



Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements After *China—Raw Materials*

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I. INTRODUCTION

On January 30, 2012 the Appellate Body to the World Trade Organization (WTO) released a decision in *China—Measures Relating to the Exportation of Various Raw Materials (Raw Materials)*¹ in which it condemned China's refusal to freely export certain raw materials mined within its territory. Apart from the significant political implications of the decision,² the *Raw Materials* report went a good distance towards answering a persistent question in trade law circles: when, if at all, can the savings clause contained in Article XX of the General Agreement on Tariffs and Trade (GATT)³ be invoked to justify a violation of another WTO

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1. Appellate Body Report, *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R (Jan. 30, 2012) [hereinafter Appellate Body Report, *Raw Materials*].
2. See, e.g., Christopher Doyle, *Gimme Shelter: The Necessary Element of GATT Article XX in the Context of the Audiovisuals Products Case*, 29 B.U. INT'L L.J. 143, 145-48 (2011).
3. See General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, as amended by Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1867 U.N.T.S. 154, 33 I.L.M. 1125 [hereinafter GATT]. The relevant sections of Article XX are set out below:

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 importation or exportation 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;

agreement?⁴ Answering the question is important because if GATT Article XX is generally available as a defense against non-GATT violations, it would ensure that the specialized WTO agreements are as tolerant of public policy motivated trade restrictions as is the GATT. That, in turn, would assuage concerns that certain specialized agreements such as the Technical Barriers to Trade Agreement (TBT)⁵ or the Agreement on Subsidies and Countervailing Measures (SCM),⁶ which lack their own savings clauses, are insufficiently sensitive to non-trade concerns, such as environmental protection.⁷ Stated otherwise, permitting broad recourse to Article XX outside of the GATT would soften the perceived rigidity of the specialized agreements, thereby preventing the WTO from inappropriately encroaching upon members' domestic regulatory space.⁸

This Essay attempts to throw light on the Appellate Body's *Raw Materials* report and, more specifically, the impact that it will have on attempts to invoke Article XX outside the GATT in the future. The analysis proceeds in five parts. Part II presents context necessary to understand the normative arguments advanced in favor of applying Article XX to non-GATT agreements. In Part III we trace the origins of the controversy about the scope of Article XX and then, in Part IV, review the muddled state of the jurisprudence on this question prior to *Raw Materials*. Next, in Part V, we set out the crux of our argument; we argue

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

Id.

4. At one end of the spectrum are those who think it is almost absurd that Article XX could be raised as a defense against violations of other agreements. *See, e.g.*, Gabrielle Marceau & Joel Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36 J. WORLD TRADE 811, 874 (2002) (arguing it would take a "heroic approach to interpretation" to find that Article XX could justify a violation of another WTO Agreement). On the other end of the spectrum are those who think that allowing broad recourse to Article XX is necessary to maintain the balance between regulatory autonomy and trade facilitation that the parties agreed to under the GATT. *See* Robert Howse, Comment to *The China—Raw Materials AB Report: GATT Article XX and Non-GATT Agreements*, INT'L ECON. L. & POL'Y BLOG (Jan. 30, 2012, 1:59 PM), <http://worldtradelaw.typepad.com/ielpblog/2012/01/the-china-raw-materials-ab-report-gatt-article-xx-and-non-gatt-agreements.html> (contending that allowing GATT Article XX as a defense to a violation of the SPS or TBT Agreements "would address many of the problems with those Agreements threatening to overreach into the domestic regulatory process, and causing difficulties for non-discriminatory measures with legitimate public policy justifications"). For a general discussion of the issue, see Bradley J. Condon, *Climate Change and Unresolved Issues in WTO Law*, 12 J. INT'L ECON. L. 895 (2009).
5. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT].
6. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM].
7. *See generally* Christopher Tran, *Using GATT, Art. XX To Justify Climate Change Measures in Claims Under the WTO Agreements*, 27 ENVTL. & PLAN. L.J. 346 (2010).
8. For a more detailed discussion of the importance of protecting domestic regulatory autonomy, see Michael Ming Du, *The Rise of National Regulatory Autonomy in the GATT/WTO Regime*, 14 J. INT'L ECON. L. 639, 639 (2011). *But see* Joost Pauwelyn, *Squaring Free Trade in Cultural Goods and Services with Chinese Censorship: The WTO Appellate Body Report on China—Audiovisuals*, 11 MELB. J. INT'L L. 119, 137 (2008), which notes that excessive deference to domestic regulatory prerogative may bring about "a considerable reduction of WTO obligations."

that the most plausible reading of the Appellate Body's *Raw Materials* report is that it created a presumption that Article XX cannot be invoked outside the GATT unless the breached provision specifically incorporates a reference to Article XX or wording of similar import.

We are cognizant that our reading of the *Raw Materials* report may be unpopular with those who wish to see Article XX applied more broadly. Therefore, in Part VI, we respond to counterarguments that might be raised in favor of an alternative interpretation. We further explain why, in our view, the Appellate Body was correct in refusing to permit the broad cross-application of Article XX to other of the WTO covered agreements. We contend that permitting the generalized application of Article XX outside of the GATT would do needless violence to the delicate balance between trade facilitation and regulatory autonomy to which WTO members agreed.

