

# Accession Commitments in WTO Dispute Settlement

*Seminar on WTO Accessions Rules, 11 February 2019*



## ***Accession commitments are enforceable in WTO DS***

Protocols are integral parts of the WTO Agreement

Commitments are incorporated by reference from Working Party Reports, or enshrined directly in the Protocol (e.g. China)

### Panel in China – Auto Parts:

“All parties agree that China’s commitments under its Working Party Report are enforceable in WTO dispute settlement proceedings. The Accession Protocol is an integral part of the WTO Agreement pursuant to Part I, Article 1.2 of the Accession Protocol. In turn, paragraph 342 of China's Working Party Report incorporates China’s commitments under its Working Party Report, including paragraph 93, into the Accession Protocol. Therefore, China’s commitment in paragraph 93 of the Working Party Report is also an integral part of the WTO Agreement” (para. 7.740)

### Appellate Body in China – Rare Earths:

“Indeed, it is uncontested that China’s Accession Protocol is enforceable under the DSU.” (para. 5.90)

## ***Commitment in Working Party Report of Afghanistan***

**210.** Asked as to whether Afghanistan would commit not to use export subsidies, the representative of Afghanistan agreed that, upon Afghanistan's accession, his country would bind its agricultural export subsidies at zero in its Schedule of Concessions and Commitments on Goods (CLXX), and not maintain or apply any export subsidies for agricultural products. The Working Party took note of these commitments.

**301.** [...] The Working Party took note of the commitments by the Islamic Republic of Afghanistan in relation to certain specific matters, which are reproduced in paragraphs 42, 45, 51, 57, 64, 65, 77, 82, 85, 88, 93, 100, 109, 121, 129, 133, 135, 139, 145, 158, 171, 187, 191, 193, 199, 207, **210**, 253, 255, 279, 280, 281, 282, 283, 291, 292 and 300.

### ***Para. 1 of Afghanistan's Protocol of Accession***

2. [...] This Protocol, which shall **include the commitments referred to in paragraph 301** of the Working Party Report, shall be an **integral part of the WTO Agreement**.

➤ *The WTO Agreement is a “covered agreement” (Article 1 DSU + Appendix 1 to DSU)*

***Note: Part of China's commitments have been enshrined directly into the Protocol.***

## ***Can be used both offensively and defensively***

Offensive use: file case against Art. XII Member for breach of accession commitments

Defensive use: invoke provision in Protocol/WPR to justify otherwise WTO-inconsistent measure

