

EFFECTIVENESS OF THE APPLICATION OF GATT ARTICLE XX

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ABSTRACT

Trade-related goals and interests do not necessarily coincide with non-economic concerns and objectives such as environmental protection and animal welfare. Thus, member states are likely to adopt trade-restrictive regulations and measures in order to protect those non-trade values, which may result in breach of their WTO commitments. This article examines the scope of Article XX in the light of its applicability to WTO obligations other than the GATT when non-trade values such as environmental protection is at issue; secondly, it analyzes two-tier test of Article XX with reference to paragraphs (b) and (g) so as to find out whether a proper balance is struck by DSB.

Key words: *GATT Article XX, exception clause, cases, effectiveness of the Article XX.*

АННОТАЦИЯ

Цели и интересы, связанные с торговлей, не обязательно совпадают с неэкономическими интересами и задачами, такими как защита окружающей среды и благополучие животных. Таким образом, государства-члены, вероятно, примут торговые ограничительные правила и меры для защиты этих неторговых ценностей, что может привести к нарушению их обязательств перед ВТО. В этой статье исследуется сфера действия статьи XX в свете ее применимости к обязательствам ВТО, помимо ГАТТ, когда речь идет о неторговых ценностях, таких как охрана окружающей среды; во-вторых, он анализирует двухуровневую проверку статьи XX со ссылкой на параграфы (b) и (g), чтобы выяснить, соблюдает ли DSB надлежащий баланс.

Ключевые слова: *статья XX ГАТТ, оговорка об исключении, случаи, действие статьи XX.*

INTRODUCTION

The GATT 1994 provides “General Exceptions” under Article XX, which are designed to reconcile trade liberalization with other public policy objectives of Member States. Specifically, Members can adopt otherwise GATT-inconsistent regulations so as to protect non-trade values, which can be justified under Article XX provisions. However, as it is asserted by the panel in *US-Section 337 Tariff Act*, Article XX grants ‘limited and conditional exceptions from obligations under other

GATT provisions’.¹ In particular, the list of exemptions included in ten paragraphs of Article XX is exhaustive and defenses for GATT-inconsistent measures are legitimate only in case requirements of Article XX are satisfied.² Hence, Article XX is by its nature ‘a balancing provision’³ applied to strike a balance between GATT obligations and public policies of Members by Dispute Settlement Body (DSB) of WTO. However, the scope and interpretation of Article XX has been criticized by Member States, politicians and environmentalists, claiming that its provisions do not facilitate adequate environmental protection. Certainly, only two cases out of twenty have been successful in invoking legitimate defence under Article XX of the GATT since the commencement of WTO and DSB in 1995.⁴ Two specific paragraphs, (b) and (g) of Article XX GATT 1994 justify GATT-inconsistent measures for environmental protection namely, If such measures are necessary to protect human, animal or plant life or health or, if they relate to the conservation of exhaustible natural resources correspondingly.⁵

The applicability of Article XX to WTO commitments other than the GATT 1994

As it is stated in Article XX ‘*nothing* in this Agreement shall be construed to prevent the adoption or enforcement by any [Member] of measures...’⁶, it provides defenses under certain conditions for inconsistency with any of the GATT obligations. However, the availability of Article XX justifications for inconsistencies with other WTO commitments, which fall outside the ambit of GATT 1994 has been a controversial subject of WTO disputes. This matter was addressed in three cases: *China-Publications and Audiovisual Products (2010)*, *China-Raw Materials (2012)* and *China-Rare Earths (2014)*. In these cases, China seeks to invoke Article XX defences for violations of its Accession Protocol and Working Party Report.

In *China-Publications and Audiovisual Products*, Chinese measures and regulations pertaining to the importation and dissemination of particular publications and audiovisual entertainment products were found by the panel to be inconsistent with the commitments included in paragraphs of 2.1 and 5.1 of China’s Accession

¹ Panel Report, *US-Section 337 Tariff Act* (7 November 1989) L/6439 - 36S/345, para.. 5.9.

² Bossche and Zdouc (n 1) 547.

³ Ibid 548.

⁴ Niall Moran, “The First Twenty Cases Under GATT Article XX: Tuna or Shrimp Dear?” in Giovanna Adinolfi and others (eds), *International Economic Law* (Springer Cham 2017) pp.4

⁵ ‘Environmental Policies covered by Article XX’ (World Trade Organization) <https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm> accessed 8 November 2019

⁶ GATT 1994:General Agreement on Tariffs and Trade 1994 (15 April,1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), Article XX

Protocol.⁷ China invoked Article XX (a), depending on the introductory clause of paragraph 5.1 of the Accession Protocol, which states ‘without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement’⁸. In that instance, the Appellate Body (AB) interpreted the terms separately: “right to regulate”-‘as an inherent power enjoyed by a Member’s government, rather than a right bestowed by international treaties such as *WTO Agreement*’ and “in a manner consistent with WTO Agreement” –‘...constrains the exercise of that regulatory power such that China’s regulatory measures must be shown to conform to WTO disciplines.’⁹ According to the observation of the AB, WTO consistency of the Members’ regulatory requirements can be embodied in two ways: either if they do not violate any WTO commitments or If such violation is justified under a relevant exception.¹⁰ Accordingly, the AB noted that the term “a manner consistent with the WTO Agreement” covers both types of WTO-conformity.¹¹ Therefore, the AB found that defences under article XX were available for contravention of the commitments included in paragraph 5.1 of the Accession Protocol, by means of incorporation but measures in question were subject to relevant conditions of Article XX.¹²

