JUSTIFIABILITY OF THE CHINESE ACCESSION PROTOCOL AND PROBLEMS IN ITS INTERPRETATION

*By **Shivani Rajesh***

Assistant Professor of Law, School of Legal Studies, CMR University, Bangalore

ABSTRACT

The WTO was established in the year 1994, under the Agreement establishing the world trade organization, to regulate trade amongst various countries of the world. This organization grandfathers various agreements, aiming for trade liberalization, entered into by the countries at a global level. Countries that wish to take advantage of the various principles under the WTO have to be a member of the WTO and to acquire membership of the WTO, countries has to accede to the WTO on certain terms. China is one such country that has acceded to the WTO and its accession is eventful for various reasons. The result of the negotiations was a Protocol, which included obligations that prima facie seem to substantially exceed the normal obligations undertaken by the rest of the countries of the world. The current essay analyzes the justifiability of these obligations and highlights the difficulty in interpreting the obligations due to its excessive nature. The study limits itself to the analysis of the WTO – plus obligations included in the accession protocol and do not concern itself with the China's other obligations under the protocol.

INTRODUCTION

China became a member of the World Trade Organization (Hereinafter referred to as '**the WTO**') on 11th December 2001. Prior to China's accession, almost fourteen other countries were acceded to the Marrakech agreement with minute changes in their obligations as compared to the obligations undertaken by the rest of the countries. However, China was subjected to a number of unilateral obligations under the protocol, which is not found in any other agreement or accession in the history of the WTO. This makes the Chinese accession protocol extremely important in identifying and reading China's obligations under the WTO.

China was a member of the General Agreement on Trade and Tariffs, 1947 as one of its founding members. However, due to the change of government and administration it withdrew

its membership in 1949. Thereafter, many negotiations took place between various other countries that were a party to the GATT, 1947 and on the basis of reciprocal promises trade was liberalized to a great extent. In 1986, China started to feel the need to be a part of the global trade regime and applied for membership again. These negotiations extended till later than 1994 when the WTO was established and China's application for membership to the GATT, 1947 got converted into an application for membership to the WTO. The negotiation process included bilateral negotiations with specific countries majorly for the issue of market access in various products and services and multilateral negotiations for other obligations. During the multilateral negotiations a lot of inhibitions were put forth stating China's probable inability to fulfill all its obligations under the WTO in its true sense, which is why, many additional obligations were negotiated and accepted by China to assure the countries. These obligations are referred to as the WTO – plus obligations.

THE WTO – PLUS OBLIGATIONS UNDER CHINESE ACCESSION:

The WTO – plus obligations are those obligations that have been undertaken by China in addition to the general obligations under the various WTO agreements. These WTO – plus obligations are manifold but can broadly be divided into five major categories.

i. Obligations in the nature of domestic regulations: China has undertaken many specific obligations regarding domestic regulation in the form of increased transparency obligations, obligations regarding regulatory independence, obligations to accept public comments on various laws enforced by the government etc. Such obligations clearly interfere with China's sovereignty and no other country has undertaken such obligations.

ii. Obligations regarding market economy: China has undertaken under the Chinese Accession Protocol (Hereinafter referred to as '**the Protocol**') an obligation to ensure that the prices of products and services in the market are decided by market forces and not the government. Such a clear-cut obligation to ensure that market economy exists in a country has never been provided for in the WTO.

iii. Liberalization of Foreign direct investment: The countries have negotiated an obligation wherein China promises to not impose any governmental condition with respect to foreign direct investment regarding performance requirement, technology

transfer, etc. China has also undertaken to grant equal treatment to its foreign and domestic investors, which goes way beyond the obligations of the other countries.

iv. Liberalization of trade in goods: China has undertaken an obligation to do away with any kind of export tariffs except for those products specifically mentioned. No other member of the WTO s undertaken this obligation and such an obligation is imposed despite the fact that any restriction on trade based on tariff is definitely more transparent and preferred than a non-tariff barrier.

As a result of these obligations, China has been put in a disadvantageous position as compared to any other country of the world. However, it has also been argued that China is a closed economy as well as one of the largest economies as a result of which it may indulge in unfair practices and non-transparent behavior. Thus, in order to ensure that China does not take advantage of its status as a WTO member by hiding under the garb of its closed and Centre-controlled economy, certain additional obligations had to be negotiated unilaterally

JUSTIFIABILITY OF THE CHINA'S WTO – PLUS OBLIGATIONS

CHINESE ACCESSION PROTOCOL – A TRANSGRESSION OF THE UNIFORM STRUCTURE OF WTO

GATT 1947 preceded the Marrakech Agreement in regulating international trade between its member states. However, the structure of GATT was extremely scattered because the member states had undertaken their obligations under the GATT 1947 either by way of the Protocol of Provisional Application[i] (Hereinafter referred to as **'PPA'**) or the Protocol of Accessions by the acceding states. As a result of this, although the GATT 1947 provided for proper rules and regulations to be followed by the members, the member states usually were guided by the obligations that each of them had undertaken under the respective PPAs and the protocols of Accession.[ii] This unsteady structure of the GATT 1947 rule was considered to be one of the reasons of failure of the agreement in regulating the international trade in an effective manner.

