R & WT/DS398/R (July 5, 2011) [hereinafter Panel Reports]. The targeted materials include certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous, and zinc.

[2] General Agreement on Tariffs and Trade [GATT] art. XX (b) & (g).

[3] *Id.* art. XII.

[4] *Id.* art. XXI (b).

[5] *Id.* art. XX (c).

[6] Protocol on the Accession of the People's Republic of China, WT/L/432, ¶ 11.3 & Annex 6.

[7] For a list of the measures, see Panel Reports, *supra* note 1, ¶¶ 2.3-2.5; see also Request for Consultations by the European Communities, WT/DS395/1 (June 25, 2009), Request for Consultation by Mexico, WT/DS398/1 (Aug. 26, 2009) & Request for Consultation by the United States, WT/DS394/1 (June 25, 2009).

[8] Argentina, Brazil, Canada, Chile, Colombia, Ecuador, India, Japan, Korea, Norway, Chinese Taipei, Turkey, and Saudi Arabia reserved third-party rights, although neither Norway nor Chinese Taipei provided any views to the panel. See Panel Reports, *supra* note 1, ¶¶ 5.1-5.2.

[9] *Id.* ¶¶ 7.155-7.157 (China arguing that its inherent right to regulate trade stems from the WTO agreements read as a whole. The panel responded that China had exercised its right by ratifying its Accession Protocol.); Appellate Body Report, *supra* note 1, ¶¶ 38-39, 49, 80-82, 300.

[10] Panel Reports, *supra* note 1, ¶¶ 6.35, 7.265, 7.356.

[11] *Id.* ¶¶ 7.356-7.364. This interpretation was vigorously opposed by the complainants. See *id.* ¶¶ 7.365-7.368.

[12] *Id.* ¶¶ 7.377-7.381.

[13] *Id.* ¶¶ 7.157, 7.381-7.383, 7.407; Appellate Body Report, *supra* note 1, ¶ 304 (not explicitly responding to arguments regarding the right to regulate trade, but making a narrower finding that paragraph 11.3 of China's Accession Protocol did not carve out language involving the right to regulate trade as paragraph 5.1 has done).

[14] Panel Reports, *supra* note 1, ¶¶ 7.388-7.389. See also ¶ 7.399.

[15] *Id.* ¶¶ 7.400-7.401.

[16] *Id.* ¶¶ 7.470-7.472.

[17] *Id.* ¶¶ 7.614, 7.616.

[18] *Id.* ¶¶ 7.239 et seq.

[19] *Id.* ¶¶ 7.429-7.435.

[20] Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (adopted Dec. 17, 2007, as modified by Appellate Body Report WT/DS332/AB/R); Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (adopted May 20, 1996, as modified by Appellate Body Report WT/DS2/AB/R).

[21] Panel Reports, *supra* note 1, ¶¶ 7.512-7.512.

[22] *Id.* ¶¶ 7.265, 7.389, 7.399, 7.403.

[23] *Id.* ¶ 7.271.

[24] *Id.* ¶¶ 7.280, 7.400.

[25] *Id.* ¶¶ 7.340-7.346 (also finding that China had failed to prove that there was a “critical shortage” of the material at paragraph 7.351); Appellate Body Report, *supra* note 1, ¶ 344.

[26] Appellate Body Report, ¶ 334.

[27] Panel Reports, *supra* note 1, ¶¶ 7.124-7.129; Appellate Body Report, *supra* note 1, ¶¶ 279-285.

[28] Appellate Body Report, *supra* note 1, ¶ 291 (Accession Protocol Paragraph 11.3 refers specifically to GATT Article VIII, and the Appellate Body construed this as excluding the availability of other GATT exceptions), ¶ 293 (distinguishing Accession Protocol Paragraph 11.3 from Paragraphs 11.1 and 11.2 making broad references to “GATT 1994”). *See also* Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (adopted Jan. 19, 2010) (finding that GATT exceptions were available in relation to Article 5.1 of China’s Accession Protocol).

[29] On this issue generally, *see* Joel Trachtman, *Book Review: J. Pauwelyn, Conflicts of norms in International Law: How WTO Law Relate to Other Rules of International Law* (Cambridge University Press, 2003), 98 Am. J. Int’l L. 855 (2004).

[30] *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, Request for Consultations*, WT/DS431/1 (Mar. 13, 2012) (complaint by the United States), WT/DS432WT/1 (Mar. 13, 2012) (complaint by the European Union), DS433/1 (Mar. 15, 2012) (complaint by Japan).