An impossible relationship?
Article XX GATT and China’s accession protocol in the China – Raw Materials case

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On 30 January, the WTO Appellate Body (AB) handed down a long awaited ruling in the dispute brought by the US, the EU and Mexico against several export restrictions imposed by China on raw materials. The AB concluded that there is no basis in the China Accession Protocol (the Protocol) to allow the application of Article XX GATT to Paragraph 11.3, the WTO-plus provision of the Protocol requiring Beijing to eliminate export duties. The AB’s interpretative result runs the risk of strengthening what is increasingly perceived as an irrational aspect of the multilateral trade system that is also difficult to reconcile with the principle of permanent sovereignty over natural resources. This article proposes a different coordinated reading between Paragraph 11.3 of the Protocol and the GATT general exceptions’ clause – one that is more likely to produce an interpretative outcome in harmony with the principle of sustainable development enshrined in the Preamble of the WTO Agreement.

China WTO-plus obligation to eliminate export duties
The 2001 China Accession Protocol contains the largest number of “WTO-plus” obligations – the more stringent disciplines imposed on WTO acceding members going beyond the commitments generally undertaken by the WTO membership. Among such special obligations there is the severe regime on the elimination of export duties. Pursuant to Paragraph 11.3 of the Protocol, “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.” While the latter concerns fees and charges imposed as payment for a service rendered, Annex 6 of the Protocol lists 84 products – mainly raw materials – indicating for each of those goods the maximum export duty rate that Beijing may impose as export tariff. A Note to Annex 6 reaffirms that “the tariff levels included in this Annex are maximum levels which will not be exceeded,” pointing out that “China ... would not increase the presently applied rates, except under exceptional circumstances.”

China infringed Paragraph 11.3 by imposing export duties on products not listed in Annex 6 of the Protocol – including coke, various types of metal scraps, and some forms of fluorspar. It therefore requested to justify those export duties on the basis of Article XX(b) and (g) GATT, considering that those tariff measures were “necessary to protect human, animal or plant life or health,” and “relating to the conservation of exhaustible natural resources.”

Beijing claimed that the attacked measures were part of a unitary environmental strategy also addressing the objective of reducing the pollution emitted when the raw materials are extracted or produced, in order to decrease the risks to human, animal, and plant life and health in accordance with Article XX(b) GATT. With regard to export duties adopted as conservation measures, China argued that they are an expression of its sovereign right to elaborate and implement a wide-ranging mineral conservation policy, bearing in mind China’s special social and economic development needs. Beijing stressed that Article XX(g) GATT, devoted to the preservation of exhaustible natural resources, protects the principle of sovereignty on the latter, observing that the sovereign right on natural resources...
WTO Agreement Preamble

“[WTO members'] relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”

resources, sheltered by Article XX(g), has to be exercised in the light of the principle of sustainable development enshrined in the WTO Preamble.

Since the Panel Report concluded that “the wording and the context of Paragraph 11.3 precludes the possibility for China to invoke the defence of Article XX of the GATT 1994 for violations of the obligations contained in Paragraph 11.3 of China’s Accession Protocol” (para. 7.158), Beijing asked the AB to reverse the finding, being convinced of the erroneous nature of the Panel’s assumption “that the absence of language expressly granting the right to regulate trade in a manner consistent with Article XX means that China and other members intended to deprive China of that right” (AB Report, para. 28).

Text and context in the AB interpretation

After having reported that the Protocol has to be considered “an integral part” of the WTO Agreement, and thus interpreted in accordance with the customary rules of interpretation of public international law, as requested by Article 3.2. of the DSU, the AB expressly recalled Article 31 § 1 of the 1969 Vienna Convention on the Law of Treaties, pursuant to which “a treaty [has to] be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose,” beginning its analysis with the text of Paragraph 11.3 of the Protocol.

In few lines, the AB concluded that the absence of indications, in the wording of the WTO-plus obligation, on the applicability of Article XX GATT, together with the lack of any introductory clause similar to that of Paragraph 5.1 of the Protocol — pointing out that the right to import and export goods has to be guaranteed to all enterprises established in China “[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement” — “suggest ... that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3 of China’s Accession Protocol” (para. 291), finding it “difficult to see how [the WTO-plus obligation] language could be read as indicating that China can have recourse to the provisions of Article XX of the GATT in order to justify imposition of export duties on products that are not listed in Annex 6 or the imposition of export duties on listed products in excess of the maximum levels set forth in Annex 6” (para. 284).