An Attempt at Uniformity

Taking a lesson from this, when the WTO was established, it was decided that the members shall each accede to the Marrakech agreement as a whole and shall be obligated to follow the

rules and regulations mentioned thereunder in a uniform manner. Under the WTO regime, adoption of a single undertaking i.e. the Marrakech Agreement was envisaged and every multilateral trade agreement that concluded between the members was annexed to the Marrakech agreement in order to ensure its uniform application across all the member states. The Appellate Body recognized this unified structure of the WTO on Imports of Certain Dairy Products wherein it stated, *"it is important to understand that the WTO agreement is on treaty"* and *"the provisions of the Multilateral Trade Agreements included in its annexes must be read as a whole."*[iii]

A Loophole in a Unified and Integrated Treaty Structure

In spite of these efforts to make the WTO regime subject to a uniform rule structure, the provision relating to accession of members to the WTO, creates distortion in the near perfect set of obligations. Article XII of the Marrakech Agreement once again provided for formation of an accession protocol and does not provide for any ground rules to bring the provisions of the accession protocol in conformity with the otherwise uniform rules of the WTO. The loose wordings of the provision led to the WTO members taking advantage of the position of China as an applicant and imposed obligations, which far exceeded the obligations provided for in the Marrakech Agreement.[iv] An effort was made to improve this situation by making the Chinese accession protocol an integral part of the Marrakech Agreement. However, this attempt would have worked only if the additional obligations under the protocol were minimal. In case of the Chinese Accession Protocol, the scope of the WTO – plus obligations applies to a whole new set of area, which binds no other member. This has led to contrasting obligations undertaken by the members of the WTO on one hand and China only the other thereby repeating the history, which the WTO had tried to surpass.

FAULTY NEGOTIATION PROCEDURE

The provision for accession in the GATT is provided for under Article XII of the Marrakech Agreement, which states that the accession of an applicant country must be concluded on terms that are negotiated between the applicant country and the WTO. The negotiation of these terms in case of China took place in three stages i.e. bilateral negotiations, multilateral negotiation and the approval and acceptance of the protocol.[v]

i. Bilateral Negotiations: Under this, the member states were given an opportunity to apply for bilateral negotiations with China in order to negotiate terms on a personal level. Usually at this stage, both parties decide the tariff concessions and the market access obligations by balancing out their interests.

ii. Multilateral Negotiations: This is the stage where majority of the rule based and WTO – plus obligations are negotiated between the member states and the applicant country. In this negotiation the many member states raised points of concern relating to China's accession to the WTO and the China had to undertake obligations to appease the member states and assure them of its intention to comply with the WTO structure.

iii. Approval and Acceptance: At this stage the Protocol and the working party report that contained the terms of negotiations concluded between China and the member states was submitted to the Ministers of member states who accepted it and thus concluded the process of China's Accession to the WTO.

In this entire process, the stage of multilateral negotiations was the most unjustified and grossly against China's position. In case of general WTO multilateral agreements, the negotiations are carried out by most of the members of the WTO. Each country is interested in ensuring that their interests are served as against the interest of the other country. Thus, checks and balances are maintained in such a negotiation process by the interest of each country as against the other. However, in case of the negotiation process during China's accession to the WTO, China had to negotiate single handedly against all the members representing one group.[vi] Thus in the negotiating process there were absolutely no checks and balances as it was China's interest on one hand as against the interest of all members of the WTO. Thus, the success of the negotiation was dicey from the beginning itself. In addition to this, at the time of its negotiations, China was fairly new to the whole process and did not have any experience as to the manner in which its obligations shall be interpreted and enforced by the member states.[vii]

AGAINST THE BASIC PRINCIPLES OF THE WTO

The preamble of the WTO explicitly recognizes two things as a means to achieve its objectives. Firstly, to enter into reciprocal and mutually advantageous arrangements; and secondly, to eliminate discriminatory treatment in the international trade relations. Both these principles, which must constitute the guiding light of the WTO regime, are convoluted in case of China's Accession Protocol. As noticed while discussing the faulty negotiation process, the only reason

that led China to accept stringent and excessive obligations was the fact that several countries held inhibition of China's compliance with the WTO rules and regulations. This issue led to the creation of some unjust and excessive obligations, which are being interpreted by the Dispute Settlement Bodies as unconditional as well. Thus, the one sided negotiation process did not ensure that the principles of reciprocity and mutual advantageous arrangements and above that due to the unilateral excessive obligations there is a clear discrimination with respect to the obligations to be followed by the member states and those followed by China.

