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A NOTE ON THE APPELLATE BODY REPORT IN THE CHINESE MINERALS EXPORT RESTRICTIONS CASE

MITSUO MATSUSHITA*

Until recently, export restrictions by countries producing natural resources have not been the subject of much discussion in WTO jurisprudence. However, the situation is changing rapidly due to the prospect of an increasing scarcity of natural resources. The Appellate Body (AB) in the Chinese Minerals dispute banded down a decision upholding most of the panel rulings and reversing some. The major rulings of the AB report include the following. First, with respect to terms of reference, the AB reversed the panel's ruling that insufficiency of information and arguments in the original terms of reference could be cured by later submissions of the parties and rendered moot some other parts of the Panel's decisions. By overturning the panel ruling on this point, the AB may have tried to tighten up the discipline with respect to drafting of the terms of reference. However, it seems to the author, that this issue has to be decided on a case-by-case basis. Second, the AB held that the panel's recommendation could cover not only the measures which the claimants alleged to be an infringement of WTO agreements at the time of initiating the dispute settlement procedure, but also subsequent measures, as long as they are related to implementing the Panel's recommendation; thus, it upheld the panel's ruling in this regard. The author believes that the purpose of the panel's recommendations is to rectify a WTO-inconsistent measure and bring it in conformity with WTO agreements. In a dispute like the one at hand, where the framework legislation is implemented through a series of measures; whereby some measures are abolished and renewed annually, the panel recommendation ought to have some prospective effect in order for it to be effective. Third, the AB upheld the Panel's ruling that China could not invoke a provision in its Accession Protocol to justify its export restrictions based on Article XX exceptions, as Para 11.3 of the Accession Protocol does not state that rights and obligations under the WTO Agreement (GATT 1994) are not affected. Fourth, the AB criticized the Panel report in respect of its ruling that Article XI: 2 (a) and Article XX: (g) of the GATT are mutually exclusive and application of one precludes the application of the other., The AB stated that there

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would be subject matters that are covered both by GATT Article XI: 2 (a) and, at the same time, by Article XX: (g). This 'overlap theory' enunciated by the AB seems to lead to a contradiction, that an application of Article XI: 2 (a) could constitute an infringement of Article XX: (g) and vice-versa, making a harmonious interpretation of these two provisions difficult. Fifth, the AB reversed that portion of the panel's holding which held that in order to satisfy the requirement of GATT Article XX: (g), the export restriction in question must be primarily aimed at guaranteeing the effectiveness of the domestic restriction because there is no wording in Article XX: (g) that would justify this requirement. The AB Report in the Chinese Export Restrictions of Minerals dispute is an important precedent in the relationship between WTO principles and export control of natural resources and it is hoped that WTO jurisprudence in this area is further enriched.

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I. INTRODUCTION: THE PANEL REPORT IN THE CHINESE MINERALS CASE AND APPEALS BY THE PARTIES

Until recently, the export restrictions imposed by countries producing natural resources have not been the subject of much discussion in WTO jurisprudence. However, the situation is rapidly changing due to the rising prospect of a scarcity of natural resources caused, *inter alia*, by an explosion of the world population, the rapid economic growth of BRICS countries, speculations in natural resources by hedge funds as well as sovereign funds, and the activities of monopolies and export cartels. It is expected that disputes regarding export restrictions will only increase among WTO Members in the years to come. The international trading system will have to formulate rules to regulate export restrictions of natural resources and foodstuffs. For this purpose, the role of the Appellate Body is essential in establishing jurisprudence on export controls. The *Chinese Minerals* dispute will provide a valuable precedent to WTO jurisprudence on the subject.

The Panel which dealt with the *Chinese Minerals* dispute issued its report on the

5th July 2011.¹ In the report, it approved most of the claimants' petitions, and held that the mineral export restrictions (export taxes and export quotas) imposed by China, were inconsistent with its WTO obligations.

The respondent, China and the claimants (United States, European Union and Mexico) appealed against the decision. The Appellate Body (AB) issued its report in January 2012, and held that the imposition of export duties and export quotas on minerals were inconsistent with WTO agreements and China's Accession Protocol [the Protocol], supporting three out of the five rulings of the Panel.² The author has published an article describing and analysing the findings of the Panel Report,³ and readers are referred to the article for a more detailed analysis. A brief summary of the Panel Report is given below.

The United States, European Union and Mexico brought claims to the WTO Dispute Settlement Body (DSB), stating that China had violated Article 11:1 of the GATT 1994⁴ and Para 11.3 of the Protocol according to which China had undertaken to abolish all export duties, except for those items listed under Annex 6 of the Protocol.⁵ The measure in question was the imposition of export duties and quotas on exportation of minerals such as magnesium scrap, manganese scrap, zinc scrap, coke, magnesium metal, manganese, fluorspar, bauxite, white phosphorus, lead, silicon metal and silicon carbide ["Raw materials"]. China argued that the measures were justified under Article XX: (b) and (g), and thus were exempted from the GATT prohibition of Article XI:1 by Article XI: 2 (a) of the GATT. The Panel issued its report on 5 July 2011, holding that the export duties,

¹ Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DSD394/R, WT/DSD395/R, WT/DS398/R (July 5, 2011) [hereinafter Panel Report].

² Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012) [hereinafter AB Report].

