National Chiao Tung University

Institute of Technology Law

Thesis

The Applicability of GATT Art. XX in WTO Accession Protocol

GATT 一般例外條款於 WTO 入會議定書之適用可能性

Student: Yi-Ting Chen

Advisors: Dr. Kuei-Jung Ni & Dr. Tsai-fang Chen

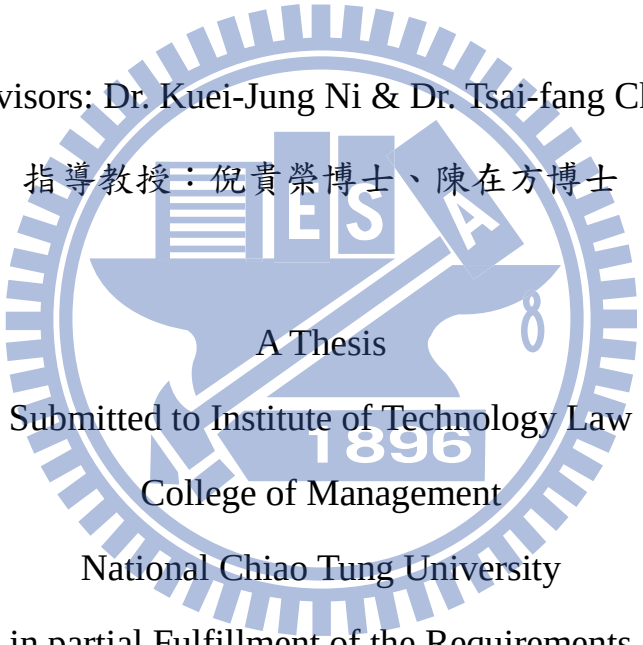
July, 2013

The Applicability of GATT Art. XX in WTO Accession Protocol

GATT 一般例外條款於 WTO 入會議定書之適用可能性

Student: Yi-Ting Chen

研究生：陳怡婷



Advisors: Dr. Kuei-Jung Ni & Dr. Tsai-fang Chen

指導教授：倪貴榮博士、陳在方博士

A Thesis

Submitted to Institute of Technology Law

College of Management

National Chiao Tung University

in partial Fulfillment of the Requirements

for the Degree of

Master

of

Laws

July, 2013

Hsinchu, Taiwan, Republic of China

Abstract

WTO Accession Protocol (AP), a legal instrument concluded between the WTO and new Member at the time of accession, has received more and more attention recently because it no longer functions as a confirmation of compliance with the existing WTO disciplines, it starts to contain Member-specific substantive obligations that deviate from the existing WTO rules. China's AP and Russia's AP are cases in point.

When being found violating the obligations under the AP, acceding Members purport to invoke general exceptions under the GATT as a defense, claiming to pursue a non-trade policy objective. This defense stirs up lots of discussions. The most important and thorny issue in this matter is the applicability of GATT Art. XX in the AP. That is, whether GATT Art. XX can extend its application beyond the GATT and justify a violation in a separate agreement under the WTO, i.e. the AP. This is the focus of this thesis.

The applicability matter has been addressed in two recent cases, *China – Publications and Audiovisual Products* and *China – Raw Materials*. WTO judiciary has made a major shift in its attitude, from avoiding this question to providing an answer. However, the reasoning and ruling in these two cases receive many critiques from the academia.

This thesis will firstly provide background knowledge of the AP and GATT Art. XX with an aim to illuminate the relationship between these two. Then, a detailed account of *China – Publications and Audiovisual Products* and *China – Raw Materials* will be presented, along with some comments. Finally, this thesis proposes that AP obligations that are related to or built upon the obligations under the GATT should be treated like GATT obligations, including the recourse to GATT Art. XX defense.

Keyword: GATT Art. XX, General Exceptions under the GATT, Applicability, Accession Protocol, China – Publications and Audiovisual Products, China – Raw Materials.

Table of Contents

Chapter 1 Introduction

Section 1 Motive and Purpose of Research

This thesis aims to provide a thorough research on the applicability of GATT Art. XX in the Accession Protocol (the AP). This is a very controversial and complex issue because it concerns Members' regulatory autonomy to promote non-trade interests, policy of the WTO, legal nature of the AP and relationship between the AP and GATT Art. XX. Unfortunately, not much research and attention are directed to this area. Accordingly, this thesis hopes to explore this uncharted territory and provide some thoughts.

This issue has grown more and more important in practice and thus studies on the applicability issue is desperately needed. As the AP starts to contain substantive obligations, not just a confirmation of compliance with the existing WTO rules, WTO Members start to bring claims under the AP and respondents often try to justify the breach by invoking GATT Art. XX. The AP of China and the AP of Russia are great examples. Given that China and Russia are active players in international trade, it is sure that the applicability of GATT Art. XX in the AP will become a quite recurrent issue in the WTO dispute settlement system.

In fact, after a long technical avoidance, recently the WTO judiciary finally has decided to come face to face to this matter. In two recent cases, *China – Publications and Audiovisual Products* and *China – Raw Materials*, the WTO judiciary takes a stance on this matter. However, the reasoning and ruling of these two cases stir up lots of debate and discussion in academia. As a result, this thesis intends to analyze these two cases, provide a detailed account of scholars' opinion and present its own view.

Research on the applicability of GATT Art. XX in the AP has strong implication for other non-GATT agreements. Applying GATT Art. XX in other non-GATT agreements encounters similar predicaments. For example, when Members provide environmental subsidies that are inconsistent with the Agreement on Subsidies and Countervailing Measures (SCM Agreement), can such violation be justified by GATT Art. XX (g) as a measure relating to the conservation of exhaustible natural resources? Also, can Members invoke GATT Art. XX (a), measures necessary to protect public morals, to justify a health or safety restriction that are in violation of Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) or Agreement on Technical Barriers to Trade (TBT Agreement)? This thesis can also provide some guidance to the availability of GATT Art. XX in other non-GATT agreements.

Section 2 Research Method and Structure of the Present Thesis

A. Research Method

In Part I, this thesis conducts a research on the background knowledge of the applicability issue, such as the purpose and function of GATT Art. XX, obligations under the AP and the relationship between the GATT and the AP, by studying books, periodicals and publications from WTO.

Part II focuses on the only two cases in the current WTO judiciary, i.e. *Chain – Publications and Audiovisual Products* and *China – Raw Materials*. This Part closely analyzes and comments on the reasoning and rulings of the Panel and AB Reports in these two cases. This Part thoroughly includes comments and suggestions on these Reports from scholars. Considering these comments and suggestions, the thesis presents its own comments and suggestions.

Part III proposes an overall solution to this issue. This Part are based on the studies of the prior parts, i.e. background knowledge of GATT Art. XX, the AP and the relationship between the GATT and the AP, two WTO cases and comments from scholars. This Part tries to put forth a proper treaty interpretation by analyzing interpretative methods listed in the Vienna Convention on the Law of Treaties (VCLT) Art. 31 and 32, such as textual interpretation, contextual interpretation, object and purpose of the treaty and circumstances of the conclusion.

B. Structure of the Present Thesis

This thesis is divided into three parts. Part I, which contains Chapter 2 and Chapter 3, aims to introduce basic knowledge of the AP and GATT Art. XX. Such understanding will help illuminate the applicability of GATT Art. XX in the context of the AP. Chapter 2 will provide background knowledge of the AP, including the formation of the AP, the unique nature of the obligations of the AP and the relationship between the AP and GATT Art. XX. In Chapter 3, GATT Art. XX will be introduced from the perspective of the AP. This Chapter will argue that GATT Art. XX is of systemic importance in the WTO regime and the application scope of GATT Art. XX is not limited to the violation of the GATT.

Part II will present and comment on the only two cases in WTO jurisprudence that deal with the applicability of GATT Art. XX in the AP. There are two Chapters in Part II, Chapter 4 and 5. Section 1 of Chapter 4 will make a detailed description of the Panel and AB Reports in *China – Publications and Audiovisual Products*. Section 2 will include critiques of *China – Publications and Audiovisual Products*, along with some suggestions. Chapter 5 also contains two sections. Section 1 will make a close account of *China – Raw Materials* and Section 2 will cover critiques of *China – Raw Materials* and make some suggestions.

The last part, Part III, will propose a solution to the applicability matter. There is one Chapter in this Part, Chapter 6. This Chapter puts forth a proposal that GATT Art. XX is applicable when the AP obligations are related to or built upon the obligations under the GATT. Chapter 6 argues that interpreters should not solely rely on the text of the AP and a contextual reading is of crucial importance. Also, the object and purpose of the treaty and the circumstances of conclusion should be taken into consideration. Furthermore, conflicts of norms will not occur.

Chapter 7 is the last chapter, which includes a brief recap on all previous Chapters.

Part I

BACKGROUND

Chapter 2 WTO Accession Protocol

Section 1 Introduction

In order to determine whether GATT Art. XX is an available defense against violation of the AP, it is imperative to understand the nature and characteristic of the obligations under the AP. It is the unique nature of the AP obligations makes the applicability issue more complicated and controversial. This chapter aims to provide background knowledge of the formation of the AP and the origin of the AP obligations that deviate from the regular WTO law. Also, this chapter will provide a close scrutiny of the AP obligations by categorizing them into obligations that are more stringent than the regular WTO rules, so-called WTO-plus obligations, and obligations that are less stringent than the regular WTO rules, so-called WTO-minus obligations. This thesis will focus on WTO-plus and WTO-minus obligations under the AP because their deviation from general WTO law posts a great interpretative challenge to the applicability of GATT Art. XX. Importantly, this basic knowledge provided in this chapter will greatly help elucidate the relationship between the AP and the WTO Agreement and consequently provide guidance to the applicability of GATT Art. XX in the AP.

Section 2 WTO Accession Process – the Birth of the Accession Protocol

When a country wishes to accede to the WTO, the applicant government first needs to file an application to the Director-General of the WTO, stating its desire to accede to the WTO under Art. XII of the WTO Agreement. Art. XII lays down the basic rules for accession:

> Article XII
>
> Accession

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.[1]

After receiving the application, the Director-General will consider the request and establish a Working Party.[2] The Working Party consists of any interested WTO Members and mandates to examine the application and finally produces a Working Party Report and a draft AP. The Working Party will firstly examine the factual information provided by the applicant country on its trade regime. A series of questions will be addressed to the applicant country, if there is any unclarity on the factual situation of the trade regime. The questions raised by the Working Party and the answers provided by the applicant country will be documented as Factual Summary of Point Raised and this document will eventually form a part of the Working Party Report.[3]

[1] Marrakesh Agreement Establishing the World Trade Organization art. XII, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter the WTO Agreement].

[2] WORLD TRADE ORGANIZATION & ARIF HUSSAIN, A HANDBOOK ON ACCESSION TO THE WTO 3 (2008).

[3] *Id.*

After scrutinizing the trade regime of the applicant country, the Working Party will start to negotiate terms of accession with the applicant country. Thus, in addition to complying with the WTO Agreement and the Multilateral Trade Agreements annexed to the WTO Agreement, applicant country will need to abide by the terms of accession, which vary from country to country. Negotiation on terms takes place in three main parts. First, the commitments on rules are negotiated multilaterally with the Working Party itself. The results will be contained in the AP itself or in the relevant paragraphs in the Working Party Report, which will subsequently be incorporated by reference in the AP. These commitments might go beyond or fall behind the regular provisions of the WTO as there is no limitation or rule on the level of commitments. Second, agricultural domestic support and export subsidies commitments are discussed plurilaterally with interests Members in the Working Party and the results will be brought to the Working Party for approval. These results will be contained in Part IV of the Goods Schedule. Third, bilateral negotiation on concessions on goods and specific commitments on services will be conducted with interested Working Party Members. The results of the bilateral negotiation will be reviewed by the Working Party and included in the Goods and Services Schedule.[4] In addition, bilateral negotiation might be held to deal with issues that are normally discussed in a multilateral context. All the above-mentioned negotiation proceeds simultaneously.[5]

After the negotiation on terms of accession, the Working Party will produce a Working Part Report, covering the results of negotiation.[6] The Report will summarize the discussion and commitments accepted by the applicant country and end with recommendations. The Report will include a draft AP as an annex setting out terms agreed by the applicant country to

[4] *Id.* at 3–4.

[5] *Id.* at 39.

[6] Tokio Yamaoka, *Analysis of China's Accession Commitments in the WTO: New Taxonomy of More and Less Stringent Commitments, and the Struggle for Mitigation by China*, 47 J. WORLD TRADE 105, 110 (2013).

accede to the WTO and the obligations in the AP will be an integral part of the WTO Agreement. Also, the Report will annex a draft General Council/Ministerial Conference Decision inviting the applicant country to accede to the WTO.[7] Furthermore, applicant's Schedule of Concessions and Commitments on Goods and its Schedule of Specific Commitments on Services will be annexed to the AP. The AP provides that these Schedules shall become Schedules of the GATT and GATS, respectively.[8]

The Working Party Report will be submitted to the General Council/Ministerial Conference for adoption.[9] After approving the text of the draft AP and the Decision, the General Council/Ministerial Conference will adopt the Decision and the Working Party Report as a whole, including the Schedules on Goods and Services.[10] When the Decision is adopted, WTO Members offer terms of accession to the applicant country.[11] Applicant country accepts those terms by accepting the AP.[12] After accepting the AP, the applicant country will become a Member of the WTO thirty days after its acceptance.[13]

Section 3 Obligations in the Accession Protocol – Deviation from General WTO Law

There are mainly two types of obligations under the AP. One is the market access commitments and the other is the commitments on rules. Market access commitments consist of individual commitments to reduce trade barriers on goods and services and are contained in the Schedule of Concessions and Commitments on Goods and the Schedule of Specific Commitments on Services. These two Schedules are annexed to the GATT and GATS,

[7] WORLD TRADE ORGANIZATION & HUSSAIN, *supra* note 2, at 44.

[8] *Id.* at 45.

[9] General council meets more frequently than Ministerial Conference. General Council meets once every six to eight weeks, while Ministerial Conference convenes at least once every two year. *Id.* at 13.

[10] *Id.* at 46.

[11] *Id.* at 4.

[12] *Id.* at 47.

[13] *Id.*

respectively. Thus, the Schedules are an integral part of the GATT and GATS. Since market access commitments are inherently country-specific, the notion of WTO-plus or WTO-minus does not apply to such commitments.[14] Also, market access commitments on goods are included in a Schedule annexed to the GATT, and thus are made an integral part of the GATT. Therefore, the applicability of GATT Art. XX will not be a problem.[15]

On the other hand, commitments on rules refer to the general obligations to comply with the WTO rules, such as the WTO Agreement, the GATT and the GATS. To avoid a fragmented set of rules on trade and the consequences of grandfather clause in GATT era, the Uruguay Round established a single undertaking understanding.[16] Thus, WTO Members all follow a uniform set of rules. WTO Members had made efforts to preserve this uniformity by using a standardized form of the AP.[17] The standardized AP only contains market access commitments and confirmation on compliance with existing and uniform WTO rules and does not contain obligations that is different from the WTO rule.[18] Thus, in early WTO era, the commitments on rule used to be quite unified, with very few and minor exceptions.[19] However, the situation has significantly changed since the accession of China. Commitments on rules start to differ greatly in the acceding Member's AP and cover various subject matters, which causes problems on interpretation and especially the application of general exceptions

[14] Julia Ya Qin, *The Challenge of Interpreting "WTO-PLUS" Provisions*, 44 J. WORLD TRADE 127, 128 (2010).

[15] The Panel in China – Raw Materials states that "[i]f China's export duties commitments were part of China's GATT 1994 Schedule, the general defences of Article XX of the GATT 1994 would be available to justify potential violations." Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶7.140, WT/DS394/R, WT/D395/R, WT/D398/R (July 5, 2011) [hereinafter China – Raw Materials Panel Report].

[16] OLIVIER CATTANEO & CARLOS PRIMO BRAGA, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT WTO ACCESSION (BUT WERE AFRAID TO ASK) 28 (World Bank, Policy Research Working Paper, November 1, 2009).

[17] Julia Ya Qin, *"WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System*, 37 J. WORLD TRADE 483, 487–88 (2003).

[18] Mitali Tyagi, *Flesh on a Legal Fiction: Early Practice in the WTO on Accession Protocols*, 15 J. INT. ECON. LAW 391, 420 (2012).

[19] Qin, *"WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System*, *supra* note 17, at 487.

under the GATT. This thesis will focus on commitments on rules and refer to this type of commitments generally as the AP obligations.

Due to the lack of specificity in Art. XII of the WTO Agreement, many commitments on rules in the AP begins to deviate from the regular WTO rules. Art. XII provides that a State or a separate customs territory may accede to the WTO Agreement on terms to be agreed between it and the WTO. There is no limitation or rule on the construction of terms of accession. Thus, there is room to agree on terms that deviate from the ordinary WTO law.[20] Moreover, a standardized provision of the AP further boosts this practice.[21] That standardized provision makes reference to particular paragraphs in the Working Party Report and incorporates those paragraphs into part of the AP. Consequently, the commitments that go beyond the regular WTO rules under the Working Party Report become part of the AP obligations. Sometimes, the obligations are less stringent than the regular WTO law and are referred to as WTO-minus obligations. However, more often, the obligations extend beyond those in the WTO Agreement and are called WTO-plus obligations.[22]

The definitions of WTO-plus and WTO-minus obligations have been slightly different from scholar to scholar. While the common understanding of WTO-plus obligations is the obligations that go beyond what regular WTO law asks for and WTO-minus obligations refer to the obligations require less than the ordinary WTO law, this broad and general definition is far from clear. Thus, scholars try to specify and categorize these obligations. While assessing China's AP, Qin considers provisions that impose more stringent disciplines than required by the Multilateral Trade Agreement WTO-plus commitments, whereas provisions that weaken

[20] *Id.*; Yamaoka, *supra* note 6, at 111.

[21] Qin, *"WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System*, *supra* note 17, at 488.

[22] *See generally* Cattaneo & Braga, *supra* note 16, at 18. This practice is subject to severe criticisms, see WORLD TRADE ORGANIZATION & HUSSAIN, *supra* note 2, at 50.

the existing WTO disciplines and reduce the right of China WTO-minus commitments.[23] With respect to China's AP, WTO-plus commitments range from disciplines on transparency, judicial review, sub-national government, to foreign investment, national treatment of foreign investors, economic reform, government procurement, and compliance review.[24] On the contrary, WTO-minus commitments cover primarily trade remedies. In sum, Qin understands WTO-plus obligations as those expand WTO rules of conduct and WTO-minus obligation as those revise the existing WTO rules.[25]

Yamaoka provides a more detailed classification on WTO-plus and WTO-minus obligations. Yamaoka finds the terms "plus" and "minus" unclear because they can have different meanings when viewed from different perspectives.[26] That is, a WTO-plus obligation for an acceding Member may be a WTO-minus obligation for incumbent Members.[27] Hence, Yamaoka sets forth four categories: 1. More stringent obligations to an acceding Member compared with the WTO Agreement. This category can be further divided into a. commitments that are covered by the WTO Agreement, such as commitments on industrial subsidies in China's AP, and b. commitments that go beyond the scope of the WTO Agreement, such as export concessions and liberalization on trading rights in China's AP.[28] 2. Less stringent obligations to an acceding Member compared with the WTO Agreement. This category aims to accommodate the situation in a transitional economy, such as a grace period to eliminate non-tariff measures or to apply national treatment on certain products.[29] 3. More stringent obligations to incumbent Members compared with the WTO Agreement. This

[23] Qin, *"WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System*, *supra* note 17, at 490.

[24] See for a detailed examination on these commitments, *id.* at 491–509.

[25] *Id.* at 490.

[26] Yamaoka, *supra* note 6, at 117–18.

[27] *Id.* at 118.

[28] *Id.* at 126–36.

[29] *Id.* at 136–37.

commitments rarely occur.[30] 4. Less stringent obligations to incumbent Members compared with the WTO Agreement. This is a new type of obligations. Examples are the transitional product-specific safeguard mechanism and the transitional textile safeguard mechanism in China's AP.[31] Moreover, Yamaoka observes that China's AP contains many market economy provisions that bear no comparison in the WTO Agreement and thus those provisions do not fall into those four categories.[32]

Charnovitz provides a new perspective on assessing WTO-plus and WTO-minus obligations and creates a new category. Charnovitz first clarifies that there are no rights but obligations under the WTO law.[33] Then, Charnovitz proposes that to assess the AP obligations, one needs to determine the legal baseline of the obligations of WTO membership. Charnovitz thus proposes a new typology of the AP obligations. Similar to that of Yamaoka, Charnovitz also provides four types: 1. Applicant WTO-plus obligations; 2. Applicant WTO-minus obligations; 3. Incumbent WTO-plus obligations; and 4. Incumbent WTO-minus obligations. Charnovitz observes that a provision in Taiwan's AP constitutes an incumbent WTO-plus obligation, which occurs rarely. The provision is under "Taiwan Special Exchange Agreement," which is annexed to Taiwan's AP, provides that "exchange contracts which involve the currency of any Member or Chinese Taipei and which are contrary to the exchange control regulations of that Member or Chinese Taipei maintained or imposed consistently with the Articles of Agreement of the Fund or with the provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV of the General Agreement 1994 or this Special Exchange Agreement, shall be unenforceable in the territories

[30] *Id.* at 137.

[31] *Id.* at 137–38.

[32] *Id.* at 118–19, 122–25.

[33] Steve Charnovitz, *Mapping the Law of WTO Accession*, *in* WTO GOV. DISPUTE SETTL. DEV. CTRIES. 855, 867 (Merit E. Janow et al., 2008).

of Chinese Taipei or in the territories of any Member."[34] Charnovitz sees that this provision imposes a new obligation on incumbent Members not to enforce such contracts in their own territory and thus this provision constitutes an incumbent WTO-plus obligations.[35] Furthermore, aside from the four categories, Charnovitz creates another new category that increases or decreases obligations on the WTO itself. Charnovitz finds that it is possible for the WTO to take on greater or fewer obligations than it otherwise has to its existing Members, because the AP is an agreement between the acceding Member and the WTO.[36] Charnovitz considers that a provision in the Special Exchange Agreement under Taiwan's AP imposes a greater obligation on the WTO itself, which provides that "whenever the WTO consults with the Fund on exchange matters or in other appropriate cases particularly affecting Chinese Taipei, the WTO shall take measures, as are satisfactory to the Fund, to ensure effective presentation of Chinese Taipei's case to the Fund, including, without limitation, the transmission to the Fund of any views communicated by Chinese Taipei to the WTO."[37] However, Charnovitz cannot find an example of obligations that impose fewer obligations on the WTO.[38]

Based on the classification provided by Yamaoka and Charnovitz, this thesis begins to examine the obligations under Taiwan's AP. Aside from the two obligations mentioned by Charnovitz, Taiwan' AP contains some applicant WTO-plus and applicant WTO-minus obligations, too. As for applicant WTO-plus obligations, Taiwan agrees that it would permit advertising for alcoholic beverages in all media, subject to regulation in relation to the content

[34] Taiwan Special Exchange Agreement art. II:3.

[35] Charnovitz, *supra* note 33, at 872.

[36] *Id.* at 873.

[37] Taiwan Special Exchange Agreement art. VI:3.

[38] Charnovitz, *supra* note 33, at 873.

and timing of advertising.[39] Also, although the GATT does not prohibit the use of tariff rate quotas, a practice that allows a specific quantity of the product concerned to be imported at a lower rate of import duty than is charged on out-of-quota imports, Taiwan commits that tariff rate quotas will not be imposed on industrial products other than passenger cars, light commercial vehicles and certain fish products and tariff rate quotas on passenger cars, light commercial vehicles and certain fish products will be removed over an eight year transitional period.[40] As for applicant WTO-minus obligations, transitional period is the most common one. For example, Taiwan states that it will eliminate the import ban on passenger cars equipped with diesel engines two years after the accession to the WTO.[41]

In sum, these categorizations clearly describe various kinds of the AP obligations. To correctly interpret the AP obligations, it is important to identify the nature of the AP obligations. That is, interpreters need to examine if the AP obligations deviate from the regular WTO law. To do this, one needs to firstly identify the baseline or benchmark of the AP obligations.[42] Comparing with the basic WTO rules, interpreters then can determine if the AP obligations constitute WTO-plus or WTO-minus obligations. It is not easy to recognize WTO-plus and WTO-minus obligations because the language in the AP does not clearly specify the relationship between the AP obligations and the regular WTO law. Also, it is hard to discern between obligations that merely confirm the existing WTO rules and obligations that add to or diminish the existing WTO rules. In sum, identifying the characteristics of the AP obligations is an important step for treaty interpretation and further assessment of the applicability of GATT Art. XX.

---

[39] Protocol on the Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, ¶ 12, WT/L/433 (Nov. 23, 2001) [hereinafter Taiwan's AP].

[40] Taiwan's AP, ¶ 61; WORLD TRADE ORGANIZATION & HUSSAIN, *supra* note 2, at 73–75.

[41] Taiwan's AP, ¶ 71; Charnovitz, *supra* note 33, at 880.

[42] *Id.* at 868–69; Qin, *The Challenge of Interpreting "WTO-PLUS" Provisions*, *supra* note 14, at 159–162.

Section 4 Relationship Between the Accession Protocol and GATT Art. XX

To correctly interpret the AP obligations and assess the applicability of general exceptions under the GATT, it is imperative to understand the relationship between the AP and GATT Art. XX. The only provision under the AP that might be able to shed light on the relationship is paragraph 1.2 of the AP. This standardized paragraph states that "this Protocol, which shall include the commitments referred to in paragraph ___ of the Working Party Report, shall be an integral part of the WTO Agreement."[43] The most important question is how the AP should be integrated into the WTO Agreements. The understanding on this integral clause will help elucidate the relationship between the AP and GATT Art. XX.

The first task is to interpret the term "integral part." The ordinary meaning of an integral part can be defined as a part that is "necessary to make a whole complete" and is "included as part of a whole rather than supplied separately."[44] This definition clearly points out that an integral part is a constituent part, instead of a separate part, of a whole. Thus, upon this definition, the AP is a constituent part of the WTO Agreements. When interpreting a Member's WTO obligations, the AP and disciplines under the WTO Agreements should be read together as a whole.

Integral clauses have been used in various WTO legal texts. It appears in GATT Art. II:7, which states that "the Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement."[45] Thus, when interpreting Part I of the GATT, interpreters should not ignore the Schedules annexed to the GATT. Also, GATT Art. XXXIV provides that

[43] *E.g.*, Taiwan's AP, ¶ 1.2.

[44] OXFORD DICTIONARIES ONLINE (Oxford U. Press 2012).

[45] General Agreement on Tariffs and Trade art. II:7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

"the annexes to this Agreement are hereby made an integral part of this Agreement."[46] Therefore, the GATT should be read together with its annexes as one instrument. Moreover, Art. II:2 of the WTO Agreement states that the agreements and associated legal instruments included in Annexes 1, 2 and 3 are integral parts of this Agreement. Hence, the institutional agreement is read together with the multilateral agreements to develop a unified trading mechanism. Consequently, by the same token, scholars propose that the AP being an integral part of the WTO Agreement denotes that it should be read together with the WTO Agreement, including the multilateral agreements. As the GATT is one of the multilateral agreements, the AP should be read with the GATT.[47] To construe otherwise will render the AP a separate part of the WTO Agreements and disconnect the AP from the WTO trading system.[48]

Kennedy suggests a more precise reading on the integral clause. Kennedy finds that the annexes to GATT contain a cross-reference indicating the relationship between the annexes and the relevant provisions under the GATT.[49] For example, in ANNEX I of the GATT, each notes and supplementary provisions clearly indicates the relevant provisions in the body of the GATT. Also, Kennedy observes that the first four annexes to the Agreement on Agriculture specify the relevant provisions in the body of text.[50] Moreover, Kennedy indicates that the first annexes to the SPS Agreement and the TBT Agreement contain definitions of terms and thus relate to each respective agreement as a whole. Based on this

[46] GATT 1994 art. XXXIV.

[47] Hua Liu, *Comment on the Invocation of Article XX for Violation of Para.11.3 in China—Raw Materials*, 3 BEIJING LAW REV. 152, 155 (2012); Bin Gu, *Applicability of GATT Article XX in China – Raw Materials: A Clash Within the WTO Agreement*, J. INT. ECON. LAW, 16–17 (2012).

[48] Gu, *supra* note 47, at 17.

[49] Matthew Kennedy, *The Integration of Accession Protocols into the WTO Agreement*, 47 J. WORLD TRADE 45, 60 (2013).

[50] *Id.*

observation, he proposes that the AP should be read together with relevant provisions in the WTO Agreements as one instrument.[51]

Kennedy further finds support in the procedures for the consideration of waivers of the WTO obligations. Waivers are granted either by the institutional WTO Agreement or the multilateral agreements annexed to the institutional WTO Agreement. Thus, a Member who wishes to request a waiver can either file a request to the Ministerial Conference or to the relevant Council, depending on what the obligations concern. Consequently, with respect to waivers of the AP obligations, Members can either file a request under the institutional WTO Agreement or the multilateral agreements annexed to the institutional WTO Agreement. Kennedy observes that in practice, waivers concerning the staged implementation of tariff concessions, export duties and customs valuation under the AP have been filed to the Council on Trade in Goods, instead of the Ministerial Conference.[52] Kennedy considers this procedural practice confirms his view that these obligations bear a close relationship with relevant obligations under the multilateral agreements. Accordingly, the AP obligations should be read with relevant provisions under the WTO Agreement, including the multilateral agreements.

