

XI.15 The principal of sovereignty over natural resources and the WTO

*Stephanie Switzer**

Senior Lecturer and Co-Director of the University of Strathclyde's Centre for Environmental Law and Governance, Glasgow, Scotland

Abstract

State sovereignty is a central principle of international law, with sovereignty over natural resources considered a fundamental expression of such state sovereignty. Sovereignty over natural resources is itself recognised as a principle of customary international law. There is no explicit reference to sovereignty over natural resources within the WTO-covered agreements. Nonetheless, the principle has been used as an aid to interpretation by WTO panels in two disputes; namely *China – Raw Materials* and *China – Rare Earths*. This chapter evaluates both disputes with a view to ascertaining more fully the relevance of the principle to WTO law. It further offers insights from the literature on certain of the more troubling aspects of this jurisprudence.

Keywords

Trade and environment, exhaustible natural resources, exceptions, permanent sovereignty over natural resources

Contents

- XI.15.1 Introduction
- XI.15.2 Development of the principle of permanent sovereignty over natural resources
- XI.15.3 Natural resources under WTO law
- XI.15.4 The principle of permanent sovereignty over natural resources under WTO law
- XI.15.5 Analysis
- XI.15.6 Outlook

XI.15.1 Introduction

This chapter aims to provide an overview of the development of the principle of permanent sovereignty over natural resources as well as its recognition within WTO law. While there is

* The author wishes to thank Iyan Offor for his help, discussions and advice in preparing this chapter. Any errors are the author's own.

no explicit reference to sovereignty over natural resources within the WTO-covered agreements, the principle has nevertheless been used as an aid to interpretation by WTO panels in two disputes; namely *China – Raw Materials* and *China – Rare Earths*. This chapter will analyse the contribution of each of these disputes to clarifying the relevance of the principle of permanent sovereignty over natural resources to WTO law. The chapter will conclude by noting that while certain aspects of the jurisprudence on the application of the principle of sovereignty over natural resources have provided useful points of clarification, certain important gaps remain in achieving the full implementation of the principle within WTO law.

XI.15.2 Development of the principle of permanent sovereignty over natural resources

State sovereignty is a central principle of international law, with sovereignty over natural resources considered a fundamental expression of such state sovereignty. Sovereignty over natural resources is itself recognised as one of the ‘bedrock principles of international law’,¹ with Resolution 1803 (XVII) of the UN General Assembly in 1962, entitled ‘Permanent Sovereignty over Natural Resources’, speaking of ‘[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources’. The UN General Assembly resolution further notes that such sovereignty ‘must be exercised in the interest of their national development and of the well-being of the people of the State concerned’. The ICJ in *Armed Activities on the Territory of Congo*² recognised that permanent sovereignty over natural resources constituted a principle of customary international law.

The development of the principle of sovereignty of natural resources arose in the context of decolonisation. Newly independent states wished to affirm the ‘claim’ of newly independent states over natural resources, vis-à-vis foreign corporations.³ In essence, control over natural resources was intended to ensure ‘that independence was not just an empty shell but a concrete attribute which could pave the way to economic development.’⁴ The principle was given further expression in the 1974 Charter of Economic Rights and Duties of States, which

¹ Umplová (2020).

² *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005), 19th December 2005, para 244.

³ Barrall (2016).

⁴ Ibid.

affirmed in Article 2(1) the right of every state to, ‘freely exercise full permanent sovereignty including possession, use and disposal, over all its wealth, natural resources and economic activities’. More generally, the principle became a central facet of the New International Economic Order (NIEO), which was intended to establish a right to development on the part of developing states based upon, *inter alia*, their sovereignty over natural resources.⁵

The principle of permanent sovereignty over natural resources must also be situated within the broader context of public international law. Of relevance here is the customary international law principle set down in principle 2 of the 1992 Rio Declaration on Environment and Development. This directs that in the exercise of ‘the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies’ no state may use its own territory to cause harm to other states or in areas beyond the limits of its national jurisdiction. This necessarily circumscribes the application of the principle of permanent sovereignty over natural resources, particularly given the global nature of many environmental problems.⁶