³ Mitsuo Matsushita, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources*, 3(2) TRADE L. & DEV. 267 (2011). For articles discussing this case and related matters, see generally Bin Gu, *Mineral Export Restraints and Sustainable Development – Are Rare Earths Testing the WTO's Loopholes?*, 14 J. INT'L ECON. L. 765 (2011); Baris Karapinar, *China's export restriction policies: complying with 'WTO plus' or undermining multilateralism?*, 10 WORLD TRADE REV. 389 (2011); Nathan Cunningham & Junlei Peng, *WTO Case Analysis, Suggestions and Impacts: China – Measures Related to the Exportation of Various Raw Materials*, 7 GLOBAL TRADE AND CUSTOMS J. 27 (2012).

⁴ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

⁵ Accession of the People's Republic of China, Decision of 10 November 2011, ¶ 11.3 & Annex 6 WT/L/432 (Nov. 23, 2001) [hereinafter Protocol of Accession].

the export quotas, the export licensing system and the minimum export price were not exempted by Article XX: (b) and (g), and Article XI:2 (a) of the GATT. Furthermore, the aforementioned measures were inconsistent with Article XX:1 of the GATT as well as Para 11.3 of the Protocol.

As stated earlier, all disputing parties appealed to the AB, and various claims were made by the parties, for e.g., eight claims were made by China, one by EU and two by Mexico.

The AB dealt with five categories of claims made by China, which alleged an error in the Panel's rulings. *First*, China argued that the Panel erred by approving the terms of reference submitted by the claimants, because the terms of reference did not properly identify the alleged unlawful measures. In addition, it did not relate the measures which allegedly infringed specific provisions of the WTO agreement.⁶

Second, China argued that the Panel erred when it issued its recommendations regarding Chinese measures adopted after 2009, because the claimants had requested that the Panel should deal with measures which existed in 2009 and nothing else; it was beyond the scope of the dispute to extend recommendations to the measures adopted after 2009.

Third, China challenged the Panel's ruling which denied the applicability of GATT Article XX exceptions to export duties. The claimants alleged the same to be a violation of Para 11.3 of the Protocol of Chinese Accession to the WTO.

Fourth, the Panel rejected China's claim on the applicability of GATT Article XI:2 which exempts export restrictions and application of GATT disciplines in cases of emergency. China argued that this ruling was wrong.

Fifth, China had invoked GATT Article XX: (g) which provides that measures relating to the conservation of exhaustible natural resources are exempted from GATT disciplines, and the Panel denied the applicability of this provision to the Chinese measures in question. China alleged that the Panel's ruling on this issue was also wrong.

Although the AB made critical comments on a few rulings of the Panel and partly reversed them, the AB rejected most of the other claims of China and thus upheld the majority of the rulings of the Panel.

⁶ AB Report, *supra* note 2, ¶ 3.

II. TERMS OF REFERENCE

China appealed on the ground that the claimants did not clarify specific points of their legal claims in Section III of the request of the panel. As described below, many Chinese laws and measures were involved, which the claimants alleged were a violation of WTO agreements. China argued that the claimants were required to clarify the laws and regulations which were at issue, and identify the laws which were in violation of specific provisions of the WTO agreements in question. Specifically, China argued that, (i) the relationship between the narrative descriptions of the facts and the thirty seven measures in question, (ii) the relationship between those measures and the thirteen provisions in the WTO agreements which the claimants had alleged to have been violated, and further, (iii) the relationship between those provisions and the facts that were alleged to have existed, were not clarified, and that these unclear claims amounted to a violation of Article 6:2 of the DSU.⁷ The Panel Report rejected China's argument stating that, although initially the request for the establishment of a panel was not clear and lacked specificity, the claimants' submissions clarified them subsequently and thus the relationship was clarified.⁸

The AB Report held that, Section III of the request did not clearly set out which Chinese measures regarding the export licensing system on export quotas and the minimum export price system were inconsistent with specific provisions of WTO agreements. Particularly, the claimants claimed that thirty seven Chinese laws including the Foreign Trade Law and implementing rules were contrary to WTO agreements, but did not specify which measure specifically violated which provision of WTO agreements. The Panel Report hence stated that, both China and the Panel could hardly understand the precise legal points at issue.

The AB Report states that defects in the request for establishment of a panel cannot be cured by later submissions. Moreover, it held that the Panel erred in reserving its judgment, on whether the panel request was in conformity with the requirement under Article 6:2 of the DSU, until all submissions and responses of the parties had been filed. The AB Report concluded that the request for the establishment of a panel by the claimants did not clarify the relationship between Article VIII:1 (a), Article X of the GATT, Part I of China's Accession Protocol,

⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, art. 6.2 [hereinafter DSU]: "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

⁸ See Panel Report, *supra* note 1, ¶ 7.3(b).

the thirty seven Chinese measures, and parts of the Report of the Working Group on China's accession to the WTO, Consequently, the request for the establishment of a panel by the claimants did not meet the requirement of Article 6:2 of the DSU. For this reason, the AB Report reversed the parts of the Panel Report dealing with the administration of export quota, the export licensing system, the minimum export price system and export fees and formality.

