



**CHINA – MEASURES RELATED TO THE EXPORTATION  
OF RARE EARTHS, TUNGSTEN, AND MOLYBDENUM**

AB-2014-3

AB-2014-5

AB-2014-6

*Reports of the Appellate Body*

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Note:

The Appellate Body is issuing these Reports in the form of a single document constituting three separate Appellate Body Reports: WT/DS431/AB/R; WT/DS432/AB/R; and WT/DS433/AB/R. The cover page, preliminary pages, sections 1 through 5, and the annexes are common to all three Reports. The page header throughout the document bears the three document symbols WT/DS431/AB/R; WT/DS432/AB/R; and WT/DS433/AB/R, with the following exceptions: section 6 on pages US-154 to US-155, which bears the document symbol for and contains the Appellate Body's conclusions and recommendations in the Appellate Body Report WT/DS431/AB/R; section 6 on pages EU-156 to EU-157, which bears the document symbol for and contains the Appellate Body's conclusions and recommendations in the Appellate Body Report WT/DS432/AB/R; and section 6 on pages JPN-158 to JPN-159, which bears the document symbol for and contains the Appellate Body's conclusions and recommendations in the Appellate Body Report WT/DS433/AB/R.

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<i>Canada – Herring and Salmon</i>	GATT Panel Report, <i>Canada – Measures Affecting Exports of Unprocessed Herring and Salmon</i> , L/6268, adopted 22 March 1988, BISD 35S, p. 98
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<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
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<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717

## PANEL EXHIBITS CITED IN THESE REPORTS

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<b>Submitted by China</b>		
CHN-1		Information Office of the State Council, The People's Republic of China, "Situation and Policies of China's Rare Earth Industry" (Beijing, June 2012)
CHN-4		S. Shaw and J. Chegwidan, "Global Drivers for Rare Earth Demand", <i>Roskill Information Services</i> (August 2012)
CHN-6		M. Humphries, "Rare Earth Elements: The Global Supply Chain", <i>Congressional Research Service</i> (6 September 2011)
CHN-8	2012 Export Licensing Catalogue	Notice on "2012 Export Licensing Management Commodities List" (MOFCOM and General Administration of Customs, Notice (2011) No. 98, promulgated on 30 December 2011, effective on 1 January 2012)
CHN-11	Foreign Trade Law	Foreign Trade Law of the People's Republic of China (adopted at the 7th Session of the Standing Committee of the Eighth National People's Congress on 12 May 1994, and amended at the 8th Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004, effective on 1 July 2004)
CHN-13	Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry	Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry (Guo Fa [2011] No. 12, 10 May 2011)
CHN-21	Administration of Directive Production Plan of Rare Earths	Provisional Measures on the Administration of the Directive Production Plan of Rare Earth (Ministry of Industry and Information Technology, Gong Xin Bu Yuan [2012] No. 285, 13 June 2012)
CHN-24		Australian Atlas on Minerals and Mines: Rare Earths, available online at: <a href="http://www.australiaminesatlas.gov.au">http://www.australiaminesatlas.gov.au</a> , accessed on 11 November 2012
CHN-38	2012 Application Qualifications and Procedures for Rare Earth Export Quotas	Public Notice on 2012 Application Qualifications and Application Procedures for Rare Earth Export Quota, Notice (2011) No. 77, promulgated by MOFCOM on 11 November 2011
CHN-39		Circular of the Ministry of Land and Resources on Carrying out the Nationwide Special Rectification Campaign of the Exploitation Order of Rare Earth and Other Minerals (Guo Tu Zi Fa [2010] No. 68, 10 May 2010)
CHN-54	Regulations on the Administration of the Import and Export of Goods	Regulations of the People's Republic of China on the Administration of the Import and Export of Goods (Order of the State Council No. 332, adopted at the 46th executive meeting of the State Council on 31 October 2001, effective on 1 January 2002)
CHN-55	2012 List of Enterprises for the Export of Rare Earths 2012	Notice Publishing Online the List of Enterprises Applying for the Export Quota for Rare Earths and Coke in 2012 (MOFCOM, 14 December 2011)



Exhibit No.	Short title (if any)	Full title
<b>Submitted by China</b>		
CHN-56	2012 First Batch Rare Earth Export Quotas	2012 Notification on List of Rare Earth Exporting Enterprises and First Batch Rare Earth Export Quota (MOFCOM, Shangmaohan [2011] No. 1133, 27 December 2011)
CHN-57	2012 First Batch Rare Earth Export Quotas (Supplement)	Notice Regarding the Supplement to the 2012 First Batch of Rare Earth Export Quotas (MOFCOM, Shangmaopi [2012] No. 618, 16 May 2012)
CHN-58	2012 Second Batch Rare Earth Export Quotas	Notice on Distributing the 2012 Second Batch of Rare Earth Export Quotas (MOFCOM, Shangmaohan [2012] No. 627, 16 August 2012)
CHN-63	Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products	Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products (Zhang Chenyang, MOFCOM, 14 December 2012)
CHN-64		"Current situation of China rare earth industry and outlook for '2011-2015' period", <i>China Rare Earths Information Journal</i> , Vol. 17, No. 12, December 2011, and Vol. 18, No. 1, January 2012
CHN-85	Circular on Establishing Team of Mining Zone Assistant Administrators for Ore Districts of Rare Earths and Other Materials	Circular on Establishing Team of Mining Zone Assistant Administrators for Ore Districts of Rare Earths and Other Materials (General Office of Ministry of Land and Resources, Guo Tu Zi Ting Han [2010] No. 52, 27 July 2010)
CHN-92		USGS Mineral Commodity Summaries 2012, "Tungsten"
CHN-96	Export Quota Administration Measures	Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation (2011) No. 12, adopted at the 9th ministerial office meeting of the Ministry of Foreign Trade and Economic Cooperation of 2001, effective on 1 January 2002)
CHN-97	2012 Export Quota Amounts	Notice Regarding 2012 Export Quota Amounts for Agricultural and Industrial Products (MOFCOM, Notice (2011) No. 71, promulgated on 31 October 2011, effective on 1 January 2012)
CHN-98	2012 List of Enterprises for the Export (or/and Supply) of Tungsten, and List of Enterprises for the Export of Molybdenum	Notice Publishing the List of the State Trading Export Enterprises of Tungsten, Antimony and Silver, the Enterprises Exporting and Supplying Tungsten and Antimony, and the Enterprises Qualified to Apply for the Export Quotas for Indium and Molybdenum in 2012 (MOFCOM, 14 December 2011)
CHN-99	2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals	2012 Notice on List of Export (Supply) Enterprises and First Batch Export Quota of Tungsten, Antimony and Other Nonferrous Metals (MOFCOM, Shangmaohan, No. 1131, 26 December 2011)
CHN-100	2012 Application Qualifications and Application Procedures of Tungsten Export (or Supply) Enterprises	Public Notice on 2012 Application Qualifications and Application Procedures of the Tungsten, Antimony and Silver State Trading Export Enterprises, and Tungsten and Antimony Export Supply Enterprises, Notice (2011) No. 80, promulgated by MOFCOM on 11 November 2011
CHN-106		USGS Minerals Commodities Summaries 2012, "Molybdenum"
CHN-107	2012 Application Qualifications and Application Procedures for Molybdenum Export Quota	Public Notice on 2012 Application Qualifications and Application Procedures for Indium, Molybdenum and Tin Export Quota, Notice (2011) No. 79, promulgated by MOFCOM on 11 November 2011

Exhibit No.	Short title (if any)	Full title
<b>Submitted by China</b>		
CHN-132		"Three Concerns Behind the Prosperity of Rare Earth Listed Companies", <i>21st Century Business Herald</i> , 2 August 2011
CHN-137		Rare Earth Data (1999-2012)
CHN-139		Molybdenum Data (1999-2012) (this exhibit was updated by CHN-224)
CHN-157	Selected Economic Issues Regarding Export Quotas and Production Quotas	Professor Jaime de Melo, Expert Economic Report: "Selected Economic Issues Regarding Export Quotas and Production Quotas" (April 2013)
CHN-165	2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals	Notice on Distributing the 2012 Second Batch Export Quotas of Tungsten, Antimony and Other Nonferrous Metals (MOFCOM, Shangmaohan (2012) No. 513, 19 July 2012)
CHN-186		Dr David Humphreys, "A response to expert evidence supplied with their Second Written Submissions by the United States, the European Union and Japan", Report prepared by Dr David Humphreys of DaiEcon Advisors (June 2013)
CHN-191		Updated Rare Earths Data (1999-2012)
CHN-192		"The impact of Chinese rare earth quotas on non-Chinese exploration, development, demand and production", A review by J.R. Goode (10 June 2013)
CHN-193		Rare Earths Recycling in China
CHN-196		Updated Rare Earths Prices, June 2013
CHN-200		Metal-Pages ( <a href="http://www.metal-pages.com">http://www.metal-pages.com</a> ), "Critical Minerals 2013: Rare earth prices to trade in bond of \$50-70/kg REO long term – Kingsnorth", 5 June 2013
CHN-206	Response by Professor Jaime de Melo to Professor Grossman and Professor Winters' Expert Reports	Response to Expert Reports by Professor Grossman (Panel Exhibit JE-164) and Professor Winters (Panel Exhibit JE-169), Expert Economic Report prepared by Professor Jaime de Melo (July 2013)
CHN-214		"Introduction of the Rare Earths Recycling in China", Association of China Rare Earth Industry, 3 July 2012
CHN-224		Molybdenum Data (1999-2012) (Exhibit CHN-139 updated)

<b>Submitted by the Complainants</b>		
(with corresponding Exhibit Nos. submitted by China, if any)	Short title (if applicable)	Full title
JE-23		Rare Earths, data produced by Daniel J. Cordier (US Geological Survey (USGS), Mineral Commodity Summaries, January 2012)
JE-37		US Geological Survey (USGS) Mineral Commodity Summaries (2012): Tungsten
JE-43		Roskill Consulting Group, Ltd., "Study of the market for molybdenum" (November 2011)

Submitted by the Complainants		
(with corresponding Exhibit Nos. submitted by China, if any)	Short title (if applicable)	Full title
JE-45	2012 Tariff Implementation Program (Customs Tariff Commission)	Notice Regarding the 2012 Tariff Implementation Program (State Council Customs Tariff Commission, Shuiweihui (2011) No. 27, promulgated on 9 December 2011, effective on 1 January 2012)
JE-46	Regulations on Import and Export Duties	Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council (2003) No. 392, adopted at the 26th executive meeting of the State Council on 29 October 2003, effective on 1 January 2004)
JE-47	2012 Tariff Implementation Plan (General Administration of Customs)	Circular of the General Administration of Customs on the 2012 Tariff Implementation Plan (2011) No. 79, promulgated on 23 December 2011, effective on 1 January 2012
JE-48 (CHN-8)	2012 Export Licensing Catalogue	Notice on "2012 Export Licensing Management Commodities List" (MOFCOM and General Administration of Customs, Notice (2011) No. 98, promulgated on 30 December 2011, effective on 1 January 2012)
JE-49 (CHN-11)	Foreign Trade Law	Foreign Trade Law of the People's Republic of China (adopted at the 7th Session of the Standing Committee of the Eighth National People's Congress on 12 May 1994, and amended at the 8th Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004, effective on 1 July 2004)
JE-50 (CHN-54)	Regulations on the Administration of the Import and Export of Goods	Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (Order of the State Council No. 332, adopted at the 46th executive meeting of the State Council on 31 October 2001, effective on 1 January 2002)
JE-51	2008 Export Licence Administration Measures	Measures for the Administration of Licence for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, promulgated on 7 June 2008, effective on 1 July 2008)
JE-52 (CHN-96)	Export Quota Administration Measures	Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation (2011) No. 12, adopted at the 9th ministerial office meeting of the Ministry of Foreign Trade and Economic Cooperation of 2001, effective on 1 January 2002)
JE-53	2010 Amendment of Measures for Administration of Licensing Entities	2010 Decision of the Ministry of Commerce on Amending the Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Order (2010) No. 3, promulgated by MOFCOM on 12 September 2010)
JE-54	Customs Law of the People's Republic of China	Customs Law of the People's Republic of China (adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, amended 8 July 2000)
JE-55 (CHN-56)	2012 First Batch Rare Earth Export Quotas	Circular on the 2012 List of Rare Earth Export Enterprises and First Batch of Rare Earth Export Quotas (MOFCOM, Shangmaohan, No. 1133, 26 December 2011)

Submitted by the Complainants		
(with corresponding Exhibit Nos. submitted by China, if any)	Short title (if applicable)	Full title
JE-56 (CHN-57)	2012 First Batch Rare Earth Export Quotas (Supplement)	Notice Regarding the Supplement to the 2012 First Batch of Rare Earth Export Quotas (MOFCOM, Shangmaopi [2012] No. 618, 16 May 2012)
JE-57 (CHN-58)	2012 Second Batch Rare Earth Export Quotas	Notice on Distributing the 2012 Second Batch of Rare Earth Export Quotas (MOFCOM, Shangmaohan [2012] No. 627, 16 August 2012)
JE-58 (CHN-97)	2012 Export Quota Amounts	Notice Regarding 2012 Export Quota Amounts for Agricultural and Industrial Products (MOFCOM, Notice (2011) No. 71, promulgated on 31 October 2011, effective on 1 January 2012)
JE-59 (CHN-99)	2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals	Notice Regarding the 2012 List of Export (Supply) Enterprises and First Batch Export Quotas of Tungsten, Antimony and Other Nonferrous Metals (MOFCOM, Shangmaohan [2011] No. 1131, 26 December 2011)
JE-60 (CHN-165)	2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals	Notice on Distributing the 2012 Second Batch Export Quotas of Tungsten, Antimony and Other Nonferrous Metals (MOFCOM, Shangmaohan [2012] No. 513, 19 July 2012)
JE-61 (CHN-38)	2012 Application Qualifications and Procedures for Rare Earth Export Quotas	Public Notice on 2012 Application Qualifications and Application Procedures for Rare Earth Export Quota, Notice (2011) No. 77, promulgated by MOFCOM on 11 November 2011
JE-62 (CHN-100)	2012 Application Qualifications and Application Procedures of Tungsten Export (or Supply) Enterprises	Public Notice on 2012 Application Qualifications and Application Procedures of the Tungsten, Antimony and Silver State Trading Export Enterprises, and Tungsten and Antimony Export Supply Enterprises, Notice (2011) No. 80, promulgated by MOFCOM on 11 November 2011
JE-63 (CHN-107)	2012 Application Qualifications and Application Procedures for Molybdenum Export Quota	Public Notice on 2012 Application Qualifications and Application Procedures for Indium, Molybdenum and Tin Export Quota, Notice (2011) No. 79, promulgated by MOFCOM on 11 November 2011
JE-65 (CHN-98)	2012 List of Enterprises for the Export (or/and Supply) of Tungsten, and List of Enterprises for the Export of Molybdenum	Notice Publishing the List of the State Trading Export Enterprises of Tungsten, Antimony and Silver, the Enterprises Exporting and Supplying Tungsten and Antimony, and the Enterprises Qualified to Apply for the Export Quotas for Indium and Molybdenum in 2012 (MOFCOM, 14 December 2011)
JE-66 (CHN-55)	2012 List of Enterprises for the Export of Rare Earths	Notice Publishing the List of Enterprises Applying for the Export Quota for the Rare Earth and Coke in 2012 (MOFCOM, 14 December 2011)
JE-78	Rules on the Management of Import and Export Licence Certificates	Rules on the Management of Import and Export License Certificates (MOFCOM, Shangwubuling, No. 1, issued 4 February 2012, effective 5 March 2012)
JE-79		Joseph Gambogi and Daniel J. Cordier, US Geological Survey (USGS) 2010 Minerals Yearbook: Rare Earths [advance release]
JE-102		"Cost of 'greener' lighting explodes as China dominates rare-earth supply", <i>Pittsburgh Tribune Review</i> , published 14 August 2011

Submitted by the Complainants		
(with corresponding Exhibit Nos. submitted by China, if any)	Short title (if applicable)	Full title
JE-118		Xinhua Insight, "China tightens regulation of rare earth industry", Xinhua General News Service (15 June 2011)
JE-129	Rare Earth Elements	Roderick G. Eggert, "Rare Earth Elements", 25 April 2013 (Rare Earth Report)
JE-130		PricewaterhouseCoopers, "Tungsten Study", September 2012
JE-141		Professor L. Alan Winters, "Under-filled export quotas do not indicate that the quotas impose no costs on non-Chinese users", 25 April 2013
JE-145		"Establishment of Subsidiary", company release by HOYA Corporation (16 June 2011)
JE-146		"Shin-Etsu Chemical to set up a base in China to manufacture magnet alloys for rare earth magnets", company release by Shin-Etsu Chemical Co., Ltd. (March 2012)
JE-147		"On addition of capital to Chinese joint venture for increased optical glass production capacity", company release by Ohara Inc. (20 October 2011)
JE-152	Preferential Policies Encouraging Investments for Fujian (Longyan) Rare Earth Industrial Park	Notice Regarding the Preferential Policies Encouraging Investments for Fujian (Longyan) Rare Earth Industrial Park, Longzhengzuo (2010) No. 388, 27 September 2010
JE-164		Statement by Professor Gene M. Grossman, "Export Restrictions: Possible Effects of Under Filled Quotas on Prices and Consumption"
JE-167		Xinhua news, "Baotou Steel Rare earth halts production to stabilize prices" (24 October 2012)
JE-168		Company Halts Rare Earth Metals Production Amid Price Fall, Caixin Online (19 October 2011)
JE-169		Paper by Professor L. Alan Winters, "The Effect of China's Rare Earth Export Restrictions on Export Prices"
JE-182		Professor L. Alan Winters: Response to Paragraph 53 of China's Opening Statement at the Second Hearing
JE-183		Professor L. Alan Winters: "Response to Professor Jaime de Melo (CHN-157)"
JE-188		Web-Published Notice on the 2013 Initial Approval List of Enterprises Qualified to Export Rare Earths in the Annual Review (MOFCOM, Department of Foreign Trade, 17 December 2012)
JE-189		Sina.com.cn, "Rare Earth Mining Controls said to 'might as well not exist', real production remains over-quota every year" (1 April 2011)
JE-190		Yangcheng Evening News, "Rare Earth Industry Reorganizing, Guangdong Staking an Early Claim" (28 February 2012)
JE-191		Xinhuanet.com, "China Minmetals Proposes Production Freeze, Revealing Unspoken Rules inside RE Industry"

Submitted by the Complainants		
(with corresponding Exhibit Nos. submitted by China, if any)	Short title (if applicable)	Full title
JE-192		Quotes from "China's Export Quotas and Measures Promoting Downstream Industries"
JE-193		Professor L. Alan Winters, "Comments on China's replies to Panel Questions 76 and 87"
JE-194		Professor L. Alan Winters, "Comments on China's replies to Panel Questions 78 and 86"
JE-195		Professor L. Alan Winters, "Response to Professor Jaime de Melo (Panel Exhibit CHN-206) and certain points in China's answers of 8th July 2013"
JE-196		Dudley Kingsnorth, "Rare Earths: An Industry Undergoing Rejuvenation", June 2013, published jointly by Curtin University and IMCOA (figures on rare earths supply and demand, 2005-2016)
JE-197		Professor Gene Grossman, "Response to Professor Jaime de Melo"

## ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
Agreement on Customs Valuation	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
China's Accession Protocol	Protocol on the Accession of the People's Republic of China to the WTO, WT/L/432
China's Accession Working Party Report	Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and Corr.1
complainants	United States, European Union, and Japan
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU Panel Report	Panel Report, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS432/R
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
Japan Panel Report	Panel Report, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS433/R
Marrakesh Agreement*	Marrakesh Agreement Establishing the World Trade Organization <i>excluding</i> the Multilateral Trade Agreements annexed to it
MOFCOM	Ministry of Commerce of the People's Republic of China
Panel Reports	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R / WT/DS432/R / WT/DS433/R, circulated to WTO Members 26 March 2014
rare earths	The common name for a group of 15 chemical elements in the periodic table with the atomic numbers 57 to 71 (also known as Lanthanides). Two other rare earth elements, scandium (atomic No. 21) and yttrium (atomic No. 39), are also within the scope of these disputes.
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS	trade-related aspects of intellectual property rights
US Panel Report	Panel Report, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/R
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

\* As explained *infra*, fns 56, 333, 376, and 443, these Reports follow the Panel Reports in using "Marrakesh Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization *excluding* its annexes. The use of such nomenclature is for purposes of these appeals only, and without prejudice to the legal issues raised by China on appeal.

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**China – Measures Related to the  
Exportation of Rare Earths, Tungsten, and  
Molybdenum**

United States, *Appellant*<sup>1</sup>/*Appellee*<sup>2</sup>/

*Third Participant*<sup>3</sup>

China, *Appellant*<sup>4</sup>/*Other Appellant*<sup>5</sup>/*Appellee*<sup>6</sup>

European Union, *Appellee*<sup>7</sup>/*Third Participant*<sup>8</sup>

Japan, *Appellee*<sup>9</sup>/*Third Participant*<sup>10</sup>

Argentina, *Third Participant*

Australia, *Third Participant*

Brazil, *Third Participant*

Canada, *Third Participant*

Colombia, *Third Participant*

India, *Third Participant*

Indonesia, *Third Participant*

Korea, *Third Participant*

Norway, *Third Participant*

Oman, *Third Participant*

Peru, *Third Participant*

Russia, *Third Participant*

Saudi Arabia, *Third Participant*

Separate Customs Territory of Taiwan, Penghu,

Kinmen and Matsu, *Third Participant*

Turkey, *Third Participant*

Viet Nam, *Third Participant*

AB-2014-3

AB-2014-5

AB-2014-6

Division:

Seung Wha Chang, Presiding Member

Ricardo Ramírez-Hernández, Member

Yuejiao Zhang, Member

## 1 INTRODUCTION

1.1. The United States and China each appeals certain issues of law and legal interpretations developed in the Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R (US Panel Report).<sup>11</sup> China also appeals certain issues of law and legal interpretations developed in the Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS432/R (EU Panel Report)<sup>12</sup> and in the Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS433/R (Japan Panel Report).<sup>13</sup> The Panel issued its findings in the form of a single document constituting three separate Panel Reports, which we refer to, collectively, as the

<sup>1</sup> In DS431 only.

<sup>2</sup> In DS431 only.

<sup>3</sup> In DS432 and DS433.

<sup>4</sup> In DS432 and DS433.

<sup>5</sup> In DS431 only.

<sup>6</sup> In DS431 only.

<sup>7</sup> In DS432 only.

<sup>8</sup> In DS431 and DS433.

<sup>9</sup> In DS433 only.

<sup>10</sup> In DS431 and DS432.

<sup>11</sup> WT/DS431/R, 26 March 2014.

<sup>12</sup> WT/DS432/R, 26 March 2014.

<sup>13</sup> WT/DS433/R, 26 March 2014.



"Panel Reports".<sup>14</sup> The Panel was established<sup>15</sup> to consider complaints by the United States<sup>16</sup>, the European Union<sup>17</sup>, and Japan<sup>18</sup> (the complainants) with respect to China's use of export duties and export quotas on various forms of rare earths, tungsten, and molybdenum.

### 1.1 Panel proceedings

1.2. The complainants challenged China's imposition of export duties on 58 rare earth<sup>19</sup> products, 15 tungsten<sup>20</sup> products, and 9 molybdenum<sup>21</sup> products.<sup>22</sup> The complainants' challenges regarding export quotas related to 75 rare earth products, 14 tungsten products, and 9 molybdenum products.<sup>23</sup> Rare earths, tungsten, and molybdenum are naturally occurring minerals found in various mined ores.<sup>24</sup> The products subject to the challenged measures consist of both the naturally occurring minerals, as well as a number of intermediate products, that is, materials that have undergone some initial processing, for example, into concentrates, oxides, salts, and metals.<sup>25</sup> Generally speaking, the downstream products in which rare earths, tungsten, and molybdenum are ultimately used are not covered by the measures at issue in these disputes.<sup>26</sup> Further details about the products at issue in these disputes may be found in paragraphs 2.2 to 2.7 of the Panel Reports and paragraphs 4.10 through 4.12 of these Reports.

1.3. The complainants identified a number of legal instruments in connection with their claims, including Chinese framework legislation, implementing regulations, other applicable laws, and specific annual measures. The European Union and Japan also made claims in respect of replacement measures and renewal measures, while the United States made claims in respect of "implementing measures in force to date".<sup>27</sup>

<sup>14</sup> WT/DS431/R, WT/DS432/R, WT/DS433/R, 26 March 2014. The Panel issued its findings in the form of a single document constituting three separate Panel Reports, with a common cover page, preliminary pages, and sections 1 through 7. In section 8 of its Reports, the Panel set out separate conclusions and recommendations in respect of each dispute: pages USA-252 and USA-253 bear the document symbol for and contain the Panel's conclusions and recommendations in the Panel Report WT/DS431/R (US Panel Report), the dispute initiated by the United States; pages EU-254 and EU-255 bear the document symbol for and contain the Panel's conclusions and recommendations in the Panel Report WT/DS432/R (EU Panel Report), the dispute initiated by the European Union; and pages JPN-256 and JPN-257 bear the document symbol for and contain the Panel's conclusions and recommendations in the Panel Report WT/DS433/R (Japan Panel Report), the dispute initiated by Japan.

<sup>15</sup> At its meeting on 23 July 2012, the Dispute Settlement Body (DSB) established a single panel, in accordance with Articles 6 and 9.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) pursuant to requests by the United States, the European Union, and Japan. (Panel Reports, para. 1.3)

<sup>16</sup> Request for the Establishment of a Panel by the United States, WT/DS431/6.

<sup>17</sup> Request for the Establishment of a Panel by the European Union, WT/DS432/6.

<sup>18</sup> Request for the Establishment of a Panel by Japan, WT/DS433/6.

<sup>19</sup> "Rare earths" is the common name for a group of 15 chemical elements in the periodic table with atomic numbers 57 to 71. Two other rare earth elements, scandium (atomic No. 21) and yttrium (atomic No. 39), are also within the scope of these disputes. (Panel Reports, para. 2.3)

<sup>20</sup> Tungsten is the name given to the element with atomic No. 74. (Panel Reports, para. 2.6)

<sup>21</sup> Molybdenum is a silvery metallic element with atomic No. 42. (Panel Reports, para. 2.7)

<sup>22</sup> Panel Reports, para. 7.30. The products subject to export duties are listed in paragraph 7.46 of the Panel Reports. See also *ibid.*, para. 2.16.

<sup>23</sup> The products subject to export quotas are listed in paragraph 2.16 of the Panel Reports.

<sup>24</sup> Panel Reports, paras. 2.5-2.7.

<sup>25</sup> Panel Reports, paras. 2.2, 2.5-2.7, and 2.16.

<sup>26</sup> Panel Reports, paras. 7.169, 7.170, and 7.588. Downstream products include, e.g. rare earth magnets. (*Ibid.*, paras. 7.582 and 7.588)

<sup>27</sup> Panel Reports, paras. 2.8-2.16, and fn 19 to para. 2.9.

1.4. Before the Panel, the complainants claimed that<sup>28</sup>:

- a. in respect of export duties on rare earths, tungsten, and molybdenum, the relevant measures at issue<sup>29</sup> are inconsistent with China's obligations under Paragraph 11.3 of Part I of the Protocol on the Accession of the People's Republic of China to the WTO<sup>30</sup> (China's Accession Protocol);
- b. in respect of export quotas on rare earths, tungsten, and molybdenum, the relevant measures at issue<sup>31</sup> are inconsistent with Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and China's obligations under Paragraph 1.2 of Part I of China's Accession Protocol, which incorporates Paragraphs 162 and 165 of the Report of the Working Party on the Accession of China<sup>32</sup> (China's Accession Working Party Report); and
- c. in respect of the administration and allocation of export quotas on rare earths and molybdenum<sup>33</sup> and, more specifically, restrictions – such as prior export performance and minimum registered capital requirements – on the trading rights of enterprises seeking to export those products, the relevant measures at issue<sup>34</sup> are inconsistent with Paragraph 5.1 of Part I of China's Accession Protocol, as well as with China's obligations under Paragraph 1.2 thereof, which incorporates commitments in Paragraphs 83 and 84 of China's Accession Working Party Report.<sup>35</sup>

1.5. In defending its measures, China contended<sup>36</sup>:

- a. that the general exceptions of Article XX of the GATT 1994 are available to China to defend a potential violation of Paragraph 11.3 of China's Accession Protocol, and that the export duties on rare earths, tungsten, and molybdenum are justified under Article XX(b) of the GATT 1994;
- b. that the export quotas on rare earths, tungsten, and molybdenum are justified under Article XX(g) of the GATT 1994; and
- c. that the trading rights commitments in Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Accession Working Party Report do not prevent the use of prior export performance and minimum registered capital requirements as criteria to administer the rare earth and molybdenum export quotas.

<sup>28</sup> Panel Reports, para. 3.1.

<sup>29</sup> The measures identified by the complainants as those through which China subjects various forms of rare earths, tungsten, and molybdenum to export duties that are not listed in Annex 6 to China's Accession Protocol are listed in paragraphs 2.9 and 2.10 of the Panel Reports, and in fn 340 to para. 4.4 of these Reports.

<sup>30</sup> WT/L/432.

<sup>31</sup> The measures identified by the complainants as those through which China subjects various forms of rare earths, tungsten, and molybdenum to export quotas are listed in paragraphs 2.11 and 2.12 of the Panel Reports, and in fn 341 to para. 4.4, and paras. 4.3-4.9 of these Reports.

<sup>32</sup> WT/ACC/CHN/49 and Corr.1.

<sup>33</sup> These claims were not raised with respect to tungsten, because it is a product listed in Annex 2A to China's Accession Protocol. China's obligation to grant the right to trade does not apply to the goods listed in Annex 2A, which are reserved for importation and exportation by state trading enterprises.

<sup>34</sup> The measures identified by the complainants as those through which China imposes restrictions – such as prior export performance and minimum registered capital requirements – on the trading rights of enterprises seeking to export various forms of rare earths and molybdenum are listed in paragraphs 2.14 and 2.15 of the Panel Reports, and in fn 342 to para. 4.4 of these Reports. The Panel also noted that, although each of the complainants had, in its request for establishment of a panel, raised claims relating to an alleged lack of uniform, impartial, or reasonable administration of the export quotas, all of the complainants confirmed to the Panel during the course of the proceedings that they were no longer pursuing these claims. (Panel Reports, para. 2.13)

<sup>35</sup> All three complainants raised claims that, with respect to rare earths and molybdenum, the measures at issue were inconsistent with China's commitments under Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Accession Working Party Report. (Panel Reports, para. 7.983) In addition, the European Union claimed, with respect to molybdenum, that, by virtue of the 2012 Application Qualifications and Application Procedures for Molybdenum Export Quota (Panel Exhibits CHN-107 and JE-63), China had acted inconsistently with its commitment under Paragraph 84(b) of its Accession Working Party Report to grant trading rights to foreign enterprises in a non-discretionary way. (Panel Reports, paras. 7.973 and 7.1047)

<sup>36</sup> Panel Reports, para. 3.2.

1.6. The factual aspects of this dispute are set forth in greater detail in paragraphs 2.1 to 2.16 of the Panel Reports, and in section 4 of these Reports.

1.7. On 9 October 2012, the Panel received a request from Canada for enhanced third-party rights, including third-party access to the entirety of both substantive meetings and all written submissions, and the right to make an oral statement at the second Panel meeting. On 19 October 2012, after consulting the parties to these disputes on the request, the Panel declined Canada's request.<sup>37</sup>

1.8. On 20 December 2012, in its first written submission, China requested the Panel to issue, on an expedited basis, a preliminary ruling on the issue of whether the obligation in Paragraph 11.3 of China's Accession Protocol is subject to the general exceptions contained in Article XX of the GATT 1994.<sup>38</sup> On 1 February 2013, following the submission of comments on this issue by all of the parties to these disputes, the Panel informed the parties and third parties that it had decided not to rule on this issue prior to the first Panel meeting with the parties, which was to be held on 26-28 February 2013.<sup>39</sup> On 6 February 2013, China requested the Panel to make a preliminary ruling on this issue prior to the first meeting, and, on 8 February 2013, the Panel reiterated its decision not to do so.<sup>40</sup> Instead, the Panel informed China that, if it intended to present a substantive defence under Article XX of the GATT 1994 with respect to Paragraph 11.3 of its Accession Protocol, it should provide a written submission presenting this defence no later than 15 February 2013 so as to allow the parties and third parties a meaningful opportunity to respond at the first Panel meeting.<sup>41</sup> China subsequently submitted a written defence by the stated deadline<sup>42</sup> and, at the first Panel meeting, the Panel informed the parties to these disputes that it would not issue a preliminary ruling on this matter but would instead address the issue in its Reports.<sup>43</sup>

1.9. On 18 July 2013, China filed an objection with the Panel regarding certain exhibits submitted by the complainants at the last stage of the Panel proceedings. China asked the Panel to reject the exhibits in question, together with all arguments based on them. The evidence to which China objected consisted of 10 exhibits, including four expert reports, which had been submitted by the complainants to the Panel on 17 July 2013, together with their comments on China's responses to the Panel's questions after the second Panel meeting.<sup>44</sup> The Panel afforded the complainants an opportunity to respond to China's request, and China an opportunity to comment on such responses, while at the same time reserving its right to decide whether the relevant exhibits should be considered as late evidence.<sup>45</sup> Subsequently, the Panel addressed the issue of the admissibility of the disputed evidence in its Reports, and decided to accept China's request that the exhibits be rejected<sup>46</sup>, ruling that:

... the relevant exhibits were submitted too late; they could have been submitted earlier and in a manner consistent with due process. Additionally, these exhibits do not supplement the evidence already accepted by the Panel. They do not, as far as the Panel can see, say anything substantially new or different from what is said in the exhibits that the complainants submitted prior to 17 July 2013.<sup>47</sup>

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<sup>37</sup> Panel Reports, paras. 1.10 and 7.1-7.10.

<sup>38</sup> Panel Reports, para. 1.11.

<sup>39</sup> Panel Reports, paras. 1.8 and 1.11.

<sup>40</sup> Panel Reports, para. 1.12.

<sup>41</sup> Panel Reports, paras. 1.11 and 1.12.

<sup>42</sup> Panel Reports, para. 1.13.

<sup>43</sup> Panel Reports, para. 1.14.

<sup>44</sup> Panel Reports, paras. 7.11 and 7.12. Further details regarding the Panel exhibits and expert reports to which China objected are set out in paragraph 7.15 of the Panel Reports.

<sup>45</sup> Panel Reports, para. 7.12.

<sup>46</sup> Panel Reports, para. 7.28.

<sup>47</sup> Panel Reports, para. 7.27.

1.10. The Panel Reports were circulated to Members of the World Trade Organization (WTO) on 26 March 2014.

1.11. In its Reports, the Panel explained that it would make its findings and recommendations with respect to the series of measures comprising the relevant framework legislation, the implementing regulations, other applicable laws, and the specific annual measures imposing the export duties and export quotas existing at the date of the Panel's establishment.<sup>48</sup>

1.12. In each of the Panel Reports, in respect of the claims concerning export duties, the Panel found that the export duties that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue are inconsistent with Paragraph 11.3 of China's Accession Protocol.<sup>49</sup>

1.13. The Panel further found that China may not seek to justify the export duties it applies to various forms of rare earths, tungsten, and molybdenum pursuant to Article XX(b) of the GATT 1994<sup>50</sup>, because the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994<sup>51</sup>, and China had not presented any "cogent reason" for departing from the same finding made by the Appellate Body in *China – Raw Materials* on the same issue.<sup>52</sup> In a separate opinion, one member of the Panel expressed the view that, "unless China explicitly gave up its right to invoke Article XX of GATT 1994, which it did not, the general exception provisions of the GATT 1994 are available to China to justify a violation of Paragraph 11.3 of its Accession Protocol."<sup>53</sup>

1.14. The Panel further found, assuming *arguendo*<sup>54</sup> that China could seek to justify the export duties under subparagraph (b) of Article XX of the GATT 1994, that China had not demonstrated that the export duties it applies to various forms of rare earths, tungsten, and molybdenum are justified pursuant to that provision, or that the measures are applied in a manner that satisfies the chapeau of Article XX.<sup>55</sup>

1.15. In the reasoning leading up to its conclusion that China may not seek to justify its export duties under Article XX(b) of the GATT 1994, the Panel considered, and rejected, an argument made by China that, due to the legal effect of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement Establishing the World Trade Organization<sup>56</sup>

<sup>48</sup> Panel Reports, paras. 7.41 and 7.235. See also fns 96, 318, 1005, 1174, 1300, 1367, and 1374. The Panel recalled, in this respect, the approach followed by the panel and the Appellate Body in *China – Raw Materials*. (Panel Reports, para. 7.41 and fn 84 thereto (referring to Panel Reports, *China – Raw Materials*, para. 7.33; and Appellate Body Reports, *China – Raw Materials*, para. 266))

<sup>49</sup> US Panel Report, para. 8.1.a; EU Panel Report, para. 8.6.a; Japan Panel Report, para. 8.11.a.

<sup>50</sup> US Panel Report, para. 8.1.b; EU Panel Report, para. 8.6.b; Japan Panel Report, para. 8.11.b.

<sup>51</sup> Panel Reports, para. 7.115.

<sup>52</sup> Panel Reports, paras. 7.99, 7.104, and 7.114.

<sup>53</sup> Panel Reports, para. 7.138. See also *ibid.*, para. 7.119.

<sup>54</sup> All three panelists agreed that China had not demonstrated that its export duties are justified under Article XX(b) of the GATT 1994, or that they are applied consistently with the chapeau of Article XX. However, for the panelist who expressed a separate opinion, this part of the reasoning was not undertaken on an *arguendo* basis. (Panel Reports, para. 7.140)

<sup>55</sup> US Panel Report, para. 8.1.b; EU Panel Report, para. 8.6.b; Japan Panel Report, para. 8.11.b.

<sup>56</sup> Before the Panel, China drew a distinction between the Marrakesh Agreement Establishing the World Trade Organization *excluding* the Multilateral Trade Agreements annexed to it, on the one hand, and that Agreement *together with* its annexes, on the other hand. China used "the Marrakesh Agreement" to refer to the former, and "the WTO Agreement" to refer to the latter. On appeal, China draws the same distinction. In its findings regarding the availability of Article XX of the GATT 1994 to justify a breach of Paragraph 11.3 of China's Accession Protocol, the Panel also used "the Marrakesh Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization *excluding* its annexes. For purposes of consistency, we, like the Panel, use "the Marrakesh Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization *excluding* its annexes, even in instances where the complainants and third participants themselves have not, in their submissions, used the nomenclature "the Marrakesh Agreement". We underline that our use of such nomenclature is for purposes of these appeals only, and without prejudice to the legal issues raised by China on appeal.

(Marrakesh Agreement), "Paragraph 11.3 of China's *Accession Protocol* has to be treated as an integral part of the GATT 1994".<sup>57</sup> The Panel found, instead, that:

... the legal effect of the second sentence of Paragraph 1.2 is to make China's Accession Protocol, in its entirety, an "integral part" of the Marrakesh Agreement, and not that, in addition, the individual provisions thereof are also integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement.<sup>58</sup>

1.16. In each of the Panel Reports, in respect of the claims concerning export quotas, the Panel found that:

- a. the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue are inconsistent with Article XI:1 of the GATT 1994<sup>59</sup>;
- b. the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue are inconsistent with Paragraphs 162 and 165 of China's Accession Working Party Report as incorporated into China's Accession Protocol by virtue of Paragraph 1.2 of that Protocol<sup>60</sup>; and
- c. China had not demonstrated that the export quotas applied to various forms of rare earths, tungsten, and molybdenum are justified pursuant to subparagraph (g) of Article XX, or that the measures are applied in a manner that satisfies the chapeau of Article XX of the GATT 1994.<sup>61</sup>

1.17. In each of the Panel Reports, in respect of the claims concerning export quota administration and allocation, the Panel found that:

- a. the restrictions on the trading rights of enterprises exporting rare earths and molybdenum that China applies by virtue of the series of measures at issue are inconsistent with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Accession Working Party Report, as incorporated into China's Accession Protocol by virtue of Paragraph 1.2 of that Protocol, and with Paragraph 5.1 of China's Accession Protocol<sup>62</sup>; and
- b. while China is entitled to seek to justify such restrictions on the trading rights of enterprises exporting rare earths and molybdenum pursuant to Article XX(g) of the

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<sup>57</sup> Panel Reports, para. 7.76 and fn 162 thereto (referring to China's first written submission to the Panel, section V.C, paras. 422-435; and China's responses to the complainants' comments on China's request for a preliminary ruling on the availability of Article XX of the GATT 1994, section III, paras. 13-34). The Panel further expressed its understanding that this argument by China rested on the following two premises:

- a. The legal effect of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement is to make China's Accession Protocol an "integral part" of the Marrakesh Agreement, and also to make each of the Accession Protocol-specific provisions an integral part of one of the Multilateral Trade Agreements (e.g. GATT 1994) annexed to the Marrakesh Agreement.
- b. The determination of *which* Multilateral Trade Agreement(s) (e.g. GATT 1994) a particular provision of the Accession Protocol is an "integral part" must be based on an evaluation of which Multilateral Trade Agreement(s) the provision at issue is "intrinsically" related to. Paragraph 11.3 of China's Accession Protocol contains an obligation regarding trade in goods, and in particular regulating the use of export duties. Therefore, it is "intrinsically related" to the GATT 1994, and in particular the provisions of [the] GATT 1994 regulating the use of export duties – which, in China's view, are Articles II and XI of the GATT 1994. Accordingly, Paragraph 11.3 must be treated as an "integral part" of the GATT 1994. Paragraph 11.3 is therefore subject to the general exceptions in GATT Article XX unless there is explicit treaty language to the contrary.

(*Ibid.*, para. 7.76 (fn omitted; emphasis original))

<sup>58</sup> Panel Reports, para. 7.93. See also *ibid.*, paras. 7.80 and 7.89.

<sup>59</sup> US Panel Report, para. 8.2.a; EU Panel Report, para. 8.7.a; Japan Panel Report, para. 8.12.a.

<sup>60</sup> US Panel Report, para. 8.2.b; EU Panel Report, para. 8.7.b; Japan Panel Report, para. 8.12.b.

<sup>61</sup> US Panel Report, para. 8.2.c; EU Panel Report, para. 8.7.c; Japan Panel Report, para. 8.12.c.

<sup>62</sup> US Panel Report, para. 8.3.a and b; EU Panel Report, para. 8.8.a and b; Japan Panel Report, para. 8.13.a and b.

GATT 1994, China had failed to make a *prima facie* case that the violations of its trading rights commitments are justified pursuant to Article XX(g).<sup>63</sup>

1.18. In the EU Panel Report, the Panel also found, in respect of the European Union's additional claim concerning export quota administration and allocation, that the European Union had not established that the prior export performance criterion in the 2012 Application Qualifications and Application Procedures for Molybdenum Export Quota is inconsistent with the commitment in Paragraph 84(b) of China's Accession Working Party Report as incorporated into China's Accession Protocol by virtue of Paragraph 1.2 of that Protocol.<sup>64</sup>

1.19. In each of the Panel Reports, the Panel found, in accordance with Article 3.8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), that, by virtue of infringing its obligations under Article XI:1 of the GATT 1994; Paragraphs 1.2, 5.1, and 11.3 of China's Accession Protocol; and Paragraphs 83, 84, 162, and 165 of China's Accession Working Party Report as incorporated into its Accession Protocol by virtue of Paragraph 1.2 of that Protocol, China has nullified or impaired benefits accruing to each respective complainant.<sup>65</sup> The Panel then made the following recommendation in each of the Panel Reports:

Pursuant to Article 19.1 of the DSU, having found that China has acted inconsistently with Article XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83, 84, 162 and 165 of China's [Accession] Working Party Report, the Panel recommends that the Dispute Settlement Body requests China to bring the existing measures at issue into conformity with its obligations under the GATT 1994, China's Accession Protocol and China's [Accession] Working Party Report. In respect of findings concerning export duties and export quotas on various forms of rare earths, tungsten, and molybdenum, and restrictions on the trading rights of enterprises exporting rare earths and molybdenum, the Panel has found that the series of measures have operated to impose export duties and export quotas on various forms of rare earths, tungsten, and molybdenum, and restrictions on the trading rights of enterprises exporting rare earths and molybdenum (i.e. the prior export experience requirement, the export performance requirement, and the minimum registered capital requirement), that are inconsistent with China's WTO obligations. The Panel, therefore, recommends that the Dispute Settlement Body requests China to bring its measures into conformity with its WTO obligations such that the series of measures does not operate to bring about a WTO-inconsistent result.<sup>66</sup>

## 1.2 Appellate proceedings

1.20. On 8 April 2014, the United States notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the US Panel Report (WT/DS431/R) and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>67</sup> and an appellant's submission with the Appellate Body Secretariat pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>68</sup> (Working Procedures). On 13 April 2014, the Director of the Appellate Body Secretariat sent a letter to the participants and the third parties in DS431, informing them of the composition of the Appellate Body Division that would be hearing this appeal, and providing them with a Working Schedule specifying the deadlines for the filing of written submissions, and indicating that the date of the oral hearing in that appeal would be communicated on a subsequent date.

1.21. On 17 April 2014, China notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the US Panel Report, and certain legal

<sup>63</sup> US Panel Report, para. 8.3.c and d; EU Panel Report, para. 8.8.c and d; Japan Panel Report, para. 8.13.c and d.

<sup>64</sup> EU Panel Report, para. 8.8.e.

<sup>65</sup> US Panel Report, para. 8.4; EU Panel Report, para. 8.9; Japan Panel Report, para. 8.14.

<sup>66</sup> US Panel Report, para. 8.5; EU Panel Report, para. 8.10; Japan Panel Report, para. 8.15.

<sup>67</sup> WT/DS431/9 (attached as Annex 1 to these Reports).

<sup>68</sup> WT/AB/WP/6, 16 August 2010.

interpretations developed by the Panel, and filed a Notice of Other Appeal<sup>69</sup> and an other appellant's submission pursuant to Rule 23 of the Working Procedures.

1.22. On 25 April 2014, China notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the EU Panel Report (WT/DS432/R) and the Japan Panel Report (WT/DS433/R), and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>70</sup> and an appellant's submission with the Appellate Body Secretariat pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures. On the same day, the Director of the Appellate Body Secretariat sent a letter to the participants and the third parties in DS432 and DS433 informing them that the Appellate Body Division selected to hear these appeals was composed of the same three Appellate Body Members as the Division in DS431, and providing them with a Working Schedule specifying the deadlines for the filing of written submissions, and indicating that the date of the oral hearing in these appeals would be communicated on a subsequent date.

1.23. On 1 May 2014, China and the United States each filed an appellee's submission in relation to the issues appealed in DS431.<sup>71</sup> On 13 May 2014, the European Union and Japan each filed an appellee's submission in relation to the issues appealed in DS432 and DS433<sup>72</sup>, respectively.

1.24. On 16 May 2014, seven third participants (Argentina<sup>73</sup>, Australia, Brazil, Canada, Colombia, Saudi Arabia, and the United States<sup>74</sup>) each filed a third participant's submission.<sup>75</sup> On the same day, eight third participants (India, Indonesia, Korea, Norway, Peru, Russia, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Turkey<sup>76</sup>) each notified its intention to appear at the oral hearing.<sup>77</sup> On 2 June and 3 June 2014, respectively, Oman and Viet Nam each notified its intention to appear at the oral hearing.<sup>78</sup>

1.25. The oral hearing in these appeals was held on 4-6 June 2014. The participants each made an opening oral statement.<sup>79</sup> Eight of the third participants (Australia, Brazil, Canada, Korea, Norway, Russia, Saudi Arabia, and Turkey) made opening oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing these appeals.

1.26. By letters of 17 June 2014 (relating to DS431)<sup>80</sup> and 23 June 2014 (relating to DS432 and DS433)<sup>81</sup>, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Reports in these three disputes within their respective 60-day periods pursuant to Article 17.5 of the DSU, or within their respective 90-day periods provided for under the same provision. The Chair of the Appellate Body explained that this was due to several reasons, in particular: the unfilled vacancy on the Appellate Body, the Appellate Body's significant

<sup>69</sup> WT/DS431/10 (attached as Annex 2 to these Reports).

<sup>70</sup> WT/DS432/9, WT/DS433/9 (attached as Annex 3 to these Reports).

<sup>71</sup> Pursuant to Rules 22 and 23(4) of the Working Procedures.

<sup>72</sup> Pursuant to Rule 22 of the Working Procedures. In accordance with the Procedural Ruling issued by the Division hearing these appeals on 1 May 2014 (see paragraph 1.34 and Annex 5 of these Reports), the European Union elected to have its appellee's submission also serve as its third participant's submission in DS431 and DS433, and Japan elected to have its appellee's submission also serve as its third participant's submission in DS431 and DS432.

<sup>73</sup> Argentina filed its third participant's submission in Spanish. A courtesy English translation prepared by the WTO Secretariat was provided to all participants and third participants on 23 May 2014.

<sup>74</sup> The United States submitted a third participant's submission in respect of the disputes initiated by the European Union (DS432) and Japan (DS433).

<sup>75</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>76</sup> As Turkey's notification was not received before the 17:00 deadline specified in Rule 18(1) of the Working Procedures, the Division treated it as a notification to attend the oral hearing and request to make an oral statement made pursuant to Rule 24(4) of the Working Procedures.

<sup>77</sup> Pursuant to Rule 24(2) of the Working Procedures (except where noted otherwise).

<sup>78</sup> Pursuant to Rule 24(4) of the Working Procedures.

<sup>79</sup> The United States made a single opening oral statement as appellant and appellee in DS431 and as a third participant in DS432 and DS433. China made a single opening oral statement as other appellant and appellee in DS431 and as appellant in DS432 and DS433. The European Union made a single opening oral statement as appellee in DS432 and as a third participant in DS431 and DS433. Japan made a single opening oral statement as appellee in DS433 and as a third participant in DS431 and DS432.

<sup>80</sup> WT/DS431/11.

<sup>81</sup> WT/DS431/12; WT/DS432/10; WT/DS433/10.

workload, the volume and complexity of the issues raised by the participants in these disputes along with the large number of participants and third participants, the time needed for translation of the Reports, and the consolidation of the three appellate proceedings. In his letter of 23 June 2014, the Chair of the Appellate Body informed the Chair of the DSB that the Reports in these appeals would be circulated no later than 7 August 2014.

### 1.3 Procedural issues raised in these appeals

#### 1.3.1 Allocation of appeal numbers

1.27. The appeal filed by the United States in DS431 on 8 April 2014 was filed simultaneously with the appeal by China of the panel report in a different dispute, namely, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China (US – Countervailing and Anti-Dumping Measures (China))* (DS449).<sup>82</sup> On 9 April 2014, the Chair of the Appellate Body sent a letter to the parties in *China – Rare Earths* (DS431; DS432; DS433), as well as to the parties in *US – Countervailing and Anti-Dumping Measures (China)*, explaining that, in the past, the Appellate Body had attributed appeal numbers sequentially based on the date and time of receipt of the Notice of Appeal. Given the unprecedented situation of simultaneous filings of appeals, however, the Appellate Body Chair invited the parties to these disputes to provide their views, by 10 April 2014, as to the considerations relevant to the Appellate Body's determination of how to allocate appeal numbers AB-2014-3 and AB-2014-4 to the two appeals in *China – Rare Earths* (DS431) and *US – Countervailing and Anti-Dumping Measures (China)* (DS449).

1.28. On 10 April 2014, the Appellate Body received comments in response to the Chair's letter of 9 April 2014 from China, the European Union, Japan, and the United States. On the same day, the Appellate Body Chair sent a letter to the parties to the disputes in *China – Rare Earths* (DS431; DS432; DS433) and to the participants in *US – Countervailing and Anti-Dumping Measures (China)* (DS449) informing them that, having given careful consideration to their submissions, the Appellate Body had determined that, in the face of the unprecedented situation of simultaneous appeals, the Appellate Body's usual manner of assigning appeal numbers – according to the sequence in which the Notices of Appeal were filed – was not available. The Appellate Body underlined the necessity of assigning an appeal number to each appeal before the Appellate Body Members constituting the respective divisions could be selected. The Appellate Body recalled, in this connection, that Rule 6(2) of the Working Procedures calls for the Members constituting a division to be selected taking into account, *inter alia*, "the principles of random selection [and] unpredictability". The Appellate Body expressed the view that, in order to ensure respect for these principles, in the specific circumstances of a simultaneous filing of two appeals, the appeal numbers should be assigned to each dispute by means of a random draw. To this end, the Chair of the Appellate Body invited the parties to the *China – Rare Earths* (DS431; DS432; DS433) and *US – Countervailing and Anti-Dumping Measures (China)* (DS449) disputes to the Appellate Body Secretariat on Friday, 11 April 2014, in order to witness the assignment of appeal numbers to the appeals in DS431 and DS449 through a random draw. The Chair of the Appellate Body also adverted, in his letter, to the Appellate Body's regret at the unfortunate circumstances that had led to this situation, and to the need for parties to WTO disputes to coordinate, communicate, and cooperate amongst themselves, as well as with the Appellate Body and the Appellate Body Secretariat, in the planning, filing, and conduct of their appeals.