II. CONTEXTUALIZING THE DEBATE: THE SIGNIFICANCE OF ARTICLE XX'S SCOPE

The GATT sets forth a number of substantive obligations owed by all WTO members. Although the content of specific provisions varies widely, their thematic aim is to keep states from enacting measures that restrict the flow of goods across their borders. GATT Article XX operates as a general exception to the substantive obligations of the GATT, providing an escape hatch for measures that violate those obligations, but nevertheless serve important policy objectives.⁹

The Appellate Body established early on in its jurisprudence that two prerequisites must be satisfied for a GATT Article XX defense to succeed. First, the measure in question must fall within the scope of one of the ten subparagraphs of Article XX.¹⁰ Having met that hurdle, the measure must then satisfy the *chapeau* of Article XX.¹¹ To pass that bar, a measure must not result in "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or be a "disguised restriction on international trade."¹²

The Appellate Body's GATT Article XX jurisprudence has done much to reassure members that, at least with respect to measures falling within the scope of the GATT, there is sufficient regulatory space at the domestic level for states to enact measures that, though trade-restrictive, serve pressing public policy goals.¹³ However, with respect to measures that fall under other WTO agreements such as the SCM, TBT, or indeed the Agreement on Trade-Related Aspects of Intellectual

9. See GATT, *supra* note 3, art. XX.

10. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 22, WT/DS2/AB/R (Apr. 29, 1996) ("In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions—paragraphs (a) to (j)—listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX."); see also Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 118-19, WT/DS58/AB/R (Oct. 12, 1998) (explaining that the *chapeau* provides an additional check for measures which are provisionally permissible under the subparagraphs).

11. See *id.*

12. GATT, *supra* note 3, art. XX.

13. See Carrie Wofford, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENVTL. L. REV. 563 (2000); see also Steve Charnovitz, *The WTO's Environmental Progress*, 10 J. INT'L ECON. L. 685, 697 (2007).

Property Rights (TRIPS),¹⁴ the absence of a separate Article XX-like savings clause has led some commentators to worry that legitimate public policy measures could be wrongly invalidated by the WTO. To prevent that threat of encroachment, some suggest permitting Article XX to operate as a defense to violations of WTO agreements other than the GATT.¹⁵

Concerns about encroachment are particularly germane in the environmental domain. As the problem of climate change grows ever more serious and hopes for effective multilateral efforts to solve the problem fade, some states have taken steps towards enacting unilateral measures to help reduce greenhouse gas emissions associated with climate change.¹⁶ Yet, many such unilateral measures hold the potential to breach provisions of the non-GATT WTO agreements. For instance, attempts to differently label or otherwise provide preferential market access to products with low lifecycle greenhouse gas emissions may be found to contravene the nondiscrimination obligation contained in Article 2.1 of the TBT Agreement.¹⁷ And if they are, there is nothing in the text of the TBT Agreement itself that could save them.

Similarly, subsidies designed to address climate change concerns may be fatally incompatible with the substantive provisions of the SCM Agreement.¹⁸ SCM Article 8 established that a limited range of subsidies were non-actionable. That included, pursuant to SCM Article 8(2), certain environmental subsidies. The legal effect of that provision, however, lapsed after five years,¹⁹ meaning that there is no longer a safe harbor for environmental subsidies that would otherwise violate the terms of the SCM Agreement.²⁰ Accordingly, the question of whether Article XX can be applied outside of the GATT is today of “utmost importance.”²¹ As will be described, after many years of debate and discord, in *Raw Materials*, the Appellate Body responded to that need and provided an answer to the question at hand.

III. THE ROOT OF THE UNCERTAINTY

The question of Article XX’s reach outside the GATT has long been controversial. The root of the problem stems from the fact that the texts of the GATT and the Marrakesh Agreement Establishing the World Trade

14. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].

15. *See generally* Tran, *supra* note 7. Note, however, that Tran expresses numerous reservations to this argument. *See id.* at 358.

16. For example, the European Union has decided to unilaterally extend its emissions trading scheme to aviation activities of all commercial airliners landing in its airports. *See* Stephanie Switzer, *Aviation and Emissions Trading in the European Union: Pie in the Sky or Compatible with International Law?*, 39 *ECOLOGY L. CURRENTS* 1, 1-2 (2012).

17. *See* Condon, *supra* note 4, at 920-21.

18. *See* Lauren Henschke, *Going It Alone on Climate Change. A New Challenge to WTO Subsidies Disciplines: Are Subsidies in Support of Emissions Reductions Schemes Permissible Under the WTO*, 11 *WORLD TRADE REV.* 27 (2012).

19. *See* World Trade Organization, Minutes of Special Meeting Held on 20 December 1999, G/SCM/M/22 (2000).

20. *See* Charnovitz, *supra* note 13, at 5.

21. Pauwelyn, *supra* note 8, at 136; *see also* Paola Conconi & Joost Pauwelyn, *Trading Cultures: Appellate Body Report on China—Audiovisuals*, 10 *WORLD TRADE REV.* 95, 104-06 (2011).