The Ministers issuing the decision on acceptance of and accession to the Marrakech Agreement also noticed this hypocrisy and they tried to salvage the situation by shedding some light on the criterion of the WTO accession. In the preamble of that decision issued by the ministers, the following was stated:

"Recognize that the WTO Agreement does not distinguish in any way between the WTO members which accepted the Agreement in accordance with Article XI and XIV [i.e. the original members] and the WTO members which acceded to it in accordance with article XII and wish to ensure that procedures for accession of the states and separate customs territories which have not become contracting parties to the GATT 1947 as on the date of the entry into force of the WTO Agreement are such as to avoid any unnecessary disadvantage or delay for these states and separate customs territories."[viii]

This clearly indicates that it was officially recognized in the Uruguay round negotiations that there was no intention to distinguish between the already existing members and the acceded members. However this has clearly been overlooked in the recent times with the introduction of multiple WTO – plus obligation in the China's Protocol.

THE RATIONALE BEHIND THE WTO – PLUS OBLIGATIONS

The WTO – plus obligations that are imposed on China as evidenced in the protocol as well as the working party report is prima facie excessive in nature as a result of which it seems that China has an additional burden to fulfill certain obligations over and above the obligations that are stated in the various WTO Agreements.[ix] The justification for these excessive obligations is usually given to be the separate conditions that existed in China at the time of the accession, which might have prevented China from fulfilling the general obligations that are otherwise mentioned in the WTO Agreements. However, what exactly are these conditions that led to the

inclusion of the WTO – plus obligations is neither explicitly mentioned in the Protocol nor in the working party report.

China – An Economic Giant

On the outset one of the things that distinguishes China from the other members of the WTO is the enormity of its economy. In addition to being the sixth largest trading nation in the world,[x] the cheap labor force and the amount of energy that is being pumped in to improve the Chinese economy, it has a very good chance of growing and improving its economic stature. Majority of the countries of the world were threatened at the thought of China entering the WTO and taking advantage of the lower tariff concessions and higher market access, which might be the motivation that led them to negotiate and impose unjust and excessive obligations on China.[xi] However, even if the motive of the members of the WTO was to ensure that China does not get advantage served to it on a platter as a result of the accession, it justifies only the increased tariff concession obligations that can be imposed on China.

China's Rigid and Closed Domestic Regulatory Environment

The Rule based obligations that China is subjected to still remain highly unwarranted and unjustified. Many obligations such as those related to transparency, regulatory independence, uniformity in administration, etc., which strictly fall under the sovereign power of the country, has also been imposed on China by way of the Protocol. Even if it is considered that China's domestic environment was extremely government controlled and was not in consonance with the principles that are required for a country to ensure conformity with the international trade obligations, it can be argued that the same is true for most of the developing countries that are a part of the WTO at the time of China's accession. However, all these other countries are still a part of the WTO without undertaking such rule-based obligations as undertaken by China. This shows that the treatment of a country while conducting the negotiating its terms of accession is being dependent upon the status of economic growth of the country, This hypocrisy exercised by the WTO members at the time of negotiations goes against the basic equality principle and the uniform rule system undertaken by the WTO.

Excessive Obligations - An Entry Fee

In addition to the rule-based obligations, there are several substantial obligations in the Protocol in the form of export duty restrictions and unconditional foreign direct investment, which are extremely excessive and impose immense burden on China's presence in the WTO Regime. The Panel in China – Measures Related to the Exportation of Various Raw Materials (Hereinafter referred to as **'China – Raw Materials'**) states the justification for such obligations as follows: *"the acceding member and the WTO membership recognize that the intensively negotiated content of an accession package is the "entry fee" to the WTO system."*[xii] The justification says that this particular entry fee is very similar to the "ticket of admission" wherein the excessive obligations are fair because the acceding member enters at a stage where the tariff imposed by almost all the members has been reduced as a result of the multiple negotiations that have taken place up until that point and the acceding member will freely get the fruits of these reduced tariff concessions by way of the Most Favored Nation (Hereinafter referred to as **'MFN'**) Treatment.[xiii] This argument works perfectly in case of tariff concessions, as they are truly reciprocal in nature. Thus, when reduction of tariff rates is considered as a condition for entry to the WTO, it makes sense because of the fact that the acceding member also gets equal treatment in the form of lower tariff rates on the part of the member states.[xiv] However, this argument cannot be forwarded to justify the WTO – plus obligations imposed on China because these obligations are absolutely unilateral where only China is expected to implement them. China does not get any benefit from any other country, which can be considered as a reciprocal promise as against such obligations, and this makes the obligations entirely unjustified.

