

ARTICLES

Mitsuo Matsushita, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources*

Diane Desierto, *Development as an International Right: Investment in the new Trade-Based IIAs*

Patrick Wieland, *Why the Amicus Curia Institution is Ill-suited to address Indigenous Peoples' Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention*

NOTES AND
COMMENTS

Petros C. Mavroidis, *Doha, Dohalf or Dohaha? The WTO Licks its Wounds*

Claus D. Zimmermann, *Toleration of Temporary Non-Compliance: The Systemic Safety Valve of WTO Dispute Settlement Revisited*

Melissa Blue Sky, *Developing Countries and Intellectual Property Enforcement Measures: Improving Access to Medicines through WTO Dispute Settlement*

TL
&D

Trade, Law *and* Development

Vol. 3, No. 2

2011

PATRON

Justice N. N. Mathur

FACULTY-IN-CHARGE

Yogesh Pai

EDITORS-IN-CHIEF

Prateek Bhattacharya

Jayant Raghu Ram

EDITORS

(MANAGING)

Shreya Munoth

(SENIOR CONTENT)

Aman Bhattacharya

Lakshmi Neelakantan

ASSOCIATE EDITORS

Meghana Chandra

Prianka Mohan

Neha Reddy

COPY EDITORS

Namrata Amarnath

Ali Amerjee

Nakul Nayak

Paarth Singh

CONSULTING EDITORS

Shashank P. Kumar

Gopalakrishnan R.

Meghana Sharafudeen

BOARD OF ADVISORS

Raj Bhala

Glenn Wiser

Jagdish Bhagwati

Daniel Magraw

B. S. Chimni

M. Sornarajah

Ricardo Ramírez Hernández

Vaughan Lowe

W. Michael Reisman

Published by

The Registrar, National Law University, Jodhpur

ISSN : 0976-2329 | eISSN : 0975-3346

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)

EXPORT CONTROL OF NATURAL RESOURCES: WTO PANEL RULING ON THE CHINESE EXPORT RESTRICTIONS OF NATURAL RESOURCES

MITSUO MATSUSHITA*

The delicate balance between the demand and supply of natural resources is likely to be affected by the increase in population and the needs of emerging nations. China's de facto embargo on rare earths in 2010 has brought these issues to the forefront of WTO jurisprudence. The dispute initiated by the US, E.U. and Mexico led to the Panel holding that the Chinese restrictions were contrary to the GATT prohibition on export controls. Part I of the article introduces the various facets of the dispute against the background of WTO principles regarding export controls. Part II of the article discusses the legality of export controls under GATT and the exceptions to the rule of prohibition of export controls. The facts of the Chinese rare earth minerals dispute, the questions of law involved, the discussions adopted by the Panel and the decision regarding the legality of such measures are analysed in Part III of the article. The Panel held that the Chinese measures were inconsistent with Article XI:1 and that the justifications under Article XI:2(c) as well as Article XX: (b) and (g) could not be upheld. Part IV examines the key themes present in the dispute and also summarily scrutinizes the supplementary questions involved. More specifically, it deals with the question of whether a Member can resort to Article XX: (b) and (g) to control the production of natural resources and impose export quotas on them. Part V offers a conclusion with regard to the formulation of certain principles regarding export controls and the role of the WTO in implementing them.

* Professor Emeritus of Tokyo University, Former Member of the WTO Appellate Body. The author can be contacted at: [mtm\[at\]dd.ij4u.or.jp](mailto:mtm[at]dd.ij4u.or.jp). The usual disclaimer applies.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. THE LEGAL FRAMEWORK FOR EXPORT CONTROL UNDER THE WTO/GATT
 - A. *Export Quotas*
 - B. *Export Duties*
- III. PANEL REPORT ON THE CHINESE EXPORT CONTROL OF CERTAIN NATURAL RESOURCES AND MINERALS
 - A. *Previous WTO Disputes on Export Restrictions*
 - B. *The Chinese Mineral Export Restrictions Case*
 - 1. Export Duties
 - 2. Export Quotas
 - 3. Other Issues
 - (i) Export Quota Allocation and Administration
 - (ii) Export Licensing
 - (iii) Minimum Export Price
 - C. *Comments on the Panel Report on the Chinese Mineral Exports Restrictions*
- IV. EQUITABLE ALLOCATION OF EXPORT QUOTAS
- V. CONCLUSION

I. INTRODUCTION

A WTO Panel recently issued a report on a dispute brought on a complaint by the United States, the European Union and Mexico against China with regard to the Chinese export restrictions of certain natural resources. This is the first major dispute settlement proceeding on the issue of export restrictions and is therefore an important precedent. China has thereafter notified the Dispute Settlement Body of its decision to make an appeal to the Appellate Body.¹ China, the respondent, appealed the Panel Report on September 1st, 2011. The Appellate Body is expected to finish the review of panel reports within a maximum of three months. Therefore, at the time of writing this article, the Appellate Body is expected to issue its report soon.

In the past, much attention has been paid to issues of import restrictions such as safeguards, antidumping and countervailing duties. Export controls of natural resources by countries are becoming more and more important because of, *inter alia*, an increase in world population, growing demands for natural resources of newly industrializing countries by hedge fund speculations and other economic institutions. In the past, WTO/GATT issues regarding export controls received relatively little attention compared to those on import restrictions. However, the

¹ China appeals raw material dispute panel reports, WTO: 2011 News, *available at*: http://www.wto.org/english/news_e/news11_e/ds394_395_398apl_31aug11_e.htm

time has come for issues of export control in the context of WTO jurisprudence to be studied in greater detail. In July 2011, a WTO Panel issued a report on the Chinese restrictions of certain minerals. The complainants (U.S., EU and Mexico) claimed that the Chinese restrictions were contrary to the GATT prohibitions on export controls. China did not contest the existence of restrictions but invoked Article XX: (b) and (g) of the GATT to justify the restrictions. The Panel rejected the Chinese claims and held that justifications under Article XX: (b) and (g) were available only when the invoking Member controls and reduces domestic production of such resources, and that China had not proven that the domestic production of the natural resources had been controlled in such a way so as to treat domestic users and foreign purchasers in an even-handed manner. The precedent set by the Panel report establishes that export controls are under WTO/GATT disciplines. Export control of natural resources is permitted provided it satisfies the requirements under Article XX of GATT.²

In this connection, it is important to formulate the way in which natural resources are allocated to domestic users and foreign users. Although there are no specific provisions on this issue, import control stipulations under the GATT regarding such allocation can be used as a guide to formulate principles of such allocation. Broadly, import restrictions include high tariffs, import quotas, trade remedies (antidumping and countervailing duties and safeguards) and any other governmental measures restricting imports. According to Article II: 1 of the GATT, the maximum rate for tariffs for each imported item is set by the concession that the Member had made in trade negotiations, and the tariffs imposed by the Member are required to be within this limit. Article XI: 1 prohibits WTO Members from imposing export and import quotas except when they are justified by Article XX exceptions. Trade remedy measures are not prohibited *per se* but the invocation of trade remedy measures is disciplined by the relevant provisions in GATT and specific agreements such as the Anti-Dumping Agreement,³ the Agreement on Subsidies and Countervailing Measures⁴ and the Agreement on Safeguards.⁵

As stated earlier, when compared to the attention that import restrictions have received, relatively little attention has been given to export restrictions. In addition,

² General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194 (hereinafter GATT).

³ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

⁴ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

⁵ Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (hereinafter Safeguards Agreement).

there are also exceptions to the WTO/GATT prohibitions on export restrictions and such prohibitions are somewhat more relaxed than those on import restrictions.⁶ This difference in stringency may be attributed to the fact that, when the GATT 1947 was negotiated, the negotiators were predominantly preoccupied with mercantilism in relation to import controls, such as high import tariffs, and thus did not foresee that export restrictions would become a prominent trade issue in the future. However, export restrictions have become increasingly important and have evolved into a major trade issue today.