Organization²² provide contradictory clues as to the relevance of GATT Article XX to the other WTO agreements.

On the one hand, Article II:2 of the Marrakesh Agreement states, “The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as ‘Multilateral Trade Agreements’) are integral parts of this Agreement, binding on all members.”²³ The Appellate Body has consistently interpreted this language as calling for the constituent parts of the WTO Agreement to be interpreted as a cohesive treaty,²⁴ “in a way that gives meaning to all of them, harmoniously.”²⁵ That instruction suggests that adjudicators should not allow the commitments in the non-GATT agreements to undermine the rights that Article XX protects because doing so would deprive Article XX of its “meaning.” Arguably, the most straightforward way of preventing that result is to allow Article XX to be used as a defense against a breach of another WTO Agreement.²⁶

And yet, the text of GATT Article XX itself cautions against permitting the defense to excuse violations of other agreements. Specifically, the *chapeau* of Article XX states, “[N]othing in *this* Agreement shall be construed to prevent the adoption . . . of measures.”²⁷ The language in the *chapeau* is taken directly from Article XX of the original 1947 GATT,²⁸ which was applied on a provisional basis until the WTO came into being in 1994.²⁹ Because none of the other WTO agreements were in force when the 1947 GATT was drafted, it is clear that at the time the text was written, it referred to the GATT. Although the negotiators could have amended the language during the Uruguay Round to refer to the WTO Agreement, or explained in the General Interpretative Note to Annex 1A of the Agreement Establishing the World Trade Organization that it would now have expanded reach,³⁰ they did neither. In light of that seemingly deliberate omission,³¹ allowing Article XX to justify breaches of other agreements seems to

22. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1125.

23. *Id.*

24. Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 81, WT/DS98/AB/R (Dec. 14, 1999).

25. Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 81, WT/DS121/AB/R (Dec. 14, 1999); Appellate Body Report, *Brazil—Measures Affecting Desiccated Coconut*, 12-13, WT/DS22/AB/R (Feb. 21, 1997).

26. Another way of achieving this result would be to interpret the text of the specialized agreements in a way that makes it unlikely that a measure justifiable under GATT Article XX violates the specialized agreement. *See infra* note 88 and accompanying text.

27. GATT, *supra* note 3, art. XX (emphasis added).

28. *Id.*

29. For more on the history of the 1947 GATT and the ill-fated “International Trade Organization” that was supposed to supersede it, *see* DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & A.O. SYKES, *THE GENESIS OF THE GATT* 164 (2009).

30. *See* Multilateral Agreements on Trade in Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1125.

31. Notably, in Article 2.4 of the Agreement on Sanitary and Phytosanitary Measures (SPS), the relationship between that agreement and Article XX of the GATT was specified. Article 2.4 of the SPS states that “[s]anitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).” Agreement on the Application of Sanitary and Phytosanitary Measures art. 2.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493. This specification suggests that at least some of the Uruguay Round negotiators were aware of the

broaden the scope of the defense beyond that which its terms, and moreover, the Uruguay Round negotiators, actually contemplated.

IV. THE PRE-RAW MATERIALS CASE LAW

A. *The Early Reports: A Pattern of Intentional Avoidance*

The confusion regarding the applicability of Article XX outside of the GATT has not been confined to the academic community. In fact, at least four dispute settlement panels were asked to consider the breadth of Article XX's reach outside of the GATT prior to the *Raw Materials* dispute. And yet, testifying to the complexity of the issue, in each dispute the panel took pains to avoid ruling upon the question.

In the first two disputes, *EC—Trademarks* and *EC—Biotech*, the European Communities, as the defendant, asserted that if the challenged measures were found inconsistent with the TBT Agreement, they could be rehabilitated under Article XX of the GATT.³² Conveniently, however, the respective panels in both disputes found that the TBT Agreement was either inapplicable or that a *prima facie* claim of breach of the TBT Agreement had not been established. As such, the panels did not have to decide whether Article XX of the GATT could be used to cure a violation of the TBT.³³

The next time the issue arose, in *United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*,³⁴ GATT Article XX was raised as a defense for a measure that was found to violate the Agreement on Anti-Dumping.³⁵ Here, too, the panel avoided taking a stand on the matter: despite India's express request that the panel consider the threshold issue of whether Article XX(d) was available as a defense to the Anti-Dumping violation, the panel proceeded directly to analyze whether the measure at issue satisfied the requirements of Article XX(d) before stopping to consider if the defense was in fact available.³⁶ Perhaps surprisingly, on appeal, the Appellate Body declined to complete the analysis, choosing instead to assume *arguendo* that Article XX(d)

need to clarify the relationship between the different covered agreements that comprise the WTO.

32. See Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 4.357, WT/DS291/R, WT/DS292/R, WT/DS293 (Sept. 29, 2006) [hereinafter *EC—Biotech*] (stating that the European Communities put forward the argument that the “European Communities claims that the general exceptions contained in Articles XX and XXI of the GATT 1994 also apply to the *TBT Agreement*”); Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Product and Foodstuffs*, ¶ 7.440, WT/DS290/R (Mar. 15, 2005) [hereinafter *EC—Trademarks*].