Article 6:2 of the DSU requires that a panel request contain (1) the fact that a consultation took place, (2) specific measures at issue and (3) a brief summary of the legal basis on which the claim is brought. In this case, many types of minerals were involved. The relevant Chinese laws and regulations in question were numerous and constituted a large jumble of measures. The claimants were required to sort out this jumble and clearly indicate the measure, which allegedly violated specific provisions of the WTO agreement in question. The AB held that the request of panel in this case was insufficient and lacked precision.⁹

In some previous reports¹⁰, the AB has taken a more lenient approach towards claimants and given some amount of leeway to the parties even if their requests for panels lacked precision, due to the fact that minor imprecisions could be clarified by later submissions. In those disputes, claimants' terms of reference lacked sufficient information to a certain extent with regard to the facts alleged, the relationship between the measures alleged to be an infringement of WTO agreements and the WTO agreements in question. However, in later submissions to the panel, the claimants supplied the information and arguments with regard to the above, and the panels were satisfied with them because necessary information and arguments were eventually supplied. The Panels thought that to dismiss terms of reference only because they somewhat lacked clarity would amount to an undue denial of justice; as long as that lack of clarity could be made clear by later submissions in a relatively short period of time. In other words, a minor delay in submitting sufficient information on the details of claims of claimants would not unduly prejudice the right of defense on the part of respondents, if sufficient information would be supplied within a month or two. In fact, the Panel may have relied on these precedents when it accepted the request in this case. By overturning the panel ruling with regard to this issue, the AB may have tried to tighten up the

⁹ AB Report, *supra* note 2, ¶ 234.

¹⁰ See Appellate Body Report, *European Communities – Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R/ DS68/AB /R (June 5, 1998); Appellate Body Report, *Korea-Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS98/AB /R (Dec. 14, 1999); Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R (Nov. 28, 2002).

discipline. It seems to the author that this issue has to be decided on a case-by-case basis.

The question under consideration is one of due process of law. On the one hand, it may be too rigid and inflexible to throw away requests for the establishment of a panel simply because they lacked clarity somewhat. An excess of hair-splitting technicality may be too harsh to claimants, and contrary to the due process in WTO legal processes. Article 6:2 of the DSU does not specifically require that descriptions of facts and summary of claims have to be submitted by the claimants in a perfect form at the time when the terms of reference are submitted to Panel. Although the terms of reference submitted by the claimants may have lacked specificity to a certain extent at the time they were submitted to the Panel, this deficiency was quickly cured in subsequent submissions. This was, at the most, only a matter of two months. Some flexibility would be desirable with regard to the timing for submitting sufficient information.

On the other hand, to allow too much addition to the original panel requests would lead to a lack of discipline in the panel process, and create an unfair consequence to the respondents. Future panels will have to read several appellate reports and ascertain which principles apply to the cases before them.

In *U.S.-Gambling*, the claimant, Antigua-Barbuda, enumerated several U.S. laws, rules and guidelines regarding the cross-border prohibition of gambling services without putting them in order, and argued that the “totality” of such measures constituted a violation of the GATS.¹¹ The Panel took the pains to put the alleged measures into orderly classifications, which formed the basis of their judgment. In the *Chinese Minerals Case*, the claimants- the U.S. and the EU, were well versed with the WTO Dispute Settlement Process; there would have been no room for the Panel to give such a favor to the claimants. It is generally recognized that developing country Members of WTO are at a disadvantage in the WTO dispute settlement procedure due to relatively insufficient economic and legal resources compared to developed country Members such as the U.S. and the EU. Panels and the AB are well aware of this problem and, if the insufficiency of legal arguments is due to a lack of such resources and experience in dispute settlement, it is taken into account. However, this can be done only at the risk of an adverse effect it may have on the objectivity of the dispute settlement procedure. Therefore, a proper way to promote the interest of developing country Members in dispute settlement is to increase their capacity in handling the complex legal issues that arise in the WTO dispute settlement process, through education, legal aid and financial assistance.

¹¹ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005).

The AB held that the rulings of the Panel on the enforcement procedures regarding export quotas, export licensing and minimum export price systems, that were put into effect by the Chinese Government, should be reversed for the reason that the terms of reference on those items were not established. Therefore, the rulings of Panel on those subjects were held to be moot. These findings of the AB, however, did not affect the rulings of the Panel with regard to the applicability of GATT Article XI: 2 (a) and Articles XX: (b) and (g) which are the main subject matters of the dispute.

III. SCOPE OF THE PANEL'S RECOMMENDATIONS

The Panel included within its recommendations the Chinese measures adopted and enforced after the establishment of the Panel (21 December 2009).¹² China argued that since the claimants excluded measures after the establishment of the Panel from the terms of reference, the Panel's inclusion of such measures were a violation of Article 7:1 of the DSU.¹³ The Panel considered that the imposition of export duties and export quotas on minerals by China, was made through the operation of many laws and regulations ("series of measures") and that the restriction of export was the result of the working of all of such series of measures. The Panel noted that, while the basic legal framework for the imposition of export duties and export quotas were in effect, some rules and regulations concerning specific export duties and export quotas were abolished and supplanted by others. Therefore, the question arose whether the Panel should deal with the measures that existed only in 2009 or those measures that existed in 2010 regarding export duties and export quotas as well.

The Panel recalled that the terms of reference included broad language evinced by the usage of, among others, "any amendments", "extensions" and "renewal measures" and stated that the following items would be considered.¹⁴

- (a) The Panel will make findings on the WTO consistency of original measures included in its terms of reference. In light of the request made by the

¹² Panel Report, *supra* note 1, ¶¶ 8.8, 8.15 & 8.22.

¹³ DSU art. 7.1:

Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document...and to make such findings as will assist the SBB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

¹⁴ Panel Report, *supra* note 1, ¶ 7.33.

complainants that the Panel not make any findings on any amendments or replacement measures, the Panel will only make findings on 2009 measures and will not make findings on 2010 measures.