Kennedy then elucidates how to discern "relevant" provisions. Kennedy notes that sometimes the AP refers to specific provisions or subject matters under the WTO Agreement. Thus, those specific provisions or the provisions under the same subject matters are the relevant provisions and should be read together with that AP obligations. Liu also considers that the AP should be read together with provisions dealing with the same subject matter.[53] Thus, it is possible that the AP obligations should be read with provisions under different

[51] *Id.* at 60–61.

[52] *Id.* at 65.

[53] Liu, *supra* note 47, at 155.

agreements. With regard to the AP obligations that do not have a corresponding obligations in the WTO Agreements, Kennedy proposes that interpreters can employ the "clearly discernable, objective link" test provided by the AB in *China – Publications and Audiovisual Products*, even though such test aimed to solve a different issue in that case.[54] Hence, if the AP obligations that are not covered by the WTO Agreements present a clearly discernable, objective link to certain provisions of the WTO Agreement, the AP obligations should be read together with that provisions as a whole.

This thesis agrees with Kennedy's and Liu's argument that the AP should be read with relevant provisions under the WTO Agreement. Indeed, the text in the integral clause is not clear enough to demonstrate the systemic position of the AP within the WTO regime. The structure of the WTO legal texts is set out in the Annex 1 of the WTO Agreement and the AP is not included in the Annex 1. Thus, it is difficult to define how the AP is integrated into the WTO legal structure. Given that the subject matters of the AP cover various substantive obligations across the WTO law, this thesis suggests that the relationship between the AP and the WTO Agreement depends on the specific provisions under the AP. This thesis agrees with the scholars that when an AP obligation is based on or related to obligations under the WTO Agreement, that AP obligation is an integral part of the related agreement and should be read together with that agreement. Consequently, each AP obligation is situated under a specific agreement and should be read with that related agreement together as one instrument. On this view, when the AP obligations are related to or based on the obligations under the GATT, those AP obligations will become an integral part of the GATT and should be read with the GATT, including GATT Art. XX. Hence, GATT Art. XX is an available exception to those AP obligations.

[54] Kennedy, *supra* note 49, at 67–68.

Chapter 3 GATT Art. XX from the Perspective of the Accession Protocol

Section 1 Introduction

In pursuit of free trade, WTO Members may still promote non-trade interests under the WTO regime. GATT Art. XX enables Members to adopt measures that pursue a confined list of public objectives, even though such measures might have negative effects on trade. GATT Art. XX demonstrates Members' choice of value that promotion of certain public non-trade interests may take precedence over trade interest. However, the question is whether this value still holds true in the context of the AP. To answer this question, it is crucial to have a basic understanding of the purpose and function of GATT Art. XX and the systemic position of GATT Art. XX.

Section 2 Purpose and Systemic Importance of GATT Art. XX

GATT Art. XX provides general exceptions to trade facilitation obligations:

> Article XX: General Exceptions
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) relating to the importations or exportations of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.[55]

GATT Art. XX recognizes Members' need to adopt policies that pursue interests other than trade and such policies might adversely affect trade.[56] With an aim to preserve Members' regulatory autonomy, GATT Art. XX provides Members space to promote a list of policy objectives. Thus, GATT Art. XX intends to reconcile trade facilitation with other societal values and interests, trying to strike a balance between these two.[57] Members may violate their obligations to liberalize trade in pursuit of those policy objectives, provided such measures do not constitute arbitrary discrimination or a disguised restriction on international trade.[58] This provision clearly acknowledges that certain public policies that pursues non-economic societal interests may take precedence over the objectives of trade liberalization.[59]

Although GATT Art. XX is situated under the GATT, the value enshrined in it has systemic implication in the WTO regime. This is firstly because of its inherent nature. As recognized by the AB in *China – Publications and Audiovisual Products*, the right to regulate

[55] GATT art. XX.

[56] SIMON LESTER ET AL., WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY 363 (2nd ed. 2012); Michael Ming Du, *The Rise of National Regulatory Autonomy in the GATT/WTO Regime*, 14 J. INT. ECON. LAW 639 (2011).

[57] PETROS MAVROIDIS, TRADE IN GOODS 615 (2012).

[58] GATT art. XX chapeau.

[59] MAVROIDIS, *supra* note 57, at 616.

trade is an inherent right, rather than a right bestowed by international treaties. Thus, the right to invoke GATT Art. XX is an inherent right to WTO Members and should not be lightly denied. Interpreters should not easily presume that GATT Art. XX is inapplicable. Such presumption should be made when it is supported by explicit language in the agreement.

Moreover, the fact that GATT Art. XX is included in the very first draft of the GATT, the London Draft, suggests that drafters highly valued the need to promote public non-economic interests. Furthermore, the position and the general language of GATT Art. XX indicates its systemic significance. The GATT includes fundamental principles of the WTO regime, such as the most-favored-nation treatment and national treatment. Besides, the GATT also mentions several important subjects of WTO, for example, safeguard measures, subsidies, anti-dumping, etc. At the time when the GATT was the only multilateral trade agreement, GATT Art. XX provides that all the violation in the GATT can be justified by GATT Art. XX. It is worth noting that GATT Art. XX possesses a universally defensible characteristic.

Section 3 Application Scope of GATT Art. XX Is Not Limited to the GATT Violation

The scope of GATT Art. XX receives more and more attention in the WTO judiciary and academia. The availability of GATT Art. XX in agreements other than the GATT is a thorny issue because GATT Art. XX specifically points out that nothing in "this Agreement" shall be construed to prevent the adoption or enforcement of certain measures. This issue was not envisaged at the time of drafting in that the GATT was the only multilateral trade agreement.[60] As more and more multilateral trade agreements add to the WTO framework, the applicability of general exceptions under GATT Art. XX becomes less clear.[61]

[60] LESTER ET AL., *supra* note 56, at 364.

[61] *Id.*

The reference to "this Agreement" in the chapeau of GATT Art. XX leads to two different readings. The narrow reading sticks to the text, "this Agreement," and argues that only violation under the GATT can be justified by GATT Art. XX. This reading refers to negotiating history to support this narrow interpretation. Although the phrase "this agreement" is taken directly from the original GATT 1947, the drafters could have changed "this Agreement" to "WTO law" or "the multilateral agreements on trade in goods" during the Uruguay Round or expanded the scope in the General Interpretative Note to Annex 1A of the WTO Agreement.[62] But they did not. As a result, the narrow reading considers that the negotiating history suggests a deliberate omission. That is, applying GATT Art. XX beyond the scope of the GATT runs afoul of what the Uruguay Round negotiators actually contemplated.[63]

On the contrary, the broad reading suggests that the applicability of GATT Art. XX should not be limited to the GATT. Scholars propose several different reasons. Among them, Liu advances that sometimes "the words mean something other than what they appear to mean."[64] Liu cites the First Amendment of the U.S. Constitution as an example. The First Amendment states that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Liu observes that "even the most ardent strict constructionist understands that the amendment also applied to the President or the courts"[65] In addition, Liu finds that even the Panel itself expanded the interpretation of a treaty term. In the Panel report of *China – Raw Materials*, when examining "in conformity with the GATT 1994" under paragraph 11.1 and 11.2 of China's AP, the Panel expanded the GATT to "WTO

[62] Danielle H. Spiegel-Feld & Stephanie Switzer, *Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements After China-Raw Materials*, 38 YALE J. INT. LAW ONLINE 16, 20 (2012); Fernando Piérola, *The Availability of a GATT Article XX Defence with Respect to a Non-GATT Claim: Changing the Rules of the Game?*, 5 GLOB. TRADE CUST. J. 172, 172 (2010).

[63] Spiegel-Feld & Switzer, *supra* note 62, at 20–21.

[64] Liu, *supra* note 47, at 154.

[65] *Id.* at 155.

obligations."[66] Due to these reasons, Liu advances that "this Agreement" should also include agreements concluded afterwards on tariffs and trade.[67]

A recent amicus curiae submission to the Panel in *Canada – Renewable Energy* also agrees with the broad reading. Even though this amicus curiae brief means to argue that GATT Art. XX is available as a defense against breaches of the SCM Agreement, its reasoning can still lend some support in the context of beaches of the AP. The amicus curiae brief suggests that there is no clear ordinary meaning on "this Agreement" now because this term was constructed prior to the Uruguay Round, when the GATT 1947 was the primary multilateral trade agreement.[68] When the term was rewritten into the GATT 1994, no consideration was given as to its new place as one of many multilateral agreements on goods. This amicus curiae brief thus proposes to interpret the reference of "this Agreement" in light of today's systemic position of GATT Art. XX and the link of the GATT 19994 to other multilateral trade agreements.[69] Furthermore, this amicus curiae brief finds support from the AB report of *Brazil – Desiccated Coconut*, which ruled that the meaning of "this Agreement" in Art. 32.3 of the SCM Agreement refers not only to the SCM Agreement, but also Art. VI of the GATT. Hence, this amicus curiae submission puts forth that the meaning of this Agreement is not inherently limited to the agreement that it is used in.[70] In addition, the amicus curiae brief refers to negotiating history of GATT Art. XX to confirm the broad reading. Art. 37 of the London draft, which later became the chapeau of GATT Art. XX, did not yet refer to "this Agreement" but to "undertakings in Chapter IV of this Charter relating to

[66] China – Raw Materials Panel Report, ¶ 7.138.

[67] Liu, *supra* note 47, at 155.

[68] Amicus Curiae Submission on International Institute for Sustainable Development (IISD), Canadian Environmental Law Association (CELA) and Ecojustice Canada (Ecojustice) to the panel in *Canada – Renewable Energy*, 13, 10 May 2012 [hereinafter the amicus curiae brief in *Canada – Renewable Energy*].

[69] The amicus curiae brief in *Canada – Renewable Energy*, 13.

[70] The amicus curiae brief in *Canada – Renewable Energy*, 13.

import and export restrictions."[71] The reference of "this Agreement" was later introduced in the Geneva Conference by the Benelux and French delegations to expand the application of general exceptions to disciplines in GATT Art. III, VI and XVI. As a result, the amicus curiae brief finds the negotiating history infers that the reference to "this Agreement" means to broaden the application of GATT Art. XX.[72]

Qin also supports a broad reading yet with different reasons. This thesis resonates with Qin's argument that the text of GATT Art. XX cannot hinder its application under the AP. According to Qin, whether GATT Art. XX is applicable to non-GATT agreements relies not on the language of the GATT, but rather on the agreements between the parties. Qin convincingly elucidates her argument with an example that if two countries that are not WTO Members agree to include GATT rules in their free trade agreement, the scope of application of the GATT will not hinder such inclusion and application in their free trade agreement.[73] Likewise, whether GATT Art. XX is available in the AP should be determined by the intention of the parties to the AP. Their intention can be ascertained from the context of the AP, not from the GATT provision itself.[74] Accordingly, the reference to "this Agreement" in GATT Art. XX will not hinder the application of GATT Art. XX in non-GATT agreements.

Moreover, reasoning of *China – Publications and Audiovisual Products* and *China – Raw Materials* also indicates the WTO judiciary looked to the text of the AP provision at issue to determine the application of GATT Art. XX. The WTO judiciary looked at the textual link contained in the text of the AP provision at issue to affirm the applicability of GATT Art. XX in the AP. For instance, in *China – Publications and Audiovisual Products*, China violated

[71] The amicus curiae brief in *Canada – Renewable Energy*, 16.

[72] The amicus curiae brief in *Canada – Renewable Energy*, 16-17.

[73] J. Y. Qin, *Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence--A Commentary on the China-Publications Case*, 10 CHIN. J. INT. LAW 271, 299 (2011).

[74] *Id.* at 299–300.

paragraph 5.1 of China's AP, which provides that without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A and 2B. The AB looked to the introductory clause of paragraph 5.1 of the AP to assess the applicability of GATT Art. XX.[75] Accordingly, the reference to "this Agreement" in GATT Art. XX will not bar its application under the AP because the applicability issue depends on the text of the AP.

In sum, the reference to "this Agreement" under GATT Art. XX cannot obstruct applying GATT Art. XX outside the scope of the GATT. GATT Art. XX may still be applied in non-GATT context. As a result, the applicability of GATT Art. XX in the AP will not be hindered because of the reference to "this Agreement" under GATT Art. XX.

[75] Appellate Body Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products and Audiovisual Entertainment Products*, ¶216, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter China – Publications and Audiovisual Products AB Report].

Part II

THE APPLICABILITY OF GATT ART. XX IN THE ACCESSION PROTOCOL – WTO JURISPRUDENCE

Chapter 4 An Analysis of *China – Publications and Audiovisual Products*

Section 1 Summary of the Dispute

China – Publications and Audiovisual Products sheds some light on whether the violation of one agreement can be excused by the exception regulated in another agreement, even though these two agreements are within the purview of the WTO Agreement. In this case, China conducted several measures restricting the importation and distribution of audiovisual products, including reading materials, audiovisual products, sound recordings, and films for theatrical release. The Panel and the AB found many of these measures inconsistent with the trading rights commitments contained in China's Accession Protocol. In response, China argued that the inconsistency could be justified by the exception provision contained in another separate agreement, i.e., Article XX (a) of the GATT 1994. After examining the introductory clause of paragraph 5.1 in China's AP, the AB approved the applicability of the exceptions of the GATT 1994, meaning that China can invoke exceptions in one agreement, in this case the GATT 1994, to justify the violation of a different agreement, i.e., China's AP.

This case is important for two main reasons. First, it deals with a very controversial issue: whether a violation in one agreement can be justified by another agreement. There has gathered tremendous attention on the cross agreement application between "covered agreements." For example, whether violation of the SCM Agreement can be justified by GATT Art. XX, or whether violation of the MFN obligation under the SG Agreement Art. 2.2 can be excused by GATT Art. XXIV. Yet, this case deals with a thornier issue: cross application between "the AP" and "the covered agreements." That is, whether violation of the AP can be justified by GATT Art. XX. Second, given that there is limited jurisprudence on the obligations of the AP, this case offers some insights into the application of the AP's obligations and possible defenses against such violation.

A. The Measure at Issue

China adopted a series of measures to establish a content review mechanism.[76] China considered certain products as "cultural goods" and established a content review mechanism on imported cultural goods, including reading materials, audiovisual products and films for theatrical release.[77] Under the review mechanism, China would prohibit the distribution of such products, if the content of the products would have a negative impact on public or individual morals.[78] To carry out the content review mechanism effectively and efficiently, China imposed regulations on import entities.[79] That is, only "approved" and/or "designated" import entities could import relevant products.[80] Take newspapers and periodicals importation for example. Importers must be approved and designated by the authority to import such reading materials.[81] To obtain such status, a publication import entity must, *inter alia*, be a wholly state-owned enterprise and have a suitable organization and qualified personnel.[82]

Another measure at issue concerned China's Foreign Investment Regulation. Under China's Foreign Investment Regulation, foreign investors were only allowed to invest in certain prescribed industry.[83] According to the Catalogue, which listed out prohibited foreign investment industries, foreign investment in areas such as the importation of books, newspaper, periodicals, electronic publications and audiovisual products, and audiovisual products was not allowed.[84] The Panel determined that China's Foreign Investment

[76] *Id.* ¶ 141.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* ¶ 147.

[82] *Id.*

[83] *Id.* ¶ 142.

[84] *Id.* ¶ 143.

Regulations and the Catalogue led to the result that any foreign-invested enterprise in China was prohibited from importing books, newspaper, audiovisual products, etc.[85]

In the case, the Panel found that China's measures violated the trading rights commitments under China's AP paragraph 5.1.[86] This provision provides that all enterprises in China shall have the right to trade in all goods throughout China, except for goods listed in Annex 2A and 2B.[87] The phrase "all enterprises in China" in paragraph 5.1 refers to both wholly Chinese-invested enterprises and foreign-invested enterprises that include wholly foreign-owned enterprises and Chinese-foreign joint ventures.[88] The protected "right to trade" includes the right to import and export goods, as stated in paragraph 5.1.[89] The Panel found that China's measures requiring that only approved and/or designated import entities could import relevant products and that foreign-invested enterprises in China were prohibited from importing products at issue amount to restrictions of enterprises' right to trade.[90] The explicit exception provided under this provision, Annex 2A and 2B, does not apply, which is not in

[85] Panel Report, *China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products and Audiovisual Entertainment Products*, ¶ 7.347, WT/DS363/R (Aug. 12, 2009) [hereinafter China – Publications and Audiovisual Products Panel Report].

[86] *Id*. ¶ 7.706.

[87] Paragraph 5.1 China's AP provides:

> "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users. For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period."

[88] China – Publications and Audiovisual Products AB Report, ¶ 135.

[89] Protocol on the Accession of the People's Republic of China, ¶ 5.1, WT/L/432 (Nov. 10, 2001) [hereinafter China's AP].

[90] China – Publications and Audiovisual Products Panel Report, ¶¶ 7.325-707.

dispute in this case.[91] Accordingly, the Panel of the case found that the measures violated paragraph 5.1 of China's AP.

B. Parties' Arguments

i. China's Arguments

China did not contest the violation of its trading rights commitments concerning the importation of reading materials and audiovisual products.[92] Instead, China argued that the breach of the provision could be justified under GATT Art. XX (a), as the measures were necessary to protect public morals.[93] Even though this justification is located in a different agreement, China submitted that the introductory clause of paragraph 5.1 of the Protocol enables the applicability of the GATT exception in the event that a violation of paragraph 5.1 is found.[94] The introductory clause of paragraph 5.1 states that the obligation contained in the paragraph 5.1 is without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, and China alleged that this introductory clause enables it to pursue legitimate policy objectives and grants China the right to regulate trade consistent with the WTO Agreement.[95] In addition, China argues that the measures at issue concerned restriction on importation and thus were regulating trade.[96] Therefore, the measure fell within the coverage of the clause.[97] Furthermore, China proposed that the WTO Agreement referred to in

[91] *Id*. ¶ 7.248.

[92] China – Publications and Audiovisual Products AB Report, ¶¶ 147, 156.

[93] *Id*. ¶ 206.

[94] *Id*.

[95] *Id*.

[96] *Id*.

[97] *Id*.

the paragraph 5.1 encompassed the WTO Agreement and all its annexes; hence Article XX of the GATT 1994 was an applicable defense.[98]

ii. The U.S.'s Arguments

The U.S. objected to China's interpretation and put forward a different reading of paragraph 5.1.[99] The U.S. proposed that only for products listed in the Annex 2A and 2B of the AP can China derogate from its obligation because goods under Annex 2A and 2B are explicitly exempted under paragraph 5.1.[100] The U.S. further argued that to read the introductory clause of paragraph 5.1 as suggested by China would permit China to reserve some goods to State trading, render these Annexes superfluous and eliminate China's trading rights commitments altogether.[101] According to the U.S.'s explanation, China's right to regulate trade does not mean China can completely evade from its obligation to grant trading rights, but simply means that China can employ measures such as import licensing, TBT, and SPS requirements to regulate trade. In the present case, the U.S. claimed that China's measure goes beyond those examples of regulating trade as provided in paragraph 84 of the Working Party Report. Furthermore, the U.S. opined that measures to regulate trade in paragraph 5.1 refer to measures addressing goods that are being traded, not the traders of the goods.[102] Accordingly, the U.S. argued that China could not justify its violation by the introductory clause of paragraph 5.1.[103]

C. WTO Dispute Settlement Body Reports

[98] *Id.*

[99] *Id.* ¶ 207.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

i. The Panel Report

The Panel did not resolve whether exceptions in the GATT could be an applicable defense against violation of the Protocol.[104] The Panel recognized the availability of GATT Art. XX in agreement other than GATT 1994 itself is a complex issue,[105] because GATT Art. XX clearly signaled the violation it can justify via the phrase "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures."[106] It is apparent that the Accession Protocol is not referred to by the term "this Agreement," i.e., GATT 1994.[107] Avoiding answering this threshold question, the Panel assumed that GATT Art. XX is an applicable defense and went on to examine the merits of GATT Art. XX (a).[108] The Panel planned to go back to examine the threshold issue if China fulfills the requirements set out in GATT Art. XX (a).[109] The Panel took this approach with an aim to follow a previous WTO case, *US–Custom Bond*.[110]

The AB in *US–Customs Bond* applied the same "assuming *arguendo*" approach.[111] In deciding the applicability of GATT Art. XX(d) to justify a breach of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), the AB assumed that GATT Art. XX is available and moved on to examine whether the U.S. measure is necessary to secure compliance with certain U.S. laws and regulations within the meaning of Article XX(d). The AB envisaged to rule on the

[104] China – Publications and Audiovisual Products Panel Report, ¶ 7.914; China – Publications and Audiovisual Products AB Report, ¶ 210.

[105] China – Publications and Audiovisual Products Panel Report, ¶ 7.743.

[106] GATT art. XX.

[107] China – Publications and Audiovisual Products Panel Report, ¶ 7.743.

[108] *Id*. ¶ 7.745.

[109] *Id*. ¶ 7.744.

[110] *Id*. ¶ 7.745.

[111] Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, ¶ 310, WT/DS343/AB/R, WT/DS345/AB/R (July 16, 2008) [hereinafter U.S. – Customs Bond AB Report].

applicability issue if the U.S. complies with the requirements in GATT Art. XX (d). In the end, the AB rejected this justification because the U.S. failed to meet the necessity requirement.[112] Thus, the AB need not take a stance on the applicability issue. Importantly, having decided that the U.S. did not conform with GATT Art. XX(d), the AB reiterated that they did not decide on whether GATT Art. XX is an applicable defense against violation of the Anti-dumping Agreement.[113] This clearly indicates AB's reluctance of making any ruling on this matter, which failed to resolve this uncertainty in the WTO legal system.

In the present case, after analyzing the merits of GATT Art. XX (a), the Panel rejected China's defenses on the ground that China failed to demonstrate the necessity requirement of its measures.[114] Hence, following its predecessors, the Panel avoided dealing with whether GATT Art. XX can be an available justification for AP inconsistent measures.

ii. The AB Report

Interestingly, the Panel's assuming *arguendo* approach was rejected by the AB this time.[115] The AB clarified that the Panel should examine whether GATT Art. XX was an available defense before looking into the merits of Art. XX.[116] The AB acknowledged that assuming *arguendo* is a legal technique to expedite the decision making process.[117] Yet, the Dispute Settlement Body is not bound to apply most efficient resolution, especially when such approach would sacrifice the clarity of the interpretation of the WTO law.[118] As enhancing security and predictability is one of the most important objectives of the WTO dispute

[112] *Id.* ¶¶ 311-18.

[113] *Id.* ¶ 319.

[114] China – Publications and Audiovisual Products Panel Report, ¶ 7.914; China – Publications and Audiovisual Products AB Report, ¶¶ 209-10.

[115] China – Publications and Audiovisual Products AB Report, ¶¶ 213-15.

[116] *Id.* ¶ 214.

[117] *Id.* ¶ 213.

[118] *Id.*

settlement, the AB criticized the Panel's analysis for creating uncertainty and took on the issue itself.[119]

The AB closely examined the introductory clause of paragraph 5.1 and came to the conclusion that GATT Art. XX can be invoked to justify the violation in the paragraph 5.1 of the AP.[120] The AB held that the term "without prejudice to" within paragraph 5.1 denotes that China's obligations to grant trading rights is qualified by China's right to regulate trade in a manner consistent with the WTO Agreement.[121] In other words, China's obligations with regard to trading right should not detrimentally affect or impair China's right to regulate trade.[122] As best explained by the Panel, China's right to regulate trade takes precedence over enterprises' right to trade, provided that China regulates trade in accordance with the WTO Agreement.[123]

The AB moved on to interpret the phrase "right to regulate trade in a manner consistent with the WTO Agreement." The AB did not construe China's right to regulate trade narrowly as the way the U.S. suggested, but rather broadly. The AB first recognized that the right to regulate trade is an inherent right, a right that need not be conferred by any international treaty to a Member.[124] Certainly, under the disciplines of the WTO, a Member's inherent right to regulate trade is qualified by WTO law.[125] Thus, the AB considered China has the inherent power to regulate international commerce, provided that the regulation is consistent with the WTO Agreement.[126] The AB further explained that "the WTO Agreement"

[119] *Id*. ¶¶ 214-15.

[120] *Id*. ¶¶ 216-33.

[121] *Id*. ¶ 218.

[122] *Id*. ¶ 219.

[123] China – Publications and Audiovisual Products Panel Report, ¶ 7. 254.

[124] China – Publications and Audiovisual Products AB Report, ¶ 222.

[125] *Id*.

[126] *Id*. ¶¶ 220-21.

within paragraph 5.1 encompassed the WTO Agreement as a whole, including its Annexes.[127] Also, compliance with the WTO Agreements means not to contravene with WTO obligations or the contravention is justified by WTO exceptions.[128]

In addition, the AB looked in paragraph 84(b) of China's Working Party Report as context to confirm the scope of China's regulatory rights.[129] As paragraph 84(b) lays down, foreign enterprises and individuals with trading rights have to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT Agreement and SPS Agreement.[130] The AB took support in this paragraph for its conclusion that China's right to regulate trade cannot be impaired by its obligations to grant the right to trade.[131] Also, relying on the term "such as" in paragraph 84(b) of China's Accession Working Party Report, the AB concluded that the type of regulatory measures is not limited to import licensing, TBT and SPS measures.[132] Rather, it only illustrates possible types of WTO-consistent regulatory measures.[133] Thus, the AB rejected the narrow reading of paragraph 5.1 proposed by the U.S. Also, the AB found U.S.'s concern that Annex 2A and 2B would lose its value untenable.[134] The AB clarified that the scope of regulatory rights is distinct from that of trading rights commitments.[135] Hence, allowing China to impose regulations on trading rights would not amount to adding new products to the Annexes.[136]

---

[127] *Id*. ¶ 222.

[128] *Id*. ¶ 223.

[129] *Id*. ¶ 224.

[130] Report of the Working Party on the Accession of China, ¶ 84(b), WT/MIN(01)/3 (10 November 2001) [hereinafter Working Party Report].

[131] China – Publications and Audiovisual Products AB Report, ¶ 224.

[132] *Id*. ¶ 225.

[133] *Id*.

[134] *Id*. ¶218 n.419.

[135] *Id*.

[136] *Id*.

The AB rejected the U.S.'s argument that China can resort to the introductory clause of paragraph 5.1 only when the regulatory measure aims at goods, not traders.[137] Relying on the language of paragraph 84(b) of the Working Party Report, the AB took the view that the regulatory measures are not limited to those directly address at goods as import licensing requirements apply to and are satisfied by traders.[138] Neither are they limited to the activity of importing or exporting because SPS and TBT measures apply to domestic goods, too.[139]

The AB further explained that the obligations to grant trading rights to traders is closely intertwined with the obligations to regulate trade in goods.[140] This close linkage is evidence in paragraph 5.1 itself as the first two sentences refer to traders and the third sentence deals with goods.[141] Making reference to previous GATT or WTO reports, the AB observed that measures that targeted at investors or manufacturers, not directly regulating goods or the importation of goods were still held violating GATT obligations by the WTO adjudicatory bodies.[142] Accordingly, the AB does not accept U.S.'s argument that the regulatory measure must direct at goods.

China's right to regulate trade, according to the AB's interpretation of paragraph 5.1, was confined to disciplines in Annex 1A of the WTO Agreement, including the GATT 1994.[143] This is based on the factor that paragraph 5.1 refers only to goods.[144]

---

[137] *Id.* ¶¶ 226-27.

[138] *Id.* ¶ 225 n.428.

[139] *Id.* ¶ 225 n.429.

[140] *Id.* ¶ 226.

[141] *Id.*

[142] *Id.* ¶ 227.

[143] *Id.* ¶ 229.

[144] *Id.*

Importantly, the AB stressed that China's right to regulate trade cannot be derogated simply by litigation tactic. The AB emphasized that China's access to a defense cannot be barred just because a complainant raises its claim under paragraph 5.1 of China's AP, instead of a claim under other covered agreements, which set out obligations under trade in goods that apply to the same or closely linked measures.[145] In other words, China's justification under GATT cannot be denied just because the U.S. raised its claim under paragraph 5.1 of the AP.

The AB's reasoning reflects a general respect for China's inherent right to regulate trade. However, perhaps in order not to erode the trader's right commitment made by China under paragraph 5.1, the AB establishes a way to ensure that China is not free to pick any provision related to trade regulation to justify derogation from the commitment. In scrutinizing whether a regulatory measure that violates the trading rights commitments can be justified by a defense under the covered agreements, the AB established a standard to verify if the measure violating trading rights commitments is closely linked with the right to regulate trade.[146] This seems to function as a filter to check whether the justification could be invoked as a justification within the meaning of the introductory clause of paragraph 5.1. For China to justify its inconsistency under GATT Art. XX in the current case, it will depend on the relationship between the measure violating trading rights commitments and China's regulation of trade in goods.[147]

The AB enunciated that for a measure violating trading rights commitments to be justified under the right to regulate trade, it must have a clearly discernable, objective link to the regulation of trade in goods at issue.[148] As indicated by the AB, a measure that violates the

[145] *Id.*

[146] *Id.* ¶¶ 229-30.