33. See *EC—Biotech*, *supra* note 32, ¶ 7.2524 (finding no need to evaluate TBT claims because measure fell within scope of SPS Agreement); *EC—Trademarks*, *supra* note 32, ¶¶ 7.437-7.476 (finding Australia had failed to make *prima facie* case that the disputed measures breached TBT Articles 2.1 or 2.2).

34. Panel Report, *United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/R (Feb. 29, 2008) [hereinafter Panel Report, *US—Anti-Dumping*].

35. *Id.* ¶ 6.11; see also Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201.

36. See Panel Report, *US—Anti-Dumping*, *supra* note 34, ¶¶ 7.287-7.313.

could excuse a violation of the Anti-Dumping Agreement without ruling that it could.³⁷

Just one year later, in 2009, a fourth panel confronted the issue in a dispute titled *China—Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products*.³⁸ As will be described, the *Audiovisuals* panel again used an *arguendo* assumption to avoid deciding the matter. This time, however, when the panel report was appealed, the Appellate Body stepped in where the panel left off.

B. Audiovisuals: *The Appellate Body Takes a First, Tentative Stand*

The *Audiovisuals* dispute was brought by the United States to challenge a slew of Chinese measures that restricted the importation and distribution of various media including reading materials, audiovisual home entertainment products, sound recordings, and films for theatrical release.³⁹ The United States alleged that these restrictions, which formed part of the Chinese censorship program, violated several provisions of China's Accession Protocol, the GATT, and the General Agreement on Trade in Services (GATS). For the purposes of this Essay, the most important point of contention between the United States and China related to a group of measures that permitted only Chinese state-owned enterprises to import the media products listed above.⁴⁰ The United States argued that these import restrictions violated, *inter alia*, China's trading-right commitments as provided for in Paragraph 5.1 of China's Accession Protocol.⁴¹ In pertinent part, Paragraph 5.1 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.⁴²

The United States interpreted that paragraph to mean that "every enterprise throughout the entire customs territory of China, without exception, must have the right to trade."⁴³ The United States argued that by allowing only enterprises that are wholly state-owned or wholly Chinese-owned to trade the relevant media products, China violated this requirement.⁴⁴

The panel largely agreed with the United States, finding that the challenged measures contravened the commitments contained in Paragraph 5.1.⁴⁵ In its defense, China invoked Article XX(a) of the GATT.⁴⁶ China argued that Article

37. See Appellate Body Report, *United States—Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, ¶ 310, WT/DS345/AB/R (July 16, 2008).

38. Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009) [hereinafter Panel Report, *Audiovisuals*].

39. *Id.* ¶ 2.1.

40. See *id.* ¶ 2.3.

41. *Id.* ¶ 3.1.

42. World Trade Organization, Ministerial Decision of 10 November 2001, WT/L/432.

43. Panel Report, *Audiovisuals*, *supra* note 38, ¶ 7.237.

44. *Id.* ¶ 7.237.

45. *Id.* ¶¶ 7.401, 7.411.

46. See Panel Report, *Audiovisuals*, *supra* note 38, ¶ 7.725.

XX was available as a defense against a Paragraph 5.1 violation because the opening clause of Paragraph 5.1—“without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement”—implicitly incorporates a “right to regulate” trade in a manner that was permitted by *any* of the WTO agreements, including the GATT.⁴⁷ China contended that, since the GATT permits members to enact trade restrictive regulations that comply with the dictates of Article XX, Paragraph 5.1 also authorizes China to enact regulations that comply with Article XX.⁴⁸ With respect to the specific import restrictions at issue in this case, they were “justified under Article XX(a),” China claimed, because they were “necessary to protect public morals.”⁴⁹

The panel did not quite know how to evaluate China’s invocation of Article XX. In explaining the difficulty the question presented, the panel wrote:

China’s invocation of Article XX(a) presents complex legal issues. We observe in this respect that Article XX contains the phrase “nothing in this Agreement,” with the term “Agreement” referring to the GATT 1994, not other agreements like the Accession Protocol. The issue therefore arises whether Article XX can be directly invoked as a defence to a breach of China’s trading rights commitments under the Accession Protocol, which appears to be China’s position, or whether Article XX could be invoked only as a defence to a breach of a GATT 1994 obligation.⁵⁰

Unable to resolve this dilemma, the panel reverted to the familiar *arguendo* assumption that Article XX was available and proceeded to examine whether the challenged measures complied with the conditions Article XX(a) set forth. When it found that the measures were not “necessary to protect public morals” as the term is used in Article XX(a), it was relieved of the task of determining whether Article XX was in fact available.⁵¹

Breaking with its earlier approach, on appeal, the Appellate Body chastised the panel for its sheepish use of the *arguendo* assumption⁵² and endeavored to complete the analysis itself. The Appellate Body employed a largely textual approach to evaluate this question. As its primary guide, it relied on the wording of the introductory clause of Paragraph 5.1: “[w]ithout prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement.” It began by giving dictionary definitions of the words “right” and “regulate” before concluding that the phrase “China’s right to regulate trade” referred to “China’s power to subject international commerce to regulation.”⁵³ From here, it reasoned that the phrase “in a manner consistent with the WTO Agreement” incorporated two sorts of measures: those that “simply [do] not contravene any WTO obligation” and those that do contravene a WTO obligation but “may be justified under an applicable exception.”⁵⁴ Combined, these findings indicated that the introductory clause of Paragraph 5.1 protected China’s right to regulate trade in a

47. *Id.* ¶¶ 7.735-36.