1.29. On 11 April 2014, a random draw was held at the Appellate Body Secretariat in the presence of the parties to the *China – Rare Earths* (DS431; DS432; DS433) and *US – Countervailing and Anti-Dumping Measures (China)* (DS449) disputes. As a result of this draw, the appeal initiated by the United States in *China – Rare Earths* (DS431) was assigned appeal number AB-2014-3, and the appeal by China in *US – Countervailing and Anti-Dumping Measures (China)* (DS449) was assigned appeal number AB-2014-4.

#### 1.3.2 China's challenge to the United States' Notice of Appeal and request for an extension of the time periods for filing submissions

1.30. On 9 April 2014, China sent a letter to the Appellate Body requesting the Appellate Body to reject the United States' Notice of Appeal in DS431 on the grounds that, due to its "conditional" nature, the Notice of Appeal did not constitute a proper Notice of Appeal within the meaning of the

<sup>82</sup> WT/DS449/R, 27 March 2014.



Working Procedures.<sup>83</sup> In the event that the Appellate Body were not to reject the Notice of Appeal, China requested the Appellate Body to extend the time-limits, pursuant to Rule 16(2) of the Working Procedures, for filing relevant documents. By letter of 10 April 2014, the Chair of the Appellate Body invited the participants, parties, and third participants to provide their comments on China's requests by 11 April 2014.

1.31. On 13 April 2014, having received comments from Australia, Brazil, Canada, China, the European Union, Japan, and the United States, the Appellate Body Division hearing the appeal in DS431 issued a Procedural Ruling in response to the 9 April 2014 request from China. In its Procedural Ruling, which is attached as Annex 4 to these Reports, the Division, first, declined China's request to reject the United States' Notice of Appeal due to its "conditional" nature. The Division considered that its jurisdiction to hear the United States' appeal was validly established given that the United States' Notice of Appeal conformed to the requirements of Rule 20 of the Working Procedures. Such jurisdiction was not, in the opinion of the Division, affected by the possibility that it might not need to rule on the issues raised by the United States in the event that the scenarios identified by the United States in its Notice of Appeal were to materialize. Second, the Division granted China's request for an extension of the time period for China to file a Notice of Other Appeal and other appellant's submission in DS431. The Division decided that these documents should be filed by 17 April 2014 rather than by 14 April 2014. As a consequence of this decision, and in order to preserve the sequence of and periods between the other deadlines prescribed under the Working Procedures, the Appellate Body also modified the dates for the filings of other submissions set out in the Working Schedule.

### **1.3.3 Consolidation of the appellate proceedings and Japan's request for an extension of the time period for filing third participants' submissions**

1.32. On 15 April 2014, the Appellate Body Division hearing the appeal in DS431 received a letter from Japan requesting the Appellate Body, pursuant to Rule 16 of the Working Procedures, to extend the deadline for filing the third participants' submissions from 5 May 2014 – the date set out in the Working Schedule for this appeal that was communicated to the participants and third participants on 13 April 2014 – to 7 May 2014. On 16 April 2014, the Division sent a letter to the participants and the third participants in DS431 stating that it was considering the request by Japan and would revert to the matter in due course.

1.33. On 25 April 2014, the Presiding Member afforded the participants and third participants in DS431, DS432, and DS433 an opportunity to comment on two issues. First, the Division referred to the interests of "fairness and orderly procedure" in Rule 16(1) of the Working Procedures, and invited comments on the consolidation of these appellate proceedings, including by holding a single oral hearing in respect of the proceedings in all three disputes. The Division noted the significant overlap in the content of these disputes and appeals, and the fact that, at the Panel stage, they were heard by a single Panel in accordance with Article 9.1 of the DSU. Second, the Division recalled the letter that it had received from Japan in DS431 on 15 April 2014 requesting, pursuant to Rule 16 of the Working Procedures, an extension of the deadline for filing the third participants' submissions from 5 May to 7 May 2014. The Division invited the participants and third participants to comment on both issues by 28 April 2014.

1.34. On 1 May 2014, having received comments from China, the United States, the European Union, Japan, Australia, Brazil, Canada, and Saudi Arabia, the Division issued a Procedural Ruling with respect to the consolidation of the appellate proceedings in the three disputes and with respect to Japan's request for an extension of the deadline for filing the third participants' submissions in DS431. In its Procedural Ruling, which is attached as Annex 5 to these Reports, the Division decided, pursuant to Rule 16(1) of the Working Procedures, to consolidate the appeals of the Panel Reports in *China – Rare Earths* (WT/DS431/R; WT/DS432/R; WT/DS433/R). Given this consolidation, and taking account of certain requests made by the participants and third participants, the Division found it necessary to make certain additional

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<sup>83</sup> As explained in paragraphs 5.253-5.258 of these Reports and in the Procedural Ruling attached as Annex 4 to these Reports, in its Notice of Appeal, the United States indicated that, "[I]f China were not to appeal the Panel Report, or if the Appellate Body were not to modify or reverse the legal findings or conclusions of the Panel pursuant to an appeal by China, then the Appellate Body would not need to reach" the issues raised by the United States in its appeal.

modifications to the Working Schedules in order to ensure fairness and orderly procedure in the conduct of these appeals. More specifically, the Division decided as follows:

- a. The single deadline for the third participants' submissions in respect of all these disputes is set as Friday, 16 May 2014. To the extent that the third participants are in a position to file their submissions earlier than this deadline, we encourage such early filing as it would assist the Division's preparation for the oral hearing;
- b. The United States, the European Union, and Japan may elect to have their submissions filed in the capacity of participant in their respective disputes also serve as their third participants' submissions in the disputes in which they are third participants. This is without prejudice to the right of the European Union (as third participant in DS431 and DS433), Japan (as third participant in DS431 and DS432), and the United States (as third participant in DS432 and DS433), should they so wish, to file third participants' submissions, separate from their appellees' submissions, by Friday, 16 May 2014.
- c. The Division will hold a single oral hearing for all these appellate proceedings. It will take place on Wednesday, 4 June 2014 and Thursday, 5 June 2014. If necessary, the oral hearing will continue on Friday, 6 June 2014.<sup>84</sup>

1.35. In its Procedural Ruling, the Division further observed that, in the light of its decision establishing a single deadline for the filing of all third participants' submissions in respect of all these appeals, it was not necessary to deal separately with Japan's request for an extension of the deadline for the filing of the third participants' submissions in DS431 from 5 May 2014 to 7 May 2014.<sup>85</sup> A revised, consolidated Working Schedule for the appellate proceedings in DS431, DS432, and DS433 was attached to the Division's Procedural Ruling.

#### 1.3.4 Requests by the complainants for separate reports

1.36. In its letter of 28 April 2014, the European Union requested "an Appellate Body Report issued as a single document, with separate pages for the findings and conclusions in each of the three disputes". By joint letter of 28 May 2014, Japan and the United States requested "that the Division issue a separate Appellate Body report for each of the appeals, in the form of a single document with separate findings and conclusions bearing the document symbol only relating to that appeal." At the oral hearing in these appeals, the Division afforded all participants and third participants an opportunity to comment on these requests. No comments were made, and the Division acceded to these requests.

## 2 ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

### 2.1 Claims of error by the United States – Appellant (DS431)

2.1. The United States requests the Appellate Body to find that the Panel's rejection of Exhibits JE-188 through JE-197<sup>86</sup> submitted together with the United States' comments on China's responses to the Panel's questions after the second Panel meeting was inconsistent with Articles 11 and 12.4 of the DSU.<sup>87</sup> The United States submits that, in rejecting the 10 exhibits in question, the Panel erroneously concluded that acceptance of such evidence would have presented "due process" concerns for China; that "the submission of new expert reports" would have

<sup>84</sup> Appellate Body Procedural Ruling of 1 May 2014 (attached as Annex 5 to these Reports), para. 1.24. (emphasis omitted)

<sup>85</sup> Appellate Body Procedural Ruling of 1 May 2014 (attached as Annex 5 to these Reports), para. 1.20.

<sup>86</sup> Although each of the three complainants in the three disputes prepared its written submissions to the Panel separately, the complainants together submitted a single, joint set of exhibits to the Panel, numbered from Joint Exhibit JE-1 to JE-197.

<sup>87</sup> United States' appellant's submission, para. 12.

interfered with the prompt settlement of the dispute; and that to be accepted as rebuttal evidence an exhibit must "rise to the required level of necessity".<sup>88</sup>

2.2. The appeal raised by the United States is subject to two conditions. In its Notice of Appeal, the United States indicated that the Appellate Body would not need to reach the issues raised on appeal in either of two scenarios: (i) if China were not to appeal the Panel Report; or (ii) if the Appellate Body were not to modify or reverse the legal findings or conclusions of the Panel pursuant to an appeal by China.<sup>89</sup>

2.3. The United States contends that, in rejecting Exhibits JE-188 through JE-197, the Panel erroneously applied Article 3.3 of the DSU and failed to provide sufficient time to the United States to prepare its submissions pursuant to Article 12.4 of the DSU. Moreover, according to the United States, due process was satisfied because the Panel did afford China an opportunity to respond to this evidence. To the extent that the Panel considered that China did not have enough time to respond to this evidence, then it was the Panel itself that created such due process concerns by setting too short a deadline. In such circumstances, the Panel should have given China more time to respond, and the Panel erred in considering that Article 3.3 of the DSU and the need for the prompt settlement of disputes prevented it from doing so. The United States maintains that a limited extension would not undermine the value of "prompt settlement" in the context of the overall length of a panel proceeding, and there was no evidence in this dispute that accepting expert reports as part of a filing expressly contemplated in the Panel's Working Procedures would have caused "a never-ending cascade of competing expert reports".<sup>90</sup>

2.4. The United States characterizes as "inherently flawed" the Panel's rejection of the exhibits on the grounds that they were not "necessary" for purposes of rebuttal, even if they may have been "confirmatory".<sup>91</sup> The Panel's reasoning suggests that evidence that is more "necessary" and, consequently, more likely to create due process concerns, would be accepted, while confirmatory data, which presents less of a due process concern, is more likely to be rejected. Moreover, in rejecting the evidence, the Panel in effect suggested that the United States should have submitted the evidence earlier in the proceedings. This, submits the United States, amounts to a failure by the Panel to provide sufficient time to the United States to prepare its submissions, and is inconsistent with Article 12.4 of the DSU.

2.5. The United States further alleges that the Panel failed to make an objective assessment of the facts, as required under Article 11 of the DSU, in finding that the evidence in question could and should have been submitted at an earlier date, and that it was not submitted to rebut arguments made by China at the second Panel meeting. The 10 exhibits in question are all "evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party(ies)" within the meaning of paragraph 7 of the Panel's Working Procedures. As such, they constituted the type of evidence that the Working Procedures specifically provided may be submitted by the parties, and the complainants submitted them for the purposes of rebuttal in commenting on China's responses to the Panel's questions following the second Panel meeting. The United States adds that the Panel was wrong in stating that these exhibits could have been submitted much earlier in the process. The United States explains, for each of the excluded exhibits, why it could not have been submitted earlier in the Panel process. For example, Exhibit JE-196 contained data published by an expert, whom China, in its response to the Panel's second set of questions, had referred to as "the world's leading rare earth market expert". Thus, the importance of this particular expert's data to rebutting China's claims did not become apparent until China's responses to the Panel's questions. Similarly, the report by another expert submitted as Exhibit JE-197 was submitted to rebut Exhibit CHN-206, which consisted of a report by a third expert that China had submitted with its responses to the Panel's second set of

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<sup>88</sup> United States' appellant's submission, para. 1 (quoting Panel Reports, paras. 7.23, 7.24, and 7.26, respectively).

<sup>89</sup> As explained in paragraphs 1.30 and 1.31 above, and in Annex 4 to these Reports, China requested the Appellate Body to reject the United States' Notice of Appeal on the grounds that, due to its "conditional" nature, the Notice of Appeal did not constitute a proper Notice of Appeal. However, the Appellate Body declined this request, finding instead that "[t]he possibility that we may not need to rule on the issues due to the occurrence of the scenarios identified by the United States does not provide a valid legal basis for us to reject the United States' appeal". (Annex 4, para. 2.10)

<sup>90</sup> United States' appellant's submission, para. 4.

<sup>91</sup> United States' appellant's submission, para. 5.

questions. Accordingly, suggests the United States, it would have been impossible to submit Exhibit JE-197 at an earlier date.

## 2.2 Arguments of China – Appellee (DS431)

2.6. China requests the Appellate Body to reject the United States' appeal regarding the exclusion, by the Panel, of 10 exhibits submitted jointly by the complainants on 17 July 2013. For China, the Panel made no error in considering Article 3.3 of the DSU, or in applying Articles 11 and 12.4 of the DSU. Rather, the Panel acted within the bounds of its discretion in prioritizing considerations of due process, including timeliness, and in deciding to exclude the relevant exhibits from its consideration of the United States' complaint.

2.7. China begins by observing that, of the 10 exhibits jointly submitted by the complainants and excluded by the Panel, the United States referred to only two of those exhibits in its comments on China's responses to the Panel's second set of questions. China highlights that the United States made "no reference whatsoever" to the other eight contested exhibits, and, for this reason, characterizes as "disingenuous" the United States' assertion that the Panel failed to give the United States sufficient time to prepare its submissions.<sup>92</sup> Not only were these exhibits not necessary for purposes of rebuttal, they were simply not used by the United States for any purpose whatsoever.

2.8. China argues that the Panel did not err in referring to Article 3.3 of the DSU and did not fail to allow the United States sufficient time to prepare its submissions pursuant to Article 12.4 of the DSU. China refers to several statements that have been made by the Appellate Body with respect to due process in panel proceedings, in particular in its report in *Thailand – Cigarettes (Philippines)*. China expresses the view that the Panel properly applied the due process principles that have been identified by the Appellate Body in reaching its decision not to admit the contested Panel exhibits. While recognizing that late submission of new evidence by complainants may be necessary in some cases, China emphasizes that the comments made by the United States on China's responses to the Panel's second set of questions were made at the very last stage contemplated by the Panel's timetable. For China, a strategy of "backloading" the submission of a significant volume of evidence until the final possible moment is not consistent with a fair and orderly procedure, and should be discouraged by panels and the Appellate Body. Moreover, the Panel made no error in taking account of the importance of the "prompt settlement" of disputes, as set out in Article 3.3 of the DSU, together with the other factors relevant to due process. China submits that the United States' argument that there was no evidence that acceptance of the expert reports would have led to a "never-ending cascade of competing expert reports" misses the point. The Panel had to draw a line somewhere. It drew the line after having given the United States eight opportunities to substantiate its case with its various submissions and exhibits, and in a context where it observed that the contested exhibits did not add "anything substantially new or different from what is said in the exhibits that the complainants submitted prior to 17 July 2013".<sup>93</sup> China adds that the logic of the United States' position regarding Article 12.4 of the DSU "is not readily apparent".<sup>94</sup> From the date of issuance of the Panel's timetable, the United States had eight months and eight separate occasions to make its case, which, in China's view, is an ample period of time to prepare submissions.

2.9. China submits that the Panel acted within the scope of its discretion under Article 11 of the DSU in excluding the contested exhibits. With respect to the two exhibits that the United States did refer to in its written comments of 17 July 2013, China asserts that these were clearly not necessary to allow the United States to rebut factual contentions by China that the United States had not previously had an opportunity to address. More specifically, China explains that, although Exhibit JE-196 was submitted in order to call into question extraction and production data submitted by China in Exhibit CHN-137 on 14 March 2013, other evidence from the United States disputing China's production figures was already on the record (in Exhibit JE-129). Even if the United States wished to also introduce the material in Exhibit JE-196 to further challenge China's data, it had the opportunity to do so prior to its comments on China's responses to the Panel's questions following the second Panel meeting. As for the expert report submitted as

<sup>92</sup> China's appellee's submission, para. 14 (referring to Panel Exhibits JE-188, JE-189, JE-190, JE-191, JE-192, JE-193, JE-194, and JE-195).

<sup>93</sup> Panel Reports, para. 7.27.

<sup>94</sup> China's appellee's submission, para. 20.

Exhibit JE-197, this sought to address China's response to the complainants' argument that even under-filled export quotas affect prices and consumption in foreign markets. However, China adds, the United States had already had an opportunity to make its point regarding the price effects in foreign markets of unfilled export quotas, in particular, at the second Panel meeting, with the expert report that it submitted as Exhibit JE-164. Since Exhibit JE-197 is, according to China, merely a repetition of what had already been said in JE-164, the Panel made no error in rejecting it as untimely filed. Article 11 of the DSU does not require a panel to allow endless rounds of expert reports. For all of these reasons, China submits, the Panel operated within the bounds of its discretion under Article 11 of the DSU by prioritizing China's right to a fair process and rejecting the late submission of these exhibits.

### **2.3 Claims of error by China – Appellant (DS432 and DS433) and other appellant (DS431)<sup>95</sup>**

#### **2.3.1 Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol**

2.10. China appeals the Panel's assessment of the relationship of specific provisions in China's Accession Protocol with the Marrakesh Agreement<sup>96</sup> and the Multilateral Trade Agreements annexed thereto. China requests the Appellate Body to reverse the Panel's conclusion that the legal effect of the second sentence of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement is to make China's Accession Protocol, in its entirety, an "integral part" of the Marrakesh Agreement, and not that, in addition, the individual provisions of the Protocol are also integral parts of the Multilateral Trade Agreements annexed to the Marrakesh Agreement.<sup>97</sup> China contends that, in reaching this conclusion, the Panel erred in its interpretation of Article XII:1 of the Marrakesh Agreement read in conjunction with Paragraph 1.2, second sentence, of China's Accession Protocol<sup>98</sup>, and failed to conduct a holistic interpretation of these provisions. China maintains that its appeals are intended to seek "[c]oherent guidance on the precise legal nature"<sup>99</sup> of post-1994 accession protocols, and to obtain clarification as to the systemic relationship between, on the one hand, specific provisions of China's Accession Protocol and, on the other hand, the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto.

##### **2.3.1.1 Paragraph 1.2 of China's Accession Protocol**

2.11. China alleges that, contrary to the Panel's conclusion, the reference to the "WTO Agreement" in Paragraph 1.2 of China's Accession Protocol cannot be read as a reference to the Marrakesh Agreement alone. China points out that there are many provisions in China's Accession Protocol in which the term "the WTO Agreement" refers to the WTO Agreement as a whole, including the Multilateral Trade Agreements annexed thereto. Read in its proper context, the prescription in Paragraph 1.2, second sentence, that China's Accession Protocol "shall be an integral part of the WTO Agreement" means that China's Accession Protocol must be treated as an integral part of the WTO Agreement as a whole, including its annexes. China contends that, in finding otherwise, the Panel disregarded the context provided by other instances in China's Accession Protocol where the term "the WTO Agreement" is used.

2.12. China asserts that, except for a few instances where "the WTO Agreement" is used to refer to one of the 16 articles of the Marrakesh Agreement, this term is used in China's Accession

<sup>95</sup> China submitted its other appellant's submission in DS431 on 17 April 2014, and its appellant's submission in DS432 and DS433 on 25 April 2014. (See paragraphs 1.21 and 1.22 of these Reports) China's appellant's submission contains all of the claims and arguments raised in its other appellant's submission. In its appellant's submission, China provides further arguments regarding the legal nature of post-1994 accession protocols, and elaborates in greater detail on the reasons why the Panel's interpretation constituted legal error.

<sup>96</sup> Before the Panel, China drew a distinction between the Marrakesh Agreement Establishing the World Trade Organization excluding the Multilateral Trade Agreements annexed to it, on the one hand, and that Agreement together with its annexes, on the other hand. On appeal, China draws the same distinction. See *supra*, fn 56 and *infra*, fns 333 and 376.

<sup>97</sup> China's appellant's submission, para. 46; other appellant's submission, para. 46 (referring to Panel Reports, paras. 7.80, 7.89, and 7.93).

<sup>98</sup> China's appellant's submission, para. 46; other appellant's submission, para. 46 (referring to Panel Reports, paras. 7.73-7.93).

<sup>99</sup> China's appellant's submission, para. 55; other appellant's submission, para. 52.

Protocol to refer to the WTO Agreement as a whole, that is, the Marrakesh Agreement including the Multilateral Trade Agreements annexed thereto. China highlights, for example, Paragraph 1.1 of the Accession Protocol, which provides that China accedes to "the WTO Agreement" pursuant to Article XII of that Agreement. China argues that this reference to "the WTO Agreement" necessarily concerns the Marrakesh Agreement together with the Multilateral Trade Agreements annexed thereto, because an acceding Member must accept the WTO Agreement *as a whole* by virtue of Article II:2 of the Marrakesh Agreement. Moreover, China highlights the first sentence of Paragraph 1.2, which defines the version of "the WTO Agreement" to which China accedes as being "the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession". To interpret the term "the WTO Agreement" in this sentence as the Marrakesh Agreement alone would mean that new WTO Members would not necessarily accede to the latest versions of the Multilateral Trade Agreements in the annexes. China also refers to a number of paragraphs in the Accession Protocol which, according to China, use the term "the WTO Agreement" to mean the WTO Agreement as a whole. China notes, in particular, that the same term in the introductory clause of Paragraph 5.1 was interpreted by the Appellate Body in *China – Publications and Audiovisual Products* as referring to the WTO Agreement as a whole.<sup>100</sup> Furthermore, in Annex 7 to China's Accession Protocol, Poland reserved the right to continue to apply certain anti-dumping measures and to bring these measures, by the end of 2002, into conformity with "the WTO Agreement" as defined in Paragraph 1.2 of the Accession Protocol.<sup>101</sup> China maintains that, because a Member's obligations regarding the imposition of anti-dumping measures are set out in the relevant Multilateral Trade Agreements (i.e. the GATT 1994 and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)) rather than the Marrakesh Agreement, Poland's reservation indicates that the term "the WTO Agreement" as used in Paragraph 1.2 refers to the WTO Agreement including the Multilateral Trade Agreements. China emphasizes that its understanding of the term "the WTO Agreement" was endorsed by the dissenting Member of the Panel.<sup>102</sup>

2.13. In China's view, the Panel's interpretation of Paragraph 1.2 would "jeopardize the internal coherence" of the WTO legal framework, which consists of an "overarching institutional agreement" (i.e. the Marrakesh Agreement) and several Multilateral Trade Agreements.<sup>103</sup> For China, the Panel's interpretation means that a "WTO-plus" commitment regarding trade in goods would have to be read as an integral part of the overarching institutional provisions of the WTO – i.e. the Marrakesh Agreement – rather than as an integral part of a substantive agreement, such as the GATT 1994. China maintains that it is the Multilateral Trade Agreements, rather than the "overarching institutional agreement", that stipulate each Member's substantive obligations, as well as the applicable exceptions. Thus, China emphasizes that a treaty interpreter assessing a provision in China's Accession Protocol must undertake the additional analytical step of determining with which Multilateral Trade Agreement that provision has an "intrinsic relationship". This additional analytical step is required as it allows the interpreter to determine the precise Multilateral Trade Agreement of which a particular provision of the Protocol is an integral part, thereby giving effective meaning to Paragraph 1.2, second sentence, of China's Accession Protocol.

2.14. China submits that the following five reasons given by the Panel in rejecting China's interpretation of Paragraph 1.2 are characterized by various flaws of law and logic. First, China alleges that the Panel confounded the ordinary meaning with the initial literal reading of the provision in finding that, because the second sentence of Paragraph 1.2 refers to "[t]his Protocol" in the singular, the Accession Protocol in its entirety is made an integral part of the Marrakesh Agreement. In China's view, the Panel "jumped ... to a premature conclusion" on the basis of a "superficial, grammatical analysis" of the provision.<sup>104</sup>

2.15. Second, the Panel erroneously found China's position that Paragraph 11.3 of China's Accession Protocol is an integral part of the GATT 1994 to be undermined by the fact that paragraph 1(b)(ii) of the GATT 1994 incorporates only the pre-1994 accession protocols into the

<sup>100</sup> China's appellant's submission, para. 106; other appellant's submission, fn 15 to para. 6.3 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222).

<sup>101</sup> China's appellant's submission, para. 107 (referring to China's Accession Protocol, fn 5 to Annex 7).

<sup>102</sup> China identified the following provisions of its Accession Protocol as ones in which, in China's view, the drafters used the term "the WTO Agreement" to refer to the Marrakesh Agreement including its annexes: Paragraphs 1.2, 2.A.1, 2.A.3, 4, 5.1, 6.1, 7.1, 8.1, 13.3, 17, 18.1 (first sentence), 18.2, 18.3, and Annex 7.

<sup>103</sup> China's appellant's submission, para. 112; other appellant's submission, para. 65.

<sup>104</sup> China's appellant's submission, para. 120.



GATT 1994. As China sees it, however, the incorporation of pre-1994 accession protocols into the GATT 1994 is consistent with the fact that post-1994 accession protocols cover areas that go beyond the GATT 1994. This, in China's view, reinforces its position that the drafters chose to let the incorporation of individual, intrinsically GATT-related, post-1994 accession commitments be achieved through the operation of Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol.

2.16. Third, China maintains that, in rejecting China's interpretation, the Panel wrongly relied on a superficial *a contrario* reasoning regarding the first paragraph of Part II of China's Accession Protocol and Article II:7 of the GATT 1994. According to the Panel, the joint operation of these two provisions makes the Schedules of Concessions and Commitments annexed to China's Accession Protocol an integral part of the GATT 1994. Yet, as observed the Panel, this joint operation would be redundant if all GATT-related provisions in the Accession Protocol were, as China argued, implicitly made an integral part of the GATT 1994 by virtue of Paragraph 1.2 of China's Accession Protocol. China contends that, in so reasoning, the Panel disregarded "a relevant technical difference" between Members' schedules of commitments and the substantive provisions set forth in the GATT 1994 and the General Agreement on Trade in Services (GATS), in that Members' goods and services schedules are separate instruments from these Agreements and may change from time to time.<sup>105</sup>

2.17. Fourth, China submits that, contrary to the Panel's statement that prior panel and Appellate Body reports do not support China's position<sup>106</sup>, this dispute presents the first occasion on which a panel or the Appellate Body has been called upon to interpret the meaning of the term "the WTO Agreement" as used in Paragraph 1.2 of China's Accession Protocol.

2.18. Fifth, China contends that the Panel erroneously found that China's interpretation would render redundant explicit references to the GATT 1994 throughout the Accession Protocol and the Accession Working Party Report. In China's view, explicit textual references to the GATT 1994 are necessary either to ensure that the relevant provisions convey substantive meaning (such as in Paragraphs 11.1 and 11.2 of China's Accession Protocol), or to confirm the understanding of how China would implement the relevant covered agreements (e.g. Paragraphs 160 and 162 of China's Accession Working Party Report confirm that China would apply export restrictions and licensing consistently with Articles XI and XX of the GATT 1994). Moreover, China submits that, as the Appellate Body found in *China – Publications and Audiovisual Products*, the introductory clause of Paragraph 5.1 of China's Accession Protocol gives China access to the exceptions under Article XX when and if the measure at issue has a clearly discernible, objective link to the *objective* of regulating trade in the goods at issue.<sup>107</sup>

### 2.3.1.2 Article XII:1 of the Marrakesh Agreement

2.19. China recalls that Articles XII:1 and XII:2 of the Marrakesh Agreement explicitly provide the authority for the Ministerial Conference, acting on behalf of the WTO, to reach agreement with each acceding Member to create Member-specific WTO law in the form of "terms of accession". Article XII of the Marrakesh Agreement is, therefore, the legal basis under which the terms of accession set forth in a post-1994 accession protocol may become a source of new, Member-specific WTO law. China emphasizes, however, that the authority of the Ministerial Conference to approve the creation of Member-specific WTO law is not unbounded. Rather, it is limited by the important requirement that specific terms of accession must "intrinsically relate to" either the Marrakesh Agreement or one of the Multilateral Trade Agreements annexed thereto. This requirement flows directly from a proper interpretation of Article XII:1 of the Marrakesh Agreement read in conjunction with Paragraph 1.2, second sentence, of China's Accession Protocol.

2.20. China submits that the Panel failed to give effective meaning to the second sentence of Article XII:1 by finding that this sentence merely prescribes that a newly acceding Member must accept the WTO legal framework as a single undertaking. In China's view, the Panel's interpretation is superficial and contrary to the rule of effective treaty interpretation. This is

<sup>105</sup> China's appellant's submission, para. 126.

<sup>106</sup> China's appellant's submission, para. 127 (referring to Panel Reports, para. 7.85).

<sup>107</sup> China's appellant's submission, para. 135 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, para. 30).

because a newly acceding Member is in any event required to accept the WTO Agreement as a whole by virtue of Article II:2 of the Marrakesh Agreement, which stipulates that the Multilateral Trade Agreements contained in Annexes 1, 2, and 3 "are integral parts of [the Marrakesh] Agreement, binding on all Members". Thus, for China, the second sentence of Article XII:1 must have a different, or additional, meaning, and not the "excessively narrow, and thus essentially redundant, meaning which the Panel erroneously ascribed to it".<sup>108</sup> China further contends that the Panel erred in stating that nothing in Article XII:1 supports China's positions that specific protocol provisions must be considered an integral part of the specific covered agreement to which they intrinsically relate, or that its Accession Protocol is not a self-contained agreement and that it merely serves to specify, including by the means of "WTO-plus" commitments, China's obligations under the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto.<sup>109</sup> In China's view, Articles XII:1 and XII:2 of the Marrakesh Agreement provide the key legal basis under which the terms of accession set forth in a post-1994 accession protocol may effectively become a source of Member-specific WTO law.

2.21. China alleges that the Panel failed to interpret Article XII:1 of the Marrakesh Agreement in its proper context, that is, Paragraph 1.2 of China's Accession Protocol. China maintains that, read together, these provisions confirm that accession commitments must relate to the subject matter covered by the Marrakesh Agreement or one of the Multilateral Trade Agreements annexed thereto. In China's view, this "overarching intrinsic link between post-1994 accession protocols and the *Marrakesh Agreement* and the multilateral trade agreements annexed thereto is a defining feature of the WTO accession process."<sup>110</sup>

### **2.3.1.3 The relationship between China's Accession Protocol, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other hand**

2.22. China alleges that a proper interpretation of Article XII:1 of the Marrakesh Agreement read in conjunction with Paragraph 1.2, second sentence, of China's Accession Protocol means that, in interpreting a specific provision in China's Accession Protocol, the treaty interpreter's initial task is to analyse to which of the covered agreements listed in Appendix 1 to the DSU that Protocol provision intrinsically relates. Once that is determined, the Protocol provision is to be treated as an integral part of such covered agreement.

2.23. According to China, the fact that post-1994 accession protocols do not figure among the exhaustive list of covered agreements in Appendix 1 to the DSU, and do not contain features that many of the Multilateral Trade Agreements possess (including general or security exceptions, or a modification clause), confirms that post-1994 accession protocols are not self-contained agreements. China argues that there was no need for the drafters to equip post-1994 accession protocols with such features, because it was their intention that specific accession protocol provisions would be treated as integral parts of either the Marrakesh Agreement or one of the Multilateral Trade Agreements, depending on the subject matter to which they intrinsically relate. Thus, a post-1994 accession protocol serves to specify, including by means of "WTO-plus" provisions, how the covered agreements will apply between the acceding Member and the incumbent WTO Members.

2.24. China contends that its interpretation of Paragraph 1.2 of its Accession Protocol and Article XII:1 of the Marrakesh Agreement achieves a coherent characterization of the legal nature of post-1994 accession protocols, as it avoids problematic implications regarding Member-specific "WTO-plus" provisions. Under China's interpretation, the treaty interpreter will first determine whether the "WTO-plus" provision relates to the same subject matter addressed by one of the covered agreements, and apply both the "WTO-plus" provision and that covered agreement harmoniously. In addition, China maintains that its interpretation provides a coherent explanation for the enforceability of post-1994 accession protocols under the DSU. Highlighting that post-1994 accession protocols are not listed among the covered agreements contained in Appendix 1 to the DSU, China explains that the drafters opted to effectively link the enforceability under the rules of the DSU to the establishment of an intrinsic relationship between the subject matter of one of the covered agreements and the various provisions in a post-1994 accession protocol.

<sup>108</sup> China's other appellant's submission, para. 61. See also China's appellant's submission, para. 86.

<sup>109</sup> China's appellant's submission, para. 77 (referring to Panel Reports, para. 7.91).

<sup>110</sup> China's appellant's submission, para. 84.



2.25. China uses the analogy of a house to illustrate the nature of the WTO single undertaking, whereby the Marrakesh Agreement provides the foundation, outer walls, and the roof of the "WTO House", and the Multilateral Trade Agreements annexed thereto are rooms in this house. According to China, a treaty interpreter analysing a provision of China's Accession Protocol must identify the appropriate "room" or "rooms" in the "WTO House" where each accession protocol provision will take up residence. Thus, China argues, the proper way to consider post-1994 accession protocols is to think of provisions contained therein as "new coats of paint or furniture items in the individual agreement rooms of the WTO House".<sup>111</sup> A Member's "terms" of accession may therefore rewrite, or add new substantive provisions to, specific provisions of the Marrakesh Agreement and its annexed agreements.

2.26. China further submits that, "[i]rrespective of the interpretation of Article XII:1 [of the Marrakesh Agreement] and Paragraph 1.2 of China's Accession Protocol", its Accession Protocol is properly characterized as a "subsequent agreement" relating to the same subject matter in the sense of Article 30 of the Vienna Convention on the Law of Treaties<sup>112</sup> (Vienna Convention).<sup>113</sup> Moreover, China contends that it has used the expression "intrinsic relationship" to describe the link between the subject matter of a given accession commitment and the subject matter of one or more provisions in the Marrakesh Agreement and its annexed agreements. Yet, "the label used to describe this relationship", whether it be "intrinsic relationship", "conceptual unity", or "shared subject matter", is "of no consequence".<sup>114</sup> In all cases, panels faced with a specific commitment of China's Accession Protocol must seek to link the subject matter of that commitment with the subject matter of one or more provisions of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. To the extent that a given accession commitment stands in conflict with one or more provisions in the Marrakesh Agreement or the Multilateral Trade Agreements annexed thereto, such conflict is resolved according to the rule under Article 30(3) of the Vienna Convention.<sup>115</sup> Thus, for example, China argues that Article XI:1 of the GATT 1994 has been modified by Paragraph 11.3 of China's Accession Protocol and, as a result, China may not impose export duties.

2.27. Finally, China reiterates that it is not seeking reversal of the Panel's finding that Article XX of the GATT 1994 is not available to justify a breach of Paragraph 11.3 of China's Accession Protocol. Moreover, China is not requesting the Appellate Body to depart from the same finding it made in *China – Raw Materials*. China expresses the view that the Appellate Body can, and should, find a way to endorse fully China's arguments in the present disputes "in a manner that stands in harmony with" the Appellate Body's decision in *China – Raw Materials*.<sup>116</sup>

## 2.3.2 Article XX(g) of the GATT 1994

### 2.3.2.1 Article XX(g) – "Relating to" the conservation of exhaustible natural resources

2.28. China requests the Appellate Body to reverse the Panel's finding that China's export quotas for rare earths and tungsten send "perverse signals" to the domestic users and, consequently, do not relate to conservation in the sense of Article XX(g) of the GATT 1994.<sup>117</sup> Further, to the extent that the Panel's errors in connection with its analysis of the "relating to" requirement taint the Panel's conclusion that China's export quotas on rare earths and tungsten cannot be provisionally justified under subparagraph (g) of Article XX of the GATT 1994, China requests the Appellate Body also to reverse this conclusion.

<sup>111</sup> China's opening statement at the oral hearing. At the oral hearing, China characterized the bicycle analogy provided by the European Union (see paragraph 2.132 of these Reports) as "inapt", and argued that China's Accession Protocol is neither a "wheel" nor a "saddle bag" of the bicycle of the WTO single undertaking, but "is akin to an extra layer of paint over parts or the whole of the bicycle".

<sup>112</sup> Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

<sup>113</sup> Article 30 of the Vienna Convention concerns the "[a]pplication of successive treaties relating to the same subject-matter".

<sup>114</sup> China's opening statement at the oral hearing.

<sup>115</sup> Article 30(3) of the Vienna Convention states: "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

<sup>116</sup> China's opening statement at the oral hearing.

<sup>117</sup> China's appellant's submission, para. 207; other appellant's submission, para. 138. In particular, China requests the Appellate Body to reverse the Panel's findings in paragraphs 7.279-7.293, 7.444, 7.446-7.448, 7.541-7.542, 7.604, 7.725, and 7.731 of the Panel Reports.

2.29. First, China contends that the Panel erred in its interpretation of the term "relating to" in Article XX(g) of the GATT 1994 by considering that, as a general rule, in order to ascertain whether there is a relationship of ends and means between a measure and its objective, it is appropriate for a panel to consider "solely" the general structure and design of the measure at issue<sup>118</sup>, to the exclusion of any evidence regarding the effects of the measure in the marketplace. Second, China submits that the Panel erred in its application of Article XX(g) in finding that China's export quotas cannot relate to conservation because, as a matter purely of structure and design, the quotas send a "perverse signal" to domestic users, while refusing to examine evidence that there are no such "perverse signals" in practice. Third, China alleges that the Panel contravened Article 11 of the DSU by failing to conduct an objective assessment of the matter, including the facts, and by providing incoherent reasoning.

#### 2.3.2.1.1 The Panel's interpretation of the term "relating to"

2.30. China requests the Appellate Body to reverse the Panel's interpretation of the term "relating to" in Article XX(g) of the GATT 1994, "to the extent that this interpretation required the Panel to examine solely the structure and design of China's export quotas".<sup>119</sup>

2.31. In China's view, the Panel considered that, as a general rule, in order to ascertain whether there is a relationship of ends and means between a measure and its objective, it is appropriate for a panel to consider "solely" the general structure and design of the measure at issue. Thus, according to China, the Panel determined that its assessment should proceed to the exclusion of any evidence regarding the effects of the export quotas in the marketplace together with other elements of China's conservation scheme. China contends that this approach by the Panel was in error, because the enquiry into whether a measure relates to conservation under Article XX(g) of the GATT 1994 cannot properly be done if a panel constrains itself not to look at evidence of the regulatory context in which the alleged conservation measure is implemented and how it operates in the marketplace for relevant goods.

2.32. China acknowledges that, in order to determine whether a measure is a genuine means to the realization of conservation ends, a panel must have regard to the general structure and design of the measure, and that sometimes, as in *US – Shrimp*, consideration of such structure and design may be enough for a panel to determine that a measure is related to conservation. However, China stresses that consideration of an impugned measure's structure and design alone may not be enough to determine whether it is indeed a means to the realization of a Member's conservation objectives. In China's view, the Panel erred by insisting that the examination of a challenged measure's relationship with conservation "must focus on the 'design and structure' of the measure ... which, together with the measure's text, must demonstrate a clear link with the conservation objective", and by finding that this somehow required the Panel not to consider available evidence on how the measure actually operates.<sup>120</sup> Thus, although the Panel correctly recognized that a measure cannot be considered in isolation and without regard to the regulatory context, the Panel did just that by asserting that it was legally bound to examine only the text, structure, and design of the measure, and not how the measure actually works in the context of China's comprehensive conservation programme. According to China, this constitutes legal error.

2.33. China adds that, where evidence sheds light on how a measure actually operates, a proper analysis under Article XX(g) of the GATT 1994 cannot end with "abstract conclusions" about the structure and design of the measure. Unless a responding Member succeeds in showing that its measure relates to conservation, based on its design and structure, or there is no evidence regarding the operation of a regulatory scheme, a panel should also have regard to how the regulatory scheme of trade and domestic measures operates in the market as a means to the realization of conservation ends.<sup>121</sup> China underlines that the absence of a requirement for a defending Member to prove empirically that its measure actually has conservation effects does not mean that such evidence can be "legally rejected and ignored by a panel" when it is put forward

<sup>118</sup> China's appellant's submission, para. 155; other appellant's submission, para. 86.

<sup>119</sup> China's appellant's submission, para. 208; other appellant's submission, para. 139 (referring to Panel Reports, paras. 7.279-7.293).

<sup>120</sup> China's appellant's submission, para. 159; other appellant's submission, para. 90 (referring to Panel Reports, para. 7.290).

<sup>121</sup> China's appellant's submission, para. 166; other appellant's submission, para. 97 (referring to Panel Reports, para. 7.446).

by the Member invoking Article XX.<sup>122</sup> China submits, therefore, that the Panel erred by "legally" rejecting and ignoring such evidence.

2.34. Referring to a statement made by the Appellate Body in *US – Gasoline* recognizing that consideration of a measure's predictable effects may in certain circumstances be relevant, China suggests that it would be strange if the "predictable effects of a measure" could shed useful light on whether the measure is related to conservation goals, but the actual effects could not.<sup>123</sup> China highlights that, in the context of determining whether there is a "contribution" (i.e. a "genuine relationship of ends and means"<sup>124</sup>) under Article XX(b) of the GATT 1994, the Appellate Body has emphasized that "[s]uch a demonstration can of course be made by resorting to evidence or data, pertaining to the past or present, that establishes" the contribution.<sup>125</sup> For China, just as under Article XX(b), the demonstration that a measure relates to conservation under Article XX(g) can also be made by resorting to evidence or data. China suggests that such evidence of actual effects, particularly when proffered in conjunction with other elements of a conservation programme, can be highly illuminating as to whether a measure provides a genuine means for the realization of its regulatory conservation ends.

2.35. China adds that a Member invoking Article XX(g) is not required to show actual effects in the marketplace in order to provisionally justify a measure. Instead, it is enough to show that a measure is apt to produce a contribution to the achievement of its objective; or, put another way, that it genuinely provides a means to realize the conservation of natural resources. According to China, the possibility to determine what a measure is "apt" to achieve recognizes that, in the case of certain measures – notably the kinds of environmental measures covered by subparagraphs (b) and (g) – the results of regulatory actions might only be observable with the benefit of time.<sup>126</sup> China indicates that a panel may therefore measure the "aptness" of what a measure is capable of achieving through making quantitative projections into the future, or by using qualitative reasoning supported by tested hypotheses supported by evidence.

#### 2.3.2.1.2 The Panel's application of the "relating to" requirement

2.36. China alleges that, although the Panel correctly stated that a measure cannot be considered in isolation and without regard to the regulatory context, the Panel did just that. Having erroneously asserted that it was legally bound to examine only the text, structure, and design of the measure, the Panel proceeded to look solely at the structure and design of China's export quotas, and failed to engage with considerable evidence as to how these features work as part of China's comprehensive conservation policy in the context of the reality of the Chinese and world markets for Chinese rare earths. The Panel's failure to test whether the theoretical "perverse signals" were actually present in the marketplace for rare earths and tungsten stemmed from the Panel's incorrect view that it must limit its consideration to the general design and structure, since Article XX(g) does not require an evaluation of the actual effects of the concerned measures. In China's view, the Panel erred in curtailing its analysis in this way.

2.37. China considers the Panel's "theoretical assertions and lack of any factual evidentiary findings" to be "particularly troubling" given that China provided considerable evidence relevant to the question of whether there actually was a "perverse effect" from the export quotas.<sup>127</sup> First, China alleges that it: (i) provided extensive evidence on the operation and the effects of domestic extraction and production caps on rare earths; (ii) demonstrated that it has in place mechanisms to enforce these caps and has taken regular enforcement actions to combat illegal mining and production; and (iii) provided evidence demonstrating the effects of these measures, including the decline of extraction and production of rare earths. Second, China contends that it provided

<sup>122</sup> China's appellant's submission, para. 154; other appellant's submission, para. 85.

<sup>123</sup> China's appellant's submission, para. 153; other appellant's submission, para. 84 (referring to Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 20).

<sup>124</sup> China's appellant's submission, para. 150; other appellant's submission, para. 81 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 145 and 210).

<sup>125</sup> China's appellant's submission, para. 150; other appellant's submission, para. 81 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151; and referring to Appellate Body Report, *China – Publications and Audiovisual Products*, para. 252).

<sup>126</sup> China's appellant's submission, para. 152; other appellant's submission, para. 83 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 151 and fn 243 thereto; and *US – Gasoline*, p. 21, DSR 1996:I, p. 20).

<sup>127</sup> China's appellant's submission, para. 168; other appellant's submission, para. 99.

evidence indicating that the 2012 rare earth export quotas did not have any of the perverse effects alleged by the Panel, because they neither decreased Chinese domestic rare earth prices nor encouraged relocation of rare earth-consuming industry to China. Faced with all this evidence, the Panel was, in China's view, required, at a minimum, to grapple with it before confirming its presumption that the export quotas at issue result in perverse signals to domestic consumers.

2.38. China further asserts that, even assuming that the Panel could properly limit its analysis to the structure and design of China's export quotas, the Panel still erred in two additional ways in applying the "relating to" element of Article XX(g).

2.39. First, separate from its allegation that the Panel failed to consider certain evidence, China submits that, given the Panel's "two-step approach" to the distinct elements of Article XX(g), questions about the relationship between the export quotas and domestic restrictions should be the subject of the second element (namely, "made effective in conjunction with").<sup>128</sup> Thus, the Panel should have considered the existence and import of domestic restrictions as a distinct requirement under the second element, rather than as part of the "relating to" element of Article XX(g). For China, the Panel's approach of analysing domestic measures as part of the "relating to" assessment essentially duplicates consideration of an issue that explicitly must be considered when assessing whether the measure is "made effective in conjunction with" domestic restrictions. Since the Panel dealt with Article XX(g) as a sequence of separate elements, in which consideration of "relating to" is an initial step followed by separate consideration of whether the impugned measure is "made effective in conjunction with" domestic restrictions, the Panel should have found that the structure and design of China's export quotas relate to conservation based on its finding that the quotas can send effective conservation signals to foreign users.

2.40. Second, China avers that, even if the Panel were right that the general effect of export quotas is to send domestic users a perverse signal, the existence of a comprehensive conservation programme, including limitations on domestic production and consumption is, purely as a matter of structure and design, clearly capable of mitigating such perverse effects. In this regard, China highlights that the Panel accepted that export quotas can, and do, send a positive conservation signal to foreign users.<sup>129</sup> The Panel also found that China's export quotas formed part of "a series of interconnected measures and programmes, including extraction and production caps and enforcement actions, which are designed to manage the extraction and supply of rare earth resources through a conservation policy".<sup>130</sup> Although the Panel identified the possibility of perverse signals to domestic users resulting from export quotas, the Panel also found that "production caps could mitigate the perverse signals that, in theory, are the general effect of export quotas."<sup>131</sup> According to China, the Panel further recognized that there are measures in place – part of a *bona fide* rare earth conservation policy – that could limit domestic production. China therefore asserts that, given that production caps could, in principle, mitigate the theoretical perverse signals found by the Panel, the theoretical sum of the design and structure of this regulatory scheme is one that is apt to make a positive overall contribution to the realization of China's conservation objectives. China acknowledges that the "degree of contribution" would – within the architecture of this regulatory scheme – depend on how the regulatory scheme actually operates.<sup>132</sup> However, China reiterates that the Panel denied the opportunity for China to prove, through evidence of the operation of the measure, how its comprehensive conservation programme actually mitigates the theoretical perverse signals that the Panel had identified.

### 2.3.2.1.3 Article 11 of the DSU

2.41. China raises a number of claims that the Panel erred under Article 11 of the DSU in reaching its finding that China's export quotas on rare earths and tungsten do not relate to conservation by

<sup>128</sup> China's appellant's submission, para. 176; other appellant's submission, para. 107. China's reference to the "two-step" approach relates to the Panel's separate analyses of: (i) whether China's quotas relate to conservation; and (ii) whether China's export quotas were made effective "in conjunction with domestic restrictions".

<sup>129</sup> China's appellant's submission, para. 178; other appellant's submission, para. 109 (referring to Panel Reports, paras. 7.443 and 7.725).

<sup>130</sup> China's appellant's submission, para. 178; other appellant's submission, para. 109 (quoting Panel Reports, para. 7.375).

<sup>131</sup> China's appellant's submission, para. 178; other appellant's submission, para. 109 (referring to Panel Reports, paras. 7.446 and 7.725).

<sup>132</sup> China's appellant's submission, para. 180; other appellant's submission, para. 111.

virtue of their signalling function. China asserts that the Panel's finding is merely a presumption and lacks an evidentiary basis. China also identifies three instances where, according to China, the Panel lacked an evidentiary basis for its findings or failed to "reconcile its findings" with contrary evidence, and one instance in which, in China's view, the Panel engaged in incoherent reasoning.

2.42. China asserts that the Panel's finding that China's export quotas on rare earths and tungsten are liable to send "perverse signals" to domestic consumers is merely a presumption. The Panel cited no evidence or any other support in the record for its finding that export quotas are likely to stimulate domestic consumption by effectively reserving a supply of low-price raw materials for use by domestic downstream industries and encourage relocation of rare earth-consuming industries to China. Nor did the Panel cite any evidence in support of its suggestion that the "general effect of an export quota" is to increase the cost of a raw material for foreign consumers but decrease its cost for domestic users.<sup>133</sup> China considers the Panel's failure to explain the basis for its presumption to be "all the more troubling" because China submitted evidence showing that, in some circumstances, the export quota would have no effect on prices or levels of consumption for either domestic or foreign consumers<sup>134</sup>, as well as evidence showing that any difference between domestic and foreign prices could not have been caused by the export quota.<sup>135</sup> This, according to China, required the Panel to explain, based on economic evidence, how it reached the conclusion that export quotas will "always", as a "general effect", reduce domestic prices when compared to export prices.<sup>136</sup>

2.43. China also points to the substantial evidence that it submitted demonstrating that the export quota on rare earths does have the positive conservation effect that the Panel recognized the export quotas could have. In China's view, it provided evidence that the export quota signals were working by demonstrating the considerable increase in the number of new rare earth mining projects starting up outside China and securing investment since 2010. The export quotas were also linked to the development, in China and abroad, of substitutes and the initiation of recycling efforts. China submitted specific evidence of rare earth recycling projects conducted by Chinese enterprises and of research and development and recycling projects being prepared. According to China, such developments are linked to the conservation signals produced by the export quotas.<sup>137</sup>

2.44. China further argues that the Panel failed to reconcile its findings with evidence demonstrating that China's rare earth export quota did not send "perverse incentives" that could have cancelled out its positive contribution to conservation. First, China refers to evidence that suggests that domestic prices for rare earths increased, and domestic consumption decreased, between January 2011 and January 2013, and that there was a considerable narrowing of the gap between foreign and domestic prices for several important rare earth metals.<sup>138</sup> Second, China refers to additional relevant evidence that it submitted showing limited investment by foreign companies in downstream industries in China, as well as to the lack of any evidence of such foreign downstream users of rare earths relocating to China after 2007 – i.e. the time when the export quota volumes were cut for the first time. On this basis, China asserts that the Panel failed to reconcile its findings with evidence demonstrating that China's rare earth export quotas did not send "perverse incentives" that could have cancelled out their positive contribution to conservation.<sup>139</sup>

2.45. China alleges that the pricing evidence it submitted to the Panel, at a minimum, raises significant doubts about the legitimacy of the presumption of perverse effects in the form of

<sup>133</sup> China's appellant's submission, para. 188; other appellant's submission, para. 119 (referring to Panel Reports, para. 7.541).

<sup>134</sup> China's appellant's submission, para. 189; other appellant's submission, para. 120 (referring to Panel Exhibit CHN-157).

<sup>135</sup> China's appellant's submission, para. 189; other appellant's submission, para. 120 (referring to China's second written submission to the Panel, para. 122; and Panel Exhibit CHN-157).

<sup>136</sup> China's appellant's submission, para. 190; other appellant's submission, para. 121.