[147] *Id.* ¶ 229.

[148] *Id.* ¶ 230.

right to trade imposes a restriction on *who* can trade, whereas a regulatory measure limits *what* can be traded.[149] There must be a clear and intrinsic link between the two and such link can be observed by the nature, design, structure and function of the measure.[150] The AB further pronounced that such close link of this kind is often discernable when the regulatory measure aims at particular goods because regulating who can import or export particular goods will normally be objectively related to and form part of the regulation of trade in that goods.[151]

In the present case, China contended that the measures at issue form part of the content review mechanism, which regulate the importation of specific goods.[152] Thus, China alleged that there is a discernable link between measure violating trading rights commitments and regulation of trade in goods.[153] The AB recognized that some measures are incorporated by its legal texts into the content review mechanism, whereas others are not.[154] The AB accepted the Panel's finding that all the measures at issue intend to form a content review mechanism.[155] The AB agreed with China that the measures, relating to which importers, i.e. *who*, can trade is closely linked to the content review mechanism which regulates *what* can be traded.[156] As a result, the AB confirmed that China's measures that violate the trading rights commitments are closely linked with the right to regulate trade and thus GATT Art. XX is an available defense against violation of paragraph 5.1 of China's AP.[157]

---

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* ¶ 231.

[153] *Id.*

[154] *Id.* ¶ 232.

[155] *Id.*

[156] *Id.* ¶ 230.

[157] *Id.* ¶ 233.

Section 2 An Appraisal of *China – Publications and Audiovisual Products*

China – Publications and Audiovisual Products is of great importance to the certainty of the WTO legal system because it is the first time that the AB has substantively dealt with the applicability of the GATT exceptions in non-GATT agreements.[158] The AB and Panel had avoided answering this question in the past cases, for example, the AB in *U.S. – Customs Bond* and the Panel in *China – Publications and Audiovisual Products*.[159] They made efforts to evade this thorny question by resorting to an assuming *arguendo* approach, conveniently examining the merits of GATT Art. XX under the assumption that GATT Art. XX is an available defense. What is more, to dispel any inappropriate inference, the AB and Panel explicitly pointed out in their reports that this *arguendo* approach does not imply any answer to the applicability dilemma.[160] Thus, the AB report of *China – Publications and Audiovisual Products* is the first AB report that proposes an answer to the applicability issue. The reasoning of this case offers important guidance for future adjudicators who are faced with the issue of the applicability of the GATT exceptions under a non-GATT context.[161]

A. An Even Thornier Situation for the Accession Protocol

The applicability of GATT Art. XX in other non-GATT covered agreements has stirred up quite a few debates and uncertainty, even though these covered agreements share a closer relationship with the GATT.[162] For example, there is a close relationship between GATT Art. XIX and Agreement on Safeguards. It is also the case for GATT Art. VI and XVI, on the one

[158] Xiaohui Wu, *Case Note: China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363/AB/R)*, 9 CHIN. J. INT. LAW 415, 430 (2010).

[159] Spiegel-Feld & Switzer, *supra* note 62, at 21–22.

[160] U.S. – Customs Bond AB Report, ¶ 319; China – Publications and Audiovisual Products AB Report, ¶ 7.914.

[161] Although the WTO adjudicatory reports only bind parties to the dispute, in order to ensure the security and predictability of WTO legal system, prior reports are repeatedly followed by subsequent cases. Wu, *supra* note 158, at 431.

[162] Joost Pauwelyn, *Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on China - Audiovisuals*, 11 MELB. J. INT. LAW 119, 137 (2010).

hand, and the SCM Agreement and Anti-dumping Agreement, on the other. Similarly, GATT Art. XX(b) and (g) and the SPS Agreement and TBT Agreement share a close relationship. Still, whether the justification contained in the GATT can be invoked for a violation of these covered agreements other than GATT itself has stirred up enough speculation. The complexity of this issue is further confirmed by *US – Customs Bond* as the AB of *US – Customs Bond* refused to handle it head-on. The unique nature of the AP and the obscure relationship between the AP and the GATT will only add another layer of complexity to this issue.

For AP, the situation is even muddier. Even though paragraph 1.2 of China's AP specifies that China's AP is an integral part the WTO Agreement, the AP has a unique legal feature, quite different from other covered agreements.[163] Rather than regulating general WTO obligations, it encompasses Member-specific obligations concerning various areas of the WTO realm.[164] Those obligations are of substantive nature and deviate from the general obligations in the WTO Agreement.[165] Most of time, the AP's obligations are stricter than the general obligations. Furthermore, unlike agreements other than GATT as listed above, the AP is not established as a further elaboration of a specific topic contained in the GATT. Given the uniqueness of the AP, the relationship between the AP and the GATT is less clear than that between the GATT and other covered agreements.[166] The obscurity of the relationship between the AP and the GATT posts a greater obstacle for interpreters to apply GATT exceptions.

B. Different Readings of the AB Report and Their Consequences

[163] Wu, *supra* note 158, at 429.

[164] Li Yu, *WTO and National Cultural Policy: Rethinking China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products and Audiovisual Entertainment Products*, 45 REV. JURID. THEMIS 457, 477 (2011).

[165] Qin, *"WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System*, *supra* note 17, at 483.

[166] Pauwelyn, *Squaring Free Trade in Culture with Chinese Censorship*, *supra* note 162, at 137.

AB's reasoning is open to two opposing interpretations on the availability issue.[167] One of them clings to the part of the reasoning that states China's right to regulate trade is an inherent right, rather than a right bestowed by international treaties such as the WTO Agreement. Thus, this view concludes that an incorporation clause is not necessary for GATT Art. XX to apply under a non-GATT context.[168] This view is referred to as the broad interpretation of the AB report in this thesis. In contrast, the other interpretation considers that the whole AB's reasoning rests upon the text of the introductory clause of paragraph 5.1, which incorporates the GATT, and thus supports a narrow application of the GATT Art. XX. This interpretation will be referred to as the narrow reading of the AB report in this thesis.

i. The Broad Reading of the AB Report and Its Consequences

The broad aspect believes that China does not need to rely on the introductory clause to invoke the general exceptions of the GATT.[169] The main reason for this view lies in part of the reasoning of the AB report. While examining the term "right to regulate trade" of paragraph 5.1 of the AP, the AB stated that the right to regulate trade is an inherent right, a right that is not bestowed by any international agreements, such as the WTO Agreement.[170] In this direction, the introductory clause seems rather dispensable as the right to invoke GATT Art. XX is not granted by the introductory clause. Additionally, this view rests on the understanding that the AP should be interpreted in a harmonious way with the WTO Agreement to achieve coherent policy considerations.[171] In other words, under the GATT obligations, Members have freedom to achieve a non-trade policy objective in pursuit of trade

[167] Spiegel-Feld & Switzer, *supra* note 62, at 24–25.

[168] China – Publications and Audiovisual Products AB Report, ¶ 222.

[169] Pauwelyn, *Squaring Free Trade in Culture with Chinese Censorship*, *supra* note 162, at 136.

[170] China – Publications and Audiovisual Products AB Report, ¶ 220.

[171] Pauwelyn, *Squaring Free Trade in Culture with Chinese Censorship*, *supra* note 162, at 136; Yu, *supra* note 164, at 475; Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 298.

liberalization. This policy autonomy should still hold true for the non-GATT obligations, including the AP's obligations. Therefore, all the WTO obligations should be interpreted against the backdrop that WTO Members enjoy a default right to regulate trade consistently with the WTO agreement. Hence, the introductory clause is merely served as a confirmation of China's inherent right. A scholar further proposes that the inherent right to regulate trade in a manner consistent with the WTO Agreement "can only be contracted away by explicit treaty provisions."[172] Accordingly, the broad reading believes Members' inherent right to regulate trade enables them to invoke GATT Art. XX with or without a reference to the GATT.

Following this line of argument, the applicability of the general exceptions in the GATT is quite broad.[173] Any violation of the AP or even other covered agreements could be justified under the general exceptions in the GATT.[174] Under the broad reading, this case supports a general fallback right for Members to invoke GATT Art. XX under non-GATT contexts.[175] This argument is of significant value especially when the violated covered agreements do not contain their own set of general exceptions.[176] On this ground, violation of the SCM Agreement or the TBT Agreement out of the concern for environmental protection may be justified by GATT Art. XX(g).[177]

Yet, this broad interpretation is subjected to several criticisms. Most obviously, this argument clearly gets beyond the text of GATT Art. XX, which sets forth that nothing in this

[172] Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 298.

[173] Yu, *supra* note 164, at 475.

[174] Wu, *supra* note 83, at 431; Tania Voon, *China and Cultural Products at the WTO - WTO Appellate Body Report, China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products and Audiovisual Entertainment Products (China - Publications and Audiovisual Products and Audiovisual Products), WT/DS363/AB/R (circulated 21 December 2009, Adopted 19 January 2010)*, 37 LEG. ISSUES ECON. INTEGR. 253, 259 (2010).

[175] Pauwelyn, *Squaring Free Trade in Culture with Chinese Censorship*, *supra* note 162, at 137.

[176] Yu, *supra* note 164, at 475.

[177] Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 297–98; Pauwelyn, *Squaring Free Trade in Culture with Chinese Censorship*, *supra* note 162, at 136–37.

Agreement, namely, the GATT, shall be construed to prevent the adoption or enforcement of measures that aim to achieve the enumerated policy objectives.[178] Also, this interpretation is criticized for opening the door far too wide as basically every violation of the non-GATT obligations can be justified under the general exceptions of the GATT. This interpretation will greatly reduce the value and effects of Members' WTO obligations and will render some obligations moot.[179] For example, obligations under the TBT Agreement and the SPS Agreement are considered the elaboration of GATT Art. XX(g) and (b). It would render TBT and SPS obligations void if the violation of which can be justified by GATT Art. XX(g) and (b).

Moreover, this interpretation is likely to run afoul of the General Interpretative Note to Annex 1A, which provides that in the event of a conflict between a provision of the GATT and a provision of another agreement in Annex 1A, the provision of the other agreement shall prevail to the extent of the conflict.[180] Thus, provided that there is a conflict between a specialized obligation under an agreement in 1A and GATT Art. XX, the Interpretative Note denotes that the specialized obligation should prevail. Therefore, this broad interpretation cannot reconcile itself with the General Interpretative Note to Annex 1A.

In addition, it has been argued that this approach will likely lead to the result that every dispute will ultimately end up in GATT Art. XX and render most of the non-GATT obligations meaningless,[181] at least from a practical point of view. Besides, according to past WTO jurisprudence, GATT Art. XX has given the Dispute Settlement Body much discretion in deciding whether the measure is "necessary" to achieve an enumerated objective in Art. XX

[178] Pauwelyn, *Squaring Free Trade in Culture with Chinese Censorship*, *supra* note 162, at 136.

[179] *Id.* at 137.

[180] *Id.* at 138.

[181] *Id.*

and if it is "non-discriminatory" as required by the chapeau of Art. XX.[182] If most of the outcomes of the cases are determined under GATT Art. XX, it will hardly realize the goal to ensure the stability and predictability of the WTO legal system. Finally, this broad application is likely to encroach on the core value of the WTO, i.e. facilitation of trade, because Members can evade most of its WTO obligations, non-GATT obligations in particular, and employ trade-unfriendly measures to pursue non-trade objectives.

ii. The Narrow Reading of the AB Report and Its Consequences

While the broad reading emphasizes the AB's reasoning on the inherent right to regulate trade, the narrow interpretation clings to the strict textual analysis of paragraph 5.1 of China's AP in the AB report.[183] This school takes the view that the AB confirmed the applicability of GATT Art. XX because of the text of the introductory clause of paragraph 5.1 of China's AP.[184] The AB considered "the WTO Agreement" encompasses all multilateral agreements under Annex 1A because the present case involves trade in goods.[185] The AB further interpreted "in a manner consistent with the WTO Agreement" within the introductory clause to mean that China is entitled to rights that are affirmatively accorded to it and rights that authorize derogation from basic WTO obligations, i.e. exceptions.[186] Due to this reasoning, GATT Art. XX is an available defense for China. Based on the above reasoning, the narrow view believes that the introductory clause is indispensable for GATT Art. XX's defense in this case.

[182] *Id.*

[183] Spiegel-Feld & Switzer, *supra* note 62, at 24–25; Wu, *supra* note 158, at 15; Fernando Piérola, *supra* note 62, at 173–74; Yu, *supra* note 164, at 474; Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 297.

[184] Paragraph 5.1 of China's AP provides that without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement.

[185] China – Publications and Audiovisual Products AB Report, ¶ 229.

[186] China – Publications and Audiovisual Products AB Report, ¶ 223.

This understanding of a strict, text-based AB ruling seems to be a more accurate interpretation of the AB's holding in this case in that the AB placed a great emphasis on the wording of the introductory clause to reach its conclusion. The AB Report shows that the existence of the introductory clause is an indispensable element for the AB to affirm the availability of GATT Art. XX. The reason that AB brought up the inherent right is to interpret the term "the right to regulate trade" of the introductory clause. It is hard to imagine that the AB would refer to the inherent right to regulate trade if there is no such introductory clause. The broad reading, which narrowly focuses on part of the reasoning on the inherent right, is taking a part for the whole.

This strict textual interpretation receives harsh criticisms from academia. It is most criticized for failing to conduct a holistic interpretation of the AP in accordance with the VCLT Art. 31 and 32.[187] While interpreting the ordinary meaning of paragraph 5.1 of China's AP, the AB applied VCLT Art. 31 mechanically by focusing on the text only.[188] Art. 31 of the VCLT provides that in determining the ordinary meaning of a treaty term, interpreters should take account of the relevant context, along with the object and purpose of the treaty.[189] Paragraph 2 of Art. 31 further substantiates "context" by stating that the entire treaty text, preamble, annexes and any related agreements should be considered context.[190] Thus, the systematic position of an article within a treaty and even in relation to the whole scheme of the rules are of great interpretative value in deciding the ordinary meaning.[191] In addition, the object and purpose of the article and the treaty plays an imperative part in treaty interpretation,

[187] Wu, *supra* note 158, at 15; Yu, *supra* note 164, at 474; Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 304.

[188] Wu, *supra* note 158, at 428.

[189] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331 [hereinafter VCLT].

[190] VCLT art. 31.

[191] OLIVER DÈORR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 543 (2012).

too.[192] Object and purpose consideration embodies the principle of effectiveness, ensuring that a phrase is interpreted to reach the goal of an article or treaty.[193] Furthermore, Art. 32 of the VCLT provides supplementary means of interpretation. Treaty interpreters may resort to the preparatory work of the treaty and the circumstances of its conclusion to confirm the interpretation result of Art. 31 of the VCLT or to determine the meaning when the application of Art. 31 leads to obscure or unreasonable results.

While interpreting paragraph 5.1 of China's AP, the AB did not consider the relevant context, nor did the AB take note of the object and purpose. Failing to comply with customary rules of interpretation significantly diminishes its value for future guidance and might even mislead future interpreters to favor a textual approach on this issue.[194] Rather, this case requires a contextual examination because it involves obligations in two different agreements and the availability of cross-agreement application.[195] Also, this contextual assessment is of crucial importance to correctly interpret the obligations in the AP because the content and structure of the AP is very different from that of other covered agreements. The AP addresses Member-specific obligations and such obligations contain substantive disciplines throughout various areas of the WTO regime.[196] On the contrary, the covered agreements provide a coherent set of generally applicable rules on a specific area. Hence, the AB should conduct a contextual analysis of China's AP obligations and assess the object and purpose of the AP and the WTO Agreement, GATT Art. XX in particular.

To analyze AP's obligations in context, the AB should firstly identify the legal status of the AP. This requires consideration of the unique nature, purposes and systemic position of

[192] *Id.* at 545–46.

[193] *Id.*

[194] Kennedy, *supra* note 49, at 56.

[195] Wu, *supra* note 158, at 15.

[196] Yu, *supra* note 164, at 477.

the AP and the substantive obligations of the AP, i.e. the trading rights commitments in this case. Based on this contextual understanding of the AP obligations, the AB should evaluate the relationship between the AP and the GATT, to determine the applicability of GATT Art. XX.[197] It is imperative to conduct such holistic evaluation under a systematic context rather than under a rigid textual wording, isolated from the context.[198]

Furthermore, the AB's over reliance on the introductory clause of paragraph 5.1 seems to give more meaning to the introductory clause than intended. This thesis considers the AB's interpretation on the introductory clause, "without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement," far-fetched. This clause seems more of a confirmation that China will still enjoy rights conferred by the WTO Agreement like any other Members, such as import licensing, TBT, and SPS requirements, rather than a link that incorporates general exceptions under the GATT into the AP. The language in the introductory clause most often appears in the AP obligations that have corresponding obligations in the GATT or other covered agreements. This sort of phrase aims to function as a confirmation that the AP obligations will not affect the basic obligations in the GATT or other covered agreements. Hence, this thesis opines that the AB infused more meaning into the introductory clause of paragraph 5.1 than originally envisaged.

The AB's textual interpretation produces several unreasonable and undesirable consequences. Firstly, its mechanical examination on the text of the introductory clause implies that without the clause, GATT Art. XX is not an available defense. This implication greatly contravenes the priority chosen by WTO Members. The establishment of GATT Art. XX clearly manifests Members' desire to pursue non-trade interests over trade facilitation in areas such as public morals, human, animal or plant life or health, national treasures of artistic,

[197] *Id.* at 474–75; Wu, *supra* note 158, at 429.

[198] Yu, *supra* note 164, at 477; Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 323–24.

historic, or archaeological value, exhaustible natural resources and similar non-trade policy objectives. Since the obligations of the AP aim to facilitate and liberalize trade, the nature of such obligations is no different from that of GATT obligations. Thus, defenses available to the GATT violation should also be available to the AP's violation, provided that such defense will not defeat the purpose of the AP' obligations. Therefore, while abiding its AP obligations, China should have the right to achieve non-trade value as enumerated in the GATT Art. XX without a reference or incorporation of the GATT.

Secondly, such textual analysis will render conflicting results between violation of paragraph 5.1 and 5.2 of the AP. Paragraph 5.2 follows up 5.1 and regulates that except as otherwise provided for in China's AP, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favorable than that accorded to enterprises in China with respect to the right to trade. Following the restrictive interpretation of the AB, violation of paragraph 5.2 cannot be justified by GATT Art. XX because the paragraph does not have an introductory clause that incorporates or makes reference to the GATT. However, paragraph 5.1 and 5.2 share a very close relationship. Paragraph 5.2 is built upon 5.1 and regulates the same subject matter, i.e., trading rights. The AB's textual interpretation will render an unreasonable result that depriving enterprises in China, including domestic and foreign enterprises, of their trading rights can be justified by GATT Art. XX whereas depriving foreign individuals and enterprises, including those not invested or registered in China, of their trading rights cannot.

Thirdly, the AB's ruling will create an undue burden for applicant countries and WTO Members in the accession process. In order to ensure that applicant countries will enjoy regulatory rights under GATT Art. XX, such reference clause needs to be inserted in every

paragraph of the AP. It would not be practical to insert such clause in every obligation of the AP.[199]

Lastly, the failure of the AB to acknowledge the WTO-plus nature of China's trading-right obligations leads to a logical error in its reasoning. When interpreting the introductory clause of paragraph 5.1, "without prejudice to China's right to regulate trade in a WTO-consistent manner," the AB reasoned that this clause denotes two types of WTO-consistent measures. One of them refers to measures taken in accordance with the specific rights that are affirmatively accrued to Members, such as SPS and TBT measures.[200] The other is justifiable regulatory measures that deviate from the obligations in the WTO Agreement, such as measures taken in accordance with the general exceptions in the GATT.[201] Following this reasoning, it suggests that China may resort to first type of WTO-consistent measures, such as generally applicable obligations on state trading operations and importation monopolies under GATT Art. II:4 and XVII. However, GATT Art. II:4, XVII or XX(d) do not prohibit Members from operating state trading enterprises or importation monopolies. Obviously, this application will render WTO-plus obligations superfluous as Members can fall back to general obligations.[202] This logical error manifests AB's neglect of the WTO-plus nature of China's trading-right obligations.[203] Thus, to justify a breach of WTO-plus obligations, China can only resort to relevant exceptions, the second type of WTO-consistency proposed by the AB.[204] In fact, the text of paragraph 5.1 of China's AP invites such misinterpretation. The introductory clause does not qualify the WTO-consistent measures. Thus, the logical error is

[199] Gu, *supra* note 47, at 22–23; Liu, *supra* note 47, at 153, 155.

[200] China – Publications and Audiovisual Products AB Report, ¶¶ 223, 228.

[201] *Id*. ¶ 223.

[202] Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 300–01; Frieder Roessler, *Appellate Body Ruling in China–Publications and Audiovisual Products*, 10 WORLD TRADE REV. 119, 127 (2011).

[203] Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 300–01.

[204] *Id.* at 301.

actually embedded in paragraph 5.1 as trading-right commitments will inevitably prejudice rights to state trading and importation monopolies under GATT Art. II:4 and XVII. However, this pitfall would have been avoidable if the AB had taken a contextual approach and acknowledges the WTO-plus nature of the trading rights commitments.

C. A Test on the Objective Link Between Goods and Traders

After affirming that China has the right to regulate trade in accordance with agreements in Annex 1A, the AB aimed to establish a link between the measures violating trading rights commitments and regulation of trade.[205] It seems that the linkage requirement is based on the understanding that the subject of regulation of trade is different from that of trading-right commitments. From the AB's reasoning, it can be inferred that trading rights obligations are owed to traders, whereas trade regulation aims at goods. Thus, the AB made a great effort to connect these two. Firstly, based on Working Party Report paragraph 84(b), which provides import licensing, TBT and SPS as examples of regulatory measures within the meaning of paragraph 5.1 of the AP, the AB proposed that regulatory measures should not be limited to measures that directly aim at goods because import licensing requirements also relate to the activity of importing and are satisfied by importers.[206] Thus, regulatory measures might also take the form of restricting rights of traders. Secondly, the AB found evidence in the paragraph 5.1 itself, which regulates traders and goods in the same provision, to show that regulations of traders and trade in goods are closely intertwined.[207] Lastly, the AB referred to previous WTO reports to show that since measures imposed on investors and manufacturers have been found inconsistent with national treatment obligation and quantitative restrictions

[205] China – Publications and Audiovisual Products AB Report, ¶¶ 229-233.

[206] *Id*. ¶ 225.

[207] *Id*. ¶ 226.

of the GATT, measures restricting traders' trading rights may also violate obligations of GATT in respect of trade in goods.[208]

This thesis believes that the distinction between regulation of goods and traders is unnecessary and problematic. Firstly, it is hard to see why the AB considered that "regulate trade" within the introductory clause "without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement" limits to regulation of trade in goods. The AB did not explain the reasons or underlying rationale for such narrow understanding on the phrase "regulate trade." The phrase regulate trade does not indicate or imply that it specifically refers to regulation of goods. Rather, as there is no legal support or practical need for a narrow interpretation, it should include any regulation that aim to regulate trade; it could either be regulation of goods or traders. Also, the distinction between trade in goods and trader does not show itself in the WTO agreements. For instance, the GATT sets forth regulation on goods as well as traders, such as importation monopolies in Art. II:4 and state trading in Art. XVII. Consequently, the phrase "regulate trade" should not be narrowly interpreted as to mean trade in goods only. This thesis argues that there is no need to make such distinction in the first place.

Besides, the AB's criteria for the distinction is rather weak. With an aim to prove that regulatory measures available within the introductory clause do not limit to those that apply directly to goods themselves, the AB explained that import licensing requirements, which is illustrated as one of the examples of the regulatory measures in paragraph 84(b) of the Working Party Report, relates to the activity of importing goods and such requirements are satisfied by traders, not goods themselves. The AB seems to suggest that import licensing does not directly regulate goods because this requirements are fulfilled by people. Following

[208] *Id.* ¶ 227.

this line of argument, it would be hard to find a measure that directly regulates trade in goods because all regulations are actually fulfilled by people.[209] Thus, even if the AB wishes to do such distinction, the AB should base on the content of the measure, instead of the addressee of the measure, to characterize the measure as regulation of goods or traders.

Furthermore, if the AB had noticed regulations on state trading and importation monopolies under the GATT Art. II:4, XVII and XX(d), it could have realized that the link between regulation of trade and restriction of traders is firmly established in the GATT. Particularly, GATT Art. XVII:3 elucidates that the purpose for regulating state trading in the GATT is to limit or reduce trade obstacles as the contracting parties recognize that state trading enterprises might be operated so as to create serious obstacles to trade. It is underlain in the GATT that trade is influenced by state trading operations and importation monopolies. Hence, the AB does not need to go to such great lengths to show the close link between regulate trade and restrict trading rights.

Moreover, this narrow interpretation forces the AB to develop an objective-link test in applying the introductory clause. The AB firstly stated that the U.S. cannot deny China's access to a defense merely because it bases its claim under the AP, rather than under other covered agreements regulating trade in goods that are applied to or closely related to the measure and that are closely linked to China's trading rights commitments.[210] More precisely, the AB seems to suggest that China can resort to GATT Art. XX if the inconsistent measures are closely linked to the obligations of the GATT. The AB moved on to say that since no parties has made such a claim that the trading rights obligations under the AP are related to the GATT in the present case, the AB decided to examine the relationship between the measure inconsistent with the trading rights commitments and China's regulation of trade in

[209] Roessler, *supra* note 202, at 129.

[210] China – Publications and Audiovisual Products AB Report, ¶ 229.

goods. Actually, if the AB had viewed the trading rights commitments in context, it could have realized that the trading rights commitments are closely linked to GATT Art. II:4 and XVII.[211] Failing to see this connection, the AB thus developed a clearly discernable and objective link test, which requires a showing that the measures regulating who may trade are objectively linked to the regulation of trade in the goods at issue. That is, the measures violating trading-right commitments are clearly and intrinsically related to the objective of regulating the goods that are traded. The AB further explained that such link is often shown when the measures address to particular goods because who may trade a specific good will normally be objectively related to and will often form part of the regulation of those goods.[212] The AB continued that whether the link is clearly discernable requires close scrutiny on the nature, design, structure and function of the measures at issue, together with the regulatory context. If such link exists, China may continue to prove that its measures are consistent with the exception of the GATT. Applying the objective-link test in the present case, the AB tried to scrutinize whether China's measures are intended to regulate the specific goods at issue.

China argued that the inconsistent measures are a part of the content review mechanism, which aims to prevent dissemination of domestic and foreign goods that could negatively affect China's public morals. The Panel noticed that some of the measures do not mention that they are taken to form a part of the review mechanism. Yet, reviewing those measures in context, the Panel agreed that they are a part of the review mechanism. Holding the same view with the Panel, the AB ruled that China's restriction on trading rights is to regulate relevant goods. Thus, the AB concluded that there is a clearly discernable, objective link between China's restriction on trading rights and regulation of relevant goods.

[211] Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 303.

[212] China – Publications and Audiovisual Products AB Report, ¶ 230.

This thesis proposes that the objective link test is unnecessary when determining whether GATT Art. XX is applicable. Firstly, the objective link requirement is actually created by the AB because it is nowhere to be found in the text of paragraph 5.1.[213] The reason that the AB established such linkage requirement is because the AB unnecessarily distinguished restriction of traders and regulation of goods in the first place. In the AB's understanding, regulation of trade specifically refers to trade in goods and thus is different from restricting who may trade in the China's AP. Therefore, for China to invoke GATT Art. XX, which regulates trade in goods, to justify violation of who may gain trading rights, China needs to show that restricting who may trade is a part of a broader regime, the content review mechanism, regulating specific goods at issue. As argue by this thesis before, the distinction is unnecessary because there is no legal basis and merit for such differentiation. If there is no such differentiation, the AB would not need to create a test that is not mentioned in the text of paragraph 5.1 of the AP. Accordingly, this thesis considers that the distinction is unnecessary and problematic.

The objective-link requirement is misplaced and should and will be examine when applying GATT Art. XX(a). It seems that the objective-link test purports to filter out the inconsistent measures that are not intended to regulate goods at issue. For example, in the present case, China cannot restrict trading rights on raw materials on the ground that it forms parts of the content review mechanism because raw materials are not relevant to the goods regulated under the content review mechanism. Actually, such purpose can easily be achieved when applying the specific requirements under GATT Art. XX, for instance, GATT Art. XX(a) for the present case. This is the approach taken by the Panel. After assuming that GATT Art. XX is an applicable defense, the Panel began to apply GATT Art. XX(a). Before looking into the necessity requirement, the Panel firstly examined the element "public morals" of Art.

[213] Roessler, *supra* note 202, at 127.

