

# RESURRECTION OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES (PSNR) BY WTO: AN ANALYSIS OF CHINA RAW MATERIALS CASE

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## ABSTRACT

*The development of international economic law after the decolonization process and end of World War II has been shaped within two parallel streams. One is the struggle of newly independent states to recognise their permanent sovereignty over their natural wealth and resources called PSNR which has been accepted overwhelmingly in General Assembly of UN with strong support of less developed states. The other is the agenda of free market ideologists' states to reduce tariff and spread such ideology among all actors by forming the GATT at the end of WW II which has finally been transformed in 1995 as WTO with the most comprehensive legal instruments and strong dispute settlement mechanism. The most significant development is the revival of PSNR for the first time within WTO dispute settlement brought by China in the China – Measures Related to the Exportation of Various Raw Materials Case. This first time face to face meeting of both has significant consequences in international law. This study will focus on the approach of states in the emergence and development of PSNR and their view on the same after almost fifty years when it has been claimed within WTO system. Secondly, it will examine the observation of the Panel and Appellate Body of WTO on the relation of PSNR with WTO mechanism and its application within the WTO legal instruments.*

## I. INTRODUCTION

China – Measures Related to the Exportation of Various Raw Materials Case, in short “China-raw materials case”, was brought before the World Trade Organisation (hereinafter WTO) in 2009.<sup>1</sup> This case is an effort to superimpose

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<sup>1</sup> World Trade Organization-Dispute Settlement, China — Measures Related to the Exportation of Various Raw Materials (Complainant: United States) - DS394; China — Measures Related to the Exportation of Various Raw Materials, (Complainant-

collectivistic thinking namely “Permanent Sovereignty” over General Agreement on Tariff and Trade (hereinafter GATT) based free market ideology.<sup>2</sup> This collective effort of developing states have been achieved firstly in 1962 in the form of Resolution of United Nations General Assembly bearing no. 1803 (XVII) of 1962 and have been revived after almost half a century within WTO put forward by China in the present case. The claim of China for its sovereign inalienable rights namely Permanent Sovereignty Over Natural Resources (hereinafter PSNR) within the rubric of WTO self-contained mechanism is a juncture of two streams for the first time although the intersection of WTO rules and other rules of public international law has been explored in prior cases and literature.<sup>3</sup> The emergence of classical liberal thinking of free trade was initiated in the form of GATT 1947, whereas collectivistic thinking of anti-colonial newly independent capital importing less-developed states in the name of PSNR had been initiated in 1950s and gained overwhelming majority in the General Assembly which challenged the underlying philosophy of GATT.<sup>4</sup> The parallel growth of both PSNR and GATT have not reached equal footage. The GATT finally transformed into self-contained multilateral body called WTO in 1995 with a sophisticated

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European Union)-DS395; China — Measures Related to the Exportation of Various Raw Materials (Complainant: Mexico)- DS398, WT/DS394/R, WT/DS395/R and WT/DS398/R, 5 July 2011, available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds395\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds395_e.htm). [Last accessed on March 12, 2016]

<sup>2</sup> Jayagovind, A., “Impact of Permanent Sovereignty over Natural Resources on WTO: A critique of WTO ruling in China: exportation of raw materials case”, 52 (2012) *Indian Journal Of International Law*, 141-1521 at p. 151

<sup>3</sup> WTO dealt with a number of cases pertinent to international law. For instance, in the field of human rights, cases include United States-Measures Affecting Government Procurement, WTO Doc. WT/DS88 & 95 (February 14, 2000), United States-The Cuban Liberty and Democratic Solidarity Act, WTO Doc. WT/DS 38, (April 24, 1998); in the field of environmental law, cases include United States-Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/R (May 15, 1998) (Panel), & WT/DS58/AB/R (November 6, 1998) (Appellate Body), Chile-Measures Affecting Transit and Importation of Swordfish, WTO Doc. WT/DS193 (suspended March 23, 2001); other disputes include Korea-Measures Affecting Government Procurement, WTO Doc. WT/DS163/R para 7.96 (June 19, 2000). Sonia E. Rolland, *China-Raw Materials: WTO Rules on Chinese Natural Resources Export Dispute*, volume 16, Issue 21, ASIL Insights, 19 June 2012. <http://www.asil.org/insights/volume/16/issue/21/china-raw-materials-wto-rules-chinese-natural-resources-export-dispute>. [Last visited on May 15, 2015]

<sup>4</sup> *supra* note 2, at p. 151.

dispute settlement mechanism.<sup>5</sup> The claims made before this mechanism will have to be based on the provisions of covered agreements and the Panel is bound to assess within the objectives of covered agreements.<sup>6</sup> WTO regime is composed of compact, comprehensive and specific objective mechanism. Conversely, PSNR influenced and contributed to adopt Declaration on New International Economic Order (NIEO) and Charter of Economic Rights and Duties. Furthermore, PSNR influenced less developed countries to be aware about their rights and entitlements before undertaking any economic obligations at international level. One of such is the UN Conference on Trade and Development where countries successfully argued for introducing Part IV of the GATT.

This study will lay down a comprehensive chain of the origin and development of PSNR and recall the debates between developed capital-exporting and less-developed capital importing states with respect to economic self-determination and rights over natural wealth and resources in Part II. The study will be constrained to articulate the debate during the early phase of PSNR on 'compensation for nationalization. In Part III, the study will look into the contemporary development of PSNR in the context of WTO regime in China Raw Materials Case. In this part, it will succinctly mention factual background of the dispute, arguments of both parties and third parties with respect to the relevance of PSNR in the context of WTO, views and findings of the Panel and Appellate Body regarding this well known principle of international law but new concept in WTO regime. Following such, in Part IV, the study will focus on whether the concept PSNR is part of *Jus Cogens* norms under international law and its relation with the self contained multilateral mechanism of WTO. The study will conclude by providing significance of this dispute in the context of the juncture of PSNR, a collectivistic thinking of less developed capital-importing states within WTO, the free market economy regime.

## II. ORIGIN AND DEVELOPMENT OF PSNR

PSNR is a well known concept in international law, originated with the progress of decolonization process among the newly independent states with the existence of many legal arrangements made during colonial period.

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<sup>5</sup> Lamy, P., *The Place and Role of the WTO (WTO Law) in the International Legal Order*, Address before the European Society of International Law, Sorbonne, Paris, 2006. To see the full speech, Home>wto news>speeches list> speech, available at <[http://www.wto.org/english/news\\_e/sppl\\_e/sppl26\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl26_e.htm)>. [Last visited on October 11, 2015]

<sup>6</sup> WTO Dispute Settlement Understanding (DSU), Article 1.1, 7, and 11, Annex II, WTO legal text, 1994, ([https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm) # dispute) [Last visited on March 12, 2016].