<sup>137</sup> China's appellant's submission, para. 192; other appellant's submission, para. 123 (referring to China's response to Panel question No. 91, paras. 107 and 108; and Panel Exhibits CHN-192, CHN-193, and CHN-214).

<sup>138</sup> China's appellant's submission, paras. 194 and 195; other appellant's submission, paras. 125 and 126 (referring to China's opening statement at the first Panel meeting, Table 1, and paras. 41 and 42; and Panel Exhibit CHN-132).

<sup>139</sup> China's appellant's submission, para. 200; other appellant's submission, para. 131 (referring to China's opening statement at the second Panel meeting, para. 57; and Panel Exhibits CHN-186 and CHN-191).



domestic prices being driven down in correlation to the degree to which they drive up export prices. In China's view, since this evidence "squarely contradicts"<sup>140</sup> the proposition that the export quotas provide either a price advantage or a perverse signal and incentive to the important Chinese users of these rare earth elements, the Panel's failure to address this evidence calls into question the objectivity of the Panel's assessment. Furthermore, in the light of this evidence, the critical question for the Panel, in applying Article XX(g) of the GATT 1994, should have been whether the presumed "perverse signal" allegedly incentivizing domestic consumption was actually present, given the characteristics and operation of the Chinese domestic markets for rare earths and tungsten in 2012 and 2013. However, the Panel failed to reconcile the evidence that conflicted with its conclusion. For China, the Panel failed to make an objective assessment of the facts, because it did not address all of the above evidence that calls into question the validity of the Panel's presumption that export quotas send perverse signals to domestic Chinese users of rare earths by guaranteeing a supply of low-priced rare earths.

2.46. China also contends that the Panel's findings are based on incoherent reasoning. China requests the Appellate Body to reverse the Panel's findings because, based on the Panel's own view that domestic restrictions can mitigate any perverse signal given to domestic users by export quotas, China's export quotas are capable of providing a genuine means to China's conservation ends. In China's view, it is "incoherent, improper, and remarkable"<sup>141</sup> for the Panel to have recognized that the key issue of its "relating to" analysis depends on the level at which the production quota is set and the way in which the export and production quotas interact, but to then have refused to consider any evidence of these very alleged effects.

2.47. China concludes by asserting that the Panel's failure to conduct an objective examination of evidence contrary to its presumption contravenes Article 11 of the DSU. For China, the Panel's failure to consider material evidence had a "bearing on the objectivity of the panel's factual assessment" and resulted in the Panel engaging in incoherent reasoning.<sup>142</sup> China contends that, had the Panel made an objective assessment of China's evidence that the export quotas did not create the price difference or relocation effects that the Panel assumes export quotas always have, it would have concluded that the export quotas relate to conservation.

### **2.3.2.2 Article XX(g) – "Made effective in conjunction with" restrictions on domestic production or consumption**

2.48. China requests the Appellate Body to reverse the Panel's finding that China's export quotas on various forms of rare earths, tungsten, and molybdenum are not "made effective in conjunction with" domestic restrictions.<sup>143</sup> Further, China requests that, "[t]o the extent the Panel's errors in connection with the analysis of the 'made effective in conjunction with' requirement taint the Panel's conclusions ... that China's export quotas on rare earths, tungsten, and molybdenum cannot be provisionally justified under Article XX(g) of the GATT 1994", the Appellate Body also reverse this conclusion.<sup>144</sup>

2.49. China alleges, first, that the Panel erred in its interpretation of Article XX(g) by requiring a separate and distinct enquiry into whether the burden of conservation-related measures is imposed in a balanced way between domestic and foreign consumers and producers. Second, China contends that the Panel erred in its interpretation of Article XX(g) by finding that it must limit the analysis under its additional "even-handedness" test to considering the structure and design of the measures, to the exclusion of evidence regarding the actual operation and impact of the measures. Third, China submits that the Panel erred in its application of Article XX(g) by applying an "additional" requirement of "even-handedness" that required a balance in the conservation burden imposed on foreign and domestic consumers and producers; and by focusing on the structure and design of the measures, to the exclusion of their operation. Fourth, China

<sup>140</sup> China's appellant's submission, paras. 198 and 199; other appellant's submission, paras. 129 and 130.

<sup>141</sup> China's appellant's submission, para. 206; other appellant's submission, para. 137.

<sup>142</sup> China's appellant's submission, para. 207; other appellant's submission, para. 138 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 442).

<sup>143</sup> In particular, China requests the Appellate Body to reverse the Panel's findings in paragraphs 7.301, 7.314-7.337, 7.568-7.599, 7.792-7.809, and 7.919-7.935 of its Reports.

<sup>144</sup> In this regard, China refers to paragraphs 7.600-7.614, 7.810-7.820, 7.936-7.944, 8.2.c, 8.7.c, and 8.12.c of the Panel Reports. (China's appellant's submission, para. 324; other appellant's submission, para. 255)

asserts that, through its failure properly to engage with evidence relating to the operation of China's domestic restrictions, its incoherent reasoning, and its use of a "double standard" in applying its "even-handedness" test, the Panel failed to make an objective assessment of the matter, including an objective assessment of the facts, under Article 11 of the DSU.<sup>145</sup>

### 2.3.2.2.1 The Panel's interpretation of the phrase "made effective in conjunction with" restrictions on domestic production or consumption

2.50. First, China alleges that the Panel erred in its interpretation of the phrase "made effective in conjunction with" restrictions on domestic production or consumption by requiring a separate and distinct enquiry into whether the regulatory system "distributes the burden of conservation-related measures between domestic and foreign consumers in a balanced way".<sup>146</sup> China takes issue with the Panel's introduction into subparagraph (g) of Article XX of a requirement that there be a *balance* between China's export quotas and domestic production restrictions. As found by the Appellate Body in *US – Gasoline*, where the Appellate Body used the term "even-handedness" for the first time as a shorthand reference for the "made effective in conjunction with" requirement, subparagraph (g) requires only that the export restrictions work together with *some* domestic restriction towards a conservation goal. There is no added requirement under subparagraph (g) for a panel to investigate the relative burdens of conservation borne by foreign and domestic consumers or producers to determine that they are equally shared or "balanced". For China, such an analysis of the relative "burdens" is relevant, instead, under the chapeau of Article XX.

2.51. China maintains that under a proper interpretation of the terms "made effective in conjunction with", so long as genuine domestic restrictions are imposed by a Member, it is not relevant to determine whether the intensity or magnitude of those restrictions is in balance with the intensity or magnitude of trade restrictions under the impugned measure. For China, the second clause of Article XX(g), and a proper understanding of "even-handedness" deriving from that legal standard, require that there be *some* domestic restrictions present that work together with the impugned measure, and that, together, they relate to conservation. The Panel, however, found that the second clause of Article XX(g) requires *more* than the existence of a burden on both foreign and domestic users. The Panel considered that this element requires, in addition, that the burden be *evenly* shared, as evidenced by its statements that "the even-handedness criterion is satisfied where the regulating Member can show that ... it has ... imposed real conservation restrictions on the domestic production or consumption" so as to "distribute the burden of conservation between foreign and domestic consumers in an even-handed or balanced manner".<sup>147</sup> In so finding, China asserts that the Panel departed from the Appellate Body's case law and developed its own erroneous legal standard.

2.52. Referring further to the Appellate Body report in *US – Gasoline*, China submits that the essence of the obligation in subparagraph (g) lies in ensuring that, just as an impugned measure may restrict trade as a means to conservation ends, so too must there be some domestic restriction imposed that works together with the trade measure.<sup>148</sup> For China, however, the Appellate Body did not suggest that there was a requirement for a panel to investigate identity, substantive complementarity, impartiality, or balance in the quantitative or qualitative scope of the restrictions imposed by the trade measure and by the domestic measure. Rather, the Appellate Body seemed to "eschew any such requirement".<sup>149</sup> Accordingly, China maintains that there is no requirement to examine under subparagraph (g) the relative burdens borne, respectively, by foreign and domestic interests.

2.53. China submits that, in *US – Shrimp*, the Appellate Body considered the existence of a domestic restriction sufficient to find that the measure at issue in that dispute was an

<sup>145</sup> China's appellant's submission, para. 291; other appellant's submission, para. 222.

<sup>146</sup> China's appellant's submission, para. 213; other appellant's submission, para. 144 (referring to Panel Reports, para. 7.332).

<sup>147</sup> China's appellant's submission, para. 227; other appellant's submission, para. 158 (quoting Panel Reports, para. 7.337).

<sup>148</sup> China's appellant's submission, para. 232; other appellant's submission, para. 163 (referring to Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 19).

<sup>149</sup> China's appellant's submission, para. 233; other appellant's submission, para. 164 (referring to Appellate Body Report, *US – Gasoline*, pp. 20-21, DSR 1996:I, p. 19).

"even-handed" measure.<sup>150</sup> The restrictions at issue in that case operated differently for foreign and for domestically caught shrimp. China emphasizes that this did not affect the Appellate Body's conclusion that the restrictions were applied "even-handedly", and notes that the Appellate Body did not assess whether the degree of burden imposed by the trade measure and by the domestic restrictions was qualitatively or quantitatively balanced.

2.54. China further contends that, in *China – Raw Materials*, the Appellate Body summarized and consolidated the case law on the meaning of "made effective in conjunction with".<sup>151</sup> For China, the Appellate Body has consistently found that there must be a measure that works together with the impugned measure towards conservation, but the Appellate Body has not required that the relative burden of the foreign and domestic restrictions be balanced. Rather, the term "even-handedness" has been used by the Appellate Body as a shorthand reference for the requirement that there must be some domestic restriction that works together with the impugned measure towards conservation. However, China submits that this does not mean that a panel must assess, under subparagraph (g), whether the relative burden of the foreign and domestic restrictions is balanced, as the Panel in this case found.

2.55. China adds that the chapeau of Article XX provides contextual support for its position. Under the chapeau of Article XX, a panel must assess whether there is discriminatory treatment of foreign and domestic users, and, moreover, whether such discrimination is "arbitrary or unjustifiable". The test under the chapeau therefore requires consideration of the respective conservation burdens borne by different countries under the measure. China contends that it would deprive the chapeau of its utility if the test under subparagraph (g) also required substantive balancing, and that this would be contrary to the logical structure of Article XX of the GATT 1994 and to the principle of effective treaty interpretation.

2.56. Second, China alleges that the Panel also erred in its interpretation of Article XX(g) by limiting its analysis of the "even-handedness" criterion to an assessment of the "structure and design" of the impugned measure and by declining to examine evidence of the actual operation or effects of the measure.<sup>152</sup> China alleges that, in doing so, the Panel denied China the opportunity to show, based on evidence of the actual operation or effects of the measure, that its measures work together towards conservation.

2.57. China maintains that the analysis of an impugned measure under subparagraph (g) must take into account the "structure and design" of the measure. However, the analysis of such structural elements cannot properly be undertaken in isolation from evidence demonstrating the actual operation of the measures and their market impact. China contends that the Appellate Body recognized in *China – Raw Materials* that the analysis under Article XX(g) is not limited to considerations of the "structure and design" of the measure, but includes consideration of how a challenged measure and a domestic restriction operate together as a means to conservation ends.<sup>153</sup> For China, consideration of the "operation" of a measure generally requires an inquiry into how it functions in practice, in the marketplace.

2.58. China further argues that the Panel erred in relying on a statement by the Appellate Body in *US – Gasoline* that subparagraph (g) does not require a respondent to meet an "empirical 'effects test'" in order for a measure to be provisionally justified under subparagraph (g).<sup>154</sup> While the Appellate Body in that case held that such an assessment was not strictly necessary, it also recognized that "predictable effects" could be relevant in the analysis of whether a measure is a means to conservation ends. China submits that the Appellate Body report in *US – Gasoline* does not stand for the proposition that a panel is precluded, under subparagraph (g), from considering evidence concerning the operation of the impugned measure in its broader regulatory context.

<sup>150</sup> China's appellant's submission, para. 236; other appellant's submission, para. 167 (referring to Appellate Body Report, *US – Shrimp*, para. 121).

<sup>151</sup> China's appellant's submission, para. 237; other appellant's submission, para. 168 (referring to Appellate Body Reports, *China – Raw Materials*, para. 356).

<sup>152</sup> China's appellant's submission, para. 246; other appellant's submission, para. 177 (referring to Panel Reports, paras. 7.332, 7.336, and 7.337).

<sup>153</sup> China's appellant's submission, para. 252; other appellant's submission, para. 183 (quoting Appellate Body Reports, *China – Raw Materials*, para. 356).

<sup>154</sup> China's appellant's submission, paras. 254 and 255; other appellant's submission, paras. 185 and 186 (referring to Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 20).



2.59. In addition, China takes issue with the Panel's statement that consideration of the operation or effects of a measure under subparagraph (g) would deprive the chapeau of its utility, because the chapeau itself is concerned with the "application and effects" of a measure.<sup>155</sup> The inquiry under the chapeau does not mandate a "simplistic, bright-line distinction" between consideration of the "application" of a measure, on the one hand, and of its "structure and design", on the other.<sup>156</sup> China maintains that, although the chapeau of Article XX refers to the "application" of a measure, this does not mean that consideration of the operation of a measure is not relevant in considering the application of subparagraph (g). In support of this argument, China points to case law confirming that a proper understanding of the WTO-consistency of a measure under the substantive provisions of the GATT 1994 is not determined solely on the basis of its design and structure, but should also take into account the manner in which the measure is expected to apply or actually applies (its "expected operation").<sup>157</sup> China sees "nothing remarkable" in the fact that the same evidence may be relevant for different legal elements under the covered agreements.<sup>158</sup>

#### **2.3.2.2.2 The Panel's application of the "made effective in conjunction with" requirement**

2.60. China alleges that the Panel also erred in its application of the clause "made effective in conjunction with restrictions on domestic production or consumption" for two reasons: first, the Panel applied an "additional" requirement of "even-handedness" requiring "balance" in the conservation burden imposed on foreign and domestic consumers and producers; and, second, the Panel erred by focusing on the structure and design of the domestic restrictions, to the exclusion of its operation.<sup>159</sup>

2.61. With regard to the first point, China contends that the Panel's error in applying subparagraph (g) flows directly from its interpretative finding that there is an additional requirement of "balance" under that provision. Accordingly, the Panel required that there be equivalence or symmetry in the nature, kind, and quantity of the restrictions imposed by China on domestic and foreign consumers and producers. In particular, the Panel found that, because there is no "domestic counterpart" to the export restrictions on rare earths, tungsten, and molybdenum – such as, limits on domestic consumption or a tax that applies exclusively to domestic consumers – China's export quota system is not "even-handed". China, however, contends that it was not required to show, in addition, that its domestic and foreign restrictions are of the same nature, in the sense that, just as export quotas apply exclusively to exports, domestic restrictions apply exclusively to domestic users.

2.62. China also takes issue with the Panel's finding that China had not proven that its measures do not discriminate in favour of domestic consumers because, for instance, there is a "consumption assurance" for domestic users, and China had, therefore, not discharged its burden of establishing "even-handedness".<sup>160</sup> China submits that it was not required to show that, through its domestic restrictions, it does not discriminate in favour of domestic consumers.

2.63. With regard to the second point, China alleges that, because of its erroneous "structure and design" interpretation of subparagraph (g), the Panel adopted an "evidentiary straightjacket"<sup>161</sup> that prevented it from considering substantial evidence relating to the operation or impact of the measures in the domestic market. China contends that this evidence would have shown that the domestic restrictions and the export quotas indeed work jointly towards a conservation purpose.

2.64. China alleges three particular errors of application with respect to its contention that the Panel erred in focusing on the structure and design of the measures at issue. First, China points out that the Panel acknowledged that China has adopted a series of *bona fide* conservation

<sup>155</sup> China's appellant's submission, para. 260; other appellant's submission, para. 191 (referring to Panel Reports, para. 7.337).

<sup>156</sup> China's appellant's submission, para. 261; other appellant's submission, para. 192.

<sup>157</sup> China's appellant's submission, para. 261; other appellant's submission, para. 192 (referring to Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 130; *EC – Selected Customs Matters*, para. 200; *Brazil – Retreaded Tyres*, para. 151; and *China – Publications and Audiovisual Products*, para. 252).

<sup>158</sup> China's appellant's submission, para. 262; other appellant's submission, para. 193.

<sup>159</sup> China's appellant's submission, para. 267; other appellant's submission, para. 198.

<sup>160</sup> China's appellant's submission, para. 273; other appellant's submission, para. 204 (referring to Panel Reports, paras. 7.594, 7.809, and 7.935).

<sup>161</sup> China's appellant's submission, para. 278; other appellant's submission, para. 209.

measures including extraction and enforcement actions, and that these measures were designed to ensure that domestic Chinese consumers do not have unlimited access to rare earth resources.<sup>162</sup> China explains that the export quotas work in the same way to ensure that foreign users do not have unlimited access to China's rare earth resources, and that it provided evidence demonstrating that the domestic restrictions and export quotas work together to send signals to domestic and foreign rare earth users, respectively, and thus positively contribute to China's conservation objective.

2.65. Second, China observes that, in finding that the export quotas were not "made effective in conjunction with" domestic restrictions, the Panel referred to four specific factors relating to the export, extraction, and production quotas that it found to be probative, namely: (i) the different levels and timing of the export, extraction, and production quotas; (ii) the different product scopes of the export, extraction, and production quotas; (iii) the fact that unused export quota shares are permitted to be resold into the domestic market and no explicit consumption quota exists that applies solely to domestic users; and (iv) in the case of rare earths, the fact that the export quotas have existed since at least 2002, while the domestic restrictions have existed only since 2006 (extraction quota) and 2007 (production quota). China alleges that, in considering these four factors, the Panel failed to explain or demonstrate why these four factors discounted the restrictive effect on domestic Chinese consumers of enforced extraction and production quotas. China emphasizes that it demonstrated that its extraction and production quotas are maintained at levels that are enforced by a wide range of measures and thus place an overarching limit on total extraction and production.

2.66. However, even assuming that these four factors were relevant to the Panel's analysis, China asserts that the Panel erred because it failed to explain or demonstrate *how* they were relevant. With respect to the timing of the 2012 export, extraction, and production quotas, China alleges that the Panel failed to address evidence submitted by China as to the manner in which allocation of the quotas is coordinated among the competent ministries. Regarding the levels of the quotas, China asserts that the Panel focused on the fact that unfilled export quota amounts are redirected to the domestic market, but that it failed to grapple with arguments made by China that such unfilled export quota amounts need not necessarily be redirected.

2.67. With regard to the "even-handedness" factor, China maintains that the Panel's consideration of whether there are measures exclusively affecting domestic users was irrelevant. China also alleges that the Panel did not address or grapple with arguments and evidence submitted by China explaining why it has not adopted an explicit domestic consumption quota.<sup>163</sup> With respect to the fourth factor, that is, the temporal connection between the quotas, China alleges that the Panel also failed to address certain evidence showing a temporal connection in the way that the domestic and export quotas work together as part of China's conservation policy. In that respect, China refers to "more detailed arguments" set out in the context of its allegations of error under Article 11 of the DSU.<sup>164</sup>

2.68. Third, China asserts that, even if there were a "balancing" requirement under subparagraph (g), the Panel erred in the application of its own test by failing to take account of evidence that domestic and foreign restrictions operate to impose equivalent burdens on domestic and foreign users. China submits that the Panel did not discuss or engage with relevant evidence that showed either a similar restrictive effect, or a lack of any restrictive effect, on both domestic and foreign users. In particular, China refers to evidence submitted in support of its argument that, in 2011 and 2012, none of the rare earth export quotas were filled<sup>165</sup>; evidence suggesting that there were no significant differences in foreign and domestic prices for rare earths by late 2012 and

<sup>162</sup> China's appellant's submission, para. 279; other appellant's submission, para. 210 (referring to Panel Reports, para. 7.375).

<sup>163</sup> China's appellant's submission, para. 284; other appellant's submission, para. 215 (referring to China's second written submission to the Panel, paras. 84 and 86-100; opening statement at the second Panel meeting, paras. 40-45; and response to Panel question No. 123, paras. 262-265).

<sup>164</sup> China's appellant's submission, fn 232 to para. 281; other appellant's submission, fn 194 to para. 216.

<sup>165</sup> China's appellant's submission, para. 286; other appellant's submission, para. 217 (referring to Panel Exhibit CHN-191).

2013 for the most important rare earth products<sup>166</sup>; evidence to establish that, since January 2007, domestic prices of roasted molybdenum concentrate have been consistently higher than prices paid by European purchasers<sup>167</sup>; and evidence demonstrating that the conservation signal sent by the export quota and domestic restrictions is effective for both foreign and domestic rare earth users.<sup>168</sup>

### 2.3.2.2.3 Article 11 of the DSU

2.69. China further alleges that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU. In particular, China alleges that the Panel failed properly to address certain evidence relating to the operation of China's domestic restrictions and export quotas, that the Panel engaged in incoherent reasoning; and that the Panel applied a "double standard" in applying its test of "even-handedness".

2.70. With regard to its allegation that the Panel failed properly to address certain evidence relating to the operation of China's domestic restrictions and export quotas, China takes issue, first, with the Panel's analysis of the timing of the 2012 export, extraction, and production quotas. China alleges that the Panel failed to address evidence submitted by China as to the manner in which allocation of the quotas is coordinated between the competent ministries, and contends that all quota levels are set by the competent ministries at the same time, even if the dates of the actual publication of the volumes may differ.<sup>169</sup>

2.71. Second, China maintains that, with respect to the levels of the quotas, the Panel focused on the fact that export quota shares not used by foreign users are redirected to the domestic market, but in doing so failed to address arguments made by China that the unfilled export quota amounts need not necessarily be redirected. China contends that, in any event, redirection of quota shares was not a relevant factor in determining whether the export quotas work in conjunction with the domestic restrictions.<sup>170</sup>

2.72. Third, regarding "even-handedness", China contends that the Panel's consideration of whether there are measures exclusively affecting domestic users was irrelevant, and that the Panel failed to address arguments and evidence submitted by China explaining why it has not adopted a domestic consumption quota, or why there is no need for such a quota.<sup>171</sup>

2.73. Fourth, China alleges that the Panel failed to address evidence submitted by China showing a temporal connection in the way that the domestic and export quotas work together. In particular, China criticizes the Panel for taking into consideration the non-existence of domestic extraction quotas between 2002 and 2006 and alleges that the Panel failed to address evidence demonstrating that, between 2006 and 2012, China did have an extraction quota in place and has significantly increased its enforcement measures. China also points to evidence that it submitted demonstrating that the extraction levels of rare earths in China have declined significantly since 2006.<sup>172</sup>

<sup>166</sup> China's appellant's submission, para. 286; other appellant's submission, para. 217 (referring to China's second written submission to the Panel, paras. 138-141, and Table 1; and opening statement at the second Panel meeting, paras. 53 and 54, and Figure 7).

<sup>167</sup> China's appellant's submission, para. 286; other appellant's submission, para. 217 (referring to China's second written submission to the Panel, paras. 191 and 199-201).

<sup>168</sup> China's appellant's submission, para. 286; other appellant's submission, para. 217 (referring to Panel Exhibit CHN-192).

<sup>169</sup> China's appellant's submission, para. 282 and 293; other appellant's submission, paras. 213 and 224 (referring to Panel Reports, para. 7.577; and Panel Exhibits CHN-13, CHN-21, and CHN-63).

<sup>170</sup> China's appellant's submission, paras. 283 and 293; other appellant's submission, paras. 214 and 224 (referring to Panel Reports, para. 7.579; and China's response to Panel question No. 123(b), paras. 258-261).

<sup>171</sup> China's appellant's submission, paras. 284 and 293; other appellant's submission, paras. 215 and 224 (referring to China's second written submission to the Panel, paras. 84 and 86-100; opening statement at the second Panel meeting, paras. 40-45; and response to Panel question No. 123, paras. 262-265).

<sup>172</sup> China's appellant's submission, paras. 294-297; other appellant's submission, paras. 225-228 (referring to China's second written submission to the Panel, para. 39; and China's opening statement at the second Panel meeting).

2.74. With regard to its allegation that the Panel engaged in incoherent reasoning, China takes issue with the Panel's finding that China does not impose domestic restrictions. China refers to statements by the Panel recognizing that China has a comprehensive and *bona fide* conservation policy, encompassing "a series of interconnected measures and programmes, including extraction and production caps and enforcement actions, which are designed to manage the extraction and supply of rare earth resources through a conservation policy."<sup>173</sup> China contrasts the Panel's reasoning with its finding, elsewhere in the Panel Reports, that none of the domestic measures imposed by China constitute "restrictions".<sup>174</sup> China alleges that, in making these two statements, the Panel engaged in incoherent reasoning.

2.75. China adds that the Panel ignored certain evidence when it engaged in such incoherent reasoning. In particular, first, with regard to the Panel's statement that "China has failed to place before [the Panel] evidence or other demonstration sufficient to support the conclusion that China set its domestic production quota below the expected level of demand in 2012"<sup>175</sup>, China submits that it provided testimony that the ministries, in setting the 2012 extraction, production, and export quotas, "did rely on market reports".<sup>176</sup> China further contends that it provided the Panel with a report in which a rare earth industry expert predicted that, by the end of 2011, the expected level of rare earth demand would increase.<sup>177</sup> China explains that the ministries thereafter set the 2012 quota levels below that predicted level of rare earth demand.<sup>178</sup> China alleges that the Panel failed to assess the relevance of this evidence.

2.76. Second, China alleges that the Panel engaged in incoherent reasoning in finding, on the one hand, that it should only assess the design, structure, and architecture, rather than the impact, of the resource tax and, on the other hand, in acknowledging that, by design and structure, the increased costs caused by the resource tax could lead to a reduction in demand and therefore limit production of rare earth ores and work to reduce extraction of rare earths.

2.77. Third, China alleges that the Panel engaged in incoherent reasoning because it failed to assess objectively the trends in rare earth extraction and production data. China alleges that the Panel failed to address China's arguments that the extraction, production, and consumption data suggest that the decreased production and consumption levels are the result of China's overall conservation policy.

2.78. Finally, China alleges that the Panel applied a "double standard" in its test of "even-handedness". China argues that, with respect to the export quotas, the Panel failed to address the extent to which China's export quotas impose an actual and not merely theoretical burden on foreign consumers and that, on the contrary, with regard to domestic restrictions, the Panel focused on whether these restrictions are actually enforced and thus have restrictive effects.

## **2.4 Arguments of the United States – Appellee (DS431) and third participant (DS432 and DS433)**

### **2.4.1 Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol**

2.79. The United States submits that China's appeal of the Panel's interpretation relating to Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol, and its request for reversal of the related Panel findings, are without merit and should be rejected.

<sup>173</sup> China's appellant's submission, para. 299; other appellant's submission, para. 230 (referring to Panel Reports, para. 7.375).

<sup>174</sup> China's appellant's submission, para. 302; other appellant's submission, para. 233 (referring to Panel Reports, paras. 7.526 and 7.528).

<sup>175</sup> China's appellant's submission, para. 302; other appellant's submission, para. 233 (referring to Panel Reports, para. 7.526).

<sup>176</sup> China's appellant's submission, para. 302; other appellant's submission, para. 233 (referring to Panel Exhibit CHN-63).

<sup>177</sup> China's appellant's submission, para. 302; other appellant's submission, para. 233 (referring to Panel Exhibit CHN-64, p. 4).

<sup>178</sup> China's appellant's submission, para. 302; other appellant's submission, para. 233 (referring to Panel Exhibit CHN-64, p. 4).

2.80. The United States emphasizes that China has not appealed the Panel's finding that Article XX of the GATT 1994 is not applicable to justify a breach of Paragraph 11.3 of China's Accession Protocol. China also has not appealed the Panel's finding that China's breach of Paragraph 11.3 in this dispute is not justified under Article XX(b) of the GATT 1994. The intermediate Panel findings that China does appeal are not specifically addressed to Paragraph 11.3 of China's Accession Protocol, and their reversal would not lead to the conclusion that Article XX of the GATT 1994 can be invoked to justify a breach of Paragraph 11.3. The United States takes note of China's statement that it is seeking coherent guidance on the systemic relationship between post-1994 accession protocols and the Marrakesh Agreement together with its annexes. The United States maintains that the purpose of the dispute settlement system is not to provide "guidance" in the abstract. Moreover, the established application of the customary rules of treaty interpretation to interpret commitments in China's Accession Protocol, as was done by the Panel in this case and by panels and the Appellate Body in the *China – Publications and Audiovisual Products* and *China – Raw Materials* disputes, does not call for further guidance.

#### 2.4.1.1 Paragraph 1.2 of China's Accession Protocol

2.81. According to the United States, the Panel rightly rejected China's interpretation of Paragraph 1.2 of China's Accession Protocol on the basis of a sound analysis grounded in the text and context of the relevant provisions. The Panel noted that the reference to "the WTO Agreement" in Paragraph 1.2 means that China's Accession Protocol "*in its entirety* is made an integral part of *one* other agreement".<sup>179</sup> Moreover, the Panel noted that the preamble of China's Accession Protocol, the Decision of the Ministerial Conference of 10 November 2001 regarding China's accession to the WTO, and Paragraph 1.3 of China's Accession Protocol all support a reading of the term "the WTO Agreement" in Paragraph 1.2 as referring to the Marrakesh Agreement only. The Panel also noted the context provided by Article II:2 of the Marrakesh Agreement, which indicates that each of the Multilateral Trade Agreements, in its entirety, is made an integral part of one other agreement, i.e. the Marrakesh Agreement. The Panel additionally noted the relevance of paragraph 1 of the language incorporating the GATT 1994 into Annex 1A, which provides an exhaustive list of what the GATT 1994 consists of and does not refer to post-1994 accession protocols. Furthermore, the Panel noted that Paragraph 1 of Part II of China's Accession Protocol, which makes the schedules of concessions an integral part of the GATT 1994, would be redundant if all provisions that are intrinsically related to the GATT 1994 were automatically an integral part of the GATT 1994.<sup>180</sup> In this respect, the United States argues, China fails to explain why the fact that the schedules of concessions may be subject to periodic negotiation and change from time to time means that specific language incorporating the schedules into the GATT 1994 would have been required.

2.82. Thus, the United States argues, the Panel's analysis of Paragraph 1.2 of China's Accession Protocol is not, as China asserts, "a superficial, grammatical analysis".<sup>181</sup> Rather, the Panel's interpretation of Paragraph 1.2 reflects an interpretation that takes into account all relevant elements and gives effective meaning to the terms used in that provision and to Article XII of the Marrakesh Agreement. China's assertion that the reference to "the WTO Agreement" in Paragraph 1.2 cannot be read as the Marrakesh Agreement alone is therefore "baseless".<sup>182</sup> Moreover, under China's interpretation, the term "[t]his Protocol" in Paragraph 1.2 refers to provisions thereof, while the term "the WTO Agreement" refers to the "WTO Agreement and the Multilateral Trade Agreements annexed thereto". In the United States' view, such an approach contradicts the words actually used in Paragraph 1.2 and is untenable.

2.83. The United States contends that the Panel's interpretation does not, as China suggests, "jeopardize the internal coherence of the WTO legal framework" by precluding a provision of the Accession Protocol from being an integral part of a Multilateral Trade Agreement.<sup>183</sup> The Panel expressly recognized that a provision of the Accession Protocol could be an integral part of one or

<sup>179</sup> United States' appellee's submission, para. 63 (quoting Panel Reports, para. 7.82 (emphasis original)).

<sup>180</sup> United States' appellee's submission, paras. 61-64.

<sup>181</sup> United States' third participant's submission, para. 22 (quoting China's appellant's submission, para. 120).

<sup>182</sup> United States' appellee's submission, para. 65 (referring to China's other appellant's submission, para. 63).

<sup>183</sup> United States' appellee's submission, para. 67 (referring to China's other appellant's submission, para. 65).

more of the Multilateral Trade Agreements, including the GATT 1994, and properly recognized that this would "not occur as a result of Paragraph 1.2" but, rather, would occur "if and where such language is included in the individual provision".<sup>184</sup> Moreover, China provides no support for its assertion that the Panel's interpretation means that its Accession Protocol must be read together with the Marrakesh Agreement, thereby preventing it from being read harmoniously with the covered agreements. Rather, China acknowledges that, pursuant to Article II:2 of the Marrakesh Agreement, the Multilateral Trade Agreements annexed thereto are each an integral part of the Marrakesh Agreement. Although these agreements also cover a range of substantive obligations, China does not dispute that these agreements are capable of harmonious interpretation. In addition, the United States contends, China fails to address the fact that its reading of "the WTO Agreement" in Paragraph 1.2 cannot be reconciled with Article II:2 of the Marrakesh Agreement unless that provision were similarly interpreted to make all of the Multilateral Trade Agreements an integral part of one another.

2.84. The United States disagrees with China's argument that the Panel erred in rejecting China's explanations as to why China's interpretation of Paragraph 1.2 does not render redundant the explicit references to the GATT 1994 in China's Accession Protocol and Accession Working Party Report. The United States submits that the language in each of the provisions containing such explicit references (Paragraphs 5.1, 11.1, and 11.2 of China's Accession Protocol and Paragraph 160 of China's Accession Working Party Report) provides examples demonstrating that Members knew when and how to include a reference to the GATT 1994 when they wanted to do so. Moreover, China's argument that the language referring to the GATT 1994 was necessary in Paragraphs 11.1 and 11.2 because the policy tools covered by these paragraphs are subject to various obligations in the GATT 1994 is inconsistent with its position that any provisions of its Accession Protocol that have an "intrinsic relationship" to the GATT 1994 – which would presumably include Paragraphs 11.1 and 11.2 – are automatically an integral part of the GATT 1994. Similarly, it is unclear why the language "in a manner consistent with the WTO Agreement" in the opening clause of Paragraph 5.1 of China's Accession Protocol is necessary given that, under China's interpretation, Paragraph 5.1 is presumably also "intrinsically related" to, and thus an integral part of, the GATT 1994.

#### 2.4.1.2 Article XII:1 of the Marrakesh Agreement

2.85. The United States maintains that the Panel correctly interpreted Article XII of the Marrakesh Agreement and rejected China's argument that Article XII dictates that the provisions of China's Accession Protocol are an integral part of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. China's argument that the Panel "superficially" interpreted Article XII:1 as "merely serv[ing] to prescribe that newly acceding Members may not 'pick and choose' amongst the covered agreements" is without basis.<sup>185</sup> Rather, in response to China's argument that the second sentence of Article XII means that China's Accession Protocol merely serves to specify China's obligations under those agreements, the Panel correctly began its analysis by examining the text of Article XII. The Panel's interpretation that, pursuant to Article XII, second sentence, a new Member is not entitled to pick and choose to which particular agreements it will accede, is evident from the text of the second sentence of Article XII. In this regard, the United States contends that China's argument that the Panel's interpretation renders Article XII:1, second sentence, "excessively narrow, and thus essentially redundant", is also baseless.<sup>186</sup> Rather, the United States argues, Article XII:1 makes clear that the accession "applies" to both the Marrakesh Agreement and the Multilateral Trade Agreements. Thus, through accession, an acceding Member takes up the obligations of all of the Multilateral Trade Agreements. In contrast, Article XII:3 stipulates that accession to the Plurilateral Trade Agreements is governed by the provisions of those agreements.

2.86. According to the United States, China's argument that the Panel ignored the relevance of Article XII:1 of the Marrakesh Agreement is "highly convoluted, and without apparent logic".<sup>187</sup> China provides no basis for its assertion that Article XII:1 of the Marrakesh Agreement indicates

<sup>184</sup> United States' appellee's submission, para. 67 (quoting Panel Reports, para. 7.80).

<sup>185</sup> United States' appellee's submission, para. 57 (quoting China's other appellant's submission, para. 60).

<sup>186</sup> United States' appellee's submission, fn 50 to para. 58 (quoting China's other appellant's submission, para. 61).

<sup>187</sup> United States' third participant's submission, para. 8 (referring to China's appellant's submission, paras. 79-84).



that China's Accession Protocol is an integral part of the Marrakesh Agreement and the agreements set out in the annexes thereto. Rather, China's arguments amount to "an unexplained leap" from the word "terms" in Article XII:1 to the proposition that the actual terms set out in an accession protocol should be ignored and replaced with an unspecified "intrinsic relationship" test.<sup>188</sup> In the United States' view, the only way to interpret the terms upon which China acceded to the WTO is to examine the language that China and all WTO Members agreed to in the Accession Protocol.

2.87. Moreover, the United States argues, China ignores the fact that the Panel agreed with China that "China's Accession Protocol does indeed specify the obligations China undertook as well as the rights it was accorded upon accession" to the WTO, and that "it is to the Protocol that we must look to find how they are linked" to the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto.<sup>189</sup> However, as the Panel rightly found, even if Article XII of the Marrakesh Agreement meant that China's Accession Protocol "merely serves to specify" China's obligations, "it would not follow, as a matter of logic or law, that the individual provisions of an accession protocol would thereby, *and for that reason, automatically* become an 'integral part' of the Multilateral Trade Agreements annexed to the Marrakesh Agreement."<sup>190</sup> In this respect, the Panel noted that various provisions of the Multilateral Trade Agreements might overlap in subject matter with, and be said to specify obligations contained in, the GATT 1994. Yet, that does not mean that those different agreements all have an "intrinsic relationship" to the GATT 1994 such that the exceptions therein should be assumed to apply to the other covered agreements.

#### **2.4.1.3 The relationship of accession protocol provisions with the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto**

2.88. The United States contends that the Panel's analysis contained in the paragraphs subject to China's appeal is sound, and China has failed to show any legal error. On the contrary, China's proposed "intrinsically related" test departs from the customary rules of treaty interpretation and leads to uncertainty. Under this test, a panel must engage in a "speculative exercise" in attempting to determine to which covered agreement an accession commitment "intrinsically relates".<sup>191</sup> In the United States' views, such an approach renders the carefully negotiated language of accession commitments meaningless. The United States further submits that the Panel's rejection of China's assertion that Article XII of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol support "its intrinsic relationship" test is likewise consistent with the analysis of provisions of China's Accession Protocol in past disputes. As the Panel found, and as panels and the Appellate Body found in previous disputes, where the drafters of China's Accession Protocol intended to incorporate a provision of a Multilateral Trade Agreement, they made that intention clear.<sup>192</sup> In those disputes, the panel and the Appellate Body analysed the provision at issue by applying the customary rules of treaty interpretation, rather than an "intrinsic relationship" test. Both the panel and the Appellate Body found in *China – Raw Materials* that the text and context of Paragraph 11.3 make clear that Article XX of the GATT 1994 is not available to justify a breach of Paragraph 11.3. The United States emphasizes that, in these disputes, China has neither addressed those findings nor shown any flaws in the thorough and well-reasoned interpretive work conducted by both the panel and the Appellate Body in *China – Raw Materials* in examining the relationship between Paragraph 11.3 and the GATT 1994.

2.89. The United States emphasizes that there is no obligation in the WTO covered agreements to eliminate export duties. As the Panel rightly observed, it is unclear how the obligation in Paragraph 11.3, "which by definition go[es] beyond the obligations contained in the Multilateral Trade Agreements annexed to the Marrakesh Agreement, 'merely serve[s] to specify' a Member's obligations under the existing provisions of the Multilateral Trade Agreements annexed to the Marrakesh Agreement",<sup>193</sup> Furthermore, the United States highlights the Panel's finding that there is "no necessary logic" to suggest that, to the extent that its Accession Protocol serves to specify

<sup>188</sup> United States' third participant's submission, para. 10.

<sup>189</sup> United States' appellee's submission, para. 66 (quoting Panel Reports, para. 7.91).

<sup>190</sup> United States' appellee's submission, para. 67 (quoting Panel Reports, para. 7.92). (emphasis added by the United States)

<sup>191</sup> United States' appellee's submission, para. 75.

<sup>192</sup> United States' appellee's submission, para. 68 (referring to Panel Reports, paras. 7.80 and 7.86; Panel Reports, *China – Raw Materials*, para. 7.124; and Appellate Body Reports, *China – Raw Materials*, paras. 291, 293, and 303).

<sup>193</sup> United States' appellee's submission, para. 73 (quoting Panel Reports, para. 7.91).



China's obligations under the covered agreements, the Protocol is automatically an "integral part" of one or more of those agreements.<sup>194</sup> In the United States' view, the fact that under Article XII an acceding Member takes up the obligations of all of the Multilateral Trade Agreements does not by its terms or by implication require a panel to examine to which agreement(s) the specific provisions of China's Accession Protocol are intrinsically related. The United States emphasizes that Article II of the Marrakesh Agreement further undermines China's position in these appeals, because this provision makes the annexed agreements integral parts of the Marrakesh Agreement by virtue of express language, not by virtue of any "intrinsic relationship".

2.90. The United States maintains that China's assertion that its Accession Protocol is not a "self-contained" agreement does not support its "intrinsic relationship" test. Neither Article XII of the Marrakesh Agreement, nor any provision of the covered agreements, uses the term or concept of "self-contained" agreements. The United States also disagrees with China's assertion that its interpretation is the only coherent explanation for the enforceability of China's Accession Protocol under the DSU. Rather, as an integral part of the WTO Agreement, China's Accession Protocol and all of the commitments set forth therein – including but not limited to Paragraph 11.3 – are enforceable in WTO dispute settlement pursuant to Article 1.1 of the DSU. Thus, as the Panel also recognized, the justiciability of the commitments set forth in China's Accession Protocol has been well accepted without recourse to China's interpretation.

## 2.4.2 Article XX(g) of the GATT 1994

### 2.4.2.1 Article XX(g) – "Relating to" the conservation of exhaustible natural resources

2.91. The United States maintains that the Panel correctly found that China's export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of Article XX(g) of the GATT 1994. Accordingly, the United States requests the Appellate Body to reject China's arguments and to uphold the relevant Panel findings and conclusions.

2.92. The United States submits that China's request for legal review of the Panel's conclusion that the rare earth and tungsten export quotas do not relate to conservation is: (i) based on a representation of a legal standard under Article XX(g) of the GATT 1994 that is incorrect, internally contradictory, and liable to produce an absurd result; and (ii) premised on either a mischaracterization or simply a fundamental misunderstanding of the Panel's analysis and reasoning, both of which are sound. In addition, the United States contends that China's characterization of the Panel's findings and conclusions as a failure by the Panel to carry out its mandate under Article 11 of the DSU should also be dismissed because, as a careful review of the Panel Reports shows, the Panel's assessment of this issue was objective and the Panel's reasoning coherent.

#### 2.4.2.1.1 The Panel's interpretation of the term "relating to"

2.93. The United States asserts that, for a measure to "relate to" conservation, it must bear a relationship to the goal of conservation. However, not just any relationship between the measure and conservation is sufficient for purposes of Article XX(g) of the GATT 1994; instead, a very particular relationship is required. As the Appellate Body has found, the term "relating to" requires a "substantial relationship" or a "close and genuine relationship of ends and means".<sup>195</sup> A measure that is merely incidentally or inadvertently aimed at conservation will not satisfy this test. Hence, a Member's ability to maintain an otherwise non-conforming conservation measure should not be accidental or determined by random factors outside its control.

2.94. The United States submits that, although a panel is not precluded from examining the effects of a measure in its analysis under Article XX(g), contrary to the thrust of China's arguments, Article XX(g) does not establish an empirical "effects test". Rather, as noted by the panel in *China – Raw Materials*, "[t]o determine whether a challenged export restriction relates to conservation, a panel should examine the text of the measure itself, its design and architecture,

<sup>194</sup> United States' appellee's submission, para. 74 (referring to Panel Reports, para. 7.92).

<sup>195</sup> United States' appellee's submission, paras. 85 and 99 (referring to Appellate Body Reports, *US – Gasoline*, p. 19, DSR 1996:I, p. 18; *US – Shrimp*, para. 136; and *China – Raw Materials*, para. 355).

and its context".<sup>196</sup> The United States explains that the Panel's focus on the design, structure, architecture, and text of the export quotas was not only supported by guidance from the Appellate Body, but was also appropriate given the nature of the Panel's inquiry.<sup>197</sup> A panel's task under Article XX(g) of the GATT 1994 is to determine whether a measure has as its genuine objective the goal of conservation. To make "actual effects" in the marketplace a touchstone for making this determination would render the task meaningless. The "vagaries of the market place" would mean that measures that might at one point in time appear, based on empirical effects, to "relate to" conservation might, at a different point in time with different data, appear not to "relate to" conservation, and would also raise difficult questions of causation.<sup>198</sup> Hence, according to the United States, basing such a determination on empirical effects could undermine a panel's ability to make any determination at all.

2.95. The United States disagrees with China's unsupported assertion that "it is enough to show that a measure is apt to produce a contribution to the achievement of its objective; or, put another way, that it genuinely provides a means to realize the conservation of natural resources".<sup>199</sup> To the United States, China's mixing of the concepts of "relating to" and "contribution", and thus of the proper interpretations of Article XX(g) with those of Articles XX(a) and XX(b) of the GATT 1994, results in an approach that ignores important distinctions between the various subparagraphs of Article XX. China's approach is incorrect under the customary rules of treaty interpretation because each of those subparagraphs is meant to address a different policy objective deemed important enough to justify deviations from the disciplines of the GATT 1994. Interpretations of Article XX(g) must remain sensitive to the fact that subparagraph (g) has unique characteristics that the other subparagraphs, including (a) and (b), do not. For the United States, these characteristics have a significant bearing on the determination of whether a challenged measure can be provisionally justified as one relating to conservation.

#### 2.4.2.1.2 The Panel's application of the "relating to" requirement

2.96. The United States asserts that the Panel was correct when it considered that Article XX(g) of the GATT 1994 required China to show that there is a mechanism to ensure that the export quotas and extraction and/or production caps work together so as to counteract the perverse, non-conservation-serving signals that China's export quotas send to domestic consumers of rare earths and tungsten, and contests China's assertion that the Panel refused to take China's "real world" evidence into account. The United States submits that China's argument must fail because: (i) the Panel did not conclude, as China argues, that it was forbidden from reviewing China's evidence; (ii) the Panel did, in fact, review the evidence provided by China, but simply found that China had failed to show how the design, structure, architecture, and text of the export quotas showed that the export quotas "related to" conservation; and (iii) the Panel correctly found that China's empirical evidence did not establish a "substantial relationship" to the objective of conservation.

2.97. The United States points to the actual reasoning found in the Panel Reports<sup>200</sup> to illustrate that China's assertions that the Panel "somehow 'excluded'" evidence regarding the effects of China's conservation regime, or that the Panel ignored how the measures "actually work", are "simply wrong".<sup>201</sup> The United States asserts that the Panel correctly focused its attention on the design, structure, architecture, and text of the export quotas, and did not exclude other evidence. Moreover, the Panel addressed China's argument that it had domestic extraction and production targets and found that China had failed to establish that the targets actually restricted Chinese production or, importantly for the perverse signal issue, consumption.

2.98. The United States further considers China's argument to be flawed because it asks the Panel as the trier of fact to accept mere correlation as evidence of a substantial relationship between the

<sup>196</sup> United States' appellee's submission, para. 96 (quoting Panel Reports, *China – Raw Materials*, para. 7.418).

<sup>197</sup> United States' appellee's submission, para. 97 (referring to Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 20).

<sup>198</sup> United States' appellee's submission, para. 97.

<sup>199</sup> United States' appellee's submission, para. 88 (referring to China's appellant's submission, para. 152; and other appellant's submission, para. 83).

<sup>200</sup> United States' appellee's submission, para. 102 (referring to Panel Reports, paras. 7.290 and 7.379).

<sup>201</sup> United States' appellee's submission, para. 102 (referring to China's appellant's submission, paras. 155 and 159; and other appellant's submission, paras. 86 and 90).

measures and conservation. By way of example, the United States refers to China's assertion that, between January 2011 and January 2013, domestic prices for rare earths rose while domestic demand for rare earths decreased, and that these two phenomena were the "actual effects" of its production and extraction targets eliminating the pro-consumption signals sent by the export quotas. The United States contends that China's argument must fail because it does not take into account the number of other factors that could have impacted the domestic prices of and demand for Chinese rare earths between January 2011 and January 2013. One prominent factor impacting demand for all raw materials, which was wholly unrelated to the question of whether China had addressed the non-conservation signals sent by the export quotas, was the lingering effects of the 2008 global crises. The United States also recalls the Panel's finding that China had failed to show that it had "any mechanism to ensure that the export quota and the extraction and/or production caps will work together in such a way as to counteract the perverse signals sent by its export quota to domestic consumers".<sup>202</sup> As a result, China could not establish that any "actual effects" in the domestic market were caused by its conservation regime as opposed to something else, such as Chinese measures to stimulate domestic consumption through subsidies to downstream consuming industries, which would be contrary to conservation. The United States therefore concludes that the flaw in China's argument lies with the "well-known" problem of determining causation<sup>203</sup>, which has led the Appellate Body to focus its analysis under the "relating to" prong of Article XX(g) to the design and structure of the measures at issue. Thus, for the United States, the Panel correctly focused on the design and structure of China's conservation regime, and found that the design and structure did not address the perverse signals sent by the export quotas to domestic consumers.

2.99. In response to China's assertion that the Panel was required to segment its analysis of the different requirements under Article XX(g), and should not have assessed the alleged domestic restrictions as part of its analysis of whether the export quotas are related to conservation, the United States emphasizes that China provides no support for such assertion, and that no such support exists. The United States adds that China's argument that the Panel should not have examined the arguments and evidence submitted by the complainants establishing the "perverse signals" sent by the export quotas to domestic consumers, and should instead have relied exclusively on China's arguments and evidence regarding the signals sent to foreign consumers, introduces an element of discrimination into the "relating to" analysis, which is inconsistent with the language of Article XX(g) of the GATT 1994, and, for this reason, should be rejected.

#### 2.4.2.1.3 Article 11 of the DSU

2.100. The United States asserts that the record of these disputes shows that there is no basis for China's claim that the Panel committed the sort of "egregious error" that would warrant a finding of a violation of Article 11 of the DSU. To the contrary, the record shows that the Panel undertook a thorough examination of the evidence before it and the arguments of the parties. Hence, the United States considers China's assertions to be unfounded and requests the Appellate Body to reject them.

2.101. The United States submits that the Panel had ample support for its determination that the export quotas on rare earths and tungsten send "perverse signals" to domestic consumers. The evidence revealed drastic differences between domestic and foreign prices for rare earths and tungsten, which showed that the export quotas simply shifted consumption to the domestic market, as well as statements and policy documents from Chinese local governments demonstrating that the availability of cheaper or unrestricted rare earths is held out to attract new foreign investment in the rare earth processing industry in China.<sup>204</sup> Hence, the Panel's qualitative reasoning (that export quotas stimulate domestic consumption) was supported by evidence, in particular of the two-tiered pricing structure.

2.102. The United States also points out that, while China asserts that the Panel ignored its pricing data, the Panel found that China's analysis suffered from significant methodological failures related to China's downward revision to foreign prices based on fees associated with export and

<sup>202</sup> United States' appellee's submission, para. 117 (referring to Panel Reports, para. 7.447).

<sup>203</sup> United States' appellee's submission, para. 118 (referring to Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 20).

<sup>204</sup> United States' appellee's submission, para. 122 (referring to Panel Reports, paras. 7.441 and 7.723, in turn quoting Panel Exhibits JE-118 and JE-152).

the fact that China had deducted the export duties on rare earth and tungsten exports. The United States observes that China has not offered any explanation as to how the Panel erred when it found that China's pricing data were unreliable "based on these failures".

2.103. The United States avers that the Panel addressed the evidence regarding China's domestic extraction and production targets, and found that China had failed to establish that the targets actually restricted Chinese production or, most importantly for the perverse signal issue, consumption. Indeed, the Panel expressly found that, contrary to China's argument, the combined effect of the extraction, production, and export quotas does not establish a maximum level of domestic consumption.

2.104. Concerning China's argument on the limited relocation of rare earth industries to China, the United States contends that there was ample support for the Panel's finding that the export quotas encouraged relocation of downstream rare earth-consuming industries to China. The Panel cited evidence supplied by the complainants containing statements from Chinese officials, in which they suggested that industries relocate to China in order to avoid the export quotas.<sup>205</sup> The United States also contests China's assertion that relocation of industries did not happen in the rare earth sector (as a function of the export quotas) after 2008, when China tightened the export quotas of rare earths, noting that the Panel fully addressed China's argument and rightly rejected China's "unwarranted cherry-picking of the data".<sup>206</sup>

2.105. The United States considers that China's argument that the Panel engaged in incoherent reasoning fares no better. For the United States, China's argument is flawed as it is easy to see how a Member might have a *bona fide* conservation regime that does not account for the stimulating effects that an export quota has on domestic consumption. As is the case here, a Member may not have a domestic consumption restriction, or may not set its domestic production restriction at a level that actually restricts demand.