- (b) In situations where the 2010 replacement measure appears to correct the WTO inconsistency of the original 2009 measure - in whole or in part (and therefore is considered not to have the same essence, in whole in part, as the expired measure) – the Panel will decline to make findings or recommendations on the 2010 measure, as it would fall outside its terms of reference. However, in order to make a determination on whether the new measure is of the same essence as the expired measure, and hence imbues the expired measure with ongoing effect or prospective application – the Panel will necessarily have to determine (without making formal finding) whether the WTO inconsistency is no longer present in the new measure.
- (c) Nonetheless, with a view to ensuring that annually renewed measures do not evade review by virtue of their annual nature, the Panel will make findings with respect to 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.
- (d) With respect to recommendation, generally the Panel will not make a recommendation on any original measure or on any measure no longer in existence (or part thereof) on 15 December 2010, unless there is clear evidence that the measure has ongoing effect.
- (e) In situations where the claim is based on an annual measure, as is the case with measures imposing export duties and with some of the measures relating to export quotas, the Panel will make recommendations with respect to the series of measures comprised of the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific measures imposing export duties or export quotas in force at the date of the Panel's establishment.

In short, the Panel stated that it would review the measures that existed at the time the Panel was established in 2009 but, since export duties and export quotas would be renewed annually, it would extend surveillance on such measures so that it can make sure that there would be no evasion of the recommendation. The gist of China's objection was that such an extension would be contrary to the terms of reference, and an infringement of Article 7:1 of the DSU.

The AB noted that the Chinese imposition of export duties and quotas comprised a series of measures, and that the effective rectification of WTO inconsistency would be accomplished only through the inclusion of all such measures, and by doing so, the Panel did not make recommendation on items

outside the terms of reference. In the view of the AB, a panel recommendation should have a prospective effect even after the adoption of the panel and the appellate reports. In the present case, the Panel reviewed a series of measures put into effect by the framework legislation and its implementing measures that existed in 2009, as well as export duties and export quotas that constituted a part of such measures that were imposed annually, or imposed within the time limit. The AB judged that the Panel did not go beyond the terms of reference which stated that it would not review measures taken in 2010 even if they were included in the recommendation export duties and export quotas that would be imposed after 2009. If other interpretations had been adopted, it would have created a situation where a WTO inconsistent measure would subsist without being corrected. By their own nature, recommendations of Panels and the AB must have a prospective effect because they are intended to change domestic measures held to be inconsistent with WTO agreements and bring them in conformity with WTO norms. Domestic measures such as a domestic legislation may be continued by their bylaws and implementing regulations in future and if recommendations of Panels and the AB cannot reach them, WTO inconsistent situations may continue without being addressed. Recommendations intended to prevent the recurrence of measures, having a similar or the same effect as those that were held inconsistent with WTO agreements, may be as important as those which recommend the abolition of existing inconsistency. Therefore, it seems to be appropriate that the AB upheld the finding of the Panel which provided for recommendations covering prospective measures of the Chinese Government.

As stated earlier, the purpose of the panel's recommendations is to rectify the WTO inconsistency of a measure of a WTO Member, and bring it in conformity with WTO agreements. In a dispute like the one at hand, where the framework legislation is implemented through a series of measures and some measures are abolished and renewed annually; the panel recommendation is bound to have some prospective effect in order for it to be effective. China raised the above issue under Article 7:1 of the DSU and the Panel and the AB dealt with it as such. This sort of issue may be considered under Article 11 of the DSU as well.¹⁵ Article 11 of the DSU requires panels to engage in an objective assessment of law and facts. This provides for due process of law in the WTO dispute settlement procedure. The due process requirement requires the enforcement of legal rules to fair, objective

¹⁵ DSU art. 11:

A panel should make an objective assessment of the matter before it, including the objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

and effective at the same time. Article 7:1 of the DSU may be regarded as an application of the due process principle to specific situations. Therefore, claims under Article 7:1 of the DSU can also be entertained under Article 11.

IV. ARTICLE XX OF THE GATT

In the Panel proceeding, China did not contest the claim that its measures infringed GATT Article XI: 1. Instead, it argued that its measures would be justified under GATT Article XX which provides for exemptions from GATT disciplines under certain conditions.

The question here is whether the obligations that China committed itself to under Para 11.3 of the Accession Protocol, can be excused by Article XX of the GATT. Para 11.3 of the Accession Protocol states that, China would abolish all export duties except for the items listed in Annex 6 of the Protocol, and fees and charges imposed in accordance with Article VIII of the GATT. All the minerals that are subject to review in this case, except for yellow phosphorus, are not listed in Annex 6. The Panel ruled that Article XX cannot be applied to the obligations of China under Para 11.3 of the Accession Protocol, because Para 11.3 does not refer to the WTO agreement, and, in this respect, Para 11.3 differs from Para 5.1 which explicitly refers to the WTO agreement. The Panel ruled that this dispute can be distinguished from the *China- Audio* dispute¹⁶ in which the panel held that China could invoke Article XX: (a) to defend itself against a charge that it infringed the obligations under Para 5.1 of the Accession Protocol which, as mentioned above, contains the phrase “Without prejudice to China’s right to regulate trade in a manner consistent with the WTO agreement ...” Therefore, the absence of a similar provision in Para 11.3 should mean that Para 11.3 intends to exclude China from relying on Article XX, which is part of the WTO agreement.

Annex 6 lists 84 items that are subject to export duties and also the maximum rates thereof. It states that the rates stipulated therein are the maximum rates, and the rates that are applied can be changed only “under exceptional circumstances”. Further, it requires that, when changes in the rates occur, China will engage in prior consultation with interested WTO Members.