Already in the early 1970's, the Club of Rome published a surprising report entitled "The Limits to Growth"⁷ which warned that the economic growth of major countries would be halted by the scarcity of natural resources. Shortly after that, the OPEC (The Organization of Petroleum Exporting Countries) announced a production cut and raising of crude oil prices. This had a tremendous impact on the world economy and in some countries, the economy plunged into panic.⁸ In the 1980's and 1990's, the economies of the major trading nations prospered and the Uruguay Round was successfully concluded in 1993. The World Trade Organization came into being in 1995, as an accomplishment of the Uruguay Round. This gave a bright perspective to the future of international trade, while issues of scarcity of natural resources and the resulting economic difficulties were relegated to oblivion.

However, more recently, these issues of scarcity of natural resources and food have arisen again. The world population is expanding, and it is predicted that it will reach 10 billion within this century.⁹ The demand for natural resources for the sustenance of such a large population is likely to increase. Economic development in newly emerging nations such as India, China, Brazil, South Africa and Russia requires increasing quantities of natural resources. With climate change having acquired a global profile, developed nations are being urged to reduce carbon dioxide emissions which are believed to be an important cause of global warming. Speculations by hedge funds and other economic institutions may push up the prices of natural resources. All of these factors placed together cast doubt on the

⁶ Details of provisions exempting export restrictions from the GATT disciplines are discussed in Part II.A & B, *infra*, of this article.

⁷ THE LIMITS TO GROWTH: A REPORT OF THE CLUB OF ROME'S PROJECT N THE PREDICAMENT OF MANKIND (Donella H. Mathews ed., 1972) (hereinafter LIMITS TO GROWTH).

⁸ On the OPEC, see Melaku G. Desta, The Organization of Petroleum Exporting Countries, The World Trade Organization, and Regional Trade Agreements, 37(3) J. WORLD TRADE. 523-51 (2003).

⁹ Press Release, United Nations, World Population to reach 10 billion by 2100 if Fertility in all Countries Converges to Replacement Level (May 3, 2011), available at: http://esa.un.org/wpp/Other-Information/Press_Release_WPP2010.pdf.

sufficiency of the supply of natural resources in satisfying the demand posed by industries, energy requirements and food sources. China's *de facto* embargo of rare earths in 2010 was a cause of alarm in the United States, Japan and other industrialized countries.¹⁰ National textile groups in the United States and the EU (the U.S. Council of Textile Organization, and the Belgium based Eurocoton) requested their national governments to take a strong stance against the restriction and delay of the export of cotton by India to world markets.¹¹ In 2007 and 2008, there were crop failures in Europe and Australia thereby increasing the demand for cereals in emerging countries. Anticipating food shortage, many countries resorted to export restrictions of foodstuffs, e.g., Argentina, India, Indonesia, Ukraine, Egypt, Kazakhstan, Serbia, Tanzania, China, Nepal, Pakistan, Bangladesh, Brazil, Vietnam, Bolivia and Russia.¹²

In light of the above situation, the study of trade issues regarding export controls with some emphasis on natural resources, energy and foodstuffs, as well as the role of international economic lawyers is of great importance.¹³

Part II of the article discusses the legal framework for export control under the GATT wherein the concepts of export quotas and export duties and the legal provisions pertaining to them are discussed. Export quotas are generally prohibited although there are a number of exceptions. Jurisprudence generated on the topic of export controls at the WTO is discussed in Part III of the article, wherein the Chinese Mineral Export Restrictions case is analysed in detail. The facts of the present matter, the dispute in issue, as well as the deliberations undertaken by the Panel are discussed, specifically with regard to export duties and export quotas, with a supplementary focus on some of the peripheral issues involved. The Panel ruled that the Chinese imposition of export quotas and export duties was inconsistent with Article XI: 1 of the GATT and not justified by Article XI: 2 (c) and Article XX: (b) and (g). After a brief and critical review of the Panel Report, Part IV deals with the issues surrounding the allocation of natural resources to domestic users and foreign purchasers if a WTO Member is allowed to invoke Article XX: (b) or (g) to control production of natural resources and impose export quotas on them. A conclusion is then offered with regard to questions of

¹⁰ Bureau of National Affairs, WTO Reporter, 2/10/2010 and 1/11/2010.

¹¹ Bureau of National Affairs, WTO Reporter, 1/11/2010.

¹² The METI REPORT, Japan: 2010 Report on Compliance by Major Trading Partners with Trade Agreements – WTO, FTA/EPA and BIT – 2011) at 23-26 & 327-354.

¹³ On export control of major trading nations, *see* EXPORT CONTROL LAW, AND REGULATIONS HANDBOOK, A PRACTICAL GUIDE TO MILITARY AND DUAL-USES GOODS TRADE RESTRICTIONS AND COMPLIANCE (Yann Aubin & Arnold Idiart eds., Kluwer Law International 2007); EXPORT CONTROLS IN TRANSITION, PERSPECTIVES, PROBLEMS AND PROSPECT (Gary K. Vertsch & Steve Elliot Gower eds., Duke Univ. Press 1992).

formulation of principles, the role of the WTO in implementing such principles and challenges that the issue of export controls poses for generations to come.

II. THE LEGAL FRAMEWORK FOR EXPORT CONTROL UNDER THE WTO/GATT

A. *Export Quotas*

Article XI of the GATT¹⁴ prohibits both import and export restrictions (except for tariffs) and import and export quotas are generally prohibited. However, there are a number of exceptions with regard to export quotas in particular.

Article XI: 2 (a) and (b) of the GATT permits Contracting Parties to restrict export in order to prevent and mitigate critical shortage of foods and other essential resources and to apply technical standards respectively. Article XX allows WTO Members to take: measures necessary to protect life and health of humans, animals and plants (b); measures to enforce domestic laws and regulations which are not inconsistent with the GATT (d); measures to protect national treasures and articles of archaeological value (f); measures relating to the conservation of exhaustible natural resources (g); measures to implement obligations provided in international commodity agreements (h); measures to control export in order to secure necessary quantity of essential raw materials to the domestic processing industries when the price of such domestic raw materials are held below the international price level by the domestic price stabilization program (i); and essential measures necessary to secure or distribute products which are in shortage nationally or locally (j).

The aforementioned provisions in Article XX of the GATT are subject to the requirements laid down in the introductory part of Article XX, i.e. the chapeau. The chapeau states that measures taken by WTO Members in pursuance of any of the general exceptions shall not be arbitrary, unjustly discriminatory for any Members where the same conditions prevail and/or a disguised restriction of international trade. In addition, Article XXI:(b)(iii) of the GATT permits Contracting Parties to exercise trade restraints including export control to protect their national security in situations of war or "other emergency" which may include a critical shortage of essential resources. In light of the number of exceptions attached to the prohibition of export quotas in Article XI of the GATT, commentators state that such prohibition under Article XI is rendered almost meaningless.¹⁵

¹⁴ General Agreement on Tariffs and Trade, 1947 (hereinafter GATT).

¹⁵ JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC

B. Export Duties

Unlike Article II: 1 (b) of the GATT which provides that WTO Members shall not impose import tariffs above the concession rates, there is no comparable provision regarding export duties in the GATT. Therefore, WTO Members are presumably free to impose export duties on any products which they deem appropriate. If an export duty on a product is so high that it becomes impossible to export the product, it amounts to *de facto* export quota (zero quota) and the same is prohibited by Article XI of the GATT. Beyond this eventuality, an export duty is neither prohibited nor are there any limitations on the maximum quota which can be imposed.