XX(a) and under which it looked into the "link between import entities, content review and the protection of public morals"[214] because some of the measures that restrict trading rights do not make reference to the content review mechanism. It is not apparent that whether such measures mean to regulate the relevant goods. After reviewing all the measures in context, the Panel concluded that there is a link between the measures, content review and public morals.[215] The Panel's approach serves to resolve the same problem that the AB has in mind. Thus, the Panel's approach can function well as the filter that the AB aimed to establish. The AB and the Panel tried to solve the same problem with different reasoning. On one hand, the Panel aimed to examine this issue under the application of GATT Art. XX(a), the element of the protection of public morals in particular, and tried to ascertain whether there is a link between the inconsistent measures and the protection of public morals. On the other hand, the AB investigated this issue under the applicability of GATT Art. XX and built a link between the inconsistent measures and regulation of trade in goods at issue. This thesis agrees with the Panel's approach. It is not necessary to invent the objective-link test while applying paragraph 5.1 of the AP as the distinction between regulation of goods and restriction of traders is unnecessary in the first place and there is no such requirement in the text of paragraph 5.1. The problem that this linkage test aims to solve is readily coped with when applying the specific requirements under the relevant exceptions. Accordingly, this thesis believes that the objective-link test created by the AB is misplaced.

D. Suggesting a Different Interpretation with a Focus on Context

This thesis proposes to address the issue with a contextual approach by firstly identifying the legal characters and systematic status of China's AP and its obligations. The AP obligations should be read together with its related and basic obligations under the WTO

[214] China – Publications and Audiovisual Products Panel Report, ¶ 7.750.

[215] *Id.* ¶¶ 7.751-7.781.

Agreement. If the breached AP obligation is related to or extended from obligations under the GATT, GATT Art. XX can be an available defense. Otherwise, it would be unfair that violation of GATT obligations can be excused by GATT Art. XX, whereas violation of obligations extended from the GATT cannot, provided that such justification would not contravene the very purpose of the extended obligation. This interpretation will not produce the contradiction that GATT Art. XX is an applicable defense for violation of paragraph 5.1 but not 5.2. Most importantly, it is in line with the value pursued by the WTO regime. Through the establishment of GATT Art. XX, WTO Members consciously choose to favor some non-trade value and interests over trade. This policy choice and consensus should be respected over the whole WTO scheme. Accordingly, this thesis believes that violation of all non-GATT obligations that have certain bearing to the GATT can be justified under GATT Art. XX, unless such defense would fundamentally defeat the object and purpose of the non-GATT obligations.

To begin a contextual interpretation, it is imperative to identify the legal status and nature of the AP. Unfortunately, the legal status of the AP is not all clear. The only provision in China's AP that has bearing to this issue is paragraph 1.2, which provides that China's AP shall be an integral part of the WTO Agreement.[216] This paragraph confirms that the AP is legally binding to China as the WTO Agreement is. It stops short of elucidating the systematic relationship between China's AP and the WTO agreement, the GATT in particular. However, as disussed in previous part, it denotes that to correctly understand China's AP, it should be read together with relevant WTO agreements. With this contextual approach in mind, this thesis will start analyze the substantive obligations of the AP.

[216] China's AP, ¶ 1.2.

The legal nature and characteristics of the AP's obligations vary and in most cases the AP obligations deviate from the WTO Agreement. The AP's obligations are the results of negotiation of the terms of accession. When a country wishes to accede to the WTO, pursuant to Art. XII of the WTO Agreement, the applicant country and the WTO will agree on the terms of accession and the Ministerial Conference will subsequently approve the agreement on the terms of accession by a two-thirds majority of the Members.[217] During the accession process, the applicant country will negotiate the terms with the incumbent Members and the result of the negotiation will form part of its obligations in its AP. Since there is no rule on the scope and degree of the terms of accession, the AP obligations to some extent deviate from the basic principles in the WTO Agreement and run across various areas of WTO regime. The obligations that are more lenient than the generally applicable obligations in the covered agreements are called "WTO-minus" obligations by scholars. However, most often, under the demand of the incumbent Members, the AP obligations are more stringent than the WTO Agreement and therefore are named as "WTO-plus" obligations. Sometimes, the AP sets up obligations that are not even regulated in the WTO Agreement.[218] Accordingly, the legal characteristics and systemic positions of the AP obligations differ provision by provision. The AP's obligations in some cases amend the basic disciplines and in other cases supplement the general obligations in the WTO Agreement for the acceding Members.[219]

In China's AP, most of the obligations substantially deviate from the WTO Agreement and the trading rights obligation at issue is a case in point.[220] The trading rights obligations were negotiated against the backdrop that China only conferred some Chinese enterprises the

[217] The WTO Agreement art. XII.

[218] Yamaoka, *supra* note 6, at 116.

[219] Kennedy, *supra* note 49, at 46.

[220] Yamaoka, *supra* note 6, at 116.

rights to import and export.[221] Those Chinese enterprises were mostly state-owned enterprises.[222] China also conferred the rights to trade to certain foreign-invested enterprises provided that the imported products were for production purpose and exported products were in accordance with the enterprises' scope of business.[223] The Members of the Working Party indicates that this practice significantly runs afoul of the goal of the WTO to facilitate trade and is inconsistent with the WTO Agreement.[224] In the negotiation, China agreed to progressively liberalize the availability and scope of trading rights within three years after its accession in 2001. After the three-year transitional period, all enterprises in China shall have the right to trade in all goods except for products in Annex 2A and 2B.

To read the trading rights commitments of China's AP in context, adjudicators need to identify relevant disciplines in the WTO agreements. GATT Art. II:4, Art. XVII and Art. XX(d) prescribe conditions for Members to establish a monopoly on importation and state trading operations. Therefore, these provisions can serve as relevant context for the purpose of interpretation. Under GATT Art. II:4, Members are authorized to establish, maintain or authorize a monopoly on importation of certain products on the condition that such monopoly is not operated so as to afford protection on the average in excess of the amount of protection provided for in the Schedule.[225]

Furthermore, GATT Art. XVII is the principal article dealing with state-trading enterprises and their operations. State-trading enterprises basically refer to three types of enterprises: (1) state-owned enterprises; (2) enterprises granted special privileges by the State; and (3) enterprises granted exclusive privileges, i.e. a monopoly in the trade of certain

[221] Working Party Report, ¶ 80.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] GATT art. II:4.

goods.[226] Art. XVII sets forth that when these enterprise purchase or sale involving either imports or exports, they should act in a manner consistent with the general principles of non-discriminatory treatment and their decisions on imports and exports are guided only by commercial considerations. Art. XVII also instructs Members should notify their state trading enterprises to the WTO annually.

In addition, GATT Art. XX(d) provides that Members can take measures necessary to secure compliance with laws or regulations, including those relating to the enforcement of monopolies operated under Article II:4 and Article XVII, provided that such measures do not constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.[227] These articles clearly show that the practice of state trading or importation monopolies is not prohibited by the WTO as long as it complies with GATT Art. II:4 and Art. XVII.

Compared with these basic GATT disciplines, the trading rights commitments undertaken by China are more stringent.[228] By requiring all enterprises in China have the right to trade, paragraph 5.1 of the AP basically prohibits the operation of state trading or authorization of importation monopolies, except for goods under Annex 2A and 2B.[229] China's trading-right obligations aim to further reduce the trade barriers created by state trading operation as GATT Art. XVII:3 explicitly recognizes that state trading enterprises might be operated to "create serious obstacles to trade" and further negotiation to reduce such obstacles are of importance to the expansion of international trade.[230] This effort to liberalize

[226] GATT art. VII.

[227] GATT art. Art. XX

[228] Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 31; Yamaoka, *supra* note 6, at 132–34.

[229] Roessler, *supra* note 202, at 124.

[230] GATT art. XVII:3.

trade is made in the obligations of China's AP.[231] As China's commitments on trading rights lay down stricter obligations on state trading and importation monopolies than the basic obligations in the GATT, contextually China's commitments should be construed as an extension of GATT Art. II:4 and XVII and fit into the same obligation group.[232]

Since violation of the basic disciplines, i.e. GATT Art. II:4 and XVII, can be justified by GATT Art. XX, this thesis argues that China should also have the right to invoke GATT Art. XX for the breach of its trading-right commitments. Based on the principle of equality, exceptions available to basic obligations should also be available to the WTO-plus obligations, provided that such exception would not directly impede the very purpose of the WTO-plus obligations.[233] Hence, GATT Art. XX(d) is not an appropriate exception in this case because it prescribes that Members may take necessary measures to enforce law on monopolies operated under Article II:4 and Article XVII.[234] Since China's trading rights obligations basically prohibit state trading and importation monopolies, it will render China's obligations meaningless if China is allowed to resort to GATT Art. XX(d). Yet, there is not such concern in *China – Publications and Audiovisual Products*, where China invoked GATT Art. XX(a), protection of public morals, to justify its breach of trading-right commitments. The protection for public morals will not directly defeat the purpose of the trading rights commitment because protecting public morals does not directly grant China the right to establish state trading or importation monopolies.

Furthermore, WTO Members made a conscious decision through the establishment of GATT Art. XX that some societal values and interests take precedence over trade

[231] Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 33.

[232] *Id.* at 40–41.

[233] *Id.* at 34, 40–41.

[234] GATT art. XX(d).

liberalization and public morals are one of them.[235] Thus, affirming the applicability of GATT Art. XX(a) is consistent with the value of the WTO.[236] Moreover, it would be unreasonable to deny China's invocation of GATT Art. XX(a) if other Members can invoke GATT Art. XX(a) to justify their violation of state trading operations or importation monopolies under GATT II:4 and XVII. As a result, this thesis proposes that since China's trading-right obligations are an extension of GATT Art. II:4 and XVII, GATT Art. XX should be applied to justify violation of China's trading-right obligations as it applies to justify GATT Art. II:4 and XVII violation.

In fact, overlooking the relevant context and the object and purpose of paragraph 5.1 might not be a mere act of negligence of the AB. This is observed from the fact that after examining China's defense under GATT Art. XX(a), the AB resumed to its normal course of inspection in the next part, following Art. 31 of the VCLT, which includes inspection on ordinary meaning, context and object and purpose, and Art. 32 to determine the meaning of sound recording distribution services under China's GATS schedule entry. The reason for such departure in the assessment of paragraph 5.1 of the AP might lie in the deficiencies in the AP.[237]

The connection between the obligations in the AP and that in the WTO multilateral agreements is not always clear. The AP comprises substantive obligations on various subject matters across the WTO regime and the AP does not specify its relation with the covered agreements. Thus, it is hard to identify the relevant context for the AP's obligations. Furthermore, the object and purpose of the AP's obligations are not clear, either. The AP does not explain why such obligation is needed for China and what the purpose for the obligations

[235] MAVROIDIS, *supra* note 57, at 455; PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS 615–16 (2008).

[236] Roessler, *supra* note 202, at 125.

[237] Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 52–54; Yu, *supra* note 164, at 477.

is. The lack of any reference to supplementary means of interpretation, such as the preparatory work and the circumstances of the treaty's conclusion, might also be the result of insufficiency in and confidentiality of the negotiation records. Given those deficiencies, the AB might be therefore restrained from making a holistic and contextual interpretation and resort to a prudent approach, i.e. narrowly focusing on the text of the AP.

Chapter 5 An Analysis of *China – Raw Materials*

Section 1 Summary of the Dispute

After *China – Publications and Audiovisual Products* in 2009, the WTO judiciary was again confronted with the issue of the applicability of GATT Art. XX to justify violation of the AP. In 2012, the WTO judiciary rendered a seemingly different result, i.e. rejecting the applicability of GATT Art. XX as a defense. In fact, these seemingly different outcomes result from applying the same interpretation method, i.e. narrow textual interpretation.[238] *China – Raw Materials*, as a second case dealing with the applicability of GATT Art. XX under a non-GATT context, further confirms a general rule that the availability of GATT Art. XX in a non-GATT context mainly hinges on a textual linkage between the breached non-GATT obligation and the GATT.

In *China – Raw Materials*, China's imposition of export duties was found violating paragraph 11.3 of China's AP by the Panel and AB. As in *China – Publications and Audiovisual Products*, China invoked Art. XX of the GATT as a defense. This contention failed this time because the Panel and the AB considered the GATT or GATT Art. XX is not incorporated in paragraph 11.3 of China's AP. Thus, before examining the merits of GATT Art. XX(b) and (g), the AB rejected the availability of GATT Art. XX. From this case, it can be confirmed that to successfully defend a violation of the AP by GATT Art. XX, an incorporation clause is definitely in need.

A. The Measure at Issue

[238] The Panel and AB of China – Raw Materials conducted a limited examination on relevant context. The strict textual interpretation still dominates the course of the Panel's and AB's reasoning. Yu, *supra* note 164, at 476.

In 2009, China introduced several measures to restrict the exportation of certain raw materials.[239] One of the measures was the imposition of export duties on various forms of bauxite, coke, fluorspar, magnesium, silicon metal, yellow phosphorous and zinc.[240] Chinese law regulated that export duties must be paid off by exporters within a specific period of time.[241] None of the raw materials was permitted to leave China unless the export duties were discharged.[242] Also, as of July 1, 2009, the special export duty on yellow phosphorous was removed.[243] This imposition of export duties was challenged by the United States, the European Union and Mexico and this dispute was brought before the Panel in 2009.[244]

Imposing export duties on the raw materials, except for yellow phosphorous, was found violating paragraph 11.3 of China's AP by the Panel and was not argued on appeal.[245] Paragraph 11.3 states that China shall eliminate all taxes and charges applied to exports, except for products listed in Annex 6 of the AP or for charges and fees applied in conformity with the provisions of Article VIII of the GATT 1994.[246] The raw materials at issue, except for yellow phosphorous, were not among products in Annex 6.[247] Moreover, China did not invoke GATT Art. VIII to justify its imposition.[248] Hence, the Panel ruled that China's imposition of export duties violated paragraph 11.3 of China's AP and China did not argue this ruling on appeal.

---

[239] China – Raw Materials Panel Report ¶ 2.1.

[240] *Id.* ¶ 7.59.

[241] *Id.* ¶ 7.61.

[242] *Id.* ¶ 7.61.

[243] *Id.* ¶ 7.63.

[244] *Id.* ¶ 2.3.

[245] *Id.* ¶¶ 7.77, 7.81, 7.85, 7.89, 7.93, 7.98, 7.101.

[246] China' AP, ¶ 11.3.

[247] China – Raw Materials Panel Report, ¶¶ 7.75, 7.80, 7.84, 7.88, 7.92, 7.97, 7.101.

[248] *Id.* ¶¶ 7.75, 7.79, 7.83, 7.87, 7.91, 7.96, 7.100.

The imposition of export duties on yellow phosphorous was not found inconsistent with China's WTO obligations by the Panel and was not argued on appeal because yellow phosphorous was one of products listed in Annex 6 and the duties imposed on yellow phosphorous did not exceed the maximum rate required by Annex 6.[249] Annex 6 provides a list of products subject to certain export duty rates and a note attached at the end of Annex 6 stating that China confirms that the rates illustrated in Annex 6 are maximum levels and China will not raise the present applied rates, except under exceptional circumstances.[250] If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs.[251] In face of the challenges from the complainants, China removed the special export duty rate on yellow phosphorus before the establishment of the Panel.[252] Thus, the export duty rate on yellow phosphorus did not exceed the ceiling set in Annex 6 at the time when the Panel was established.[253] Therefore, the Panel ruled that export duties on yellow phosphorous were not inconsistent with China's WTO obligations.[254]

B. China's and the Complainants' Arguments

China contended that the violation can be justified by Art. XX(b) and (g) of the GATT. For export duties on zinc, magnesium, manganese and coke, China asserted that such violation can be justified by GATT Art. XX(b) because the production process of those raw materials is highly-polluting and thus posts a threat to human, animal or plant life or health.[255]

---

[249] *Id*. ¶ 7.71.

[250] China's AP, Note to Annex 6.

[251] *Id*.

[252] China – Raw Materials Panel Report, ¶ 7.63.

[253] *Id*. ¶ 7.71

[254] *Id*.

[255] *Id*. ¶ 7.106; Executive Summary of the First Written Submission of China, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 15, WT/DS394/R/Add.1, WT/DS395/R/Add.1, WT/DS398/R/Add.1 (July 5, 2011) [hereinafter First Written Submission of China].

Also, China argued that the imposition of export duties to fluorspar can be excused by GATT Art. XX(g), because fluorspar is an exhaustible non-renewable mineral resource.[256]

The complainants confronted this justification with the threshold question, i.e. the applicability of GATT general exceptions.[257] The complainants asserted that GATT Art. XX cannot be an applicable defense because the text of Art. XX explicitly written that it can only be invoked to justify violation of the GATT.[258] Additionally, the complainants contended that paragraph 11.3 does not make reference to or incorporate the GATT like paragraph 5.1 of the AP.[259]

Responding to complainants' submissions, China advanced several arguments. Firstly, based on the AB report of *China – Publications and Audiovisual Products*, China asserted that it enjoys the inherent right to regulate trade in a manner consistent with the WTO Agreement and such right is not bestowed by any international treaties such as the WTO Agreement.[260] China further argued that the text of paragraph 11.3 does not abandon the inherent right to regulate trade.[261] Thus, China still retains the inherent right to regulate trade. In addition, China alleged that this is confirmed particularly by the Note to Annex 6, which authorizes China to depart from its commitments in paragraph 11.3 if there are exceptional circumstances.[262] In China's view, the exceptional circumstances clause in the Note

[256] China – Raw Materials Panel Report, ¶ 7.106; First Written Submission of China, ¶ 6

[257] China – Raw Materials Panel Report, ¶ 7.108.

[258] *Id.* ¶ 7.111.

[259] *Id.*

[260] Executive Summary of the Opening Oral Statement by China at the First Substantive Meeting, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 19, WT/DS394/R/Add.1, WT/DS395/R/Add.1, WT/DS398/R/Add.1 (July 5, 2011) [hereinafter Opening Oral Statement by China at the First Substantive Meeting].

[261] Executive Summary of the Second Written Submission of China, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 12, WT/DS394/R/Add.1, WT/DS395/R/Add.1, WT/DS398/R/Add.1 (July 5, 2011) [hereinafter Second Written Submission of China].

[262] Opening Oral Statement by China at the First Substantive Meeting ¶ 22.

demonstrates that WTO Members recognize China still retains the inherent right to regulate trade via export duties to protect non-trade interests.[263] Thus, China can exercise its inherent right embodied in GATT Art. XX.

Secondly, China contended that since the GATT, other covered agreements and the AP all form an integral part of the WTO Agreement, the policies enshrined in GATT Art. XX should apply to all goods-related obligations.[264] China explained that with respect to trade in goods, the GATT, other covered agreements in Annex 1A and the relevant disciplines in the AP all from an inseparable package of rights and obligations and should be read in conjunction.[265] China stated that Art. XX and XXI of the GATT, Art. XIV and XIV *bis* of the GATS and the entirety of the SPS Agreement and the TBT Agreement all reflect the basic principle in the WTO scheme that with respect to trade obligations, Members are not refrained from taking measures to promote fundamental societal interests recognized in the covered agreements.[266] As a result, while assuming obligations under trade in goods, Members can exercise its inherent right to pursue non-trade interests as enshrined in GATT Art. XX.

Thirdly, China asserted that paragraph 170 of the Working Party Report incorporates GATT Art. XX.[267] Under the heading of "Taxes and Charges Levied on Imports and Exports," paragraph 170 provides that China "ensures that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994."[268] China asserted that its export duties clearly fall under the heading and thus are within purview of this

[263] *Id.*

[264] Second Written Submission of China ¶ 14.

[265] *Id.*

[266] Opening Oral Statement by China at the First Substantive Meeting ¶¶ 19, 21.

[267] China – Raw Materials Panel Report, ¶ 7.137.

[268] Working Party Report, ¶ 170.

paragraph.[269] Moreover, the list is not exhaustive but rather illustrative as it uses the word "including."[270] Hence, with respect to export duties, China assumes all obligations under the GATT, including its general exceptions.[271] China also considered paragraph 170 resembles the introductory clause of paragraph 5.1 and therefore GATT Art. XX is incorporated into paragraph 170.[272]

C. WTO Dispute Settlement Body Reports

i. The Panel Report

Before assessing the merits of the present issue, the Panel took note of relevant background knowledge. The Panel firstly pointed out that to examine the applicability of GATT Art. XX, the understanding of the legal status of the AP within the WTO Agreement and especially the legal relationship between paragraph 11.3 of the AP and the other provisions of the WTO Agreement is crucial.[273] Then, the Panel made its observations of the AB report of *China – Publications and Audiovisual Products* and significantly, the Panel found that the AB of *China – Publications and Audiovisual Products* did not discuss the systemic relationship between the obligations in the AP and those in the GATT, within the WTO Agreement.[274] Rather, the AB focused on the text of the provision of the AP, assessing the meaning of a particular term, together with the surrounding context and overall structure of the AP.[275] Lastly, the Panel concluded from *China – Publications and Audiovisual Products* that GATT Art. XX is applicable provided that such defense is incorporated by way of

[269] Second Written Submission of China, ¶ 13.

[270] China – Raw Materials Panel Report, ¶ 7.132.

[271] Second Written Submission of China, ¶ 13.

[272] China – Raw Materials Panel Report, ¶¶ 7.133, 7.137.

[273] *Id.* ¶ 7.116.

[274] *Id.* ¶ 7.117.

[275] *Id.*

reference into the AP and thus forms a constituent part of the provision of the AP.[276] Against this background knowledge, the Panel started with its assessment of the applicability of GATT Art. XX in justifying the breach of paragraph 11.3 of the AP.

The Panel firstly reviewed the ordinary meaning of paragraph 11.3 of China's AP and concluded that GATT Art. XX is not incorporated into paragraph 11.3 of China's AP.[277] Guided by the AB report of *China – Publications and Audiovisual Products*, the Panel considered that GATT Art. XX is an available defense when it is incorporated in or referred to by the provision at issue, such as the introductory clause of paragraph 5.1 of China's AP.[278] The Panel noted that the text of paragraph 11.3 does not make reference to GATT Art. XX of the GATT or provisions of the GATT generally.[279] Moreover, there is no introductory clause similar to the one in paragraph 5.1.[280] The Panel found that the text of paragraph 11.3 provides its own set of exceptions, i.e. Annex 6 and GATT Art. VIII.[281] The Panel believed that it is a deliberate choice of WTO Members and China to leave out GATT Art. XX because they could have mentioned or made reference to the WTO Agreement or the GATT in the AP.[282] In the Panel's view, this is especially true when paragraph 11.3 explicitly refers to GATT Art. VIII but leaves out GATT Art. XX.[283] Thus, the Panel concluded that it is the common intent of the parties to exclude GATT Art. XX as a defense against violation of paragraph 11.3. For that reason, the Panel rejected China's contention that paragraph 11.3 and the exceptional circumstances clause in the Note to Annex 6 can support the invocation of GATT Art. XX.

---

[276] *Id.* ¶ 7.119.

[277] *Id.* ¶¶ 7.121, 7.122.

[278] *Id.* ¶ 7.124.

[279] *Id.* ¶¶ 7.124, 7.129.

[280] *Id.*

[281] *Id.* ¶¶ 7.126, 7.129.

[282] *Id.* ¶ 7.129.

[283] *Id.*

Next, the Panel turned to review the context provided by other provisions of China's Working Party Report and rejected China's interpretation of paragraph 170 of the Working Party Report to mean that GATT Art. XX is an available defense. The Panel first took note of paragraph 11.1 and 11.2 of the Working Party Report and observed that both paragraphs contain the wording "in conformity with the GATT 1994."[284] In contrast, paragraph 11.3 includes neither such phase, nor phrases like the introductory clause of paragraph 5.1.[285] Also, if GATT Art. XX had been an intended defense, China and WTO Members could have made China's export duties commitments an integral part of China's commitments under the GATT.[286] Yet, they did not choose to do so.[287] Thus, the Panel concluded that this is a deliberate omission to exclude the applicability of GATT Art. XX.[288] To further support this reading of paragraph 11.3, the Panel reinforced that GATT Art. XX would not apply because "China's export duties commitments arouse exclusively from China's Accession Protocol."[289]

The Panel further observed that paragraph 170 of the Working Party Report and paragraph 11.3 actually refer to two different obligations.[290] On one hand, paragraph 170 regulates domestic taxes and charges levied on imports and exports and specifies specific GATT rules for such practices.[291] On the other hand, paragraph 11.3 concerns taxes and charges only on exports and such obligations do not exist in the GATT.[292] Rather, obligations under paragraph 11.3 relate to paragraph 155 and 156 of the Working Party Report under a

[284] *Id.* ¶¶ 7.136-7.138.

[285] *Id.* ¶ 7.138.

[286] *Id.* ¶ 7.140.

[287] *Id.*

[288] *Id.* ¶ 7.138.

[289] *Id.*

[290] *Id.* ¶ 7.141.

[291] *Id.*

[292] *Id.* ¶¶ 7.141-7.142.

different section because paragraph 155 and 156 have the same content as paragraph 11.3.[293] Importantly, those paragraphs do not make reference to GATT Art. XX but they actually could have.[294] Thus, the Panel refuted China's argument that paragraph 170 of the Working Party Report enables GATT Art. XX as a defense.[295]

Lastly, the Panel looked into the context provided by other provisions of the WTO Agreements and concluded that GATT Art. XX is not an available defense. The Panel first noted that there is no general umbrella exception to all WTO agreements.[296] For example, GATS provides its own set of general exceptions.[297] Also, TRIPS, TBT and SPS contain their own exceptions and flexibilities.[298] Thus, the Panel rejected China's arguments that GATT Art. XX can apply to all obligations concerning trade in goods. Then, the Panel observed that GATT Art. XX can be invoked only to justify a breach of GATT provisions as the text of Art. XX sets out that nothing in "this agreement" should be construed to prevent the adoption or enforcement of a certain measure.[299] In addressing the issue that whether GATT Art. XX can be invoked to justify a violation falling outside the scope of the GATT, the Panel mentioned that on occasion, GATT Art. XX can be invoked to justify a breach out of GATT violation provided the GATT or GATT Art. XX is incorporated, by cross-reference, into the other covered agreements.[300] For example, GATT Art. XX is explicitly incorporated into the Agreement on Trade-Related Investment Measures (TRIMs Agreement).[301] Thus, if GATT Art.

[293] *Id.* ¶¶ 7.143, 7.145.

[294] *Id.* ¶¶ 7.145-7.146.

[295] *Id.* ¶ 7.148.

[296] *Id.* ¶ 7.150.

[297] *Id.* ¶ 7.153.

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

XX had been intended to apply to paragraph 11.3, the incorporation would have been made.[302] The Panel further specified that the legal basis for GATT Art. XX defense lies in the provision that incorporates GATT Art. XX, not in the Art. XX itself.[303] In consequence, since China's export duties obligations do not refer to GATT and there is no similar disciplines in the GATT, either, GATT Art. XX cannot find its way to justify violation of paragraph 11.3.[304]

Furthermore, the Panel rejected China's assertion that it enjoys the inherent right to regulate trade.[305] In the Panel's view, the Panel recognizes Members' inherent right to regulate trade and China has exercised its inherent right in negotiating the terms of accession and agreeing the export duties obligations in paragraph 11.3.[306] Thus, China's WTO obligations, including those in the AP, are the result of its sovereignty.[307]

In conclusion, the Panel stated that there is no legal basis for China to invoke GATT Art. XX considering the wording and the context of paragraph 11.3 of the AP.[308] The Panel recognized that the export duties commitments assumed by China do not apply to any other WTO Members and the prohibition on the use of GATT Art. XX might create imbalance.[309] Yet, based on the text and the relevant context, the Panel assumed that this is the common intention of China and WTO Members to preclude the application of GATT Art. XX.[310]

ii. The AB Report

[302] *Id.* ¶ 7.154.

[303] *Id.* ¶ 7.153.

[304] *Id.* ¶ 7.154.

[305] *Id.* ¶¶ 7.156-7.157.

[306] *Id.* ¶ 7.156.

[307] *Id.* ¶ 7.157.

[308] *Id.* ¶¶ 7.158-7.159.

[309] *Id.* ¶ 7.160.

[310] *Id.* ¶ 7.160.

On appeal, China submitted several arguments and requested the AB to find that GATT Art. XX is an available defense.[311] Firstly, China argued that the exceptional circumstances clause in the Note to Annex 6 applies both to products listed in Annex 6 and those not listed.[312] Also, the scope of the exceptional circumstances clause substantively overlaps that of GATT Art. XX.[313] From this, China read that there is a shared intent of China and WTO Members that violation of export duties commitments can be justified by exceptional circumstances in GATT Art. XX.[314] However, this assertion was disapproved by the AB. The AB stated that the Note to Annex 6 applies only to products listed in Annex 6.[315] The Note sets out that "China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances."[316] The AB interpreted the Note to mean that China may increase the presently applied rates on the products listed in Annex 6 provided that there is an exceptional circumstance.[317] Also, the term "furthermore" in the second sentence of the Note suggests that the exceptional circumstances clause is a commitment that adds to the previous sentence, which provides that the tariff levels included in Annex 6 are maximum levels.[318] In the present case, except for

[311] Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶¶ 273-75, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012) [hereinafter China – Raw Materials AB Report].