## ***Are general exceptions available to justify breach of accession commitments?***

## China

*China – Rare Earths (US, EU, Japan)*

*China – Raw Materials (US, EU, Mexico)*

*China – Publications and Audiovisual Products (US)*

*China – Auto Parts (EU, US, Canada)*

*EU – Footwear*

*EC – Fasteners*

*US – Tyres*

### *Pending Disputes*

*EU – Price Comparison Methodologies (before Panel)*

*US – Measures Related to Price Comparison Methodologies  
(in consultations)*

*China – Raw Materials II (US, EU) (panel established but not  
composed)*

## Russian Federation

*Russia – Pigs (EU)*

*Russia – Tariff Treatment (EU)*

## Viet Nam

*US – Shrimp II (Viet Nam)*

*US – Shrimp (Viet Nam)*



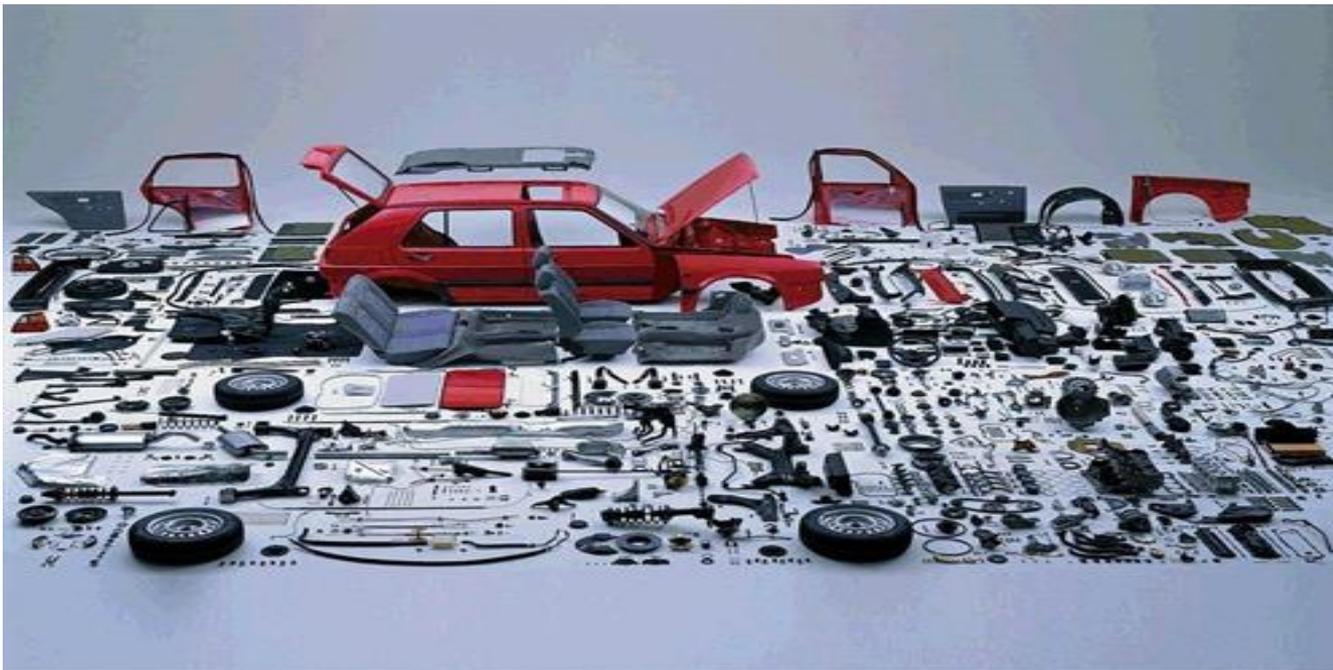
WTO OMC



Accessions

## *Para. 93 of China's Working Party Report*

93. [...] the representative of China confirmed that China had no tariff lines for completely knocked-down kits for motor vehicles or semi-knocked down kits for motor vehicles. If China created such tariff lines, the tariff rates would be no more than 10 per cent. The Working Party took note of this commitment. (emphasis added)



Source: [mbacars.blogspot.com](http://mbacars.blogspot.com)

## *First try, unsuccessful: China – Auto Parts (Canada, EC, US)*

- ❑ Tariff for auto parts: 10% on average
  - ❑ Tariff for complete vehicles: 25 % on average
  - ❑ China classified CKD and SKD as complete vehicles.
- **The Panel found that:**
- ❑ **CKD and SKD could be classified as complete vehicles. Hence, China had not breached Art. II:1(b) of GATT 1994.**
  - ❑ **However, China had breached Para. 93 of WPR.**
    - **Reversed by the AB, as the Panel's conclusion had been premised on a misconstruction of the challenged Chinese measure.**

## *China – Publications and Audiovisual Products (US)*

‘Paragraph 5.1 of China's Accession Protocol imposes on China the obligation to ensure that, with the exception of certain goods set out in Annex 2A (which are not at issue in this dispute), **"all enterprises in China shall have the right" to import and export all goods "throughout the customs territory of China"**. Paragraphs 83(d) and 84(a) of China's Accession Working Party Report confirm China's obligation to grant the right to trade. In addition, paragraph 84(b) of China's Accession Working Party Report contains **an obligation to grant in a non-discretionary manner the right to trade to foreign enterprises and individuals.**’ (AB, para. 167, emphasis added)

*A number of China's measures were found to be in breach, inter alia, because:*

- Foreign-invested enterprises were not allowed to import certain publications and audiovisual products.
- Importation of certain products was restricted to SOEs.
- Only enterprises “designated” or “approved” by the State Administration on Radio, Film and Television (SARFT) were allowed to import films for theatrical release into China. SARFT decisions were discretionary.