If two or more WTO Members enter into an international agreement wherein they promise to reduce or eliminate altogether export duty on a certain product amongst themselves, this benefit should be extended to all other WTO Members in accordance with the MFN (Most Favoured Nation) principle in Article II: 1 (a). But does this benefit amount to a “tariff concession” in the sense of Article II: 1 (b)? If “No”, then the parties to this agreement can cancel or change the special benefit without incurring any obligations in relation to other WTO Members. If “Yes”, the Members who are parties to this agreement must comply with the requirements for revoking concessions as is stipulated in the GATT. Article II: 5 and Article XVIII: 2 and 3 of the GATT require that the revoking Members must consult with other WTO Members in relation to this revocation and offer compensation as well. Other Members can withdraw concessions provided to the revoking Members in accordance with Article XVIII: 7, Article XXIII: 2 and Article XXVIII: 3 and 4.

Two views have been expressed with regard to the question of whether or not an agreement between two or more WTO Members whereby they reduce or eliminate entirely export duties is a concession in the sense of Article II: 1 (b). A negative view has been expressed by Professor Jackson and a positive view by Mr. Roessler and the UNCTAD.

Professor Jackson¹⁶ argues that an elimination or reduction of export duty by an agreement between two GATT Contracting Parties is not a tariff concession in the sense of Article II: 1 (b) of the GATT for the reason that the subsequent provisions that follow Article II: 1 (b) mention only import but not export. It can be inferred from this lack of mention of export, that the intention of the drafters of Article II:1 (b) was to include only import tariffs in this article but not export

RELATIONS 946 (St. Paul's MN: West Publishing Co., 3d ed. 1995).

¹⁶ JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 499 (Bobbs-Merrill Co. Inc. 1969).

tariffs. On the other hand, Mr. Roessler¹⁷ and the UNCTAD¹⁸ argue that such elimination or reduction of export duty by WTO Members amounts to a tariff concession in the sense of Article II: 1 (b) because Article II: 1 (a) which provides for the MFN principle stipulates “commerce” which should include both export and import, and thus does not limit its scope to import alone. They argue that despite the subsequent provisions following Article II: 1 (b) which mention only import, this is merely indicative of the fact that the negotiators of the GATT 1947 were preoccupied with the elimination and reduction of import tariffs, and that it cannot be interpreted to necessarily imply that their intention was to exclude export duties altogether from the scope of Article II: 1 (b). Mr. Roessler and the UNCTAD further argue that Article XXVIII: 1 emphasises the importance of trade negotiation to substantially reduce import tariffs and export tariffs, and therefore Article XXVIII: 1 should be regarded as an appropriate context for the interpretation of Article II: 1 (b).

Between these two views, the author would prefer the latter view for the three reasons: (1) That Article II: 1 (a) refers to commerce but not export; (2) That Article XXVIII: 1 emphasizes the importance of trade negotiation to reduce import and export tariffs substantially; and (3) That, even though the negotiators of the GATT 1947 wanted to deal with mercantilism through the reduction and elimination of import tariffs, a teleological interpretation requires that today’s situations and circumstances need to be taken into account when interpreting Article II: 1 (b).

III. PANEL REPORT ON THE CHINESE EXPORT CONTROL OF CERTAIN NATURAL RESOURCES AND MINERALS

A. Previous WTO Disputes on Export Restrictions

When compared to the area of import control, where many WTO Panel and Appellate Body reports have been adopted, reports on export control are scanty and jurisprudential rules have scarcely been established. The Chinese mineral export restrictions case which will be discussed in this section is probably the first major WTO dispute case dealing with the issue of export control. However, prior to this Panel Report, there were two disputes in which the GATT and the WTO dealt with export control. These two disputes have been discussed below.

In the *Japan–Semiconductor* case,¹⁹ the issue was an export price control imposed

¹⁷ Frieder Roessler, *The GATT and Access to Supplies*, 9(12) J. WORLD TRADE 25-39 (1975).

¹⁸ United Nations Conference on Trade and Development, N. Y. and Geneva, 2000, *Trade Agreements, Petroleum and Supply Policies*, p. 2 *et seq.*

¹⁹ Report of the Panel, *Japan – Trade in Semi-Conductors*, L/6309 – 35S/116 (May 4,

by the Japanese government pursuant to the U.S./Japan Semiconductor Agreement. There had been disputes between those two countries regarding the export of semiconductor chips from Japan to the United States. The United States argued that semi-conductor chips produced in Japan were dumped into the U.S. market. In order to resolve this dispute, the Japanese Government and the Japanese semiconductor chips industry entered into a suspension agreement with the U.S. government in which the Japanese government and industry promised to refrain from exporting the chips at dumped prices. The Japanese government promised to impose a control on semiconductor chips to be exported to third countries whereby the Japanese industry was directed to export the chips to third countries at prices above the minimum price as indicated by the government. The European Communities took Japan to the GATT dispute settlement process and argued that this export price control amounted to a *de facto* export prohibition contrary to Article XI of the GATT.

The Panel ruled that the minimum price system imposed by Japan was an export prohibition which constituted an infringement of Article XI of the GATT. Japan argued that the price regulation was merely an administrative guidance which did not have any legal effect. The Panel in turn, stated that although the price control in Japan constituted more in the nature of advice rather than a legal order, it still constituted a government measure as long as it was effectively implemented and constituted an infringement of Article XI of the GATT.²⁰

In the *Argentina–Bovine Hides* case,²¹ Argentina established a regime wherein domestic tanners were allowed to participate in a committee to examine the validity of export of bovine hides. The European Communities brought a complaint before the WTO and argued that the participation of domestic tanners in a committee whose role was to examine whether bovine hides should be allowed to be exported, amounted to an infringement of Article XI of the GATT. Another reason provided was that such participation would have a prohibitive effect on the export of bovine hides and this amounted to a violation of Article X: 3 (a) of the GATT which requires that fair and equitable procedures be guaranteed with regard to export and import regulations. The Panel rejected the EC claim that the Argentine measure amounted to an infringement of Article XI of the GATT but

1988).

²⁰ For comments on this case, see John Kingery, *The U.S. – Japan Semiconductor Arrangement and the GATT*, 25 STAN. J. INT'L L. 467-79 (1989); Amelia Porges, *Japan – Trade in Semiconductors*, 83(2) AM. J. INT'L L., 388-94 (1989); James Predergast, *The European Economic Community's Challenge to the U.S.–Japan Semiconductor Arrangement*, 19 LAW & POL'Y INT'L BUS. 548-601 (1987).

²¹ Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (Feb. 16, 2001), DSR 2001: V, at 1779.

accepted the claim that the measure would be an infringement of Article X: 3 (a). The EC's claim regarding Article XI was rejected by the Panel because the permission granted by the Argentine government to allow domestic tanners to sit in committees for examining the export of hides did not constitute a prohibition of export *per se*. A higher burden of proof was required in order to establish the EC's claim of an existence of export prohibition. However, the Panel accepted the EC claim that this measure would constitute an infringement of Article X: 3 (a) which requires due process of law in export inspections processes. Article X: 3 (a) of the GATT states: "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 2 of this Article." This article requires contracting parties to conduct export inspection processes in a uniform, impartial and reasonable manner. Its reasoning for accepting the latter claim was that since domestic tanners' interests are adverse to the export of the products, allowing them to participate in a committee which decided whether the product should be exported or not would be contrary to a fair, objective and neutral procedure regarding international trade.

There are some other minor disputes as well in which issues of export control were dealt with in the GATT dispute settlement process.²² Although these disputes are useful precedents, the issues dealt with in them are not the core issues in export control under the WTO/GATT regime.