China cited the phrase “under exceptional circumstances” used in Annex 6, and pointed out the similarity between this phrase and the wording of Article XX. It argued that there was a substantive overlap between the wording of the two provisions. China stated that, as evidenced in the wording of Annex 6, China and

¹⁶ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009).

WTO Members had agreed that China could invoke Article XX in exceptional circumstances; to rescue export duties that would otherwise be held inconsistent with Para 11.3 of the Protocol. In other words, China claimed that it could make use of the exception stipulated in Annex 6, for the purpose of exempting export duties on other items of minerals that are not listed in Annex 6.

The AB rejected this argument, stating that the wording of Annex 6 could not be interpreted to mean that China could invoke it to justify export duties on items that were not listed in Annex 6.

With respect to the exception under Article VIII of the GATT, the AB made the following observation. Article VIII of the GATT provides that fees and other charges (other than import and export and taxes within the purview of Article III) should be approximately equal to the actual services rendered for them, and that they should not be charges for the protection of domestic industries, or exist for revenue purposes. China argued that, just as a measure, which would otherwise infringe Article VIII, could be justified by Article XX, similarly a measure which other WTO Members claimed as an infringement of Para 11.3 of the Protocol, could be justified by Article XX. China also argued that, the fact that Article VIII mentioned fees and other charges concomitant to export and import and not export duties could not be interpreted to mean that China had abandoned the right to invoke Article XX.

The AB held that Article VIII referred to fees and other charges in connection with export and import, but did not refer to export duties and that, for this reason, it was clear that export duties were outside the purview of Article III. Further, the decision that China would not impose export duties except for the items listed in Annex 6, originated from Para 11.3 of the Accession Protocol and not from any provision of the GATT 1994. The implication is that Para 11.3 of the Accession Protocol is not part of GATT 1994, but an independent provision, and thus rights and obligations contained therein are not derived from GATT. Therefore, in a sense, there is a discontinuity between GATT 1994 and Para 11.3 of the Accession Protocol, and infringement of Para 11.3 cannot be rescued by invoking exceptions under Article XX of GATT.

If the intention of the WTO Members had been to allow China to invoke Article XX in respect of export duties, this intention would have been incorporated in the text of Para 11.3. The absence of such wording should mean that the WTO Members did not intend to allow it.

China also relied on Para 170 of the Report of the Working Party on the Accession of China, and argued that export duties were covered by Article XX of

the GATT. Para 170 of the Report states that, when China entered the WTO, fees, taxes and other charges have to be imposed in compliance with Articles I, III: 2 and XI: 1 of GATT. Since the title of the Section to which this paragraph and Section 11 belong uses the same language, both apply to export duties and other charges. As Para 170 of the Report allows China to take measures that would otherwise be inconsistent with WTO agreements, similarly, measures which would otherwise infringe Para 11.3 of the Accession Protocol would be exempted from illegality by Article XX of the GATT.

In response to this, the AB replied that Para 170 of the Working Party Report could not be used as the context for the interpretation of Para 11.3 of the Accession Protocol, and Paras 155 and 156 of the Report should be referred to instead. These paragraphs are under the title “Export Regulations” and the wording used in Para 155 is similar to that used in Para 11.3 of the Accession Protocol. The AB drew a conclusion from this, that export duties had been abolished with regard to any item, unless permitted by Annex 6, Para 11.3 of the Protocol or by Article VIII of the GATT. Para 156 of the Report states that 84 items are subject to export duties and others are not. Neither Para 11.3 of the Protocol nor Paras 155 and 156 of the Report mention Article XX of the GATT and the GATT in general. The AB stated that this could also be a reason why the Chinese obligation under Para 11.3 of the Protocol could not be excused by Article XX of the GATT. Therefore, the AB considered all these factors, and upheld the ruling of the Panel that the Chinese imposition of export duties on certain minerals were not permitted by Article XX: (b) and (g) of the GATT.

The Chinese claims with regard to interpretation of the phrase, “under exceptional circumstances” in Annex 6 of Para 11.3 of the Protocol, Article VIII of the GATT and Paragraphs in the Report of the Working Party on Accession are a tortured interpretation of the relationship between the above provisions. For example, China argued that the phrase “under exceptional circumstances” used in the wording of Annex 6 and that of GATT Article XX were similar and therefore the exceptions in GATT Article XX should be applied to Annex 6. However, Annex 6 does not mention anything about GATT 1994 and one cannot find any continuity between them. A mere similarity in wordings in both provisions can hardly be the basis for arguing that exceptions granted in GATT Article XX apply to Annex 6. Article 31 of the Vienna Convention¹⁷ which incorporates the rules of interpretation of treaty languages, mandates panels and the AB to follow the ordinary meaning of the words used in a treaty and the context of the provision in question. The claim made by China on the relationship between Para 11.3 and GATT Article XX can hardly be justified in light of the rules of interpretation

¹⁷ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

enunciated in Article 31 of the Vienna Convention. It can be easily understood that the AB had no choice but to reject these claims and uphold the ruling of the Panel Report.