48. *Id.* ¶ 7.737.

49. *Id.* ¶ 7.727 (internal quotation marks omitted).

50. *Id.* ¶ 7.743.

51. *Id.* ¶ 7.911.

52. Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 213-15, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter Appellate Body Report, *Audiovisuals*].

53. *Id.* ¶¶ 220-21.

54. *Id.* ¶ 223.

manner that conformed to the exceptions laid out in GATT Article XX.⁵⁵ Its analysis of China's Accession Working Party Report, which provides context for Paragraph 5.1, lent further support to this conclusion. As such, China was entitled to raise Article XX as a defense for its trading right restrictions. However, whether a given trade restriction will pass muster under Article XX depends on the particularized facts of the dispute and, in *Audiovisuals*, the Appellate Body agreed with the panel that the requisite burden had not been met. The measures were therefore struck down.

The Appellate Body's close textual analysis of Paragraph 5.1 led some to suspect that other non-GATT provisions would have to contain similar references to a "right to regulate" in order for the Appellate Body to permit recourse to the GATT Article XX defense.⁵⁶ At the same time, the Appellate Body made some remarks in dicta that cast this conclusion into doubt. Of particular import, just after declaring that the phrase "in a manner consistent with the *WTO Agreement*" referred to the WTO Agreement as a whole, the Appellate Body stated: "We note, in this respect, that we see the 'right to regulate,' in the abstract, as an inherent power enjoyed by a Member's government, rather than a right bestowed by international treaties such as the *WTO Agreement*."⁵⁷ As Conconi and Pauwelyn have explained, this phrase left open the possibility that "even without the savings clause in the Protocol, China could have relied on its 'inherent power' to regulate trade and, as a result, have justified its breach with reference to GATT Article XX(a)."⁵⁸ Several commentators interpreted the *Audiovisuals* holding to mean exactly that.⁵⁹

Thus, the *Audiovisuals* holding was susceptible to two plausible yet opposing interpretations: (1) WTO members' inherent right to regulate entitled them to freely invoke Article XX as a defense to non-GATT commitments; and (2) that

55. *Id.*

56. See, e.g., Tania Voon, *China and Cultural Products*, 37 LEGAL ISSUES ECON. INTEGRATION 253, 258-59 (2010) (stating that while "the ruling could lend weight to an argument by China or other [M]embers that have acceded to the WTO since its creation in 1995 that the exceptions in both GATT Article XX and GATS Article XIV apply to all the obligations contained in their accession protocols," the Appellate Body's "careful reliance on the opening words of paragraph 5.1 of Part I of the Accession Protocol ensure that it could in a future case insist that its decision with respect to the applicability of GATT Article XX(a) to China's Accession Protocol was limited to the particular factual and legal circumstances at issue").

57. Appellate Body Report, *Audiovisuals*, *supra* note 52, ¶ 222.

58. Conconi & Pauwelyn, *supra* note 21, at 104.

59. See, e.g., Xiaohui Wu, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, 9 CHINESE J. INT'L L., 415, 428 (2010) (stating that the *China—Audiovisuals* ruling "dispels a cloud of legal uncertainty and lends predictability to the interpretation and implementation of China-specific obligations, in line with the purpose of the WTO dispute settlement system. Moreover, the finding is of great importance not just for the limited jurisprudence of China's Accession Protocol, but for all of the GATT Article XX provisions that can be invoked for non-GATT violations in future cases"). Continuing, Wu speculated that whether China would be able to defend against an alleged violation of its Accession Protocol in the then-nascent *China—Raw Materials* dispute would hinge on "whether China can justify the measures under Article XX." *Id.* That comment indicates that Wu took for granted that Article XX *would* be available to defend against the alleged violation of the Accession Protocol. See also, e.g., Julia Ya Qin, *Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence—A Commentary on the China—Publications Case*, 10 CHINESE J. INT'L L. 271, 294 (2011) (arguing that "[t]he Appellate Body's analysis has paved the way for interpreting the various agreements within the WTO as an integrated whole based on coherent policy considerations").

Article XX was only available to justify violations of non-GATT provisions that specifically alluded to a “right to regulate” or something similar. The next time the opportunity presented itself, in the *Raw Materials* dispute, the Appellate Body clarified its position on this important question.⁶⁰

V. RAW MATERIALS

The United States initiated the dispute in *Raw Materials* to protest against certain Chinese export restrictions on bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous, and zinc. These materials are used in a variety of products, including medicines, electronics, batteries, and refrigerants. The United States, as well as Mexico and the European Union, who subsequently joined as complainants, claimed that China was imposing unlawful restrictions on the export of these raw materials, including: “(i) export duties; (ii) export quotas; (iii) export licensing and; (iv) minimum export price requirements.”⁶¹ These restrictions, the complainants alleged, violated various provisions of China’s Accession Protocol, China’s Accession Working Party Report, and the GATT.⁶²