CHALLENGES IN INTERPRETING THE WTO – PLUS OBLIGATIONS

In addition to the fact that the obligations imposed upon China in the Protocol are excessive and unjust in nature, the manner in which the protocol is entered into and drafted makes it very difficult for the bodies under the dispute settlement mechanisms[xv] (Hereinafter referred to as the '**Dispute Settlement Bodies**') to interpret it. The absence of reasons behind the inclusion of the WTO – plus obligations, the complex systemic relationship between the Protocol and the WTO Agreements and the threadbare manner of drafting of the Protocol are some of the challenges that are faced by the Dispute Settlement Bodies.

ISSUES RELATING TO INTERPRETATION

Improper Drafting Of The Protocol

It would seem on the outset that the interpretation of the terms of the protocol will not be a big deal for the Dispute Settlement Bodies as they can use the same approach as they use for the interpretation of the provisions of the multilateral trade agreements that exist in the WTO regime. However, this is slightly difficult, as the obligations under the accession protocol have not been drafted in a wholesome and prudent manner, as is the case with the multilateral trade agreements. The drafting of the obligations under the protocol is very haphazard and incomplete as is obvious especially with respect to those obligations that find a reference in the working party report.[xvi] This is glaringly visible in paragraph 18 of the working party report, which contains a clause requiring China to extend national treatment to the enterprises receiving foreign funds. The relevant paragraph states, *"The representative of China further confirmed that China would provide the same treatment to Chinese enterprises, including foreign funded enterprises, and foreign enterprises and individuals in China."* At the outset this obligation seems to be self content however a close inspection reveals that this obligation would mean that China has unilaterally and unconditionally undertaken to extend the national treatment obligation to the units mentioned in the paragraph.[xvii] This is true for numerous other obligations as well including Article 11.3 of the Protocol, which prima facie reveals that China has undertaken export duty restrictions without having recourse to the general exceptions available under GATT 1994.

Under the VCLT, the terms of the obligations are not to be interpreted in isolation but rather along with the context and the object and purpose of the obligation and Protocol.[xviii] It is very difficult to understand the context of a particular obligation as very few specific provisions actually mentioned how they are to be interpreted in the light of the corresponding provision under the WTO Agreements. Thus, most of them seem to be standalone obligations without any context.[xix] In addition to this, neither the provisions are precluded by the reason behind its existence nor does the preamble of the Protocol mention the object behind bringing it into force or the purpose, which it aims to achieve. Although at the outset, it may seem that the purpose of the protocol is to accede China to the WTO, this purpose is not enough to interpret the object behind inclusion of specific obligations under the Protocol.

Systemic Obligations

At the time of China's Accession to the WTO, many countries raised qualms about the rigid domestic regulatory framework and the transparency issues existing in China's national jurisdiction. This led to the WTO members negotiating certain obligations some examples being, market access obligations, transparency, independence of regulatory authority, etc. which lay in the sphere that was regulated by the sovereign authority of the State.[xx] These obligations had to be included in the Protocol, as the member states needed to be sure that China would not be hampered from fulfilling its obligations under the WTO regime simply because of impossibility at the domestic front. These obligations have faded the line of distinction between what lies in the WTO jurisdiction and what lies in the national jurisdiction of the state.[xxi] There have been many instances such as in the case of US – Gambling[xxii] and EC – Hormones[xxiii] wherein the court has decided the issues on matter which severely fell within the domestic regulatory sphere of the member state and it has met with hostility as the member states against whom the case was decided refused to bring its measures in accordance with the obligations under the WTO regime. Such non-implementation of the Dispute Settlement Bodies' decision will lower its credibility. As a result of this complication, the Dispute Settlement Bodies might altogether skip an attempt to interpret such obligations as far as possible and thereby fail to bring about predictability in the application of such provisions.[xxiv]

INTERPRETATIVE ISSUES IN DISPUTES BEFORE THE WTO

China – Measures Affecting Imports Of Automobile Parts.[xxv] (Hereinafter referred to as **'China – Auto Parts'**)

In this case, the issue in dispute was that China's imposition of a surcharge on the automobile parts imported from other countries was challenged as it violated China's obligation to bound the tariff rate on imported auto parts at 10%. With the imposition of the additional surcharge, the tariff rate on import of automobile parts was coming up to 25%.[xxvi] China's obligation to bind tariff rate on auto parts is reflected in paragraph 93 of the working party report, which states,

"Certain members of the Working Party expressed particular concerns about tariff treatment in the auto sector. In response to questions about the tariff treatment for kits for motor vehicles, 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 percent"

China argued that the above stated bound tariff shall be applicable only when tariff lines were created for such kits of motor vehicle, and since no tariff lines had been created by China, it wasn't bound by the maximum tariff commitment of 10%.[xxvii] The panel rejected this and stated that China was imposing the tariff on the auto parts under the subheading of 'complete sets of assemblies' under the tariff heading of motor vehicles and that the imposition of import duty on such auto parts shall be deemed to be a creation of tariff lines for such kits.