It should be noted that export duties are not prohibited by the GATT 1994, and all WTO Members except those Members, including China, which promised in their accession protocols that they would abolish export duties or limit their imposition, are generally permitted to impose export duties. China is deprived of this right because it gave up this right by agreeing to incorporate Para 11.3 in the Accession Protocol. However, there is an imbalance of rights and obligations regarding export duties among WTO Members. This is so because, generally WTO Members are entitled to impose export duties but some Members such as China committed not to impose export duties or limit the rate and scope of them in their accession protocols. This imbalance is a systemic problem within the WTO. It may have a serious consequence because export duties can play an important role in protecting natural resources within the territory of a WTO Member, from being drained by export. If this is left without being remedied for a long time, it may adversely affect the credibility of the WTO system at large. This is especially so, in light of the position of China as an emerging trade power. The confidence of WTO Membership in the dispute settlement system may be jeopardized eventually. To remedy this situation, WTO Membership may consider the use of Article IX: 2 of the Marrakesh Agreement, which authorizes the Ministerial Conference and the General Council to adopt an exclusive interpretation of WTO agreements. Under Article IX:2, the General Council could adopt an interpretation that would ease literal interpretation and allow a WTO Member to invoke exceptions under GATT Article XX in an extraordinary circumstance to rescue export duties to be imposed when the Member is threatened with the imminent drainage of essential materials.

The ruling of the AB will also have a consequence beyond the present dispute. When the GATT 1947 entered into effect, there was no other agreement modifying, elaborating or implementing it, and hence the wording in Article XX (“nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures...”) did not give rise to a question of whether exceptions under Article XX of the GATT applied to other agreements modifying, elaborating or implementing it. Later, many other agreements came into being and constituted part of the GATT. When the WTO was inaugurated, Annex 1A of the WTO Agreements included all those agreements into one category of trade in goods. This created the uncertainty of whether Article XX would apply to agreements constituting part of Annex 1A, but distinct from the GATT 1994.

Each nation has the sovereign right over natural resources that exist within its

own territory. On the other hand, a Member of the WTO is obligated to abide by the rules of trade incorporated in WTO agreements according to which export restrictions must comply with rules in GATT 1994. The question is how to reconcile the territorial sovereignty over natural resources within the territorial jurisdiction and the requirement of GATT 1994 that there should be no export prohibition and export quota. Perhaps a compromise can be reached by allowing GATT XX exceptions to export duties of natural resources in extreme situations where domestic drainage of an essential natural resource is imminent.

Perhaps the AB chose to leave this question open for future panels to decide whether Article XX would apply to agreements other than the GATT 1994 on a case-by-case basis. Most of Annex 1A agreements contain provisions indicating a link with GATT 1994. For example, the Antidumping Agreement is entitled the Agreement to Implement Article VI of the GATT [AD Agreement] suggesting that the AD Agreement and Article VI are part of a package of provisions on antidumping. In this sense, the former is an elaboration of the latter. Article 1 of the Safeguard Agreement [SG Agreement], states that it establishes rules for the application of safeguard measures, which shall be understood to mean those measures provided for in Article XIX of GATT 1994. This provision indicates that the SG Agreement substantiates the content of Article XIX of GATT 1994.

One may draw a conclusion from this linguistic structure that Article VI of GATT 1994 and the AD Agreement should be read together. It also applies to the relationship between Article XIX of GATT 1994 and the SG Agreement. Interpreted in this way, Article XX of GATT 1994 applies to provisions of Annex 1A agreements which contain provisions suggesting that they are part of GATT 1994.

On the other hand, if one follows the strict literal approach taken by the AB, one may come to a conclusion that Article XX does not apply to provisions in Annex 1A agreements because there is no clear statement in them that they are part of GATT 1994. It is for future panels and the AB to consider both positions (and any other positions, if there are any) and come up with an interpretation which most suits the resolution of disputes before them. The ruling of the AB on this point should be interpreted to reach only the relationship between Para 11.3 of the Protocol and Article XX of the GATT.

V. ARTICLE XI:2(A) OF THE GATT

Article XI: 2 (a) provides for emergency measures which a WTO Member can take when there is a serious shortage of foodstuffs and other essential materials. For example, when a WTO Member is faced with a situation where bad weather

has caused the failure of crops creating a state of famine, it is allowed to ban export of foodstuffs to secure supply of food so that the population can tide over the crisis. China invoked this article and argued that the Chinese measures in question can be justified under this provision.

Article XI: 2 (a) of the GATT provides that export prohibitions and restrictions made temporarily by a Member to deal with critical shortage of foodstuff and other essential materials are exempted from the prohibition under Article XI: 1. The AB understood that the Panel interpreted the term “temporarily” to mean “a time-limit fixed in advance”. The AB disagreed with this interpretation, and stated that the word “temporarily” in Article XI: 2 (a) should mean a measure applied for a limited duration adopted in order to bridge a passing need, irrespective of whether or not the temporal scope of the measure is fixed in advance. The Panel interpreted the term “temporary” to mean a time period beginning with a certain day and lasting for a fixed period.¹⁸ This is a strict and narrow interpretation of temporality. The AB criticized this decision and stated that “temporary” should mean a measure of “a limited duration.” Perhaps the AB wanted to criticize the Panel’s ruling as it thought it to be too specific and rigid. However, even if one accepts the interpretation of the AB, “a limited duration” necessarily refers to the time when it begins and ends. Looking at it from this perspective, the author fails to see much difference between the view of the Panel and that of the AB. It is not clear how much difference in substance is there between the interpretation of the AB and that of the Panel.

China alleged that the Panel erroneously found that Article XI: 2 (a) and Article XX (g) are mutually exclusive. The AB said that the Panel did not find that these two provisions were mutually exclusive and rejected the appeal of China in this regard.¹⁹ However, the AB critiqued the propositions of the Panel Report.