For our purposes, the most important claim concerned Paragraph 11.3 of China’s Accession Protocol, which obligates China to eliminate all export taxes and charges other than those applied in conformity with Article VII of the GATT or Annex 6 of the Protocol. Annex 6, in turn, establishes maximum tariff rates for eighty-four different products. Critically, the Note to Annex 6 elaborates on these tariff limitations, stating:

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. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.⁶³

The complainants alleged that the export duties on the relevant raw materials could not be justified under the exceptions provided. Apart from yellow phosphorous, none of the materials were even listed in Annex 6 and the export duties did not fall within the terms of GATT VII. Therefore, they alleged, the export measures violated Paragraph 11.3.⁶⁴

60. There was, in fact, one other occasion between *Audiovisuals* and *Raw Materials* in which a panel considered the applicability of XX outside the GATT. In that dispute, *United States—Certain Measures Affecting Imports of Poultry from China*, a panel found that Article XX could not be invoked to justify a violation of the SPS Agreement. Panel Report, *United States—Certain Measures Affecting Imports of Poultry from China*, ¶¶ 4.174-4.198, WT/DS392/R (Sept. 29, 2010). However, *China—Poultry* was not appealed. Therefore, the Appellate Body did not have the chance to pronounce upon the question again until *Raw Materials* appeared on its docket.

61. Appellate Body Report, *Raw Materials*, *supra* note 1, ¶ 2.

62. *Id.*

63. *Id.* ¶ 281.

64. Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 7.67, WT/DS394/R (July 5, 2011) [hereinafter Panel Report, *Raw Materials*].

After considering the relevant treaty texts and tariff regulations, the panel concluded that all the export duties apart from those on yellow phosphorus did indeed breach Paragraph 11.3.⁶⁵ In its defense, China argued that the export restrictions on coke, fluorspar, magnesium, manganese, and zinc were justified, *inter alia*, under Articles XX(b) and (g). China explained that they were permitted by Article XX(g) because the materials are exhaustible natural resources, and by XX(b), because duties were applied in order to reduce pollution, which benefited human health.⁶⁶

The panel rejected the notion that GATT Article XX could be invoked as a defense. It began its analysis of this issue by examining the way in which the Appellate Body had approached Article XX in *Audiovisuals*. In that dispute, the panel noted, “the Appellate Body did not discuss the systemic relationship between the provisions of China’s Accession Protocol and those of the GATT 1994, within the WTO Agreement.”⁶⁷ Instead, it “[focused] on the text of the relevant provisions of the Protocol.”⁶⁸ The panel understood this to suggest that it should also base its analysis on the text of Paragraph 11.3, looking for references to Article XX akin to those in Paragraph 5.1. After examining the text of Paragraph 11.3 and the context in which it appears, the panel concluded that, unlike Paragraph 5.1, “there is no general reference to the WTO Agreement or even to the GATT 1994.”⁶⁹ This omission led the panel to conclude that, “the WTO Members and China did not intend to incorporate into Paragraph 11.3 the defenses set out in Article XX of the GATT 1994.”⁷⁰ Prophetically, the *Raw Materials* panel understood the *Audiovisuals* report to create a presumption that Article XX could only be used to justify a non-GATT violation where Article XX is specifically or impliedly referenced in the breached provision itself.

The Appellate Body upheld all aspects of the panel’s GATT Article XX analysis. Like the panel, the Appellate Body found that Paragraph 11.3 of the Accession Protocol contrasted sharply with other texts that explicitly reference Article XX.⁷¹ Specifically, whereas Paragraph 11.3 explicitly mentions Article VII of the GATT, it is silent with respect to Article XX.⁷² Moreover, Paragraph 11.3 does not contain any language referencing the “WTO Agreement,” which the Appellate Body “relied upon” in reaching its finding with respect to Paragraph 5.1 of the Accession Protocol.⁷³ Accordingly, Paragraph 11.3 cannot be read as permitting recourse to Article XX, the Appellate Body ruled.⁷⁴

The combination of the *Audiovisuals* and *Raw Materials* reports, in which the Appellate Body reached different conclusions about the applicability of Article XX with respect to two provisions in the same agreement, strongly

65. Appellate Body Report, *Raw Materials*, *supra* note 1, ¶ 4.

66. *Id.* ¶ 5. China did not invoke Article XX as a justification for the export duties imposed on bauxite, other forms of manganese, or silicon metal.

67. Panel Report, *Raw Materials*, *supra* note 64, ¶ 7.117.

68. *Id.* ¶ 7.117.

69. *Id.* ¶ 7.129.

70. *Id.*

71. Appellate Body Report, *Raw Materials*, *supra* note 1, ¶ 303 (“We note, as did the Panel, that WTO Members have, on occasion, ‘incorporated . . . the provisions of Article XX of the GATT 1994 into other covered agreements.’ For example, Article 3 of the *Agreement on Trade-Related Investment Measures* . . . explicitly incorporates the right to invoke the justifications of Article XX of GATT 1994, stating, ‘[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement.’”).

72. *Id.*

73. *Id.* ¶ 304.