B. *The Chinese Mineral Export Restrictions Case*

This is the first major case at the WTO dispute settlement process where a Panel dealt squarely with the questions of applicability of Article XI and Article XX of the GATT to export restrictions. The dispute was initiated at the WTO by petitions on behalf of the United States, the European Union and Mexico.²³

The United States, the EU and Mexico brought claims before the WTO against China on the grounds that China imposed export quotas and export duties on raw materials such as magnesium scrap, manganese scrap, zinc scrap, coke, magnesium metal, manganese, fluorspar, bauxite, white phosphorus, lead, silicon metal and silicon carbide. The consultation proceedings among the disputing parties failed to reach any consensus and, in November 2010, the three complainant Members brought claims against China. The claimants argued that the

²² Panel Report, *United States – Measures That Utilized Export Limits As Subsidies*, (DS 194); GATT Doc. C.P. 2/SR. 11 (1948); GATT Doc. L/421 (1952); GATT Doc. CP. 3/SR.

²³ Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R; WE/DS395/R; WE/DS398/R, (July 5, 2011) (hereinafter the Report).

Chinese measures violated provisions of China's obligations under the Protocol of Accession to which China had agreed when it entered the WTO,²⁴ as well as certain provisions of the GATT 1994. They claimed that the Chinese measures were not covered by the exceptions provided under Article XX of the GATT 1994. China did not contest that the Chinese measures infringed the provisions of the Protocol of Accession and the GATT, but raised a defence that the measures claimed to be in violation of the Protocol and the GATT were rescued by the exceptions under Article XX: (b) and (g), and Article XI:2 (a) of the GATT.

Therefore, an issue which has arisen from the dispute is whether or not an infringement of a provision in the Protocol can be exempted under Article XX of the GATT. The relevant precedent is the *China – Audiovisual Case*²⁵ in which China restricted the right to trade audio-visual products to state-owned enterprises. The United States argued that this restriction was contrary to Paragraph 5:1 and 5:2 of the Accession Protocol as well as the report of the Working Party²⁶ which guaranteed the right of trade in audio-visual products to foreign owned enterprises. China argued, among other things, that the restriction would be justified by Article XX: (a) of the GATT which states that WTO Members can take measures to protect public morals.

The Panel rejected this argument but the Appellate Body accepted it on the grounds that, although Paragraph 5.1 of the Accession Protocol requires that China progressively liberalise the availability and scope of the right to trade in audio-visual products, the introductory part of this paragraph includes the phrase “Without prejudice to China's right to trade in a manner consistent with the WTO Agreement” and, since the GATT 1994, under which Article XX falls, is part of the WTO Agreement, China is entitled to invoke it in order to defend itself against this challenge. Therefore, the Appellate Body concluded that China could invoke Article XX: (a) to justify the restriction on the trade of audio-visual products if the requirements of Article XX: (a) and its chapeau are fulfilled.²⁷

In the *Chinese Export Restrictions* case, China relies on Article XX: (b) and (g) and Article XI (a) of the GATT to justify export duties and export quotas. Export

²⁴ Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432 (Nov. 23, 2001) (hereinafter Protocol of Accession).

²⁵ Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009); Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, (Jan. 19, 2010).

²⁶ On this report, see Panel Report *supra* note 23, at 54-55.

²⁷ See Fernando Pierola, *The Availability of a GATT Article XX Defense with Respect to a Non-GATT Claim: Changing the Rules of the Game?*, 5 GLOBAL TRADE & CUSTOMS J. 172-75 (2010).

duties as such are not prohibited in the GATT. However, when China entered the WTO, it undertook, as per the Accession Protocol, to abolish export duties except for certain items. It is only in relation to this Accession Protocol that the issue of whether they are exempted from GATT disciplines by virtue of Article XX was raised.

In connection with the applicability of Article XX: (b), the claimants argued that the domestic production of the minerals in question needs to be restricted, and not their export. If the alleged purpose of the measures is to protect the life and health of humans, animals and plants, then if domestic production is not restricted, the export restriction only has the effect of subsidizing domestic industries using the minerals to produce finished domestic products. A similar argument was presented by the claimants with regard to the issue of whether Article XX: (g) applies to the dispute.

China also relied on Article XI: 2 (a) of the GATT to justify the export restrictions. This article provides: “The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or restrictions temporality applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting country party”.

On July 5, 2011, the Panel issued a report in the case of the Chinese Export Controls of Raw Materials.²⁸ The Report deals with four issues, e.g., (1) export duties, (2) export quotas, (3) export licensing, and (4) minimum export price. Among these items, export duties and export quotas are the most important to this article and will be discussed in the following subsection.

1. Export Duties

In 2009, China imposed export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc. Paragraph 11.3 of China’s Accession Protocol states that export duties shall be eliminated except for those items listed in Annex 6. From the above mentioned items only yellow phosphorus is included in Annex 6. Thus, the claimants argued that the imposition of export duties on these items was in violation of paragraph 11.3 of the Protocol.

The Panel in turn, found in favour of the claimants - that China’s imposition of export duties on those minerals *was* inconsistent with Paragraph 11.3 of the Accession Protocol.²⁹ China invoked Article XX: (b) for certain minerals and argued that extraction of such minerals entailed hazardous consequences to human

²⁸ The Report, *supra* note 23.

²⁹ *Id.* ¶¶ 7.77, 7.81.

life and health, and that it was important to impose duties on the export of such minerals in order to reduce their production. For other minerals, China argued that the minerals were scarce and it was necessary to take measures in order to conserve them and that such conservation measures were covered by the exception provided for under Article XX: (g). The complainants argued that China could not invoke Article XX to justify its measure of export restrictions and, even if Article XX could be invoked, the Chinese measure did not satisfy the requirements of Article XX. The Panel stated that the Appellate Body had ruled that China could invoke Article XX exceptions with regard to the trading right incorporated in Paragraph 5 of the Accession Protocol and pointed out that Paragraph 5 affirmed China's rights under the WTO agreements and that the WTO agreements were inclusive of Article XX of GATT 1994. The Panel further stated that, in contrast with Paragraph 5, Paragraph 11.3 did not have such an introductory part or any mention otherwise of the WTO agreements and therefore, an *a contrario* interpretation would suggest that China could not invoke Article XX defences in connection with Paragraph 11.3.³⁰ The Panel noted that there would be an imbalance of the rights and obligations provided under the WTO agreements as between China and other WTO Members with respect to export duties if such an interpretation were to be adopted because China would be prohibited from imposing export duties while other WTO Members would be free to impose them. However, the Panel concluded that, given the difference in the language of Paragraphs 5 and 11.3, this would be the only correct interpretation.

2. Export Quotas

Although export quotas are generally prohibited, they are permitted in certain exceptional circumstances, e.g., in situations where a WTO Member is faced with critical shortages of foodstuff and other essential materials (Article XI: 2 (a)). Exceptions are also granted when restrictions are necessary to protect the life and health of humans, animals and plants (Article XX: (b)) and when restrictions are related to the conservation of exhaustible natural resources.

The complainants claimed that China imposed export quotas on bauxite, coke, fluorspar, silicon carbide and zinc and that this was inconsistent with Article XI: 1 of the GATT 1994, which prohibits export and import quotas, as well as with some provisions in the Accession Protocol and the Working Party Report. China argued that these quotas were permitted under Article XI: 2 (a) (with respect to refractory-grade bauxite) and, even if the exemption under Article XI: 2 (a) did not apply, the export quotas would be justified under Article XX: (g) and (b) of the GATT. The Panel noted that the burden of establishing that the requirements of Articles XI: 2 (a) and XX: (b) and (g) was on the respondent and ruled as below.

³⁰ *Id.* ¶ 7.129.