The Panel stated that if Article XI: 2 (a) is not interpreted as confined to measures of limited duration, Members could resort indistinguishably to either Article XI: 2 (a) or Article XX: (g) to address the problem of an exhaustible natural resource. The AB suggested that Article XX provides an exception to the prohibitions in the GATT and by contrast, Article XI: 1 (a) provides for situations not covered under Article XI: 1. Accordingly, where the requirements of Article XI: 2 (a) are met, there would be no scope for the application of Article XX because no obligation exists in the first place.²⁰ According to the view of the AB, Article XI: 2 (a) and Article XX: (g) have different functions and contain different obligations, i.e., Article XX: 2 (a) addresses measures taken to prevent or relieve

¹⁸ Panel Report, *supra* note 1, ¶ 7.255.

¹⁹ AB Report, *supra* note 2, ¶ 334.

²⁰ *Id.*

critical shortage of foodstuffs or other essential products and Article XX: (g), on the other hand, addresses measures relating to the conservation of exhaustible natural resources.

However, the AB states: “We do 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” and also “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 foodstuffs or other essential product.”²¹ It further states: “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).”²²

These statements of the AB are not without ambiguity. However, to the author, it would seem that the AB implies that the situation covered by Article XI: 2 (a) where there is temporarily a crucial shortage of natural resources can also be covered by Article XX: (g) in relation to a measure relating to conservation of exhaustible natural resources. If so, would it mean that, given this situation, WTO Members can take an export restriction measure to redress a critical shortage of essential raw materials under Article XI: 2 (a) which is temporary in nature and, at the same time, a measure to deal with conservation of exhaustible natural resource under Article XX: (g)? What is the relationship between those two measures? A measure under Article XI: 2 (a) should be limited in time because it is to deal with shortage of essential natural resources which is temporary, whereas a measure under Article XX: (g) needs not be limited in time. Also, under Article XX: (g), a measure to restrict export should be put into effect in conjunction with a domestic restriction of production or sale of the resources in question, but a measure under Article XI: 2 (a) is under no such restriction.

Perhaps one can deduce from the statements of the AB the nature of the relationship between Article XI: 2 (a) and Article XX: (g), which can be described as that between two circles that are not concentric, but partly overlapping. In its view, Article XI: 2 (a) is not entirely a part of Article XX in that the former has its own sphere of application. For example, a serious shortage of foodstuffs which occurs temporarily due to a crop failure in a year is covered by Article XI: 2 (a) but not by Article XX: (g) because a measure to deal with this situation is not related to the conservation of exhaustible natural resources. On the other hand, in its view, a shortage of rare earth, which occurs temporarily but may last for some time until substitutes are found can be covered by both Article XI: 2 (a) and Article XX: (g).

²¹ *Id.* ¶ 337.

²² *Id.*

In this situation, Article XI: 2 (a) overlaps with Article XX: (g). The question arises whether, in the overlapping area, two measures taken by two articles of the GATT can be applied simultaneously and consistently so that those two measures can be implemented side-by-side without any disharmony. Requirements of Article XX: (g) and those of Article XI: 2 (a) are different. For example, Article XX: (g) requires that a measure to conserve exhaustible natural resources should be applied in conjunction with a restriction of domestic production or consumption but there is no such requirement in Article XI: 2 (a). If both apply to the same situation, should the claimant prove that the measure in question is not applied in conjunction with a restriction of domestic production or consumption or is there no need to prove it? Article XX: (g) clearly requires this proof and Article XI: 2 (a) clearly does not require it.

Furthermore, Article XI: 2 (a) requires that a measure taken should be temporary, but a measure under Article XX: (g) is not required to be so. Looked at from this light, this ‘overlap theory’ enunciated by the AB seems to lead to a contradiction that an application of Article XI: 2 (a) could constitute an infringement of Article XX: (g) and *vice-versa*. This makes a harmonious interpretation of these two provisions difficult. It seems to the author that a better interpretation of the relationship between Article XI: 2 (a) and Article XX: (g) of the GATT is simply to say, as the Panel did, that each has its own sphere of application and are mutually exclusive. For example, Article XI: 2 (a) provides for a measure to deal with “temporary” and critical shortage of essential materials and such a measure is outside the scope of the prohibition of GATT Article XI: 1, whereas, Article XX: (g) grants an exception to a measure relating to the conservation of exhaustible natural resources and the effect of such a measure will have a lasting effect on export and import of the natural resources in question.

VI. ARTICLE XX: (G) OF THE GATT

GATT Article XX: (g) permits WTO Members to take measure to conserve exhaustible natural resources, provided that it is exercised in conjunction with domestic restrictions of production or consumption of the resource in question. This dispute deals with minerals which, according to China, will be exhausted and depleted unless some restrictions are imposed and so China invoked GATT Article XX: (g) to justify the export restrictions in question.

Here the question is how to interpret the provision in Article XX: (g) considering that a restriction of trade in an exhaustible natural resource is allowed only if it is “made effective in conjunction with” domestic restriction of production or sale of that natural resource. The Panel interpreted this provision “in conjunction with” as meaning that (1) an export restriction is enforced together

with a domestic restriction of production or sale of the natural resource in question and (2) this export restriction is primarily aimed at guaranteeing the effectiveness of the domestic restriction.²³ The AB upheld (1) but reversed (2) of the Panel's holding for linguistic reason, i.e., there is no wording in Article XX: (g) or elsewhere in Article XX which suggests that an export restriction should be aimed at effectuating the domestic restriction of production.

Restriction of export may not be necessary to enforce domestic restriction of production or sale of a natural resource. For example, because there is no danger that foreign buyers would buy up this natural resource and bring about drainage of it in the domestic market, the foreign demand of this resource may be negligible and, even without putting into effect an export restriction of it, the domestic production restriction can be effectively implemented. In some situations, therefore, domestic control of production or sale of a natural resource does not have to go hand-in-hand with an export control.