74. *Id.* ¶ 307.

suggests that the Appellate Body is disinterested in formulating a grand theory regarding the relationship between the GATT and the various agreements that comprise the WTO Agreement. Instead, it appears, the Appellate Body will evaluate attempts to invoke Article XX on a case-by-case basis, allowing its use only where there is evidence that the drafters intended the defense to be available to cure a violation of the specific provision that is breached. Stated otherwise, in *Raw Materials* the Appellate Body created a rebuttable presumption against permitting the invocation of Article XX outside of the GATT.

Those wishing to counter the conclusion reached above will likely argue that because *Raw Materials*, like *Audiovisuals*, related to the Chinese Accession Protocol, the findings are only relevant with respect to the Protocol and have little bearing on attempts to apply GATT Article XX to the Uruguay Round agreements. This does, of course, add a degree of uncertainty to the analysis. At the same time, for the reasons described below, it seems unlikely that the Appellate Body intended to limit the effect of the *Raw Materials* holding to accession protocols.

First and foremost, the panel in *Raw Materials* made several comments that indicated that it was discerning a metric for determining the availability of GATT Article XX outside the GATT in general, rather than solely in respect of the Protocol at hand. For example, the panel stated, “The Panel observes that there are no general umbrella exceptions in the Marrakesh Agreement. Each WTO agreement provides its own set of exceptions or flexibilities applicable to the specific obligations found in each covered agreement.”⁷⁵ The Appellate Body made no attempt to distance itself from these types of statements in its *Raw Materials* report. In fact, it uncritically repeated a number of the panel’s other similarly general statements in its own findings.⁷⁶

Critically, however, the Appellate Body did step back from its own prior discussion of China’s inherent “right to regulate” in *Raw Materials*. For example, when explaining the basis of its earlier finding in *Audiovisuals*, the *Raw Materials* report states only that the earlier conclusion “relied on the language of the introductory clause of Paragraph 5.1.”⁷⁷ Even more importantly, in discussing the availability of Article XX to Paragraph 11.3, the Appellate Body refrained from mentioning the right to regulate as an “inherent power enjoyed by a Member’s government” as it had done in *Audiovisuals*.⁷⁸ This is significant since, as we set out above, the *Audiovisuals* report left open the possibility that WTO members enjoy a freestanding “right to regulate.” Such a right would entitle members to raise Article XX as a generalized defense to non-GATT provisions that are part of the WTO Agreement. By omitting any reference to a generic “right to regulate,” the *Raw Materials* report seems to shut the door upon such claims. Accordingly, post-*Raw Materials* it seems highly doubtful that the Appellate Body will allow recourse to Article XX of the GATT where there is no specific textual basis for doing so.

75. Panel Report, *Raw Materials*, *supra* note 64, ¶ 7.150; *see also id.* ¶ 7.153 (“*A priori*, the reference to *this* ‘Agreement’ [in GATT Art. XX] suggests that the exceptions therein relate only to the GATT 1994, and not to other agreements.”).

76. *See* Appellate Body Report, *Raw Materials*, *supra* note 1, ¶ 303.

77. *Id.* ¶ 304.

78. *Id.*

VI. THE CRITIQUE

Some may argue that in creating a presumption against cross-application of GATT Article XX, the *Raw Materials* report wrongly ignored the Appellate Body's earlier calls to interpret the various WTO agreements as a harmonious whole.⁷⁹ However, while China was denied the use of Article XX in *Raw Materials*, the Appellate Body's report implicitly acknowledged its prior jurisprudence by noting that it understood the "WTO Agreement, as a whole, to reflect the balance struck by WTO members between trade and non-trade-related concerns."⁸⁰ Persuasively, the Appellate Body went on to explain that cognizance that such a balance exists does not provide "specific guidance on the question of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol."⁸¹ Indeed, without any concrete reason to believe the parties desired Article XX to be available to a given instance, tipping the balance in favor of the availability of Article XX would do violence to the balance that the members could most reasonably be believed to have chosen for themselves. To avoid any such over-reaching, or charge of activism, the Appellate Body in *Raw Materials* made clear that, as concerns the application of GATT Article XX to non-GATT agreements, it will not read something into the text of the WTO agreements that simply is not there.⁸²

Those who believe the "legislative branch" of the WTO is too slow to legislate on important issues may criticize the Appellate Body's cautious stance. Scholars in this camp tend to argue that the Appellate Body should be more active, "for the sake of a better functioning of the WTO system."⁸³ However, even if we accept the goal of better functioning as proper, it is unclear that expanding the reach of Article XX would actually serve this end. First, the process of justification under Article XX has been described as "arduous," particularly as concerns the analysis of "necessity."⁸⁴ Moreover, the iterated exceptions under Article XX do not seem sufficiently malleable to fit the notion of an omnipotent "right to regulate."⁸⁵ If this is true, allowing free recourse to Article XX outside the GATT might well necessitate a second judicially imposed expansion of the categories set out under Article XX.⁸⁶ There may be other more efficient and legally defensible ways to preserve members' policy space without stretching the text of the GATT so far.