#### **2.4.2.2 Article XX(g) – "Made effective in conjunction with" restrictions on domestic production or consumption**

2.106. The United States requests the Appellate Body to reject China's allegations that the Panel failed to properly interpret and apply the clause "made effective in conjunction with restrictions on domestic production or consumption" in Article XX(g) of the GATT 1994 and to uphold the Panel's findings. The United States further requests the Appellate Body to reject China's claim that the Panel failed to make an objective assessment of the matter contrary to Article 11 of the DSU.

##### **2.4.2.2.1 The Panel's interpretation of the phrase "made effective in conjunction with" restrictions on domestic production or consumption**

2.107. The United States maintains that the Panel's interpretation and application of the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994 are correct. The Panel's interpretation of this phrase is in accordance with the ordinary meaning of the terms of Article XX(g) in their context and in the light of the object and purpose of the GATT 1994, and is also consistent with and supported by the interpretation of the same phrase made by the Appellate Body.

2.108. The United States argues that, for China, "working together with" means simply that a domestic restriction is working and a trade restriction is working – i.e. that the two restrictions do not need to bear any particular conjunctive relationship to each other. Not only is this different from the Appellate Body's interpretation of the phrase "made effective in conjunction with", but such an approach renders these words superfluous. On China's approach, the second clause of subparagraph (g) could simply state "if restrictions on domestic production or consumption also exist". However, Article XX(g) was not so drafted. The United States also points out that the mere fact that "even-handedness" is not treaty text does not render it void as a mechanism to inquire whether the non-conforming measure is "made effective in conjunction with" domestic restrictions. If this particular phrase were not understood, as the Panel used it, to summarize the conjunctive relationship required by the text of Article XX(g), then the treaty interpreter would necessarily use similar phrases and concepts in interpreting and applying Article XX(g). What is important is that

<sup>205</sup> United States' appellee's submission, para. 126 (referring to Panel Exhibits JE-118 and JE-152).

<sup>206</sup> United States' appellee's submission, paras. 127 and 128 (referring to Panel Reports, para. 7.633).

the second clause of Article XX(g) – which is unique to subparagraph (g) of Article XX and its conservation purpose, without analogy in other subparagraphs of Article XX – has been correctly and consistently interpreted as a requirement ensuring that the protection afforded by the Article XX exception applies only to legitimate conservation measures. For the United States, Article XX(g) serves to ensure that the shared right to trade in the world's limited resources is accompanied by the shared responsibility to bear the burden of conserving those resources, and the Panel's use of the term "balance" reflects the same concept as expressed by the Appellate Body in *US – Gasoline* and *US – Shrimp*.<sup>207</sup>

2.109. With regard to China's allegation that the Panel erred in its interpretation in finding that the analysis of "even-handedness" is limited to an examination of the structure and design, to the exclusion of evidence regarding the effects of, the measure, the United States refers to the Appellate Body reports in *US – Gasoline* and *US – Shrimp*, arguing that the Appellate Body assessed the broad structural correspondence between the non-conforming measure and the domestic restriction to determine if the former operated "in conjunction with" the latter.<sup>208</sup>

2.110. In response to China's argument that the fact that the Appellate Body eschewed an inquiry into the relative burdens borne by foreign and domestic interests in *US – Gasoline* suggests that there is no requirement to balance the burden of conservation under Article XX(g), the United States contends that the Appellate Body's discussion of the "even-handedness" requirement in *US – Gasoline* only identified the logical boundaries of that requirement.<sup>209</sup> The Appellate Body did not address what relative treatment of domestic and foreign interests, within those logical boundaries, was required in order to qualify as "even-handed". The United States submits that the Appellate Body's reasoning in *US – Gasoline* does not stand for the proposition that Article XX(g) permits Members to impose measures that advantage their own domestic interests at the expense of the interests of other Members as long as some level of restriction that is greater than nothing is imposed on domestic supply, and adds that the panel in *China – Raw Materials* explicitly rejected such a proposition.<sup>210</sup>

2.111. In response to China's argument that the Panel's "even-handedness" analysis renders the chapeau of Article XX of the GATT 1994 superfluous, the United States argues that China improperly conflates the structural correspondence inquiry under the "even-handedness" criterion in Article XX(g) with the application inquiry under the chapeau.

#### **2.4.2.2.2 The Panel's application of the "made effective in conjunction with" requirement**

2.112. The United States contends that the Panel did not err in its application of Article XX(g) of the GATT 1994 by focusing on the structure, design, and architecture of the export quotas and domestic restrictions when assessing whether they "work together". The Appellate Body in *US – Gasoline* specifically avoided undertaking the type of "effects test" articulated by China. The United States contends, moreover, that the alleged "actual effects" proffered by China in its appeals were specifically addressed, and rejected, by the Panel in the course of the proceedings.<sup>211</sup>

2.113. The United States maintains that China's position would leave the determination of whether the "even-handedness" requirement is met to the vagaries of the marketplace. Moreover, it avoids the problem of causation and is based on a presumption that correlation (e.g. a lack of quota fill for rare earths) is evidence of the export quota and the domestic restriction working together to promote conservation. China's position does not account for the numerous other factors that could have impacted the rate at which the export quota on rare earths was used, or China's domestic demand for rare earths, tungsten, and molybdenum. The United States points in particular to the lingering effects of the 2008 global crisis as one prominent factor impacting

<sup>207</sup> United States appellee's submission, para. 149 (quoting Appellate Body Reports, *US – Gasoline*, p. 18, DSR 1996:I, p. 18; and *US – Shrimp*, para. 143).

<sup>208</sup> United States appellee's submission, paras. 151-155 (quoting Appellate Body Reports, *US – Gasoline*, p. 21, DSR 1996:I, p. 20; and *US – Shrimp*, paras. 121 and 144).

<sup>209</sup> United States appellee's submission, paras. 158 and 159 (referring to Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 20).

<sup>210</sup> United States' appellee's submission, para. 160 (referring to Panel Reports, *China – Raw Materials*, para. 7.464).

<sup>211</sup> United States' appellee's submission, para. 163.



demand for all raw materials, which was wholly unrelated to the question of whether the export quotas and domestic restrictions worked together to promote conservation.

2.114. Furthermore, the United States argues that China fails to address how its analysis under subparagraph (g) would substantively differ from the subsequent analysis that must be conducted pursuant to the chapeau of Article XX, in which a panel focuses on the application of the non-conforming measure. For the United States, China fails to provide a concrete analysis as to what should be the practical differences under China's proposed approach in the analysis under the chapeau and in the subparagraphs of Article XX.

2.115. Moreover, the United States refers to the Appellate Body's statement in *China – Raw Materials* that Article XX(g) "permits trade measures relating to the conservation of exhaustible natural resources when such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource", and submits that the best way to determine how a measure operates is to focus on the measure's structure, design, and architecture.<sup>212</sup>

2.116. With regard to China's reference to the Appellate Body's finding in *US – Gasoline* that "predictable effects" may be relevant to the analysis under Article XX(g), the United States contends that China's argument conflates the "predictable effects" of a measure, which are discovered through a review of its structure, design, and architecture, with the state of being of the market, which China mischaracterizes as the "actual effects" of the measure.<sup>213</sup> However, this state of being of the market may not be a logical result of the structure, design, and architecture of the measure. In any event, the United States argues, the Panel addressed and rejected arguments raised by China relating to the effects of its regulatory scheme in various parts of its Reports.

#### 2.4.2.2.3 Article 11 of the DSU

2.117. The United States recalls Appellate Body statements on what must be established to prove an Article 11 of the DSU violation, including in *EC – Fasteners (China)*.<sup>214</sup> In its appeals, however, China misstates the Panel's reasoning and ignores that the Panel expressly analysed certain evidence. The United States further argues that China has failed to show that the Panel's assignment of greater weight value to certain facts was in error. In particular, the United States contests China's implication that the Panel was inconsistent in assessing the facts at issue because, when it was disadvantageous to China, the Panel ignored the structure and design of the measures at issue in favour of the "actual effects". The United States alleges that China misstates the Panel's reasoning and points to statements by the Panel indicating that evidence submitted by China was "insufficient to establish" China's position or "cast doubt on" China's assertion.<sup>215</sup>

2.118. In response to China's assertion that the Panel erred because it found that China had developed a *bona fide* conservation regime for rare earths, tungsten, and molybdenum, and yet did not find that the conservation regime was sufficient to invoke Article XX(g) of the GATT 1994, the United States contends that China's argument is baseless because the standard under Article XX(g) is whether the Member maintains "domestic restrictions on production or consumption", and not merely whether it has a conservation regime. In response to China's allegation that the Panel applied a double standard in its "even-handedness" analysis, the United States contends that, contrary to what China alleges, the Panel assessed the design and structure of the measures at issue for both the export measures and the domestic restrictions.<sup>216</sup>

<sup>212</sup> United States' appellee's submission, para. 169 (quoting Appellate Body Reports, *China – Raw Materials*, para. 356).

<sup>213</sup> United States' appellee's submission, paras. 170 and 172 (referring to China's other appellant's submission, paras. 186 and 189; and Appellate Body Report, *US – Gasoline*, pp. 21-22, DSR 1996:I, p. 20).

<sup>214</sup> United States' appellee's submission, para. 177 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442).

<sup>215</sup> United States' appellee's submission, paras. 179 and 180 (referring to Panel Reports, paras. 7.554 and 7.509).

<sup>216</sup> The United States referred to, *inter alia*, paragraphs 7.447, 7.509, and 7.554 of the Panel Reports.

## 2.5 Arguments of the European Union – Appellee (DS432) and third participant (DS431 and DS433)

### 2.5.1 Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol

2.119. The European Union submits that the Appellate Body should reject China's appeal and affirm the Panel's finding, and the Appellate Body's finding in *China – Raw Materials*, that Article XX of the GATT 1994 is not available as a defence to a breach of Paragraph 11.3 of China's Accession Protocol.

2.120. The European Union notes that China has not appealed, either directly or consequentially, the Panel's conclusions that: (i) the export duties at issue in these disputes are inconsistent with Paragraph 11.3 of China's Accession Protocol; (ii) Article XX of the GATT 1994 is not available to justify such inconsistency; and (iii) in any event, the export duties at issue are not justified under subparagraph (b) or the chapeau of Article XX. Thus, in the European Union's view, "China's appeal is incapable of resulting in the modification or reversal" of the Panel's conclusions and "incapable of contributing ... to securing a positive solution" to these disputes.<sup>217</sup> The European Union submits that the Appellate Body has the inherent power to issue summary judgment on an accelerated basis and requests the Appellate Body to do so in the particular circumstances of these appeals. Referring to China's statement that it has filed these appeals to "seek clarification" of certain "systemic" matters, the European Union further argues that Article IX:2 of the Marrakesh Agreement provides the exclusive procedure for raising interpretative issues.

#### 2.5.1.1 Paragraph 1.2 of China's Accession Protocol

2.121. The European Union disagrees with China that the second sentence of Paragraph 1.2 of China's Accession Protocol means that Paragraph 11.3 of the Protocol becomes an integral part of the GATT 1994 by virtue of an "intrinsic relationship" between Paragraph 11.3, on the one hand, and Articles II and XI of the GATT 1994, on the other hand. According to the European Union, the Panel's conclusion that the term "the WTO Agreement" in Paragraph 1.2, second sentence, of China's Accession Protocol means the Marrakesh Agreement alone is strongly supported by the convention of definition reflected in the first recital of the preamble of China's Accession Protocol. In that preamble, and in accordance with convention, the term "the WTO Agreement" is defined as the Marrakesh Agreement Establishing the World Trade Organization. The European Union also draws attention to paragraph 1 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, the General Interpretative Note to Annex 1A, and the preamble of the Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization, all of which adopt the same convention of definition.

2.122. The European Union emphasizes that Part I of China's Accession Protocol, consisting of Paragraphs 1.1, 1.2, and 1.3, consistently uses the term "the WTO Agreement" to refer to the Marrakesh Agreement alone. In particular, Paragraph 1.1 provides that "[u]pon accession, China accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO." Both the terms "the WTO Agreement" and "that Agreement" in Paragraph 1.1 mean the Marrakesh Agreement alone. Moreover, the first sentence of Paragraph 1.2, which refers to the WTO Agreement "as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession", is "boilerplate" language that is also found elsewhere in the covered agreements, such as paragraph 1 of the language incorporating the GATT 1994 into Annex 1A.<sup>218</sup> Used in Paragraph 1.2, first sentence, of China's Accession Protocol, this language was to cover the eventuality that the Marrakesh Agreement might be rectified, amended, or modified during the intervening period between the Ministerial Conference decision regarding the accession and the ratification of the accession protocol by China.

2.123. The European Union argues that, contrary to China's claims, the Panel's assessment of Paragraph 1.2 was not based on a "superficial grammatical analysis" or a "serious

<sup>217</sup> European Union's appellee's submission, para. 4.

<sup>218</sup> European Union's response to questioning at the oral hearing.



misunderstanding" of the rules of treaty interpretation under the Vienna Convention.<sup>219</sup> Rather, in addition to its analysis of the relevant provisions of China's Accession Protocol, the Panel also examined the context provided by the "integral parts" language in Article II:2 of the Marrakesh Agreement. The Panel found that, like the same language in Article II:2, the "integral part" language of Paragraph 1.2 also concerns one agreement being an integral part of another agreement (i.e. the Marrakesh Agreement), and not specific provisions of one agreement being an integral part of another agreement.

2.124. The European Union further maintains that, like all other provisions of the Marrakesh Agreement, Article II:2 uses the term "this Agreement" to refer to the Marrakesh Agreement only. Otherwise, the provision would contain "an infinite re-iteration" that the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto are integral parts of themselves, which would be "manifestly absurd".<sup>220</sup> The European Union sees no room for China's theory that specific provisions that are "intrinsically related" could be transported from one agreement to another in such a way as to alter the express terms of the other agreement. The European Union maintains that the same is true for exceptions, such as Article XX of the GATT 1994, which are expressly limited by their own terms to the particular agreements in which they are contained. Exceptions in one agreement can be reiterated in another agreement if the latter specifically and expressly refers to those exceptions. According to the European Union, the general "integral part" language of Article II:2 of the Marrakesh Agreement, combined with the improvised concept of "intrinsically related" that China derives from the use of the same "integral part" language in Paragraph 1.2 of its Accession Protocol, does not have this legal consequence. Yet, accepting China's position would have the implication that exceptions in one covered agreement can be read into another covered agreement even in the absence of express language to that effect.

2.125. The European Union submits that the Panel properly considered the relevance of Paragraph 1 of the language incorporating the GATT 1994 into Annex 1A, which contains an exhaustive list of what the GATT 1994 consists of, and does not refer to post-1994 accession protocols. The European Union submits that it would have been possible to include in this list the post-1994 accession protocols to the extent they would contain provisions "intrinsically related" to the GATT 1994, but no such provision exists. Furthermore, as the Panel rightly found, explicit provisions incorporating schedules of concessions into the GATT 1994 would have been unnecessary if this were achieved by Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol. Noting China's argument that explicit provisions incorporating schedules are necessary because schedules change from time to time, the European Union contends that China identifies nothing in these provisions that make them more apt to achieve dynamic (rather than static) incorporation compared to Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol.

2.126. The European Union submits that the Appellate Body's reasoning in *China – Publications and Audiovisual Products* does not support China's position in the present disputes. In *China – Publications and Audiovisual Products*, after a careful analysis of Paragraph 5.1, including the phrase "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement", the Appellate Body discerned a reference to Article XX of the GATT 1994. Thus, the exception in Article XX of the GATT 1994 is "pulled into" China's Accession Protocol by Paragraph 5.1.<sup>221</sup> In contrast, China is seeking to "push the obligation in Paragraph 11.3 of China's Accession Protocol into the GATT 1994, using Paragraph 1.2".<sup>222</sup> The European Union agrees with China that the Appellate Body read the term "the WTO Agreement" in Paragraph 5.1 of China's Accession Protocol as "referring to the *WTO Agreement* as a whole, including its Annexes".<sup>223</sup> However, "referring to" and being "an integral part of" do not mean the same thing, because one agreement can refer to another agreement without either becoming an integral part of the other. Thus, it does not follow from the Appellate Body's reasoning that the reference to "the WTO Agreement" in Paragraph 1.2 of China's Accession Protocol makes the Protocol, or any part of it, an "integral part" of one of the covered agreements.

<sup>219</sup> European Union's appellee's submission, para. 91 (quoting China's appellant's submission, paras. 119 and 121).

<sup>220</sup> European Union's appellee's submission, para. 84.

<sup>221</sup> European Union's appellee's submission, para. 97. (emphasis omitted)

<sup>222</sup> European Union's appellee's submission, para. 97. (emphasis omitted)

<sup>223</sup> European Union's appellee's submission, para. 98 (quoting Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222).

2.127. Finally, the European Union highlights that Paragraph 11.3 of China's Accession Protocol, by its own specific and express terms, contains exceptions with respect to Annex 6 and Article VIII of the GATT 1994, but not Article XX of the GATT 1994. Thus, if the specific provisions of Paragraph 11.3 do not pull the exception in Article XX of the GATT 1994 into Paragraph 11.3, it is difficult to understand how the general provision of Paragraph 1.2 pushes the obligation in Paragraph 11.3 into the GATT 1994.

#### **2.5.1.2 Article XII:1 of the Marrakesh Agreement**

2.128. The European Union disagrees with China that the second sentence of Article XII:1 of the Marrakesh Agreement means that Paragraph 11.3 of China's Accession Protocol is an integral part of the GATT 1994. The European Union submits that the word "Such" at the beginning of the second sentence of Article XII:1 refers to the term "accede" in the first sentence, which, in turn, provides that the relevant state or customs territory may accede to the Marrakesh Agreement. The second sentence of Article XII:1 thus refers to a legal event whereby a state or customs territory becomes a Member of the WTO. Therefore, the term "apply" in the second sentence is not referring to the application of a legal instrument. Rather, it confirms that the act of accession must be operative with respect to both the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. As a result, the acceding Member cannot "pick and choose" to which agreement it accedes. In the European Union's view, the above interpretation is not changed by the phrase "on terms to be agreed" in the first sentence, because the words "[s]uch accession" in the second sentence are not referring to the legal instruments embodying the terms of accession.

2.129. The European Union further contends that this interpretation does not render Article II:2 of the Marrakesh Agreement redundant, because the general principle of the single undertaking finds expression in diverse provisions of the covered agreements, including the Marrakesh Agreement. These provisions include Article II of the Marrakesh Agreement (scope of the WTO), Article XI (original membership), Article XII (accession), Article XIII (non-application of the Multilateral Trade Agreements between particular Members), Article XIV (acceptance, entry into force, and deposit), and Article XV (withdrawal). In addition to Article II, therefore, Article XII provides that, in the context of accession, the principle of the single undertaking also applies. Article XII thus does not have the different or additional meaning proposed by China whereby Paragraph 11.3 of China's Accession Protocol becomes an integral part of the GATT 1994.

#### **2.5.1.3 The relationship of accession protocol provisions with the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto**

2.130. The European Union considers that China's arguments are not clear and could be understood in at least three ways. First, China appears to introduce a "double existence" theory by arguing that a provision of China's Accession Protocol could exist both in the Protocol and in one of the covered agreements to which the provision intrinsically relates.<sup>224</sup> Such a theory, however, does not assist China's position, because China could still breach Paragraph 11.3 of its Accession Protocol and not benefit from any exception contained therein. Second, China seems to argue that all of the provisions of its Accession Protocol are somehow transported by Paragraph 1.2 into the covered agreements to which they intrinsically relate, leaving China's Accession Protocol an "empty shell".<sup>225</sup> Such a theory is "implausible and contradicted" by the specific provisions of China's Accession Protocol that import, by cross-reference, specific provisions of the covered agreements.<sup>226</sup> Finally, China appears to assert that specific provisions of its Accession Protocol must be interpreted and applied as an integral package of rights and obligations together with *all* of the provisions of the covered agreements to which such Accession Protocol provisions intrinsically relate. However, this is not generally understood to be the consequence of the "integral parts" language of Article II:2 of the Marrakesh Agreement, or any other provision giving expression to the principle of the single undertaking. The European Union points out, in this regard, that Article XX of the GATT 1994 is not generally understood to be available as an exception to a breach of provisions in the other covered agreements.

2.131. Despite such uncertainty, the European Union seeks to respond to China's arguments on its own terms. In particular, the European Union emphasizes that China's "intrinsically related" test

<sup>224</sup> European Union's appellee's submission, para. 71.

<sup>225</sup> European Union's appellee's submission, para. 71.

<sup>226</sup> European Union's appellee's submission, para. 71.

is not treaty language and cannot be implied from Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol. The European Union also stresses that China's reference to "self-contained" agreements is equally without basis in either the covered agreements or China's Accession Protocol. With regard to the enforceability of China's Accession Protocol, the European Union reiterates that, because China's Accession Protocol is an integral part of the Marrakesh Agreement by virtue of Paragraph 1.2, and because the Marrakesh Agreement is listed as a covered agreement in Appendix 1 to the DSU, China's Accession Protocol is also covered by the DSU. Moreover, the enforceability of China's Accession Protocol under the DSU, and China's consent to such enforceability, is apparent from the mandatory language used throughout China's Accession Protocol.

2.132. The European Union underlines that Article II:2 of the Marrakesh Agreement provides relevant context for understanding the term "integral part" in Paragraph 1.2 of China's Accession Protocol. Under Article II:2, each of the Multilateral Trade Agreements, such as the GATT 1994, is an integral part of the Marrakesh Agreement. This does not mean that the GATT 1994 is an integral part of another covered agreement. The European Union employs, in this connection, an analogy whereby the front and back wheels of a bicycle are each an integral part of the bicycle, but neither wheel is an integral part of the other. Extending this analogy to Article XII:1, the European Union argues that the second sentence of Article XII:1 indicates that, to buy the bicycle, one must buy the whole and does not have the option to buy select parts of it. Furthermore, by virtue of Paragraph 1.2 of China's Accession Protocol, China brings with it its own saddle bag (its Accession Protocol) and this is also an integral part of the bicycle (the WTO Agreement). The European Union reiterates that neither the saddle bag nor any part of it is an integral part of either wheel. As regards the "WTO House" analogy used by China<sup>227</sup>, the European Union contends that China's Accession Protocol is akin to an additional room inside the House.<sup>228</sup>

2.133. The European Union further argues that Article 30(3) of the Vienna Convention, which states that "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty", is inapposite because there is no question of "incompatibility" between the provision at issue – that is, Paragraph 11.3 of China's Accession Protocol – and the GATT 1994. Even if there were a conflict, the European Union maintains that Article 30(3) of the Vienna Convention would indicate that the later provision – namely, Paragraph 11.3 – should apply. Hence, as the exceptions contained in the GATT 1994 are not mentioned in Paragraph 11.3, such exceptions would not apply pursuant to the rule under Article 30(3). The European Union therefore does not understand how China's reference to Article 30(3) of the Vienna Convention supports China's position.

2.134. Finally, the European Union recalls that, in *China – Raw Materials*, the Appellate Body concluded that a proper interpretation of Paragraph 11.3 of China's Accession Protocol indicates that the exceptions under Article XX of the GATT 1994 are not available to China to justify a breach of Paragraph 11.3. The European Union submits that it concurs with this conclusion and with the Panel's analysis and findings in the present disputes. The European Union stresses that it legitimately expects that, absent cogent reasons, the Appellate Body would reach the same conclusion in the present disputes.

## 2.5.2 Article XX(g) of the GATT 1994

### 2.5.2.1 Article XX(g) – "Relating to" the conservation of exhaustible natural resources

2.135. The European Union requests the Appellate Body to reject China's request to find that the Panel erred in its interpretation and application of the "relating to" requirement in Article XX(g) of the GATT 1994, as well as China's request for reversal of the Panel's findings in this regard. The European Union further requests the Appellate Body to reject China's allegations of error under Article 11 of the DSU.

<sup>227</sup> See paragraph 2.25 of these Reports.

<sup>228</sup> European Union's response to questioning at the oral hearing.

### 2.5.2.1.1 The Panel's interpretation of the term "relating to"

2.136. The European Union considers that China's claim that the Panel erred in its interpretation of the term "relating to" is based on a "misreading" of the Panel's analysis, and is without merit.<sup>229</sup>

2.137. The European Union submits that the Panel was correct, in terms of its analytical approach, to focus the analysis under Article XX(g) of the GATT 1994 on the design and structure of the measures at issue. Indeed, the European Union observes, this is precisely what China itself asked the Panel to do.<sup>230</sup> The European Union explains that, in the context of an Article XX(g) defence, a panel should first examine, in accordance with the conservation of natural resources objective of Article XX(g), the consistency of the measure at issue in terms of its design and structure. Only then, if necessary, should the focus of the examination turn to the application of the measure in the context of the chapeau analysis.

2.138. The European Union expresses the view that, in conducting an analysis under Article XX(g), panels are not precluded from looking at aspects other than the design and structure of the measure at issue. Indeed, panels should always give full consideration to all the relevant facts and all the relevant circumstances in any given case. However, once a panel is satisfied that, due to a fundamental deficiency in the design and structure of the measure, no genuine link between the measure and the conservation objective can be established, other facts are no longer relevant. According to the European Union, this is so because neither the evidence of instances of the application of the measure, nor its potential "aptness" to contribute to conservation in specific factual circumstances, can affect the conclusion that the measure cannot be provisionally justified, because the genuine link with the declared objective is broken at the level of design and structure.<sup>231</sup>

2.139. For the European Union, even China's own line of argument on appeal suggests that, when a clear conclusion can be reached based on the design and structure, scrutiny of other elements becomes redundant. China acknowledges that reliance on evidence of actual operation "may not be necessary where a measure can be shown, on the basis of its design and structure alone, to relate to conservation, or if there is a complete lack of evidence regarding the operation of a regulatory scheme".<sup>232</sup> The European Union points out that, in any event, contrary to what China alleges, in considering whether a "close" and "substantial" relationship can be said to exist between the measures at issue and the conservation objective, the Panel considered not only the design and structure of China's export quota regime but also the regulatory context in which its export quotas operate.

2.140. The European Union disagrees with China's arguments regarding "contribution", which the European Union views as an attempt by China to set forth a different, less rigorous standard of "relating to". According to the European Union, China's arguments suggest that, if a measure makes or is able to make a contribution to conservation, "regardless of how insignificant that contribution may be", the measure should be regarded as "related to" conservation within the meaning of Article XX(g).<sup>233</sup> According to the European Union, China's position is contrary to established jurisprudence that measures must bear a "substantial, close, and real" relationship to the conservation objective and that a merely "incidental" or "inadvertent" connection will not suffice.

### 2.5.2.1.2 The Panel's application of the "relating to" requirement

2.141. The European Union emphasizes that the reasoning of the Panel with respect to the "signalling"<sup>234</sup> function of the export quotas has to be taken into account as a whole, since what China in its appeal refers to as "findings" are, in fact, only fragments of the Panel's reasoning on

<sup>229</sup> European Union's appellee's submission, paras. 17 and 140.

<sup>230</sup> European Union's appellee's submission, para. 151 (referring to China's first written submission to the Panel, paras. 44-46; and second written submission to the Panel, para. 52).

<sup>231</sup> European Union's appellee's submission, paras. 153 and 154.

<sup>232</sup> European Union's appellee's submission, para. 157 (referring to China's appellant's submission, paras. 142 and 151; and other appellant's submission, paras. 73 and 82).

<sup>233</sup> European Union's appellee's submission, para. 164.

<sup>234</sup> European Union's appellee's submission, paras. 141-144 (referring to Panel Reports, paras. 7.443-7.448 and 7.725).

"signalling".<sup>235</sup> The European Union explains that the Panel considered that export quotas can send two signals: (i) on the one hand, they can transmit a signal to foreign consumers, investors, and innovators to explore and develop alternative sources of supply and thus reduce demand for limited Chinese rare earth reserves; and (ii) on the other hand, they can send a signal to domestic consumers to increase demand domestically. The Panel correctly observed that these two signals are competing. The Panel then examined whether China has put in place a mechanism that would, for the specific case of China's export quotas, address the two competing signals in a manner that would be conducive to the achievement of the declared conservation goal. The Panel addressed China's arguments that various recycling projects, efforts to modify industrial designs of downstream products so that they use less rare earths, and the development of rare earth substitutes are underway, but did not consider this to be sufficient. The Panel correctly concluded that a connecting mechanism between the two signals at the level of design and structure and not at the level of actual application at a given point in time is needed in order to demonstrate the existence of a "close", "real", "rational", and "substantial" relationship with the conservation objective.<sup>236</sup>

2.142. The European Union understands that, on appeal, China criticises the Panel for concluding that any potential contribution by its export quotas in transmitting conservation-related signals to foreign consumers is liable to be undone by the "perverse signals" that the export quotas send to the Chinese domestic market, and contends that the "perverse signals" are a "presumption" that is irrelevant for the assessment of whether a measure is related to conservation.<sup>237</sup> Referring to the entirety of the Panel's analysis, the European Union emphasizes that, when it is apparent, as it was here, that there are competing signals transmitted to foreign users and to domestic users, the Panel could not ignore this in assessing whether a link to conservation exists.

2.143. The European Union also contests China's argument that the existence of production and extraction caps is capable, "as a matter purely of structure and design"<sup>238</sup>, of mitigating the perverse signals that export quotas may send to domestic users. Instead, the European Union considers that whether or not there is a genuine link to conservation (and thus access to a general exception under Article XX of the GATT 1994) cannot depend on chance. If the measure is to be considered as related to conservation by virtue of its structure and design, the link between the measure and conservation cannot be potential and conditional.

2.144. The European Union adds that, even if China were correct and the Panel was required to consider evidence about the actual operation of the export quotas for rare earths and tungsten pursuant to Article XX(g), the evidence on the record supports and reinforces the conclusion reached by the Panel, based on the design and structure of the export quotas – i.e. that the export quotas at issue cannot be considered as related to conservation. The Panel considered not only the design and structure of China's export quota regime, but also the regulatory context in which its export quotas operate. For the European Union, consideration of regulatory context is simply part of appreciating a particular measure, and is distinct from a consideration of how it applies and what its effects are. Hence, the European Union submits that the Panel was correct in concluding that China did not establish the existence of a genuine link to conservation and that China's arguments to the contrary should be rejected.

2.145. The European Union disagrees with China's assertion that the Panel's examination of the domestic restrictions in its analysis under "relating to" was in error. The European Union submits that even if this were the case and the Panel had brought into the "relating to" test considerations which are relevant in the context of "even-handedness", this would not be fatal for the conclusion, since it is well-established that a measure which is not even-handed also cannot be considered as related to conservation within the meaning of Article XX(g).<sup>239</sup>

2.146. Furthermore, the European Union stresses that the Panel did not make the finding that China seeks to attribute to it – i.e. that China's export quotas do or at least can contribute to

<sup>235</sup> European Union's appellee's submission, para. 141.

<sup>236</sup> European Union's appellee's submission, para. 144.

<sup>237</sup> European Union's appellee's submission, paras. 161 and 162 (referring to China's appellant's submission, para. 164; and other appellant's submission, para. 95).

<sup>238</sup> European Union's appellee's submission, para. 174.

<sup>239</sup> European Union's appellee's submission, para. 173 (referring to Panel Reports, paras. 7.240, 7.327, and 7.328; Appellate Body Report, *US – Gasoline*, pp. 20-21, DSR 1996:I, pp. 19-20; and Panel Reports, *China – Raw Materials*, paras. 7.406 and 7.465).

conservation within the meaning of Article XX(g). According to the European Union, what is clear from the Panel Reports is that the Panel considered that export quotas can involve two signals: (i) on the one hand, they can transmit a signal to foreign consumers, investors, and innovators to explore and develop alternative sources of supply and thus reduce demand for limited Chinese rare earth reserves; and (ii) on the other hand, they can send a signal to domestic consumers to increase demand domestically. In the European Union's view, the Panel correctly observed that these two signals are competing, and the Panel could not ignore this in assessing the existence of a link to conservation.

2.147. Finally, the European Union notes that China does not even attempt to explain to what extent its request to reverse the Panel's conclusions that the export quotas at issue are "not related to" conservation could be considered as properly grounded, in view of the other findings by the Panel, which China does not appeal, on the other functions of the export quotas at issue. The European Union highlights that the Panel rejected five other arguments advanced by China as to why the design and architecture of the measure at issue demonstrate that the export quota for rare earths "relates to" conservation.<sup>240</sup> Therefore, the European Union considers that the contribution made by the signalling function alleged by China would in any event be insufficient to show that there is a genuine link between the export quotas at issue and the objective of conservation within the meaning of Article XX(g).

#### 2.5.2.1.3 Article 11 of the DSU

2.148. The European Union notes that the relevance of China's claims under Article 11 of the DSU rests on the validity of its claims that the Panel erred in focusing on the design and structure of the export quotas, and that the European Union has already explained why these claims are without merit. The European Union adds that, even if China were correct and the Panel was required to consider evidence about the actual operation of the export quotas for rare earths and tungsten pursuant to Article XX(g) of the GATT 1994, there is no basis for a finding that the Panel failed to comply with its duties under Article 11 of the DSU. Contrary to what China alleges on appeal, the evidence on the record supports and reinforces the conclusion reached by the Panel that the export quotas cannot be considered as related to conservation.

2.149. In response to China's allegation that there is no evidentiary basis for the transmission by the export quotas of "perverse signals" to China's domestic market, the European Union submits that, contrary to what China alleges, the Panel's analysis on the existence of "perverse signals" of export quotas does not depend on a mere presumption of the existence of a general effect of an export quota. The complainants provided evidence that the existence of perverse signals is confirmed by standard economic theory. The complainants also provided evidence that, while the export quotas may be capable of transmitting signals to foreign users that they should try to find alternative sources of supply (or consume less if they cannot), at the same time, they stimulate consumption by domestic users (which are already by far the largest consumers of these products). Additionally, the complainants provided evidence of an express invitation to foreign users to relocate to China.<sup>241</sup>

2.150. The European Union stresses that most of the arguments and exhibits that China now claims were not considered or given sufficient weight by the Panel in the context of the application of the "related to" test, were in fact duly and expressly considered and rejected in the context of the Panel's analysis elsewhere in the Reports. This includes: (i) the pricing data submitted by China; (ii) China's arguments that unfilled export quotas cannot cause any difference between domestic and foreign prices; (iii) China's evidence on the narrowing of price gaps for certain rare

<sup>240</sup> European Union's appellee's submission, paras. 179-185 (referring to Panel Reports, paras. 7.426, 7.429-7.430, 7.436, 7.439, 7.447, 7.451, 7.452, 7.462-7.471, and 7.478-7.485). At paragraph 179 of its appellee's submission, the European Union lists the five additional arguments as follows:

(a) the export quota prevents smuggling and/or the export of illegally extracted rare earth products; (b) the export quota reduces domestic demand for illegally extracted and/or produced rare earth products, and thus enforces and strengthens the extraction and production quotas; (c) ...; (d) the export quota works as a "safeguard" against "speculative surges" in demand, which would undermine sustainable development; (e) the export quota enables China to "allocate" the limited supply of rare earth resources; and (f) the way in which the export quota is established "relates to" conservation.

<sup>241</sup> European Union's appellee's submission, paras. 205 and 206 (referring to Panel Reports, paras. 7.441, 7.632, 7.633, 7.723, and 7.824; and Panel Exhibits CHN-157, JE-152, JE-183, and JE-196).



earth metals; (iv) evidence allegedly showing that domestic rare earth consumers reduced their consumption of rare earth products due to an increase in prices; and (v) China's allegation that it has put in place production and consumption caps that impose effective restrictions.<sup>242</sup>

2.151. With respect to China's allegation that the Panel disregarded evidence submitted by China confirming the existence of positive conservation effects of export quotas, the European Union notes that China bases its argument on the premise that "conservation" within the meaning of Article XX can be pursued through market segmentation. For the European Union, this is incorrect. In any event, even if this were permissible, the European Union contends that the complainants demonstrated that the potentially constraining effect on overseas consumption is cancelled out by perverse effects stimulating domestic consumption. They also showed that export quotas (and the manner in which China sets and administers them) generate price volatility and uncertainty on the world market, thus creating an environment that is unfavourable for long-term investment in new mining projects, and thereby undermining the alleged reason of their existence.

2.152. In the European Union's view, contrary to China's allegations, the record shows that the Panel in no way exceeded its authority as trier of fact. The Panel duly considered all the arguments and evidence presented to it and the Panel Reports show that all factual findings by the Panel have a proper basis in that evidence and are accompanied by coherent and adequate reasoning by the Panel. Consequently, the European Union submits that there is no basis for China's claim that the Panel made an error that would justify a finding that the Panel failed to comply with its duties under Article 11 of the DSU.

#### **2.5.2.2 Article XX(g) – "Made effective in conjunction with" restrictions on domestic production or consumption**

2.153. The European Union requests the Appellate Body to reject China's allegations that the Panel failed properly to interpret and apply the clause "made effective in conjunction with restrictions on domestic production or consumption" in Article XX(g) of the GATT 1994. The European Union further requests the Appellate Body to reject China's claim that the Panel failed to make an objective assessment of the matter contrary to Article 11 of the DSU.

##### **2.5.2.2.1 The Panel's interpretation of the phrase "made effective in conjunction with" restrictions on domestic production or consumption**

2.154. The European Union contends that the Panel's interpretation of the clause "made effective in conjunction with restrictions on domestic production or consumption" in Article XX(g) of the GATT 1994 is correct and should be upheld by the Appellate Body. The European Union considers that China essentially argues that the proper legal interpretation of the term "made effective in conjunction with" in Article XX(g) does not require an inquiry into the respective burdens borne by domestic and foreign interests under a scheme of conservation measures. The European Union understands that, for China, all that subparagraph (g) requires is "that there *be genuine restrictions* on domestic production or consumption, working together with the challenged measure, to contribute to conservation".<sup>243</sup> In other words, according to China, as long as domestic restrictions with a conservation purpose coexist with export quotas that are "relating to conservation", the "made effective in conjunction with" requirement under subparagraph (g) is satisfied. The European Union notes that the "interpretative conundrum" presented by China "is somewhat artificially created since, as the Panel correctly concluded, it is clear on the face of the *export quotas at issue that they are not genuine conservation measures*."<sup>244</sup> The European Union submits that where one can – unlike for China's export quotas at issue – conclude on the basis of a measure's design and structure that it is genuinely related to "conservation", the issue of balancing the burden placed on domestic users and foreign users – while still pursuing one and the same conservation objective – will simply not arise.

<sup>242</sup> European Union's appellee's submission, paras. 207-212 (referring to Panel Reports, paras. 7.510, 7.525, 7.527, 7.544, 7.550, 7.609, 7.632, 7.633, 7.638-7.640, 7.647-7.649, and 7.831; and Panel Exhibits CHN-196, CHN-200, JE-152, JE-167, JE-168, JE-169, and JE-183).

<sup>243</sup> European Union's appellee's submission, para. 252 (quoting China's appellant's submission, para. 229). (emphasis original)

<sup>244</sup> European Union's appellee's submission, para. 254. (emphasis original)



2.155. The European Union disagrees with China's allegation that the Panel "conjure[d] up" a novel test of even-handedness without a solid base in the language of the treaty or in the jurisprudence.<sup>245</sup> For the European Union, two sets of restrictive measures are in principle permitted as long as, in their structure and design, there is a mechanism ensuring that they both work effectively or operate in pursuit of the same conservation objective.

2.156. The European Union submits that, where measures pursuing conservation objectives differ for goods intended for export and goods intended for domestic consumption, any substantial structural incoherence between the ways in which each set of restrictions tries to achieve the conservation goal raises doubts as to whether the measures are genuine conservation measures. In cases of disparate restrictions, therefore, the issue of balance and coherence between two sets of restrictions is a critical part of the assessment to be made by a panel assessing measures under Article XX(g). The European Union considers that, where the burden placed on foreign users is disconnected from and disproportionate to the burden placed on domestic users, measures cannot be said to work or operate together in the pursuit of the same conservation objective.

2.157. The European Union disagrees with China's contention that the Panel's interpretation of the clause "made effective in conjunction with restrictions on domestic production or consumption" departs from prior case law. The fact that the Appellate Body did not, in *US – Gasoline*, engage in an assessment of complementarity between the restrictions on imports, on the one hand, and the restrictions on domestic production, on the other hand, does not suggest that such complementarity is not required. For the European Union, the Appellate Body's discussion of the even-handedness requirement in *US – Gasoline* only identified the logical boundaries of the requirement, but it did not address what relative treatment of domestic and foreign interests, within those logical boundaries, was required in order to qualify as "even-handed".<sup>246</sup>

2.158. With regard to China's argument that the Appellate Body report in *US – Shrimp* supports an interpretation whereby coexistence of restrictions would be sufficient to satisfy the requirements of Article XX(g), the European Union points out that the measure in that case imposed the same restrictions on domestic and foreign production or consumption.<sup>247</sup> In such circumstances, an inquiry into the existence of a balance between such restrictions is not, as China argues, incorrect, but simply redundant.

2.159. The European Union adds that the Appellate Body reports in *China – Raw Materials* confirm and develop what the Appellate Body set out in *US – Gasoline* and in *US – Shrimp*. In addition, the European Union contends that the Panel reports in *China – Raw Materials* stand for the proposition that the mere existence of a production restriction does not automatically imply even-handedness between export restrictions and domestic restrictions.<sup>248</sup>

2.160. The European Union agrees with China that the chapeau of Article XX is relevant context for the interpretation of subparagraph (g), but disagrees that the chapeau supports China's view that there is no requirement of structural balance in the imposition of restrictions under Article XX(g). The European Union argues that the chapeau does not support a reading of subparagraph (g) that would allow for a lack of equity in the design and structure of restrictions. It would be untenable to interpret or apply the tests under Article XX(g) in a manner that allows, in the design and structure of a measure, what is expressly prohibited by the chapeau in the application of the measure.

2.161. The European Union further disagrees with China's allegation that the Panel also erred in its interpretation of Article XX(g) by limiting its analysis of the "even-handedness" criterion to an assessment of the "structure and design" of the impugned measures and by declining to examine evidence of the actual operation or effects of the measures. For the European Union, the Panel correctly focused the analysis under Article XX(g) on the design and structure of the measures at issue, while focusing on the application of the measures in the second step of the two-tier test,

<sup>245</sup> European Union's appellee's submission, para. 256.

<sup>246</sup> European Union's appellee's submission, paras. 270-275 (referring to Panel Reports, para. 7.318; and Appellate Body Report, *US – Gasoline*, pp. 20-21, DSR 1996:I, pp. 19-20).

<sup>247</sup> European Union's appellee's submission, para. 278 (referring to Appellate Body Report, *US – Shrimp*, para. 145).

<sup>248</sup> European Union's appellee's submission, para. 283 (quoting Panel Reports, *China – Raw Materials*, para. 7.464).

that is, under the chapeau. Thus, the European Union asserts that evidence on the application and actual effects of the challenged measure in specific factual circumstances is not relevant and cannot affect the conclusion once a panel is satisfied that, based on the design and structure of the measure at issue, the "even-handedness" test is not met.

2.162. For the European Union, both the "even-handedness" test under subparagraph (g) and the chapeau required the Panel to look at elements of equal treatment. The focus under Article XX(g) is on the design, structure, and architecture of the measure(s) imposing restrictions on other WTO Members. The chapeau serves as a safety net against abuse of the exceptions through measures provisionally justified under a subparagraph by requiring that also in their application such measures do not result in discriminatory treatment or constitute a disguised restriction on international trade. The European Union further contends that no facts are *per se* excluded from the analysis under the even-handedness prong of the test under Article XX(g) or under the chapeau, but that it is for the party relying upon certain facts to explain why these facts are relevant for either analysis.

#### **2.5.2.2.2 The Panel's application of the "made effective in conjunction with" requirement**

2.163. The European Union contends that the Panel did not err in its application of the clause "made effective in conjunction with restrictions on domestic production or consumption". For the European Union, China's claims that the Panel erred in the application of subparagraph (g) of Article XX of the GATT 1994 are consequential to China's claims of error in the legal interpretation by the Panel. Accordingly, the Appellate Body should reject China's claims relating to the Panel's application of subparagraph (g) for the same reasons that it should reject China's claims relating to the interpretation of that provision.

2.164. In addition, the European Union contends that, even based on China's interpretation of Article XX(g), China's claims that the Panel erred in the application of subparagraph (g) cannot stand. First, the European Union highlights that China has not appealed the Panel's findings regarding the absence of domestic restrictions. The Panel applied the "even-handedness" test on an *arguendo* basis. Therefore, even assuming that the Panel erred in its interpretation and application of the phrase "made effective in conjunction with", this would not affect the Panel's conclusion that the export quotas cannot be provisionally justified under subparagraph (g).

2.165. Second, with respect to China's allegation that the Panel failed to explain why and how certain evidence discounted the restrictive effect of extraction and production caps on domestic consumers, the European Union contends that this claim does not relate to an error of application of law, but to the Panel's obligation to make an objective assessment of the facts. Referring to the Appellate Body's statement in *EC and certain member States – Large Civil Aircraft* that, in most cases, "an issue will *either* be one of application of the law to the facts or an issue of the objective assessment of facts, and not both", the European Union expresses the view that these arguments by China concern the determination of whether or not a certain event occurred and the Panel's determination of the credibility and weight properly to be ascribed to a piece of evidence.<sup>249</sup> To underline this point, the European Union adds that China refers to its arguments in the context of its claim under Article 11 of the DSU to support its allegation that the Panel erred in the application of the law.<sup>250</sup> Thus, the European Union requests the Appellate Body to decline to rule on this claim or reject it as an Article 11 of the DSU claim.

2.166. Third, the European Union argues that, even if the actual effects of the alleged domestic restrictions and export quotas were relevant for purposes of the analysis under subparagraph (g) of Article XX, this would not affect the conclusion that the export quotas at issue cannot be provisionally justified under subparagraph (g). The European Union submits that the Panel properly considered and rejected all arguments presented by China in support of its position that China's export quotas were justified under subparagraph (g). In particular, the Panel considered and rejected arguments by China relating to the effects of unfilled export quotas. The Panel also considered pricing data submitted by China and rejected that data due to concerns about the

<sup>249</sup> European Union's appellee's submission, para. 320 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872).

<sup>250</sup> European Union's appellee's submission, para. 321 (referring to China's appellant's submission, fn 239 to para. 285).

reliability of the data. Moreover, the European Union argues that the Panel considered arguments and evidence submitted by the complainants and by China when addressing the issue of whether "signalling" concerning recycling and research and development of substitutes occurred.

#### 2.5.2.2.3 Article 11 of the DSU

2.167. The European Union maintains that, as the initial trier of facts, a panel enjoys a certain margin of discretion in its consideration of the facts. In order to comply with its duty under Article 11, a panel must provide reasoned and adequate explanations and coherent reasoning, it must not reveal a lack of "even-handedness" in the treatment of evidence, and it must base its findings on a sufficient evidentiary basis.

2.168. With respect to China's contention that the Panel failed to address evidence submitted by China as to the timing of and manner in which the allocation of the export, extraction, and production quotas was coordinated and that this demonstrated that all quota levels were set by the competent ministries at the same time, the European Union maintains that the Panel acknowledged, and rejected, the evidence and arguments submitted by China.<sup>251</sup>

2.169. Second, the European Union addresses China's contention that, with regard to the levels of the quotas, the Panel focused on the fact that the unused export quota shares were redirected to the domestic market, but failed to address China's argument that the unfilled export quota shares need not necessarily be redirected to the domestic market. The European Union argues that China first raised this argument in the interim review, that it was not supported by evidence, that it has no merit, and that it should be rejected.<sup>252</sup>

2.170. Third, the European Union addresses China's allegation that the Panel failed to address arguments and evidence submitted by China explaining why it has not adopted domestic consumption quotas and submits that the Panel fully considered and rejected China's arguments and evidence to that effect.<sup>253</sup> In addition, the European Union contends that China fails to explain why, in the light of all other factual findings made by the Panel regarding "even-handedness", the allegedly disregarded evidence is so material to China's case that the Panel's failure to address the evidence has a bearing on the objectivity of the Panel's factual assessment.<sup>254</sup>

2.171. The European Union also responds to China's allegation that the Panel failed to address certain evidence showing the existence of a temporal connection in the way that the domestic and export quotas work together as part of China's conservation policy. For the European Union, these arguments concern alleged effects as opposed to the design and structure of the measures at issue, and the Panel was therefore correct in not considering them as relevant in the context of its analysis under Article XX(g). In addition, the European Union contends, these arguments were contested by the complainants.

2.172. Furthermore, the European Union disagrees with China that the Panel engaged in incoherent reasoning in finding, on the one hand, that China had adopted a comprehensive conservation policy and, on the other hand, that it had not imposed "restrictions" in the sense of Article XX(g). For the European Union, the Panel's finding that China had not imposed restrictions on domestic production or consumption demonstrates that the conservation regime was not sufficient to comply with Article XX(g).

2.173. Finally, in response to China's allegation that the Panel applied a "double standard" in its "even-handedness" analysis, the European Union contends that this criticism is based on the premise that the Panel was required to consider the effects of the export quotas and of domestic restrictions. However, for the European Union, the Panel was not required to do so, and correctly focused on the design and structure of the measures at issue.

<sup>251</sup> European Union's appellee's submission, para. 343 (referring to Panel Reports, paras. 7.466-7.478 and 7.572).

<sup>252</sup> European Union's appellee's submission, paras. 348 and 349 (referring to Panel Reports, paras. 6.20 and 7.628).

<sup>253</sup> European Union's appellee's submission, para. 351 (quoting Panel Reports, paras. 7.547-7.550).

<sup>254</sup> European Union's appellee's submission, para. 352 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 442).

## 2.6 Arguments of Japan – Appellee (DS433) and third participant (DS431 and DS432)

### 2.6.1 Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol

2.174. Japan requests the Appellate Body to reject China's "opaque and unconvincing arguments" on appeal<sup>255</sup>, and to uphold the Panel's findings as they are based on a proper examination of the provisions at issue.

2.175. Japan notes that China's appeal is limited to portions of the Panel's reasoning in addressing the issue of the availability of Article XX of the GATT 1994 to justify a breach of Paragraph 11.3 of China's Accession Protocol. Japan highlights that China does not appeal, and does not seek reversal of, the Panel's conclusions that the export duties at issue in these disputes are inconsistent with Paragraph 11.3 of China's Accession Protocol, and that China may not seek to justify the export duties pursuant to Article XX(b) of the GATT 1994. Japan contends, therefore, that China is seeking an "advisory opinion" from the Appellate Body that would have no legal or practical effect on the outcome of these disputes. In Japan's view, seeking advisory opinions is inconsistent with the DSU, in particular Article 3.4 of the DSU, which requires the DSB's recommendations and rulings to aim at settling the dispute at hand.

#### 2.6.1.1 Paragraph 1.2 of China's Accession Protocol

2.176. Japan maintains that the Panel correctly assessed the meaning of the term "the WTO Agreement" in Paragraph 1.2 of China's Accession Protocol in finding that China's Accession Protocol is an integral part of the Marrakesh Agreement and not, in addition, an integral part of the Multilateral Trade Agreements annexed thereto. According to Japan, China's assertion that the Panel confounded the ordinary meaning of Paragraph 1.2 with the initial literal reading of its terms is without merit. Rather, the Panel viewed the consistent use of singular words in the second sentence of Paragraph 1.2 to describe China's Accession Protocol as supportive of the interpretation that China's Accession Protocol is a single instrument to be treated as a unitary part of "the WTO Agreement".

2.177. Moreover, Japan argues, the Panel did not stop at the text of Paragraph 1.2 but went on to analyse, and find confirmation for its interpretation in, the context provided by other "integration" provisions in the covered agreements, such as Article II:2 of the Marrakesh Agreement. The Panel's interpretation was also confirmed by its examination of paragraph 1 of the language incorporating the GATT 1994 into Annex 1A, which contains the exhaustive list of what the GATT 1994 consists. According to Japan, this list, which does not refer to post-1994 accession protocols, reflects Members' recognition that an explicit textual basis is required to integrate any legal instrument into a specific Multilateral Trade Agreement.