However, when a domestic production is restricted for the purpose of conserving a natural resource and foreign demands are strong for this natural resource, it would be necessary to put into effect an export control of it in parallel to the domestic production control. This is so because, foreign buyers may purchase the whole amount produced within its production limit and it would be drained in the domestic market. It is in this situation, that an export control has to be effectuated when the government of an exporting country is engaged in the restriction of production or sale of a natural resource. It seems then that, in such a situation, an export restriction is aimed at effectuating a domestic restriction of production or sale of this natural resource. Article XX: (g) does not explicitly require that an export restriction be aimed at implementing a domestic reduction or sale of a natural resource. However, as touched upon above, an export restriction is necessary only in the situation where the foreign demand is so strong for the particular natural resource, that there is a high potential for foreign purchasers to purchase in bulk thereby exhausting its domestic availability. Thus, to secure some supply of it for the domestic market, it is necessary to restrict export. An export restriction of a natural resource for the purpose of conserving it, is justified only under this circumstance. If so, the requirement that an export restriction should be primarily aimed at implementing a domestic restriction of production or sale of it can be regarded as implicitly contained in Article XX: (g). Then can one not say that, an export restriction is allowed when it is necessary for the purpose of implementing the domestic restriction of a natural resource and, therefore, it is aimed at effectuating the domestic production control?

²³ Panel Report, *supra* note 1, ¶ 7.356.

The AB ruling in this regard lightens the burden of proof on the part of the party invoking Article XX: (g) because that party is not required to prove that an export restriction is enforced, in order to make effective a domestic restriction of production or sale of a natural resource.

IX. CONCLUSION

The *Chinese Minerals* dispute is the first major case in which the AB enunciated its view on Article XI: 2 (a), GATT Articles XX: (b) and (g) in relation to export restrictions of natural resources. As stated earlier, future generations will have to face a relative scarcity of natural resources in the face of an explosion of worldwide population and an ever expanding demand for natural resources in newly emerging economies. In light of this prospect, it is urgently required for the WTO jurisprudence to establish principles to be applied to export restrictions of natural resources. This appellate ruling is the first step towards it and is, in this sense, very significant.

At this time, a dispute is pending at the WTO dispute settlement procedure in which Chinese restrictions of export of rare earth are at issue.²⁴ Although the details of that dispute are not known to the public yet, it is certain that this is another important case for export restrictions on natural resources. It seems certain that the rulings of the AB and the Panel in the dispute will be considered and relied upon by the Panel dealing with the rare earth dispute. The rules established in this case will be an important precedent in similar disputes in the future. The AB Report in the *Chinese Minerals* dispute established an important precedent in the relationship between WTO principles and export control of natural resources. It established a rule that when WTO Members restrict export of natural resources (or any other items) under the exception in Article XX: (g) of GATT, they have to restrict domestic production or consumption of the resource in question. Otherwise, the domestic industry using that natural resource would have the opportunity to purchase the whole amount of it, as it is produced domestically whereas foreign industries requiring such natural resource would only have a limited supply of it. This would have an effect of providing *de facto* subsidy to the domestic industry by sacrificing foreign competing industries. Under the rule established in the Panel and Appellate reports, a WTO Member invoking export

²⁴ Request for the Establishment of a Panel by the United States, *China-Measures Relating to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/6 (June 29, 2012); Request for the Establishment of a Panel by the European Union, *China-Measures Relating to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS 432/6 (June 29, 2012); Request for the Establishment of a Panel by Japan, *China-Measures Relating to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS 433/6 (June 29, 2012).

restrictions under Article XX: (g) must allocate some portion of the natural resources produced according to the principle of proportionality. The AB has not clarified what this proportion should be as it was not an issue in the dispute. This will be clarified in future panel and AB reports.

In the past, much attention has been paid to the area of tariffs and import restrictions in the form of quantitative restrictions and trade remedies. There are many WTO disputes in which import restrictions in the form of safeguards (quantitative restrictions and higher tariffs) and antidumping and countervailing duties were discussed and resolved.²⁵ Future generations will have to deal with not only issues of import restrictions, but also export restrictions which may bring about serious consequences to the economies of countries with scarce natural resources. In light of this prospect, the AB report which has been discussed above will serve as a valuable precedent.

The coverage of the report is rather limited. Some important trade issues are left out. For example, the relationship between an invocation of Article XX: (b) of the GATT (export restrictions for protection of life and health of humans, animals and plants) and domestic restriction or sale of natural resources is not touched upon. Under Article XX: (b), a WTO Member can invoke an export restriction if it is necessary to protect human, animal and plant life and health. Here again the question is whether a WTO Member invoking an export restriction based on Article XX: (b) is required to restrict the domestic production and consumption of the substance subject to such restriction and allocate a certain portion of it to export and, if so, under what principle? Unlike Article XX: (g), Article XX: (b) does not specifically require that a restriction should be imposed in conjunction with a domestic restriction of production or consumption. It seems clear from the nature of things that the same principle applies here. However, a clear jurisprudence is necessary to explain why this is so. It is highly desired that future panel and appellate decisions clarify it. However, the scope of review of the AB is limited to the issues raised by parties to a dispute and the parties in this case did not appeal this aspect to the AB. It is hoped that, in the near future, the WTO jurisprudence in this area is enriched.

²⁵ See WORLD TRADE ORGANIZATION, *WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE* 517, 743, 881 (2d ed. 2007).