[312] *Id*. ¶ 282.

[313] *Id*. ¶¶ 30, 282.

[314] *Id*. ¶ 282.

[315] *Id*. ¶ 284.

[316] China's AP, Note to Annex 6.

[317] China – Raw Materials AB Report, ¶ 284.

[318] *Id*. ¶ 287.

yellow phosphorus, none of the materials fall under Annex 6.[319] Accordingly, the AB denied China's assertion that the Note to Annex 6 enables GATT Art. XX's application.[320]

Secondly, China argued that GATT Art. XX is an available defense due to the reference to GATT Art. VIII in paragraph 11.3 of the AP.[321] China explained that violation of export duties commitments indicates a breach of paragraph 11.3 and GATT Art. VIII and violation of GATT Art. VIII can surely resort to GATT Art. XX.[322] Thus, China argued that the violation at issue can also be justified by GATT Art. XX. Relied on *China – Publications and Audiovisual Products*, China asserted that its right to resort to GATT Art. XX to justify violation of Art. VIII cannot be deprived because the complainants decide to raise this claim under paragraph 11.3. Also, China alleged that although Art. VIII does not directly regulate export duties, the reference to Art. VIII demonstrates that obligations under paragraph 11.3 is not absolute and unqualified.[323] Yet, this claim was repudiated by the AB. Pointing to the text of GATT Art. VIII, the AB underlined that Art. VIII applies to all fees and charges other than export duties.[324] Thus, export duties commitments fall outside the scope of GATT Art. VIII and violation of export duties commitments will not bring about any inconsistency with Art. VIII.[325] The AB further elucidated that under the context of paragraph 11.3 of the AP, GATT Art. XX can justify violation of GATT Art. VIII does not necessarily mean that GATT Art. XX can justify violation unrelated to Art. VIII, such as export duties.[326] Hence, looking into

[319] *Id.* ¶ 282.

[320] *Id.* ¶ 287.

[321] *Id.* ¶ 289.

[322] *Id.*

[323] *Id.*

[324] GATT art. III; China – Raw Materials AB Report, ¶ 290.

[325] China – Raw Materials AB Report, ¶ 290.

[326] *Id.*

the reference of GATT Art. VIII in paragraph 11.3, the AB concluded that with respect to violation of export duties commitments, GATT Art. XX cannot be invoked.[327]

To further reinforce this conclusion, the AB examined the context of paragraph 11.3.[328] As noted by the Panel, the AB made comparison between paragraph 11.1 and 11.2 and paragraph 11.3.[329] The AB noted that paragraph 11.1 and 11.2 contain the phrase, in conformity with the GATT, and whereas paragraph 11.3 makes no such reference.[330] In addition, the AB mentioned that the subject matters for paragraph 11.1, 11.2 and 11.3 are quite different.[331] Paragraph 11.1 regulates "customs fees and or charges" in general and paragraph 11.2 refers to "internal taxes and charges."[332] In contrast, paragraph 11.3 regulates elimination of "all taxes and charges applied to exports" specifically.[333] Given the different subject matters and nature of the obligations, the AB concluded that the absence of mentioning the GATT or GATT Art. XX in paragraph 11.3 leads to a reasonable assumption that GATT Art. XX is not an intended defense.[334] Moreover, considering the fact that export duties commitments arise exclusively from China' AP, instead of the GATT, the AB found it reasonable to assume that China and WTO Members could have referenced to GATT Art. XX if such defense had been intended.[335] Accordingly, the AB found support in the context of paragraph 11.3 for its conclusion that GATT Art. XX is not an applicable defense in the present case.

---

[327] *Id.* ¶ 291.

[328] *Id.* ¶ 292.

[329] *Id.* ¶ 293.

[330] *Id.*

[331] *Id.*

[332] China's AP, ¶¶ 11.1, 11.2; China – Raw Materials AB Report, ¶ 293.

[333] China's AP, ¶¶ 11.3; China – Raw Materials AB Report, ¶ 293.

[334] China – Raw Materials AB Report, ¶ 293.

[335] *Id.* ¶ 293.

Thirdly, China referred to paragraph 170 of the Working Party Report to show that it still retains the flexibilities contained in paragraph 170 in carrying out its obligations under export duties.[336] Paragraph 170 stipulates that China would ensure its laws and regulations relating to all charges and taxes levied on imports and exports would be in conformity with its WTO obligations.[337] In China's view, paragraph 170 confirms the availability of GATT Art. XX to justify violation of charges and taxes levied on imports and exports.[338] On appeal, China highlighted that the measures covered by section 11 of the AP considerably overlap the measures under paragraph 170 of the Working Party Report because both are under the title of "Taxes and Charges Levied on Imports and Exports."[339] Thus, China argued that the as GATT Art. XX can justify violation of obligations in paragraph 170, i.e. taxes and charges levied on imports and exports, such defense can also justify violation of export taxes and charges under paragraph 11.3 of the AP.[340]

However, the AB disagreed with China's allegation. The AB started with assessing the context of paragraph 170.[341] The AB examined the systemic position of paragraph 170 and found that it is situated under section IV "Policies Affecting Trade in Goods" and falls under a subsection D "Internal Policies Affecting Foreign Trade in Goods," among other subsections, i.e. A "Trading Rights," B "Import Regulation," C "Export Regulations."[342] The AB then looked into subsection D and found that there are only two paragraphs, paragraph 169 and 170.[343] Paragraph 169 expresses some Members' concern with the application of the value-

[336] *Id*. ¶ 294.

[337] Working Party Report, ¶ 170.

[338] China – Raw Materials AB Report, ¶ 294.

[339] *Id*. ¶ 296.

[340] *Id*.

[341] *Id*. ¶ 298.

[342] *Id*.

[343] *Id*.

added tax and additional charges levied by sub-national governments on imports and calls for non-discriminatory application of internal taxes.[344] Accordingly, the AB concluded that paragraph 170 aims at regulating internal policies affecting taxes and charges on imports and exports and additional charges levied by sub-national governments on imports and therefore paragraph 170 is of little relevance to the elimination of export duties under paragraph 11.3 of the AP.[345] The AB further explained that the elimination of export duties is established in paragraph 155 and 156 of the Working Party Report under the subsection C "Export Regulations" because their language is very similar to paragraph 11.3.[346] As paragraph 155 and 156 make no reference to the GATT or Art. XX, it further supports the AB's view that GATT Art. XX is not an available defense.[347]

Lastly, China reiterated that it enjoys an inherent right to regulate trade in a WTO-consistent manner.[348] Citing *China – Publications and Audiovisual Products*, China stated that to comply with WTO obligation, a Member can either invoke affirmative obligations or relevant exceptions.[349] Also, China emphasized that nothing in the AP or the Working Party Report indicate that it has abandoned its inherent right to regulate trade.[350] China contested that Panel's ruling renders an inherent right an acquired right. Furthermore, China claimed that the preambles of the WTO Agreement and the GATT signify that the WTO regime recognizes that Members have the right to promote fundamental non-trade interests, such as conservation and public health. Consequently, China stated that the Panel's denial of such

[344] *Id.* ¶¶ 169, 298.

[345] *Id.* ¶ 298.

[346] *Id.* ¶ 299.

[347] *Id.*

[348] *Id.* ¶ 300.

[349] *Id.*

[350] *Id.*

right distorts the balance of rights and obligations.[351] The U.S. countered that China has exercised its sovereign right when it made its commitments under paragraph 11.3.[352] In addition, the U.S. stated that if China can invoke GATT Art. XX in the present case, the introductory clause in paragraph 5.1 and the reference of the GATT in paragraph 11.1 and 11.2 would be superfluous.[353] The U.S. further asserted that the right to invoke GATT Art. XX in *China – Publications and Audiovisual Products* lies in the introductory clause of paragraph 5.1, rather than an abstract right to regulate trade.[354] Lastly, the U.S. supplemented that denying China the right to invoke GATT Art. XX in the present case would not deprive its right to pursue non-trade interests because China could resort to measures other than export duties to promote non-trade interests.[355]

The AB did not respond directly to China's assertion concerning the inherent right to regulate trade. Regarding China's allegation that the Panel distorted the balance of rights and obligations established in China's AP, the AB rejected such claim.[356] The AB noted that China based this contention on the preambles of the WTO Agreement and the AB recognized that the WTO Agreement read as a whole presents the balance between trade and non-trade.[357] Yet, the AB clarified that the objectives in the preamble of the WTO Agreement do not specify the applicability of GATT Art. XX in the present case.[358] Furthermore, the AB observed that, the AB in China – Publication relied on the reference to the WTO Agreement of introductory

[351] *Id.*

[352] *Id.* ¶ 301.

[353] *Id.*

[354] *Id.*

[355] *Id.*

[356] *Id.* ¶ 306.

[357] *Id.* ¶ 305.

[358] *Id.* ¶ 306.

clause to find that GATT Art. XX is applicable.[359] Thus, the AB emphasized that to invoke GATT Art. XX defense outside the context of the GATT, it is indispensable that GATT Art. XX is incorporated, by way of reference, into the violated provision at issue.[360] The AB also drew Art. 3 of the TRIMs Agreement as an example, which explicitly refers to GATT Art. XX as an available defense.[361] The AB placed great emphasis on the fact that paragraph 11.3 makes reference to GATT Art. VIII and leaves out GATT Art. XX or even the GATT.[362] The AB considered this provides clear evidence that GATT Art. XX was deliberately omitted from paragraph 11.3. Furthermore, paragraph 11.3 does not contain any language similar to the introductory clause of paragraph 5.1.[363] Thus, the AB concluded that GATT Art. XX is not an applicable defense in the present case because there is no textual link to GATT Art. XX or the GATT.[364]

Section 2 An Appraisal of *China – Raw Materials*

A. Setting Forth a General Rule

China – Raw Materials confirms a general rule on the application of GATT Art. XX in a non-GATT context. In contrast, the AB of *China – Publications and Audiovisual Products* approached the applicability issue with a narrow focus on paragraph 5.1 and did not use general language in its report. Thus, it was not certain if the reasoning in *China – Publications and Audiovisual Products* could be applied to violation of other non-GATT provisions. This doubt is surely cleared away when *China – Raw Materials* handles this matter with a broad

[359] *Id.* ¶ 304.

[360] *Id.* ¶ 303.

[361] Agreement on Trade-Related Investment Measures art. III, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement].

[362] China – Raw Materials AB Report, ¶ 303.

[363] *Id.* ¶ 304.

[364] *Id.* ¶ 306.

language. The Panel and the AB make clear with the general wording in their reasoning that the issue before them is whether GATT Art. XX can be applied to justify a violation of a provision falling outside the GATT.[365] Also, both the Panel and AB refer to general practice of cross-agreement application in the WTO to support their reasoning in this specific case.[366] Hence, *China – Raw Materials* sets forth an important guideline for future adjudicators in face of the issue of cross-agreement application.

China – Raw Materials lifts cloud of uncertainty from *China – Publications and Audiovisual Products* by confirming that the textual-link requirement is necessary for cross-agreement application.[367] In *China – Publications and Audiovisual Products*, while interpreting the introductory clause of paragraph 5.1 and especially the phrase "the right to regulate trade,"[368] the AB stated that WTO Members enjoy an inherent right to regulate trade and this right is not bestowed by any international treaty. In exercising this inherent right, WTO Members are obliged to act in accordance with the WTO disciplines, including GATT Art. XX. From this part of reasoning, some scholars and China interpreted that WTO Members can resort to GATT Art. XX outside the context of the GATT without any incorporation clause or reference.[369] To read otherwise would render an inherent right an acquired right. However, this reading of the AB report of *China – Publications and Audiovisual Products* was rejected by the Panel and the AB of *China – Raw Materials*; both observed that the AB of *China – Publications and Audiovisual Products* heavily relied on the text of the introductory clause of paragraph 5.1 in reaching its decision. The Panel and AB of *China – Raw Materials* mainly based their reasoning on the textual interpretation, too.

[365] China – Raw Materials Panel Report, ¶ 7.152.

[366] China – Raw Materials Panel Report, ¶ 7.153; China – Raw Materials AB Report, ¶ 303.

[367] Spiegel-Feld & Switzer, *supra* note 62, at 27.

[368] China's AP, ¶ 5.1.

[369] Pauwelyn, *Squaring Free Trade in Culture with Chinese Censorship*, *supra* note 162, at 136.

Consequently, the broad reading of *China – Publications and Audiovisual Products*, i.e. a broad application of GATT Art. XX, is rejected by *China – Raw Materials*.

B. Interpretation of Silence of Treaty – Lessons from *Argentina – Footwear*

Scholars argue that the Panel and AB neglect the ruling in *Argentina – Footwear*, which demonstrates that omission of a phrase does not necessarily mean such phrase is deliberately excluded. It was argued in *Argentina – Footwear* that whether the requirement of unforeseen development is expressly omitted in applying safeguard measures. This debate arises from the discrepancy between GATT Art. XIX:1(a) and the Safeguards Agreement, Art. 2.1 in particular. GATT Art. XI:1(a) governs "Emergency Action on Imports of Particular Products" and stipulates that "if, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."[370] Whereas, Art. 2.1 of the Safeguard Agreement provides conditions for applying safeguard measures, which reads "a Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or

[370] GATT art. XI:1(a).

directly competitive products."[371] Comparing these two articles, the Panel and AB found that the phrase "as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement" in GATT Art. XIX:1(a) was not mentioned in the Safeguards Agreement. With respect to this omission, the Panel and AB produced opposite interpretations.

The Panel of *Argentina – Footwear* considered that the criterion of unforeseen developments is expressly omitted in the Safeguards Agreement. The Panel reasoned that the Safeguards Agreement reflects the latest statement of WTO Members on the requirements of applying safeguard measures.[372] Also, the Panel found support from the object and purpose of the Safeguards Agreement.[373] The object and purpose of the Safeguards Agreement, as stated in its preamble, recognize that the Safeguards Agreement intends to clarify and reinforce the disciplines of GATT Art. XIX in particular and to re-establish multilateral control over safeguards.[374] Therefore, the Safeguard Agreements aims to re-establish a comprehensive set of rules on the application of safeguard measures.[375] From the preamble, the Panel concluded that the Safeguards Agreements intends to modify and refine GATT Art. XIX.[376] Hence, the omission of the unforeseen development criterion is a deliberate choice of the negotiators.[377]

However, the AB of *Argentina – Footwear* did not accept the Panel's reading of the omission. The AB stated that according to Art. II of the WTO Agreement, the GATT and the

---

[371] Agreement on Safeguards art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 [hereinafter Safeguards Agreement].

[372] Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, ¶ 8.58, WT/DS121/R (June 25, 1999) [hereinafter Argentina – Footwear Panel Report].

[373] *Id*. ¶¶ 8.61-8.62.

[374] Safeguards Agreement recital ¶ 2.

[375] Safeguards Agreement recital ¶ 4.

[376] Argentina – Footwear Panel Report, ¶ 8.62-8.63.

[377] *Id*. 8.66-8.67.

Safeguards Agreement both are integral part of the WTO Agreement.[378] Also, both the GATT and Safeguards Agreement enter into force at the same time.[379] As a consequence, the GATT Art. XIX and Safeguards Agreement should apply equally to WTO Members.[380] The AB also found support from Art. I and XI of the Safeguards Agreement. Art. I of the Safeguards Agreement states that Safeguards Agreement establishes rules for the application of safeguard measures, which shall be understood to mean those measures provided for in Article XIX of GATT 1994. The AB interpreted this provision to confirm that GATT Art. XIX is still in full force and establishes prerequisite requirements for safeguard measures.[381] Moreover, Art. XI of the Safeguards Agreement provides that a Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms to the provisions of that Article applied in accordance with this Agreement. From this provision, the AB confirms that safeguard measures should be taken in accordance with both GATT Art. XIX and the Safeguards Agreement.[382] Thus, GATT Art. XIX and the Safeguard Agreement should be read together as they represent an inseparable package of disciplines on safeguard measures.[383] Based on the interpretative principle of effectiveness, the AB concluded that all relevant treaty provisions should be given meaning to harmoniously.[384] Additionally, the AB asserted that if the drafters had intended to omit the unforeseen developments requirement, they would and could have said so in the Safeguards Agreement and they did not do so.[385] As no evidence indicates that GATT Art. XIX is entirely

[378] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, ¶ 81, WT/DS121/AB/R (Dec. 14, 1999) [hereinafter Argentina – Footwear AB Report].

[379] *Id.* ¶ 81.

[380] *Id.*

[381] *Id.* ¶ 83.

[382] *Id.*

[383] *Id.* ¶ 81.

[384] *Id.*

[385] *Id.* ¶ 88.

superseded by the Safeguards Agreement, GATT Art. XIX and the Safeguard Agreement should apply cumulatively.[386] Hence, the unforeseen developments criterion is not intentionally omitted as the Panel ruled in its report, but rather, it should still govern the application of safeguard measures.[387]

Baroncini and Gu find *Argentina – Footwear* supporting their argument that omission does not necessarily mean exclusion.[388] They rely on the reasoning of the AB report of *Argentina – Footwear*, which states that even if the requirement of unforeseen developments is omitted in the Safeguards Agreement, this does not mean the requirement is intentionally omitted and if the negotiators had intended to omit such requirement, it would have made that clear.[389] Baroncini and Gu believe the WTO judiciary should apply the same reasoning in *China – Raw Materials* when interpreting the treaty silence.[390] Thus, the omission of GATT Art. XX in paragraph 11.3 does not mean Art. XX is expressly excluded. If China and WTO Members had intended to exclude GATT Art. XX, they would have said so.[391] Liu also finds it more likely that if Chain and negotiating Members mean to prevent the invocation of GATT Art. XX, they would have said so.[392] Liu believes that if China and negotiating Members agree on such important preclusion of GATT Art. XX, it is unlikely that the preclusion is left unmentioned.[393] Also, Liu considered it unfeasible to insert the introductory clause of paragraph 5.1 in every paragraph of the AP.[394] Therefore, it would be more likely and possible

---

[386] *Id.* ¶ 89.

[387] *Id.* ¶ 97.

[388] Elisa Baroncini, *The Applicability of GATT Article XX to China's WTO Accession Protocol in the Appellate Body Report of the China-Raw Materials Case: Suggestions for a Different Interpretative Approach*, 1 CHINA-EU LAW J. 1, 21 (2013); Gu, *supra* note 47, at 10.

[389] Baroncini, *supra* note 388, at 21; Gu, *supra* note 47, at 10.

[390] Baroncini, *supra* note 388, at 21; Gu, *supra* note 47, at 10.

[391] Baroncini, *supra* note 388, at 21; Gu, *supra* note 47, at 10.

[392] Liu, *supra* note 47, at 153.

[393] *Id.*

[394] *Id.*

that if GATT Art. XX had been deliberately excluded, such exclusion would have been expressly stated in that paragraph.[395]

Baroncini and Gu also refer to reasoning in *Argentina – Footwear* that states the Safeguards Agreement and GATT are an integral part of the WTO Agreement and thus they constitute cumulative obligations.[396] Baroncini and Gu believe this reasoning is applicable in *China – Raw Materials* because the AP and GATT are an integral part of the WTO Agreement, too. Therefore, the AP and GATT should be read cumulatively and GATT Art. XX is an available defense.[397] In addition, Gu stated that cumulative reading is applicable among section 11 of the AP, too. As paragraph 11.1 and 11.2 contain the phrase "in conformity with the GATT 1994," paragraph 11.3 should be read cumulatively with its preceding paragraphs.[398] Hence, GATT Art. XX is an available defense. Unfortunately, the AB considered China's export duties obligations arise exclusively from its AP and not from the GATT, and therefore the AB assumed that if GATT Art. XX defense had been intended, such language would have included in paragraph 11.3 or the AP.[399] Baroncini and Gu criticizes this reasoning of the AB report for it disconnecting the AP from other WTO agreements.[400]

Even though not referring to *Argentina – Footwear*, similarly, Liu also proposes an argument that since the AP is an integral part of the WTO Agreement, it should be read together with the related agreements, the GATT in particular because paragraph 11.3 and the GATT both concern with the same subject matter, i.e. tariffs.[401] The lack of the phrase "in

---

[395] *Id.*

[396] Baroncini, *supra* note 388, at 21; Gu, *supra* note 47, at 10.

[397] Baroncini, *supra* note 388, at 21; Gu, *supra* note 47, at 10.

[398] Gu, *supra* note 47, at 11.

[399] China – Raw Materials AB Report, ¶ 293.

[400] Baroncini, *supra* note 388, at 21; Gu, *supra* note 47, at 9.

[401] Liu, *supra* note 47, at 155.

conformity with the WTO Agreement" in paragraph 11.3 does not mean that China does not need to comply with other WTO obligations or the GATT.[402] Liu further finds support in dispute settlement proceedings. Even though the AP does not mention its judiciability in the dispute settlement proceedings, all WTO Members agree that Members can initiate a dispute on the basis of violation in the AP. This is because the AP constitutes an integral part of the WTO Agreement and becomes part of the covered agreements.[403] Therefore, Liu suggests that the AP and the GATT should be read together and thus GATT Art. XX is an applicable defense.

This thesis observed some difficulties in applying the AB report of *Argentina – Footwear* to *China – Raw Materials*. In fact, it is not that straightforward as suggested by the scholars. The AB of *Argentina – Footwear* concluded that the Safeguards Agreement and the GATT Art. XIX create cumulative disciplines on safeguard measures for mainly three reasons: 1. the GATT and Safeguards Agreement are integral parts of the WTO Agreement pursuant to Art. II of the WTO Agreement;[404] 2. GATT Art. XIX and the Safeguards Agreement both relate to the same thing, i.e. the application of safeguard measures;[405] and 3. Art. I and XI of the Safeguards Agreement provides that safeguard measures should be applied in conformity with GATT Art. XIX and the Safeguards Agreement.[406] It should also be noted that the AB of *Argentina – Footwear* narrowly tailored its reasoning. The AB carefully stated that "GATT Art. XIX" should be read in conjunction with the Safeguards Agreement and apply cumulatively, instead of referring to "the GATT."[407]

---

[402] *Id.*

[403] *Id.*

[404] Argentina – Footwear AB Report, ¶ 81.

[405] *Id.*

[406] *Id.* ¶ 83.

[407] *Id.* ¶¶ 81-83.

With the above observations, one should apply the reasoning of *Argentina – Footwear* with caution. The first reason mentioned above appears itself in *China – Raw Materials* as paragraph 1.2 of the AP states that China's AP is an integral part of the WTO Agreement. The second reason is not directly demonstrated in *China – Raw Materials* because paragraph 11.3 and GATT Art. XX do not govern the same subject matter and thus it is hard to argue that they create an inseparable package of obligations. However, like Liu proposes, paragraph 11.3 and the GATT both concerns with tariffs.[408] Or, as proposed by Qin, China's export duties obligations are intrinsically related to export restrictions obligations under the GATT.[409] Therefore, this thesis proposes that when the AP obligations are related to or built upon the GATT obligations, the AP should be read together with the relevant obligations in the GATT, including its exceptions. This thesis argues that being an integral part of the WTO Agreement is not enough to confirm the applicability of GATT Art. XX because it would open the door too wide that all non-GATT covered agreements can resort to GATT Art. XX, which would seriously contradict with the text of GATT Art. XX and the intent of the drafters. Hence, this thesis proposes that GATT Art. XX is applicable when the infringed AP obligations are intrinsically related to or built upon the GATT obligation.

One might argue that this proposal also contradicts with the text of GATT Art. XX, which clearly states that GATT Art. XX can only justify violation under the GATT. Yet, this is not absolute and the AB report of *China – Publications and Audiovisual Products* is a case in point.[410] Instead of rigid textual linkage requirement set forth by *China – Raw Materials*, this thesis suggests a requirement of contextual linkage. Compared with some scholars' arguments, which put forth that GATT Art. XX is an available defense because the AP is an integral part

[408] Liu, *supra* note 47, at 155.

[409] Qin's proposal will be explained in detail later.

[410] A more detailed discussion on this point is provided in Section 3 of Chapter 3.

of the WTO Agreement, meaning that any non-GATT and irrelevant to GATT violation can be justified by GATT exceptions, the viewpoint proposed by this thesis will greatly mitigate the conflict derived from the text of GATT Art. XX, i.e. the reference to "this Agreement" because it still respects the text of GATT Art. XX and the drafters' intent by allowing recourse to GATT Art. XX when the breached AP obligations are contextually connected to the GATT.

C. An Unsatisfying Response to China's Argument on the Inherent Right

With respect to China's arguments concerning the inherent right to regulate trade, the Panel responded that China has exercised its inherent right to regulate trade when negotiating and ratifying the terms of accession.[411] The Panel further clarified that China's inherent and sovereign right to regulate trade enables it to negotiate and agree with the conditions set forth in paragraph 11.3 of the AP.[412] Thus, the Panel concluded that there is no contradiction between China's sovereign right to regulate trade, the rights acquired, and the commitments under the AP.[413]

It is difficult to see the causal link between the Panel's reasoning and its conclusion. Having exercised its inherent right to regulate trade in joining the WTO does not mean that China thus loses its inherent right to regulate trade in accordance with GATT Art. XX afterwards. The other possible reading of the Panel's reasoning is that the Panel considered China has negotiated away its inherent right to regulate trade when consenting to the terms in paragraph 11.3. Nevertheless, the Panel's reasoning is questionable in that the Panel reached this merely from the silence of the treaty. To abandon an inherent, sovereign right requires more than just silence of the treaty. The renouncement of sovereign rights can only be

[411] China – Raw Materials Panel Report, ¶¶ 7.156-7.157.

[412] *Id.*

[413] *Id.*

confirmed with explicit treaty terms.[414] Since there is no positive evidence confirming that China has abandoned its inherent right to regulate trade during the negotiation, China still retains its inherent right to regulate trade pursuant to GATT Art. XX.

On appeal, the AB did not comment on this part of the Panel report and did not respond to China's argument concerning the inherent right.[415] When referring *to China – Publications and Audiovisual Products* and explaining GATT Art. XX,[416] the AB refrained from mentioning or using the term "inherent right."[417] Instead, the AB emphasized that to enable GATT Art. XX defense, it is imperative to show a textual link between the GATT and the AP. It seems that the AB is afraid to recognize the inherent right to regulate trade because this might invite the argument that GATT Art. XX is a general defense, a defense that can justify any non-GATT violation without any textual incorporation.[418] Accordingly, the AB of *China – Raw Materials* did not provide a satisfying response to China's inherent right arguments.

D. A Failed Attempt to Pursue a Correct Contextual Interpretation

The interpretation approach taken by the Panel and AB in *China – Raw Materials* is not much different from the AB report of *China – Publications and Audiovisual Products*. Even though the Panel and AB of *China – Raw Materials* intended to bring in relevant contexts to support its textual interpretation, their reports are still largely dominated by a narrow textual interpretation. This is rather disappointing because in the beginning of its

[414] Gu, *supra* note 47, at 22.

[415] Spiegel-Feld & Switzer, *supra* note 62, at 27.

[416] China – Raw Materials AB Report, ¶ 304

[417] Spiegel-Feld & Switzer, *supra* note 62, at 27.

[418] *Id.*; Tyagi, *supra* note 18, at 408.

report the Panel correctly identified the crux of the issue.[419] The Panel pointed out that this issue involves the legal status of the AP within the WTO Agreement and the relationship between different legal instruments within the WTO legal and institutional framework, in particular paragraph 11.3 of the AP and other provisions of the WTO Agreement.[420] After asking the right questions, the Panel identified the interpretative method applied by the AB of *China – Publications and Audiovisual Products*. The Panel observed that the AB of *China – Publications and Audiovisual Products* did not discuss the systemic relationship between provisions of the AP and GATT, but rather focused on the text of paragraph 5.1 and its surrounding context.[421] This flow of reasoning seems to suggest that the Panel have recognized the flaw in the previous case and planned to take a different route. Disappointingly, the Panel did not take a different approach and did not clearly address these questions, either. Rather, the Panel applied a narrow textual interpretation, as the AB of *China – Publications and Audiovisual Products* did, with a limited analysis of context. This textual approach was later confirmed by the AB. Accordingly, the WTO judiciary misses a chance to supplement its prior decisions and future adjudicators are likely to resort to textual analysis when dealing with cross-agreement application in the WTO.[422]

The Panel and AB conducted a limited contextual analysis, which is insufficient to solve this cross-agreement-application predicament. The Panel and AB only assessed a few paragraph in the AP and China's Working Party Report as context.[423] Moreover, while examining relevant context in the WTO Agreements, they both performed a narrow contextual analysis without taking account of the broad systemic structure of the WTO Agreements.

[419] Tyagi, *supra* note 18, at 405.

[420] China – Raw Materials AB Report, ¶ 7.116.

[421] *Id*. ¶ 7.117.

[422] Spiegel-Feld & Switzer, *supra* note 62, at 27.

[423] Julia Ya Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, 11 CHIN. J. INT. LAW 237, 241 (2012).