Arguments against the interpretation:

In this this case, although the panel seems to have taken a logical stance, the manner in which it reached its conclusion is worrisome. While interpreting paragraph 93 of the unlike, in case of interpreting the GATT 1994, the panel simply looked into the text of the obligation from a policy perspective without delving into neither the ordinary meaning of its terms, nor its context and its object and purpose as is required under the VCLT.[xxviii]

China – Measures Affecting Trading Rights And Distribution Services For Certain Publication And Audiovisual Entertainment Products [xxix] (Hereinafter referred to as **'China Audiovisuals Case'**)

In this case, a complaint was made by the United States stating that certain measures imposed by China on the importation and distribution of publications and audiovisual products violated certain provisions of GATT, GATS, as well as Article 5.1 of the Protocol which provided for liberalized trading rights for all the Chinese enterprises including those which are foreign funded. These measure argued against were certain specific Chinese measures that were imposed by China on the importation and content review of certain category of goods.[xxx] China argued that these measures imposed by it in the form of strict procedural requirements and content-review were extremely important for preservation of public morals in the Chinese society and thus it falls within the exception provided for under Article XX (a) of the GATT 1994. The question before the panel was whether the exceptions provided for under Article XX(a) of the GATT 1994 will be available to circumvent an obligation provided for in the Protocol. The panel answered this question in negative and the Appellate Body also upheld this decision of the panel however disagreed with its reasoning.

Arguments against the interpretation:

While deciding as to whether Article XX of the GATT 1994 was available as an exception under Article 5.1 of the Protocol, the panel undertook an arguendo approach in which it first intended to decide as to whether the Chinese measures in questions qualified to be given the protection of the public morals exception under Article XX of the GATT 1994. Only if this had answered in affirmative would the panel have gone ahead to determine the availability of Article XX of the GATT 1994 to the provisions of the Accession Protocol. This approach was criticized by the Appellate body when the decision of the panel was appealed against. The Appellate body stated, *"the arguendo approach may not always provide for a solid foundation upon which to rest legal conclusions"* and *"It will lead to risks creating uncertainty."*[xxxi] The Appellate body thus affirmed the availability of the exceptions under Article XX of the GATT in this exception where Article 5.1 of the protocol was violated majorly because of the text in the beginning of that article stating *"Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement."* This was a welcome decision in the WTO jurisprudence as it broadened the applicability of the public policy exceptions to the Accession Protocols as well.[xxxii]

China – Raw Materials Case[xxxiii]

In this case, the United States, the European Communities and Mexico were aggrieved by certain measure imposed by China in the form of export duties on certain raw materials and brought about a complaint to the Panel against the same. In its defense, China invoked the exceptions under Article XX of the GATT 1994 to state that the measures were necessary to preserve the exhaustible natural resources[xxxiv] and to protect human, animal and plant health.[xxxv] This argument of China was rejected by the Panel as well as the Appellate Body as they held that Article XX of the GATT 1994 is not available as a justification for imposing restrictions contrary to Article 11.3 of the Protocol since provision does not have any textual link to the exceptions under GATT 1994 as was the case in the China – Audiovisuals Case.

Arguments against the interpretation:

The Panel and the Appellate Body both undertook a very strict interpretation of the provisions in this case. The fact that no textual link to the exceptions under GATT was given as a reason for not allowing the defense of environmental conservation and public health to China shows

that China has based its decision solely on the text of Article 11.3 of the GATT 1994. The Panel and the Appellate body failed to consider its own previous decision which stated that silence of the text does not preclude the task of ascertaining the meaning of the treaty provision as even silence does not exclude the possibility that a particular requirement was intended to be included by the parties.[xxxvi] Although the VCLT requires interpretation of the text in its contextual background, the Appellate body limited its contextual analysis to a few provision from the Protocol and a few paragraphs from the working party report. It should have extended its analysis and considered the relevant provisions in the WTO Agreements as the context of the particular provision.[xxxvii]

In addition to this, Article 32 of the VCLT that deals with supplementary rules of interpretation should have been resorted to. This argument is basically forwarded taking into consideration that the current interpretation leads to an "absurd and unreasonable" interpretation of the provisions on two grounds: Firstly, the exceptions provided for in the Article XX of the GATT 1994 is in the nature of public policy exceptions. These exceptions are based on the recognition given by the parties to various non-trade considerations such as environment, labor standards, standard of living, etc. in the preamble of the Marrakech Agreement. Thus to state that just because there is no textual link in the Article 11.3 of the Protocol as the basis for rejecting the applicability of the exceptions under GATT 1994 leads to absurdity in its interpretation. Secondly, even the most basic WTO obligations in the form of MFN treatment is subject to the exceptions provided for under Article XX of the GATT 1994. Thus, by interpreting that the export duty restrictions do not get the defense of the public policy restriction means to put it at a pedestal higher than the MFN treatment, which once again leads to absurdity.[xxxviii] It is a general rule that in case the interpretation reached at by following the rules provided for in Article 31 lead to "absurdity or unreasonableness" the supplementary rules of interpretation must be resorted to.[xxxix] Thus, in this case, the Dispute Settlement Bodies should have referred to the negotiation history as well as the circumstances surrounding the conclusion of the Protocol to interpret Article 11.3 of the Protocol.