2.178. Japan further submits that, as the Panel rightly found, China's interpretation would render redundant the explicit language throughout China's Accession Protocol that makes cross-references to the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. Specifically, the Panel found that Paragraph 1 of Part II of China's Accession Protocol, read together with Article II:7 of the GATT 1994, expressly makes the schedules of concessions annexed to the Protocol an integral part of the GATT 1994. Such express language would have been unnecessary if "all GATT-related provisions of the Accession Protocol were implicitly made an 'integral part' of the GATT 1994".<sup>256</sup> Japan notes that, in criticizing this Panel finding, China contends that Members' goods and services schedules are "separate instruments" and "change from time to time".<sup>257</sup> However, Japan argues, China ignores the fact that an accession protocol is also a "separate instrument" and fails to explain why possible modifications to schedules would sever the "intrinsic relationship" between the GATT 1994 and the schedules. Moreover, as the Panel rightly found, such explicit cross-references to the Marrakesh Agreement and the Multilateral Trade Agreements can be found in, *inter alia*, Paragraph 5.1 of China's Accession Protocol. Japan maintains that the explicit cross-reference in Paragraph 5.1 was central to the Appellate Body's decision in *China – Publications and Audiovisual Products* that Article XX of the GATT 1994 was available to justify a breach of Paragraph 5.1. With respect to Paragraph 11.3, Japan further

<sup>255</sup> Japan's appellee's submission, para. 160.

<sup>256</sup> Japan's appellee's submission, para. 188 (quoting Panel Reports, para. 7.84).

<sup>257</sup> Japan's appellee's submission, para. 188 (quoting China's appellant's submission, para. 126).

recalls the Appellate Body's finding in *China – Raw Materials* that, "had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in Paragraph 11.3 or elsewhere in China's Accession Protocol".<sup>258</sup> In Japan's view, China's arguments fail to engage with the fact that, in both disputes, the Appellate Body properly grounded its decision on the availability of Article XX of the GATT 1994 to breaches of China's Accession Protocol in the express language in the Protocol.

2.179. Japan disagrees with China's contention that the Panel's interpretation of Paragraph 1.2 "would jeopardize the internal coherence of the WTO legal framework", because "a far-reaching requirement regarding ... China's 'WTO-plus' commitments" would have to be "an integral part of" the institutional agreement of the WTO – the Marrakesh Agreement.<sup>259</sup> In Japan's view, such a concern is unwarranted, because there is nothing in the WTO legal framework that would preclude the substantive trade obligations, in both the Multilateral Trade Agreements and China's Accession Protocol, from being an integral part of the Marrakesh Agreement. Finally, Japan agrees with the Panel that, as indicated in prior disputes involving China's Accession Protocol, Paragraph 1.2 of the Protocol serves the function of making the obligations in the Protocol enforceable under the DSU, and ensuring that those obligations are interpreted in accordance with the customary rules of interpretation of public international law within the meaning of Article 3.2 of the DSU. Thus, Japan submits that the Panel correctly found that China's interpretation of Paragraph 1.2 "appears to depart significantly from the understanding of the legal effect of this provision, as reflected in prior panel and Appellate Body reports".<sup>260</sup>

#### 2.6.1.2 Article XII:1 of the Marrakesh Agreement

2.180. Japan submits that the Panel carefully considered, and rightly rejected, China's arguments with respect to Article XII:1 of the Marrakesh Agreement. Japan contends that China never explained how Article XII:1, read together with the context provided by Paragraph 1.2 of China's Accession Protocol, confirms that China's Accession Protocol serves to specify, including by means of "WTO-plus" commitments, China's rights and obligations under the Marrakesh Agreement and the annexed Multilateral Trade Agreements. Rather, China's reading of Article XII:1 is contrary to a proper interpretation of the provision pursuant to the principle of treaty interpretation under Article 31 of the Vienna Convention. Japan maintains that the words "[s]uch accession" at the beginning of the second sentence of Article XII:1 refer to the act of acceding to the Marrakesh Agreement described in the preceding sentence. If the drafters had intended to convey the meaning advocated by China, they would have used an entirely different formulation by stating, for example, that "each of the relevant terms of accession contained in an accession protocol shall be incorporated into this Agreement or one of the Multilateral Trade Agreements, as applicable".<sup>261</sup>

2.181. Japan maintains that the words actually used in Article XII:1, second sentence, read in their context, indicate that this provision serves to specify the scope of agreements to be accepted by an acceding State or customs territory. China's argument that such an interpretation makes Article II:2 of the Marrakesh Agreement redundant fails to recognize the import of the different functions served by Articles II:2 and XII:1, respectively. In Japan's view, Article II:2 defines the scope of the application of the Multilateral Trade Agreements with respect to existing Members, whereas Article XII:1 regulates the process of acceding to the WTO by a prospective Member. Thus, Article XII:1 ensures that no State or customs territory would become a WTO Member unless and until it accepts to be bound by the WTO single undertaking, thereby giving effect to Article II:2.

2.182. Moreover, Japan argues, to the extent that China's position is that each "WTO-plus" obligation set out in its Accession Protocol is to be added to one of the Multilateral Trade Agreements as an integral part thereof, China is effectively arguing that each provision of China's Accession Protocol is an amendment to the Multilateral Trade Agreements. The procedures for amending the WTO Agreement, including the Multilateral Trade Agreements, are set forth in Article X of the Marrakesh Agreement. Japan submits that nothing in Article XII suggests that the

<sup>258</sup> Japan's appellee's submission, para. 195 (quoting Appellate Body Reports, *China – Raw Materials*, para. 293).

<sup>259</sup> Japan's appellee's submission, para. 183 (quoting China's appellant's submission, para. 112).

<sup>260</sup> Japan's appellee's submission, para. 190 (quoting Panel Reports, para. 7.85). (emphasis original)

<sup>261</sup> Japan's appellee's submission, para. 211.

accession procedures set forth therein can replace, or dispense with, the specific decision-making procedures for amendments provided in Article X.

2.183. Japan further submits that Article XII:1 of the Marrakesh Agreement does not specify what the "terms" of accession should be, but leaves the task of defining such terms to the working parties established for individual accession processes. In this respect, Japan recalls the Appellate Body's findings in *China – Raw Materials* and in *China – Publications and Audiovisual Products*, which confirm that access to the exceptions of Article XX of the GATT 1994 for measures inconsistent with China's commitments set out in its WTO Accession Protocol are only available if specific language to that effect is incorporated in the text of the provisions setting out such commitments.<sup>262</sup>

### **2.6.1.3 The relationship of accession protocol provisions with the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto**

2.184. Japan submits that the Multilateral Trade Agreements, including the GATT 1994, are integral parts of the Marrakesh Agreement under its Article II:2. By virtue of Paragraph 1.2 of China's Accession Protocol, that Protocol is also an integral part of the Marrakesh Agreement. Accordingly, there is no hierarchy between China's Accession Protocol and the Multilateral Trade Agreements, nor does the former belong to the latter, and nothing in the Marrakesh Agreement provides otherwise. Moreover, contrary to China's argument, the drafters determined to specify the link, if any, between the specific commitments set out in China's Accession Protocol, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand, through explicit text – i.e. "terms of accession" – to be drafted by the Working Party and agreed upon by the Members and China pursuant to Article XII:1 of the Marrakesh Agreement. The drafters did not elect to rely, as China surmises, on the "opaque" operation of Article XII:1 of the Marrakesh Agreement and Paragraph 1.2, second sentence, of China's Accession Protocol.<sup>263</sup>

2.185. Japan maintains that China's position, in particular its "intrinsic relationship" test, threatens to create a host of unnecessary problems for panels and the Appellate Body in interpreting post-1994 accession protocols. Moreover, under China's approach, until review by panels or the Appellate Body is complete, the particular agreement of which a specific accession protocol commitment is an integral part would remain undetermined. Japan further contends that the "intrinsic relationship" test is "unworkable" where a provision of China's Accession Protocol relates to more than one covered agreement.<sup>264</sup> Japan points, in this regard, to the commitments made by China in Paragraph 2.2 of its Accession Protocol, which concerns the uniform administration of China's trade regime and applies to measures "pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights ('TRIPS') or the control of foreign exchange".

2.186. In addition, Japan argues, the "intrinsic relationship" test is likely to be particularly problematic where a provision of China's Protocol contains "WTO-plus" commitments, which go beyond what is required in the covered agreements. For example, the obligation to eliminate export duties in Paragraph 11.3 of China's Accession Protocol is a "WTO-plus" obligation and is subject to specific exceptions set out in Annex 6 to China's Accession Protocol. However, under China's interpretation, the Appellate Body would be required to "shift" this WTO-plus obligation out of China's Accession Protocol and into the GATT 1994, subjecting it to a host of exceptions contained therein. In Japan's view, China is effectively asking the Appellate Body to "rewrit[e] and transform[]" a specific bargain struck by the WTO Members when China joined the WTO".<sup>265</sup>

2.187. Furthermore, Japan contends that China's characterization of post-1994 accession protocols as not "self-contained" is equally without basis. The term "self-contained" is absent from the text of the covered agreements, and China does not explain what this term means or what legal significance China ascribes to it. According to Japan, a post-1994 accession protocol is not divisible but is a single instrument that must be treated as an integral and unitary part of the Marrakesh Agreement. Japan further observes that there is "no disagreement among the parties"

<sup>262</sup> Japan's appellee's submission, para. 214 (referring to Appellate Body Reports, *China – Raw Materials*, para. 306; and *China – Publications and Audiovisual Products*, para. 221).

<sup>263</sup> Japan's appellee's submission, para. 187 (referring to China's appellant's submission, para. 123).

<sup>264</sup> Japan's appellee's submission, para. 216.

<sup>265</sup> Japan's appellee's submission, para. 219.



that China's Accession Protocol is not listed in Appendix 1 to the DSU, and yet its terms are covered by the DSU.<sup>266</sup> Japan reiterates that it is Paragraph 1.2 of China's Accession Protocol that incorporates its provisions within the coverage of the DSU.

2.188. Japan observes that China has modified its arguments several times throughout the course of these disputes. For example, China initially contended that Paragraph 11.3 of its Accession Protocol is "intrinsically related to" Article XI:1 of the GATT 1994. Subsequently, China abandoned this position and instead argued that Article II:1(a) of the GATT 1994 is the provision of the GATT 1994 to which Paragraph 11.3 intrinsically relates.<sup>267</sup> Moreover, China's emphasis on the importance of Article XII of the Marrakesh Agreement evolved during the course of these disputes. Despite substantial arguments in its first written submission to the Panel in support of its contention that Article XX of the GATT 1994 is available to China to defend its WTO-inconsistent export duty measures<sup>268</sup>, China never mentioned Article XII of the Marrakesh Agreement.

2.189. Finally, Japan observes that China never addresses the panel and Appellate Body findings in *China – Raw Materials*. As Article 3.2 of the DSU makes clear, the function of panels and the Appellate Body is to "clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law", not "add to or diminish the rights and obligations provided in the covered agreements". In Japan's view, exceeding this limited function would undermine the security and predictability that the DSU is designed to guarantee, as well as the rules of interpretation of public international law.

## 2.6.2 Article XX(g) of the GATT 1994

### 2.6.2.1 Article XX(g) – "Relating to" the conservation of exhaustible natural resources

2.190. Japan urges the Appellate Body to reject China's "misportrayal" of the Panel's analysis, as well as China's effort to require panels and the Appellate Body to consider the "actual effects" of China's export quota measures, contrary to the previous interpretations of Article XX(g) of the GATT 1994 provided by the Appellate Body.<sup>269</sup> According to Japan, the Panel conducted an exhaustive examination of the design and structure of China's export quota measures and correctly determined that they lack any meaningful relationship to the "conservation of exhaustible natural resources" under Article XX(g) of the GATT 1994.

#### 2.6.2.1.1 The Panel's interpretation of the term "relating to"

2.191. Japan observes that the Article XX(g) exception is strictly limited to measures "relating to the conservation of exhaustible natural resources". This requires what the Appellate Body termed in *US – Shrimp* a "close and genuine relationship of ends and means", and an examination of the relationship between "the general structure and design of the measure ... and the policy goal it purports to serve".<sup>270</sup> Accordingly, Japan considers that it was incumbent upon China to show a "substantial relationship" between the export quota measures and China's ostensible conservation goals, such that China's measures "cannot be regarded as merely incidentally or inadvertently aimed at ... the purposes of Article XX(g)".<sup>271</sup>

2.192. Japan notes that, while a panel may take a WTO Member's characterization of its measure into account, it should also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. Such an inquiry into a measure's objective structure and design is vital, because it allows a panel to "go beyond a responding Member's normal protestations" that it has, of course, complied with its WTO obligations, by examining the objective elements and design of the challenged measure and its role in the overall conservation

<sup>266</sup> Japan's appellee's submission, para. 174.

<sup>267</sup> Japan's appellee's submission, para. 200 (referring to China's first written submission to the Panel, para. 422; and China's responses to the complainants' comments on China's request for a preliminary ruling on the availability of Article XX of the GATT 1994, paras. 21-23).

<sup>268</sup> Japan's appellee's submission, para. 202 (referring to China's first written submission to the Panel, paras. 408-461).

<sup>269</sup> Japan's appellee's submission, para. 26.

<sup>270</sup> Japan's appellee's submission, para. 28 (referring to Appellate Body Report, *US – Shrimp*, paras. 136-138).

<sup>271</sup> Japan's appellee's submission, para. 28 (referring to Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, p. 18).



scheme to determine whether the "protestations" match with objective reality.<sup>272</sup> For Japan, this case underscores the wisdom of the Appellate Body's adoption of a "structure and design" test for Article XX(g), as opposed to requiring that panels and the Appellate Body delve into a "Pandora's box" of "effects", "positive contributions", or a WTO Member's subjective intentions, thereby leaving the security and predictability of WTO rules adrift.<sup>273</sup>

2.193. Japan highlights that, generally, panels under the GATT 1947 were, and the Appellate Body has been, sceptical about incorporating "effects" tests, as evidenced, for example, in the Appellate Body report in *Japan – Alcoholic Beverages II*.<sup>274</sup> It is difficult to apply "effects" tests in a way that is consistent with the goal set out in Article 3.2 of the DSU, of promoting security and predictability to the multilateral trading system. For Japan, one of the core weaknesses of China's efforts to insert an "effects" test into the Article XX(g) review and analysis is that, without a detailed examination of various causes, it is impossible to determine whether the effects – positive or negative – result from the export quotas or something else. In other words, such a methodology invites "false positives" or "false negatives", because it depends on whether there is a causal linkage between a measure and the positive (or negative) "effect" or "contribution". Otherwise, it may be mere coincidence. In contrast, Japan characterizes the "design and structure" test as an objective tool for determining whether there is a genuine relationship of means and ends.

2.194. Japan clarifies that the effect or the contribution can be useful evidence to discern or analyse the design and structure of the measure. However, it is not sufficient to show that there is some causal link between the effect and the measure. In Japan's view, if effects are to be taken into account, those effects need to be inherent in the measure. Japan adds that the actual effects of a measure may be looked at in confirming that the measure, in its design and structure, is related to conservation, but these actual effects should not be the basis of the decision of whether the required nexus exists between the challenged measure and the conservation objective.

2.195. Japan contends that there is no support in the text of Article XX(g) or in the jurisprudence for a "positive contribution" test of whether a measure "relates to" conservation. Japan asserts that China's legal rationale for this "new-found" test improperly mixes and matches disparate elements of Article XX(g) and Article XX(b) jurisprudence in a way that seriously distorts both provisions.<sup>275</sup> Given the fundamental textual and contextual differences between these two provisions, Japan submits that it is wholly inappropriate to borrow concepts like "apt to" and "material contribution" from Article XX(b) and insert them into an entirely different GATT 1994 exception, as China proposes.<sup>276</sup> Indeed, in *US – Gasoline*, the Appellate Body warned against precisely this type of indiscriminate mixing of different GATT exceptions. Japan therefore requests the Appellate Body to reject China's claim that there is a basis in the text of the GATT 1994 or in Appellate Body precedents for adding a "positive contribution" element to the "relating to" requirement.

2.196. Japan maintains that China has yet to provide any plausible reasons, much less the "cogent reasons" required by *US – Stainless Steel (Mexico)*, for the Appellate Body to "jettison two decades of its own jurisprudence" under Article XX(g) and instead rely on an unknown test involving "positive contributions", effects, and causal linkages.<sup>277</sup>

#### 2.6.2.1.2 The Panel's application of the "relating to" requirement

2.197. Japan submits that, in seeking to justify its claims of error to the Appellate Body, China has resorted to "caricaturing, if not outright misrepresenting"<sup>278</sup> the Panel's factual findings and legal reasoning. Japan avers that, far from grounding its decision solely on "perverse signals", as China alleges, the Panel found multiple and manifest flaws in the overall structure, design, and

<sup>272</sup> Japan's appellee's submission, para. 30.

<sup>273</sup> Japan's appellee's submission, para. 30.

<sup>274</sup> Japan's appellee's submission, para. 37 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 23 and 29, DSR 1996:I, pp. 115 and 120).

<sup>275</sup> Japan's appellee's submission, paras. 32 and 33.

<sup>276</sup> Japan's appellee's submission, para. 35.

<sup>277</sup> Japan's appellee's submission, para. 39 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160).

<sup>278</sup> Japan's appellee's submission, para. 40.

operation of China's export quotas, and properly found that these measures having nothing to do with conservation.

2.198. Japan submits that it was entirely appropriate for the Panel to consider such "perverse signals", which are amply documented in economic literature and grounded in basic economic principles, and were explicitly discussed by the panel in *China – Raw Materials*.<sup>279</sup> For Japan, an objective review of the Panel Reports shows that the Panel: (i) did not apply a presumption; (ii) carefully examined the operational structure and design of the production, extraction, and export quotas in China's rare earth regime; and (iii) ultimately was not convinced that the design, structure, and architecture of China's export quotas on rare earths, tungsten, and molybdenum could counter the "perverse signals" being sent to Chinese users or ensure that domestic demand was not being artificially stimulated by low prices and government assurances of an abundant future supply arising.

2.199. Japan recalls the findings of the Panel with respect to "signalling"<sup>280</sup>, namely, that China's rare earth regime, like its tungsten regime, lacks any structural mechanism to counter the "perverse signals" being sent by the WTO-inconsistent export quotas to Chinese downstream industrial users. Japan considers this finding by the Panel to be critical because, in the absence of such mechanism in the structure and design of China's rare earth regime, it follows that any positive effects that, according to China, arose from the operation of its export quotas were coincidental and lacked any "causal linkage" to China's rare earth policies.<sup>281</sup> Japan points out that China has yet to explain how, if no mechanisms exist in the quotas' structure and design, the operation of China's rare earth regime can counter the "perverse signals" sent to domestic consumers. Japan concludes, therefore, that the Panel's scepticism about the conservation-related "signals" being sent by the Chinese export quotas was entirely justified.

2.200. Japan adds that, contrary to China's allegations, the Panel's "theoretical" observations regarding the "perverse signals" sent by export quotas were fully borne out by the undisputed facts of this case. In this regard, Japan contests China's claim that there was a decline in domestic consumption as a result of alleged domestic restrictions, maintaining that the reasons for this alleged decline are "muddled"<sup>282</sup>: such decline could have been a result of the signals, or of an unprecedented global recession, or of a massive spike in rare earth prices in 2010 after China sharply tightened the export quota levels. Japan therefore maintains that, had the Panel chosen to weigh "actual effects", it would have had no impact on the outcome of these disputes since the evidence makes it clear that the "perverse signals" arising from the export quotas were correctly understood and fully internalized by Chinese users and downstream industries. In Japan's view, for the Appellate Body to reweigh the facts, as China insists, would not only be clear legal error, it would also "fly in the face" of clear, undisputed evidence of sharp increases in Chinese production and consumption and call into question the effectiveness of the DSU's fact-finding processes.<sup>283</sup>

2.201. Japan also highlights that China put forth a half dozen "shifting justifications"<sup>284</sup> for how its export quotas relate to conservation, all of which were challenged by the complainants and rejected by the Panel. China appeals but one of those Panel findings. For Japan, "a fair-minded review" of the Panel's detailed findings and legal reasoning demonstrates that China's argument "incorrectly elevates a secondary aspect of the Panel's reasoning to the apex of its legal rationale"<sup>285</sup>, while ignoring multiple other Panel findings, including: (i) the Panel's findings that the text, structure, and design of China's rare earth, tungsten, and molybdenum export quotas were deficient in numerous respects aside from the "perverse effect"; and (ii) the Panel's correct finding that the evidence showed overwhelmingly that China's export quota measures have nothing to do with conservation; instead, they relate directly to China's policy of protecting and promoting downstream, value-added industries that use rare earths, molybdenum, and tungsten in manufacturing advanced materials and technologies. Japan further points to multiple other structural and design oddities of China's rare earth regime, some of which were discussed by the

<sup>279</sup> Japan's appellee's submission, para. 42 (referring to Panel Reports, *China – Raw Materials*, para. 7.586).

<sup>280</sup> Japan's appellee's submission, para. 43 (referring to Panel Reports, paras. 7.447 and 7.448).

<sup>281</sup> Japan's appellee's submission, para. 45.

<sup>282</sup> Japan's appellee's submission, para. 47.

<sup>283</sup> Japan's appellee's submission, para. 48.

<sup>284</sup> Japan's appellee's submission, para. 50 (referring to Panel Reports, para. 7.408).

<sup>285</sup> Japan's appellee's submission, para. 57.

Panel, and which show that this regime appears to be tied not to conservation, but rather to industrial policy.

#### 2.6.2.1.3 Article 11 of the DSU

2.202. Japan contends that China's argument, that the Panel erred under Article 11 of the DSU in its ascertainment of the facts relevant for the application of subparagraph (g) of Article XX, and in its reasoning in support of its "relating to" analysis, is without merit. In Japan's view, the Panel conducted a thorough legal and factual analysis of the "relating to" test, consistent with Article 11 of the DSU. Specifically, the Panel carefully considered China's contentions with respect to the possible "perverse effects" of China's export quotas. These "perverse effects" played but a minor role in the Panel proceedings, and the Panel arrived at the correct conclusions in respect thereof. In addition, Japan submits that China mischaracterizes the legal standard under which panels review and handle evidence pursuant to Article 11 of the DSU. Japan emphasizes that both Article 11 of the DSU and prior Appellate Body decisions provide substantial discretion to panels to handle evidence in a manner tailored to the circumstances of a particular dispute, and set a high threshold for appellate review of a panel's assessment of the facts under Article 11.

2.203. Japan also asserts that, whereas China's appellant's submission portrays the evidence with respect to the pricing, recycling, and relocation "effects" of China's export quotas as straightforward and uncontested, China is simply recycling its factual arguments from the Panel proceedings. China is requesting the Appellate Body to consider *de novo* several factual issues presented to the Panel, even though each of these issues was "litigated vigorously" before the Panel.<sup>286</sup> Japan then provides examples of these already litigated issues, which include: (i) China's allegation that export quotas do not affect pricing of rare earths, and that, particularly where an export quota is not filled, the price gaps cannot be caused by the export quota<sup>287</sup>; (ii) China's claim that its pricing data illustrated how China's export quotas relate to conservation<sup>288</sup>; (iii) China's claim that its export measures "relate to" its efforts to promote recycling of rare earths<sup>289</sup>; and (iv) China's argument that there was no economic pressure on downstream manufacturers to relocate to China.<sup>290</sup>

2.204. Further, Japan contends that, contrary to China's claims on appeal, the Panel's findings in this regard were reasonably predicated on the record evidence and are based neither on an "assumption", nor on "incoherent reasoning".<sup>291</sup>

#### 2.6.2.2 Article XX(g) – "Made effective in conjunction with" restrictions on domestic production or consumption

2.205. Japan requests the Appellate Body to reject China's appeal in respect of the second clause of Article XX(g) and to uphold all findings and conclusions set forth in the Panel Reports. Japan contends that the Panel correctly determined that China's export quotas on rare earths, tungsten,

<sup>286</sup> Japan's appellee's submission, para. 79.

<sup>287</sup> Japan's appellee's submission, para. 82. Japan takes particular issue with China's statement at paragraph 189 of its appellant's submission that "the evidence provided by the complainants does not disagree with Professor de Melo's understanding". Japan indicates that China's "representation is plainly inaccurate", highlighting the complainants' arguments that "the medium- and long-term trade-distorting effects of these export restrictions are substantially more complicated and difficult to evaluate". (See *ibid.* (referring to China's appellant's submission, para. 189; and other appellant's submission, para. 120, in turn referring to Panel Exhibit CHN-157); Japan's second written submission to the Panel, paras. 159 and 186 (referring to Panel Exhibit JE-141); opening statement at the second Panel meeting, paras. 43 and 44; response to Panel question No. 79, para. 45; and comments on China's responses to the Panel's second set of questions, paras. 25, 26, and 33-34 (referring to Panel Exhibit JE-182))

<sup>288</sup> Japan's appellee's submission, para. 82 (referring to Japan's opening statement at the second Panel meeting, paras. 43 and 44; and response to Panel question No. 78, paras. 34 and 35).

<sup>289</sup> Japan's appellee's submission, para. 83 (referring to Panel Reports, para. 7.448).

<sup>290</sup> Japan's appellee's submission, para. 84 (referring to Japan's second written submission to the Panel, para. 184, in turn referring to Panel Exhibits JE-146 and JE-147); opening statement at the second Panel meeting, para. 42; response to Panel question Nos. 76 and 82, paras. 29-31, and 52; comments on China's responses to the Panel's second set of questions, paras. 31-33; and United States' second written submission to the Panel, paras. 130 and 131 (referring to Panel Exhibits JE-102, JE-118, JE-145, and JE-147); opening statement at the second Panel meeting, para. 50.

<sup>291</sup> Japan's appellee's submission, para. 70.

and molybdenum were not "made effective in conjunction with restrictions on domestic production or consumption" and were not "even-handed".

#### **2.6.2.2.1 The Panel's interpretation of the phrase "made effective in conjunction with" restrictions on domestic production or consumption**

2.206. Japan contends that the Panel correctly interpreted the clause "made effective in conjunction with restrictions on domestic production or consumption" in Article XX(g). The Panel properly focused on whether China's domestic and export restrictions are structured "in a balanced way". Japan refers to the Appellate Body reports in *US – Gasoline*, *US – Shrimp*, and *China – Raw Materials* in support of its argument that the relationship between domestic and trade-restrictive measures cannot be merely coincidental, so that both merely happen to exist at the same point in time.<sup>292</sup> Rather, such measures must have a genuine operational relationship as well, so that they function together to advance the goals of the conservation scheme. For Japan, this flows from the Appellate Body's choice of the word "operate" to characterize the type of relationship required between the two sets of measures, building on the use of the phrase "made effective" in subparagraph (g). Japan contends that the word "operate" connotes a functional or operative relationship such that both sets of measures function together as part of a unitary scheme to support conservation.

2.207. Moreover, Japan submits that the Panel's focus on whether the export and domestic production and consumption restrictions were being applied "in a balanced way" flowed naturally from the Panel's interpretation of the term "conservation" in Article XX(g) as prohibiting the control of allocation or distribution of a natural resource in order to advance an economic purpose. Japan explains that the Panel's interpretation that Article XX(g) requires that the burden of conservation must be distributed in a balanced manner between foreign and domestic consumers is consistent with the definition of "even-handedness".<sup>293</sup> This "balance" also ensures that the export and domestic measures work together to support conservation. If this balance is missing, it is difficult to see how the trade measures can work together with restrictions on domestic production or consumption. For Japan, even-handedness or balance is particularly important when rapidly rising domestic consumption presents the biggest threat of resource depletion. Japan adds that these considerations are "somewhat theoretical", given that the Panel did not find that any of China's measures qualified as "restrictions" for purposes of subparagraph (g).<sup>294</sup>

2.208. Japan alleges that China takes an extreme minimalist approach, criticizing the Appellate Body's "even-handedness" test and arguing that the term "in conjunction with" requires only that some restrictions, however minimal, must be applied to domestic production or consumption. This means that any limits on production or consumption, however meaningless and unbalanced, suffice for purposes of showing that a trade-restrictive measure operates "in conjunction with restrictions on domestic production or consumption". According to Japan, all that is required, under China's view, is that domestic production is not unlimited.

2.209. Japan disagrees with China that the Appellate Body specifically "eschewed"<sup>295</sup> any inquiry into "identity, substantive complementarity, impartiality or balance" of the trade measure and the domestic restrictions in *US – Gasoline*. For Japan, the Appellate Body merely emphasized that "even-handedness" does not require "identical treatment", and described two extreme situations at the opposite ends of the spectrum; where there is strict identity of treatment, and where no restrictions are imposed on domestic products at all.<sup>296</sup> Japan is of the view that the Appellate Body properly left it to future cases to determine specific standards for "even-handedness" based on review of specific factual situations.

<sup>292</sup> Japan's appellee's submission, paras. 94-100 (referring to Appellate Body Report, *US – Shrimp*; and quoting Appellate Body Reports, *US – Gasoline*, p. 20, DSR 1996:I, p. 19; and *China – Raw Materials*, para. 356).

<sup>293</sup> Japan's appellee's submission, para. 98 (quoting Oxford Dictionaries online, definition of "even-handedness", available at: <<http://www.oxforddictionaries.com/definition/english/incidence?q=incidence>>, accessed 9 May 2014).

<sup>294</sup> Japan's appellee's submission, para. 105.

<sup>295</sup> Japan's appellee's submission, para. 107 (quoting China's appellant's submission, para. 233; and other appellant's submission, para. 164).

<sup>296</sup> Japan's appellee's submission, para. 107 (referring to Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, p. 18).

2.210. Furthermore, Japan maintains that China's interpretation would undermine the function of the "in conjunction with" requirement as a proxy for ensuring the legitimacy of ostensibly conservation-related trade restrictions, because, as soon as it can be shown that domestic production or consumption is restricted in any way, there would be "even-handedness", even if there is no corresponding regulatory measure applicable to domestic production or consumption. Japan adds that China's interpretation of the "made effective in conjunction with" requirement would be contrary to statements from the negotiating history of Article XX(g), because it would render the requirement meaningless. According to Japan, statements from the negotiating history of Article XX(g) suggest that this requirement was meant to be an effective safeguard against abuse and a structural proxy for the legitimacy of conservation-related trade restrictions.

2.211. In response to China's argument that the Panel erred by focusing on the structure and design of the domestic restrictions, to the exclusion of its operation, Japan submits that China is suggesting a test of "adverse trade effects" despite the fact that such a test has proven notoriously hard to apply and has been rejected in the context of several obligations under the GATT 1994. In this regard, Japan refers to the Appellate Body reports in *US – Gasoline* and *Korea – Alcoholic Beverages*.<sup>297</sup> Japan highlights that the Appellate Body has adopted "effects" tests only where the text of a provision expressly requires such a test, such as Article VI of the GATT 1994 (material injury and threat thereof).

#### **2.6.2.2.2 The Panel's application of the "made effective in conjunction with" requirement**

2.212. Japan maintains that, in applying the second clause of Article XX(g), the Panel properly focused on the structural correspondence of China's regulatory measures (or the lack thereof). Japan explains that this approach tracks the methodology applied by the Appellate Body in *US – Gasoline* and *US – Shrimp*. In those disputes, the Appellate Body focused on whether the United States maintained regulatory measures applicable to US producers that corresponded to its regulatory requirements for foreign gasoline emissions and shrimp turtle-excluder devices (TEDs) respectively, as opposed to evaluating whether the application of the measures led to disparate burdens, which was taken up under the chapeau of Article XX.<sup>298</sup> The Panel correctly found that, in the present disputes, foreign users are subject to rapidly shrinking export quotas, while, in the absence of corresponding limitations on Chinese consumption, Chinese industrial users enjoy virtually unlimited access to an expanding supply of rare earths, tungsten, and molybdenum. For Japan, the main function of export quotas within the overall regulatory scheme is to provide a guaranteed minimum supply to Chinese industrial users. The Panel's analysis correctly showed that the regulatory scheme is deliberately designed to support China's industrial ambitions in the global production of value-added rare earth materials and technologies.

2.213. Japan highlights that, in those cases, the Appellate Body did not attempt to weigh quantitative "trade effects" or evaluate comparative burdens, but focused on whether there was a "systemic balance" in the key elements of the challenged regulatory structure. An examination of effects would be particularly problematic in the facts of the present case, because China's export quotas have been in effect for years and have seriously distorted the marketplace. Furthermore, Japan contends that an "effects" test would be unworkable, because it would require panels and the Appellate Body to sort out the combined impact of a number of factors, including export quotas on rare earths, export duties on rare earths, extraction and production quotas on rare earths, substantial tightening of export quota levels in recent years, China's pattern of non-enforcement of its rare earths, tungsten, and molybdenum extraction and production quotas, the far-reaching impacts of a deep global recession and sudden price hikes, and to identify an appropriate causation standard that isolates and calculates the impacts of various factors. Limitations of the underlying economic data and disagreements between economic experts as to the proper interpretation of such data would add further complexities to the application of such a test.

<sup>297</sup> Japan's appellee's submission, paras. 121 and 122 (quoting Appellate Body Reports, *US – Gasoline*, p. 21, DSR 1996:I, p. 20; and *Korea – Alcoholic Beverages*, para. 120).

<sup>298</sup> Japan's appellee's submission, paras. 115 and 116 (referring to Appellate Body Report, *US – Shrimp*, para. 144).

### 2.6.2.2.3 Article 11 of the DSU

2.214. Japan alleges that China improperly seeks to have the Appellate Body reweigh conflicting evidentiary issues decided by the Panel, contrary to Article 11 of the DSU. Japan requests the Appellate Body to reject all of China's claims under Article 11 and highlights, in this regard, the significant latitude accorded to panels under Article 11 and the heavy burden faced by China in contesting the Panel's evidentiary findings.

2.215. First, with regard to China's claims relating to the Panel's assessment of evidence of how export and production quotas work together, Japan submits that the Panel correctly took into account the evidence provided by China. However, the Panel explained that China had failed to establish that the export restrictions and domestic restrictions "work together".<sup>299</sup> In particular, in response to China's allegation that the Panel failed to assess how the export and production quotas work together, Japan asserts that the Panel correctly noted the evidence submitted by China, but nonetheless found that China had failed to establish that there was coordination of the export and domestic restrictions. Japan further argues that China failed to explain why the Panel's conclusion about the different product scopes of export and production quotas is inconsistent with Article 11 of the DSU. In response to China's argument that the Panel failed to explain why the fact that unused export quota shares are permitted to be redirected into the domestic market discounted the restrictive effect on domestic Chinese consumers of extraction and production quotas, Japan argues that China's argument relates to legal rather than evidentiary issues and therefore falls outside the scope of Article 11 of the DSU. Regarding the time-lag between the imposition of China's export quotas and the imposition of extraction and production restrictions, Japan asserts that this was not a central feature of the Panel's analysis. In any event, the Panel correctly found that the temporal disconnect casts doubt on whether the measures were made effective in conjunction with one another.

2.216. Second, with regard to China's allegation that the Panel engaged in "incoherent reasoning", Japan contends that, while the Panel recognized that China has adopted a conservation policy, none of the *bona fide* elements of that policy that the Panel identified relate to China's export quotas or export duties. Moreover, Japan contends that China's further allegations of "incoherent reasoning" are mere criticism of the Panel's handling and weighing of specific evidence, and that China has offered little to support them.

2.217. Third, in response to China's allegation that the Panel applied a double standard in its "even-handedness" test, Japan argues that this argument is a mere reiteration of China's position that the analysis under Article XX(g) of the GATT 1994 should include an "effects" test. However, Japan considers that the Panel was correct in focusing, instead, on the structure and design of China's export restrictions rather than on the actual effects of China's measures.

## 2.7 Arguments of the third participants

### 2.7.1 Argentina

2.218. Argentina submits that, although this is not the first time the Appellate Body is asked to consider whether China can rely on Article XX of the GATT 1994 to justify a breach of the commitments under its Accession Protocol, the question has still not been definitively elucidated. Argentina argues that the circumstances in the present disputes are comparable to those in *China – Publications and Audiovisual Products*, because, like the measure in the earlier dispute, the export duties at issue in these disputes also have "a clearly discernable, objective link" to the GATT 1994.<sup>300</sup> Argentina further submits that, pursuant to Article XII:1 of the Marrakesh Agreement, a State seeking accession to the WTO understands that the accession process simultaneously relates to the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, and that the rights and obligations contained in these agreements would be available and applicable to it. Argentina further contends that the novel arguments put forward by China in these disputes differ from those analysed by the Appellate Body in *China – Raw Materials*, and that a thorough examination of China's arguments could lead to reasoning and findings different from those adopted in previous disputes. In Argentina's view, resolving the issue raised

<sup>299</sup> Japan's appellee's submission, para. 143 (referring to Panel Reports, paras. 7.577-7.581).

<sup>300</sup> Argentina's third participant's submission, para. 16 (quoting Appellate Body Report, *China – Publications and Audiovisual Products*, para. 230).



by China regarding the applicability of Article XX of the GATT 1994 to justify a breach of commitments in China's Accession Protocol is crucial to establishing a proper basis for China's defence regarding alleged breaches of its Accession Protocol.

### 2.7.2 Australia

2.219. With respect to the United States' appeal in DS431, Australia underlines that the aim of prompt settlement of disputes needs to be balanced against the right of the parties to present their case fully, which includes the right to present rebuttal evidence. Australia cautions against unduly restraining parties in respect of the rebuttal evidence that may be submitted in panel proceedings. In accordance with due process, parties should have a full opportunity to present rebuttal evidence in response to the arguments of the opposing party or parties, provided that the other party is equally accorded procedural fairness.

2.220. With respect to China's claim that the Panel erred in its interpretation and application of the term "relating to" in Article XX(g), although Australia agrees with the Panel that the analysis under Article XX(g) does not require an evaluation of the actual effects of the concerned measure (i.e. whether the challenged measure has in fact improved the level of conservation of exhaustible natural resources), Australia is of the view that the Appellate Body could usefully consider whether or not there is a distinction between the "operation" of a measure and the "actual effects" of the measure. Australia further suggests that the Appellate Body consider whether a focus on the "design and structure" of the written measure still allows, in some cases, for a consideration of other information that may possibly be useful in assessing whether there is a "genuine" or "real" relationship between the measure and the conservation objective.

2.221. Regarding the Panel's interpretation of the second clause of Article XX(g) ("made effective in conjunction with"), Australia refers to the Panel's statement that it understood the "even-handedness" test to be a synonym for that clause.<sup>301</sup> Australia agrees that this is what *US – Gasoline* established. However, Australia notes that the term "even-handedness" seems to be used in a variety of ways in the Panel Reports. Australia points, on the one hand, to a statement by the Panel that the "even-handedness" criterion is satisfied where the regulating Member can show that, in addition to its GATT-inconsistent measures, it has also imposed real conservation restrictions on the domestic production or consumption of the resource subject to its GATT-inconsistent measures<sup>302</sup> and, on the other hand, to a statement by the Panel that "[t]hese domestic measures must distribute the burden of conservation between foreign and domestic consumers in an *even-handed* or balanced manner".<sup>303</sup> Australia contends that, in the latter statement, "even-handed" seems to describe the manner in which the burden of conservation must be distributed between foreign and domestic consumers. Australia then refers to a third statement by the Panel that the "even-handedness requirement is to be read together with the requirement that the challenged border restriction be made effective in conjunction with domestic restrictions".<sup>304</sup> Yet, if these concepts are synonymous, it is not clear to Australia why it is necessary for them to be read together, as they would naturally mean the same thing. Thus, the last statement seems to suggest two different requirements. Australia suggests that the Appellate Body may find it useful to clarify the role to be played by the concept of "even-handedness" in the assessment of whether a measure meets the requirements of Article XX(g) of the GATT 1994.

### 2.7.3 Brazil

2.222. Brazil contends that the general exceptions under Article XX of the GATT 1994 are fundamental provisions of the multilateral trading system that strike a balance between WTO Members' policy space to pursue legitimate objectives and their WTO obligations. In Brazil's view, therefore, restrictions on a Member's right to promote its legitimate objectives, such as sustainable development, cannot be presumed but must be deemed to exist in the light of "compelling textual, contextual and systemic evidence".<sup>305</sup> Brazil submits that, in the absence of

<sup>301</sup> Australia's third participant's submission, para. 21 (referring to Panel Reports, para. 7.331).

<sup>302</sup> Australia's third participant's submission, para. 23 (referring to Panel Reports, para. 7.337).

<sup>303</sup> Australia's third participant's submission, para. 24 (quoting Panel Reports, para. 7.337). (emphasis added by Australia)

<sup>304</sup> Australia's third participant's submission, para. 25 (quoting Panel Reports, para. 7.333).

<sup>305</sup> Brazil's third participant's submission, para. 4.

explicit textual references excluding the applicability of provisions of the covered agreements, an acceding Member should be presumed to be subject to the same rights and obligations applicable to other WTO Members. With regard to export duties, Brazil argues that the MFN obligation in Article I:1 of the GATT 1994 would apply in addition to the obligation in Paragraph 11.3 of China's Accession Protocol, even without any express reference in this regard. Similarly, the exceptions provided for under the GATT 1994 should enable an acceding Member to rely on legitimate objectives in connection with GATT-plus accession commitments. For Brazil, "[o]ne cannot cherry pick the applicable principles."<sup>306</sup>

2.223. With respect to China's claim that the Panel erred in its interpretation and application of the term "relating to" in Article XX(g), Brazil puts forward its views concerning: (i) the Panel's definition of "conservation"; (ii) the Panel's application of the "relating to" test in the context of the "perverse signals" broadcast by China's export quotas; and (iii) China's arguments about the relevance of "contribution" in assessing whether a measure relates to conservation for the purposes of Article XX(g).

2.224. Brazil disagrees with the Panel's statement that measures whose objective is to "promote economic development are not 'measures relating to conservation' but measures relating to industrial policy".<sup>307</sup> Conservation cannot be read as being in opposition to or conflicting with economic development. Accordingly, Brazil believes that the Panel did not properly take into account the concept of sustainable development in interpreting the relationship between environmental concerns and economic development, and that the Panel's reading of the "relating to" test is overly restrictive vis-à-vis the objective of sustainable development enshrined in the preamble of the Marrakesh Agreement. For Brazil, the appropriate test under Article XX(g) should reflect an adequate relationship of means and ends between measures understood in the broader context of sustainable development and the consequent conservation of natural resources.

2.225. As regards the Panel's assessment of "perverse signals", Brazil considers that a measure can only be provisionally justified under Article XX(g) if it meets three requirements. First, the measure must be concerned with "exhaustible natural resources". Second, the measure must be "related to" the conservation of the relevant exhaustible natural resources, implying that the measure is "primarily aimed at conservation" and that there is a "genuine relationship of ends and means" between the measure and its objectives. Third, the measure must be "made effective in conjunction with restrictions on domestic production or consumption".<sup>308</sup> Brazil is of the view that the Panel conflated the second and third requirements of Article XX(g) and took an overly narrow approach to the "relating to" test with regards to export quotas. The relationship between a measure and the conservation of an exhaustible natural resource cannot be assessed by dividing the domestic and foreign markets, as that would render the third element of the test redundant. According to Brazil, the Panel seemed to affirm that the export quotas are ineffective because there are no restrictions on the domestic market, as they ultimately signal more internal consumption. This does not make, in and of itself, the measure unrelated to the conservation objective for the purposes of "a close and genuine relationship of ends and means".<sup>309</sup> In Brazil's view, the comparison between domestic and the foreign markets should not be a component of the analysis in the "related to" test, as the effectiveness of the measures is to be addressed under the third requirement of Article XX(g), and any discrimination is to be assessed under the chapeau.

2.226. With regard to China's argument that a "contribution" analysis is relevant to an examination of whether a measure relates to conservation for the purposes of Article XX(g), Brazil notes that the "necessity" test of Article XX(a), (b), and (d) of the GATT 1994 is significantly different from the "relating to" test of Article XX(g). In the absence of the "alternative measure" analysis that accompanies the "contribution" analysis in the "necessity" test, the role of the "contribution" analysis, while possibly relevant for Article XX(g), is diminished and does not carry the same weight that it does under the "necessity" test.

<sup>306</sup> Brazil's third participant's submission, para. 7.

<sup>307</sup> Brazil's third participant's submission, para. 13 (referring to Panel Reports, para. 7.460).

<sup>308</sup> Brazil's third participant's submission, para. 11 (referring to Appellate Body Report, *US – Shrimp*, paras. 127, 136, and 143).

<sup>309</sup> Brazil's third participant's submission, para. 21 (referring to Appellate Body Reports, *China – Raw Materials*, para. 355).

2.227. Brazil submits that the concept of "even-handedness" in Article XX(g) must be read in a way that allows a country to exploit its resources pursuant to its own environmental and development policies and in accordance with its level of economic development. At the same time, Brazil emphasizes that domestic restrictions considered under Article XX(g) must be actual restrictions, and that they must be effective. Moreover, Brazil argues that the criterion of "even-handedness" should not overlap with the requirements in the chapeau. Rather, "even-handedness" under subparagraph (g) should be understood as being more flexible than under the chapeau. The "even-handedness" analysis under Article XX(g) should therefore not be overly concerned with an equivalence of restrictions between the domestic and the foreign consumption or production, but mainly with fairness and impartiality, particularly if the environmental conditions in the Member implementing the measures are different from those in other Members.

#### 2.7.4 Canada

2.228. Canada maintains that China's arguments concerning the relationship between China's Accession Protocol and the GATT 1994 in these disputes are not "novel", but are merely an attempt to recast its arguments in previous disputes in which the same issue was addressed. In *China – Publications and Audiovisual Products*, the Appellate Body found that China had the right to invoke Article XX of the GATT 1994 to defend a breach of Paragraph 5.1 of China's Accession Protocol due to the scope of the specific obligations assumed under Paragraph 5.1, and not because of the general availability of Article XX to justify violations of obligations in China's Accession Protocol. In *China – Raw Materials*, the Appellate Body concluded that access to Article XX of the GATT 1994 can be granted for violations of a non-GATT obligation insofar as language to that effect is present in the paragraph of China's Accession Protocol creating the obligation. The Appellate Body found that Paragraph 11.3 does not contain such language, and that mere reference to a GATT provision (such as Article VIII in Paragraph 11.3) does not in and of itself suffice to render Article XX of the GATT 1994 applicable. Canada argues that China has not provided "cogent reasons" for departing from the Appellate Body's findings in *China – Raw Materials*, and its appeal should be rejected. Canada highlights the finding of the panel in *US – Countervailing and Anti-Dumping Measures (China)* that cogent reasons for departing from an Appellate Body finding could exist if the Appellate Body finding "proved to be unworkable in a particular set of circumstances".<sup>310</sup> Canada argues that there are no differences in the circumstances of these disputes that would make the Appellate Body's findings in *China – Raw Materials* unworkable.

2.229. Moreover, Canada submits that, even if one accepts China's interpretation of the term "the WTO Agreement" in Paragraph 1.2 of China's Accession Protocol as referring to the Marrakesh Agreement together with its Annexes, "too many interpretative leaps are necessary for China's conclusion as to the effect of that interpretation to be correct".<sup>311</sup> First, on its own, the answer to the question of whether an accession protocol is an "integral part" of the Marrakesh Agreement alone, or of that Agreement together with its annexed Multilateral Trade Agreements, "tells us little about the relationship between the various parts of these instruments".<sup>312</sup> Moreover, China's interpretation suggests that provisions of different parts of a Member's WTO obligations should modify each other simply on the grounds that the relationship between them is "intrinsic". Such an interpretation, Canada contends, would introduce considerable instability and unpredictability and undermine the security on which the trading system depends.

2.230. With respect to China's claim that the Panel erred in its interpretation and application of the term "relating to" in Article XX(g), Canada addresses three issues: (i) the legal standard for "relating to" and whether it is equivalent to "contribution"; (ii) the Panel's examination of the "predictable effects" of China's export quotas; and (iii) the relevance of evidence of effects in the "relating to" analysis.

2.231. Canada recalls that the Panel noted that the Appellate Body's Article XX(g) jurisprudence does not require that the measure be "primarily aimed at" conservation to "relate to"

<sup>310</sup> Canada's third participant's submission, para. 12 (quoting Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.317).

<sup>311</sup> Canada's opening statement at the oral hearing.

<sup>312</sup> Canada's opening statement at the oral hearing.

conservation.<sup>313</sup> Nonetheless, while the measure may not be required to be primarily aimed at conservation, the statements by the Appellate Body should not be construed as lowering the standard to a marginal level of contribution, particularly given the Appellate Body's clarification that a measure "merely incidentally" aimed at conservation would not meet this threshold.<sup>314</sup> Canada posits that, to be provisionally justified under Article XX(g), a measure must have a close and genuine relationship of ends and means with the goal of conservation.

2.232. Canada further refers to China's argument that, when considering the design and structure of the measure, the "predictable effects" of that measure can provide evidence of whether it is genuinely "related to" conservation, and contends that this is precisely what the Panel did: it found that the predictable effects of China's export quotas are the sending of "perverse signals" to domestic consumers, and that this is a part of the measures' design and structure. In *US – Gasoline*, the Appellate Body recognized that it may be appropriate to take the wider regulatory context of a measure into account, but it did not suggest that evidence of a wider programme of conservation is sufficient to find that the measure itself relates to conservation.<sup>315</sup> For Canada, a measure may be enacted as part of a *bona fide* comprehensive policy aimed at conservation and yet, in isolation, not relate to conservation within the meaning of Article XX(g). This is because it is the design and structure of the measure itself that must demonstrate its relationship to conservation.

2.233. With respect to the relevance of effects, Canada suggests that the evidence of effects should be considered, and that they may be useful to the extent that they shed light on, and confirm, the design and structure of a measure. Canada notes that there is no Appellate Body jurisprudence on whether consideration of empirical evidence is precluded when determining whether a measure relates to conservation, and emphasizes that this was not the position taken by the Panel. However, evidence of effects cannot, on its own, be determinative of whether a measure "relates to" conservation. The measure must be more than indirectly or incidentally aimed at conservation. It is Canada's position that considering evidence of effects to be determinative of this issue runs the risk of capturing measures that may not have a substantial, "close and genuine relationship" with conservation, and that giving equal weight to effects would substitute correlation for causation.

2.234. Canada reads the Appellate Body reports in *US – Gasoline* and *China – Raw Materials* as suggesting that, under Article XX(g), evidence of the effects of foreign and domestic restrictions can be taken into account in order to determine if a domestic restriction is operative.<sup>316</sup> However, such evidence cannot be determinative. For Canada, this approach to Article XX(g) would not duplicate the analysis under the chapeau, because the objective of each analysis is different. Under subparagraph (g), the objective is to determine whether the measure is genuinely about conservation. In contrast, the objective of the analysis under the chapeau is to determine whether, even if the measure is genuinely about conservation, it is applied in a manner that, *inter alia*, favours domestic interests over foreign ones in an arbitrary or unjustifiable manner.

2.235. Further, Canada maintains that the term "in conjunction with" requires the domestic restrictions to be in force at relatively the same time as the foreign restrictions. While it seems unreasonable to impose a requirement of strict simultaneity on governments enacting domestic and foreign restrictions, a reasonably close timing can be highly informative of whether the requirement is fulfilled. With regard to "even-handedness", Canada agrees with the complainants that China's interpretation ignores the actual text of Article XX(g). At the same time, the distribution of the burden between foreign and domestic interests should not need to be balanced in the same sense as under the chapeau, because otherwise the chapeau would be rendered inutile. The correct threshold should lie somewhere between merely proving that some burden on domestic interests exists and a "chapeau-style balancing".<sup>317</sup>

<sup>313</sup> Canada's third participant's submission, para. 17 (referring to Panel Reports, para. 7.285; and Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, p. 18).

<sup>314</sup> Canada's third participant's submission, para. 17 (referring to Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, p. 18).

<sup>315</sup> Canada's third participant's submission, para. 22 (referring to Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, p. 18).

<sup>316</sup> Canada's third participant's submission, para. 27 (referring to Appellate Body Reports, *US – Gasoline*, p. 20, DSR 1996:I, p. 19; and *China – Raw Materials*, paras. 356 and 360).

<sup>317</sup> Canada's third participant's submission, para. 35.