XI.15.3 Natural resources under WTO law

There is no explicit reference to sovereignty over natural resources within the WTO-covered agreements. Similarly, there is no specific WTO agreement intended to govern trade in natural resources.⁷ That is not to say, however, that WTO law does not apply to natural resources trade. As set out in the 2010 WTO World Trade Report, the general obligations of Members under both the GATT and the wider set of WTO-covered agreements apply to the ‘extent a natural resource may be traded’; that is, the extent to which they are a tradable good or product (or indeed a service). Under certain circumstances, this can include natural resources in their ‘natural’ state, such as unharvested timber, as established by the Appellate Body in *US – Softwood Lumber IV*. Accordingly, while ‘tradeable’ natural resources are likely to fall within the domain of WTO law, the extent to which other natural resources will fall within the purview of WTO is very much context dependent. Questions have been raised over, for example, the application of WTO law to water in its natural state, although it is clear that WTO law applies to water as falling under Chapter 22 of the Harmonized System.

⁵ Ibid.

⁶ Ibid, 4.

⁷ Chi (2014).

To the extent that natural resources do fall under the purview of WTO law, Members will be subject to a number of obligations, including, *inter alia*, the non-discrimination mandates set out in the GATT most-favoured nation and national treatment rules, as well as the prohibition on quantitative restrictions. The latter provision, GATT Article XI:1, is particularly significant to natural resources trade to the extent that a Member may wish to restrict exports of a particular natural resource in recognition of its sovereignty over natural resources.

The framers of the GATT recognised that there may be occasions under which a party may wish to regulate natural resources in a manner that results in a breach of certain of its obligations under the GATT. Accordingly, under the general exceptions clause of GATT Article XX, subparagraph (g) recognises that Members may take measures, ‘relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.’ While this is not an explicit recognition of the sovereignty over natural resources per se, it certainly does underscore the significance of natural resources, and the desire to retain regulatory competence over them, to the original framers of the GATT.⁸ The term ‘exhaustible natural resources’ is not further defined within the GATT though the jurisprudence of the WTO dispute settlement system has helped, at least in part, to flesh out the meaning of the term. In *US – Shrimp*, for example, the Appellate Body took an evolutionary approach to the meaning of exhaustible natural resources, noting that the phrase must be read, ‘in the light of contemporary concerns of the community of nations about the protection and conservation of the environment’. Under this reading, exhaustible natural resources can include both non-living and living resources such as migratory sea turtles.

In terms of the scope provided under WTO law for members to manage natural resources more generally, the Appellate Body in the dispute of *US – Gasoline*, opined that

“WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.”

⁸ On this, see Van Calster (2013).

In essence, and as upheld in later jurisprudence such as *China – Raw Materials*, Members have an inherent ‘right to regulate’ in respect of natural resources but only to the extent that such regulation is compliant with any relevant WTO obligations.

XI.15.4 The principle of permanent sovereignty over natural resources under WTO law

As noted in the previous section, there is no reference to the permanent sovereignty over natural resources under WTO law. However, the principle of permanent sovereignty was raised in GATT discussions during the Tokyo Round, which took place from 1973 to 1979, by numerous GATT contracting parties and has also been the subject of some, albeit limited, discussion within the WTO committee system. In addition, and as noted above, two WTO disputes – *China – Measures Related to the Exportation of Various Raw Materials (China – Raw Materials)* and *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (China – Rare Earths)* – have provided an opportunity for the WTO dispute settlement system to confront more fully the principle of permanent sovereignty and its application to WTO law.