China – Measures Related To The Exportation Of Rare Earths, Tungsten, And Molybdenum[xl] (Hereinafter referred to as **'China – Rare Earths Case'**)

In this case, the United States, the European Union and Japan complained against certain measures imposed by China on the exports of rare metals such as tungsten, molybdenum, etc.

The case was more or less similar to the China – Raw Materials Case as the provision in question was the same and the arguments of the complainants were also the same. The Panel and the Appellate Body once again decide against the defense of the exceptions under Article XX of the GATT 1994 being available to justify a restriction imposed in violation of Article 11.3 of the Protocol. In this case, China wanted to refrain from appealing to the appellate body against the decision of the panel that rejected its claim of defense under Article XX of the GATT vis-à-vis Article 11.3 of the Protocol since there already existed three reports rejecting its arguments. Thus, China appealed to the Appellate body to determine the relationship between the Multilateral Trade Agreements and the Marrakech Agreement.[xli] The Appellate body responded to this appeal with the following points:

i. The Accession Protocol and the Multilateral Trade Agreements are an integral part of the Marrakech Agreement. They all form a set of same WTO rights and obligations.
ii. The relation between the Accession Protocols, the Multilateral Trade Agreements and the Marrakech Agreement must be decided on case-by-case basis. No right or obligation shall automatically transpose from one agreement to the other.
iii. Whether exceptions can be invoked to justify the breach of the Protocol provision must also be decided on case-by-case basis by analyzing the provision as well as by applying the customary rules of treaty interpretation.[xlii]

While deciding as to whether any changes in interpretation needs to be made with regards to the position of law as it stands today with respect to the applicability of Article XX exceptions to the breach of the Protocol, the Appellate body treated its decision in the earlier case as de facto binding precedents.[xliii] The Appellate Body relied upon its own decision stating, absent "cogent reason, an adjudicatory body will decide the same legal question in the same way in a subsequent case."[xliv]

Arguments against Interpretation:

Although, the decision in this case as well went against China, the thing to be noted in this case is that unlike in the China – Raw Materials case, the panel did not give a unanimous decision. One of the panelists gave a dissenting opinion with respect to the issue to applicability of Article XX exceptions to the export duty restrictions under Article 11.3 of the Protocol. In addition to this, even at the arguments stage, unlike in the China – Raw Materials Case where

all the third party members coherently opposed China's defense as raised under Article XX of the GATT 1994, seven third party participants had changed their stance and supported China in its argument that Article XX of the GATT 1994 shall be applicable to Article 11.3 of the Protocol.[xlv] This shows that at the time the China – Rare Earths Case was decided; a number of countries in the world had started to see the actual nature of the obligations in the Protocol in supported the interpretation of the protocol in an integrated manner with the WTO Agreements. While arguing the case before the Appellate Body, China had argued with respect to alternative ways to interpret the provisions of the Protocol in a manner that is legal as well as in consonance with the principles of the WTO as stated in its preamble. These arguments are presented in the next part and the analysis and practical advantage of it are also discussed.

ALTERNATIVE INTERPRETATIVE APPROACH

INTERPRETATION OF SILENCE

In the China – Rare Earth Case as well as China – Raw Materials Case, the basic reason for not interpreting the provision of Article 11.3 of the Protocol subject to the exceptions of the GATT 1994 was the fact that no reference was made, in Article 11.3 of the Protocol, to the exceptions under GATT 1994. Thus, silence was considered to mean that the parties did not intend to subject the provision to the exceptions. The justification for this decision that was given was that since some of the other provisions of the Protocol, such as Article 5.1 as well as Article 11.1 and Article 11.2, included reference to the GATT 1994 as that was intended. This argument does not hold water as already discussed because it leads to an absurd interpretation where the supplementary obligations of China under the Protocol become unconditional while certain other obligations such as the MFN Treatment which is the most basic principle of the WTO Regime remains conditional. However, if it is believed that such a silence should not be considered as absence of intention of the parties to include a particular provision, then there has to be an alternative way to interpret it. This is discussed in the points below.