## 2.7.5 Colombia

2.236. Colombia agrees with the Panel that the wording of Paragraph 1.2 of China's Accession Protocol makes an explicit reference to "the WTO Agreement" and not to specific Multilateral Trade Agreements. However, Colombia argues, this does not mean that China's Accession Protocol is "a stand-alone text" that holds no relation to the Multilateral Trade Agreements.<sup>318</sup> Rather, an accession protocol contains commitments that are to be undertaken together with obligations covered in the Multilateral Trade Agreements. Colombia argues that Paragraph 11.3 of China's Accession Protocol "expands ... China's obligations regarding export duties encompassed in [A]rticle XI:1 of [the] GATT 1994", and is therefore a "WTO-plus" obligation.<sup>319</sup> In Colombia's view, determining whether a "WTO-plus" provision becomes an integral part of one of the Multilateral Trade Agreements requires a "holistic and systemic interpretation" of the relevant provisions<sup>320</sup> and a cumulative reading of the relevant provisions.<sup>321</sup> Paragraph 11.3 of China's Accession Protocol "modifies" and "broadens" China's obligations under Article XI:1 of the GATT 1994 and, given that it regulates trade in goods, it is either an integral part of the GATT 1994 or an independent obligation under Annex 1A to the Marrakesh Agreement.<sup>322</sup> To understand fully China's obligations, both provisions must be read in conjunction and applied cumulatively. Colombia considers that China must abide by its commitments under both provisions, and that the exceptions under Article XX of the GATT 1994 are applicable to measures regarding China's commitments under both Article XI:1 of the GATT 1994 and Paragraph 11.3 of China's Accession Protocol.

## 2.7.6 European Union

2.237. With respect to the United States' appeal in DS431, the European Union states that it "does not disagree with the various statements of principle made by the Panel and the Parties".<sup>323</sup> At the same time, the European Union registers its objection to the rejection of the relevant Panel exhibits, recalling that it raised the same objection before the Panel. In the view of the European Union, these exhibits could and should have been accepted into the record by the Panel. Further, the European Union expresses its expectation that the exhibits in question have in any event been transmitted to the Appellate Body, and its belief that no party should be precluded from referring to them, should it so wish.

## 2.7.7 Korea

2.238. Korea submits that the WTO agreements do not prohibit a Member from pursuing its legitimate policy goals, including sustainable economic development. These agreements strike a careful balance in which exceptions under Article XX protect sovereign countries' legitimate policy goals, provided that they comply with specified rights and obligations. Faced with new challenges presented by technological development and globalization, the WTO should provide Members with "correct treaty interpretation and application" of the "20-year-old provisions of the WTO agreements".<sup>324</sup> In Korea's view, the interpretation pursuant to Article 31 of the Vienna Convention "seems to leave the meaning of Paragraph 11.3 of China's Accession Protocol still ambiguous or obscure".<sup>325</sup> Therefore, Korea argues, in answering the question of whether Article XX could be invoked as a defence to breaches of Paragraph 11.3, recourse to preparatory work of the accession negotiations, pursuant to Article 32 of the Vienna Convention, may assist in finding the "correct intention between the negotiating parties".<sup>326</sup>

<sup>318</sup> Colombia's third participant's submission, para. 14.

<sup>319</sup> Colombia's third participant's submission, para. 10.

<sup>320</sup> Colombia's third participant's submission, para. 11 (referring to Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, p. 106; and *US – Gasoline*, p. 23, DSR 1996:I, p. 21; and quoting Panel Report, *US – Section 301 Trade Act*, para. 7.22).

<sup>321</sup> Colombia's third participant's submission, para. 12 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, paras. 87-90).

<sup>322</sup> Colombia's third participant's submission, para. 13.

<sup>323</sup> European Union's third participant's submission in DS431 (contained in its appellee's submission in DS432 and DS433), para. 369.

<sup>324</sup> Korea's opening statement at the oral hearing.

<sup>325</sup> Korea's opening statement at the oral hearing.

<sup>326</sup> Korea's opening statement at the oral hearing.

### 2.7.8 Norway

2.239. Norway agrees with the Panel that China's arguments did not constitute "cogent reasons" for departing from the Appellate Body's finding in *China – Raw Materials* that Article XX of the GATT 1994 is not available to justify a breach of Paragraph 11.3 of China's Accession Protocol. Norway shares the Panel's view that nothing in Article XII:1 of the Marrakesh Agreement or Paragraph 1.2 of China's Accession Protocol supports China's position that, faced with a specific accession commitment, a treaty interpreter must determine to which of the Multilateral Trade Agreement it intrinsically relates, and then treat such commitment as an integral part of the related Multilateral Trade Agreement. In Norway's view, the Panel undertook a thorough interpretation of both provisions, consistently with the DSU. Norway concurs with the Panel that individual provisions of an accession protocol could only be made an integral part of one or more of the Multilateral Trade Agreements if and where specific language to that effect is contained in the relevant individual provisions, and not by virtue of interpretation of Paragraph 1.2.

### 2.7.9 Russia

2.240. Russia submits that the Panel's finding that an explicit textual link between the GATT 1994 and Paragraph 11.3 of China's Accession Protocol is required for Article XX of the GATT to be available to justify a breach of the Protocol is of serious concern. Russia claims that, during its accession negotiations, upon assurance by the incumbent WTO Members that defences under the WTO agreements are equally available to all WTO Members, Russia agreed to delete the following statement from its Accession Protocol: "nothing in these commitments shall be understood to derogate from the rights of the Russian Federation under the WTO Agreement as applied between the Members of the WTO by the date of accession of the Russian Federation to the WTO."<sup>327</sup> In Russia's view, the Panel's above finding means that the statement Russia agreed to delete should have been included in the accession protocols of all newly acceded WTO Members. Russia further maintains that the Panel's finding would apply to all other defences, including the security exceptions in Article XXI of the GATT 1994. For Russia, an acceding Member's intention to waive its right to protect important values such as life and health must be clearly and unambiguously explained. In this regard, Russia stresses its agreement with the views of the dissenting member of the Panel.<sup>328</sup>

### 2.7.10 Saudi Arabia

2.241. Saudi Arabia contends that the issue of the relationship between accession commitments and the covered agreements raised in China's appeal consists of two separate but related matters. The first matter is whether accession commitments must be read in the light of the relevant covered agreements to which they refer either expressly or by necessary implication. The second matter is whether failure to comply with an accession commitment that relates to a particular covered agreement necessarily gives the newly acceded Member the right to invoke the exceptions of the covered agreement that were not directly or indirectly incorporated in the accession documents. With regard to the first matter, Saudi Arabia submits that a Member's accession commitments contained in its accession protocol and accession working party report "complement and supplement" its obligations under the covered agreements.<sup>329</sup> Where the accession commitments have such a close and obvious relationship with provisions in one or more of the covered agreements, the relevant provisions of the agreements must be read in the light of and in combination with the accession commitment. This implies that compliance with the accession commitment also means compliance with the relevant provision of the covered agreements that the commitment sought to specify and clarify. However, this interpretation does not necessarily lead to a particular resolution of the second matter. In Saudi Arabia's view, the fact that a Member's accession commitments must be read together with the covered agreements does not necessarily mean that all of the defenses provided in the relevant covered agreements are automatically available to justify also the violation of the accession commitment. Rather, according

<sup>327</sup> Russia's opening statement at the oral hearing (quoting document WT/ACCSP/EC/RUS/25/Rev.3, p. 243).

<sup>328</sup> Russia's opening statement at the oral hearing. Russia refers, in particular, to paragraphs 7.124, 7.135, and 7.137 of the Panel Reports. The dissenting member of the Panel stated, *inter alia*, that "the defences provided in the GATT 1994 are automatically available to justify any GATT-related obligations, including border tariff-related obligations – unless a contrary intention is expressed by the acceding Member and WTO Members." (Panel Reports, para. 7.137 (fn omitted))

<sup>329</sup> Saudi Arabia's third participant's submission, para. 13.



to Saudi Arabia, absent direct or indirect references to the availability of such exceptions, the Member has agreed to abide by its accession commitment, without exception. Saudi Arabia further argues that, where a dispute arises as to the consistency of a measure with a Member's accession commitments, the interpretation must not "add to or subtract" from the "carefully negotiated balance" of rights and obligations contained in "the comprehensive accession package of commitments and benefits, rights and obligations".<sup>330</sup>

2.242. With respect to China's claim that the Panel erred in its interpretation and application of the words "relating to" in Article XX(g) of the GATT 1994, Saudi Arabia considers that the Panel correctly developed the legal standard of when a measure "relates to" conservation. There needs to exist a close and genuine relationship of means and ends between the measure and the conservation policy, and this relationship is determined by analysing the general structure and design of the measure at issue and the manner in which it is related to the conservation objective. Saudi Arabia adds that, although China's appeal does not specifically raise any claims about the Panel's analysis of the chapeau of Article XX, it is important to note that the examination under the chapeau concerns merely the way in which the conservation measure is applied, not its genuine relationship with the conservation objective. Furthermore, Saudi Arabia suggests that an important aspect of any dispute concerning conservation and use of natural resources, such as the claims in these disputes under Article XX(g), is the context provided by the principle of permanent sovereignty over natural resources. For Saudi Arabia, this principle, which allows Members endowed with natural resources to utilize those resources to promote economic and social development, is in line with the objectives of the WTO as recorded in the first recital of the preamble of the Marrakesh Agreement.

2.243. Saudi Arabia notes, with regard to the second clause of subparagraph (g) of Article XX, that the Appellate Body has in previous cases applied a test of general "even-handedness" without inquiring into the effectiveness of domestic measures. The Appellate Body has not discussed whether regulations on foreign and domestic goods must be identical or even similar. Instead, the Appellate Body has stated that the restrictions must be applied or imposed jointly on foreign and domestic goods, and that this requirement is met when the trade measure and the domestic restriction "work together".<sup>331</sup> In Saudi Arabia's view, the Panel in the present case developed a very similar legal analysis, and Saudi Arabia thus considers that the Panel's approach is in line with prior Appellate Body jurisprudence.

### 2.7.11 Turkey

2.244. With respect to China's claim that the Panel erred in its interpretation and application of the term "relating to" in Article XX(g), Turkey opines that the Panel's approach, to give special attention to examining the relationship between the general structure and design of the measures at issue and the policy goals sought by China in regard to determining the "related to" criteria, is correct. However, Turkey emphasizes that any relevant information submitted by the parties should be considered in assessing whether there is a "genuine" or "real" relationship between the measure and the conservation objective.<sup>332</sup>

<sup>330</sup> Saudi Arabia's third participant's submission, para. 16.

<sup>331</sup> Saudi Arabia's third participant's submission, para. 25 (referring to Appellate Body Reports, *US – Gasoline*, p. 20, DSR 1996:I, p. 19; and *China – Raw Materials*, paras. 356-358).

<sup>332</sup> Turkey's opening statement at the oral hearing.

### 3 ISSUES RAISED IN THESE APPEALS

3.1. The following issues are raised in these appeals:

- a. with respect to dispute DS431 only, whether the Panel erred, and acted inconsistently with its duties under Articles 11 and 12.4 of the DSU, in deciding to reject Exhibits JE-187 through JE-196 submitted by the United States on 17 July 2013 together with its comments on China's responses to the second set of questions from the Panel;
- b. with respect to the Panel's findings regarding the relationship between specific provisions of China's Accession Protocol, on the one hand, and the Marrakesh Agreement<sup>333</sup> and the Multilateral Trade Agreements annexed thereto, on the other hand:
  - i. whether the Panel erred in its interpretation of Article XII:1 of the Marrakesh Agreement in finding that this provision does not support China's position that each provision of its Accession Protocol must be considered an integral part of the specific covered agreement to which it intrinsically relates; and
  - ii. whether the Panel erred in its interpretation of the second sentence of Paragraph 1.2 of China's Accession Protocol in finding that the legal effect of the second sentence of Paragraph 1.2 is to make China's Accession Protocol, in its entirety, an "integral part" of the Marrakesh Agreement, and not that, in addition, the individual provisions of China's Accession Protocol are also integral parts of the Multilateral Trade Agreements annexed to the Marrakesh Agreement; and
- c. with respect to the Panel's findings that China had not demonstrated that China's export quotas for rare earths, tungsten, and molybdenum are justified under Article XX(g) of the General Agreement on Tariffs and Trade 1994 (GATT 1994):
  - i. whether the Panel erred, in its reasoning regarding the signals sent by China's export quotas on rare earths and tungsten to foreign and domestic consumers, in finding that those export quotas are not measures "relating to" conservation, and, more specifically:
    - whether the Panel erred in interpreting the term "relating to" in Article XX(g) of the GATT 1994 as requiring the Panel to limit its analysis to an examination of the design and structure of the measures at issue, to the exclusion of evidence regarding the effects of relevant measures in the marketplace;
    - whether the Panel erred in applying Article XX(g) to the facts of this case, in particular by limiting its analysis to an examination of the design and structure of China's export quotas for rare earths and tungsten, to the exclusion of evidence regarding the effects of such export quotas and other elements of China's conservation scheme in the marketplace; and
    - whether the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU; and

<sup>333</sup> Before the Panel, China drew a distinction between the Marrakesh Agreement Establishing the World Trade Organization *excluding* the Multilateral Trade Agreements annexed to it, on the one hand, and that Agreement *together* with its annexes, on the other hand. China used "the Marrakesh Agreement" to refer to the former, and "the WTO Agreement" to refer to the latter. On appeal, China draws the same distinction. In its findings regarding the availability of Article XX of the GATT 1994 to justify a breach of Paragraph 11.3 of China's Accession Protocol, the Panel also used "the Marrakesh Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization *excluding* its annexes. For purposes of consistency, we, like the Panel, use "the Marrakesh Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization *excluding* its annexes, even in instances where the complainants and third participants themselves have not, in their submissions, used the nomenclature "the Marrakesh Agreement". We underline that our use of such nomenclature is for purposes of these appeals only, and without prejudice to the legal issues raised by China on appeal.

- ii. whether the Panel erred in finding that China's export quotas for rare earths, tungsten, and molybdenum are not "made effective in conjunction with" domestic restrictions, and, more specifically:
  - whether the Panel erred in interpreting Article XX(g) of the GATT 1994 as imposing a separate requirement of "even-handedness" that must be fulfilled in addition to the conditions expressly specified in subparagraph (g); and in interpreting Article XX(g) as requiring Members seeking to invoke Article XX(g) to prove that the burden of conservation is evenly distributed, for example, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand; and as requiring the Panel to limit its analysis to an examination of the design and structure of the measures at issue, to the exclusion of evidence regarding the effects of relevant measures in the marketplace;
  - whether the Panel erred in its application of Article XX(g) by requiring that the burden of conservation be evenly distributed between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand; and by limiting its analysis to an examination of the design and structure of China's export quotas, to the exclusion of evidence regarding the effects of such export quotas and other elements of China's conservation scheme in the marketplace; and
  - whether the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU.

#### 4 BACKGROUND AND OVERVIEW OF THE MEASURES AT ISSUE

4.1. Before commencing our analysis of the issues of law and legal interpretations raised in these appeals, we provide a brief overview of the measures at issue and the products covered by these measures. For additional details in this regard, recourse should be had to the Panel Reports.<sup>334</sup>

4.2. As mentioned in paragraph 1.2 above, before the Panel, the complainants challenged three types of measures applied to three groups of products. More specifically, the complainants challenged China's use of export duties<sup>335</sup> and export quotas<sup>336</sup> on a range of rare earth, tungsten, and molybdenum products, as well as certain aspects of China's administration and allocation of its export quota regimes on rare earths and molybdenum.

4.3. The complainants identified multiple legal instruments in connection with each of their claims, including China's framework legislation, implementing regulations, other applicable laws, and specific annual measures. The European Union and Japan also made claims in respect of replacement measures and renewal measures, while the United States made claims in respect of "implementing measures in force to date".<sup>337</sup>

4.4. The Panel determined that, for each type of measure, it would "make findings and recommendations with respect to the series of measures comprising the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific annual measures ... existing at the date of the Panel's establishment".<sup>338</sup> The Panel found that, through

<sup>334</sup> Panel Reports, paras. 2.2-2.16, 7.41-7.47, 7.204-7.235, and 7.985-7.990.

<sup>335</sup> The complainants challenged China's imposition of export duties on 58 rare earth products, 15 tungsten products, and nine molybdenum products that are not identified in Annex 6 to the Protocol on the Accession of the People's Republic of China to the WTO, WT/L/432 (China's Accession Protocol). (See Panel Reports, paras. 7.30 and 7.46)

<sup>336</sup> The complainants challenged China's imposition of export quotas on 75 rare earth products, 14 tungsten products, and nine molybdenum products. (See Panel Reports, para. 2.16 (referring to Panel Exhibits CHN-8 and JE-48))

<sup>337</sup> Panel Reports, paras. 2.10, 2.12, and 2.15, and fn 19 to para. 2.9, fn 20 to para. 2.11, and fn 22 to para. 2.14.

<sup>338</sup> Panel Reports, paras. 7.41 and 7.235. In adopting this approach, the Panel explained that it was taking the same approach as in the *China – Raw Materials* disputes and referred, in this regard, to paragraph 7.33 of the panel reports, and paragraph 266 of the Appellate Body reports in those disputes.

this "series of measures"<sup>339</sup>, China subjected various forms of rare earths, tungsten, and molybdenum to export duties<sup>340</sup> and export quotas<sup>341</sup> in 2012.<sup>342</sup>

4.5. As explained in the subsequent sections of these Reports, the appeals raised by the United States and China are limited in scope, and do not call for extensive consideration of the challenged measures on appeal. Since, however, the issues appealed by China under Article XX(g) of the GATT 1994 require some discussion of the quotas that China applies to rare earths, tungsten, and molybdenum, we consider it useful to outline briefly certain aspects of those quotas and of China's export quota regime as applied to these three product groups, in particular in 2012.

4.6. The Foreign Trade Law<sup>343</sup> allows for the imposition of restrictions or prohibitions, including through export quotas, on the exportation of goods in the pursuit of certain specific objectives, such as protecting human life or health, or conserving exhaustible natural resources. The Regulations on the Administration of the Import and Export of Goods<sup>344</sup> prescribe rules governing the administration of the export and import of goods, while the Export Quota Administration Measures<sup>345</sup> specify further aspects of the administration of export quotas. The Export Quota Administration Measures applies in respect of tungsten and molybdenum, but not in respect of exports of rare earths.<sup>346</sup>

4.7. The Ministry of Commerce of the People's Republic of China (MOFCOM) has authority to administer all Chinese export quotas<sup>347</sup> and, in collaboration with China's customs authorities, is responsible for "formulating, adjusting, and publishing"<sup>348</sup> catalogues of those goods subject to

<sup>339</sup> Panel Reports, paras. 7.41 and 7.235.

<sup>340</sup> In their requests for the establishment of a panel, the complainants identified four instruments through which China subjects various forms of rare earths, tungsten, and molybdenum to export duties. The Panel expressly referred to these four instruments as the "series of measures" that were the subject of its findings. These instruments are: Customs Law of the People's Republic of China (Panel Exhibit JE-54); Regulations on Import and Export Duties (Panel Exhibit JE-46); 2012 Tariff Implementation Program (Customs Tariff Commission) (Panel Exhibit JE-45); and 2012 Tariff Implementation Plan (General Administration of Customs) (Panel Exhibit JE-47).

<sup>341</sup> In their requests for the establishment of a panel, the complainants identified 18 instruments through which China subjected the various forms of rare earths, tungsten, and molybdenum to quantitative restrictions in the form of export quotas. The Panel expressly referred to 15 of those measures in the course of its analysis. These measures are contained in Panel Exhibits JE-51; JE-53; CHN-8 and JE-48; CHN-11 and JE-49; CHN-38 and JE-61; CHN-54 and JE-50; CHN-55 and JE-66; CHN-56 and JE-55; CHN-57 and JE-56; CHN-96 and JE-52; CHN-97 and JE-58; CHN-98 and JE-65; CHN-99 and JE-59; CHN-100 and JE-62; and CHN-107 and JE-63 (see Table of Exhibits on page 8 of these Reports). The Panel also included the following two instruments, not expressly identified in the complainants' panel requests, in its description of the "series of measures" comprising China's export quota regime: 2012 Second Batch Rare Earth Export Quotas (Panel Exhibits CHN-58 and JE-57); and 2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals (Panel Exhibits CHN-165 and JE-60). In response to questioning at the oral hearing, all the participants agreed that these two instruments are included in the "series of measures" that were the subject of the Panel's findings.

<sup>342</sup> With respect to China's administration and allocation of its export quota regime, the complainants, in their requests for the establishment of a panel, identified 17 instruments through which China imposes restrictions on the trading rights of enterprises seeking to export various forms of rare earths and molybdenum. However, in the course of its analysis, the Panel emphasized that, according to the complainants, only five of those 17 measures contain eligibility criteria with which export quota applicants must comply so as to be eligible to apply for part of the rare earth, tungsten, and molybdenum quota allocation. (Panel Reports, para. 7.985) The Panel therefore expressly referred to the following five measures in the course of its analysis: Export Quota Administration Measures (Panel Exhibits CHN-96 and JE-52); 2012 Application Qualifications and Procedures for Rare Earth Export Quotas (Panel Exhibits CHN-38 and JE-61); 2012 Application Qualifications and Application Procedures for Molybdenum Export Quota (Panel Exhibits CHN-107 and JE-63); 2012 First Batch Rare Earth Export Quotas (Supplement) (Panel Exhibits CHN-57 and JE-56); and 2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals (Panel Exhibits CHN-99 and JE-59).

<sup>343</sup> Panel Exhibits CHN-11 and JE-49.

<sup>344</sup> Panel Exhibits CHN-54 and JE-50.

<sup>345</sup> Panel Exhibits CHN-96 and JE-52.

<sup>346</sup> Panel Reports, para. 7.204 (referring to Foreign Trade Law, Article 19; Regulations on the Administration of the Import and Export of Goods, Articles 4 and 36; and Export Quota Administration Measures, Article 1).

<sup>347</sup> Panel Reports, para. 7.205 (referring to Foreign Trade Law, Article 20).

<sup>348</sup> Panel Reports, para. 7.206 (referring to Foreign Trade Law, Article 18; Regulations on the Administration of the Import and Export of Goods, Article 35; and 2008 Export Licence Administration Measures (Panel Exhibit JE-51), Article 3, para. 2).

import or export restrictions. In this regard, the 2012 Export Licensing Catalogue<sup>349</sup> issued by MOFCOM identified, among the goods subject to export quotas and to export quota licensing administration, concentrates and a variety of processed and alloyed products of rare earths, tungsten, and molybdenum goods.<sup>350</sup> This means that quota shares are directly assigned by MOFCOM and require MOFCOM's approval.<sup>351</sup> Accordingly, any firm seeking to export any of these three categories of products must apply for an export quota share and meet certain criteria in order to be eligible.<sup>352</sup> Firms approved to export these products receive a quota certificate. After obtaining a quota certificate, exporters apply to MOFCOM for an export licence, which can be presented to China's customs authorities.<sup>353</sup>

4.8. The Regulations on the Administration of the Import and Export of Goods provides that MOFCOM shall publish annual quota amounts for products listed in the Export Licensing Catalogue by 31 October of the preceding year.<sup>354</sup> MOFCOM published the 2012 Export Quota Amounts on 31 October 2011.<sup>355</sup> This document indicates the total 2012 export quota for certain agricultural and industrial products, including tungsten and molybdenum.<sup>356</sup> However, there was no announcement in October 2011 of the total 2012 export quota for rare earths.<sup>357</sup>

4.9. China also maintains a series of criminal and administrative penalties for the exportation of restricted goods in a manner inconsistent with the quota regime. The holder of an export quota allocation is required to return any unused quota volume by 31 October of the year for which the export quotas have been issued. Exporting enterprises may be subject to sanction if they fail to do so, or if they fail fully to use their quota by the end of the year. Enterprises may also face sanctions for exporting without permission, for exceeding the quantitative limitations, or for buying or selling quota certificates or other documents without approval. Sanctions include refusal to handle the offending enterprise's customs inspection; revocation of the non-complying enterprise's business licence for foreign trade; a reduction in the offending enterprise's quota allocation; and possible criminal punishment. Quota-administering authorities that distribute quotas exceeding their authority may also be subject to sanction.<sup>358</sup>

4.10. As for the products at issue, rare earths, tungsten, and molybdenum are naturally occurring minerals found in various mined ores.<sup>359</sup> "Rare earths" is the term commonly used to refer to a group of chemical elements in the periodic table of elements, also known as lanthanides. In these disputes, "rare earths" refers to the 15 elements that make up this lanthanide group, as well as to two other elements, which are also considered to be rare earths.<sup>360</sup> These elements are found in a

<sup>349</sup> Panel Exhibits CHN-8 and JE-48.

<sup>350</sup> Panel Reports, paras. 7.207 and 7.209 (referring to 2012 Export Licensing Catalogue).

<sup>351</sup> Panel Reports, para. 7.209 (referring to 2012 Export Licensing Catalogue).

<sup>352</sup> Panel Reports, para. 7.212 (referring to 2012 Application Qualifications and Procedures for Rare Earth Export Quotas (Panel Exhibits CHN-38 and JE-61)). See also 2012 Application Qualifications and Additional Application Procedures of Tungsten Export (or Supply) Enterprises (Panel Exhibits CHN-100 and JE-62), Article IV(iv); 2012 Export Quota Amounts (Panel Exhibits CHN-97 and JE-58); and 2012 Application Qualifications and Application Procedures for Molybdenum Export Quota (Panel Exhibits CHN-107 and JE-63).

<sup>353</sup> Panel Reports, para. 7.212 (referring to Regulations on the Administration of the Import and Export of Goods, Articles 41 and 43).

<sup>354</sup> Panel Reports, para. 7.207 (referring to Regulations on the Administration of the Import and Export of Goods, Article 38).

<sup>355</sup> Panel Reports, para. 7.208 (referring to 2012 Export Quota Amounts).

<sup>356</sup> Panel Reports, para. 7.208.

<sup>357</sup> The amounts of the rare earth, tungsten, and molybdenum export quotas were further specified in separate announcements issued by MOFCOM related to each product, with the amounts divided among different "batches". With respect to rare earths, China announced the specific amounts allocated for the 2012 export quotas in three separate instruments published in December 2011, May 2012, and August 2012. (Panel Reports, paras. 7.213-7.215 (referring to Panel Exhibits CHN-56 and JE-55, CHN-57 and JE-56, and CHN-58 and JE-57)) In respect of tungsten and molybdenum, China announced the specific amounts allocated for the 2012 export quotas in two separate instruments published in December 2011 and July 2012. (Panel Reports, paras. 7.228 and 7.229 (referring to 2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals; and 2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals) See also Panel Reports, paras. 7.222-7.224 and 7.227-7.230)

<sup>358</sup> Panel Reports, para. 7.210.

<sup>359</sup> Panel Reports, paras. 2.5-2.7.

<sup>360</sup> Panel Reports, para. 2.3. Thus, the 17 "rare earths" included in the scope of these disputes comprise: lanthanum (La), cerium (Ce), praseodymium (Pr), neodymium (Nd), promethium (Pm), samarium (Sm), europium (Eu), gadolinium (Gd), terbium (Tb), dysprosium (Dy), holmium (Ho), erbium (Er), thulium (Tm), ytterbium (Yb), lutetium (Lu) (the lanthanide group), as well as scandium (Sc) and yttrium (Y).

variety of different ores. Tungsten is primarily found in two ores: wolframite and scheelite.<sup>361</sup> Molybdenum is mined from ore containing molybdenite, which is often recovered as a by-product of copper mining.<sup>362</sup>

4.11. The products subject to the export measures at issue consist of both the naturally occurring minerals, as well as a number of intermediate products, that is, materials that have undergone some initial processing, for example into concentrates, oxides, salts, metals, and chemicals. Generally speaking, the downstream products in which rare earths, tungsten, and molybdenum are used are not covered by the measures at issue in these disputes.<sup>363</sup> Examples of such finished products include, for rare earths, magnets and phosphors<sup>364</sup>; for tungsten, hardened alloys in the form of tungsten billet and cemented carbides<sup>365</sup>; and, for molybdenum, stainless steel.<sup>366</sup> Further details about the products at issue in these disputes may be found in paragraphs 2.2 to 2.7 of the Panel Reports.

4.12. Worldwide, China plays a central role in the production and consumption of rare earths, tungsten, and, to a lesser extent, molybdenum. China also produces many of the finished products that use rare earths, tungsten, and molybdenum as inputs.<sup>367</sup> Evidence submitted to the Panel suggests that China accounted for at least 90% of global production of rare earths in 2011.<sup>368</sup> China is also the largest global consumer of rare earths. The Panel noted that more than 80% of rare earths extracted in China are consumed in China<sup>369</sup>, and China itself submitted evidence that it accounted for nearly 70% of global demand for rare earths in 2012.<sup>370</sup> Similarly, as regards tungsten, China is the largest global producer, accounting for over 80% of such production.<sup>371</sup> Moreover, China consumes more than 60% of tungsten extracted domestically, and accounts for more than half of global consumption.<sup>372</sup> In relation to molybdenum, the Panel referred to evidence submitted by China indicating that China produced over 35% of the world's molybdenum supply.<sup>373</sup> Additionally, the parties submitted evidence indicating that China accounted for approximately 28% of global molybdenum consumption.<sup>374</sup>

<sup>361</sup> Panel Reports, para. 2.6.

<sup>362</sup> Panel Reports, para. 2.7.

<sup>363</sup> Panel Reports, paras. 7.169, 7.170, and 7.588.

<sup>364</sup> Panel Reports, paras. 7.552, 7.582, and 7.588.

<sup>365</sup> Panel Reports, paras. 2.6, 7.746, 7.786, and 7.800.

<sup>366</sup> Panel Reports, paras. 7.921, 7.932, and 7.958.

<sup>367</sup> With respect to rare earths, for example, China identified "three important rare earth-using industries in China (NiMH batteries, rare earth catalyst and permanent magnets)", and explained that there are "about 130 permanent magnet producers, 86 rare earths catalysts producers and dozens of major NiMH battery producers" in China. (China's appellant's submission, paras. 200 and 201; other appellant's submission, paras. 131 and 132)

<sup>368</sup> China submitted evidence showing that it accounted for 90% of the world's total production of rare earths in 2011. (Panel Exhibit CHN-01, p. 5) The complainants submitted evidence suggesting that China produced close to 97% of the world's supply of rare earths in 2011. (Panel Exhibits JE-23 and JE-79) The Panel also took note of evidence submitted by China illustrating that China accounted for 90-97% of global rare earth production in 2011. (Panel Exhibit CHN-6, p. 10; Panel Exhibit CHN-24, p. 4)

<sup>369</sup> Panel Reports, paras. 7.464 and 7.660.

<sup>370</sup> China's second written submission to the Panel, para. 111 (referring to Panel Exhibit CHN-4).

<sup>371</sup> The complainants and China submitted evidence to the Panel indicating that China produced 90.8% of worldwide tungsten supply in 2010 and 83% in 2011. (Panel Reports, para. 7.825. See also China's first written submission to the Panel, para. 285; Panel Exhibit JE-130, p. 26; and Panel Exhibits JE-37 and CHN-92, p. 177)

<sup>372</sup> Panel Reports, paras. 7.825 and 7.835. See also Panel Exhibit JE-130, pp. 36-37.

<sup>373</sup> China submitted evidence indicating that, in 2010, China produced 38% of the world's molybdenum supply, while, in 2011, China accounted for 37% of such production. The complainants submitted similar data estimating that China accounted for 36% of global molybdenum production in 2010. (See Panel Reports, para. 7.850; China's first written submission to the Panel, para. 344; Panel Exhibit CHN-106, p. 107; and Panel Exhibit JE-43, p. 4)

<sup>374</sup> See Panel Exhibits CHN-224, CHN-139 (updated), and JE-43, p. 14.



## 5 ANALYSIS OF THE APPELLATE BODY

### 5.1 Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol

#### 5.1.1 Introduction

5.1. China appeals the Panel's "erroneous assessment of the systemic relationship" between, on the one hand, specific provisions in the Protocol on the Accession of the People's Republic of China to the WTO<sup>375</sup> (China's Accession Protocol), and, on the other hand, the Marrakesh Agreement<sup>376</sup> and the Multilateral Trade Agreements annexed thereto.<sup>377</sup> China contends that the Panel erred in its interpretation of Article XII:1 of the Marrakesh Agreement and Paragraph 1.2, second sentence, of China's Accession Protocol in finding that "the legal effect of the second sentence of Paragraph 1.2 is to make China's Accession Protocol, in its entirety, an 'integral part' of the Marrakesh Agreement, and not that, in addition, the individual provisions thereof are also integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement."<sup>378</sup> China requests reversal of the three paragraphs in which this finding is set out, namely, paragraphs 7.80, 7.89, and 7.93 of the Panel Reports.

5.2. The Panel findings challenged by China are part of the Panel's intermediate findings leading to its conclusion that Article XX of the GATT 1994 is not available to China as a defence to justify the export duties at issue in these disputes<sup>379</sup>, which the Panel had found to be inconsistent with Paragraph 11.3 of China's Accession Protocol.<sup>380</sup> China's appeal, therefore, is narrow in scope, and does not involve any challenge to the ultimate findings and conclusions reached by the Panel regarding the inconsistency of China's export duties with its WTO obligations. More specifically, China has not appealed the Panel's finding that the export duties are inconsistent with Paragraph 11.3 of China's Accession Protocol.<sup>381</sup> China has also not appealed the Panel's conclusion that Article XX of the GATT 1994 is not available as a defence to justify these export duties<sup>382</sup>, nor the Panel's other intermediate findings leading to that conclusion.<sup>383</sup> Furthermore, China has not appealed the Panel's finding, reached on an *arguendo* basis, that the export duties at issue are not justified by either subparagraph (b) or the chapeau of Article XX of the GATT 1994.<sup>384</sup> In addressing this part of China's appeal, we begin with a brief overview of the context in which the Panel findings challenged by China were made, as well as a brief summary of the Panel findings subject to appeal and the participants' claims and arguments on appeal. We then analyse the interpretative issues raised by China on appeal.

<sup>375</sup> WT/L/432.

<sup>376</sup> Before the Panel, China drew a distinction between the Marrakesh Agreement Establishing the World Trade Organization *excluding* the Multilateral Trade Agreements annexed to it, on the one hand, and that Agreement *together* with its annexes, on the other hand. China used "the Marrakesh Agreement" to refer to the former, and "the WTO Agreement" to refer to the latter. On appeal, China draws the same distinction. In its findings regarding the availability of Article XX of the GATT 1994 to justify a breach of Paragraph 11.3 of China's Accession Protocol, the Panel also used "the Marrakesh Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization *excluding* its annexes. For purposes of consistency, we, like the Panel, use "the Marrakesh Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization excluding its annexes, even in instances where the complainants and third participants themselves have not, in their submissions, used the nomenclature "the Marrakesh Agreement". We underline that our use of such nomenclature is for purposes of these appeals only, and without prejudice to the legal issues raised by China on appeal.

<sup>377</sup> China's appellant's submission, paras. 4 and 46; other appellant's submission, paras. 4 and 46.

<sup>378</sup> Panel Reports, para. 7.93.

<sup>379</sup> Panel Reports, para. 7.115.

<sup>380</sup> Panel Reports, para. 7.48. Paragraph 11.3 requires China to eliminate export duties on all products except for those listed in Annex 6 to its Protocol or permitted under Article VIII of the GATT 1994. In the present disputes, it is uncontested that, with the exception of tungsten ores and concentrates (HS No. 2611.00), none of the products at issue are listed in Annex 6. (*Ibid.*, fn 77 to para. 7.30)

<sup>381</sup> Panel Reports, para. 7.48.

<sup>382</sup> Panel Reports, para. 7.115. As further described below, one panelist expressed a separate opinion, stating that "unless China explicitly gave up its right to invoke Article XX of the GATT 1994, which it did not, the general exception provisions of the GATT 1994 are available to China to justify a violation of Paragraph 11.3 of its Accession Protocol." (*Ibid.*, para. 7.138)

<sup>383</sup> Panel Reports, paras. 7.72, 7.104, and 7.114.

<sup>384</sup> Panel Reports, para. 7.196.

## 5.1.2 The Panel's findings

### 5.1.2.1 The context in which the Panel findings subject to appeal were made

5.3. Before the Panel, China did not contest that its export duties are inconsistent with its obligations under Paragraph 11.3 of its Accession Protocol. China argued, however, that its obligations under Paragraph 11.3 of its Accession Protocol are subject to the general exceptions in Article XX of the GATT 1994. Specifically, China argued that the export duties at issue are justified under Article XX(b) of the GATT 1994 because they are necessary to protect human, animal, or plant life or health.<sup>385</sup>

5.4. The Panel recalled that, in *China – Raw Materials*, the panel and the Appellate Body found that a proper interpretation of Paragraph 11.3 of China's Accession Protocol does not make available to China the general exceptions under Article XX of the GATT 1994.<sup>386</sup> The Panel noted that, in the present disputes, China requested the Panel to examine the issue of the availability of Article XX exceptions in the light of new arguments that, according to China, had not been asserted or addressed previously.<sup>387</sup> The Panel referred to the Appellate Body's statement in *US – Stainless Steel (Mexico)* that, "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."<sup>388</sup> The Panel additionally considered that, when a party asks a panel to deviate from a prior Appellate Body finding on a question of law on the basis of novel legal arguments, a full exploration of those arguments may assist the Appellate Body in the event of an appeal. The Panel expressed the view that "China's argument regarding the systemic relationship between the provisions of its Accession Protocol and those of the GATT 1994 is a new argument, and one that raises complex legal issues."<sup>389</sup> The Panel therefore re-examined the issue of whether the obligation in Paragraph 11.3 of China's Accession Protocol is subject to the general exceptions in Article XX, in order to determine whether the arguments raised by China in this case, including its "new" argument, presented "cogent reasons" for departing from the adopted panel and Appellate Body findings on the same question of law.<sup>390</sup>

5.5. The Panel addressed four arguments raised by China. Specifically, China argued that: (i) although there is no explicit textual link between Paragraph 11.3 of China's Accession Protocol and Article XX of the GATT 1994, such textual silence does not mean that it was the Members' common intention that no such defence should be available to China; (ii) Paragraph 11.3 of China's Accession Protocol has to be treated as an integral part of the GATT 1994; (iii) the phrase "nothing in this Agreement" in the chapeau of Article XX of the GATT 1994 does not exclude the availability of Article XX to defend a violation of Paragraph 11.3 of China's Accession Protocol; and (iv) an appropriate holistic interpretation, taking due account of the object and purpose of the *WTO Agreement*, confirms that China may justify export duties through recourse to Article XX of the GATT 1994.<sup>391</sup>

5.6. The Panel found that none of the four arguments put forward by China constituted a "cogent reason" for departing from the Appellate Body's findings in *China – Raw Materials*.<sup>392</sup> On this basis, the Panel concluded that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions provided in Article XX of the GATT 1994.<sup>393</sup> China has not appealed this conclusion, nor the Panel's rejection of three of the four arguments that China made in support of its claim that it had access to Article XX of the GATT 1994 to justify a breach of

<sup>385</sup> Panel Reports, para. 7.49.

<sup>386</sup> Panel Reports, para. 7.53 (referring to Panel Reports, *China – Raw Materials*, para. 7.159; and Appellate Body Reports, *China – Raw Materials*, para. 307).

<sup>387</sup> Panel Reports, para. 7.54.

<sup>388</sup> Panel Reports, para. 7.55 (quoting Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160 (fn omitted)).

<sup>389</sup> Panel Reports, para. 7.59. In addition, the Panel took into account "the following particular circumstances of this dispute: (i) no party or third party has argued that the Panel is legally precluded from re-examining this issue; (ii) the parties to this dispute are not identical to the parties in *China – Raw Materials* (which did not include Japan but did include another Member); [and] (iii) this legal issue is 'a central aspect of this dispute' that is 'of fundamental systemic importance', as evidenced by the extensive argumentation of the issue by the parties as well as many of the third parties in this dispute". (Ibid. (fn omitted))

<sup>390</sup> Panel Reports, para. 7.61.

<sup>391</sup> Panel Reports, para. 7.62 (referring to China's first written submission to the Panel, paras. 411, 422-435, 436-444, and 445-458, respectively).

<sup>392</sup> Panel Reports, para. 7.115.

<sup>393</sup> Panel Reports, para. 7.115.

Paragraph 11.3 of its Accession Protocol.<sup>394</sup> China has also not appealed the Panel's subsequent conclusion, reached on an *arguendo* basis, that China's measures are not justified by Article XX(b) of the GATT 1994.<sup>395</sup>

5.7. One panelist, while supporting the ultimate conclusion of the Panel that the export duties were not justified under Article XX(b) of the GATT 1994, expressed a separate opinion on the issue of the availability of Article XX to China to justify a violation of Paragraph 11.3. The panelist considered that China's obligation with respect to export duties under Paragraph 11.3 of its Accession Protocol "expands" its obligations under Articles II and XI:1 of the GATT 1994, which deal with, *inter alia*, the overlapping subject matter of border tariff duties.<sup>396</sup> Given this "close relationship", the panelist believed that Paragraph 11.3 of China's Accession Protocol must be read "cumulatively and simultaneously" with Articles II and XI of the GATT 1994.<sup>397</sup> Therefore, in the panelist's view, Paragraph 11.3 of China's Accession Protocol became, upon accession, an integral part of the GATT 1994 as that agreement applies between China and the WTO Members. Furthermore, the panelist opined that "the defences provided in the GATT 1994 are automatically available to justify any GATT-related obligations, including border tariff-related obligations – unless a contrary intention is expressed by the acceding Member and the WTO Members."<sup>398</sup> The panelist thus concluded that, "unless China explicitly gave up its right to invoke Article XX of GATT 1994, which it did not, the general exception provisions of the GATT 1994 are available to China to justify a violation of Paragraph 11.3 of its Accession Protocol."<sup>399</sup>

#### 5.1.2.2 The Panel findings appealed by China

5.8. China appeals the Panel's rejection of the second of the four arguments that China put forward in support of its position that the general exceptions in Article XX of the GATT 1994 can be invoked to justify a breach of the obligation in Paragraph 11.3 of its Accession Protocol. In addressing China's second argument – i.e. that Paragraph 11.3 of China's Accession Protocol must be treated as an integral part of the GATT 1994 – the Panel observed that this raised the question of the relationship between Paragraph 11.3 of China's Accession Protocol and the GATT 1994. According to the Panel, China relied upon the following two premises in making its argument:

- a. The legal effect of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement is to make China's Accession Protocol an "integral part" of the Marrakesh Agreement, and also to make each of the Accession Protocol-specific provisions an integral part of one of the Multilateral Trade Agreements (e.g. GATT 1994) annexed to the Marrakesh Agreement.
- b. The determination of *which* Multilateral Trade Agreement(s) (e.g. GATT 1994) a particular provision of the Accession Protocol is an "integral part" must be based on an evaluation of which Multilateral Trade Agreement(s) the provision at issue is "intrinsically" related to. Paragraph 11.3 of China's Accession Protocol contains an obligation regarding trade in goods, and in particular regulating the use of export duties. Therefore, it is "intrinsically related" to the GATT 1994, and in particular the provisions of GATT 1994 regulating the use of export duties – which, in China's view, are Articles II and XI of the GATT 1994. Accordingly, Paragraph 11.3 must be treated as an "integral part" of the GATT 1994. Paragraph 11.3 is therefore subject to the general exceptions in Article XX of the GATT 1994 unless there is explicit treaty language to the contrary.<sup>400</sup>

<sup>394</sup> The Panel's findings rejecting these arguments are found in paragraphs 7.72, 7.104, and 7.114 of the Panel Reports.

<sup>395</sup> Panel Reports, paras. 7.139-7.196.

<sup>396</sup> Panel Reports, para. 7.136.

<sup>397</sup> Panel Reports, para. 7.138.

<sup>398</sup> Panel Reports, para. 7.137. (fn omitted)

<sup>399</sup> Panel Reports, para. 7.138.

<sup>400</sup> Panel Reports, para. 7.76.a and b.

The Panel decided to address these two premises in analysing China's argument that it was entitled to invoke Article XX to justify a breach of Paragraph 11.3 of its Accession Protocol.<sup>401</sup> Only the Panel's findings on the first premise are subject to China's appeal.

5.9. In addressing the first premise, the Panel examined the context of Paragraph 1.2 of China's Accession Protocol, including the Decision of the Ministerial Conference of 10 November 2001 to which China's Accession Protocol is annexed<sup>402</sup>, the preamble of China's Accession Protocol, and Paragraph 1.3 of the Protocol. Having done so, the Panel disagreed with China that the term "the WTO Agreement" in the second sentence of Paragraph 1.2 refers to the Marrakesh Agreement together with the Multilateral Trade Agreements annexed to it. Instead, the Panel considered that the term "the WTO Agreement" in the second sentence of Paragraph 1.2 refers to the Marrakesh Agreement alone.<sup>403</sup>

5.10. The Panel further noted that Article II:2 of the Marrakesh Agreement states that the annexed Multilateral Trade Agreements are "integral parts of" the Marrakesh Agreement. In the Panel's view, this does not mean that the Multilateral Trade Agreements are integral parts of one another, or that individual provisions of one Multilateral Trade Agreement are integral parts of another Multilateral Trade Agreement. The Panel considered that individual provisions of China's Accession Protocol could also be made an integral part of one or more of the Multilateral Trade Agreements only if such language is contained in the individual provision.<sup>404</sup> The Panel provided six additional reasons supporting its interpretation of Paragraph 1.2 of China's Accession Protocol, based on the text of Paragraph 1.2, the context provided by, *inter alia*, other provisions of China's Accession Protocol and relevant provisions of the Report of the Working Party on the Accession of China<sup>405</sup> (China's Accession Working Party Report), provisions of the Marrakesh Agreement and the GATT 1994, and findings in prior cases involving China's Accession Protocol.<sup>406</sup>

5.11. The Panel next turned to review China's arguments relating to Article XII:1 of the Marrakesh Agreement and its assertion that, by virtue of the accession process prescribed in Article XII:1 of the Marrakesh Agreement, there is an intrinsic link between the provisions contained in China's Accession Protocol and the provisions of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. The Panel observed that it saw "nothing in Article XII:1" to support China's position.<sup>407</sup> Rather, Article XII:1 provides for States and separate customs territories to accede to "this Agreement" and stipulates that, when this occurs, such accession must apply across the board and not just with respect to one or some of the Multilateral Trade Agreements. Thus, in the Panel's view, Article XII:1 makes clear that an acceding Member is subject to all of the obligations under all of the Multilateral Trade Agreements, and is not allowed "to pick and choose" the agreements to which it will accede.<sup>408</sup>

5.12. On this basis, the Panel concluded that "the legal effect of the second sentence of Paragraph 1.2 is to make China's Accession Protocol, in its entirety, an 'integral part' of the Marrakesh Agreement, and not that, in addition, the individual provisions thereof are also integral

<sup>401</sup> Panel Reports, para. 7.77.

<sup>402</sup> Accession of the People's Republic of China, Decision of the Ministerial Conference of 10 November 2001, WT/L/432, p. 1.

<sup>403</sup> Panel Reports, paras. 7.79 and 7.80.

<sup>404</sup> Panel Reports, para. 7.80.

<sup>405</sup> Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and Corr.1.

<sup>406</sup> Panel Reports, paras. 7.82-7.88.

<sup>407</sup> Panel Reports, para. 7.91 (referring to China's responses to the complainants' comments on China's request for a preliminary ruling on the availability of Article XX of the GATT 1994, para. 18).

<sup>408</sup> Panel Reports, para. 7.91.

parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement."<sup>409</sup> On appeal, China requests us to reverse this finding of the Panel, together with two prior iterations of essentially the same content.<sup>410</sup>

### 5.1.2.3 Overview of the claims and arguments by the participants

5.13. China submits that the Panel erred in its interpretation of Article XII:1 of the Marrakesh Agreement, read in conjunction with Paragraph 1.2 of China's Accession Protocol, in finding that "the legal effect of the second sentence of Paragraph 1.2 is to make China's Accession Protocol, in its entirety, an 'integral part' of the Marrakesh Agreement, and not that, in addition, the individual provisions thereof are also integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement."<sup>411</sup> China argues that the Panel should have conducted a "holistic" interpretation of these provisions<sup>412</sup>, which would have led it to the conclusion that each provision of China's Accession Protocol is an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements annexed thereto. According to China, this means that, when faced with a specific obligation in China's Accession Protocol, the treaty interpreter's initial task is to analyse to which of the covered agreements listed in Appendix 1 to the DSU the relevant protocol provision "intrinsically relates". Once this has been determined, that provision is to be treated as an integral part of the related covered agreement.<sup>413</sup>

5.14. To illustrate China's interpretation, it may be useful to recall the Panel's description of how China's interpretation applies to the commitment at issue in these disputes, that is, Paragraph 11.3 of China's Accession. The Panel noted that, according to China:

Paragraph 11.3 of China's Accession Protocol contains an obligation regarding trade in goods, and in particular regulating the use of export duties. Therefore, it is "intrinsically related" to the GATT 1994, and in particular the provisions of GATT 1994 regulating the use of export duties – which, in China's view, are Articles II and XI of the GATT 1994. Accordingly, Paragraph 11.3 must be treated as an "integral part" of the GATT 1994. Paragraph 11.3 is therefore subject to the general exceptions in GATT Article XX unless there is explicit treaty language to the contrary.<sup>414</sup>

5.15. We emphasize, however, that China has not appealed the Panel's analysis of Paragraph 11.3 or its findings thereunder, and, indeed, has not referred to Paragraph 11.3 in its written submissions on appeal. Furthermore, we note that China's argument has evolved during these appellate proceedings. At the oral hearing, China argued that, "[i]rrespective of the interpretation of Article XII:1 [of the Marrakesh Agreement] and Paragraph 1.2 of China's Accession Protocol", its Accession Protocol is properly characterized as a "successive treaty" relating to the same subject matter in the sense of Article 30 of the Vienna Convention on the Law of Treaties<sup>415</sup>

<sup>409</sup> Panel Reports, para. 7.93. The Panel went on to make findings on the second premise of China's arguments, i.e., those concerning Paragraph 11.3 of China's Accession Protocol, and these findings are *not* subject to China's appeal. The Panel noted that, in the light of its disagreement with China's interpretation, it was "not strictly necessary" for the Panel to address China's arguments that Paragraph 11.3 of China's Accession Protocol must be treated as an "integral part" of the GATT 1994 and subject to the general exceptions in Article XX of the GATT 1994 due to its intrinsic relationship with Articles II and XI of the GATT 1994. (Ibid., para. 7.94) Nonetheless, the Panel considered it useful to offer its observations "in the interest of providing a full exploration of the issues raised by China's specific arguments". (Ibid.) The Panel observed that there is no provision in the GATT 1994 that requires Members to eliminate export duties. Moreover, the Panel found that China and WTO Members could have included commitments regarding the use of export duties in China's goods schedule, which in turn would be an integral part of the GATT 1994, but China and WTO Members did not do so. Finally, the Panel found that Paragraph 11.3 contains explicit treaty language precisely identifying exceptions that apply to the obligation contained therein. In conclusion, the Panel found that China's argument was not a "cogent reason" for departing from the Appellate Body's finding that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994. (Ibid., paras. 7.95-7.99)

<sup>410</sup> Panel Reports, paras. 7.80 and 7.89.

<sup>411</sup> Panel Reports, para. 7.93.

<sup>412</sup> China's appellant's submission, para. 72; other appellant's submission, para. 59.

<sup>413</sup> China's appellant's submission, para. 11; other appellant's submission, para. 11.

<sup>414</sup> Panel Reports, para. 7.76.b.

<sup>415</sup> Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

(Vienna Convention).<sup>416</sup> Thus, to the extent that a given accession provision stands in conflict with one or more provisions in the Marrakesh Agreement or the Multilateral Trade Agreements annexed thereto, such conflict is to be resolved according to the rule under Article 30(3) of the Vienna Convention.<sup>417</sup> For example, China argues that Article XI:1 of the GATT 1994 has been modified by Paragraph 11.3 of China's Accession Protocol and, as a result, China may not impose export duties.<sup>418</sup>

5.16. All three complainants submit that the Panel's analysis of Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol is well supported by the text and context of these provisions, as well as by relevant jurisprudence. They maintain that China's proposed "intrinsically related" test departs from the customary rules of treaty interpretation and leads to uncertainty. The European Union further argues that Article 30(3) of the Vienna Convention, which states that "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty", is inapposite because there is no question of "incompatibility" between the provision at issue, that is, Paragraph 11.3 of China's Accession Protocol, and the provisions of the GATT 1994. Japan emphasizes that the drafters determined to specify the link, if any, between the obligations set out in China's Accession Protocol, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand, through explicit text – i.e. "terms of accession" – to be drafted by the Working Party and agreed upon by the Members and China pursuant to Article XII:1 of the Marrakesh Agreement. All three complainants highlight that the panel and the Appellate Body found in *China – Raw Materials* that the text and context of Paragraph 11.3 make clear that Article XX of the GATT 1994 is not available to justify a breach of Paragraph 11.3. The complainants maintain that the Panel in the present disputes correctly came to the same conclusion. The United States, in particular, emphasizes that China has neither addressed those findings nor shown any flaws in the interpretive work conducted by both the panel and the Appellate Body in *China – Raw Materials* in examining the relationship between Paragraph 11.3 and the GATT 1994.