## *Availability of Art. XX GATT 1994 as Defence for Breach of Accession Commitments*

### **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;
- [...]

## *Availability of Art. XX GATT 1994 as Defence for Breach of Accession Commitments*

### **Para. 5.1 of China's Protocol of Accession**

#### 5. Right to Trade

**1. 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. [...] (emphasis added)**

## *Availability of Art. XX GATT 1994 as Defence for Breach of Accession Commitments*

### *AB Report, China – Publications and Audiovisual Products*

- ❑ ‘[T]he first sentence of paragraph 5.1 [...] contains a commitment, or obligation, undertaken by China, namely to progressively liberalize the right to trade and ensure that, within three years of accession, all enterprises in China have the right to import and export all goods.’ (§ 218)
- ❑ ‘This obligation is, however, qualified by the introductory clause of the first sentence: "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement".’ (§ 218)

## *Availability of Art. XX GATT 1994 as Defence for Breach of Accession Commitments*

### *AB Report, China – Publications and Audiovisual Products*

- ❑ ‘An obligation that is "without prejudice to" a right may not detrimentally affect, encroach upon, or impair such right.’
- ❑ ‘In the introductory clause of paragraph 5.1, the "right" that may not be impaired is "China's right to regulate trade".’
- ❑ ‘This right is itself further qualified by the phrase "in a manner consistent with the WTO Agreement". [...]’. (§ 219, emphasis added)

## *Availability of Art. XX GATT 1994 as Defence for Breach of Accession Commitments*

### *AB Report, China – Publications and Audiovisual Products*

**What does it mean to regulate trade "in a manner consistent with the WTO Agreement"?**

- ❑ ‘We read the phrase "in a manner **consistent with the WTO Agreement**" as referring to the WTO Agreement as a whole, including its Annexes [e.g. GATT 1994].’ (§ 222, emphasis added)
  
- ❑ **Two options for regulating ‘in a manner consistent with the WTO Agreement’:**
  1. The regulations ‘may simply not contravene any WTO obligation’
  2. ‘even if they contravene a WTO obligation, they may be justified under an applicable exception’ (§ 223)

## *Availability of Art. XX GATT 1994 as Defence for Breach of Accession Commitments*

### *AB Report, China – Publications and Audiovisual Products*

**‘We see the obligations assumed by China in respect of trading rights, which relate to traders, and the obligations imposed on all WTO Members in respect of their regulation of trade in goods, as closely intertwined. This is particularly true of China’s trading rights commitments, on the one hand, and the obligations imposed on all WTO Members under Articles III and XI of the GATT 1994, on the other hand, as certain WTO Members expressly recognized during the negotiations on China's accession to the WTO. ‘ (§ 226, emphasis added)**

## *Availability of Art. XX GATT 1994 as Defence for Breach of Accession Commitments*

### *AB Report, China – Publications and Audiovisual Products*

‘[...] whether China may [...] justify its measure under Article XX of the GATT 1994 must in each case depend on the relationship between the measure found to be inconsistent with China's trading rights commitments, on the one hand, and China's regulation of trade in goods, on the other hand.’ (§ 229, emphasis added)

## *Availability of Art. XX GATT 1994 as Defence for Breach of Accession Commitments*

### *AB Report, China – Publications and Audiovisual Products*

- ❑ ‘[...] we consider that the provisions that China seeks to justify have a **clearly discernable, objective link** to China's regulation of trade in the relevant products.’
  
- ❑ ‘In the light of this relationship between provisions of China's measures that are inconsistent with China's trading rights commitments, and China's regulation of trade in the relevant products, we find that China **may rely upon the introductory clause of paragraph 5.1** of its Accession Protocol and seek to justify these provisions as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994.’ (§ 233, emphasis added)

# China's Accession Protocol

## 11. Taxes and Charges Levied on Imports and Exports

....

**3. 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.**

- *“WTO - plus” provision*
- *Violations found in:*

***China – Raw Materials, and  
China – Rare Earths***

- ***Article XX GATT 1994 found not to apply.***

## ***Panel Report, China – Raw Materials***

- ❑ No express reference in in Para. 11.3 to Art. XX GATT, or GATT provisions more generally (§ 7.124)
- ❑ As opposed to introductory clause in Para 5.1, *i.e.*:
  - ❑ *'Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement'*
- ❑ *'nothing in this agreement'* in *chapeau* of Art. XX suggests application to GATT only. (§ 7.153)
- ❑ Provisions of Art. XX have been incorporated, for instance, into TRIMs Agreement. (§ 7.156)
  - Hence, Art. XX not available as a defence for violation of Para. 11.3. (§ 7.158)