They found that some WTO Agreements contain their own exceptions and TRIMs Art. III specifically makes reference to GATT Art. XX. Under this contextual finding, they ruled that GATT Art. XX is not a general exception for a non-GATT violation in principle unless it is incorporated by the text of the infringed provision. This contextual interpretation is too narrow to solve a systemic issue like this. The present issue requires a broad assessment of the WTO Agreements and reading the WTO Agreements as a whole because it concerns cross-agreement application. The WTO judiciary should address the systemic relationship between the AP and the GATT, GATT Art. XX in particular. Specifically, a close scrutiny should be directed to the systemic position of paragraph 11.3 of the AP. Thus, the Panel and AB's contextual approach is too narrow and limited to correctly handle this issue.

i. Context in Paragraph 11.3 of China's Accession Protocol

The contextual interpretation made by the Panel and AB is flawed with ill-grounded reasoning.[424] The Panel and AB first looked into the context provided in paragraph 11.3 and found that the paragraph contains its own specific exceptions, i.e. Annex 6 and GATT Art. VIII. More importantly, they observed that paragraph 11.3 explicitly mentions GATT Art. VIII but leaves out GATT Art. XX.[425] In assessing the applicability of GATT Art. XX, the Panel employed the general legal canon of construction, i.e. *expressio unius est exclusio alterius*, which means that the expression or inclusion of one thing implies the exclusion of another.[426] Thus, the Panel and AB attached significant importance to this omission and considered the

[424] Liu, *supra* note 47; Gu, *supra* note 47; Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423.

[425] China – Raw Materials Panel Report, ¶ 7.129; China – Raw Materials AB Report, ¶¶ 291, 303.

[426] China – Raw Materials Panel Report, ¶ 7.129 n.178.

omission a deliberate choice of China and WTO Members to exclude invocation of GATT Art. XX.[427]

This absence-equates-waiver approach is problematic, especially for the applicability issue. The absence of a treaty term does not necessarily mean that such term is unequivocally excluded. The absence might be because that achieving non-trade policy objectives under the AP never crossed the mind of the negotiators and therefore paragraph 11.3 only includes directly related exceptions, i.e. 84 items listed in Annex 6 and payment for service rendered under GATT Art. VIII. Or, the absence may still imply something and this concept is confirmed by the AB in *U.S. – Carbon Steel*. The AB in *U.S. – Carbon Steel* observed that "the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement. Such silence does not exclude the possibility that the requirement was intended to be included by implication."[428] At least, the silence should not be interpreted in a way that makes China's export duties commitments the most stringent and scared obligation in the WTO.[429] Applying the doctrine of *expressio unius est exclusio alterius* in the present issue is likely to bind China with judicial-made obligations that it did not expressly accept and might not have been willing to accept.[430] Besides, the Panel and AB did not provide any reasonable explanation for adopting the absence-equates-waiver approach.[431] Accordingly, interpreting treaty silence in the present case via the doctrine *expressio unius est exclusio alterius* is debatable.

---

[427] *Id*. ¶ 7.129; China – Raw Materials AB Report, ¶ 303.

[428] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶65, WT/DS213/AB/R (Nov. 28, 2003) [hereinafter U.S. – Carbon Steel AB Report].

[429] Baroncini, *supra* note 388, at 18.

[430] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 241; RICHARD K. GARDINER, TREATY INTERPRETATION 145, 147 (2008).

[431] The reasons provided by the Panel and AB are unsustainable, which will be explained later.

Furthermore, scholars pointed out that the absence-equates-waiver interpretation seems to disconnect obligations under the AP from those under the GATT.[432] The Panel's and AB's reasoning appears to suggest that only the obligations expressed in the paragraph 11.3 will govern China. This reading will lead to an absurd result that fundamental obligations in the GATT, such as most-favored-nation treatment and national treatment, will not apply because they are not expressed in paragraph 11.3. This is not in line with the concept that the WTO obligations constitute a single undertaking and nor is it compatible with paragraph 1.2 of the AP, which provides that China's AP is an integral part of the WTO Agreement.

In addition, scholars observed that the interpretation in *China – Raw Materials* seems to contradict with that in *China – Publications and Audiovisual Products*. In *China – Publications and Audiovisual Products*, China intended to invoke GATT Art. XX to justify violation of paragraph 5.1 of the AP. Paragraph 5.1 of the AP also provides a specific set of exceptions, i.e. Annex 2A and 2B. The U.S. in that case proposed that China could only resort to the self-contained exceptions, instead of GATT Art. XX and this allegation was rejected by the AB back then. However, in *China – Raw Materials*, a specific set of exceptions leads the Panel and AB to conclude that China can only invoke the expressed exceptions, i.e. Annex 6 and GATT Art VIII, but not GATT Art. XX. The AB's reasoning in these two cases appears to contradict each other.[433]

ii. Context in Paragraph 11.1 and 11.2 of China's Accession Protocol

The Panel and AB then examined the immediate context of paragraph 11.3, i.e. paragraph 11.1 and 11.2. They observed that paragraph 11.1 and 11.2 both contain the phrase "in conformity with the GATT 1994" and in contrast such phrase does not appear in paragraph

[432] Gu, *supra* note 47, at 18–19.

[433] *Id.* at 19.

11.3. Based on the interpretative principle of effectiveness, which requires interpreters should give meaning to each word of a treaty, comparing with paragraph 11.1 and 11.2, the Panel and AB read the omission of "in conformity with the GATT 1994" in paragraph 11.3 as a deliberate choice of China and WTO Members.[434]

However, this reasoning is incorrect. The omission cannot infer that China and WTO Members decided to renounce the right under GATT Art. XX. It is only normal that such phrase is not written into paragraph 11.3 because there is no general obligation under the GATT regulating export duties.[435] The Panel and AB also recognized that China's export-duty commitments exclusively arise from China's AP.[436] While on the contrary, paragraph 11.1 and 11.2 built upon the general obligations under the GATT and thus paragraph 11.1 and 11.2 make reference to the GATT to reassure the general obligations under the GATT are respected and followed. Hence, the absence of a textual reference to the GATT in paragraph 11.3 does not mean that GATT Art XX is deliberately denied. Furthermore, Section 5 of the AP also supports this reading. Paragraph 5.1 begins with an introductory clause "without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement," whereas such clause does not exist in paragraph 5.2. It would be absurd to conclude that GATT Art. XX is only available to paragraph 5.1 but not 5.2 because paragraph 5.2 is an extended obligation from paragraph 5.1.[437] Accordingly, the absence of a reference to the GATT does not necessarily mean GATT Art. XX is deliberately rejected.

The Panel further reasoned that if China and WTO Members had wanted GATT Art. XX to be an available defense in the paragraph 11.3, they could have made China's export

[434] China – Raw Materials Panel Report, ¶ 7.138; China – Raw Materials AB Report, ¶ 293.

[435] LESTER ET AL., *supra* note 56, at 258; Baroncini, *supra* note 388, at 22.

[436] China – Raw Materials Panel Report ¶ 7.142; China – Raw Materials AB Report, ¶ 293.

[437] This argument is discussed in B, Section 3, Chapter 5. Gu, *supra* note 47, at 17.

duties commitments an integral part of the GATT.[438] For instance, the Panel suggested that WTO Members could have incorporated China's export duties obligations into China's GATT Schedule and in that case, GATT Art. XX is an available defense.[439] This reasoning was not mentioned by the AB on appeal.

Liu opposes to the Panel's suggestion because Liu observes that GATT Schedule is comprised of import-related obligations, instead of exports.[440] Liu explains that in general, Members' Schedules contain a list of commitments on market access, such as bound tariff rates and access to services markets. It is pertinent to imports and not exports. Each Member's Schedule consists of four parts: 1. most-favoured-nation concessions, maximum tariffs to goods from other WTO members; 2. preferential concessions (tariffs relating to trade arrangements listed in GATT Article I); 3. concessions on non-tariff measures; and 4. specific commitments on domestic support and export subsidies on agricultural products.[441] Liu does not think China's export duties commitments belong to any of these categories and thus cannot be included in the GATT Schedule.[442]

Differently, Qin comments that China should have incorporated its export duties commitments into its GATT Schedule.[443] Qin considers that commitments on tariff reduction should be included in the Schedule.[444] Yet, Qin does not reject the applicability of GATT Art. XX because China's export duties commitments are not listed in its GATT Schedule. Qin observes that in practice, export-duty commitments have not been incorporated into Members'

---

[438] China – Raw Materials Panel Report, ¶ 7.140.

[439] *Id.*

[440] Liu, *supra* note 47, at 154.

[441] *Schedules of Concessions on Goods*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm (last visited June 26, 2013).

[442] Liu, *supra* note 47, at 154.

[443] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 245.

[444] *Id.*

GATT Schedule.[445] Until recently, Russia breaks this practice and creates a new precedent. In Russia's GATT Schedule, there are extensive commitments on export-duty. Thus, following the Panel's reasoning, Qin concludes that Russia is entitled to GATT Art. XX defense if violation of its export-duty obligations occurs.[446]

This thesis finds it hard to conclude that because China's export-duty commitments are not included in its GATT Schedule, it can be inferred that WTO Members intended to exclude the applicability of GATT Art. XX. It seems more likely that, as proposed by Liu, export-duty commitments do not fit into any of those categories in the GATT Schedule and thus China and WTO Members placed them under the AP. The reason that Russia's export-duty obligations are situated under Russia's GATT Schedule is neither because of an established practice in the WTO nor an understanding that obligations included in the GATT Schedule enjoy GATT Art. XX defense whereas others do not. Rather, it is because of ruling of *China – Raw Materials* and Russia tries to secure its access to GATT Art. XX. It cannot be concluded that China's placement of export duties commitments is an express intent of WTO Members to exclude the application of GATT Art. XX, especially given that China is the first acceding Member that agrees to so many unprecedented obligations. This thesis also notices that Members' schedules of concessions are either annexed to the Marrakesh Protocol to the GATT or annexed to a Protocol of Accession.[447] Thus, the Panel's reasoning will lead to an unreasonable result that Members who annex their schedules of concessions to the GATT are entitled to GATT Art. XX defense while Member who annex their schedule of concessions to their AP are not. Accordingly, whether GATT Art. XX is an applicable defense should not

[445] *Id.*

[446] *Id.*

[447] *Schedules of Concessions on Goods*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm (last visited June 26, 2013).

depend on the placement of the obligations, but the nature and characteristics of the obligations.

iii. Context in China's Working Party Report

After reviewing the immediate context of paragraph 11.3 of the AP, the Panel and AB turned to the context in China's Working Party Report. China asserted that paragraph 170 of the Working Party Report and paragraph 11.3 of the AP fall under the same subtitle, "Taxes and Charges Levied on Imports and Exports" and therefore paragraph 170 should cumulatively apply to China's export duties obligations.[448] As paragraph 170 stipulates that all Chinese laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, China contended that it can invoke GATT Art. XX for inconsistency with export duties commitments under paragraph 11.3.[449]

Nevertheless, the Panel and AB rejected this allegation. The Panel and AB reasoned that the subject matter governed under paragraph 170 of the Working Party Report is different from that under paragraph 11.3 of the AP.[450] The Panel and AB reports seem to suggest that China's export duties commitments under paragraph 11.3 of the AP are exclusively governed by paragraph 155 and 156 of the Working Party Report, not paragraph 170.[451] The Panel and AB found support from the systemic position of paragraph 155 and 156 and paragraph 170. Paragraph 155 and 156 is placed under 1. "Customs Tariffs, Fees and Charges for Services Rendered, Application of Internal Taxes to Exports" of subsection C "Export Regulations," while paragraph 170 is situated under 1. "Taxes and Charges Levied on Imports and Exports"

[448] China – Raw Materials AB Report, ¶ 296.

[449] *Id*.

[450] *Id*. ¶¶ 112-113; China – Raw Materials Panel Report, ¶¶ 7.141-7.143.

[451] Gu, *supra* note 47, at 12.

of subsection D "Internal Policies Affecting Foreign Trade in Goods." Hence, in the viewpoint of the Panel and AB, export duties commitments fall under paragraph 155 and 156 and therefore paragraph 170 is not applicable. This reasoning appears to suggest that the scope of paragraph 155 and 156 and that of paragraph 170 are mutually exclusive.[452] Following this line of thought, once a measure is defined as an export regulation under subsection C, it cannot constitute an internal policy affecting foreign trade in goods under subsection D at the same time.

Yet, this mutually exclusive theory seems untenable as it is hard to reconcile with the fact that when drafting the AP, China and WTO Members decided to place export duties commitments under the title of "Taxes and Charges Levied on Imports and Exports." They might have recognized that export duties commitments share a common ground with paragraph 170 and constitute a part of "Taxes and Charges Levied on Imports and Exports."[453] In addition, a subject matter may be governed under two sections simultaneously due to different regulatory aspects and this does not mean they are two different things.[454] As suggested by the titles, it is more likely that subsection C aims to center on export regulations while subsection D means to deal with internal policies affecting both imports and exports. The scope of subsection C may overlap that of subsection D.[455] In the present case, both paragraph 155 and 156 and paragraph 170 should apply to measures on export duties.[456]

The AB further observed that the subject matter of paragraph 170 is informed by paragraph 169.[457] Paragraph 169 expresses Members' concerns about the application of the

[452] *Id.*

[453] *Id.*

[454] Liu, *supra* note 47, at 154.

[455] Gu, *supra* note 47, at 12.

[456] *Id.* at 20.

[457] China – Raw Materials AB Report, ¶ 298.

value-added taxes and additional charges levied by sub-national governments on imports. The AB thus tried to confine the scope of paragraph 170 to the concerns in paragraph 169.[458] The AB report seems to suggest that paragraph 170 actually governs internal policies affecting the application of value-added tax and additional charges levied by sub-national government on imports. Obviously, this reading is at odd with the inclusive language of paragraph 170. Paragraph 170 clear sets out the subject matters, i.e. all fees, charges or taxes levied on imports and exports. It does not limit its application to value-added tax and additional charges levied by sub-national government on imports. Rather, noting the concerns in paragraph 169, paragraph 170 aims to reinforce that the GATT should have effect throughout China's laws and regulations relating to all fees, charges or taxes levied on imports and exports.[459]

The Panel also examined paragraph 164 and 165 of the Working Party Report and found that these two paragraphs specifically refers to justification under the GATT when regulating the use of quantitative restrictions on exports. From this context, the Panel concluded that GATT Art. XX is not an available defense for export duties commitments due to the absence of such reference.[460] The Panel's contextual reading is likely to lead to an undesired result. This reading seems to suggest that China should have employed export quotas or licenses, instead of export duties. At least, China would still retain the right to GATT Art. XX. Yet, this implication is at odd with the value of the WTO.[461] The WTO prefers the application of export duties over export quotas and licenses because export quotas and licenses are more trade restrictive and less transparent. Thus, export quotas and licenses are prohibited in general unless it is applied in conformity with GATT Art. XI:2 or Art. XX.[462]

---

[458] Gu, *supra* note 47, at 12–13.

[459] *Id.* at 13.

[460] China – Raw Materials Panel Report, ¶ 7.146.

[461] Gu, *supra* note 47, at 14.

[462] GATT art. XI:1.

On the contrary, there are no disciplines regulating export duties. The Panel's reasoning seems to force China to adopt export quotas and export licenses, the most trade-obstructing and distorting measures, to achieve public policies.[463] This contextual analysis obviously runs afoul of the value of the WTO.

iv. Context in Other Provisions of the WTO Agreements

After the examination of the context in the Working Party Report, the Panel and AB considered the context provided by other provisions of the WTO Agreement. China proposed that the WTO Agreements and the AP should be read together and thus China still remains the right to regulate trade in compliance with GATT Art. XX while abiding its obligations under the AP. Yet, the Panel rejected this argument and stated that "there are no general umbrella exception in the Marrakesh Agreement."[464] The Panel further explained that each WTO agreement provides its own set of exceptions available for the specific obligations in that agreement and made an example out of Art. XIV of the GATS, TRIPS, TBT and SPS.[465] This is confirmed by the language under GATT Art. XX, which reads "nothing in this agreement (namely, the GATT) should be construed to prevent the adoption or enforcement . . . ." The Panel and AB observed that on occasion GATT Art. XX is incorporated by cross-reference into other covered agreements.[466] They referred to Art. III of the TRIMs as an example.[467] Thus, the Panel and AB set forth that for China to invoke exceptions contained in a different agreement, such exceptions must be explicitly referred to.[468]

[463] Qin, *The Challenge of Interpreting "WTO-PLUS" Provisions*, *supra* note 14, at 158; Baroncini, *supra* note 388, at 17.

[464] China – Raw Materials Panel Report, ¶ 7.150.

[465] *Id*. ¶¶ 7.150, 7.153.

[466] *Id*. ¶ 7.153; China – Raw Materials AB Report, ¶ 303.

[467] China – Raw Materials Panel Report, ¶ 7.153; China – Raw Materials AB Report, ¶ 303.

[468] Spiegel-Feld & Switzer, *supra* note 62, at 26.

This reasoning demonstrates that the Panel overlooked the substantive differences between the AP and WTO covered agreements. Each WTO covered agreement stipulates a specific area of trade and contains a coherent set of rules and thus it can provide its own set of exceptions. On the contrary, the AP regulates subject matters across various areas of the WTO regime.[469] This is the reason that the AP does not and cannot provide a specific set of exceptions.[470] As a result, the fact that each covered agreement contains an own set of exceptions does not necessarily mean there are no general umbrella exceptions in the WTO. The lack of a set of exceptions in the AP does not block China from invoking GATT Art. XX.[471]

In fact, a clear reference to the GATT under paragraph 11.3 is not needed because acting in accordance with the WTO Agreements is already implied in the AP. When a country accedes the WTO, it is self-evident that it should act in accordance with the WTO Agreements. Such underlying understanding does not need repeating in every paragraph of its AP.[472] That is, although paragraph 11.3 does not make reference to the WTO Agreement, it does not mean that China can disobey the most-favored-nation treatment or national treatment under the GATT. This confirms that the WTO Agreements, including the AP, creates a cumulative obligation in its single undertaking and thus should be interpreted as a whole in a coherent and harmonious manner.[473] As a result, China does not need an explicit reference of the GATT in paragraph 11.3 to invoke GATT Art. XX.

E. Overlooking the Object and Purpose

[469] Gu, *supra* note 47, at 21.

[470] Liu, *supra* note 47, at 155.

[471] Gu, *supra* note 47, at 21.

[472] Liu, *supra* note 47, at 152–53.Liu 152-53

[473] Argentina – Footwear AB Report.

The Panel of *China – Raw Materials* failed to examine the object and purpose in its assessment of the applicability issue and the AB did not provide a satisfying interpretation, either. On appeal, China referred to the preamble of the WTO Agreement, GATT, SPS Agreement, TBT Agreement, Import Licensing Agreement, GATS and TRIPS Agreement to prove that while pursuing trade facilitation, the WTO still respects Members' choice to promote non-trade-related interests. Therefore, China opposed the rebuttable presumption established by the Panel that China's had abandoned its right to promote non-trade interests.[474]

In response, the AB recognized that the preamble of the WTO Agreement enumerates various non-trade objectives of the WTO Agreement, including protection of environment, optimal use of the world's resources in accordance with sustainable development and promotion of standards of living.[475] The AB agreed that the WTO Agreement as a whole reflects the balance between trade and non-trade interests struck by Members. However, the AB stated that the objectives listed in the preamble and the balance between trade and non-trade concerns do not provide specific guidance on the applicability of GATT Art. XX in the paragraph 11.3 of the AP.[476] Accordingly, the AB did not find any useful materials from the object and purpose of the WTO Agreement for the purpose of interpretation.

The AB's reasoning receives positive and negative responses from the academia. Feld and Switzer agree with the AB's reasoning that the balance struck in the preamble of the WTO Agreement does not provide specific guidance to the present issue.[477] They do not find any concrete evidence that indicates Members' desire to allow GATT Art. XX defense in the

[474] China – Raw Materials AB Report, ¶ 305.

[475] *Id*. 306.

[476] *Id*.

[477] Spiegel-Feld & Switzer, *supra* note 62, at 28.

AP.[478] Moreover, they think that allowing the availability of GATT Art. XX will offset "the balance that the members could most reasonably be believed to have chosen for themselves."[479] Feld and Switzer applaud the AB's reasoning for it avoiding any over-reaching interpretation and charge of judicial activism.[480] They share the AB's view that the WTO judiciary should not read something into the text of the WTO arrangements that simply is not there.[481]

On the contrary, the AB's analysis on the object and purpose of the WTO Agreement receives some criticisms. Qin considers the AB misunderstood the role of object and purpose in treaty interpretation.[482] Qin explains that the object and purpose of a treaty can never provide "specific guidance" on a particular issue because objectives of a treaty are quite broad and general. This is the reason why VCLT Art. 31(1) stated that a treaty shall be interpreted . . . in the "light" of its object and purpose, instead of in specific guidance of its object and purpose. Qin concludes that the AB's interpretation on object and purpose of the WTO Agreement effectively degraded the interpretative element of "object and purpose" to futility.

Gu criticizes AB's reasoning on object and purpose as well and provides suggestions on the analysis of object and purpose in *China – Raw Materials*. Gu starts with examining the content of GATT Art. XX and observes that Art. XX serves a fundamental position within the WTO regime because it preserves Members' inherent rights to balance trade and non-trade interests and codifies two major objectives of the WTO Agreement.[483] Gu finds it hard to

---

[478] *Id.*

[479] *Id.*

[480] On the contrary, Julia believes the WTO judiciary should be more active because it is unrealistic to expect the WTO legislative branch to clarify the relationship between the various WTO agreements. Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 298–99.

[481] Spiegel-Feld & Switzer, *supra* note 62, at 28.

[482] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 243; Gu, *supra* note 47, at 22.

[483] Gu, *supra* note 47, at 21.

identify the object and purpose of the AP, and therefore resorts to the general object and purpose of the WTO Agreement.[484] From the preamble of the WTO Agreement, Gu discovers that besides the objective of trade facilitation, the WTO regime aims to protect environment and promote sustainable development.[485] Gu thus disagrees with the AB's reasoning that the objectives of the WTO Agreement can never provide specific guidance and comments that the AB wrongfully limited its examination of object and purpose of the WTO Agreement to those that can provide specific guidance on the applicability matter.[486]

Baroncini also provides suggestions on the assessment of object and purpose. Baroncini observes that the preamble of the WTO Agreement stipulates the object and purpose of the WTO, which characterize the whole WTO mechanism.[487] The preamble makes clear that trade facilitation is not the only goal pursued in the WTO and nor is it absolute.[488] Rather, Baroncini perceives the preamble to denote that trade facilitation is served as a tool to raise standards of living, to preserve environment and to promote sustainable development.[489] This value of the WTO is specifically codified in the general exceptions clauses.[490] The AP, as an integral part of the WTO Agreement, should be interpreted in line with this value of the WTO.[491] Thus, Baroncini does not consider that the silence of paragraph 11.3 denotes China's renouncement of its regulatory right to promote conservation of natural resources, environmental protection and public health, when accepting the WTO-plus obligations on

[484] *Id.* at 22.

[485] *Id.* at 21–22.

[486] *Id.* at 22.

[487] Baroncini, *supra* note 388, at 23.

[488] *Id.*

[489] *Id.*

[490] *Id.*

[491] *Id.* at 24.

export duties.[492] Instead, Baroncini advances that in order to pursue the goal of sustainable development enshrined in the preamble of the WTO Agreement, GATT Art. XX should be an applicable defense against violation of WTO-plus obligations in China's AP.[493]

This thesis agrees that the AB wrongfully conducted its assessment on the object and purpose of the WTO Agreement. The object and purpose analysis is not an independent means of treaty interpretation.[494] It serves to confirm the interpretation derived from the ordinary meaning and to ensure that practical effects of a treaty will not be diminished.[495] Object and purpose assume a supplementary role in treaty interpretation because objectives or goals of a treaty are usually quite broad and vague and do not include substantive obligations. This nature makes it hard to act as an independent interpretative factor in the operation of treaty interpretation.[496] Thus, it is unrealistic to expect the object and purpose of a treaty to provide an answer to a specific interpretive issue. This thesis agreed with scholars' criticism that the AB falsely expected the objectives of the WTO Agreement can provide specific answer to the applicability issue.[497] The objectives of the WTO Agreement cannot provide a yes or no answer to the applicability of GATT Art. XX in the AP, and nor can these objectives affirmatively accrue a right to invoke GATT Art. XX to China. Rather, this thesis proposes that the objectives of the WTO Agreement, as an indicator of the value of the WTO, should serve as a confirmation of contextual interpretation. That is, whether the contextual interpretation of paragraph 11.3 is in line with or hinder the objectives of the WTO Agreement

[492] *Id.*

[493] *Id.*

[494] ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES - THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 203 (2007).

[495] GARDINER, *supra* note 430, at 190; DÈORR & SCHMALENBACH, *supra* note 191, at 545.

[496] GARDINER, *supra* note 430, at 190.

[497] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 243.

and the AP.[498] This approach is also advanced by Qin in interpreting WTO-plus obligations.[499] Thus, this thesis's proposal on the examination of object and purpose is slightly different from the scholars mentioned above.

F. Consequences of the Narrow Textual Interpretation

The Panel and AB shrunk back into their comfort zone and conducted a rigid textual analysis on this matter. Hence, as in *China – Publications and Audiovisual Products*, *China – Raw Materials* is mostly criticized for applying a rigid textual interpretation and failing to take account of the broad context and the object and purpose of paragraph 11.3 of the AP and the WTO Agreement. Following *China – Publications and Audiovisual Products*, the Panel and AB emphasized that for GATT Art. XX to be an available exception to violation of paragraph 11.3, Art. XX or the GATT must be incorporated by reference into paragraph 11.3, like the introductory clause of paragraph 5.1.[500] They cited Art. 3 of the TRIMs as an example, which provides that "all exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement."[501] It can be inferred that anything short of such clear textual link would render GATT exceptions unavailable.

In fact, Gu observes that there is a textual link in *China – Raw Materials*. Gu considers paragraph 1.2 of China's AP gives the same effects to paragraph 11.3 as the introductory clause of paragraph 5.1 does to paragraph 5.1.[502] Gu explains that paragraph 1.2 states that China's AP is an integral part of the WTO Agreement, and this denotes that while observing the obligations in paragraph 11.3 of its AP, China should also abide by the WTO

[498] A detailed application of this approach is elaborated in the later part.

[499] Qin, *The Challenge of Interpreting "WTO-PLUS" Provisions*, *supra* note 14.

[500] China – Raw Materials AB Report, ¶¶ 303, 304.

[501] *Id*. ¶ 303; TRIMS Agreement art. III.

[502] Gu, *supra* note 47, at 21.

Agreement.[503] It seems that Gu advances that being an integral part of the WTO Agreements means AP should be applied along with the WTO Agreements. Hence, GATT Art. XX is applicable to paragraph 11.3. However, the WTO judiciary reads paragraph 1.2 differently. The WTO judiciary considers paragraph 1.2 a confirmation that China's AP is legally binding as the WTO Agreements, rather than a textual link between the AP and the WTO Agreements.[504]

This thesis finds the Panel and AB's cross-reference questionable. In order to further support the textual linkage requirement, the Panel and AB made cross-reference to the introductory clause of paragraph 5.1 of China's AP and paragraph 11.1 and 11.2 of China's AP. The Panel and AB put forth that for China to invoke GATT Art. XX in paragraph 11.3, there should be a clause similar to the introductory clause of paragraph 5.1 or a phrase similar to the phrase "in conformity with the GATT 1994" of paragraph 11.1 and 11.2. As illustrated in the prior part, this thesis has harbored doubts about the function of the introductory clause of paragraph 5.1. Likewise, this thesis is skeptical about function of the phrase "in conformity with the GATT 1994" in paragraph 11.1 and 11.2 of China's AP. This thesis considers the Panel and AB conferred more meaning to the phrase than intended. The reason for inserting such phrase is to ensure that the basic rules in the GATT are still in full effect because the obligations under paragraph 11.1 and 11.2 are more stringent than the basic rules in the GATT. The phrase "in conformity with the GATT 1994" clarifies the relationship between the WTO-plus obligations under paragraph 11.1 and 11.2 and the basic obligations under the GATT and confirms that China should obey obligations under both legal instruments. This thesis finds it far-fetched to read the phrase as incorporating GATT Art. XX defense in the AP, when its intended function is simply a confirmation.

---

[503] *Id.*

[504] China – Raw Materials Panel Report, ¶¶ 7.114-7.115.