XI.15.4.1 China – Raw Materials

The first of these disputes, *China – Raw Materials*, involved a number of export restrictions, including export duties and quotas, imposed by China on certain minerals of critical importance to both the renewables and high technology industries. The complainants in the dispute alleged, *inter alia*, that certain of the export quotas imposed by China breached GATT Article XI:1 while the export duties constituted a breach of paragraph 11.3 of China’s WTO Accession protocol. Pursuant to this, China had committed to eliminate all taxes and charges on exports except in respect of certain of those products listed under Annex 6 of its Accession Protocol. China sought to rely on, among other things, GATT Article XX(g) as a defence to the allegations.

The panel in the dispute had cause to address directly the application of the principle of the permanent sovereignty to WTO law. In essence, China, in raising its GATT Article XX(g) defence, argued that as the restrictions at issue applied to scarce, exhaustible natural resources which, ‘need to be managed and protected ... nothing should interfere with (China’s) sovereignty over such natural resources’. A further issue for consideration was whether GATT Article XX(g) was even available as a defence to a breach of paragraph 11.3 of China’s Accession protocol. The conclusion of the panel was that the GATT Article XX

defence was not available to China to defend such a breach, but the panel nevertheless examined its applicability on an *arguendo* basis.

The panel noted that pursuant to Article 31(3)(c) of the Vienna Convention, in its interpretation of Article XX(g), it should, “take into account” the principle of sovereignty over natural resources’. Accordingly, it recognised that, ‘the treaty interpreter may take into account the international law principle of sovereignty over natural resources, to the extent relevant to the case at hand’. The Panel went on to recognise China’s right to sovereignty over its natural resources, but noted that such rights can only be exercised, ‘within the parameters of WTO provisions’ including of course the requirements set out under GATT Article XX(g). Ultimately, the panel found that China had not met the parameters of the GATT Article XX(g) defence, with it accordingly being clear that ‘the fulfilment of sovereignty over natural resources is subject to WTO rights and obligations’.⁹ To expand, the panel opined that in respect of measures relating to *conservation*, only environmental aims will pass muster under GATT Article XX(g). The panel considered that the measures in question pursued industrial, as opposed to environmental goals.

On appeal, the Appellate Body did not specifically reference the application of the principle of the sovereignty over natural resources in respect of its interpretation of GATT Article XX(g), though it ultimately agreed with the panel that the GATT Article XX(g) defence was not available to China in respect of its breach of paragraph 11.3 of China’s Accession protocol. Based upon the jurisprudence of *China – Raw Materials*, it is clear that the principle of sovereignty over natural resources can act as an interpretative aid within the context of the WTO dispute settlement system but will not override the texts of the WTO agreements themselves.

XI.15.4.2 China – Rare Earths

In the dispute of *China – Rare Earths*, the central legal issues were broadly similar to those raised by the complainants in the *China – Raw Materials* dispute – namely, that China had imposed export duties on certain rare earth elements and tungsten and molybdenum in breach of its commitments under Paragraph 11.3 of its Accession protocol, and that it had imposed export quotas in breach of GATT Article XI:1. China did not contest that its imposition of export quotas constituted a breach of GATT Article XI:1, but argued that the defence of

⁹ Abu-Gosh and Leal-Arcas (2013).

GATT Article XX(g) should apply. In its analysis, and echoing its approach in *China – Raw Materials*, the Panel drew insights from the principle of permanent sovereignty over natural resources as relevant to its interpretation of GATT Article XX(g). It observed that, ‘Members are entitled to develop conservation policies on the basis of, or taking into account, a full range of policy considerations and goals, including the need to preserve resources in their current state as well as the need to use them in a sustainable manner’. In essence, in relation to the conservation of exhaustible natural resources, the panel sought to strike a balance between trade liberalization on the one hand, and sovereignty over natural resources as well as the right to sustainable development on the other. In the view of the Panel, it was for Members to decide upon, for example, how much of a resource should be used today and how much should be reserved for future generations. Ultimately, however, the Panel found that the Article XX(g) defence had not been made out by China, a finding upheld by the Appellate Body, albeit on different grounds. Similar to its approach in *China – Raw Materials*, the Appellate Body in *Rare Earths* did not directly address the applicability of the principle of sovereignty over natural resources to GATT Article XX(g).