## ***AB Report, China – Raw Materials***

- ❑ No language in Para. 11.3 similar to that in Para 5.1, *i.e.*:
  - ❑ *“Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement”* (§ 291)
- ❑ No reference to “conformity with the GATT 1994”, in contrast to other paras. in the Protocol. (§ 293)
- ❑ **“China’s obligation to eliminate export duties arises exclusively from China’s Protocol, and not from GATT 1994”**. (§ 293)
  - “had there been common intention to provide access to Art. XX of the GATT 1994 ... language to that effect had been included in Paragraph 11.3 or elsewhere in China’s Protocol” (§ 293)
- ❑ Attached significance to lack of reference to GATT provisions including Art. XX (except Art. VIII which did not regulate export duties) (§§ 290 & 303)
  - **AB ultimately upheld the Panel’s conclusion.**

## ***China – Rare Earths***

### **China argued that:**

- ❑ “WTO Agreement” in Para. 1.2 of the Protocol means “Marrakesh Agreement and the Multilateral Trade Agreements”.
- ❑ Pursuant to Art. XII, States accede to the Marrakesh Agreement and the MTAs.
- ❑ **Accession provisions become integral parts of either the Marrakesh Agreement or one of the MTAs, depending on which agreement the commitment “intrinsically” relates to.**
- ❑ Para. 11.3 concerns export duties, and is therefore related to Arts. II and XI of GATT 1994.
- ❑ **Para. 11.3 should be seen as integral part of the GATT 1994.**
  - Hence, Para. 11.3 is subject to GATT general exceptions unless there is explicit language to the contrary.

## Panel Report, China – Rare Earths

- ❑ Pursuant to Para. 1.2 Accession Protocol became integral part of Marrakesh Agreement alone. (§ 7.80)
- ❑ Individual accession provisions may become integral parts of one of the MTAs, **“if and where if and where such language is contained in the individual provision ”** (§ 7.80)
- ❑ Para. 11.3 not intrinsically related to Arts. II and XI, as GATT 1994 does not require elimination of export duties. (§ 7.95)
- ❑ Accepting China’s interpretation would make redundant references in Protocol and WPR making exceptions available (e.g. Paras 162 and 165 of WPR, and para. 5.1 of Protocol) (§ 7.86)
- ❑ ‘nothing *in this agreement*’ in *chapeau* of Art. XX suggests application to GATT only. (§ 7.101)
- ❑ No cogent reasons to depart from interpretation in Raw Materials.
  - **Para. 11.3 not subject to Art. XX of GATT 1994.**(§ 7.115)

# Panel Report, China – Rare Earths

## *Dissenting Panelist*

- ❑ Para. 11.3 modifies Art. XI of the GATT 1994 as far as China is concerned..
- ❑ It also expands China's obligations under Arts. II and XI of the GATT 1994.
- ❑ Hence, Para. 11.3 of Protocol must be read together with Arts. II and XI of the GATT 1994.
  - Para. 11.3 integral Part of GATT 1994.
    - Article XX of GATT 1994 applies to Para. 11.3 of Protocol.

(§§ 7.136 – 7.138)

## AB Report, China – Rare Earths

- ❑ Whether ‘WTO Agreement’ means ‘Marrakesh Agreement’ or ‘Marrakesh Agreement and the Multilateral Trade Agreements’ is not dispositive. (§ 5.72)
- ❑ Para. 1.2 is a bridge between the Accession Protocol and the WTO legal framework (Marrakesh Ag. + MTAs), but of general nature (§ 5.50)
  - ❑ Hence, no automatic transposition from one part of the legal framework into another. (§ 5.68)
- ❑ The specific relationship between accession provisions and provisions in the Marrakesh Agreement and the MTAs must be determined on a case-by-case basis (§ 5.57)
- ❑ Express textual reference, or absence thereof, to a GATT provision is not dispositive. (§§ 5.61 and 5.63), but rather

*‘whether there is an objective link between an individual provision in China's Accession Protocol and existing obligations under the Marrakesh Agreements and the Multilateral Trade Agreements’* (§ 5.71)

## ***Key Takeaways***

- ❑ The wording of commitments really matters.
- ❑ However, reference or no reference to GATT 1994 provisions is not dispositive.
- ❑ What matters is an objective link between the commitment and GATT 1994 provisions.
- ❑ The availability of general exceptions is to be determined on a case-by-case basis.

**Thank you!**



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