Article XI: 2 (a) exempts from GATT disciplines measures taken temporarily to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party. The Panel noted that Article XI: 2 (a) did not have a chapeau like that of Article XX and therefore concluded that Article XI: 2 (a) is to be interpreted narrowly, and that the duration of the restriction in question under Article XI: 2 (a) should be limited and not indefinite.³¹ With regard to the question of whether foodstuffs or products were essential, Article XI: 2 (a) states: “Nothing in this Agreement shall be construed...to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”. From this provision the Panel deduced that, when determining the essential nature of the products in question, the particular circumstances which the Member faced at the time of application for the exemption should be considered.³²

The Panel emphasized that the term “temporary” in Article XI: 2 (a) is closely related to the term “critical shortages”, and that if shortages of foodstuffs or other products last long and cannot be relieved by a temporary export restriction, then such a situation falls outside the scope of Article XI: 2 (a). In such a situation, the scarcity of natural resources would continue to exist for a lengthened period of time until the resources became depleted altogether. This is a situation to be addressed by Article XX: (g) and if Article XI: 2 (a) was interpreted to address this situation, it would imply that both Article XX: (g) and Article XI: 2 (a) apply to the same situation. This form of duplicative interpretation should necessarily be avoided.

The Panel concluded that Article XI: 2 (a) permits the application of restrictions or prohibition on a limited basis to address “critical shortages” of “essential products” and that a product may be “essential” within the meaning of Article XI: 2 (a) when it is “important” or “necessary” or “indispensable” to a particular Member. This may include a product which is an “input” to an important product in a later stage of production. A determination of whether a particular product is “essential” to a Member must take into consideration the particular circumstances faced by that Member at the time when the Member applied for a restriction or prohibition under Article XI: 2 (a). Finally, the Panel concluded that the term “critical shortage” in Article XI: 2 (a) refers to those situations or events that may be relieved or prevented through the application of measures on a temporary, and not indefinite or permanent, basis.³³

In reference to the situations faced by China, the Panel concluded that

³¹ *Id.* ¶ 7.258.

³² *Id.* ¶ 7.282.

³³ *Id.* ¶ 7.306.

refractory-grade bauxite was essential to China due to its usage in Article XI: 2 (a).³⁴ However, the Panel stated that the Chinese export quota on this product had lasted at least a decade, and therefore this hardly qualified as a temporary measure. For this reason, the Panel decided that the Chinese export quota was not justified by Article XI: 2(a).

China also raised a defence that the export quotas on refractory-grade bauxite and fluorspar would be justified by Article XX: (g) of GATT 1994. Article XX: (g) exempts from the GATT disciplines, measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with the restrictions on domestic production or consumption. Following the rule established by the Appellate Body in the U.S. Gasoline Case,³⁵ the Panel stated that “relating to” in Article XX: (g) requires that a substantial relationship exist between the export measures and conservation efforts, and that a measure must be primarily aimed at the conservation of exhaustible natural resources in order to fall within the ambit of Article XX: (g).³⁶

The Panel postulates, as a general principle, that WTO Members have sovereignty over natural resources within their jurisdictions and such sovereignty should be exercised in consistence with the obligations of the WTO agreements.³⁷ As a context for Article XX: (g), the Panel cited Article XX: (i), which allows the export restriction of necessary materials on the condition that such restrictions shall not operate to increase the protection afforded to a domestic industry. The Panel stressed that Article XX: (g) could not be interpreted to contradict Article XX: (i), i.e., Article XX: (g) could not be relied upon to excuse export restrictions which would effectively protect a domestic industry. The Panel pointed out that the correct interpretation would require that, in exercising export controls, domestic industry and foreign purchasers be treated even-handedly. This even-handedness would lead to a requirement that, when an export quota is applied on certain minerals, domestic production or consumption of such minerals must not only be applied simultaneously with the export restrictions but, in addition, the purpose of the export restrictions must be to ensure the effectiveness of those domestic restrictions.³⁸ If domestic production or consumption of the minerals in question is not restricted while an export quota is imposed on them, domestic producers using the minerals to manufacture their products do not bear any burden of restricted supply of the minerals, whereas the supply of the minerals to

³⁴ *Id.* ¶ 7.340.

³⁵ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (May 20, 1996) (hereinafter *US–Gasoline*).

³⁶ The Report, *supra* note 23, ¶ 7.370.

³⁷ *Id.* ¶ 7.381.

³⁸ *Id.* ¶¶ 7.395-98.

foreign producers using the minerals to produce the same or similar products is limited by the export quota and therefore, foreign users of the minerals are at a disadvantage in comparison with domestic users. In this way, foreign users are not treated even-handedly compared to domestic users.

Moreover, a policy of restricting domestic production of the relevant minerals would be more in line with a policy to achieve conservation rather than a policy of restricting exports. For this reason, the Panel stated that, for the purpose of conservation of a resource, it was not relevant whether the resource was consumed domestically or in foreign countries but what mattered was its pace of production.³⁹ According to the evidentiary information available, there was a substantial increase in the domestic consumption of fluorspar and refractory-grade bauxite, while exports failed to grow at the same pace. Further, measures that increase the costs of refractory-grade bauxite and fluorspar for foreign consumers but decrease their costs for domestic users are difficult to reconcile with the goal of conservation of refractory-grade bauxite. Considering these factors, the Panel observed that China did not meet its burden of proving that its export quota on refractory-grade bauxite and fluorspar and its export duty were related to the conservation of the minerals.⁴⁰

The Panel found that Article XX: (g) required that domestic restrictions on production of the minerals in question be operated concurrently with the trade measures at issue and export restrictions be primarily aimed at rendering effective these domestic restrictions. WTO Members cannot justify their export restrictions by relying on future or potential domestic restrictions on the production of minerals which would not operate concurrently with the export restrictions, and yet China had maintained export restrictions on refractory-grade bauxite and fluorspar for many years. The Panel concluded that China did not demonstrate that its export restrictions on refractory-grade bauxite and fluorspar were made effective in conjunction with restrictions on domestic production or consumption because the restrictions were not intended to – nor did they in effect – enforce a reduction in domestic production or consumption. The caps on production which were introduced in 2010 might, in the future, justify the restrictions of future exports under Article XX: (g), but at present, China had not met the burden of proving that its export restrictions were made effective in conjunction with restrictions on domestic production or consumption.⁴¹

The Panel further stated that, assuming a production cap was 100 units annually and there was an export quota of 40 units for that product, this production cap

³⁹ *Id.* ¶ 7.428.

⁴⁰ *Id.* ¶ 7.435.

⁴¹ *Id.* ¶ 7.458.

would limit domestic consumption only when the domestic demand was greater than the quantity available to the domestic industry (i.e. 60 units). If the cap was anything to the contrary, the domestic industry would be able to obtain as much quantity of raw materials as it required for its downstream production. China had not proved that the cap system would always operate in a way that both domestic and foreign consumers bear equitable burdens. Therefore, the mere existence of a production cap did not automatically imply concurrence between the export restriction and the domestic restriction on production of the minerals.⁴² The Panel mentioned that China had not demonstrated that its export restrictions were made effective in conjunction with the domestic restrictions designed to limit production or consumption at present. In addition, China did not demonstrate that its domestic measures aimed at restricting production or consumption resulted, at present, in an equal burden on foreign and domestic consumers. Therefore, the Panel ruled that China's export quota on refractory-grade bauxite was inconsistent with Article XI of GATT 1994 and that this could not be justified pursuant to Article XX: (g) of the GATT.

China's next argument was with regard to the GATT Article XX (b) exception. It claimed that the following export measures were justified under Article XX (b):

- (1) The export duties on scraps (magnesium scrap, manganese scrap and zinc scrap);
- (2) Export duties on EPR products (energy-intensive and highly polluting resource-based products. E.g.: coke, magnesium metal, manganese metal);
- (3) The export quotas on other EPR products (coke and silicon carbide).