Dissent in the China – Rare Earths Case

In order to interpret the silence in Article 11.3 with respect to the GATT 1994, except the cursory reference to Article VIII of the GATT, the dissenting opinion of one of the panelist in

the China – Rare Earths Case is very relevant.[xlvi] The dissenting panelist stated that mere absence of any reference to the GATT exception provision does not mean that there was no intention to refer to that provision. In order to explain this stance, the panelist gave an example of applicability of the MFN treatment. As can be observes, Article 11.3 is not subject to the MFN treatment as envisaged under the GATT as well. However, this does not mean that China can thereby impose differential export duties on exports to different member states as the whole WTO community will expect it to follow the principles of MFN even when it is not explicitly stated in Article 11.3. Thus, instead of a strict interpretation of just the text, the possible intention of the parties should be considered while reaching a conclusion. According to the panelist, the exceptions provided under GATT must be available to justify the breach of any GATT related obligation as long as the otherwise is not expressly mentioned. The panelist reaches this decision by applying the same logic as the majority panelist with respect to presence of references in other provisions of GATT. The panelist applies this argument in an inverted manner as he states that Article 7.3 of the Protocol expressly gives up the benefit that the member state is entitled to under the TRIMs Agreement. Thus, if the parties did not want China to get the advantage of the exceptions under GATT 1994 under Article 11.3, they would have expressly mentioned as it is done in the case of Article 7.3 of the Protocol.

Intention of the Parties

As discussed in the earlier parts, the nature of the obligations under the protocol is excessive, harsh and unjust as against China. As the result of this, the nature of the Protocol of Accession, the realities that existed at the time of conclusion of the Protocol as well as the drafting principles and loopholes must be considered while interpreting China's obligations under the Protocol. The intention of China at the time of negotiating the terms of accession must also be considered. Perusal of the actual intention of China must be specifically considered at the time of interpretation of its obligations under the Protocol because; these obligations are almost unilateral in nature without any element of reciprocity especially in case of substantial obligations. In addition to this, in case of any confusion regarding its interpretation, the obligation must always be construed in a narrow manner.[xlvii] This is known as the principle of '*in dubio mitius.'* The International Law Commission (ILC) of the United Nations has also highlighted this principle as it provided for an interpretative guidance in order to interpret the unilateral declarations made by the states, which states:[xlviii]

"A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."

Such an interpretation in favor of China might actually be the need of the hour because of the sole reason that the Protocol is drafted in a very poor manner without giving a proper thought to its implication and interpretation. This can specifically be evidenced when the Russian Accession Protocol and the Ukrainian Accession Protocol is perused. It can be observed that Russia and Ukraine, having learned from the mistakes of China have either explicitly subjected the export duty restrictions to the GATT exceptions (Ukraine) or have included the export duty restrictions under the GATT Schedule itself so that they can take advantage of the exceptions.[xlix] This could lead us to a possible conclusion that even China would have wanted its obligation to be subjected to the GATT exceptions if ever they were expressly asked about it. Thus, a restrictive interpretation approach will lead us to a proper interpretation of the obligations under the Accession Protocol.

CUSTOMARY RULES OF TREATY INTERPRETATION

The VCLT embodies by itself the customary rules of treaty interpretation in the international sphere. The VCLT provides for various methods in order to interpret the terms of any treaty. It requires the treaty to be interpreted in good faith i.e. based on the ordinary meaning of the terms in their respective context and in the light of its object and purpose.[l] The panels and the Appellate Body in the above-mentioned cases have more or less followed this rule of interpreting the terms in respect of its context. However, the point of object and purpose of the obligations has not been explored by the Dispute Settlement Bodies. In addition to this, the panel only in the China – Raw Material Case examined the context of the Protocol in which only the Protocol and the working party report were examined in order to determine context. VCLT mentions the context to be any agreement related to the treaty in question in connection with the conclusion of the treaty. In this regards, although Article 1.2 of the Protocol mentions the protocol as an integral part of only the Marrakech Agreement, the remainder of the multilateral agreements annexed to the WTO definitely become the context with regards to the

Protocol as they are related to the Protocol in the sense that most obligations in the protocol have a baseline obligation[li] in the GATT, GATS or TRIMs.

CONCLUSION

The obligations imposed upon China in the Protocol are clearly excessive and unjust in nature. Their nature is against the basic principle of uniform treaty structure as adopted by the WTO after the failure of GATT 1947. The negotiating process provided for the accession of applicants to the WTO is also unjust and as can be witnessed from the China's Accession Protocol can also lead to bullying of a country into accepting those obligations that they do not intend to in any manner. The basic principles of reciprocity and non-discrimination are also not reflected in the obligations under the protocol as most of these obligations are unilateral in nature from the part of China. There is still a scope to justify these obligations by interpreting it in a fair manner, however, Dispute Settlement Bodies, which are expected to give fair and rational interpretation to China's obligations, also shy away from doing so. Under these circumstances, there might be circumstances wherein China might refuse to enforce its obligations under the Protocol, which might once again lead to a state of uncertainty and distortion very similar to the situation that existed in the GATT 1947 regime.

REFERENCES

[i] The agreement concluded at the time of inception of GATT 1947 between the original contracting parties.