5.17. Having briefly summarized the Panel's relevant findings and the claims and arguments on appeal, we turn now to address the specific interpretative issues raised in China's appeal.

### **5.1.3 Interpretation of Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol**

#### **5.1.3.1 Introduction**

5.18. These disputes relate, in part, to obligations undertaken by a WTO Member that acceded to the WTO subsequent to the conclusion of the Uruguay Round of multilateral trade negotiations. We recall that original Membership of the WTO is governed by Article XI of the Marrakesh Agreement, whereas Article XII of the Marrakesh Agreement concerns accession to the WTO. To date<sup>419</sup>, 32 States or separate customs territories have acceded to the WTO pursuant to Article XII of the Marrakesh Agreement. Each accession resulted from a negotiation process specific to that State or separate customs territory, and the result of such negotiation is contained in an "accession package" consisting of the new Member's accession protocol and, to the extent incorporated in such accession protocol, commitments made in its accession working party report.

5.19. As a preliminary matter, we observe that it is uncontested that provisions of China's Accession Protocol should be interpreted in accordance with the customary rules of treaty interpretation as codified in Articles 31 and 32 of the Vienna Convention. In *China – Raw Materials*, for example, the Appellate Body noted that "Paragraph 1.2 of China's Accession Protocol provides that the Protocol 'shall be an integral part' of the *WTO Agreement*."<sup>420</sup> Thus, the Appellate Body stated, "the customary rules of interpretation of public international law, as codified in Articles 31 and 32 of the *Vienna Convention* ... are, pursuant to Article 3.2 of the DSU, applicable ... in

<sup>416</sup> Article 30 of the Vienna Convention concerns the "[a]pplication of successive treaties relating to the same subject-matter".

<sup>417</sup> Article 30(3) of the Vienna Convention states: "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

<sup>418</sup> China's opening statement at the oral hearing.

<sup>419</sup> As at 7 August 2014.

<sup>420</sup> Appellate Body Reports, *China – Raw Materials*, para. 278.



clarifying the meaning of Paragraph 11.3 of the Protocol."<sup>421</sup> Although China has developed its own explanation as to why the DSU, including the interpretative rules set out in Article 3.2, is applicable to China's Accession Protocol, it does not question the proposition itself. We further note that the mandatory nature of much of the language used in China's Accession Protocol supports the view that its drafters intended it to be enforceable under the DSU. Indeed, it is uncontested that China's Accession Protocol is enforceable under the DSU.<sup>422</sup>

5.20. In order to evaluate whether the Panel erred in interpreting Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol in its disposition of China's argument regarding the relationship between the provisions of its Accession Protocol and the Marrakesh Agreement and its annexes, we begin with the interpretation of Article XII:1 of the Marrakesh Agreement, followed by the interpretation of Paragraph 1.2 of China's Accession Protocol.

5.21. In doing so, we note that China has, to a large extent, structured its analysis and arguments focusing on the meaning of specific terms in the second sentence of Article XII:1 of the Marrakesh Agreement and the second sentence of Paragraph 1.2 of its Accession Protocol. It is for this reason that, tackling the issue of the relationship between provisions of China's Accession Protocol, on the one hand, and provisions of the Marrakesh Agreement and Multilateral Trade Agreements, on the other hand, we begin with an initial assessment of Article XII:1 of the Marrakesh Agreement and the second sentence of Paragraph 1.2 of its Accession Protocol. Since, however, the question of the relationship between provisions of China's Accession Protocol and provisions of the Marrakesh Agreement and Multilateral Trade Agreements cannot be answered without a more complete enquiry, we further proceed to an integrated assessment of the relevant provisions and general architecture of the relevant instruments as they bear on the issues raised on appeal.

### 5.1.3.2 Article XII:1 of the Marrakesh Agreement

#### 5.1.3.2.1 Introduction

5.22. Before the Panel, China maintained that Article XII:1 of the Marrakesh Agreement "provides a strong textual basis requiring panels dealing with a provision in a post-1994 accession protocol, including 'WTO-plus' provisions, to examine which covered agreement a given provision intrinsically relates to"<sup>423</sup>, and argued that this language confirmed China's view that its Accession Protocol "merely serves to *specify*, including by means of 'WTO-plus' commitments, China's obligations under the *WTO Agreement* and the multilateral trade agreements annexed thereto".<sup>424</sup> The Panel, in examining Article XII:1 of the Marrakesh Agreement, found that:

[b]y its terms, Article XII:1 provides for States and customs territories to accede to the WTO Agreement and stipulates that when this occurs, such accession must apply across the board, and not just with respect to one or some WTO Agreements. Thus, in acceding to the WTO, an acceding Member is subject to all of the obligations of all the Multilateral Trade Agreements – a new Member is not entitled to pick and choose which particular Agreements it will accede to. We see nothing in Article XII:1 to support China's position that "respective protocol provision[s] must be considered as

<sup>421</sup> Appellate Body Reports, *China – Raw Materials*, para. 278. (fn omitted)

<sup>422</sup> We note that this proposition has not been contested either in the present disputes or in any prior dispute involving China's Accession Protocol. In addition, we take note of the Panel's statement that, in all prior cases involving China's Accession Protocol, panels and the Appellate Body "have proceeded on the assumption" that Paragraph 1.2 serves, *inter alia*, the function of making the obligations in China's Accession Protocol enforceable under the DSU. According to the Panel, this is because the Marrakesh Agreement is a covered agreement listed in Appendix 1 to the DSU and, as such, the provisions of that Agreement, together with the provisions of China's Accession Protocol, which is "an integral part" of that agreement, are subject to the WTO dispute settlement mechanism set out in the DSU. (Panel Reports, para. 7.85) We also take note of the fact that the DSU is one of the Multilateral Trade Agreements annexed to the Marrakesh Agreement. The Marrakesh Agreement is enforceable under the DSU pursuant to its Appendix 1.

<sup>423</sup> Panel Reports, para. 7.90 (quoting China's response to the complainants' comments on China's request for a preliminary ruling on the availability of Article XX of the GATT 1994, para. 18).

<sup>424</sup> Panel Reports, para. 7.90 (quoting China's response to the complainants' comments on China's request for a preliminary ruling on the availability of Article XX of the GATT 1994, para. 17). (emphasis added by the Panel)

an integral part of the specific covered agreement to which it intrinsically relates." Nor do we find in Article XII:1 language to support China's assertion that its Accession Protocol is not a self-contained agreement and that it "merely serves to specify" China's obligations under the WTO Agreement and the Multilateral Trade Agreements annexed thereto.<sup>425</sup>

5.23. For China, this finding by the Panel constitutes legal error. In China's view, "[b]y essentially reducing Article XII:1 to prescribing that newly acceding Members need to accept the *Marrakesh Agreement* and the multilateral trade agreements annexed thereto as a single undertaking, the Panel failed to give effective meaning to a vital element of the key provision governing the WTO accession process."<sup>426</sup> Specifically, "the Panel failed to appreciate that the precise nature of the systemic relationship between specific provisions in China's *Accession Protocol* and the *Marrakesh Agreement* and the multilateral trade agreements annexed thereto *crucially hinges* on the language contained in Article XII:1."<sup>427</sup> According to China, Article XII:1 of the *Marrakesh Agreement* indicates that specific terms of accession must intrinsically relate to either the *Marrakesh Agreement* or one of the Multilateral Trade Agreements annexed thereto.

5.24. The complainants disagree with China that Article XII:1 of the *Marrakesh Agreement* means that provisions of China's Accession Protocol must intrinsically relate to the *Marrakesh Agreement* or one of the Multilateral Trade Agreements. In the view of the European Union and Japan, the second sentence of Article XII:1 confirms that the act of accession must be operative with respect to both the WTO Agreement and the Multilateral Trade Agreements annexed thereto, and such an interpretation does not fail to give effective meaning to this provision.<sup>428</sup> The United States maintains that China's arguments amount to "an unexplained ... leap" from the word "terms" in Article XII:1 to the proposition that the actual terms set out in an accession protocol should be ignored and replaced with an unspecified "intrinsic relationship" test.<sup>429</sup>

#### 5.1.3.2.2 The interpretation of Article XII:1 of the Marrakesh Agreement

5.25. Article XII:1 of the *Marrakesh Agreement* is one of the two provisions China relies on for its proposition that each provision of China's Accession Protocol is an integral part of the *Marrakesh Agreement* or one of the Multilateral Trade Agreements to which it intrinsically relates. In particular, China focuses on the word "terms" referred to in the first sentence of Article XII:1, as well as on the second sentence of Article XII:1, in support of its position. China's arguments in this regard call for us to consider the import of Article XII:1 of the *Marrakesh Agreement* and, in particular, its second sentence. We will examine the interpretation of, as well as China's specific arguments relating to, this provision in this subsection. In the next subsection, we will interpret, and address China's specific arguments in respect of the other provision that China relies on, Paragraph 1.2 of China's Accession Protocol. Subsequently, we will proceed with an integrated assessment of the relevant provisions as well as China's relevant arguments, so as to analyse the relationship between provisions of its Accession Protocol, on the one hand, and those of the *Marrakesh Agreement* and the Multilateral Trade Agreements annexed thereto, on the other hand.

5.26. Article XII:1 provides:

#### Article XII *Accession*

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

<sup>425</sup> Panel Reports, para. 7.91. (fn omitted)

<sup>426</sup> China's appellant's submission, para. 78.

<sup>427</sup> China's appellant's submission, para. 79. (emphasis added)

<sup>428</sup> European Union's appellee's submission, paras. 74-79; Japan's appellee's submission, paras. 210-213.

<sup>429</sup> United States' third participant's submission, para. 10.

5.27. Article XII:1 of the Marrakesh Agreement thus sets out the general rule for a State or separate customs territory to become a Member of the WTO. Specifically, under its first sentence, an applicant may accede to "this Agreement", that is, the Marrakesh Agreement, on "terms to be agreed" between the applicant and the WTO. The "terms" of accession referred to in the first sentence of Article XII are not defined. Thus, apart from the stipulation in the second sentence of Article XII, discussed further below, this provision does not spell out the content of, or impose limitations on, such "terms". Rather, such terms are to be "agreed" upon by the WTO and the individual acceding Member during a specific accession process.

5.28. Article XII:1, second sentence, specifies that "[s]uch accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto". According to this sentence, when an applicant accedes to the Marrakesh Agreement pursuant to the first sentence, it necessarily also accedes to *all* Multilateral Trade Agreements under the WTO framework as a single package of rights and obligations. The second sentence of Article XII:1 therefore indicates that the accession must apply to the entirety of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, and not just some part(s) thereof.<sup>430</sup> Thus, although specific terms of accession are to be agreed upon in individual accession processes, the second sentence of Article XII:1 prescribes one feature that such terms, taken as a whole, must reflect – namely, that an acceding Member is subject to the rights and obligations in *all* of the Multilateral Trade Agreements.

5.29. This understanding is borne out by the language used in Article XII:1, second sentence. Specifically, "[s]uch accession" in the second sentence refers to the accession described in the first sentence, which stipulates that a State or separate customs territory "may accede" to the Marrakesh Agreement. The term "[s]uch accession" in the second sentence thus refers to the *legal act* of acceding to the Marrakesh Agreement specified in the first sentence. Consistent with this understanding, the word "apply" in the second sentence "is not referring to the ... application of a legal instrument or document", such as the terms of accession.<sup>431</sup> Rather, it is referring to the requirement that the legal act of becoming a WTO Member must be accomplished with respect to the Marrakesh Agreement and all Multilateral Trade Agreements under the WTO framework.

5.30. Our above reading of Article XII:1 is confirmed by, and complements, Article II:2 of the Marrakesh Agreement. Article II:2 provides that "[t]he 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." The dictionary meaning of the word "integral" includes "[b]elonging to or making up a whole", and "constituent, component; necessary to the completeness or integrity of the whole, not merely attached".<sup>432</sup> The reference to "integral parts" in Article II:2, therefore, indicates that the Multilateral Trade Agreements annexed to the Marrakesh Agreement are necessary components of the single package of WTO rights and obligations. Article II:2 thus stipulates the requirement on *existing* WTO Members to abide by the obligations under all of the agreements in this package. Article XII:1, which concerns accession, extends the same requirement to acceding Members. As Japan submits on appeal, "Article II:2 defines the scope of the application of the Multilateral Trade Agreements on existing Members, whereas Article XII regulates the process of acceding to ... the WTO Agreement by a prospective WTO Member."<sup>433</sup> These two provisions thus serve closely related, albeit distinct, functions; they are not merely duplicative of each other. Read together, they ensure that the fundamental principle of the single undertaking applies to both existing and newly acceded Members of the WTO.

5.31. China argues that Article XII:1 indicates that the authority of the Ministerial Conference to adopt Member-specific WTO law "is not unbounded", but is "limited by the important requirement that specific terms of accession must intrinsically relate to either the *Marrakesh Agreement* or one of the Multilateral Trade Agreements annexed thereto".<sup>434</sup> According to China, its position

<sup>430</sup> In contrast, pursuant to Article XII:3 of the Marrakesh Agreement, accession to the Plurilateral Trade Agreements is not required for an applicant to become a WTO Member, but is governed by the provisions of those agreements.

<sup>431</sup> European Union's appellee's submission, para. 75.

<sup>432</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1402.

<sup>433</sup> Japan's appellee's submission, para. 213. (emphasis original)

<sup>434</sup> China's appellant's submission, paras. 9, 66, and 83; other appellant's submission, paras. 9 and 57. (emphases original)

"follows ... from the requirement in the second sentence of Article XII:1 that '[s]uch accession shall apply to the [Marrakesh Agreement] and the Multilateral Trade Agreements annexed thereto', read together with the important context provided by Paragraph 1.2, second sentence, of China's *Accession Protocol*."<sup>435</sup> Thus, argues China, a proper reading of Article XII:1, second sentence, "confirm[s] that China's *Accession Protocol* serves to specify, including by means of 'WTO-plus' commitments, China's rights and obligations under the *Marrakesh Agreement* and the multilateral trade agreements annexed thereto."<sup>436</sup> China raised the same arguments before the Panel.<sup>437</sup> The Panel, however, considered that China "misconstrue[d] the import of Article XII:1".<sup>438</sup>

5.32. We do not see a textual basis in Article XII:1 for China's proposition. As discussed above, the term "[s]uch accession" in the second sentence of Article XII:1 refers to *the legal act* of acceding to the Marrakesh Agreement specified in the first sentence. Thus, the second sentence indicates that the legal act of accession must be operative with respect to the entire package of WTO rights and obligations as set out in the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. It does not mean, as China's argument seems to suggest, that *the legal instrument* embodying the "terms" of accession, or specific provisions thereof, must "apply" to, or somehow be directly incorporated into, these Agreements.<sup>439</sup>

5.33. Moreover, our interpretation of Article XII:1, set out above, accords with the Panel's view that the second sentence of Article XII:1 requires acceding Members not to "pick and choose" among the various agreements, but to accept the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto as a single undertaking.<sup>440</sup> As already discussed, Article XII:1 reinforces the principle of the single undertaking set out in Article II of the Marrakesh Agreement by ensuring that an applicant seeking accession adheres to the same principle.<sup>441</sup> In our view, it follows that the Panel rightly rejected China's arguments concerning the import of Article XII:1. As discussed above, Articles II and XII each serve a distinct function, with the former setting out the principle of the WTO single undertaking with regard to existing WTO Members, and the latter extending the same principle to newly acceded Members. We therefore do not see the Panel's interpretation of Article XII:1 as either "excessively narrow" or "essentially redundant".<sup>442</sup>

5.34. In sum, Article XII:1 of the Marrakesh Agreement provides the *general* rule for acceding to the WTO. Its first sentence stipulates that accession is to be accomplished on "terms" to be agreed between the acceding Member and the WTO, and its second sentence makes clear that such accession applies to the entire package of WTO rights and obligations, consisting of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. Pursuant to Article XII:1, while the substantive content of the "terms" of accession is to be determined in individual accessions, acquiring Membership in the WTO cannot be accomplished where an applicant accepts to be bound by only some, but not all, of the Multilateral Trade Agreements in the WTO framework. Article XII:1, however, does not define the nature of the substantive relationship between the "terms" of accession, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other hand. Rather, beyond the general rule governing accession set out in its two sentences, Article XII:1 itself does not speak to the question of the specific relationship between individual provisions of an accession protocol and individual provisions of the Marrakesh Agreement and the Multilateral Trade Agreements. In particular, Article XII:1, alone, does not create a substantive relationship, "intrinsic" or otherwise, between provisions of China's Accession Protocol (such as Paragraph 11.3) and provisions of the covered agreements (such as Article II or XI of the GATT 1994). In this regard, we note that the Marrakesh Agreement is the overarching institutional agreement of the WTO, and Article XII thereof does not directly address the question of the substantive relationship between individual

<sup>435</sup> China's appellant's submission, para. 84.

<sup>436</sup> China's appellant's submission, para. 84.

<sup>437</sup> See paragraph 5.22 of these Reports.

<sup>438</sup> Panel Reports, para. 7.91.

<sup>439</sup> See China's appellant's submission, paras. 83 and 84.

<sup>440</sup> Panel Reports, para. 7.91.

<sup>441</sup> As the European Union contends on appeal, "the general principle of the single undertaking finds expression in diverse provisions of the covered agreements, including the WTO Agreement, in different contexts, and ... these various subsequent references are not simply duplicative, redundant and ineffective." (European Union's appellee's submission, para. 77) According to the European Union, such expression can also be found in, *inter alia*, Article XIV (concerning acceptance, entry into force, and deposit) and Article XV (concerning withdrawal). (Ibid., para. 78)

<sup>442</sup> China's appellant's submission, para. 86; other appellant's submission, para. 61.

provisions of a protocol of accession, on the one hand, and the provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand. We turn now to examine the other provision concerned by China's appeal – i.e. Paragraph 1.2 of China's Accession Protocol – to see whether that provision provides further guidance on this relationship.

### 5.1.3.3 Paragraph 1.2 of China's Accession Protocol

#### 5.1.3.3.1 Introduction

5.35. According to Paragraph 1.2 of China's Accession Protocol, "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." Before the Panel, China argued that the reference to "the WTO Agreement" in Paragraph 1.2 encompasses the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. In contrast, the complainants argued that the reference to "the WTO Agreement" means the Marrakesh Agreement.<sup>443</sup> The Panel began its analysis of Paragraph 1.2 by noting that the preamble of China's Accession Protocol refers to the "WTO Agreement" as "the Marrakesh Agreement Establishing the World Trade Organization". The Panel further noted that the Decision of the Ministerial Conference of 10 November 2001 provides that China "may accede to the Marrakesh Agreement Establishing the World Trade Organization on the terms and conditions set out in the Protocol annexed to this decision".<sup>444</sup> The Panel contrasted this with Paragraph 1.3 of China's Accession Protocol, which refers explicitly to "the Multilateral Trade Agreements annexed to the WTO Agreement". The Panel provided several additional reasons for its interpretation of Paragraph 1.2 of China's Accession Protocol. These reasons relate to the Panel's examination of the text of Paragraph 1.2, the context provided by provisions of, *inter alia*, China's Accession Protocol, China's Accession Working Party Report, the Marrakesh Agreement, and the GATT 1994, and findings in prior cases involving China's Accession Protocol.<sup>445</sup> On this basis, the Panel agreed with the complainants that the term "the WTO Agreement", in the second sentence of Paragraph 1.2, is a reference to the Marrakesh Agreement rather than, as China had argued, a reference to the Marrakesh Agreement together with the Multilateral Trade Agreements annexed thereto.<sup>446</sup>

5.36. After examining, and dismissing, China's arguments relating to Article XII:1 of the Marrakesh Agreement, the Panel confirmed its above conclusion by stating that:

... the legal effect of the second sentence of Paragraph 1.2 is to make China's Accession Protocol, in its entirety, an "integral part" of the Marrakesh Agreement, and not that, in addition, the individual provisions thereof are also integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement.<sup>447</sup>

5.37. On appeal, China seeks reversal of the Panel's finding quoted above, as well as two earlier iterations of essentially the same content.<sup>448</sup> In China's view, the Panel erred in its interpretation of Paragraph 1.2, second sentence, of China's Accession Protocol, because it failed properly to interpret the meaning of "the WTO Agreement" as used in that sentence.<sup>449</sup> In particular, China maintains that the Panel's analysis of the term "the WTO Agreement" in Paragraph 1.2 "disregards"

<sup>443</sup> In its submissions on appeal, the European Union uses the term "the WTO Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization, excluding its annexes. (See European Union's appellee's submission, para. 46) Japan and the United States have largely used "the WTO Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization, excluding its annexes, although on occasion they have also used "the Marrakesh Agreement" to refer to the same. (See e.g. Japan's appellee's submission, para. 175; and United States' appellee's submission, fn 43 to para. 52) As explained *supra*, fns 56, 333, and 376, for purposes of these appeals and without prejudice to the legal issues raised by China on appeal, we, like the Panel, use "the Marrakesh Agreement" to refer to the Marrakesh Agreement Establishing the World Trade Organization excluding its annexes.

<sup>444</sup> Panel Reports, para. 7.79 (quoting Accession of the People's Republic of China, Decision of the Ministerial Conference of 10 November 2001, WT/L/432, p. 1).

<sup>445</sup> Panel Reports, paras. 7.80-7.88.

<sup>446</sup> Panel Reports, paras. 7.78 and 7.89.

<sup>447</sup> Panel Reports, para. 7.93.

<sup>448</sup> Panel Reports, paras. 7.80 and 7.89.

<sup>449</sup> China's appellant's submission, para. 93.

its context<sup>450</sup>, and that the reasons provided by the Panel for its finding are characterized by various flaws of law and logic.

5.38. The complainants submit that China's assertions regarding the Panel's errors in interpreting Paragraph 1.2 of China's Accession Protocol are without merit. In their view, the Panel correctly assessed the meaning of the second sentence of Paragraph 1.2 of China's Accession Protocol, and its analysis was sound and grounded in the text and context of that provision.<sup>451</sup> In particular, the European Union and Japan maintain that the Panel properly analysed the context provided by other "integration" provisions in the covered agreements, such as Article II:2 of the Marrakesh Agreement.<sup>452</sup> The United States emphasizes that the Panel's interpretation does not, as China suggests, preclude a specific provision of the Accession Protocol from being an integral part of a Multilateral Trade Agreement, but expressly recognizes that, where this occurs, it is a result of the language of such provision, rather than as a result of Paragraph 1.2.<sup>453</sup>

#### 5.1.3.3.2 The interpretation of Paragraph 1.2 of China's Accession Protocol

5.39. Paragraph 1.2 of China's Accession Protocol is the other provision China relies upon in support of the proposition that each provision of China's Accession Protocol is an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements to which it intrinsically relates. China focuses on the phrase "an integral part of the WTO Agreement", and in particular the term "the WTO Agreement", in support of its position. We address the interpretation of Paragraph 1.2 of China's Accession Protocol, and China's specific arguments relating thereto, in this subsection. In the next subsection, we conduct an integrated analysis of the relevant provisions, as well as China's arguments, in order to assess the relationship between provisions of its Accession Protocol, on the one hand, and those of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other hand.

5.40. The first three paragraphs of Part I of China's Accession Protocol provide:

#### **Part I – General Provisions**

##### **1. General**

1. Upon accession, China accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO.
2. The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.
3. Except as otherwise provided for in this Protocol, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force.

5.41. On appeal, China seeks to have us ascertain the meaning of the term "the WTO Agreement" in the second sentence of Paragraph 1.2 of China's Accession Protocol. We first note that Paragraph 1.2, second sentence, does not, itself, define this term. The immediate context of the term "the WTO Agreement" is found in the remaining words of the same sentence. That sentence states that the Protocol shall be "an integral part of the WTO Agreement". As noted above, the dictionary meanings of the word "integral" include "[b]elonging to or making up a whole", and "constituent, component; necessary to the completeness or integrity of the whole, not merely

<sup>450</sup> China's appellant's submission, para. 98.

<sup>451</sup> European Union's appellee's submission, paras. 89-101; Japan's appellee's submission, paras. 176-197; United States' appellee's submission, paras. 57-65.

<sup>452</sup> European Union's appellee's submission, para. 91; Japan's appellee's submission, para. 181.

<sup>453</sup> United States' appellee's submission, para. 67.



attached".<sup>454</sup> The term "integral part" is used frequently in the covered agreements in order to integrate one or more agreements (or legal instruments) into another agreement. An example is Article II:2 of the Marrakesh Agreement, which, as noted above, stipulates that the Multilateral Trade Agreements included in Annexes 1, 2, and 3 "are integral parts of" the Marrakesh Agreement, binding on all Members.<sup>455</sup>

5.42. We turn now to the context provided by the first sentence of Paragraph 1.2, as well as Paragraphs 1 and 3 of Part I of China's Accession Protocol, all of which contain references to "the WTO Agreement". The first sentence of Paragraph 1.2 stipulates that: "[t]he WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession." We note that the reference to an agreement as "rectified, amended, or modified" is standard language also found elsewhere in the WTO legal framework, including Article II:4 of the Marrakesh Agreement and paragraph 1(a) of the language incorporating the GATT 1994 into Annex 1A.<sup>456</sup> In the context of the first sentence of Paragraph 1.2 of China's Accession Protocol, the language makes clear that "the WTO Agreement", to which China accedes, is the most recent version of that "Agreement", including any rectification, amendment, or modification thereto. As we see it, by referring to rectification, amendment, or modification that "*may have entered into force*"<sup>457</sup>, the first sentence of Paragraph 1.2 may properly be understood to cover the possibility that the Marrakesh Agreement may have been rectified, amended, or modified during the period between 1995 and up to the ratification of the accession protocol by the acceding Member. In this respect, we are not persuaded by China's argument that the reference to "the WTO Agreement" in Paragraph 1.2, first sentence, "must include the annexed multilateral trade agreements", because "[t]o interpret it otherwise would mean that new Members would not necessarily accede to the latest versions of those agreements".<sup>458</sup> We recall that Article II:2 of the Marrakesh Agreement makes all Multilateral Trade Agreements annexed thereto its "integral parts". Thus, by acceding to the WTO, a new Member necessarily becomes bound by the Marrakesh Agreement and all Multilateral Trade Agreements, as rectified, amended, or modified at the time of such accession. This analysis of the provision, in our view, does not compel a conclusion that "the WTO Agreement" must be read to include, or exclude, references to the Multilateral Trade Agreements.

5.43. Turning to Paragraph 1.1 of China's Accession Protocol, we note that this provision states that: "[u]pon accession, China accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO." Article XII of "that Agreement" refers to Article XII of the Marrakesh Agreement, which, as discussed above, provides that any State or separate customs territory possessing the requisite authority "may accede to" the Marrakesh Agreement. Hence, "the WTO Agreement" in Paragraph 1.1, to which "China accedes ... *pursuant to Article XII*"<sup>459</sup>, also refers to the Marrakesh Agreement. To us, moreover, the syntax of Paragraph 1.1 confirms that "the WTO Agreement" and "that Agreement" necessarily refer to the same thing. China agrees that the term "that Agreement" in Paragraph 1.1 refers to the Marrakesh

<sup>454</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1402.

<sup>455</sup> The term "integral part" is also used in numerous other instances throughout the covered agreements in which the relevant legal instruments are "made an integral part of" another covered agreement or the agreements to which they are annexed. For example, Article 3.1 of the Agreement on Agriculture provides that the domestic support and export subsidy commitments in Part IV of each Member's Schedule "are hereby made an integral part of GATT 1994". In most other instances, references are made to annexes being an "integral part" of the agreement to which they are annexed, similar to the reference to "integral parts" in Article II:2 of the Marrakesh Agreement. For example, Article II:7 of the GATT 1994 states that: "[t]he Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement." Other examples include Agreement on Agriculture, Article 21.2 (with respect to its annexes); Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Article 1.3 (with respect to its annexes); TBT Agreement, Article 15.5 (with respect to its annexes); Anti-Dumping Agreement, Article 18.7 (with respect to its annexes); the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Article 32.8 (with respect to its annexes); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Agreement on Customs Valuation), Article 14 (with respect to its interpretative notes and annexes); Agreement on Rules of Origin, Article 9.4 (with respect to the results of the harmonization work programme to be established by the Ministerial Conference as an annex); and GATS, Article XX:3 (with respect to the schedules of specific commitments) and Article XXIX (with respect to its annexes).

<sup>456</sup> In both instances, the relevant agreement that may have been "rectified, amended or modified" is the GATT 1947.

<sup>457</sup> Emphasis added.

<sup>458</sup> China's appellant's submission, para. 103.

<sup>459</sup> Emphasis added.

Agreement.<sup>460</sup> China nonetheless argues that "the WTO Agreement" *in the same sentence* refers to the Marrakesh Agreement together with its annexed Multilateral Trade Agreements.<sup>461</sup> Our above analysis of Paragraph 1.1, however, does not support such a reading. We are therefore not persuaded by China's argument that "the WTO Agreement" in Paragraph 1.1 refers to the Marrakesh Agreement together with the Multilateral Trade Agreements annexed thereto.

5.44. In addition, Paragraph 1.3 of Part I of China's Accession Protocol states that, "[e]xcept as otherwise provided for in this Protocol, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force."<sup>462</sup> This provision thus concerns the timing of the entry into force of those obligations in "the Multilateral Trade Agreements annexed to the WTO Agreement" to which a transition period is attached. The juxtaposition of the "Multilateral Trade Agreements" with "the WTO Agreement" in Paragraph 1.3 makes clear that the latter term refers to the Marrakesh Agreement alone. We note that China does not dispute this reading of Paragraph 1.3 of its Accession Protocol.

5.45. We also note that the Decision of the Ministerial Conference of 10 November 2001, which appears on the first page of the document containing China's Accession Protocol, provides that China "may accede to the Marrakesh Agreement Establishing the World Trade Organization on the terms and conditions set out in the Protocol annexed to this decision".<sup>463</sup> The first recital of the preamble of China's Accession Protocol, in turn, identifies the term "WTO Agreement" as the abbreviation of "the Marrakesh Agreement Establishing the World Trade Organization".<sup>464</sup> This is consistent with the editorial convention used throughout the legal texts embodying the results of the Uruguay Round of Multilateral Trade Negotiations. For example, the "General Interpretative Note to Annex 1A" makes clear that the Marrakesh Agreement Establishing the World Trade Organization is referred to as "the WTO Agreement" in the agreements contained in its Annex 1A.<sup>465</sup>

5.46. Thus, read in the immediate context of the remainder of the text of Paragraph 1.2, the context provided by other provisions of Part I of China's Accession Protocol, as well as the context provided by the Decision of the Ministerial Conference of 10 November 2001 to which China's Accession Protocol is annexed and the preamble of China's Accession Protocol, it appears that the term "the WTO Agreement" in the second sentence of Paragraph 1.2 may refer to the Marrakesh Agreement, that is, to "the WTO Agreement" excluding the Multilateral Trade Agreements. At the same time, an examination of the term "the WTO Agreement", as used throughout China's Accession Protocol, indicates that the definition of "the WTO Agreement" contained in the preamble does not necessarily preclude the annexed Multilateral Trade Agreements from also falling within the scope of the term "the WTO Agreement" in some instances. This term may, depending on the specific context, include a reference to the annexed Multilateral Trade Agreements, or it may refer to the Marrakesh Agreement alone. For example, as the Appellate Body found in *China – Publications and Audiovisual Products*, the phrase "in a manner consistent with the WTO Agreement" in the introductory clause of Paragraph 5.1 of China's Accession Protocol refers

<sup>460</sup> China's response to questioning at the oral hearing.

<sup>461</sup> China's appellant's submission, paras. 101 and 102.

<sup>462</sup> This provision mirrors the language of Article XIV:2 of the Marrakesh Agreement, which provides that:

A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

<sup>463</sup> Accession of the People's Republic of China, Decision of the Ministerial Conference of 10 November 2001, WT/L/432, p. 1.

<sup>464</sup> The preamble states, in relevant part, that: "[t]he World Trade Organization ('WTO'), pursuant to the approval of the Ministerial Conference of the WTO accorded under Article XII of the Marrakesh Agreement Establishing the World Trade Organization ('WTO Agreement'), and the People's Republic of China ('China'), ... [a]gree as follows".

<sup>465</sup> Other examples include paragraph 1 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ("... the Agreement Establishing the World Trade Organization (referred to in this Final Act as the 'WTO Agreement') ..."), and the first recital to the preamble of the Decision on the Acceptance of and Accession to the Agreement Establishing the World Trade Organization ("Noting that Articles XI and XIV of the Agreement Establishing the World Trade Organization (hereinafter referred to as 'WTO Agreement') ...").

to "the *WTO Agreement* as a whole, including its Annexes".<sup>466</sup> In contrast, where a specific provision of "the *WTO Agreement*" is referred to, such as in the last sentence of Paragraph 18.1 (referring to "paragraph 5 of Article IV of the *WTO Agreement*"), the term is properly understood in its narrow sense as the Marrakesh Agreement. Therefore, the term "the *WTO Agreement*", as used in China's Accession Protocol, may have either a broad or a narrow connotation depending on the context in which it is used.

5.47. In our view, the fact that the term "the *WTO Agreement*", as used throughout China's Accession Protocol, may have both narrow and broad connotations is consistent with the principle of the single undertaking reflected in both Articles II:2 and XII:1 of the Marrakesh Agreement. Under Article II:2 of the Marrakesh Agreement, the Multilateral Trade Agreements contained in the annexes are all necessary components of the "same treaty"<sup>467</sup>, and they, together, form a single package of WTO rights and obligations. Furthermore, pursuant to Article XII:1, second sentence, China must accede to this single package to become a Member of the WTO. In other words, the Marrakesh Agreement is the umbrella under which all of the annexed Multilateral Trade Agreements are united in a single package of rights and obligations. Bearing in mind this fundamental architecture of the WTO system, whether the term "the *WTO Agreement*" is, in any given instance and in particular in the context of the second sentence of Paragraph 1.2, understood in the broad sense (as the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto), or in the narrow sense (as the Marrakesh Agreement alone), will often be of limited consequence.

5.48. We recall that, in examining the second sentence of Paragraph 1.2, the Panel found that "the term[] 'the *WTO Agreement*' ... means that China's Accession Protocol is made an integral part of the Marrakesh Agreement."<sup>468</sup> We note that this statement of the Panel is one intermediate step leading to the Panel's finding that "*the legal effect of the second sentence of Paragraph 1.2 is to make China's Accession Protocol, in its entirety, an 'integral part' of the Marrakesh Agreement, and not that, in addition, the individual provisions thereof are also integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement.*"<sup>469</sup> Our above analysis suggests that the key to understanding the legal effect of Paragraph 1.2 of China's Accession Protocol does not hinge on whether the term "the *WTO Agreement*" in the second sentence of Paragraph 1.2 refers, in the narrow sense, to the Marrakesh Agreement alone, or whether it refers in the broader sense to the entire WTO legal framework, consisting of the Marrakesh Agreement and its "integral parts", the Multilateral Trade Agreements.

5.49. In other words, and importantly, we do not consider that determining the scope of the term "the *WTO Agreement*" in Paragraph 1.2 was dispositive of the key legal question before the Panel, that is, the specific relationship between individual provisions of China's Accession Protocol and the individual provisions of the Marrakesh Agreement and the Multilateral Trade Agreements. The operative term of Paragraph 1.2 – i.e. "an integral part", together with Article XII:1 of the Marrakesh Agreement – serves the function of integrating China's Accession Protocol into the single package of WTO rights and obligations, just as Article II:2 of the Marrakesh Agreement serves the same function with regard to the Multilateral Trade Agreements. As a result of Paragraph 1.2 of China's Accession Protocol therefore, the Marrakesh Agreement, the Multilateral Trade Agreements, and China's Accession Protocol together form one package of rights and obligations that must be read in conjunction.

5.50. Paragraph 1.2 of China's Accession Protocol, and in particular its stipulation that the Protocol is to be an "integral part" of "the *WTO Agreement*", essentially serves to build a bridge between the package of protocol provisions and the existing package of WTO rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements. The bridge created by Paragraph 1.2 between the protocol provisions and the existing package of rights and obligations under the WTO legal framework, however, is of a general nature. The fact that such a bridge exists does not in itself answer the question as to *how individual provisions* in China's Accession Protocol

<sup>466</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222. China provided the following list of provisions of its Accession Protocol in which "the *WTO Agreement*" refers to one or more of the Multilateral Trade Agreements: 1.2, 2.A.1, 2.A.3, 4, 5.1, 6.1, 7.1, 8.1, 13.3, 17, 18.1 (first sentence), 18.2, and 18.3, and Annex 7. (China's opening statement at the oral hearing; China's appellant's submission, para. 105)

<sup>467</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

<sup>468</sup> See Panel Reports, para. 7.80.

<sup>469</sup> Panel Reports, para. 7.93. (emphasis added)

are related or linked to individual provisions of the other WTO agreements. More specifically, this bridge does not dispense with the need to analyse, on a case-by-case basis, the specific relationship between an individual provision in the Protocol, on the one hand, and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand.

5.51. As further discussed in the next subsection, the question as to whether a provision in China's Accession Protocol has an objective link to China's obligations under the GATT 1994, or whether the exceptions under the GATT 1994 may be invoked to justify a breach of such provision, cannot be answered on the basis of Paragraph 1.2 of China's Accession Protocol alone, which is a general provision. Rather, to answer such specific and substantive questions, a thorough analysis is required regarding the relevant provisions, starting with the text of the relevant provision in China's Accession Protocol and taking into account its context, including that provided by the Protocol itself, and by relevant provisions of the Accession Working Party Report, and by the agreements within the WTO legal framework. The analysis must also take into account the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.

#### **5.1.3.4 The relationship between China's Accession Protocol, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other hand**

5.52. As discussed in the previous subsection, Paragraph 1.2 of China's Accession Protocol serves to build a bridge between the package of protocol provisions and the existing package of rights and obligations under the WTO legal framework. As a result, the Marrakesh Agreement, the Multilateral Trade Agreements, and China's Accession Protocol together form one package of rights and obligations that must be read in conjunction. In order to understand how specific provisions within this package relate to one another, we consider it useful first to examine the relationship among specific provisions within this package created by Article II:2 of the Marrakesh Agreement.

5.53. As has been established in a number of disputes to date, the mere fact that each of the Multilateral Trade Agreements is an integral part of the Marrakesh Agreement by virtue of Article II:2 of the Marrakesh Agreement does not, in and of itself, answer the question as to how specific rights and obligations contained in those Multilateral Trade Agreements relate to each other, particularly when they are contained in different instruments that nevertheless relate to the same subject matter. For example, in *Argentina – Footwear (EC)*, the Appellate Body noted that, pursuant to Article II:2 of the Marrakesh Agreement, "[t]he GATT 1994 and the *Agreement on Safeguards* ... are *both* 'integral parts' of the same treaty, the *WTO Agreement*".<sup>470</sup> Therefore, "the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of" that treaty.<sup>471</sup> Noting that they "relate to the same thing", namely, the application of safeguard measures, the Appellate Body endorsed the panel's view that "Article XIX of GATT and the *Agreement on Safeguards* must *a fortiori* be read as representing an *inseparable package* of rights and disciplines which have to be considered in conjunction".<sup>472</sup> The Appellate Body went on to review the panel's finding regarding the relationship between Article XIX of the GATT 1994 and the *Agreement on Safeguards*, including arguments that "all the requirements of Article XIX (including the criterion of 'unforeseen developments') are subsumed by the provisions of the *Safeguards Agreement*".<sup>473</sup> The panel concluded "that safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the

<sup>470</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 81. (emphasis original)

<sup>471</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 81. (emphasis original)

<sup>472</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 (quoting Panel Report, *Argentina – Footwear (EC)*, para. 8.58 (emphasis original)).

<sup>473</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.51. The panel attached significant interpretative weight to the fact that the Uruguay Round negotiators "expressly omitted" the "unforeseen developments" clause in Article XIX of the GATT 1994 from Article 2 of the *Agreement on Safeguards*. (Appellate Body Report, *Argentina – Footwear (EC)*, para. 97 (referring to Panel Report, *Argentina – Footwear (EC)*, para. 8.58))

requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT".<sup>474</sup>

5.54. The Appellate Body examined relevant provisions of both agreements, including Articles 1 and 11.1(a) of the Agreement on Safeguards, which describe "the precise nature of the relationship" between Article XIX of the GATT 1994 and the Agreement on Safeguards within the WTO legal framework, as well as Article 2 of the Agreement on Safeguards, and Article XIX of the GATT 1994.<sup>475</sup> The Appellate Body found nothing in the language of the Agreement on Safeguards suggesting that the negotiators intended to "subsume" the requirements of Article XIX of the GATT 1994 within the Agreement on Safeguards.<sup>476</sup> Rather, the Appellate Body found that "the ordinary meaning of Articles 1 and 11.1(a) of the *Agreement on Safeguards* confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the *Agreement on Safeguards* would apply *cumulatively*."<sup>477</sup> The Appellate Body considered that this understanding was supported by the relevant context of these provisions, the object and purpose of Article XIX of the GATT 1994 and of the Agreement on Safeguards, and the General Interpretative Note to Annex 1A. On this basis, the Appellate Body reversed the panel's finding that safeguard measures that are consistent with the Agreement on Safeguards necessarily satisfy all of the requirements of Article XIX of the GATT 1994, including the "unforeseen developments" requirement that is not mentioned in the Agreement on Safeguards.<sup>478</sup>

5.55. This jurisprudence indicates that the specific relationship among individual terms and provisions of the Multilateral Trade Agreements, and between such provisions and the Marrakesh Agreement, must be determined on a case-by-case basis through a proper interpretation of the relevant provisions of these agreements. In other words, this specific relationship must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments (such as the General Interpretative Note to Annex 1A).

5.56. In some instances, such examination will lead to the conclusion that exceptions in one covered agreement, such as Article XX of the GATT 1994, may be invoked to justify a breach of an obligation set forth elsewhere than in the GATT 1994. In principle, different types of provisions and circumstances may lead to such a conclusion. One clear example is found in Article 3 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement), the express terms of which provide that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." In other instances, such examination may lead to the opposite conclusion. For example, Article XX of the GATT 1994 has been found by the Appellate Body not to be available to justify a breach of the Agreement on Technical Barriers to Trade (TBT Agreement).<sup>479</sup> In many instances, no express language identifying the relationship between specific terms and provisions of a Multilateral Trade Agreement with those of another Multilateral Trade Agreement or the Marrakesh Agreement is found in the agreements at issue. Where this is so, recourse to other interpretative elements will be necessary to determine the specific relationship among individual terms and provisions of the Multilateral Trade Agreements, and between such provisions and the Marrakesh Agreement.

5.57. Just as the Multilateral Trade Agreements are an integral part of the Marrakesh Agreement, and, thereby, of the single package of WTO rights and obligations, so too is China's Accession Protocol an integral part of the same package. Thus, like the approach to ascertaining the relationship among provisions of the Multilateral Trade Agreements, the specific relationship

<sup>474</sup> Panel Report, *Argentina – Footwear (EC)*, para. 8.69. In that dispute, the panel reasoned that, since it "must give meaning to the fact that the new Safeguards Agreement does not in so many words make a single reference to the unforeseen developments condition [in Article XIX of the GATT 1994], conformity with the explicit requirements and conditions embodied in the Safeguards Agreement must be sufficient for the application of safeguard measures within the meaning of Article XIX of GATT." (Panel Report, *Argentina – Footwear (EC)*, para. 8.67)

<sup>475</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 82.

<sup>476</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 83. (emphasis omitted)

<sup>477</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 89. (emphasis original)

<sup>478</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 97. The Appellate Body reached a similar finding in *Korea – Dairy*. (See Appellate Body Report, *Korea – Dairy*, paras. 76-90)

<sup>479</sup> See Appellate Body Report, *US – Clove Cigarettes*, paras. 96 and 101.

between the provisions of China's Accession Protocol, on the one hand, and the provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand, must also be determined on a case-by-case basis through a proper interpretation of all relevant provisions. Neither obligations nor rights may be automatically transposed from one part of the legal framework into another. Rather, the questions of whether a particular protocol provision at issue has an objective link to specific obligations under the Marrakesh Agreement and the Multilateral Trade Agreements, and whether the exceptions under those agreements may be invoked to justify a breach of such protocol provision, must be answered on a case-by-case basis. They must be ascertained through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation, as well as the circumstances of each dispute.

5.58. In some circumstances, this examination will lead to the conclusion that Article XX may be invoked to justify a breach of a provision of China's Accession Protocol. For example, in *China – Publications and Audiovisual Products*<sup>480</sup>, the Appellate Body scrutinized the meaning and effect of Paragraph 5.1 of China's Accession Protocol and the rights and obligations specified therein. The Appellate Body reasoned that the phrase "right to regulate trade in a manner consistent with the WTO Agreement" in the introductory clause of Paragraph 5.1 encompasses not only rights that the covered agreements affirmatively recognize as accruing to WTO Members, but also certain rights to take regulatory action pursuant to relevant exceptions, such as Article XX of the GATT 1994. In this respect, the Appellate Body observed that "the obligations assumed by China in respect of trading rights, which relate to traders, and the obligations imposed on all WTO Members in respect of their regulation of trade in goods, [are] closely intertwined".<sup>481</sup> The Appellate Body found that this close relationship is confirmed by the text of Paragraph 5.1 itself, by the context of Paragraph 5.1 (including China's Accession Working Party Report), and by past panel and Appellate Body reports in which measures that did not directly regulate goods, or the importation of goods, were nonetheless found to contravene GATT obligations.<sup>482</sup> The Appellate Body considered that "the introductory clause of paragraph 5.1 cannot be interpreted in a way that would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures, and which set out obligations that are closely linked to China's trading rights commitments."<sup>483</sup>

5.59. In these circumstances, the Appellate Body found that, "whether China may, in the absence of a specific claim of inconsistency with the GATT 1994, justify its measure under Article XX of the GATT 1994 must in each case depend on the relationship between the measure found to be inconsistent with China's trading rights commitments, on the one hand, and China's regulation of trade in goods, on the other hand."<sup>484</sup> The Appellate Body found, furthermore, that "[w]hether a measure regulating those who may engage in the import and export of goods falls within the scope of China's right to regulate trade may also depend on whether the measure has a clearly discernable, objective link to the regulation of trade in the goods at issue."<sup>485</sup>

5.60. Based on its reading of the introductory clause of Paragraph 5.1 of China's Accession Protocol in its context, and having found the specific measures at issue to have "a clearly

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<sup>480</sup> In that dispute, China claimed that the introductory clause of Paragraph 5.1 of its Accession Protocol allowed it to justify provisions of its measures found to be inconsistent with its trading rights commitments as necessary to protect public morals in China within the meaning of Article XX(a) of the GATT 1994. The first three sentences of Paragraph 5.1 read:

Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users.

<sup>481</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 226.

<sup>482</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 226 and 227.

<sup>483</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 229. (fn omitted; emphasis added)

<sup>484</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 229.

<sup>485</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 230.



discernable, objective link" to China's regulation of trade in the relevant products<sup>486</sup>, the Appellate Body found that China may seek to justify a breach of its trading rights obligations under Paragraph 5.1 as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994.<sup>487</sup> The Appellate Body reached this finding even though Article XX of the GATT 1994 was not expressly referenced in the first sentence of Paragraph 5.1. In so finding, the Appellate Body was particularly wary of, and refrained from adopting, an interpretation that "would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures, and which set out obligations that are closely linked to China's trading rights commitments."<sup>488</sup> The Appellate Body's finding was thus based on a thorough analysis of the text and context of Paragraph 5.1, as well as the circumstances in that dispute, including the specific measure subject to China's commitment under Paragraph 5.1, and how this commitment related to China's right to regulate trade.

5.61. The Appellate Body's findings in *China – Publications and Audiovisual Products* comport with our understanding that a case-by-case analysis is required to determine the specific relationship between an individual provision in China's Accession Protocol, on the one hand, and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand, including whether Article XX of the GATT 1994 can be invoked to justify a breach of a Protocol provision. As discussed in the previous subsection, Paragraph 1.2 of China's Accession Protocol essentially serves to build a bridge between the package of Protocol provisions and the package of existing rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements. This bridge, however, is only the starting point when examining the question as to whether an objective link exists between the *specific obligations* under China's Accession Protocol and the relevant covered agreement, or whether a breach of the former may be justified under an exception contained in the latter. Notably, under the approach adopted by the Appellate Body, express textual references, or the lack thereof, to a covered agreement (such as the GATT 1994), a provision thereof (such as Article VIII or Article XX of the GATT 1994), or "the WTO Agreement" in general, are *not* dispositive in and of themselves.

5.62. In our view, therefore, questions of whether a particular protocol provision at issue has an objective link to specific obligations under the Marrakesh Agreement and the Multilateral Trade Agreements, and of whether the exceptions under those agreements may be invoked to justify a breach of such protocol provision, must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute. The analysis must start with the text of the relevant provision in China's Accession Protocol and take into account its context, including that provided by the Protocol itself and by relevant provisions of the Accession Working Party Report, and by the agreements in the WTO legal framework. The analysis must also take into account the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.

5.63. As the findings in *China – Raw Materials* also indicate, the existence of an express reference to a GATT provision (Article VIII of the GATT 1994) in a protocol provision does not compel the conclusion that Article XX of the GATT 1994 is available to justify a breach of the protocol provision. Nor was the Appellate Body's conclusion based solely on the absence of textual references to Article XX of the GATT 1994. In those disputes, the Appellate Body applied the same analytical approach as in *China – Publications and Audiovisual Products*<sup>489</sup>, but reached a different conclusion following its assessment of the specific provision of China's Accession Protocol at issue, read in its context and within the structure of the Protocol and the GATT 1994. The Appellate Body observed that Paragraph 11.3 of China's Accession Protocol requires China to "eliminate all taxes and charges applied to exports" unless one of the following conditions is satisfied: (i) such taxes and charges are "specifically provided for in Annex 6 of this Protocol"; or (ii) such taxes and

<sup>486</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 230.

<sup>487</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 233. After reviewing the merits of China's claims under Article XX(a) of the GATT 1994, the Appellate Body ultimately found that China's measures were not justified under this provision. (Ibid., paras. 336 and 337)

<sup>488</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 229. (fn omitted)

<sup>489</sup> Appellate Body Reports, *China – Raw Materials*, para. 291.

charges are "applied in conformity with the provisions of Article VIII of the GATT 1994". The Appellate Body examined a number of textual and contextual elements and reached its conclusion on the basis of a holistic analysis of all elements. First, the Appellate Body noted that Annex 6 specifically provides for maximum export duty levels on 84 listed products, which did not include the products at issue in that appeal. Annex 6 clarifies that the maximum rates set out therein "will not be exceeded" and that China will "not increase the presently applied rates, *except under exceptional circumstances*".<sup>490</sup> In the light of the rule and exception clearly prescribed in Paragraph 11.3 and Annex 6, in particular the reference to "exceptional circumstances", the Appellate Body had difficulty reading Paragraph 11.3 and Annex 6 as allowing, in addition, recourse to Article XX of the GATT 1994 either to justify the imposition of export duties on products that are *not* listed in Annex 6 or to justify the imposition of export duties on listed products in excess of the maximum levels set forth in Annex 6.<sup>491</sup>

5.64. In addition, the Appellate Body considered the relevance of the reference to Article VIII of the GATT 1994 in Paragraph 11.3. The Appellate Body noted that Article VIII of the GATT 1994 *excludes* export duties from its scope of application. Consequently, the Appellate Body found that "the fact that Article XX may be invoked to justify those fees and charges regulated under Article VIII does not mean that it can also be invoked to justify export duties, which are not regulated under Article VIII."<sup>492</sup> The Appellate Body also contrasted the narrow and specific language of Paragraph 11.3, which refers to Article VIII of the GATT 1994 alone, with the broader references in Paragraphs 11.1 and 11.2, which require China to ensure that certain fees, taxes, or charges are "in conformity with the GATT 1994". Furthermore, the Appellate Body rejected China's argument that, unless China expressly "abandons" such right, China has an inherent right to regulate trade either by complying with affirmative obligations or by complying with exceptions.<sup>493</sup> For the Appellate Body, China's arguments could not be reconciled with the Appellate Body's approach in *China – Publications and Audiovisual Products*, confirming that such right must be established on the basis of a careful analysis of the relevant provisions at issue, their proper context, as well as the nature of the measure at issue.<sup>494</sup>

5.65. Thus, the Appellate Body's analysis in *China – Raw Materials* was not limited to the text of Paragraph 11.3 alone. Rather, the Appellate Body also relied on the context provided by Annex 6 of China's Accession Protocol, Article VIII of the GATT 1994, and the relevant structure of the Accession Protocol, including the specific exceptions to China's obligations to eliminate export duties. On this basis, the Appellate Body concluded that "a proper interpretation of Paragraph 11.3 of China's Accession Protocol does not make available to China the exceptions under Article XX of the GATT 1994".<sup>495</sup> In the present appeals, no participant has challenged the Appellate Body's ruling in *China – Raw Materials* or the same conclusion reached by the Panel in these disputes.<sup>496</sup> We also see no reason to revisit the ruling of the Appellate Body in *China – Raw Materials*.