Turning to the immediate context — Paragraph 11.1 and Paragraph 11.2 of the Protocol — the AB highlighted that Beijing guaranteed to WTO Members the application and administration of customs fees or charges and internal taxes and charges “in conformity with the GATT 1994,” a phrase which is absent in Paragraph 11.3, specifically referred to the elimination of “taxes and charges applied to exports.” Such silence, the AB argued, “further supports our interpretation that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3” in fact, went on their reasoning, as China’s WTO-plus obligation “arises exclusively from China's Accession Protocol, and not from the GATT 1994, we consider it reasonable to assume that, had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in Paragraph 11.3 or elsewhere in China’s Accession Protocol” (para. 293).

Finally, taking into consideration the WTO Preamble, the AB recalled that it contemplates various objectives, including “raising standards of living … seeking both to protect and preserve the environment … expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development,” and ending with the resolution “to develop an integrated, more viable and durable multilateral trading system.” Surprisingly, and without any further consideration or legal reasoning, the AB instantly affirmed that “none of the [considered] objectives, nor the balance struck between them, provides specific guidance on the question of whether Article XX of the GATT is applicable to Paragraph 11.3 of China’s Accession Protocol”; and it is because of such asserted absence of “specific guidance,” in light of Beijing “explicit commitment” to eliminate export duties and “the lack of any textual reference to Article XX” in the China WTO-plus obligation, that the AB
concluded to “see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3” (para. 306).

**Effects of the AB conclusions**

The austere AB interpretative approach unfortunately produces a series of negative consequences. First of all, it renders the WTO-plus obligation to eliminate export duties “immune” from any GATT policy exception, while even the pillars of trade liberalisation – the MFN clause, the principle of national treatment – may be derogated by domestic measures necessary or related to the protection of one or more of the non-trade values enshrined in the WTO general exceptions clauses. It therefore aggravates the asymmetry already characterising the WTO-plus commitments, an asymmetry which is difficult to correct by amending the multilateral trade texts, as it is by no means clear which procedure should be followed to revise Accession Protocols, nor is it simple to satisfy the very demanding decisional mechanism -provided for by Article X of the WTO Agreement- should it be concluded that the WTO amending procedure has to be applied to modify WTO-plus obligations accepted by the WTO acceding countries.

Additionally, the AB interpretation generates another “illogical result.” Being barred from using export duties – even though customs duties are considered the less distorting and the most transparent obstacle to trade, and thus the preferred tool to have recourse to by a WTO Member in need to apply a trade remedy – China is forced to resort to (severely trade distorting) bans and quotas in order to pursue its national environmental, conservation and health policies.

More generally, the impossibility to apply Article XX GATT to Paragraph 11.3 of the Protocol appears to be in contrast with the principle of sustainable development codified in the WTO Preamble and the model of sustainable economic development pursued by the Geneva-based multilateral trade system, where no trade liberalisation commitment is absolute, but may be derogated, obviously respecting the requirements of the general exceptions clauses, while pursuing the non-trade values therein contemplated.

**Suggestions for a different interpretative perspective: the text of Paragraph 11.3 of the Protocol**

Having highlighted the serious undesirable and controversial consequences that the recent Geneva case-law provokes, it may be easily stated that the inability of the WTO judiciary to mitigate the inequity among WTO Members generated by the stand-alone export concessions, more than being “perceived as imbalanced” (Panel Report, para. 7.160), leads to what Article 32, lett. b) of the Vienna Convention defines as “a result which is manifestly absurd and unreasonable.”

Such an unsatisfying scenario imposes an in-depth review of the problematic interpretative path that the AB has decided to embark upon. It is, in fact, possible to define a connection between Paragraph 11.3 of the Protocol and Article XX capable of allowing China to invoke the GATT public policy exceptions for justifying derogations to the obligation to eliminate export duties beyond the goods listed and the limits contemplated in Annex 6 of the Protocol.

Starting with the text of Paragraph 11.3, it is true that there is no reference to the GATT, but it is also accurate to say that there is no express exclusion of the possibility to invoke the GATT public policy exceptions. The certainly imprudent silence of the negotiators cannot be automatically transformed into the most stringent and inequivocal prohibition of having recourse to the GATT general exceptions clause. This is all the more so if -as required by Article 31 § 3 lett. c) of the Vienna Convention, according to which a treaty interpreter has to take into account “any relevant rules of international law applicable in...
the relations between the parties”- due consideration is given to the principle of permanent sovereignty over natural resources. Pursuant to this most relevant principle of customary law, all peoples are now recognised to have the right “for their own ends [to] freely dispose of their natural wealth and resources” (Articles 1.2 of the 1966 UN Covenants) and the State has to responsibly exercise sovereignty in order to manage natural resources in the best interest of its population. While, in light of this principle, it is acceptable that a WTO Member reduces its policy space in the management of its natural resources by agreeing to the WTO-plus obligation to reduce and/or eliminate export duties on them, the silence accompanying such special commitment cannot be interpreted as an eternal abdication by a state to dispose of the national resources of its own population by using export duties under the GATT general exceptions clause.