XI.15.5 Analysis

Both the *Rare Earths* and *Raw Materials* decisions sparked a significant amount of commentary, with much attention paid to the interpretation of the dispute settlement system of the operation of GATT Article XX(g). While the Appellate Body did not directly address the principle of sovereignty over natural resources in either dispute, on the face of it the respective panels’ pronouncements on the applicability of the principle as an aid to interpretation of GATT Article XX(g) seem relatively uncontroversial. The panel, however, made clear in *Raw Materials* that the principle of sovereignty over natural resources could not ‘trump’ a Member’s WTO commitments. More generally, the panel, in its reading of the role of sovereignty over natural resources in *Rare Earths* evoked principle 2 of the 1992 Rio Declaration on Environment and Development, thereby situating sovereignty over natural resources within its wider international law context. There are, however, certain troubling aspects of the treatment of the principle of sovereignty over natural resources identified in the literature. Much of that concern has centred upon the denial to China of the availability of the GATT Article XX(g) defence, with Bin Gu, for example, arguing that it amounted to an ‘effective deprivation of China of its sovereignty over natural resources, and results in a

fundamental challenge to the WTO system and international law in general'.¹⁰ Furthermore, the panel's analysis in *Rare Earths* also failed to take sufficient cognisance of the developmental underpinnings of the principle of permanent sovereignty over natural resources.¹¹ Accordingly, the panel's reasoning in *Rare Earths* has been criticised for 'its failure to comprehend the principle of PSNR [permanent sovereignty over natural resources] as a "development instrument" with an aim to encourage optimal utilization of natural resources deemed desirable for a nation's certain level of development'.¹²

XI.15.6 Outlook

From the above, it is clear that the exact contours of the application of the principle of sovereignty over natural resources to WTO law have yet to be fully delineated. The panel has provided some useful guidance in this respect, and the recognition that the principle can serve as an aid to the interpretation of GATT Article XX(g) is very much welcome. However, larger questions such as the space for more developmentally oriented approaches to the protection of natural resources remain unanswered.

Bibliography

Abu-Gosh ES and Leal-Arcas R, 'The Conservation of Exhaustible Natural Resources in the GATT and WTO: Implications for the Conservation of Oil Resources' (2013) 14(3) *Journal of World Investment & Trade* 480, 517.

Barrall V, 'Sovereignty over Natural Resources: Environmental Challenges and Sustainable Development' in Elisa Morgera, and Kati Kulovesi (eds), *Research Handbook on International Law and Natural Resources* (Edward Elgar Publishing Limited, 2016).

Chi M, "'Exhaustible Natural Resource" in WTO Law: GATT Article XX(g) Disputes and their Implications' (2014) 48(5) *Journal of World Trade* 939.

Gonzalez Arreaza Alejandro, 'Natural Resource Sovereignty and Economic Development in the WTO in Light of the Recent Case Law involving Raw Materials and Rare Earths' (2017) 26(3) *Review of European, Comparative & International Environmental Law* 266.

¹⁰ Gu (2012).

¹¹ Jingxia and Xingxing (2015).

¹² *Ibid*, 564.

Gu Bin ‘Applicability of GATT Article XX in *China – Raw Materials: A Clash within the WTO Agreement*’ (2012) 15(4) *Journal of International Economic Law* 1007.

Jingxia Shi and Xingxing Yang, ‘Reconciling Environmental Protection with Natural Resources Trade in International Law: A Perspective from China – Rare Earths’ (2015) 10(3) *Frontiers of Law in China* 537.

Van Calster G, ‘China, Minerals Export, Raw and Rare Earth Materials: A Perfect Storm for World Trade Organization Dispute Settlement’ (2013) 22(1) *Review of European, Comparative & International Law* 117.

Ümplová U, ‘Sovereignty over natural resources – A normative reinterpretation’ (2020) 9(1) *Global Constitutionalism* 7.