China argued that the export restrictions on scraps would increase their domestic supply and this, in turn, would facilitate a shift in Chinese production of finished products from primary materials (extracted minerals) to secondary materials (scraps) by increasing the domestic supply of scraps and reducing the extraction of minerals, thereby contributing to a reduction of pollution. China also argued that the imposition of export quotas on the minerals aforementioned was a component of China's comprehensive environmental policy designed to protect the life and health of its population. Therefore, China contended, all such measures could be justified by Article XX: (b).⁴³

The Panel stated that although the Chinese measures to protect the environment were commendable, it eluded the Panel as to how export restraints constituted an integral part of such an environmental policy. A cap on the very production of those materials would get the job done more effectively. The laws

⁴² *Id.* ¶¶ 7.463-64.

⁴³ *Id.* ¶¶ 7.470-71.

and regulations cited by China as constituting its environmental policy did not explicitly state that export restrictions were part of that policy, or that they were closely related to the accomplishment of the purpose of that policy.⁴⁴ Contrary to China's assertions, the claimants argued that it was evident from the Chinese documents related to this issue that the real purpose of the export restrictions was to assist downstream industries in China in producing finished products by using those minerals. The Panel concluded that it was crucial to prove that the export restrictions were primarily aimed at removing risks to human, animal and plant life and health, and that China was unable to substantiate this prerequisite.⁴⁵ Therefore, the necessity test in Article XX: (b) was not satisfied.

Another requirement under Article XX: (b) is the availability of WTO-consistent or less trade restrictive alternative measures, i.e., WTO-consistent or less trade restrictive alternative measures *do* exist which would accomplish the same objective as the export restrictions. The burden of proving that there is such an alternative rests with the claimant. The complainants therefore submitted six types of alternative measures, as follows:

- (1) Investment in technology;
- (2) Promotion of recycling;
- (3) Strengthening of environmental standards;
- (4) Investment in infrastructure for recycling craps;
- (5) Stimulating greater local demand for scrap minerals; and
- (6) Production restrictions or pollution controls on primary production.⁴⁶

The Panel noted that China had already implemented most of the measures suggested by the complainants. However, according to the Panel, China claimed that export restrictions were also necessary to complement these measures and that together they would serve to improve the environment.⁴⁷ China agreed that all six of these alternatives were effective in dealing with environmental issues and argued that they had implemented them. However, China claimed that export restrictions were also effective means to deal with environmental issues and the export restrictions, together with other alternatives, should be regarded as a package of measures to deal effectively with environmental deterioration. The Panel emphasized that China's interpretation of the availability of WTO consistent or less trade-restrictive alternatives would substantially expand the scope of the exceptions, and that China should be allowed exceptions under Article XX: (b) only if it could establish that the available WTO-consistent alternative could not

⁴⁴ *Id.* ¶¶ 7.511–12.

⁴⁵ *Id.* ¶ 7.516.

⁴⁶ *Id.* ¶ 7.566.

⁴⁷ *Id.* ¶ 7.584.

provide the same level of protection that China had chosen to employ. However, the Panel concluded that China had failed to do so.⁴⁸

Hence, the following conclusions were reached by the Panel:⁴⁹

1. Export quota on bauxite is inconsistent with Article XI:1 of the GATT because the quota was not made effective in conjunction with restrictions on domestic production or consumption, as is required pursuant to Article XX: (g) of GATT.
2. Export duties on fluor spar are inconsistent with Paragraph 11.3 of China's Protocol of Accession and would not be justified under the defence Article XX: (g).
3. Export quotas on coke and silicon carbide are inconsistent with Article XI of GATT and would not be justified by Article XX: (b).
4. China's export duties on EPRs and scrap products are inconsistent with Paragraph 11.3 of the Protocol of Accession and would not be justified by Article XX: (b).
5. In light of the above findings, the Panel held that it was not necessary to determine whether the Chinese measures would be contrary to the requirements of the chapeau to Article XX.

3. Other Issues

(i) Export Quota Allocation and Administration

China allocated export quotas on bauxite, fluor spar and silicon carbide through a quota bidding process, under which enterprises seeking to export must pay a bid-winning price, equal to the bid price multiplied by the bid quantity, for the right to export under the quota. The United States and Mexico claimed that the bid-winning price paid in connection with such quota allocation constituted a fee or charge imposed on or in connection with exportation and that this fee or charge was not limited in amount to the approximate cost of services rendered and as such was inconsistent with Article VIII: 1 (a) of the GATT. The Panel held that the winning bid price collected by China in connection with quota allocation did not constitute a fee or charge within the meaning of Article VIII: 1 (a) because the collection of such bid price did not amount to an imposition of a fee or charge on exportation. Nor did the winning bid price approximate the cost of service rendered as required by Article VIII: 1 (a). Therefore, China's allocation of quotas on bauxite, fluor spar and silicon carbide based on the winning bid price was not

⁴⁸ *Id.* ¶ 7.588.

⁴⁹ *Id.* ¶¶ 7.613–17.

inconsistent with Article VIII: 1 of GATT or Paragraph 11.3 of China's Accession Protocol.⁵⁰

(ii) Export Licensing

The Chinese export licensing system wherein the administering authority could exercise unlimited discretion required exporters to submit unspecified and unqualified documents. This created uncertainty for exporters and hence the Panel found the same to be inconsistent with Article XI: 1.

(iii) Minimum Export Price

China imposed a minimum export price through various measures with regard to bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc under the pain of revoking export licenses if the minimum export was not complied with. China failed to promptly publish necessary information regarding the enforcement of this minimum export price which would have enabled governments and traders outside China to become acquainted with how it is enforced. This was held to be inconsistent with Article X:1 of GATT.

C. Comments on the Panel Report on the Chinese Mineral Exports Restrictions

Regarding the question of whether Article XX of the GATT applies to China's Protocol of Accession, the Panel refers to the ruling of the Appellate Body in the *China–Audiovisual* dispute in which the Appellate Body held that China could invoke Article XX of GATT to defend a violation of Paragraph 5 of the Protocol, because Paragraph 5 of the Protocol explicitly states that the rights of China under the WTO agreements would not be affected and the WTO agreements include Article XX of GATT. The Panel noted that there is no comparable language in Paragraph 11.3 of the Accession Protocol and, therefore, an *a contrario* interpretation would require the inference that, with respect to Paragraph 11.3, China could not invoke Article XX exceptions. A plain reading and comparison of both Paragraphs seems to lead to this conclusion. However, this literal interpretation by the Panel leaves something to be desired. With this interpretation, China would be deprived of invoking export duties under any circumstances. Export duties are not prohibited by the GATT and all WTO Members except China can impose export duties when they so desire. One might argue that China paid an entry fee to the WTO by giving up the right to impose export duties under any circumstances by Paragraph 11.3 of the Accession Protocol. However, an additional denial of China's right to invoke Article XX in relation to export duties for the purpose of conserving exhaustible natural resources would create a huge

⁵⁰ *Id.* ¶ 7.861.

imbalance of rights and obligations between China and other WTO Members. This raises a serious constitutional issue in the WTO jurisprudence and the Panel could have given a thought on this aspect and provided a more substantive reason as to why China could not invoke Article XX to justify export duties besides the literal interpretation as explained by the Panel.