Also, the textual interpretation applied in *China – Raw Materials* produces several undesirable and unreasonable consequences. First, the denial of policy space enshrined in GATT Art. XX renders the export duties commitments under China's AP the most "scared" obligation under the WTO.[505] GATT Art. XX is established to ensure that in pursuit of trade liberalization, WTO Members still remain freedom to pursue its public policy and other non-trade values. Thus, GATT Art. XX can excuse violation of the most fundamental principles, such as the most-favored nation treatment and national treatment. Even the pillars of the WTO rules can be trumped by non-trade concerns listed in GATT Art. XX, it is hard to see why GATT Art. XX cannot be an exception to the export duties commitments.[506]

Second, *China – Raw Materials* significantly disturbs the delicate balance between trade and non-trade interests. While pursuing trade liberalization is an upmost goal for the WTO, Members agree to sacrifice trade interests over fundamental non-trade values, which is manifested in, among others, the preamble of the WTO Agreement and Art. XX of the GATT. For instance, the preamble of the WTO Agreement clearly sets out one of the WTO's objectives is to protect and preserve the environment and achieve sustainable development. These objectives are further codified in GATT Art. XX(b), protection of human, animal or plant life or health, and (g), conservation of exhaustible natural resources. Depriving China of its fundamental rights to protect the environment and preserve its natural resources is a serious destruction to the delicate balance struck by WTO Members.[507]

Third, rejecting the application of GATT Art. XX will create significant imbalance of rights and obligations between China and WTO Members and render China a second-class

[505] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 240.

[506] *Id.*; Baroncini, *supra* note 388, at 6.

[507] Baroncini, *supra* note 388, at 17.

Member of the WTO.[508] As its entry fee, China assumes a great amount of WTO-plus obligations, such as the elimination of all export duties under paragraph 11.3. Thus, further denial China's right to pursue non-trade interests enshrined in GATT Art. XX will aggravate the already "asymmetry" and create "a serious constitutional issue."[509] Moreover, in light of these two China cases, Russia places its export-duty commitments under Part V – Export Duties of its GATT Schedule and specified that it will comply with the export-duty commitments except for rights and obligations provided under the GATT.[510] As a result, China will be the only Member who is denied of its right to pursue non-trade values via export duties.

G. Suggesting a Different Interpretation

In *China – Raw Materials*, the lack of an explicit reference clause in paragraph 11.3 of the AP makes it more difficult for interpreters to tackle the applicability issue because there is no ordinary meaning to rely on. It is always a difficult task to interpret the silence of a treaty. Thus, it is even more important to conduct a holistic analysis pursuant to VCLT Art. 31 and Art. 32.[511] In particular, it is essential to perform a contextual interpretation as this issue involves cross-agreement application. As confirmed by the Panel of *China – Raw Materials*, to correctly address the applicability issue, one needs to assess the legal and institutional relationship between obligations set forth in the AP and those of the WTO Agreements.[512] Furthermore, the object and purpose of the treaty can provide valuable guidance, too.

Good faith principle:

---

[508] Mitsuo Matsushita, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources*, 3 TRADE LAW DEV. 267, 286–87 (2011).

[509] *Id.* at 287; Baroncini, *supra* note 388, at 6.

[510] GATT Schedule CLXV – The Russian Federation, Part V – Export Duties, Opening Statement.

[511] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 242.

[512] China – Raw Materials AB Report, ¶ 7.116

To start with, scholars decipher the silence of treaty with the interpretative principle of good faith. Pursuant to VCLT Art. 31(1), which states that a treaty shall be interpreted in good faith, Baroncini states that good faith principle requires interpreters to interpret a treaty term in a reasonable manner and reach an honest and fair result.[513] Then, Baroncini considers that GATT Art. XX represents a policy exception in the GATT, and thus Art. XX should also have an important systemic role in the WTO regime.[514] Baroncini further finds support in the fact that WTO Members have expressly and constantly given priority to such exception over GATT obligations on trade facilitation.[515] Baroncini therefore argues that given the systemic importance of GATT Art. XX, the silence of paragraph 11.3 cannot be interpreted in good faith to mean a clear denial of GATT Art. XX.[516]

Qin also holds the same view with Baroncini. Qin emphasizes GATT Art. XX, as a set of public policies, trumps GATT obligations on liberation of trade.[517] Although China's export-duty commitments are not included in the GATT, they are stricter obligations than those in the GATT. Qin proposes that from a systemic viewpoint, China's export-duty commitments should also enjoy the policy consideration.[518] Thus, the silence of paragraph 11.3 cannot infer that China intends to renounce its right to GATT Art. XX and that WTO Members in good faith expect China to agree to such renouncement.[519]

Pursuant to the principle of good faith, interpreters should apply the test of reasonableness throughout the whole interpretation process and should not make an

[513] Baroncini, *supra* note 388, at 20.

[514] *Id.*

[515] *Id.*

[516] *Id.*

[517] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 242.

[518] *Id.*

[519] *Id.*

unreasonable interpretative result.[520] China's commitments on export tariffs under the AP are actually a part of GATT regulations on export restrictions.[521] It would be unfair and unreasonable that China can invoke GATT Art. XX for violation on export restrictions under the GATT, but not export tariffs commitments under the AP. Consequently, based on the principle of good faith, GATT Art. XX should be an available defense against violation of export tariffs commitments under the AP. This thesis also agrees with Baroncini and Qin that considering the fundamental importance of GATT Art. XX and the WTO-plus nature of paragraph 11.3, an interpretation that rejects the applicability of GATT Art. XX is inconsistent with the interpretative principle of good faith.

Context:

Moving on to contextual analysis, it is imperative to ascertain the legal status of the AP and its systemic position within the WTO legal system. The only provision that might shed light on the relationship between the AP and GATT Art. XX is paragraph 1.2 of China's AP, which provides that the AP is an integral part of the WTO Agreement. Significantly, this provision denotes that the AP should be read together with the WTO Agreement, especially with the related provisions of the covered agreements.[522] This systemic approach is particularly important for interpreting obligations under the AP because the AP contains various obligations across the WTO realm. To better understand the AP's obligations and ascertain available defenses, it is essential to look into the relevant contexts of the WTO Agreements.

[520] DÈORR & SCHMALENBACH, *supra* note 191, at 548.

[521] This argument will be closely discussed in the following part.

[522] As discussed in Section 4, Chapter 2. Liu, *supra* note 47, at 155.

In the present case, the provision at issue is paragraph 11.3 of the AP. This paragraph is under the title of "11 Taxes and Charges Levied on Imports and Exports" and sets out that China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994. Annex 6 lists 84 products and the maximum export duty rates. A Note attached to Annex 6 reaffirms that China should not apply export tariffs in excess of the ceiling provided in Annex 6 and may increase the applied rates under exceptional circumstances. GATT Art. VIII regulates fees and charges connected with importation and exportation, other than import and export duties, should be limited to the cost of approximate services rendered. Thus, China is prohibited from imposing export duties on products not listed in Annex 6.

There is no rule directly regulating export duties in the WTO regime. GATT Art. II:1(b) regulates that import tariffs should not exceed the terms provided in the Schedule. However, there are not comparable disciplines under the WTO law restricting Members' use of export tariffs.[523] GATT Art. XXVIII *bis* recognizes export tariffs constitute serious obstacle to trade and calls for future negotiation to reduce export tariffs.[524] However, no negotiation was conducted afterwards.[525] Thus, WTO Members, except for China, may freely levy export duties.[526]

Although there is no rule directly regulating export tariffs in the GATT, China's export duties commitments are intrinsically linked to the regulations on export restrictions in the

[523] Baroncini, *supra* note 388, at 5.

[524] GATT art. XXVIII *bis*.

[525] Qin, *The Challenge of Interpreting "WTO-PLUS" Provisions*, *supra* note 14, at 156.

[526] This practice creates serious trade-hindering effects because export duties will make it more difficult for products to leave the country and therefore create advantages for the domestic industry because it can obtain cheap products for manufacturing. On the contrary, importing manufacturing countries will pay more to obtain products and even encounter short supply. Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 239; Baroncini, *supra* note 388, at 5.

GATT.[527] It is not doubt that imposition of export duties is one form of the export restrictions. Export restrictions might also take forms of export quotas and licenses, which are regulated under GATT Art. XI. GATT Art. XI stipulates that Members should not apply export quotas or licenses unless a. it is temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party or b. it is necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade.[528] Accordingly, with respect to export restrictions, WTO Members may freely employ export tariffs or apply export quotas and license under limited circumstances.[529] On the contrary, China cannot levy export tariffs except for products listed in Annex 6. Thus, examining China's export duties commitments under the context of the GATT, it is not hard to find that paragraph 11.3 of China's AP is an applicant WTO-plus obligation, which imposes a more stringent obligation on China.[530] The concerns in GATT Art. XXVIII *bis* are addressed by paragraph 11.3 of the AP. Accordingly, although the linkage between paragraph 11.3 of the AP and the GATT is not as obvious as the linkage between paragraph 5.1 and the GATT, it is manifest that China's export duties obligations are intrinsically related to export restrictions under the GATT.[531]

If a violation of export quotas and export licenses under GATT Art. XI can be justified by GATT Art. XX, by the same token, a violation of export duties under paragraph 11.3 of China's AP can be justified by Art. XX, too.[532] As stated above, China's export duties commitments are intrinsically linked to and more stringent than export restrictions under

[527] Gu, *supra* note 47, at 21.

[528] GATT art. XI.

[529] Consequently, WTO Members can easily circumvent its obligations under GATT Art. XI by resorting to the imposition of export duties. Baroncini, *supra* note 388, at 5.

[530] Qin, *The Challenge of Interpreting "WTO-PLUS" Provisions*, *supra* note 14, at 156.

[531] Gu, *supra* note 47, at 21.

[532] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 244.

GATT Art. XI and therefore China's export duties commitments should be categorized in the same group as export quotas and export licenses.[533] Contextually, if GATT Art. XX can justify a violation of export quotas and license under GATT Art. XI, Art. XX should be available to a violation of other kinds of export restrictions unless such defense will render the obligations moot. Otherwise, it would be unreasonable that GATT Art. XX can be an exception for one kind of violation of export restrictions but not the others. In sum, this thesis proposes that given there is no reasonable justification for different treatment between GATT Art. XI and China's export duties commitments under the AP, when the obligations at issue are inherently linked to or built upon the GATT, GATT Art. XX should be an available exception.

Qin also proposes that since GATT Art. XX is an exception for export quotas and license obligations and China's export duties commitments are inherently related to and built upon GATT Art. XI, GATT Art. XX is a relevant context for paragraph 11.3 and be examined as an important implication in the process of ascertaining the silence of treaty.[534] Furthermore, Liu advanced that since China's AP is an integral part of the WTO Agreement and paragraph 11.3 concerns "tariffs," the GATT and its available exceptions should be read together when interpreting paragraph 11.3.[535] Hence, they conclude that GATT Art. XX is an applicable defense.

Object and purpose:

This contextual reading does not contradict the object and purpose of China's export duties commitments. Resorting to GATT Art. XX will not render the purpose of paragraph 11.3 moot as it is not indicated in the Working Party Report or the negotiation history that the

[533] Gu, *supra* note 47, at 21.

[534] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 242–43; Qin, *The Challenge of Interpreting "WTO-PLUS" Provisions*, *supra* note 14, at 160.

[535] Liu, *supra* note 47, at 155.

conclusion of paragraph 11.3 means to preclude China from protection of human life and health or conservation of exhaustible natural resources. Moreover, viewing from the object and purpose of the WTO Agreement, which is enshrined in its preamble, it is recognized that in pursuit of trade liberalization, WTO Members still preserve the right to promote non-trade interests, such as sustainable development, protection of environment and human health. Accordingly, the object and purpose of China's AP and the WTO Agreement support the contextual interpretation that GATT Art. XX is an applicable exception.[536]

Relevant rules of international law – the principle of permanent sovereignty over natural resources:

Scholars advance that pursuant to VCLT Art. 31(3)(c), the principle of permanent sovereignty over natural resources should be taken into account as a relevant rule of international law applicable in the relations between the parties. Relying on a case in International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo*, which recognizes the customary nature of the principle of permanent sovereignty over natural resources, Baroncini asserts that the principle obtains customary international law status and thus the principle applies to all WTO Members.[537] Qin considers the principle a generally accepted principle of international law.[538] Baroncini points out that the principle of permanent sovereignty over natural resources has been included in various Resolutions of the General Assembly of the United Nations. The General Assembly states that every State has the sovereign right to freely dispose of its natural resources wherever deemed desirable by them for their own progress and economic development.[539] Moreover, General Assembly

[536] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 243; Baroncini, *supra* note 388, at 23–24.

[537] Baroncini, *supra* note 388, at 24–25.

[538] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 245.

[539] Right to Exploit Freely Natural Wealth and Resources, G.A. Res. 626 (VII), U.N. Doc. A/RES/626 (VII) (Dec.

declares that such right "must be exercised in the interest of the well-being of the people of tile State concerned."[540] Baroncini also refers to the Declaration on the Establishment of a New International Economic Order, which states that "in order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation and no State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right."[541] Moreover, Baroncini and Qin indicate that the principle of permanent sovereignty over natural resources is considered a basic human right under International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.[542] Accordingly, Baroncini considers the principle of permanent sovereignty over natural resources an inalienable right that cannot be derogated without a specified and limited period of time and can only be partially restrained.[543] Qin states that the exercise of such right might be limited by to the international obligations a nation undertakes voluntarily, and still the permanent nature of such right indicates that this right can always be regained.[544]

Scholars comment that the Panel's and AB's reasoning on paragraph 11.3 contradicts the customary law principle of permanent sovereignty over natural resources. In light of the principle of permanent sovereignty over natural resources, scholars oppose that the WTO

21, 1952).

[540] Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/5217 (1962). *See generally*, Karol N. Gess, *Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis*, 13 INT. COMP. LAW Q. 398 (1964).

[541] Declaration on the Establishment of a New International Economic Order, G.A. Res. S-6/3201, U.N. Doc. A/RES/S-6/3201 (May 1, 1974).

[542] Art. 1.2 of ICCPR and ICESCR: All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. Also, Art. 47 of ICCPR and Art. 25 of ICESCR: Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

[543] Baroncini, *supra* note 388, at 26.

[544] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 246.

judiciary makes such rebuttable assumption that China has renounced its right over natural resources. Baroncini states that the silence in paragraph 11.3 should not be interpreted as an overall and eternal renouncement of China's permanent sovereign right over its natural resources. Baroncini argues that China is entitled to exercise this permanent sovereign right by using export duties. Baroncini concludes that the Panel's and AB's ruling is in sharp contrast with the international customary law principle of permanent sovereignty over natural resources.[545]

Supplementary means of interpretation:

Lastly, scholars invoke VCLT Art. 32, supplementary means of interpretation, to confirm a proper interpretation in this case. VCLT Art. 32 provides that in order to confirm the meaning resulting from the application of VCLT Art. 31, or to determine the meaning when the interpretation according to Art. 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, interpreters may resort to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.[546] Qin points put that the Panel's and AB's interpretation is manifestly unreasonable because their interpretation makes China's special trade-liberalization obligations the most scared obligation in the WTO regime.[547] Hence, scholars resort to supplementary means of interpretation in accordance with VCLT Art. 32.

According to VCLT Art. 32, supplementary interpretative materials include the preparatory work of the treaty and the circumstances of its conclusion. As rightly pointed out by Baroncini, the preparatory work of the AP is never publicly disclosed by the WTO.[548] In

[545] Baroncini, *supra* note 388, at 26.

[546] VCLT art. 32.

[547] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 243.

[548] Baroncini, *supra* note 388, at 26–27.

this way, interpreters can only rely on materials on the circumstances of AP's conclusion. Recourse to the circumstance of the conclusion of a treaty provision to discern what the common intentions of the parties were at the time of the conclusion is nothing new in the WTO judiciary. The Appellate Body in *EC – Chicken Cuts* explained that while examining the circumstances surrounding the conclusion of a treaty, interpreters should look into "the historical background against which the treaty was negotiated."[549] Also, "the economic, political and social conditions of the parties"[550] may be taken into account to ascertain the reality at the time the treaty was concluded.

In order to attribute a proper meaning to the silence in paragraph 11.3, scholars reconstruct the circumstances in which the AP was concluded. Qin and Baroncini note the political reality of China at the time of the negotiation. Baroncini observes that China does not have "sufficient knowledge, expertise and experience"[551] to negotiate a clear term with the incumbent Members, especially when China is the first Member that is requested with so many unprecedented WTO-plus obligations in its AP.[552] Likewise, Qin points out that China's lack of legal capacity and negotiating experience leads China to accept loosely drafted terms in the AP.[553] Moreover, Qin doubts that China would answer in the affirmative, if China was explicitly inquired whether it wishes to renounce its right to GATT Art. XX as a defense against violation of paragraph 11.3.[554] Similarly, Qin finds it hard to imagine that if China requested the applicability of GATT Art. XX, the incumbent Members would deny such request because "there is absolutely no systemic or policy reason to deny the applicability" of

---

[549] Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 293, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005).

[550] DÈORR & SCHMALENBACH, *supra* note 191, at 579.

[551] Baroncini, *supra* note 388, at 27.

[552] *Id.*

[553] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 244.

[554] *Id.*

GATT Art. XX.[555] In light of the circumstances of the conclusion, scholars find it hard to conclude that China has any acknowledgement of its renouncement of GATT Art. XX.

Furthermore, Qin and Baroncini find that subsequent practice lends further support to their arguments. In the wake of *China – Raw Materials*, several new Members, such as Vietnam, Ukraine and Russia, include the general exceptions and security exceptions in the GATT into their WTO-plus obligations.[556] Their requests with this inclusion were not rejected by the incumbent Members.[557] There is no case showing that the incumbent Members request the applying countries to give up on the general exceptions in the GATT, either.[558] Thus, scholars argue that the WTO judiciary should not recklessly assume that the silence in paragraph 11.3 indicates that WTO Members would reject the applicability of GATT Art. XX.

In sum, this thesis posits that from a systemic and contextual viewpoint, GATT Art. XX should be an available defense against violation of not only provisions in the GATT, but also obligations related to or derived from the GATT, unless the invocation of GATT Art. XX would impede the object and purpose of the violated non-GATT obligations.

[555] *Id.*

[556] *Id.*; Baroncini, *supra* note 388, at 27.

[557] Baroncini, *supra* note 388, at 27.

[558] *Id.*

Part III

THE APPLICABILITY OF GATT ART. XX IN WTO ACCESSION PROTOCOL – A PROPOSAL

Chapter 6 A Proposed Interpretation in Accordance with the VCLT

Section 1 Introduction

To assess whether GATT Art. XX is applicable in the AP, the first step is to identify the relationship and linkage between the AP and GATT Art. XX. From the reasoning of *China – Publications and Audiovisual Products* and *China – Raw Materials*, it is clear that the WTO judiciary relies on the textual reference of the AP to determine the applicability of GATT Art. XX. That is, GATT Art. XX is an available defense against violation of the AP when the AP provision at issue makes textual reference to the WTO Agreements or the GATT. However, this thesis opposes this strict textualist approach, i.e. determining the applicability of GATT Art. XX solely bases on the text of the breached AP provision. This thesis suggests a contextual reading of the AP obligations. This thesis emphasizes the need to locate the AP obligations in their systemic positions within the WTO legal regime and to read the AP obligations together with their relevant basic WTO obligations as a whole. For instance, if the violated AP obligation is related to or built on the GATT obligations, that AP obligation should be read with the GATT as one instrument, including relevant exceptions in the GATT unless such recourse to GATT Art. XX will impede the object and purpose of the said AP obligation or is explicitly excluded by the said AP obligation. This approach can ensure that acceding Members can get fair access to GATT Art. XX when they violate GATT-related obligations.

This chapter intends to assess this applicability issue with customary rules of interpretation in the VCLT.[559] It will first examine the issue with textual interpretation and then contextual interpretation. Object and purpose of the WTO Agreement and the

[559] U.S. – Carbon Steel AB Report, ¶ 61-62; Argentina – Footwear AB Report, ¶142.

circumstances of conclusion will be considered, too. In the end, this thesis will review whether there is a conflict of norms when applying GATT Art. XX in the AP.

Section 2 Rejecting a Strict Textual Interpretation

The WTO judiciary deals with the applicability of GATT Art. XX in the AP in *China – Publications and Audiovisual Products* and *China – Raw Materials*. Reading these two cases together, it can be concluded that in order to apply GATT Art. XX in the AP, a textual reference to the WTO Agreement or to the GATT in the AP provision at issue is indispensable. Disregard of the unique nature of the AP, relevant context of the AP obligations, object and purpose of the WTO Agreements and unreasonable implications, the WTO judiciary solely bases on the text of the AP provision to determine the applicability of GATT Art. XX. Such strict textualist approach receives many criticisms and leads to several undesired consequences as stated in the previous part. The main criticism is that the strict textualism fails to take account of the unique legal nature of the AP, the systemic position of the AP obligations and properly scrutinize the relationship between the AP and GATT Art. XX.[560]

Most importantly, the text of the AP is far from clear to provide a decisive answer on the applicability issue. Viewing from the text of the AP, China's AP in particular, one can find that the applicability of GATT Art. XX was not in the mind of the negotiators because the Working Party Report, which thoroughly records the negotiation on terms of accession between China and incumbent Members, does not mention the application of GATT Art. XX.[561] Although some provisions in the AP make reference to the WTO Agreement or the GATT, it is not clear that such reference is specifically intended to allow recourse to the

[560] Baroncini, *supra* note 388; Gu, *supra* note 47; Liu, *supra* note 47; Qin, *Pushing the Limits of Global Governance*, *supra* note 73; Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423; Roessler, *supra* note 202; Wu, *supra* note 158; Yu, *supra* note 164.

[561] Liu, *supra* note 47, at 153.

general exceptions under GATT Art. XX. It is more likely that the reference is meant to echo with or take note of basic rules in the WTO Agreements. Considering that obligations in the AP touch various topics under the WTO regime and the recent AP contains more and more stricter obligations, it is important to inform the acceding Member of the relationship between the WTO-plus obligations under the AP and the basic WTO rules under the covered agreements and remind them that they still need to comply with basic WTO disciplines. Thus, this thesis does not think that the text of the AP provision can be the decisive guidance on the issue of the applicability of GATT Art. XX in the AP. The silence of treaty in the text is not in and of itself dispositive.[562] A more detailed contextual analysis on the relationship between the AP and the GATT and the systemic position of the AP obligations is needed.[563]

In addition, the reference to "this Agreement" in GATT Art. XX does not preclude the applicability of GATT Art. XX under non-GATT context. As explained in the prior part, this thesis opines that whether GATT Art. XX can be applied to defend a non-GATT violation hinges on the violated agreement, i.e. the AP, not the GATT.[564] If the parties to that agreement agree on the applicability of GATT Art. XX, the text of the GATT Art. XX, i.e. the reference to "this Agreement," will not obstruct the application of GATT Art. XX.[565] Consequently, the applicability of GATT Art. XX depends on the provision of the AP, not that of the GATT.

In fact, since the AP obligations should be read together with their corresponding agreements and become part of that agreement, the reference to "this Agreement" in GATT Art. XX will also extend to the AP obligations that are an integral part of the GATT,[566] or at least, the relevant exceptions in the corresponding agreements should be taken in account as

[562] ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 126 (2009).

[563] *Id.* at 146–55.

[564] Section 3, Chapter 3.

[565] Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 299–300.

[566] *See* Kennedy, *supra* note 49.

important context.[567] This thesis believes that this interpretation will pay due respect to the drafters' language and at the same time accommodate the unique nature of the AP obligations.

Section 3 The Importance of Contextual Reading

This thesis, together with the majority of scholars, suggests that a contextual reading of the AP provisions will provide a more satisfying answer to the applicability issue because a contextual interpretation will better illuminate the relationship between the AP and the WTO Agreement and identify the systemic position of the AP obligations.[568] Because of the unique legal nature and characteristic of the AP obligations, emphasis should be given to the relevant context of the AP provision at issue. The AP is not a self-contained legal instrument and it does not contain a coherent set of rules on a certain subject matter.[569] It consists of various requests from incumbent Members and those requests run across a wide range of subject matters within the WTO regime.[570] Some AP obligations prescribe WTO-plus obligations, while some prescribe WTO-minus obligations.[571] To correctly understand the systemic position of the AP obligations within the WTO regime, it is necessary to identify the relevant context of the AP obligations, i.e. the relevant basic obligations under the WTO Agreement.[572] Such context can usually be discerned from the subject matter the AP provision is dealing with or the text in the AP provision that makes reference to the basic WTO rules.[573] Once the context is identified, the AP obligations should be read with the related WTO agreement,

---

[567] Qin, *The Challenge of Interpreting "WTO-PLUS" Provisions*, *supra* note 14, at 160.

[568] THOMAS AU, RECONCILING WTO GENERAL EXCEPTIONS WITH CHINA'S ACCESSION PROTOCOL (Social Science Research Network, SSRN Scholarly Paper ID 2199967, January 13, 2013), *available at* http://papers.ssrn.com/abstract=2199967; Gu, *supra* note 47; Liu, *supra* note 47; Qin, *The Challenge of Interpreting "WTO-PLUS" Provisions*, *supra* note 14.

[569] Yu, *supra* note 164, at 477.

[570] Qin, *Pushing the Limits of Global Governance*, *supra* note 73, at 52.

[571] Yamaoka, *supra* note 6; Charnovitz, *supra* note 33; Cattaneo & Braga, *supra* note 16; Qin, *"WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System*, *supra* note 17.

[572] Qin, *The Challenge of Interpreting "WTO-PLUS" Provisions*, *supra* note 14.

[573] *Id.*; Liu, *supra* note 47.

including the exceptions therein. That is to say, the exceptions in the corresponding agreement should be made available to the AP obligations, unless the recourse of GATT Art. XX will impede the object and purpose of the AP obligations or such recourse is explicitly excluded by the AP obligations.[574] Take the situation in *China – Publications and Audiovisual Products* as an example. The breached AP provision provides a more stringent obligation on state-trading practices than the basic WTO regulation, i.e. GATT Art. XVII. In this way, the AP obligation should be read with the corresponding agreement, i.e. the GATT, as one instrument, including general exceptions under the GATT.

Most importantly, this contextual interpretation ensures that all WTO Members will have a fair access to general exceptions under GATT Art. XX when breaching rules that regulate the same subject matter. It will be unfair and unreasonable that violation of the basic WTO rules under the GATT can be justified by GATT Art. XX, whereas the AP obligations that are related to or built upon the GATT obligations cannot.[575] The AP obligations that deviate from the regular GATT rules are intended to supplement the basic GATT rules. Thus, the AP obligations that modify the GATT obligations should be treated as the basic GATT obligations, including the recourse to GATT Art. XX when breached. Otherwise, the uniformity of the WTO rules will be fragmented because breaches of GATT rules can be justified by GATT Art. XX and on the contrary breaches of the AP rules that regulate the same subject matter cannot.[576] Take the situation in *China – Raw Materials* as an example. Paragraph 11.3 under the AP regulates export tariffs, one form of the export restrictions. Likewise, GATT Art. XI prescribes obligations on export quotas and export licenses, which are forms of the export restrictions, too. It would be unreasonable that China can violate

[574] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423.

[575] Qin, *Pushing the Limits of Global Governance*, *supra* note 73; Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423.

[576] *See* Qin, *"WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System*, *supra* note 17; Au, *supra* note 568.

obligations on export quotas and export licenses to pursue public policies, whereas when the inconsistent measure takes the form of export tariffs, China is denied of promotion of public policies. This thesis cannot see any valid basis for such distinction. Indeed, the Member-specific obligations under the AP has ignored the single undertaking approach embraced in the Uruguay Round negotiation and undermined the coherence of WTO law.[577] Affirming applicability of GATT Art. XX in GATT-related AP obligations can ease such tension because the GATT-related AP obligations is to some extent incorporating into the multilateral trading mechanism.

The lack of specific reference to GATT Art. XX should be interpreted in light of relevant context not merely the text itself. *China – Raw Materials* ruled that the lack of textual reference is a conscious choice of acceding Members and the WTO, a deliberate omission.[578] However, their reasoning overlooks other important context. The Panel and AB did not examine paragraph 11.3 of the AP from the systemic context. If they had properly placed the export duties commitments in the systemic context, they would have realized that paragraph 11.3 is closely related to export restrictions under the GATT and the GATT, including GATT Art. XX, is an important context. As stated by the AB in *Canada – Autos*, "omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive." [579] Examining the omission in the AP with the contextual interpretation provided above, this thesis considers that specific reference to GATT Art. XX is not necessary. Since the AP obligations are read together with their relevant rules under the

[577] Chien-Huei Wu, Assistant Research Fellow, Academia Sinica, The Fragmentation of The Multilateral Trading System: The Case of Trading Rules on Export Restrictions, Symposium on International Economic Law: New Issues and Challenges (Dec. 3, 2012); Qin, *"WTO-plus" Obligations and Their Implications for the World Trade Organization Legal System*, *supra* note 17; Cattaneo & Braga, *supra* note 16; Charnovitz, *supra* note 33.

[578] China – Publications and Audiovisual Products Panel Report, ¶¶ 7.129, 7.138; China – Publications and Audiovisual Products AB Report, ¶¶ 303-306.

[579] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 138, WT/DS139/AB/R, WT/DS142/AB/R (June 19, 2000).

GATT, it does not need explicit mentioning that GATT Art. XX is an available defense. Besides, it is impractical to make reference to GATT Art. XX in every provision of the AP. Thus, specific reference is not needed for GATT Art. XX to apply when the AP obligations are related to or built upon the obligations under the GATT.