The most likely critique of the Appellate Body's findings to be raised is that the presumption against applying GATT Article XX will enable the WTO to improperly curtail domestic regulatory autonomy.⁸⁷ However, this need not be so. To begin with, having created a rebuttable presumption, *Raw Materials* reserves members' right to invoke Article XX wherever a breached provision specifically suggests that the defense should be available, as was the case in *Audiovisuals*.

79. For more on this point, see Qin, *supra* note 59, at 294.

80. Appellate Body Report, *Raw Materials*, *supra* note 1, ¶ 306 (emphasis added).

81. *Id.*

82. *Id.* ("In the light of China's explicit commitment contained in Paragraph 11.3 to eliminate export duties and the lack of any textual reference to Article XX of the GATT 1994 in that provision, we 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.").

83. See, e.g., Qin, *supra* note 59, at 294.

84. See Doyle, *supra* note 2, at 144.

85. See Pauwelyn, *supra* note 8, at 136.

86. *Id.*

87. See *id.* at 135-38 (discussing this point generally).

Moreover, where a given provision does not reference Article XX, there may still be grounds for interpreting it in a manner that is consistent with Article XX. As concerns the TBT, for example, the ethos of Article XX can be incorporated into Article 2.1 directly. The Appellate Body took precisely this approach in the recent *Clove Cigarettes* dispute.⁸⁸ In that dispute, the Appellate Body was asked to determine whether a U.S. ban upon clove cigarettes breached the nondiscrimination clause of TBT Article 2.1. In deciding the matter, the Appellate Body drew attention to the fact that “the *TBT Agreement* does not contain among its provisions a general exceptions clause. This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX.”⁸⁹ However, as the Appellate Body went on to explain, “Article 2.1 itself, read in the light of its context and of its object and purpose” strikes a similar balance between trade liberalization and regulatory autonomy as the combination of Article III and XX provides for in the GATT.⁹⁰ Thus, TBT Article 2.1 protects the same degree of policy space as GATT Article XX, obviating the need to invoke Article XX as a separate defense.

Finally, with respect to the SCM, given that SCM Article 8(2) provided a temporary savings clause to a limited range of environmental subsidies, which expired after five years,⁹¹ the use of GATT Article XX to rehabilitate environmental subsidies that otherwise violate the SCM Agreement seems so contrary to the drafter’s intentions that it could be seen as an inappropriate delegation of legislative power to the Appellate Body. To further illustrate this point we note that SCM Articles 5 and 6, which provided legal cover for certain subsidies on agricultural products maintained in line with Article 13 of the WTO Agreement on Agriculture,⁹² was also set to expire in 2004.⁹³ When these aspects of the SCM are viewed together, it seems clear that the drafters of the SCM carefully considered how to strike the difficult balance between domestic regulatory autonomy and the desire for multilateral discipline on subsidies.⁹⁴ A

88. *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter *Clove Cigarettes*]. In *Clove Cigarettes*, the Appellate Body endorsed what has been called a “regulatory context” interpretation of Article 2.1. TBT Article 2.1 sets out that, “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.” See generally Donald Regan, *Regulatory Purpose and “Like Products” in Article III:4 of the GATT (with Additional Remarks on Article III:2)*, in TRADE AND HUMAN HEALTH AND SAFETY 97 (George Bermann & Petros Mavroidis eds., 2006). Under this test, regulations that disparately impact foreign goods, as compared to domestic goods, will not be found to amount to “less favourable treatment” “if the detrimental impact on imports stems exclusively from a legitimate regulatory distinction.” *Clove Cigarettes*, at ¶ 182. Applying this approach, any distinction between products found “necessary” to protect human health, or “related to environmental protection” under Article XX and in compliance with the *chapeau*, would almost certainly pass muster under Article 2.1 as well. Notably, however, incorporating Article XX concerns directly into the text of the specialized agreement may actually be more protective of regulatory autonomy than allowing subsequent recourse to Article XX because it puts the burden on a complaining party to show that the conditions of Article XX were not met before it can establish a breach.

89. *Clove Cigarettes*, *supra* note 88, ¶ 101.

90. *Id.* ¶ 109.

91. SCM, *supra* note 6, art. 31.

92. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

93. *Id.* art. 1(f) and 13.

94. Condon, *supra* note 4, at 904.

presumption that Article XX could be used as a “meta-defense” might meaningfully disrupt the balance between regulatory autonomy, multilateral discipline and trade facilitation that they had envisioned.

VII. CONCLUSION

To conclude, in *Raw Materials*, the Appellate Body established that GATT Article XX can be invoked outside of the GATT, when, and only when, the breached provision includes a direct reference to Article XX or language alluding to a general “right to regulate.” This tempered approach appears sound. Although a wider application of Article XX is superficially attractive, as it would provide an expedient means of protecting domestic regulatory autonomy, it would also raise significant concerns about the delegation of sensitive political issues to the WTO judicial bodies.⁹⁵ The centrist path chosen by the Appellate Body steers clear of these potential pitfalls while still leaving room for public policy objectives to trump trade commitments where there is reason to believe the members intended this hierarchy of norms to reign. As such, it respects members’ regulatory autonomy without treading too heavily upon their freedom to contract.

95. Du, *supra* note 8, at 648.