Accordingly, the scope of the two ad hoc exceptions to the obligation to eliminate export duties expressly contemplated in Paragraph 11.3 of the Accession Protocol should be reconstructed just in light of the wording of that Paragraph: negotiators clarified that the severe WTO-plus discipline does not concern charges imposed as payment for a service rendered (Article VIII GATT), nor does it affect the 84 products listed in Annex 6 of the Protocol, as export duties may still be levied on those goods, within the limits of the export duty rates provided for in that Annex. These clarifications cannot be read as expressing China renouncing to the right to have recourse to Article XX GATT with reference to the right to impose export duties on products not contemplated in the list of Annex 6, or to overcome the export duty rates contemplated for the 84 products quoted in Annex 6. Of course, this assumes that all the requirements imposed by the GATT general exceptions clause are respected, in primis the condition that the extra export duties pursue one of the non-trade values contemplated in Article XX.

Undeniably there is also the Note to Annex 6 to take into consideration, pursuant to which “China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded,” and “that it would not increase the presently applied rates, except under exceptional circumstances.” But, again, such text just indicates that China undertook an additional obligation with reference to the 84 products listed in Annex 6: Beijing accepted not to raise the export duty rates applied on those products at the moment of acceding to the WTO, if those rates were lower than the rates fixed in the Annex; and it was agreed that China could derogate to such further commitment only “under exceptional circumstances.” Once more, the wording of the relevant parts of the Protocol does not allow one to conclude that China abandoned the relevant right to avail itself of the GATT public policy exceptions.

The WTO Preamble and the object and purpose of the WTO system
Turning now to examine the immediate context, this should be read always keeping in mind that Paragraph 11.3 disciplines a WTO-plus obligation. It is thus only normal that the prescriptions expressed there – being sui generis and not reflecting the GATT fees, charges or internal taxes contemplated in Paragraph 11.1 and Paragraph 11.2 in order
to reaffirm those traditional multilateral trade obligations with reference to the new WTO Member – are not accompanied by the expression “in conformity with GATT.” The General Agreement does not refer to any general obligation to eliminate export duties. Consequently, the silence of Paragraph 11.3 should be considered due to the fact that the GATT does not contain special principles or disciplines to be respected by China when implementing the WTO-plus obligation to eliminate export duties; it has hence to be concluded once again that that silence does not express China’s renunciation to resort to Article XX for justifying derogations to the Paragraph 11.3 commitment. 3

Enlarging the analysis of the context to the WTO Preamble, it is finally possible to impart a positive meaning to the silence of Paragraph 11.3 of the Protocol, a positive meaning that may also be tested in light of the “object and purpose” characterising the whole WTO system, and synthesised in the already recalled WTO Preamble. Far from being the final target of the Marrakesh Agreements, trade liberalisation is conceived and regulated within the WTO system as a tool “to raise[e] standards of living,” constantly to be pursued “allowing for the optimal use of the world’s resources,” and “in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.” Trade liberalisation commitments are consequently disciplined in the Geneva-based multilateral system not as absolute duties and prohibitions, impossible to derogate, but as obligations which may be overcome to pursue the non-trade values contemplated in many WTO rules, in particular in the general exceptions clauses, respecting all the requirements and the equilibrium among conflicting needs and concerns expressed by those multilateral provisions. The attention devoted by the WTO Preamble to environmental protection and the optimal use of natural resources, together with the explicit acknowledgement of the principle of sustainable development, evidently reveal that the signatories of the multilateral trade agreements chose a model of economic development capable of being sustainable – constantly conjugated with the respect of the environment and social progress. Since the WTO Preamble informs all the covered agreements – hence also Accession Protocols as integral parts of the WTO system – the meaning of Paragraph 11.3 has to be construed in order to be a coherent expression and articulation of the principles therein enshrined, and a proper implementation of the model of sustainable economic development therein shaped.

It follows that the text of Paragraph 11.3, read in the light of the context of the WTO Preamble, and the object and purpose of the WTO system, unequivocally indicates that China, while accepting the WTO-plus obligation to eliminate export duties, did not relinquish its right to regulate trade in a manner that promotes conservation and public health also through the adoption of export tariffs, should these measures prove to be the most appropriate tools to realise its legitimate public policy purposes.

It may therefore be concluded that Article XX GATT is applicable to the WTO-plus obligation accepted by China to eliminate export duties. In fact, attributing this meaning to the silence of Paragraph 11.3 of the Protocol is the only interpretative outcome capable of being in harmony with the principles and the model of sustainable economic development promoted by the WTO system, which provide “specific guidance” to the treaty interpreter applying all the hermeneutic criteria expressed by the international customary rules on the interpretation of treaties.