This interpretation may have further consequences. Article XX of the GATT states that “nothing in this Agreement” prevents contracting parties from adopting measures falling under any of the items contained thereafter. This interpretation of “the Agreement” by the Panel excludes the possibility of applying Article XX exceptions to any provisions of any other agreements other than GATT 1994. But what about agreements contained in Annex 1A of the WTO Agreement? For example, the TBT Agreement and the SPS Agreement require the national treatment principle in the same way as the GATT 1994 does. Does this interpretation mean that Article XX exceptions do not apply to the national treatment principle in the TBT Agreement or the SPS Agreement? To be sure, the TBT Agreement *does* have its own exception. Article 2.1 of the TBT Agreement provides for the national treatment principle in almost the same language as used in Article II: 4 of the GATT. However, if one adopts the interpretation that the exceptions enumerated in Article XX of the GATT apply only to provisions in GATT 1994 and any provision in other agreements which refer to the GATT 1994, then conceptually Article XX exceptions do not apply to infringements of the TBT Agreement. This would mean that exceptions in Article XX of the GATT apply to infringement of the national treatment principle as stated in Article II: 4 of the GATT while they do not apply to infringement of the national treatment principle incorporated in Article 2.1 of the TBT Agreement even if the languages used are similar. This interpretation appears to be somewhat incongruous. On one hand, it may be that this was the intention of the framers of the WTO agreements. On the other hand, one might argue that most, if not all, of the Annex 1A agreements have provisions referring to GATT 1994 and, by virtue of this, it may be interpreted that there is continuity rather than separation between those agreements and GATT 1994. One may construct an interpretation that GATT 1994 including Article XX thereof has been taken into those agreements as an integral part and therefore Article XX applies. However, one will have to await further clarification by panels and the Appellate Body on this issue in future.

This Panel Report is the first ruling on Article XI: 2 (a) of GATT and is therefore a valuable precedent. The Panel stated that the essentiality in the sense of this provision should be related to the particular situation and circumstances of the party invoking it. Another ruling of the Panel is that the requirements of “temporary” measure and “critical circumstances” are to be read in consonance with one another. Therefore, a continuing shortage of essential materials does not fall into this category since perennial shortage is not included within the scope of

this exemption. The Panel drew this conclusion from a comparison between Article XI: 2 (a) and Article XX. The Panel argued that if a continuing shortage were covered by Article XI: 2 (a), both this article and Article XX: (g) would apply to the same situation, and thus result in a duplicative interpretation which treaty interpreters should avoid. The Panel also stated that essential products include inputs which are used in downstream production. These interpretations are novel and will contribute towards a clarification of the meaning of Article XI.

With regard to the interpretation of Article XX: (g), the Panel recognized that WTO Members have sovereignty over natural resources within their jurisdiction. However, WTO Members need to respect their international obligations created by WTO agreements when exercising sovereignty over their respective natural resources.

Referring to the Appellate Body ruling on Article XX: (g) in the *U.S. – Gasoline* dispute, the Panel emphasized the importance of even-handedness in export restrictions and a restriction of domestic production or consumption. The Panel stated that, in order to secure even-handedness between domestic users and foreign users of the natural resources in question, the domestic production or consumption of those natural resources which are made subject to export restrictions should be limited as well. The Panel even suggested that export restrictions should be a supplementary means to support domestic restriction of production or consumption of the natural resources, because the most effective method of conservation of natural resources is limiting domestic production. As long as this is accomplished it does not matter whether natural resources are exported or domestically consumed. The Panel also mentioned that, when export restrictions are applied, the burden of such restrictions should be equitably shared by both domestic purchasers and foreign purchasers.

All of these points have been suggested by panels and the Appellate Body in previous disputes.⁵¹ However, it is the first time that a Panel makes use of those principles with regard to export restrictions of natural resources and, in this sense, has established a valuable precedent.

The Panel also held that a cap on the production of the harmful materials in question is most effective in protecting the life and health of the population. From this it follows that, restrictions on export under Article XX: (b) cannot be justified unless they are supplementary to, or concomitant with, an effective control of domestic production of those materials. Unlike Article XX: (g) which explicitly requires that measures controlling international trade of products for the purpose of conserving exhaustible natural resources be made in conjunction with

⁵¹ See *US–Gasoline*, *supra* note 35.

restrictions on domestic production or consumption of those natural resources, Article XX: (b) does not clearly state that restrictions on domestic production and consumption of products be imposed in parallel to restrictions of international trade of those products. In other words, the “even-handedness” principle is not stated in Article XX: (b). However, the Panel reads the requirement of even-handedness into Article XX: (b). On the whole, the analysis of the Panel concerning Article XX: (b) issues is less articulated than that of Article XX: (g). In all probability, this is due to the fact that, unlike Article XX: (g) as discussed above, there is no clear statement in Article XX: (b) which mandates that domestic production or consumption be controlled. Thus, elaboration on the principles of even-handedness in connection with Article XX: (b) may invite some amount of hesitation.

IV. EQUITABLE ALLOCATION OF EXPORT QUOTAS

As discussed earlier, the Panel struck down the Chinese export restrictions of certain minerals on the grounds that they constituted a violation of Para 11.3 of the WTO Accession Protocol signed by China, Article XI of GATT 1994, and on the ground that such restrictions cannot be justified under Article XX of GATT. By implication, however, the Panel Report would endorse export quotas of natural resources if such export quotas satisfied the requirements of Article XX: (b) or (g). This gives rise to the following question: Should a WTO Member invoking Article XX: (b) or (g) to impose export quotas on certain minerals not provide fair and equitable allocation of such resources and materials to domestic and foreign purchases according to the principles of the WTO agreements? This is an issue of proportionality – about how much of the resources should be allocated to export and how much toward domestic demands. The Appellate Body Report in *U.S.–Gasoline* called this principle “even-handedness” and the Panel in this case relied on the aforementioned Appellate Body Report when it ruled that control of domestic production of the minerals in question is necessary when a quota is imposed on export of the minerals.⁵²

There is no provision in the WTO/GATT agreements which specifically addresses the issue of proportional allocation of quotas in export control. However, there are some provisions in the WTO/GATT agreements which address the question of how much share is to be allocated to imports and how much to domestic suppliers when a WTO Member invokes import quotas. This is expressed in the provisions of the Safeguards Agreement and Article XI of the GATT 1994, relating to relative shares which are to be assigned to domestic and imported products when an import quota is applied.

⁵² *Id.*

Article 5: 1 of the Safeguards Agreement:

...If a quantitative restriction [of import] is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.

Article 5: 2 (a) of the Safeguards Agreement:

...the Member [invoking import safeguard] shall allot to Members having a substantial interest in supplying the products shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

Article 5: 2 (b) of the Safeguards Agreement:

A Member may depart from the provisions in subparagraph (a) ...provided that (i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the departure from the provisions in subparagraph (a) are justified, and (iii) the conditions of such departure are equitable to all supplies of the product concerned.

Article XI: 2. (c) of the GATT 1994:

The provisions of paragraph 1 of this Article (providing for general elimination of quantitative restrictions) shall not extend to the following:

(a) and (b) are omitted

(c) import restrictions on any agricultural or fishers product, imported in any form, necessary to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced... .

...any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. [I]n determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous

representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.

Ad *Article XI*, Paragraph 2, last subparagraph:

The term “special factors” includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but no changes artificially brought about by means not permitted under the Agreement.

The common principles that underlie these provisions are as follows.

- a) *Status quo* of the accomplishment of imports in the representative period (the past three year period) should be respected (Article 5.1 of the Safeguard Agreement and Article XI: 2 (c)).
- b) The proportion that prevailed with respect to imports in the representative period should be respected, e.g., shares based on the proportions supplied by exporting Members during the representative period of the total quantity or value of imports should be respected (Article 5.2 (a) of the Safeguard Agreement and Article XI: 2 (c) of the GATT).
- c) Special factors which may have affected trade or may be affecting the trade in the product should be taken into account (Article 5.2 (b) of the Safeguard Agreement and Article XI: 2 (c) of the GATT). Special factors include changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but no changes artificially brought about by means not permitted under the GATT (Ad Article XI, paragraph 2, last subparagraph).
- d) Import quotas should be applied in conjunction with the restrictions of domestic production or the sale of the natural resources or materials in question (Article XX: Chapeau and XX (g), and Article XI: 2. (c) (i)). Also Article XI: 2 (c) allows restriction on imports only in conjunction with restrictions of marketing or production of the agricultural and fisheries product in the domestic market.