Given the inherent nature of GATT Art. XX, the preclusion of GATT Art. XX will have to be explicitly expressed. States inherently have the right to regulate trade. This is confirmed by the AB in *China – Publications and Audiovisual Products*, which made clear that States enjoy an inherent right to regulate trade and this inherent right is not bestowed by any international agreement.[580] When a State joins the WTO, its regulatory autonomy is disciplined by WTO rules. GATT Art. XX is one of the important rules on regulating Members' exercise of such inherent right to promote public policies. That is, no granting is needed when Members employ regulatory measures. Members are only required to follow relevant WTO rules, such as the necessity requirement under GATT Art. XX, in exercise of their regulatory autonomy. In this way, a Member does not need a textual reference or endorsement to comply with GATT Art. XX. The inherent right to regulate trade can only be renounced by Members' expressed choice.[581] Accordingly, this thesis argues that the application of GATT Art. XX is barred when it is expressively stated.

Section 4 Taking Account of the Object and Purpose of the WTO Agreements and the Accession Protocol

One of the most important objectives of WTO is to strike a balance between trade and societal non-trade values.[582] This objective is also intended to preserve Members' regulatory

[580] China – Publications and Audiovisual Products AB Report, ¶ 222.

[581] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423; Liu, *supra* note 47.

[582] MAVROIDIS, *supra* note 57, at 615.

autonomy.[583] This is the reason that the preamble of the WTO Agreement, the Uruguay Round Agreement Decision on Trade and Environment and Doha Ministerial Declaration place a great emphasis on the delicate balance between trade and non-trade interests.[584] This goal is enshrined in GATT Art. XX, which demonstrates Members' choice to pursue a list of non-trade policy objectives while promoting trade facilitation. The fundamental importance of GATT Art. XX is self-evident. The establishment of GATT Art. XX dates back to the first draft of the GATT, the London Draft 1946.[585] At the time when the GATT was the only multilateral trade agreement, GATT Art. XX was in place to defend violation of all trade facilitation obligations, including obligations on most-favored treatment, national treatment, anti-dumping, countervailing duties, safeguard measures, etc. Accordingly, it can be inferred from the systemic position of GATT Art. XX that the WTO Agreement highly values Members' choice to pursue non-trade public interests as GATT Art. XX can defend all kind of violation under the GATT.

Although GATT XX indicates that Members are free to promote non-trade societal interests, the requirements under the GATT Art. XX still give preference to trade liberalization. Therefore, the core value of the WTO, i.e. trade facilitation, will not be encroached. For instance, the necessity requirement in GATT Art. XX (a) necessary to protect public morals, (b) necessary to protect human, animal or plant life or health and (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT makes clear that Members should adopt the least trade-restrictive measure at hand.[586]

---

[583] DANIEL L. BETHLEHEM, THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 221 (2009).

[584] *Uruguay Round Agreement Decision on Trade and Environment* (Marrakesh, 15 April 1994), Preamble; World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1,141 I.L.M. 746 (2002) [hereinafter Doha Declaration]; ISABEL FEICHTNER, THE LAW AND POLITICS OF WTO WAIVERS: STABILITY AND FLEXIBILITY IN PUBLIC INTERNATIONAL LAW 25 (2011).

[585] Douglas A. Irwin et al., *The Genesis of the GATT*, 162 (2008).

[586] MAVROIDIS, *supra* note 57, at 334. *See* Filippo Fontanelli, *Necessity Killed the Gatt - Art XX Gatt and the Misleading Rhetoric About "Weighing and Balancing,"* 5 EUR. J. LEG. STUD. 36 (2012).

In other words, WTO Members may impose measures to pursue non-trade interests even when such measures may adversely affects trade under the condition that such measures are the last resort. Hence, allowing the applicability of GATT Art. XX in the AP does not mean that acceding Members are totally free from its commitment to promote trade liberalization.

The contextual interpretation suggested by this thesis is in line with the objective of the WTO Agreement, the GATT and the AP. The WTO Agreement and the GATT pronounce one of their objectives is to promote non-trade societal interests. Therefore, allowing recourse to GATT Art. XX for breaches of GATT-related AP obligations is conforming to the object and purpose of the WTO Agreement and the GATT. Furthermore, this thesis is of the view that GATT Art. XX is not available when the purpose of the AP obligations is hindered. This interpretation pays due respect to the object and purpose of the AP, as well.

Section 5 Recourse to Circumstances of the Conclusion

The contextual interpretation proposed by this thesis best reflects the intent of acceding Members and the WTO at the time of drafting the AP. During the negotiation, acceding Members and the WTO both acknowledge that the WTO obligations should be accepted as a single undertaking and the terms of accession are meant to supplement the WTO basic rules.[587] Accordingly, the supplementary nature of the AP obligations means to modify certain trade liberalization obligations, but not to exclude the application of general exceptions, unless such intent is explicitly pointed out in the AP provision.

Furthermore, with all the extra obligations imposed by the AP, it is hard to imagine that acceding Members would agree to waive its inherent and fundamental rights to pursue non-trade interests. It is more likely that the applicability issue was not even envisaged by

[587] Tyagi, *supra* note 18, at 393–95; CHEONG CHING, HANDBOOK ON CHINA'S WTO ACCESSION AND ITS IMPACTS (2003).

China at the time of negotiation since China is the first acceding Member that undertakes so many obligations that deviate from regular WTO law. Moreover, subsequent practice indicates that recourse to GATT Art. XX under the AP is not unacceptable by incumbent Members. For example, Russia inserted clauses that make reference to general exceptions under the GATT in its AP. Therefore, incumbent Members do not mean to take away the right to pursue non-trade interests when negotiating the terms of accession.[588]

One might argue that Russia's AP makes specific reference to GATT Art. XX and in contrast China's AP does not make such reference. Therefore, China did not intend to include GATT Art. XX defense in its AP. However, this argument neglects the legal capacity of China at the time of negotiation. China did not possess sufficient legal knowledge of WTO law during the negotiation. Also, China is the first acceding Member that are requested of so many WTO-plus obligations. Due to the lack of experience and legal capacity, it is more likely that China did not request the inclusion of GATT Art. XX in the AP.[589] Moreover, Russia makes such reference to GATT Art. XX in its AP after the issue of applicability of GATT Art. XX to China's AP emerged within the WTO membership.[590] As a result, the fact that Russia's AP mentions GATT Art. XX whereas China's AP does not cannot lead to the conclusion that China specifically renounces the recourse to GATT Art. XX.

It is also recognized that in face of ambiguity, preference should be given to the interpretation that imposes less burden on a State. This is so called the principle of *in dubio mitius*, which is often used to interpret exceptions in the WTO Agreement.[591] This principle is best explained by the AB in the *EC – Hormones* as that "if the meaning of a term is

[588] Qin, *The Predicament of China's "WTO-Plus" Obligation to Eliminate Export Duties*, *supra* note 423, at 245.

[589] Baroncini, *supra* note 388, at 27.

[590] *Id.* at 28.

[591] ASIF H. QURESHI, INTERPRETING WTO AGREEMENTS 111 (2006).

ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon a party." This principle is based on the fact that a sovereign state will not intend to "impose upon themselves the more onerous, rather than the less burdensome, obligation."[592] Accordingly, when interpreting the applicability of general exceptions in the AP, the principle of *in dubio mitius* should be applied. Hence, although there is no specific reference to GATT Art. XX under the AP, it should not be lightly assumed that Members will impose more strict obligations on themselves, i.e. renounce their rights to invoke general exceptions under GATT Art. XX.[593]

Section 6 Conflicts of Norms Between the GATT and the Accession Protocol Will Not Occur

There are numerous multilateral agreements under the WTO legal regime. Sometimes, the same subject matter is regulated under two different agreements. In case that two agreements provide contradicting rules on the same issue and Members cannot comply with both agreement simultaneously, WTO law provides some regulations on the order of application in the event of conflicts. For example, Art. XVI:3 of the WTO Agreement indicates that "in the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict." Also, General Interpretative Note to Annex 1A provides that "in the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO

[592] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶ 165, WT/DS26/AB/R (Jan. 16, 1998).

[593] The amicus curiae brief in *Canada – Renewable Energy*, 11.

Agreement"), the provision of the other agreement shall prevail to the extent of the conflict." The applicability of GATT Art. XX in the AP raises the question of which agreement should prevail, the AP or the GATT.[594]

A. Art. XVI:3 of the WTO Agreement

Art. XVI:3 of the WTO Agreement will apply in the applicability issue. Art. XVI:3 provides that the WTO Agreement should prevail over the Multilateral Trade Agreement in the event of conflict. The standardized integral clause under the AP states that the AP is an integral part of the WTO Agreement. One might wonder if the AP is an integral part of the WTO Agreement, the AP will prevail over the GATT. However, as discussed in the prior part, this thesis believes that the integral clause should be interpreted as that the AP obligations are an integral part of their corresponding agreement. In this way, the AP obligations are an integral part of various multilateral agreements, depending on their respective substance, not of the WTO Agreement. Accordingly, the situation that requires the application of Art. XVI:3 of the WTO Agreement will not even occur.

B. General Interpretative Note to Annex 1A

As for the General Interpretative Note to Annex 1A, the Note states that in the event of conflicts, provisions of multilateral trade agreements in Annex 1A will prevail over provisions of the GATT. Technically speaking, the AP will not fall under the purview of the General Interpretative Note because the AP is not one of the multilateral trade agreements under Annex 1A. However, as this thesis proposes to read the AP obligations together with their corresponding agreements as a whole, the AP obligations become an integral part of the

[594] This thesis would like to thank Prof. Seung-Hwan Choi, President of International Law Association–Korean Branch, for pointing out this concern at the 2013 ILA-ASIL Asia-Pacific Research Forum – International Law and Dispute Resolution: Challenges in the Asia Pacific, where this thesis was presented during the poster session.

relevant multilateral trade agreements. In this way, some might argue that according to the General Interpretative Note, GATT Art. XX should not take precedence over the AP obligations.[595] Also, some considers that the General Interpretative Note denotes the rule of *lex specialis*,[596] and therefore the AP, being a more specific agreement, should prevail over the GATT, including GATT Art. XX.[597]

This thesis considers that the application of the AP obligations will not take precedence over GATT Art. XX due to the application of the General Interpretative Note. This is because there is no conflict between the AP obligations and GATT Art. XX. The WTO judiciary has on occasion defined the term "conflict" and the definition of conflict is rather strict.[598] In *Indonesia – Autos*, Indonesia argued that "there is a conflict because the SCM Agreement 'explicitly authorizes' Members to provide subsidies that are prohibited by Article III:2 of GATT."[599] When examining whether there is a conflict, the Panel states that for a conflict to exist, the two obligations must be "mutually exclusive."[600] That is, the two obligations cannot be complied with simultaneously.[601] If it is possible for Members to comply with one obligation without violating the other obligation, there is no conflict.[602] Again, the AB in *Guatemala – Cement* defined conflict as "a situation where adherence to the one provision will lead to a violation of the other provision"[603] In light of this definition, there

[595] Pauwelyn, *Squaring Free Trade in Culture with Chinese Censorship*, *supra* note 162.

[596] Joost Pauwelyn, *Conflict of Norms in Public International Law*, 398 (2003).

[597] Fernando Piérola, *supra* note 62, at 174.

[598] This narrow interpretation is seriously criticized. *See* Pauwelyn, *Conflict of Norms in Public International Law*, *supra* note 596; Erich Vranes, *The Definition of "Norm Conflict" in International Law and Legal Theory*, 17 EUR. J. INT. LAW 395 (2006).

[599] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, ¶ 14.98, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) [hereinafter Indonesia – Autos Panel Report].

[600] *Id*. ¶ 14.99.

[601] *Id*.

[602] *Id*.

[603] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, ¶ 65, WT/DS60/AB/R (Nov. 2, 1998).

will be no conflict between the AP obligations and GATT Art. XX because these two obligations are not mutually exclusive. Members will not violate their AP obligations because of compliance with GATT Art. XX and neither will Members violate GATT Art. XX because of compliance with their AP obligations. This is because GATT Art. XX is an exception for trade facilitation obligations. GATT Art. XX gives Members the choice to pursue non-trade policies, rather than requires Members to do so. Hence, Members can comply with GATT Art. XX and trade facilitation obligations simultaneously. Accordingly, under the current WTO judiciary's interpretation, the General Interpretative Note will not even apply.

Second, the principle of *lex specialis* will not hinder the applicability of GATT Art. XX in the AP. The *lex specialis* maxim means that preference must be given to the more specific agreement.[604] However, this does not mean that the agreement that is more general is completely replaced when there is no conflict, as in the present case.[605] The more general agreement is still "relevant and adds certain rights and obligations."[606] Moreover, GATT Art. XX by virtue of its nature as a general exception provision is not a more specific provision than the AP provisions, unless the AP provisions specifically prescribe more specific obligations regarding the requirements of the general exceptions. In other words, GATT Art. XX and the AP obligations regulate different subject matters. GATT Art. XX provides Members choices to pursue non-trade interests, whereas the AP obligations prescribe more or less stringent rules on trade facilitation. Hence, the AP obligations are not more specific or special rules than GATT Art. XX. Accordingly, the principle of *lex specialis* will not even apply.

[604] QURESHI, *supra* note 591, at 111.

[605] Pauwelyn, *Conflict of Norms in Public International Law*, *supra* note 596, at 412.

[606] *Id.*

Chapter 7 Conclusion

Whether GATT Art. XX can be an available defense against AP violation is a very complex issue. The main reason for such complexity is that the AP possesses a very unique legal nature. The AP consists of substantive obligations across the WTO realm. It does not contain a coherent set of rules on a single subject like other multilateral trade agreements in Annex 1A. Some AP rules contain obligations that are more stringent than the basic obligations in the WTO, while some require less stringent obligations. This unique legal nature should be taken in consideration in the interpretation process.

To assess whether GATT Art. XX is an applicable defense, it is crucial to discern the relationship between the AP and GATT Art. XX. One standardized clause in the AP states that the AP is an integral part of the WTO Agreement. On the ground of this integral clause, this thesis proposes to read the AP with the relevant rules under the WTO Agreements, including the relevant exceptions, as a whole. For example, when an AP obligations is closely related to or built upon an obligation under the GATT, the AP obligation should be read together with the GATT, including GATT Art. XX. Thus, GATT Art. XX is an applicable defense for GATT-related AP obligations.

The interpretation proposed by this thesis will respect Members' regulatory autonomy, which is confirmed and codified in GATT Art. XX. GATT Art. XX demonstrates Members' rights to promote non-trade interests, such as public morals, human, animal or plant life or health, exhaustible natural resources, etc. This clearly manifests that the WTO aims to strike a balance between trade facilitation and non-trade public interests. As a result, public objectives listed in GATT Art. XX may take priority over trade interests. This thesis considers that this conscious choice of value by WTO Members should still be respected when it comes to the non-GATT obligations that are in fact built upon or related to the GATT. Although the

reference to "this Agreement" under GATT Art. XX might seem to refuse applying GATT Art. XX outside the scope of the GATT, this thesis does not see the reference to "this Agreement" as an obstacle to applying GATT Art. XX under non-GATT context. This thesis believes that whether GATT Art. XX is applicable hinges on the breached AP provision, rather than GATT Art. XX. That is to say, when Members agree the recourse to GATT Art. XX in the AP, the reference to "this Agreement" in GATT Art. XX will not be a hindrance.

Recently, the WTO judiciary has been challenged with this issue in two cases, i.e. *China – Publications and Audiovisual Products* and *China – Raw Materials*. In *China – Publications and Audiovisual Products*, the Panel avoided answering the applicability question. The Panel employed the assuming *arguendo* approach. That is, the Panel assumed that GATT Art. XX is an applicable defense against violation of the AP and directly examined the merits of GATT Art. XX. The Panel reached the conclusion that China did not fulfill the requirements under GATT Art. XX and therefore the Panel did not need to address the applicability issue.

The AB in *China – Publications and Audiovisual Products* rejected the Panel's assuming *arguendo* approach and dealt with the issue head-on. The AB confirmed the availability of GATT Art. XX because the breached provision, paragraph 5.1 of China's AP, presents a textual link to the GATT. According to the AB, the introductory clause of paragraph 5.1, which reads that "without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement," incorporates GATT Art. XX defense into the paragraph 5.1. As a result, GATT Art. XX is an applicable defense against the violation of paragraph 5.1 of China's AP.

In contrast, the applicability of GATT Art. XX in *China – Raw Materials* was rejected for a lack of textual reference. The Panel and AB heavily relied on the textual interpretation

conducted by the AB in *China – Publications and Audiovisual Products* and tried to find a textual link in paragraph 11.3, the breached provision under China's AP. Unlike paragraph 5.1, paragraph 11.3, does not contain an incorporation clause similar to the one in paragraph 5.1 and does not make any textual reference to the GATT, either. Unable to find a textual reference, the Panel and AB in *China – Raw Materials* refused the applicability of GATT Art. XX.

Reading these two cases together, it is clear that with respect to applying GATT Art. XX in the AP or non-GATT context, WTO judiciary highly values the textual incorporation by means of reference. Anything short of such clear textual linkage will lead to a negative answer on the applicability question. In a word, the WTO judiciary considers that there are two occasions where GATT Art. XX is an available defense: 1. violation of the GATT and 2. violation of a non-GATT provision that incorporates GATT Art. XX by means of textual reference.

The reasoning of *China – Publications and Audiovisual Products* and *China – Raw Materials* is subject to severe criticisms in academia. The reasoning is mainly criticized for its strict textualist interpretation and for overlooking the unique legal nature of the AP and the systemic relationship between the AP obligations and GATT Art. XX. As mentioned earlier, the AP contains obligations that deviate from the basic WTO disciplines. Hence, with respect to the applicability issue, it is crucial to interpret AP obligations in their systemic position, which will be further elaborated in the next paragraph. Most importantly, the strict textual interpretation adopted by the WTO judiciary leads to unreasonable and undesired consequences. Take China's AP as an example. Paragraph 5.2 of China's AP follows up 5.1 and regulates that except as otherwise provided for in China's AP, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no

less favorable than that accorded to enterprises in China with respect to the right to trade. Following the restrictive interpretation of the AB, violation of paragraph 5.2 cannot be justified by GATT Art. XX because the paragraph does not have an introductory clause that incorporates or makes reference to the GATT. However, paragraph 5.1 and 5.2 share a very close relationship. Paragraph 5.2 is built upon 5.1 and regulates the same subject matter, i.e., trading rights. The AB's textual interpretation will render an unreasonable result that depriving enterprises in China, including domestic and foreign enterprises, of their trading rights can be justified by GATT Art. XX whereas depriving foreign individuals and enterprises, including those not invested or registered in China, of their trading rights cannot. In addition, the WTO judiciary did not examine the object and purpose of the WTO Agreements and neither did they consider the circumstances of conclusion of the AP.

This thesis opposes over-reliance on texts of an AP provision because it is more likely that the applicability issue was ever envisaged or discussed by Members during the negotiation. Thus, it is unlikely that texts can provide a decisive guidance on this issue. This thesis argues that the WTO judiciary should conduct a holistic analysis by taking into account of factors provided in VCLT Art. 31 and 32. Among them, a contextual analysis is of crucial importance as this issue involves a cross-agreement application. In addition, the unique legal nature and arrangement of the AP requires a contextual interpretation on the AP obligations. This thesis suggests a different contextual analysis from that performed in *China – Raw Materials*. This thesis proposes to read contexts on a broad scale by reading the AP obligations and its relevant, basic disciplines under the WTO Agreement together. Accordingly, this thesis proposes that when the breached AP obligation is intrinsically linked to or built upon the obligations under the GATT, GATT Art. XX should be an available defense unless such defense will defeat the very purpose of the breached obligation. This contextual reading respects the purposes of the WTO Agreement, too. The GATT clearly

denotes that non-trade values may outweigh trade interests provided that the measure is taken in accordance with GATT Art. XX. Furthermore, this interpretation follows the long established interpretative principle in the WTO judiciary, i.e. to interpret the WTO obligations in a coherent and harmonious way. Otherwise, it would be unreasonable that GATT Art. XX can justify basic obligations under the GATT, but not the more stringent AP obligations related to or built upon the basic GATT obligations. Thus, this thesis suggests that textual linkage is not the only available bridge between the AP and GATT Art. XX. A bridge can also be formed when the AP obligations are intrinsically related to or built upon the GATT obligations.

Bibliographies

WTO Cases:

[1] 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).

[2] Panel Report, China – Measures Related to the Exportation of Various Raw Materials, WT/DS394/R, WT/D395/R, WT/D398/R (July 5, 2011).

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

[4] Panel Report, China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products and Audiovisual Entertainment Products, WT/DS363/R (Aug. 12, 2009).

[5] Appellate Body Report, United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, WT/DS343/AB/R, WT/DS345/AB/R (July 16, 2008).

[6] Appellate Body Report, European Communities – Customs Classification of Frozen Boneless Chicken Cuts, WT/DS269/AB/R, WT/DS286/AB/R (Sept. 12, 2005).

[7] Appellate Body Report, United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R (Nov. 28, 2003).

[8] Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R (June 19, 2000).

[9] Appellate Body Report, Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R (Dec. 14, 1999).

[10] Panel Report, Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/R (June 25, 1999).

[11] Appellate Body Report, Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R (Nov. 2, 1998).

[12] Panel Report, Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998).

[13] Appellate Body Report, European Communities – Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R (Jan. 16, 1998).

Books:

[1] 83 LINDERFALK, ULF, ON THE INTERPRETATION OF TREATIES - THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Springer) (2007).

[2] BETHLEHEM, DANIEL L., THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW (Oxford University Press) (2009).

[3] BOSSCHE, PETER VAN DEN, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS (Cambridge University Press) (2008).

[4] Charnovitz, Steve, *Mapping the Law of WTO Accession*, *in* THE WTO: GOVERNANCE, DISPUTE SETTLEMENT AND DEVELOPING COUNTRIES 855 (Janow, Merit E. et al. eds., 2008).

[5] CHING, CHEONG, HANDBOOK ON CHINA'S WTO ACCESSION AND ITS IMPACTS (World Scientific) (2003).

[6] CORTEN, OLIVIER & KLEIN, PIERRE, THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY (Oxford University Press) (2011).

[7] DAMME, ISABELLE VAN, TREATY INTERPRETATION BY THE WTO APPELLATE BODY (Oxford University Press) (2009).

[8] DÈORR, OLIVER & SCHMALENBACH, KIRSTEN, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Springer) (2012).

[9] FEICHTNER, ISABEL, THE LAW AND POLITICS OF WTO WAIVERS: STABILITY AND FLEXIBILITY IN PUBLIC INTERNATIONAL LAW (Cambridge University Press) (2011)

[10] GARDINER, RICHARD K., TREATY INTERPRETATION (Oxford University Press) (2008).

[11] LESTER, SIMON ET AL., WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY (Hart Publishing 2) (2012).

[12] MAVROIDIS, PETROS C. ET AL., THE LAW OF THE WORLD TRADE ORGANIZATION (WTO): DOCUMENTS, CASES & ANALYSIS (West 1) (2010).

[13] MAVROIDIS, PETROS, TRADE IN GOODS (Oxford University Press) (2012).

[14] OXFORD DICTIONARIES ONLINE (Oxford U. Press 2012).

[15] PAUWELYN, JOOST, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW (Cambridge University Press) (2003).

[16] QURESHI, ASIF H., INTERPRETING WTO AGREEMENTS (Cambridge University Press) (2006).

[17] STATUS OF WTO LEGAL INSTRUMENTS (World Trade Organization) (2012).

[18] VILLIGER, MARK EUGEN, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Martinus Nijhoff Publishers) (2009).

[19] WORLD TRADE ORGANIZATION & HUSSAIN, ARIF, A HANDBOOK ON ACCESSION TO THE

WTO (Cambridge University Press) (2008).

Journal Articles:

[1] Baroncini, Elisa, *The applicability of GATT Article XX to China's WTO Accession Protocol in the Appellate Body Report of the China-Raw Materials case: suggestions for a different interpretative approach*, 1 CHINA-EU LAW JOURNAL 1 (2013).

[2] Conconi, Paola & Pauwelyn, Joost, *Trading Cultures: Appellate Body Report on China–Audiovisuals (WT/DS363/AB/R, adopted 19 January 2010)*, 10 WORLD TRADE REVIEW 95 (2011).

[3] Du, Michael Ming, *The Rise of National Regulatory Autonomy in the GATT/WTO Regime*, 14 JOURNAL OF INTERNATIONAL ECONOMIC LAW 639 (2011).

[4] Fontanelli, Filippo, *Necessity Killed the Gatt - Art XX Gatt and the Misleading Rhetoric about "Weighing and Balancing,"* 5 EUROPEAN JOURNAL OF LEGAL STUDIES 36 (2012).

[5] Gess, Karol N., *Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis*, 13 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 398 (1964).

[6] Gu, Bin, *Applicability of GATT Article XX in China – Raw Materials: A Clash within the WTO Agreement*, JOURNAL OF INTERNATIONAL ECONOMIC LAW (2012).

[7] Liu, Hua, *Comment on the Invocation of Article XX for Violation of Para.11.3 in China-Raw Materials*, 3 BEIJING LAW REVIEW 152 (2012)

[8] Matsushita, Mitsuo, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources*, 3 TRADE, LAW AND DEVELOPMENT 267 (2011).

[9] Pauwelyn, Joost, *Squaring Free Trade in Culture with Chinese Censorship: The WTO Appellate Body Report on China - Audiovisuals*, 11 MELBOURNE JOURNAL OF INTERNATIONAL LAW 119 (2010).

[10] Piérola, Fernando, *The Availability of a GATT Article XX Defence with Respect to a Non-GATT Claim: Changing the Rules of the Game?*, 5 GLOBAL TRADE AND CUSTOMS JOURNAL 172 (2010).

[11] Qin, Julia Ya, *"WTO-plus" obligations and their implications for the World Trade Organization legal system*, 37 JOURNAL OF WORLD TRADE 483 (2003).

[12] Qin, Julia Ya, *The Challenge of Interpreting "WTO-PLUS" Provisions*, 44 JOURNAL OF WORLD TRADE 127 (2010).

[13] Qin, Julia Ya, *Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence--A Commentary on the China-Publications Case*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 271 (2011).

[14] Qin, Julia Ya, *The Predicament of China's "WTO-Plus" Obligation to Eliminate*

Export Duties: A Commentary on the China-Raw Materials Case, 11 CHINESE JOURNAL OF INTERNATIONAL LAW 237 (2012).

[15] Roessler, Frieder, *Appellate Body Ruling in China–Publications and Audiovisual Products*, 10 WORLD TRADE REVIEW 119 (2011).

[16] Spiegel-Feld, Danielle H. & Switzer, Stephanie, *Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements After China-Raw Materials*, 38 YALE JOURNAL OF INTERNATIONAL LAW ONLINE 16 (2012).

[17] Tyagi, Mitali, *Flesh on a Legal Fiction: Early Practice in the WTO on Accession Protocols*, 15 JOURNAL OF INTERNATIONAL ECONOMIC LAW 391 (2012).

[18] Voon, Tania, *China and Cultural Products at the WTO - WTO Appellate Body Report, China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China - Publications and Audiovisual Products), WT/DS363/AB/R (circulated 21 December 2009, adopted 19 January 2010)*, 37 LEGAL ISSUES OF ECONOMIC INTEGRATION 253–259 (2010).

[19] Vranes, Erich, *The Definition of "Norm Conflict" in International Law and Legal Theory*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 395 (2006).

[20] Wu, Xiaohui, *Case Note: China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WT/DS363/AB/R)*, 9 CHINESE JOURNAL OF INTERNATIONAL LAW 415–432 (2010).

[21] Yamaoka, Tokio, *Analysis of China's Accession Commitments in the WTO: New Taxonomy of More and Less Stringent Commitments, and the Struggle for Mitigation by China*, 47 JOURNAL OF WORLD TRADE 105 (2013).

[22] Yu, Li, *WTO and National Cultural Policy: Rethinking China Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, 45 REVUE JURIDIQUE THEMIS 457 (2011).

Others:

[1] Amicus curiae submission on International Institute for Sustainable Development (IISD), Canadian Environmental Law Association (CELA) and Ecojustice Canada (Ecojustice) to the panel in *Canada – Renewable Energy*, 13, 10 May 2012.

[2] AU, THOMAS, RECONCILING WTO GENERAL EXCEPTIONS WITH CHINA'S ACCESSION PROTOCOL (Social Science Research Network) (2013).

[3] CATTANEO, OLIVIER & BRAGA, CARLOS PRIMO, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT WTO ACCESSION (BUT WERE AFRAID TO ASK) (WORLD BANK) (2009).

[4] WORLD TRADE ORG., http://www.wto.org/index.htm (last visited June 26, 2013).

[5] Wu, Chien-Huei, Assistant Research Fellow, Academia Sinica, The Fragmentation of The Multilateral Trading System: The Case of Trading Rules on Export Restrictions, Symposium on International Economic Law: New Issues and Challenges (Dec. 3, 2012).