However, both the panel and the AB refused applicability of Article XX in *China-Raw Materials*.¹³ In this case, China’s export restrictions on various raw materials except from yellow phosphorus were found to be inconsistent with paragraph 11.3 of the China’s Accession Protocol.¹⁴ It should be noted that WTO Agreements on trade in goods do not interdict export duties or taxes.¹⁵ Against standard framework, plenty of special provisions are incorporated in the China’s Accession Protocol that impose additional obligations going beyond the terms of the WTO agreements, which are considered as the “WTO-plus” obligations.¹⁶ One of these commitments is embodied in the paragraph 11.3 of China’s Accession Protocol which provides ‘China shall eliminate all taxes and charges applied to exports unless

⁷ Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (12 August 2009) WT/DS363/R

⁸ Ibid

⁹ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (21 December 2009) WT/DS363/AB/R, para. 222

¹⁰ Ibid para. 223

¹¹ Ibid

¹² Ibid (n 10) para. 233

¹³ ‘China Publications and Audiovisual Products’ (World Trade Organization) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds363sum_e.pdf> accessed 8 November 2019

¹⁴ Panel Reports, *China-Raw Materials* (5 July 2011) WT/DS394/R, WT/DS395/R, WT/DS398/R, para. 7.105

¹⁵ Bossche and Zdouc (n 1) 472

¹⁶ Julia Ya Qin, ‘“WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System’ (2003) 37 (3) Kluwer Law International, pp.483 <<http://www.kluwerlawonline.com.proxy.lib.strath.ac.uk/search.php?action=newsearch&fulltext=%22WTO-plus%22+obligations+and+their+implications+for+the+World+Trade+Organization+legal+system:+an+appraisal+of+the+China+accession+protocol.>> accessed 8 November 2019

specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.¹⁷

China didn't oppose the inconsistency but argued that since the paragraph 11.3 provides the reference to the consistency with Article VIII of the GATT, it breaches by default Article VIII along with paragraph 11.3, which makes Article XX defences available for its violations.¹⁸ In particular, China invoked environmental protections under Article XX (b) and (g) for export duties on certain products.¹⁹ Accordingly, China asserted its "inherent right to regulate trade" in a way to promote public health and conservation based on findings of the previous case.²⁰ The panel considered that China used its sovereign and inherent right to regulate trade in discussing and agreeing the terms of paragraph 11.3 of the Accession Protocol in a manner that pre-empts China from resorting Article XX defences.²¹ The AB confirmed the decision of the panel by applying textual interpretation as in *China-Publications and Audiovisual Products* and noted that there was no legal basis for applicability of Article XX since the language similar to the chapeau of paragraph 5.1 was not incorporated in paragraph 11.3.²² The interpretation applied by the panel and the AB in *China-Raw Materials* clarified the extent of the applicability of Article XX. According to the conclusion made by the AB, a Member is allowed to invoke Article XX justifications for contraventions of the GATT obligations only or when Article XX provisions are included by cross-reference in the relevant part of other WTO agreements.²³

The proponents of the environmental protection suggested that DSB could apply alternative approach taking into account the severity of the China's Accession Protocol commitments and public policy objectives including environmental protection. According to Xiaohui Wu, provisions of the China's Accession protocol do not only go beyond the standard requirements of the WTO Agreements but also contradict the basic principles of the WTO such as achieving reciprocity and non-discrimination in the multilateral trading system.²⁴ Accordingly, it has been suggested that traditional "textualist approach" applied by the DSB to China-specific commitments, which is solely based on the wording and context of the clause in

¹⁷ Protocol on the Accession of the People's Republic of China (23 November 2001) WT/L/132 art 11 <<http://docsonline.wto.org>>

¹⁸ Appellate Body Reports, *China-Raw Materials* (30 January 2012) WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R para.289

¹⁹ Panel Reports (n 15) 7.237

²⁰ Appellate Body Reports (n 19) para.300

²¹ Panel Reports (n 15) paras. 7.129, 7.157

²² Appellate Body Reports (n 19) para. 300

²³ Ibid para. 303

²⁴ Xiaohui Wu, 'No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization' (2011) 10 (2) Chinese Journal of International Law, pp.260 <<https://heinonline.org/HOL/P?h=hein.journals/chnint10&i=231>> accessed 10 November 2019