In the above, two basic principles can be recognized: the respect accorded to the past performance of exporting countries, and the relative efficiency of foreign exporters exporting products to importing countries and that of domestic industries. The respect for past performance in the representative period reflects relative efficiency or competitiveness of exporters and domestic suppliers at the time when the import quota is introduced. This view is supported by the fact that Article 5:2 (a) of the Safeguards Agreement requires that the proportions supplied by WTO Members during a previous representative period of the total quantity or value of imports of the product should be respected. The viewpoint is also supported by the fact that there are similar provisions in other agreements as well.

In determining the relative shares of imports, special factors should be considered. Ad *Article XI*, Paragraph 2, last subparagraph defines special factors as including changes in relative productive efficiency as between domestic and foreign producers. This would also suggest that relative efficiency and competitiveness of domestic and foreign producers must be taken into account in determining the quotas to be allocated to them. Ad *Article XI*, Paragraph 2, last subparagraph adds that no changes artificially brought about by means not permitted under this Agreement shall be taken into account. This should mean that any change brought about by trade arrangements inconsistent with GATT principles reflects distorted or disrupted market conditions and does not reflect the normal competitive processes, and that the relative market shares accomplished under such conditions should not be taken into account. Given the fact that there is no distortion of international market by trade restrictive measures incompatible with WTO agreements, exporters and domestic suppliers operate in a free market. Under this circumstance, the relative market shares accomplished by foreign and domestic suppliers reflect the relative competitiveness and efficiency at the time when the import quota is introduced. This international competition stops when quotas are introduced by the importing country. However, the relative shares accomplished by exporters and domestic industries in the domestic market in the past reflect the relative efficiency of exporters and domestic industries, and can therefore be used as a benchmark to construct market shares which would exist within the free market. Therefore, to allocate quotas based on such market shares is an approximation of shares that would exist. Although this is an imperfect way of approximating shares, this is as much as one can expect under the circumstances when export quotas are necessitated.

By allocating quotas for import and domestic industries, the market shares are pegged and no room exists any more for competitive efficiency to operate. As an alternative, one might propose an auction system in which bidders, whether domestic or foreign suppliers compete within the quota set for both domestic and foreign supplies. This would be based on comparative efficiency. However, as long as Article XX permits quantitative restrictions, some restraint on the operation of market principles is inevitable and adoption of the auction system in exclusion to all other methods of allocating export quotas (such as allocation on the basis of previous accomplishment, a mixture of allocation based on previous accomplishment and auction, or an allocation on a first come first served basis) would mean a total drainage of energy and mineral resources from the domestic market, although this method of auctioning is most faithful to the efficiency principle. This is probably too extreme a position as envisaged by the WTO agreements. Therefore, this author proposes that a combination of quota allocation on the basis of previous accomplishment and auction system be recommended.

Both in the export market and import market, international flow of goods and

services is determined by the demand and supply and competitive efficiency of exporters, importers and domestic industries who are in competition with each other. In this sense, the conditions surrounding export quotas are not different from those of import quotas. An analogy can be drawn from the principles established with respect to the conditions of imposing import quotas which can be applied to those of export quotas. The following is a tentative list of principles which may apply to export quotas:

- a) When imposing export quotas, a WTO Member should engage in prohibition or reduction of the natural resources and materials in question, or their domestic sale. This principle is derived from the requirement of even-handedness as explained by the Panel in this case. If an export quota is imposed without a corresponding restriction on domestic production or sale of the product in question, the product will, in effect, be used to subsidize the domestic industry using this product. This will disadvantage foreign users who require the same product and thus can be regarded as inequitable allocation of natural resources between domestic and foreign purchaser.
- b) When imposing export quotas, a WTO Member should respect shares of foreign purchasers in the representative period (three years) unless there are special factors affecting trade in that product.⁵³
- c) Special factors affecting trade of the product in question include relative efficiency as between domestic and foreign purchasers, e.g., relative prices and other terms of trade offered by domestic and foreign purchasers in purchasing the product in question. However, such special factors do not include trade restrictions which are not permitted by the WTO/GATT agreements, such as export quotas and subsidies to domestic purchasers which are not permitted by the WTO/GATT agreements. If such special factors are taken into account when allocating export quotas, market shares allocated to foreign exporters and domestic suppliers do not reflect their relative efficiency and too much or too few shares would be allocated to them as compared with the allocation of shares which would prevail if a free market existed.
- d) A combination of quota allocation based on the above principle and other methods should be considered. Among such other methods, one can think about an auction system and a first-come-first-serve system. Between the two, auction system is based on the principle of competition and is

⁵³ For the rationale of this principle, see the discussion relating to market shares on pages 292-293, *supra*.

therefore better. A combination of quota allocation based on previous accomplishments and auction systems seems to be worthy of consideration. As explained above, an allocation of export quotas in accordance with the previous accomplishment is probably the only equitable way of distributing quotas among foreign exporters and domestic users. However, competition between foreign and domestic suppliers stops when the quota system is initiated and the free market ceases to exist. Although this is an inevitable result of the quota system, one could think of some alternative ways that would preserve some elements of free market and competition.

Who should formulate and put into effect these above principles, and where? It seems logical to entrust this task to the WTO. Other international organizations in which this issue can be discussed may include the OECD and the UNCTAD. Alternatively, trading nations can hold international conferences, discuss this issue and agree on general policies and some rules on them. However, those principles are part of trade rules on which the WTO has primary jurisdiction. Therefore, the WTO should be the forum in which these principles are discussed.

Ideally, WTO Members should negotiate in the Doha Development Round, issues relating to new WTO norms on export controls with the view to formulate some agreements to control arbitrary and capricious export restrictions of natural resources by natural resources-holding countries and undisciplined speculations and purchases by resources-poor countries. However, the Doha Development Round has been stalemated and the prospect for its success is unpredictable.⁵⁴ Therefore, at this time, any hope for concluding any new WTO agreement on export and import of natural resources is bound to be blighted. As an alternative, the author suggests that WTO Members recognize the importance of the issues, discuss them among themselves and announce informal statements or declarations of the Committee of Trade in Goods or the General Council regarding the issue of how export controls should be moderated. Such declarations are informal and non-binding in nature. However, the WTO Dispute Settlement Body will take them into account and, while they are not legally binding, they will inform panels and the Appellate Body of a direction as to how purposes and objectives of WTO agreements, especially Article XX: (b) and (g), should be viewed.

V. CONCLUSION

The time has passed when human beings could dream of unlimited economic developments without worrying about the dearth of natural resources. To be sure,

⁵⁴ See Petros C. Mavroidis, *Doha, Dohalf or Dohaba? The WTO Licks its Wounds*, 3(2) TRADE L. & DEV. 367 (2011).

new exploitation of oil deposits, iron ores and other minerals will continue and new technologies for excavating them more efficiently will be invented. Meanwhile, new Research & Development projects will be made to develop substitutes, leading to an increase in their supply. However, the pace of population growth and economic expansion in newly emerging and developing countries may forestall those developments and future generations may face a grim reality of limits to growth as envisaged in the report of the Club of Rome in early 1970.⁵⁵

The need of the hour is a rational plan to manage and control production and distribution of natural resources to ensure sustainable economic development worldwide. In this respect, the WTO Dispute Settlement Body took up the issue of restrictions of natural resources at a timely juncture. It can easily be anticipated that similar disputes will be brought to the WTO on this issue in future. As mentioned earlier, at the time of writing this article, the release of the Appellate Report on the China's export restrictions case is imminent. It is hoped that the Appellate Body clarifies how Article XX: (b) and (g) must apply to export control issues, the meaning of Article XI: 2 (a) in connection with "critical shortages" and "essentiality" of products subject to export quotas, and the meaning of even-handedness in relation to export controls and conservation of natural resources as enunciated by the Panel.

⁵⁵ See LIMITS TO GROWTH, *supra* note 7.