[ii] Julia Ya Quin, *The Conundrum of WTO Accession Protocols: In Search of Legality and Legitimacy*, 55 Va. J. Int'l L. 369 (2015).

[iii] Appellate Body Report, *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS98/AB/R (December 14, 1999).

[iv] *Supra* note 2.

[v] Xiaohui Wu, *No longer Outsider, Not Yet Equal: Rethinking China's Membership In The World Trade Organisation*, 10 Chinese J. Int'l L. 227 (2011)

[vi] Julia Ya Qin, *Predicament of China's WTO – Plus Obligation to Eliminate Export Duties: A Commentary on the China-Raw Materials Case*, 11 Chinese J. Int'l L. 237 (2012).

[vii] *Id.*

[viii] World Trade Org., *Decision on the Acceptance of and Accession **to** the Agreement Establishing the World Trade Organization*, in The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 409 (1999).

[ix] WTO Agreements refers to the Marrakech Agreement as well as the various Multilateral Trade Agreements that are annexed to the Marrakech Agreement.

[x] For the year 2001, China was at the sixth rank in the list of the world's largest economy just behind the United States of America, Germany, Japan, France and the United Kingdom. Source: *TO Statistics: International Trade Statistics 2002*, available at <www.wto.org>.

[xi] Julia Ya Qin, "WTO – Plus Obligations and Their Implications For The World Trade Organization Legal System, 37(3) Journal of World Trade. 483 (2003.)

[xii] Panel Reports, *China – Raw Materials* WT/DS394, 395, 398/R (5 July 2011).

[xiii] *Supra* note 2.

[xiv] *Id.*

[xv] This refers to the Panel and the Appellate Body formulated under the Dispute Settlement Understanding.

[xvi] The Protocol of Accession incorporate in itself certain obligations under the working party report as well. China has adopted 143 such obligations mentions in the working party report over and above its obligations under the Protocol of Accession.

[xvii] Julia Ya Qin, *The Challenge of Interpreting 'WTO-Plus' Provisions*, 44 J. World Trade 127 (2010).

[xviii] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 Mar. 1986), A. 31.

[xix] Article 11.3 of the Protocol is an example of one such standalone obligation as the protocol does not expressly refer that it is connected to Article XI:1 of the GATT 1994 and neither does it refer to the applicability of the General Exceptions under Article XX of the GATT 1994. This is very unusual as it is very unlikely for a state to undertake unconditional and

[xx] *Supra* note 17.

[xxi] *Id.*

[xxii] Appellate Body Report, *United States – Measures affecting the Cross – Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (20 April 2005).

[xxiii] Appellate Body Report, *European Communities – Measures concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R; WT/DS48/AB/R (13 February 1998).

[xxiv] *Supra* note 17.

[xxv] Panel Reports, *China – Measures affecting imports of Automobile Parts*, WT/DS339, 340, 342.

[xxvi] *Id.*

[xxvii] *Id.*

[xxviii] *Supra* note 17

[xxix] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products*, WT/DS363.

[xxx] These measures included the Catalogue; the foreign investment regulation; the several opinion, Importation procedure, etc.

[xxxi] *Supra* note 29

[xxxii] Elanor A. Mangin, *Market Access in China - Publications and Audiovisual Materials: A Moral Victory with a Silver Lining*, 25 Berkeley Tech. L.J. 279 (2010)

[xxxiii] *Supra* note 12.

[xxxiv] The General Agreement on Trade and Tariffs 1994, Article XX (g)

[xxxv] The General Agreement on Trade and Tariffs 1994, Article XX(b)

[xxxvi] Appellate Body Report, US-Carbon Steel, WT/DS213/AB/R (28 November 2003).

[xxxvii] *Supra* note 6.

[xxxviii] *Id.*

[xxxix] *Supra* note 18, A. 31

[xl] Appellate Body Report, *China - Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014).

[xli] *Id.*

[xlii] *Id.*

[xliii] Julia Ya Qin, *Judicial Authority in WTO Law: A Commentary on the Appellate Body's Decision in China-Rate Earths*, 13 Chinese J. Int'l L. 639 (2014).

[xliv] Appellate Body Reports, US – Stainless Steel from Mexico, WT/DS344/AB/R (30 April 2008).

[xlv] *Supra* note 43.

[xlvi] *Supra* note 40, paras. 7.118 – 7.138.

[xlvii] *Supra* note 17.

[xlviii] Guiding Principle 7, *Guiding Principles applicable to unilateral declarations of State capable of creating legal obligations, with commentaries thereto*, adopted by the International Law Commission of the United Nations in its 58th session in 2006, ILC Report, A/61/10 (2006).

[xlix] *Supra* note 6.

[l] *Supra* note 18, A. 31(1)

[li] *Supra* note 17. – Baseline obligations are those obligations in the Multilateral Agreements that are connected to the obligations in the Protocol because of a common subject matter and area of application.