question rather than its purpose, should be replaced by restrictive interpretation that is known as *dubio mitius*, supplementary means of interpretation in international law.²⁵ In particular, he asserted that restraints of China's sovereignty in relation to its WTO-plus commitments should be interpreted narrowly in a manner less onerous to China by considering the purpose of the WTO Agreement as a whole, thereby striking proper balance between rights and obligations of Member States.²⁶ Moreover, Ilaria Espa emphasized on the right of China to regulate trade for the sake of environmental protection claiming that the decision of the DSB tribunals made in relation to the "inherent right to trade" defence of China is a "rigid" approach as it does not seek for any alternative solutions with regard to the applicability of Article XX, which could be reached by considering main objectives of the WTO Agreement.²⁷ Particularly, He noted that the preamble of the *WTO Agreement* along with other specific Agreements (*SPS Agreement, TBT Agreement* etc.) represent fundamental non-trade goals of WTO and are the reflection of the disciplines incorporated in Article XX.²⁸ Thus, non-consideration of the preamble as a legal basis by the AB is criticized in that it precludes a Member from adopting internal regulations designed to protect non-trade values such as public health and conservation when this regulation would lead to a breach of a non-GATT commitments not incorporating cross-reference to Article XX.²⁹ Thus, it has been commented that the AB could use a more 'courageous' interpretation in order to establish a restriction to the general approach employed in *China-Raw Materials* when the overriding values embodied in Article XX (b) and (g) are at issue, in a manner to enable the applicability of Article XX (b) and (g) justifications for contraventions of non-GATT commitments even though the wording to that effect has not been included therein.³⁰

Later, *China – Rare Earths (2014)* case also represented the contradiction between trade-related interests and environmental concerns. Again, the imposition of export duties was the subject of the dispute that China intended to invoke Article XX (b) and (g) for its inconsistency with paragraph 11.3 of China's Accession Protocol.

²⁵ Ibid

²⁶ Ibid, pp.262

²⁷ Ilaria Espa, 'The Appellate Body Approach to the Applicability of Article XX GATT in the light of China-Raw Materials: A Missed Opportunity?' (2012) 46 (6) Journal of World Trade, pp.1418 <<http://www.kluwerlawonline.com.proxy.lib.strath.ac.uk/document.php?requested=document.php%3Fid%3DTRAD2012044%26type%3Dhitlist%26num%3D0%23xml%3Dhttp%3A%2F%2Fwww.kluwerlawonline.com%2Fpdfhits.php%3Ftype%3Dhitlist%26num%3D0&id=TRAD2012044&type=hitlist&num=0#xml=http://www.kluwerlawonline.com.proxy.lib.strath.ac.uk/pdfhits.php?type=hitlist&num=0>> accessed 8 November 2019

²⁸ Ibid pp. 1420

²⁹ Ibid

³⁰ Ibid

³¹ The panel noted that none of the arguments proposed by China was considered as a “cogent reason” for deviating from the decision made in *China-Raw Materials* in relation to the non-availability of Article XX justifications for paragraph 11.3 violations.³² The AB also rejected the applicability of Article XX by reaffirming its findings in *China-Raw Materials* and asserted that there must be an objective link between a specific provision of the Accession Protocol and its obligation under WTO Agreements.³³ The decisions of the DSB in *China-Rare Earths* regarding unavailability of Article XX environmental protections to WTO-plus obligations have been widely criticized in that they do not only affect China but also other acceding states that assumed export duty commitments, which may result in severe environmental deterioration.³⁴ Holistic interpretation has been proposed to be applied in a dispute involving conflicting interests of trade and environment.³⁵ According to this approach, all relevant elements such as wording, context, purpose and good faith are considered as one holistic principle of interpretation.³⁶ This interpretation could lead to a different outcome in favour of public policy objectives since Article XX (b) and (g) constitute “general exceptions” for environmental protection.³⁷

CONCLUSION

Two areas of the scope of Article XX exceptions have been analyzed in order to find out whether the proper balance between trade liberalization and public policy objectives is maintained by the application of Article XX: the availability of Article XX for non-GATT commitments and the conditional nature of Article XX. According to the decisions made by the DSB in *China-Publications and Audiovisual Products (2010)*, *China-Raw Materials (2012)* and *China-Rare Earths (2014)*, Article XX defences can solely be invoked for the violations of GATT obligations or in case it is incorporated by cross-reference in other agreements such as TRIMS Agreement. However, this approach could be mitigated by different interpretation (as far as it is allowed by articles 31 and 32 of Vienna Convention of Treaties) in exclusive case of

³¹ Panel Reports, *China-Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (26 March 2014) WT/DS431/R, WT/DS432/R, WT/DS433/R

³² Ibid paras. 7.55, 7.62, 7.72.

³³ Appellate Body Reports, *China-Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (7 August 2014) WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R para.5.74

³⁴ Paschke, Marian and Shi Cheng, ‘Conflict and Balance between environmental protection and trade liberalization: the applicability of environmental of the GATT to China’s WTO-plus obligations –WTO panel and appellate body rulings on the Chinese export restrictions of rare earths, tungsten and molybdenum.’ (2015) 10 (2) *Frontiers of Law in China*, pp.241 <<https://link.gale.com/apps/doc/A435500997/AONE?u=ustrath&sid=AONE&xid=26ddc5ec>> accessed 10 November 2019

³⁵ Ibid

³⁶ Ibid pp. 242

³⁷ Ibid

China when the environmental concerns were at stake and China's Protocol lacked any flexibilities for taking measures.

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