5.66. Having conducted the above analysis regarding the relationship between, on the one hand, provisions of China's Accession Protocol and, on the other hand, provisions of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, we turn to examine specific arguments of China in this respect. We recall that, according to China's interpretation, Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of China's Accession Protocol, read together, indicate that specific Protocol provisions are to be treated as integral parts of either the Marrakesh Agreement or one of the Multilateral Trade Agreements, depending on the subject matter to which they "intrinsically relate".<sup>497</sup> The complainants maintain that China's "intrinsic relationship" test is devoid of any textual support in China's Accession Protocol, the Marrakesh Agreement, or the Multilateral Trade Agreements.<sup>498</sup> Japan and the United States emphasize the speculative nature of

<sup>490</sup> Appellate Body Reports, *China – Raw Materials*, para. 284. (emphasis added)

<sup>491</sup> Appellate Body Reports, *China – Raw Materials*, paras. 284 and 285.

<sup>492</sup> Appellate Body Reports, *China – Raw Materials*, para. 290.

<sup>493</sup> Appellate Body Reports, *China – Raw Materials*, paras. 300-306.

<sup>494</sup> Appellate Body Reports, *China – Raw Materials*, paras. 300-304.

<sup>495</sup> Appellate Body Reports, *China – Raw Materials*, para. 307.

<sup>496</sup> Panel Reports, para. 7.115.

<sup>497</sup> See China's appellant's submission, para. 114; and other appellant's submission, para. 67.

<sup>498</sup> European Union's appellee's submission, para. 100; Japan's appellee's submission, para. 171; United States' appellee's submission, para. 43.

this proposed test, and the uncertainty that it would generate regarding the meaning and scope of accession commitments.<sup>499</sup>

5.67. In these disputes, China has not precisely defined the meaning and scope of its "intrinsic relationship" test, and its arguments in this respect have evolved during the Panel and appellate proceedings. For example, in its first written submission to the Panel, China identified only Article XI of the GATT 1994 as the provision to which Paragraph 11.3 of its Accession Protocol intrinsically relates.<sup>500</sup> China subsequently added Article II of the GATT 1994 as another provision to which Paragraph 11.3 intrinsically relates.<sup>501</sup> In its written submissions on appeal, China's arguments suggest that its "intrinsic" relationship test is based on the "subject matter" of the respective provisions in China's Accession Protocol and the Marrakesh Agreement or one of the Multilateral Trade Agreements<sup>502</sup>, although those written submissions contain no reference to either Paragraph 11.3 or Articles II and XI of the GATT 1994. At the oral hearing, China added that "the label used to describe this relationship – whether one talks of 'intrinsic relationship', 'conceptual unity', or 'shared subject matter' – is of no consequence."<sup>503</sup>

5.68. Thus, China has not provided a clear definition of the "intrinsic relationship" test that it proposes, and the various permutations of its arguments make the precise contour of this test unclear. In any event, our interpretation set out above does not support the view that an inquiry into the relationship between an individual provision of China's Accession Protocol and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements must start from the premise that such provision is "intrinsically related" to some other provision(s). As discussed above, the general provision of Paragraph 1.2, while building a bridge between the package of Protocol provisions and the package of existing rights and obligations under the WTO legal framework, does not resolve the question as to how an individual provision of China's Accession Protocol relates to those under the other agreements. Rather, the specific relationship between the two must be ascertained through a thorough analysis of the relevant provisions, on the basis of the customary rules of treaty interpretation and the circumstances of each dispute. Therefore, China's position that a provision in its Accession Protocol is necessarily an integral part of either the Marrakesh Agreement or one of the Multilateral Trade Agreements by virtue of an "intrinsic relationship", and in particular its position that the applicability of Article XX of the GATT 1994 arises from the "intrinsic relationship" alone, sits uncomfortably with our interpretation set out above that rights and obligations *cannot be automatically transposed* from one part of the WTO legal framework to another.<sup>504</sup>

5.69. China has submitted several additional arguments in support of its understanding of the relationship between China's Accession Protocol, on the one hand, and the Marrakesh Agreement and the annexed Multilateral Trade Agreements, on the other hand. For example, China has sought to differentiate its Accession Protocol from the Multilateral Trade Agreements by arguing that, unlike those agreements, its Protocol is not a "self-contained agreement".<sup>505</sup> China emphasizes, in this regard, that its Accession Protocol does not "include most of the important features that many of the Multilateral Trade Agreements possess, such as proper general exceptions, security exceptions, or a modification clause".<sup>506</sup> Furthermore, at the oral hearing, China contended for the first time that, where a given accession provision "stands in conflict" with one or more provisions in the Marrakesh Agreement or the Multilateral Trade Agreements annexed thereto, such conflict is

<sup>499</sup> Japan's appellee's submission, paras. 171, 172, 216, and 220; United States' appellee's submission, paras. 32 and 75.

<sup>500</sup> See China's first written submission to the Panel, para. 432.

<sup>501</sup> See China's response to the complainants' comments on its request for a preliminary ruling on the availability of Article XX of the GATT 1994, para. 21.

<sup>502</sup> China's appellant's submission, para. 9.

<sup>503</sup> China's opening statement at the oral hearing.

<sup>504</sup> For these reasons, we also see no basis for the opinion of the dissenting panelist in these disputes that "the defences provided in the GATT 1994 are automatically available to justify any GATT-related obligations, including border tariff-related obligations – unless a contrary intention is expressed by the acceding Member and WTO Members". (Panel Reports, para. 7.137) Indeed, the Appellate Body rejected arguments by China to this effect in *China – Raw Materials*. (Appellate Body Reports, *China – Raw Materials*, paras. 300 and 303-306)

<sup>505</sup> China's appellant's submission, paras. 6, 10, 61, 63, and 111; other appellant's submission, paras. 6, 10, 54, and 64.

<sup>506</sup> China's appellant's submission, para. 62; other appellant's submission, fn 16 to para. 64.

resolved according to the "later-in-time" rule under Article 30(3) of the Vienna Convention.<sup>507</sup> This means that, to the extent that specific provisions under post-1994 accession protocols conflict with pre-existing provisions of the Marrakesh Agreement or the Multilateral Trade Agreements annexed thereto, the provisions of the accession protocol must prevail to the extent of the conflict. To illustrate, China points to Paragraph 11.3 of its Accession Protocol and Article XI:1 of the GATT 1994. China explains that, pursuant to Article 30(3) of the Vienna Convention, Article XI:1 of the GATT 1994 "has been modified by Paragraph 11.3 of China's Accession Protocol", such that "China, unlike other Members, cannot freely impose export duties under Article XI:1 of the GATT 1994".<sup>508</sup>

5.70. These arguments, and the concepts on which they are based, were not elaborated by China and do not, in our view, comport well with the analysis that we have set out above. We do not, for example, see the term "self-contained agreements" as an apt descriptor of the integrated WTO framework, or of any of the agreements contained therein.<sup>509</sup> In any event, as discussed above, Paragraph 1.2 of China's Accession Protocol, together with Article XII:1 of the Marrakesh Agreement, means that the Marrakesh Agreement, the Multilateral Trade Agreements, and China's Accession Protocol together form a single package of rights and obligations.<sup>510</sup> Within this single package, whether an instrument can be characterized as a "self-contained agreement", or not, seems to us to be of limited relevance for the question before us (that is, the specific relationship between a Protocol provision and provisions of a covered agreement). In the same vein, we do not consider Article 30(3) of the Vienna Convention to be apposite for understanding the relationship between the different components of this single package of rights and obligations, all of which form part of "the same treaty"<sup>511</sup> to which China acceded in 2001.

#### 5.1.3.5 Conclusion

5.71. We have found that the first sentence of Article XII:1 of the Marrakesh Agreement sets out the general rule for acceding to the WTO, whereby an applicant may accede to the Marrakesh Agreement on "terms to be agreed" by the applicant and the WTO. The second sentence of Article XII:1 further provides that the act of acceding to the WTO must apply to both the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. Article XII:1, second sentence, thus reflects the fundamental principle of the single undertaking established under Article II:2 of the Marrakesh Agreement, whereby the Multilateral Trade Agreements are all "integral parts" of the Marrakesh Agreement. Article XII:1 does not contain any further elaboration on what the "terms" of accession should be, and does not provide specific guidance on how these terms relate to the rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements. To understand how they relate to each other, further inquiry is needed.

5.72. The "terms" of China's accession are spelt out in China's Accession Protocol and those specific commitments of China's Accession Working Party Report that are incorporated into its Accession Protocol. Pursuant to Paragraph 1.2 of China's Accession Protocol, the Protocol, in its entirety, is made "an integral part of the WTO Agreement". When used in different contexts in China's Accession Protocol, the term "the WTO Agreement" may refer narrowly to the Marrakesh Agreement alone, or it may refer broadly to the Marrakesh Agreement together with the Multilateral Trade Agreements annexed thereto. We consider this to be consistent with the fact that, pursuant to Article II:2 of the Marrakesh Agreement, all the Multilateral Trade Agreements constitute integral parts of the Marrakesh Agreement. They together make up the same treaty, representing a single package of rights and obligations. In our view, whether the term "the WTO Agreement", as used in Paragraph 1.2, second sentence, of China's Accession Protocol, is referring to the narrow or broad connotation of the term is not dispositive of our understanding of the legal effect of Paragraph 1.2. Rather, the operative term of Paragraph 1.2 is "an integral part". Thus, just as Article II:2 of the Marrakesh Agreement makes the Multilateral Trade Agreements integral parts of the single package of WTO rights and obligations, Paragraph 1.2 of

<sup>507</sup> Article 30(3) of the Vienna Convention states: "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

<sup>508</sup> China's opening statement at the oral hearing.

<sup>509</sup> As all three complainants point out, the concept of "self-contained agreements" introduced by China is not found anywhere in the covered agreements. (See European Union's appellee's submission, para. 86; Japan's appellee's submission, para. 175; and United States' appellee's submission, para. 71)

<sup>510</sup> See paragraph 5.49 of these Reports.

<sup>511</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

China's Accession Protocol makes China's Accession Protocol, in its entirety, an integral part of the same package. Together, China's Accession Protocol and the other agreements that make up the same undertaking form a single package of rights and obligations with respect to China as a WTO Member.

5.73. For these reasons, we decline to accept China's interpretation of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement as meaning that a specific provision in China's Accession Protocol is an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements to which it intrinsically relates. Instead, we find that the Panel did not err in concluding that the legal effect of the second sentence of Paragraph 1.2 and Article XII:1 of the Marrakesh Agreement is *not* that the individual provisions of China's Accession Protocol are integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement.<sup>512</sup> We recall that the Panel also expressed the view that the term "the WTO Agreement" in Paragraph 1.2 refers to the Marrakesh Agreement.<sup>513</sup> However, as discussed above, whether the term "the WTO Agreement" in Paragraph 1.2 is understood in its narrow or broad sense is not dispositive of the issue regarding the relationship between a specific provision of China's Accession Protocol and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. We therefore find it unnecessary to opine on the scope of the term "the WTO Agreement" in the second sentence of Paragraph 1.2 of China's Accession Protocol.

5.74. In our view, Paragraph 1.2 of China's Accession Protocol serves to build a bridge between the package of Protocol provisions and the package of existing rights and obligations under the WTO legal framework. Nonetheless, neither obligations nor rights may be automatically transposed from one part of this legal framework into another. The fact that Paragraph 1.2 builds such a bridge is only the starting point, and does not in itself answer the questions of whether there is an objective link between *an individual provision* in China's Accession Protocol and existing obligations under the Marrakesh Agreements and the Multilateral Trade Agreements, and whether China may rely on an exception provided for in those agreements to justify a breach of such Protocol provision. Such questions must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute. The analysis must start with the text of the relevant provision in China's Accession Protocol and take into account its context, including that provided by the Protocol itself and by relevant provisions of the Accession Working Party Report, and by the agreements in the WTO legal framework. The analysis must also take into account the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.

## 5.2 Article XX(g) of the GATT 1994

### 5.2.1 China's claims under Article XX(g) of the GATT 1994

5.75. China appeals two sets of intermediate findings in the Panel's analysis of whether China's export quotas on rare earths, tungsten, and molybdenum are justified pursuant to Article XX(g) of the GATT 1994. First, China contends that the Panel erred in its interpretation and application of Article XX(g) of the GATT 1994, and acted inconsistently with Article 11 of the DSU, in finding that China's export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of Article XX(g). Second, China claims that the Panel erred in its interpretation and application of Article XX(g) of the GATT 1994, and acted inconsistently with Article 11 of the DSU, in finding that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with" domestic restrictions under Article XX(g) of the GATT 1994. Thus, China requests us to reverse the Panel's intermediate findings that China's export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of Article XX(g) of the GATT 1994<sup>514</sup>, and that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with" domestic restrictions pursuant to Article XX(g) of the

<sup>512</sup> Panel Reports, para. 7.93. See also *ibid.*, paras. 7.80 and 7.89.

<sup>513</sup> Panel Reports, paras. 7.80, 7.89, and 7.93.

<sup>514</sup> China's appellant's submission, paras. 30, 208, 209, 319, and 320; other appellant's submission, paras. 30, 139, 140, 250, and 251 (referring to Panel Reports, paras. 7.279-7.293, 7.444, 7.446-7.448, 7.541, 7.542, 7.604, 7.725, and 7.731).

GATT 1994.<sup>515</sup> Furthermore, to the extent that the Panel's errors, made in its analyses of the "relating to" and "made effective in conjunction with" requirements of Article XX(g), taint the Panel's conclusions that China's export quotas on rare earths, tungsten, and molybdenum cannot be provisionally justified under Article XX(g) of the GATT 1994, China also requests us to reverse these findings of the Panel.<sup>516</sup>

5.76. Before the Panel, China conceded that its export quotas on rare earths, tungsten, and molybdenum are inconsistent with Article XI:1 of the GATT 1994. China asserted, however, that these quotas are justified under Article XX(g) of the GATT 1994. In this regard, China contended that its sovereignty over its exhaustible natural resources entitles it to manage the supply of such resources and, more specifically, to use export quotas to allocate, as between foreign and domestic consumers, the supply of Chinese exhaustible natural resources. In order to establish its defence under Article XX(g), China submitted various measures to the Panel in order to demonstrate that China had in place: (i) a comprehensive conservation policy for each of the product groups at issue<sup>517</sup>; and (ii) restrictions on domestic production or consumption of rare earths, tungsten, and molybdenum, including through the imposition of extraction and production quotas.<sup>518</sup> As the sections below explain, China's appeal takes issue only with limited aspects of the Panel's findings under Article XX(g) of the GATT 1994.

## 5.2.2 The Panel's findings

5.77. In addressing China's defence, the Panel began by setting out its interpretation of Article XX(g) of the GATT 1994. The Panel noted that, for a measure to be justified under Article XX(g), such measure must: (i) "relate to" the "conservation" of an "exhaustible natural resource"; and (ii) be "made effective" "in conjunction" with "restrictions" on "domestic production or consumption". The Panel stressed that, while a measure must comply with each of these elements, Article XX(g) ultimately lays down a single test, the entirety of which must be satisfied if a measure is to be justified pursuant to that provision. Therefore, a measure's compliance with Article XX(g) can be determined only on the basis of a holistic assessment. The Panel further considered that, given the unitary nature of the test, facts and arguments submitted by the parties could be relevant in more than one part of the Panel's analysis.<sup>519</sup>

5.78. With regard to the term "exhaustible natural resources", the Panel concluded that it did not need to decide the precise meaning or scope of the term to resolve these disputes, because the parties agreed that measures may "'relate to the conservation of exhaustible natural resources' even if they are not imposed directly upon those resources".<sup>520</sup> For the specific product categories at issue in these disputes, the Panel found that rare earth, tungsten, and molybdenum ores are "exhaustible natural resources", but did not determine more generally the extent to which semi-processed or processed products fall within the scope of that concept.<sup>521</sup> In respect of "conservation", the Panel noted that, for the purposes of Article XX(g), this word has a "broad meaning" that strikes an appropriate balance between trade-liberalization, sovereignty over natural resources, and the right to sustainable development.<sup>522</sup> The Panel found that China had

<sup>515</sup> China seeks reversal of paragraphs 7.301, 7.314-7.337, 7.568-7.599, 7.792-7.809, and 7.919-7.935. (China's appellant's submission, paras. 44, 313, 314, 315, 322, and 323; other appellant's submission, paras. 44, 244, 245, 246, 253, and 254)

<sup>516</sup> China seeks reversal of paragraphs 7.600-7.614, 7.810-7.820, and 7.936-7.944 of the Panel Reports; and US Panel Report, para. 8.2.c; EU Panel Report, para. 8.7.c; and Japan Panel Report, para. 8.12.c. (China's appellant's submission, paras. 31, 45, 210, 288, 316, 321, and 324; other appellant's submission, paras. 31, 45, 141, 219, 247, 252, and 255)

<sup>517</sup> See e.g. Panel Reports, paras. 7.368, 7.399, 7.407 (rare earths); 7.690-7.706 (tungsten); and 7.863-7.874 (molybdenum).

<sup>518</sup> See e.g. Panel Reports, paras. 7.493-7.495 (rare earths); 7.738-7.740 (tungsten); and 7.881-7.883 (molybdenum).

<sup>519</sup> Panel Reports, para. 7.240 (referring to Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 19).

<sup>520</sup> Panel Reports, para. 7.250.

<sup>521</sup> Panel Reports, paras. 7.364, 7.365, 7.689, and 7.854 (referring to Appellate Body Report, *US – Shrimp*, para. 128; and Panel Reports, *China – Raw Materials*, para. 7.369).

<sup>522</sup> Panel Reports, para. 7.277.



demonstrated that it has in place a comprehensive conservation policy for rare earths<sup>523</sup>, tungsten<sup>524</sup>, and molybdenum<sup>525</sup>, respectively.

5.79. In applying its interpretation of Article XX(g) to the facts of the case, the Panel separately analysed the export quota imposed on each of the three product groups. The Panel then made three sets of intermediate findings for each of the export quotas: (i) that China had not established that the relevant export quota "relates to" the conservation of the respective exhaustible natural resource for the purposes of Article XX(g) of the GATT 1994<sup>526</sup>; (ii) that China had not established that the relevant export quota is "made effective in conjunction with" restrictions on domestic production or consumption for the purposes of Article XX(g) of the GATT 1994<sup>527</sup>; and (iii) that China had not established that the relevant export quota is not applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade within the meaning of the chapeau of Article XX of the GATT 1994.<sup>528</sup> The Panel concluded overall that China had not demonstrated that its export quotas on rare earths, tungsten, and molybdenum are provisionally justified pursuant to subparagraph (g).<sup>529</sup> In addition, the Panel found that China had not demonstrated that these measures are applied in a manner that satisfies the chapeau of Article XX of the GATT 1994.<sup>530</sup>

### 5.2.3 The Panel findings appealed by China

5.80. On appeal, China contends that the Panel erred in its interpretation and application of Article XX(g) of the GATT 1994, and acted inconsistently with Article 11 of the DSU, in finding that China's export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of Article XX(g) of the GATT 1994. China also claims that the Panel erred in its interpretation and application of Article XX(g) of the GATT 1994, and acted inconsistently with Article 11 of the DSU, in finding that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with" domestic restrictions under Article XX(g) of the GATT 1994.

5.81. Before addressing China's claims of error, and in order to situate China's appeal in its proper context, we note the limited scope and segmented nature of China's appeal of the Panel's findings under Article XX(g) of the GATT 1994. China does not appeal the Panel's findings with respect to "conservation" or "exhaustible natural resources". Moreover, China's claim that the Panel erred in its interpretation and application of "relating to" concerns only the Panel's findings regarding China's export quotas on rare earths and tungsten, and does not involve any challenge to the Panel's findings regarding China's export quota on molybdenum. With respect to the Panel's analysis of whether China's export quotas on rare earths and tungsten "relate to" conservation, China's appeal is directed at only a short segment of the Panel's overall analysis, namely, the Panel's findings in respect of the "signalling function" of China's export quotas. In considering whether China's measures "relate to" the conservation of exhaustible rare earth ore resources, the Panel addressed two sets of arguments made by China concerning: (i) the text of the measure; and (ii) the design, structure, and architecture of the measure. The Panel found the various references to conservation in the text of China's export quota for rare earths and related documents to be inconclusive.<sup>531</sup> In examining the design, structure, and architecture of China's export quota on rare earths, the Panel addressed six distinct arguments by China that its export

<sup>523</sup> Panel Reports, para. 7.375.

<sup>524</sup> Panel Reports, para. 7.697.

<sup>525</sup> Panel Reports, para. 7.860.

<sup>526</sup> Panel Reports, paras. 7.601 (rare earths); 7.811 (tungsten); and 7.937 (molybdenum). The Panel found that, rather than "relating to the conservation of exhaustible natural resources", China's export quotas seem designed to reserve amounts of rare earth products for domestic consumption. See e.g. Panel Reports, para. 7.601.

<sup>527</sup> Panel Reports, paras. 7.609-7.611 (rare earths); 7.813 (tungsten); and 7.939 (molybdenum).

<sup>528</sup> Panel Reports, paras. 7.679 (rare earths); 7.844 (tungsten); and 7.969 (molybdenum).

<sup>529</sup> Panel Reports, paras. 7.614 (rare earths); 7.820 (tungsten); and 7.939 (molybdenum).

<sup>530</sup> Panel Reports, paras. 7.679 (rare earths); 7.844 (tungsten); and 7.969 (molybdenum). US Panel Report, para. 8.2.c; EU Panel Report, para. 8.7.c; Japan Panel Report, para. 8.12.c.

<sup>531</sup> Panel Reports, para. 7.407.

quota "relates to" the conservation of rare earth ores. The Panel rejected all six arguments.<sup>532</sup> The third of these six arguments was China's contention that its export quota on rare earths sends a signal to foreign consumers of rare earth products to diversify their sources of supply and/or find substitutes for the rare earth products that they import from China. As regards the export quota on tungsten, the Panel addressed two arguments by China supporting its claim that its export quota on tungsten bears a "close", "real", and "substantial" connection to the goal of conserving exhaustible tungsten ores<sup>533</sup>, one of which was based on the conservation-related signals sent by the export quota to foreign consumers of tungsten.<sup>534</sup> As stated above, China's appeal is limited to the Panel's intermediate findings rejecting China's arguments with respect to the "signalling function" of the export quotas on rare earths and tungsten.

5.82. China's appeal regarding the Panel's findings that China's export quotas on rare earths, tungsten, and molybdenum are not made effective in conjunction with restrictions on domestic production or consumption is also limited in its scope. China's appeal focuses on the Panel's articulation and application of the "even-handedness" requirement. China does not appeal the Panel's interpretation of "restrictions" or its findings that China's domestic extraction and production caps on rare earths, tungsten, and molybdenum do not constitute "restrictions on domestic production or consumption" for the purposes of Article XX(g) of the GATT 1994.<sup>535</sup>

5.83. Finally, China does not appeal the Panel's findings that China had not established that its export quotas on these three groups of products meet the requirements of the chapeau of Article XX of the GATT 1994.<sup>536</sup>

#### 5.2.4 Article XX(g) of the GATT 1994 as a whole

5.84. China's appeal calls for us to consider certain issues relating to the interpretation of discrete elements of Article XX(g) of the GATT 1994. In order properly to situate these elements within Article XX(g), we begin by setting out our understanding of Article XX(g), as a whole, as explained in previous Appellate Body reports.

<sup>532</sup> Panel Reports, para. 7.415. The Panel first considered China's argument that the export quota on rare earths prevents smuggling and/or the export of illegally extracted rare earth products. The Panel found that China's measures are "overbroad" because they prevent the export of legally produced rare earth products (above a certain absolute numerical limit), rather than just illegally produced products. (Ibid., para. 7.430 (referring to Appellate Body Report, *US – Shrimp*, para. 141)) Second, although China argued that the export quota reduces domestic demand for illegally extracted and/or produced rare earth products, the Panel was not convinced that an export quota could discourage illegal extraction and production intended for the domestic market. (Ibid., para. 7.434) Third, China argued that the export quota "signals" to rare earth consumers that additional sources of supply must be found. The Panel determined that China had not demonstrated that, in the design of its export quota and its conservation programme more generally, there is any mechanism to ensure that the export quota and the extraction and/or production caps will work together in such a way as to counteract the "perverse signals" sent by its export quota to domestic consumers. As such, the Panel considered that the risk of "perverse signals" is real, and this cast doubt on China's claim that the export quota "relates to" conservation. (Ibid., para. 7.447) China's fourth argument was that its export quota works as a "safeguard" against "speculative surges" in demand. The Panel considered that China's desire to moderate "speculative demand surges that could upset the market balance and certainty sought by China" is not a conservation-related objective, but an aspect of China's industrial policy. (Ibid., para. 7.452) In respect of China's fifth submission that the export quota enables China to "allocate" the limited supply of rare earth resources, the Panel failed to see how China's allocation of quantities between foreign and domestic users could relate to conservation. (Ibid., para. 7.462) China's sixth argument was that the way in which the export quota is established shows that China's export quota "relates to" conservation. The Panel found that China had failed to explain the significance of the establishment procedures or their connection to the conservation objective. (Ibid., paras. 7.473 and 7.483)

<sup>533</sup> China's other argument was based on the text of the measures at issue. However, the Panel found that China could not discharge its burden of proof simply by citing a number of references to conservation in the text of a challenged measure without explaining how the challenged measure "relates to", supports, or furthers the goal of conserving exhaustible tungsten ores. (Panel Reports, para. 7.720)

<sup>534</sup> Panel Reports, para. 7.700.

<sup>535</sup> Panel Reports, paras. 7.609 (rare earths); 7.814 (tungsten); and 7.940 (molybdenum).

<sup>536</sup> Panel Reports, paras. 7.679 (rare earths); 7.844 (tungsten); and 7.969 (molybdenum).

5.85. Article XX(g) of the GATT 1994 states:

Article XX

*General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

...

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

5.86. Members can resort to Article XX of the GATT 1994 as an exception to justify measures that would otherwise be inconsistent with their GATT obligations.<sup>537</sup> The assessment of a defence under Article XX involves a two-tiered analysis in which a measure must first be provisionally justified under one of the subparagraphs of Article XX, and then shown to be consistent with the conditions of the chapeau of Article XX.<sup>538</sup> As the Appellate Body has noted, this "sequence of steps" in the analysis of a claim of justification under Article XX reflects "not inadvertence or random choice", but rather the fundamental structure and logic of Article XX of the GATT 1994.<sup>539</sup>

5.87. We further recall that provisional justification under one of the subparagraphs of Article XX requires that a challenged measure "address the particular interest specified in that paragraph" and that "there be a sufficient nexus between the measure and the interest protected".<sup>540</sup> We also bear in mind that Article XX uses different terms in its different subparagraphs: "necessary" – in subparagraphs (a), (b), and (d); "essential" – in subparagraph (j); "relating to" – in subparagraphs (c), (e), and (g); "for the protection of" – in subparagraph (f); "in pursuance of" – in subparagraph (h); and "involving" – in subparagraph (i). As the Appellate Body has found, these different terms suggest that the negotiators of the GATT did not intend to require, in respect of each and every category, "the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized".<sup>541</sup>

5.88. A Member seeking to justify its measure pursuant to Article XX(g) must demonstrate that its GATT-inconsistent measure has the requisite nexus ("relates to") with the legitimate policy goal (the conservation of exhaustible natural resources). The Member must also show that its measure is "made effective in conjunction with restrictions on domestic production or consumption".

5.89. With respect to the first clause of Article XX(g), "relating to the conservation of exhaustible natural resources", the Appellate Body has remarked, with reference to the preamble of the Marrakesh Agreement, that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference, but is rather, "by definition, evolutionary".<sup>542</sup> The word "conservation", in turn, means "the preservation of the environment, especially of natural resources".<sup>543</sup> It seems to us that, for the purposes of Article XX(g), the precise contours of the word "conservation" can only be fully understood in the context of the exhaustible natural resource at issue in a given dispute. For example, "conservation" in the context of an exhaustible mineral resource may entail preservation through a reduction in the pace of its extraction, or by stopping its extraction

<sup>537</sup> Appellate Body Reports, *US – Gasoline*, p. 24, DSR 1996:I, p. 22; *China – Raw Materials*, para. 334.

<sup>538</sup> Appellate Body Reports, *US – Gasoline*, p. 22, DSR 1996:I, p. 20; *US – Shrimp*, paras. 119 and 120; *EC – Seal Products*, para. 5.169. See also Appellate Body Report, *US – Gambling*, para. 292.

<sup>539</sup> Appellate Body Report, *US – Shrimp*, para. 119.

<sup>540</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.169 (quoting Appellate Body Report, *US – Gambling*, para. 292, in turn referring to Article XIV(a) of the GATS).

<sup>541</sup> Appellate Body Report, *US – Gasoline*, pp. 18, DSR 1996:I, p. 16.

<sup>542</sup> Appellate Body Report, *US – Shrimp*, para. 130.

<sup>543</sup> Appellate Body Reports, *China – Raw Materials*, para. 355 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 496).

altogether. In respect of the "conservation" of a living natural resource, such as a species facing the threat of extinction, the word may encompass not only limiting or halting the activities creating the danger of extinction, but also facilitating the replenishment of that endangered species.<sup>544</sup>

5.90. Turning to the term "relating to", we recall that, for a measure to "relate to" conservation in the sense of Article XX(g), there must be "a close and genuine relationship of ends and means" between that measure and the conservation objective of the Member maintaining the measure.<sup>545</sup> Hence, a GATT-inconsistent measure that is merely incidentally or inadvertently aimed at a conservation objective would not satisfy the "relating to" requirement of Article XX(g).<sup>546</sup> Furthermore, the absence of a domestic restriction, or the way in which a challenged measure applies to domestic production or consumption, may be relevant to an assessment of whether the challenged measure "relates to" conservation.<sup>547</sup>

5.91. The second clause of Article XX(g) requires that the GATT-inconsistent conservation measure be "made effective in conjunction with restrictions on domestic production or consumption". Accordingly, Article XX(g) requires that, when international trade is restricted, restrictions be imposed also on domestic production or consumption. The Appellate Body has described a "restriction" as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation".<sup>548</sup>

5.92. In addition, the words "made effective", when used in connection with a governmental measure, refer to a measure being "operative", "in force", or having "come into effect".<sup>549</sup> It must be "in operation at a given time" in the sense of being "brought into operation, adopted, or applied".<sup>550</sup> The phrase "in conjunction with" signifies "together with" or "jointly with".<sup>551</sup> Taking both of these elements together, the second clause of Article XX(g) refers to governmental measures that are promulgated or brought into effect, and that operate together with restrictions on domestic production or consumption of exhaustible natural resources. Thus, the requirement that restrictions be made effective "in conjunction" suggests that, in their joint operation towards a conservation objective, such restrictions limit not only international trade, but must also limit domestic production or consumption. Moreover, in order to comply with the "made effective" element of the second clause of Article XX(g), it would not be sufficient for domestic production or consumption to be subject to a possible limitation at some undefined point in the future. Rather, a Member must impose a "real" restriction on domestic production or consumption that reinforces and complements the restriction on international trade.

5.93. Accordingly, the second clause of Article XX(g) is appropriately read as a requirement that a Member seeking to rely upon Article XX(g) in its pursuit of a conservation objective must demonstrate that it imposes restrictions, not only in respect of international trade, but also in respect of domestic production or consumption. In other words, the trade restrictions must operate jointly with the restrictions on domestic production or consumption.<sup>552</sup> Such restrictions must place effective limitations on domestic production or consumption and thus operate so as to reinforce and complement the restrictions imposed on international trade. In that sense,

<sup>544</sup> We note that the Panel engaged in an extensive discussion of the scope of the word "conservation" in Article XX(g), ultimately finding that this word has a "rather broad meaning". We also note that the Panel's interpretation of the word "conservation" in Article XX(g) is not appealed. Consequently, we neither endorse nor reject the Panel's statements in this regard. (See Panel Reports, paras. 7.252-7.277)

<sup>545</sup> Appellate Body Reports, *US – Shrimp*, para. 136; *China – Raw Materials*, para. 355.

<sup>546</sup> Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, p. 18.

<sup>547</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 19 (referring to GATT Panel Reports, *Canada – Herring and Salmon*, para. 5.1; and *US – Canadian Tuna*, paras. 4.10-4.12).

<sup>548</sup> Appellate Body Reports, *China – Raw Materials*, para. 319 (referring to *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2553). The Appellate Body made this observation with respect to the word "restrictions" in Article XI:1 of the GATT 1994, and added that the word "restriction" "refers generally to something that has a limiting effect". (Ibid.)

<sup>549</sup> Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, p. 19 (quoting *The New Shorter Oxford English Dictionary on Historical Principles*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 786).

<sup>550</sup> Appellate Body Reports, *China – Raw Materials*, para. 356.

<sup>551</sup> Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, p. 19 (quoting *The New Shorter Oxford English Dictionary on Historical Principles*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 481).

<sup>552</sup> Appellate Body Reports, *China – Raw Materials*, para. 356.

subparagraph (g) "is a requirement of *even-handedness* in the imposition of restrictions, in the pursuit of conservation, upon the production or consumption of exhaustible natural resources".<sup>553</sup>

5.94. In sum, Article XX(g) permits the adoption or enforcement of trade measures that have "a close and genuine relationship of ends and means"<sup>554</sup> to the conservation of exhaustible natural resources, when such trade measures are brought into operation, adopted, or applied and "work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource".<sup>555</sup> In order to justify a measure pursuant to Article XX(g), a WTO Member must show that it satisfies all the requirements set out in that provision. Indeed, the text of Article XX(g), particularly its use of the conjunctive "if", suggests a holistic assessment of its component elements, as the Panel rightly recognized.<sup>556</sup>

5.95. While Article XX(g) calls for a holistic assessment, the provision itself must be applied on a case-by-case basis, through careful scrutiny of the factual and legal context in a given dispute, including the exhaustible natural resource concerned and the specific conservation objectives of the Member seeking to rely upon Article XX(g). Due regard must be paid to the words used by the WTO Members to express their intent and purpose<sup>557</sup>, but a panel cannot limit its analysis to the text of the measure at issue, or simply accept, without question, a Member's characterization of its measure.<sup>558</sup>

5.96. The text of Article XX(g) does not prescribe a specific analytical framework for assessing whether a measure satisfies the component requirements of that provision. All the same, we observe that, in past disputes, the Appellate Body has emphasized the importance of the design and structure of the challenged measure to a proper assessment of whether a measure satisfies the requirements of Article XX(g).<sup>559</sup> Assessing a measure based on its design and structure is an objective methodology that also helps to determine whether or not a measure does what it purports to do.<sup>560</sup> For instance, a measure declared to serve the purpose of conservation may, through an examination of its design and structure, be found not to genuinely serve that purpose. The analysis of a measure's design and structure allows a panel or the Appellate Body to go beyond the text of the measure and either confirm that the measure is indeed related to conservation, or determine that, despite the text of the measure, its design and structure reveals that it is not genuinely related to conservation. This is so because the design and structure of a measure do not vary, and are not contingent on the occurrence of subsequent events. In sum, we consider that, by focusing on the design and structure of the measure, particularly where a measure is challenged "as such", a panel or the Appellate Body has the benefit of an objective methodology for assessing whether a measure satisfies the requirements of Article XX(g).

5.97. At the same time, the analysis of the design and structure of the measure cannot be undertaken in isolation from the conditions of the market in which the measure operates. Due regard should also be given to key features of the relevant market. Since the characteristics and structure of the market would normally influence a Member's choice and design of a measure, such market features may also shed light on whether a given measure, in its design and structure, satisfies the requirements of Article XX(g). Relevant market features could include not only the

<sup>553</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 19. (emphasis original) On appeal, China challenges the Panel's understanding of the term "even-handedness". We discuss China's claims on this issue in detail below.

<sup>554</sup> Appellate Body Reports, *US – Shrimp*, para. 136; *China – Raw Materials*, para. 355.

<sup>555</sup> Appellate Body Reports, *China – Raw Materials*, para. 356.

<sup>556</sup> Panel Reports, para. 7.240.

<sup>557</sup> Appellate Body Report, *US – Gasoline*, p. 18, DSR 1996:I, p. 17.

<sup>558</sup> In a similar vein, in *US – Gambling*, in its examination of an appeal under Article XIV(a) of the GATS, the Appellate Body stated:

To be sure, a Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach – as evidenced, for example, by texts of statutes, legislative history, and pronouncements of government agencies or officials – will be relevant in determining whether the measure is, objectively, "necessary". A panel is not bound by these characterizations, however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party.

(Appellate Body Report, *US – Gambling*, para. 304 (referring to Appellate Body Report, *India – Patents (US)*, para. 66) (fn omitted))

<sup>559</sup> Appellate Body Reports, *US – Shrimp*, paras. 135-137; *China – Raw Materials*, para. 355 (referring to Appellate Body Report, *US – Shrimp*, para. 136).

<sup>560</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, p. 120.

exhaustible natural resource to be conserved, but also the market structure, the product and geographical scope of the market, and the significance of the role that foreign and domestic market participants play.

5.98. Furthermore, the Appellate Body has clarified that there is no requirement to apply an "empirical effects test" under Article XX(g).<sup>561</sup> In *US – Gasoline*, the Appellate Body identified two primary challenges that a panel, as trier of fact, would face if it were required to evaluate "effects":

In the first place, the problem of determining causation, well-known in both domestic and international law, is always a difficult one. In the second place, in the field of conservation of exhaustible natural resources, a substantial period of time, perhaps years, may have to elapse before the effects attributable to implementation of a given measure may be observable.<sup>562</sup>

5.99. We also observe that the measures that may be justified pursuant to Article XX(g) are those already found to be inconsistent with obligations contained in the GATT 1994.<sup>563</sup> Such measures may themselves have had a distorting effect in the marketplace. This, to our minds, compounds the problems of determining causation, and reinforces the need for caution in relying on an "empirical effects test" in the context of Article XX(g).

5.100. The Appellate Body has nevertheless acknowledged that consideration of the predictable effects of a measure may be relevant for the analysis under Article XX(g).<sup>564</sup> In referring to "predictable effects" in *US – Gasoline*, the Appellate Body was denoting effects that careful evaluation of the design and structure of the measure reveals are likely to or will occur in the future. Although "predictable effects" might be understood also to encompass future effects projected on the basis of empirical data of actual effects, reliance upon such effects in assessing a measure's compliance with Article XX(g) would also be fraught with the causation difficulties identified by the Appellate Body in *US – Gasoline*.

5.101. Having explained our understanding of Article XX(g), including our view that Article XX(g) always calls for a holistic assessment of all of its constituent elements, we now turn to China's claims that the Panel erred in its interpretation of certain terms in Article XX(g). First, we address China's claim that the Panel erred in its interpretation of the term "relating to", to the extent that this interpretation required the Panel to limit its analysis to an examination of the design and structure of China's export quotas.<sup>565</sup> Second, we address China's claims that the Panel erred in its interpretation of the phrase "made effective in conjunction with", by requiring a separate and distinct inquiry into "even-handedness" and whether the burden of conservation-related measures is distributed in a balanced way between domestic and foreign consumers or producers, and by finding that it must limit the analysis under its "even-handedness" test to considering the design and structure of the measures.

#### 5.2.5 China's claim that the Panel erred in its interpretation of the term "relating to"

5.102. China requests us to reverse the Panel's interpretation of the term "relating to" in Article XX(g) of the GATT 1994, "to the extent that this interpretation required the Panel to examine *solely* the structure and design of China's export quotas".<sup>566</sup>

5.103. We begin by observing that the Panel's interpretation of the words "relating to" is set out in paragraphs 7.279 to 7.293 of its Reports. China's appeal, however, challenges only the Panel's articulation of its analytical framework for assessing whether a challenged measure "relates to" conservation. According to China, the errors in the Panel's approach are found in two paragraphs of the Panel Reports. The first is the Panel's explanation that:

<sup>561</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 20.

<sup>562</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 20.

<sup>563</sup> Appellate Body Reports, *US – Gasoline*, p. 24, DSR 1996:I, p. 22; *China – Raw Materials*, para. 334.

<sup>564</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 20.

<sup>565</sup> China's appellant's submission, para. 208; other appellant's submission, para. 139.

<sup>566</sup> China's appellant's submission, para. 208; other appellant's submission, para. 139 (referring to Panel Reports, paras. 7.279-7.293). (emphasis added)



... in assessing the existence and nature of the challenged measure's relationship with conservation, *the Panel must focus on the "design and structure" of the measure*. It is these which, taken together with the measure's text, must demonstrate a clear link with the conservation objective.<sup>567</sup>

5.104. The second example of the Panel's erroneous approach is, according to China, found in the following explanation by the Panel as to how it intended to apply Article XX(g) to China's export quota on rare earths in order to ascertain whether that quota is a measure "relating to" conservation:

The Panel recalls, however, that according to the Appellate Body, the test for whether a challenged measure "relates to" conservation turns on an examination of its "general design and structure", and in particular on whether the measure is "disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation" or whether, conversely, it is "reasonably related" to the conservation objective, such that its relationship with conservation is "close and real" and "substantial". As the Panel explained in its discussion of the legal test, *the test in Article XX(g) focuses on the written measure, on the design and architecture of the challenged export quota, and its operation*, while under the chapeau of Article XX the Panel will review the manner in which the quota system is applied. As the Panel noted, *the analysis under subparagraph (g) does not require an evaluation of the actual effects of the concerned measures*. The Panel is thus not required to examine whether a challenged measure has in fact improved the level of conservation of exhaustible natural resources. There is therefore no need for the Panel to decide, in quantitative or qualitative terms, precisely what level of contribution a challenged measure has made to the conservation objective. Instead, *the Panel looks at the nature of the challenged measures to determine whether, as a matter of design and architecture, they assist, support or further the goal of conservation*.<sup>568</sup>

5.105. As we have explained above, for a measure to relate to conservation in the sense of Article XX(g), there must be "a close and genuine relationship of ends and means".<sup>569</sup> China accepts that this is the nexus required to satisfy the "relating to" test of Article XX(g). However, according to China, the Panel's statements quoted above illustrate the Panel's view that, as a general rule, in order to ascertain whether there is a close and genuine relationship of ends and means between a measure and its objective, it is appropriate for a panel "to consider *solely* the 'general structure and design' of the measure at issue".<sup>570</sup> China also contends that the Panel considered that it was legally compelled to disregard evidence regarding the effects of China's export quotas, as well as the operation of the other elements of China's conservation scheme in the marketplace. Thus, according to China, although the Panel correctly recognized that a measure cannot be considered in isolation and without regard to its wider regulatory context, the Panel did just that by asserting that it was legally bound to examine only the text, structure, and design of the measure, and not how the measure actually works in the context of China's comprehensive conservation policy. According to China, this constitutes legal error. For China, where evidence sheds light on how a measure actually operates, a proper analysis under Article XX(g) of the GATT 1994 cannot end with "abstract conclusions" about the design and structure of the measure.<sup>571</sup> Unless a responding Member succeeds in showing that its measure relates to conservation, based on its design and structure, or there is no evidence regarding the operation of a regulatory scheme, a panel should also have regard to how the regulatory scheme of trade and domestic measures operates in the market as a means to the realization of conservation ends. In its arguments supporting this allegation of Panel error, China adds that an analysis of the

<sup>567</sup> Panel Reports, para. 7.290 (referring to Panel Reports, *China – Raw Materials*, para. 7.418). (fn omitted; emphasis added)

<sup>568</sup> Panel Reports, para. 7.379 (referring to Appellate Body Report, *US – Shrimp*, para. 141). (fn omitted; emphasis added)

<sup>569</sup> Appellate Body Reports, *US – Shrimp*, para. 136; *China – Raw Materials*, para. 355.

<sup>570</sup> China's appellant's submission, para. 155; other appellant's submission, para. 86 (referring to Panel Reports, para. 7.290). (emphasis added by China) In response to questioning at the oral hearing, China identified paragraph 7.379 of the Panel Reports as containing the statement that Article XX(g) does not *require* an evaluation of actual effects. China did not identify any specific statement by the Panel reflecting that the Panel considered itself *precluded* from examining such effects.

<sup>571</sup> China's appellant's submission, para. 166; other appellant's submission, para. 97 (referring to Panel Reports, para. 7.446).

"contribution" of a measure to the conservation of exhaustible natural resources may also be used as a method of assessing whether there is a close and genuine relationship of ends and means between the measure at issue and the conservation objective.

5.106. The complainants assert that China's claim that the Panel erred in its interpretation of the term "relating to" is based on a misreading of the Panel's analysis.<sup>572</sup> The complainants agree that a panel is not precluded from examining the effects of a measure in an analysis under Article XX(g). However, once a panel is satisfied that, due to a fundamental deficiency in the design and structure of the measure, no genuine link between the measure and the conservation objective can be established, other factors, such as the effects of the measure, are no longer relevant. The complainants emphasize that Article XX(g) does not establish an "effects" test. A panel's task under Article XX(g) is to determine whether a measure has as its genuine objective the goal of conservation. According to the United States, to make actual effects in the marketplace a touchstone for making this determination would render the task meaningless. The "vagaries of the market place" would mean that measures that might at one point in time appear, based on empirical effects, to "relate to" conservation might, at a different point in time, with different data, appear not to "relate to" conservation, and would also raise difficult questions of causation.<sup>573</sup> The complainants also disagree with China's assertion that, to satisfy the "relating to" requirement of Article XX(g), "it is enough to show that a measure is apt to produce a contribution to the achievement of its objective".<sup>574</sup> The complainants consider it inappropriate to mix the concepts of "relating to" and "contribution", and thus the proper interpretation of Article XX(g) with that of Article XX(a), (b), and (d) of the GATT 1994, because such mixing would result in an approach that ignores important distinctions between the various subparagraphs of Article XX.<sup>575</sup>

5.107. In our view, two issues arise from China's claim of error: (i) whether the Panel made the findings attributed to it by China, i.e. that the assessment of whether a measure "relates to" conservation must be limited to an examination of the design and structure of the measure at issue; and (ii) whether it was proper for the Panel to place an analytical emphasis on the design and structure of the measures at issue. We address each of these issues in turn.

5.108. Concerning the first issue, we observe that China is correct that the Panel indicated that an assessment of whether a measure "relates to" conservation must focus on the design and structure of that measure.<sup>576</sup> The Panel additionally focused on the text of the challenged measure.<sup>577</sup> However, the Panel did not state, as China contends<sup>578</sup>, that the assessment of whether a measure "relates to" conservation must be limited to an examination of the design and structure of the measure at issue. Nor do we read the Panel's reasoning as suggesting that it considered itself legally compelled to disregard evidence of the effects of China's export quotas, as well as of the operation of the other elements of China's conservation scheme in the marketplace. Instead, in its interpretation of the term "relating to", the Panel emphasized the need to make the determination of whether a GATT-inconsistent measure "relates to" conservation on a case-by-case basis. For example, the Panel remarked that the "relating to" criterion must be considered by looking at the challenged measures "in their policy and regulatory context, and not only in isolation".<sup>579</sup> The Panel added that the question of whether a given export quota relates to the conservation of an exhaustible natural resource could only be answered on a case-by-case basis, "by careful scrutiny of the factual and legal context in a given dispute".<sup>580</sup> The Panel also expressed the view that "a measure's compliance with Article XX(g) can be determined only on the basis of a holistic assessment of whether the challenged measure relates to the conservation of

<sup>572</sup> European Union's appellee's submission, paras. 17 and 140; Japan's appellee's submission, paras. 26 and 40; United States' appellee's submission, para. 102.

<sup>573</sup> United States' appellee's submission, para. 97.

<sup>574</sup> China's appellant's submission, para. 152; other appellant's submission, para. 83.

<sup>575</sup> European Union's appellee's submission, paras. 164-167; Japan's appellee's submission, paras. 32-36; United States' appellee's submission, para. 88.

<sup>576</sup> Panel Reports, paras. 7.290 and 7.379.

<sup>577</sup> Panel Reports, para. 7.290.

<sup>578</sup> China's appellant's submission, para. 155; other appellant's submission, para. 86.

<sup>579</sup> Panel Reports, para. 7.289.

<sup>580</sup> Panel Reports, para. 7.292 (referring to Appellate Body Report, *US – Gasoline*, pp. 16-17, DSR 1996:I, p. 17).

rare earths and is made effective in conjunction with restrictions on domestic production or consumption".<sup>581</sup>

5.109. Hence, based on our reading of the Panel Reports, we consider it inaccurate to characterize the Panel's reasoning as suggesting that it was required to limit its analysis to an examination of the general design and structure of the measures at issue. We also do not read the Panel's reasoning as suggesting that it considered itself precluded from considering any evidence of the effects of the export quotas or other elements of China's conservation scheme in the marketplace.

5.110. This brings us to the second issue – whether the Panel's focus on the design and structure of the measure was proper and, particularly, whether the Panel was correct in stating that "the analysis under subparagraph (g) does not require an evaluation of the actual effects of the concerned measures."<sup>582</sup>

5.111. As we have explained above, the text of Article XX(g) does not prescribe a specific analytical framework for assessing whether a measure satisfies the component requirements of that provision. Nonetheless, we recall that the Appellate Body has consistently emphasized the primacy of the design and structure of the measure at issue in the assessment of whether that measure is related to the conservation of exhaustible natural resources.<sup>583</sup> In *US – Shrimp*, the Appellate Body explained that it had to examine the relationship "between the general structure and design of the measure here at stake ... and the policy goal it purports to serve".<sup>584</sup> The Appellate Body has relied on its assessment of the design and structure to determine that "[t]he means and ends relationship between [the challenged measure] and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one".<sup>585</sup> Similarly, in *US – Gasoline*, the Appellate Body examined the design of the challenged measure.<sup>586</sup> Moreover, the Appellate Body has also clarified that the legal characterization of a measure cannot be contingent upon the occurrence of subsequent events.<sup>587</sup>

5.112. As we have stated above, by focusing on the design and structure of the measure, particularly where a measure is challenged "as such", a panel or the Appellate Body has the benefit of an objective methodology for assessing whether a measure satisfies the requirements of Article XX(g), thus diminishing the uncertainty that would arise in basing such assessment on actual effects or the occurrence of subsequent events. Furthermore, as explained above, Article XX(g) does not prescribe an empirical effects test<sup>588</sup>, in particular, given the well-known problems associated with determining causation.<sup>589</sup> In any event, where the design and structure of a challenged measure clearly illustrate the absence of a nexus between that measure and the conservation objective, it would be difficult to attribute the evidence of positive effects on conservation to that measure. As the Appellate Body has remarked, a challenged measure that is merely incidentally or inadvertently aimed at a conservation objective would not satisfy the "relating to" requirement of Article XX(g) of the GATT 1994.<sup>590</sup>

5.113. Nevertheless, consideration of the predictable effects of a measure, being those effects inherent in, and discernible from, the design and structure of a measure, may be relevant for the analysis under Article XX(g). Moreover, while panels are not required to examine empirical or actual effects in their assessment of whether a measure "relates to" conservation within the meaning of Article XX(g), panels are not precluded from doing so. For example, when causation can be shown, actual effects may be used to confirm the predictable effects of a challenged measure. Simply put, the question of whether a measure "relates to" conservation must be

<sup>581</sup> Panel Reports, para. 7.363. See also *ibid.*, para. 7.240.

<sup>582</sup> Panel Reports, para. 7.379.

<sup>583</sup> Appellate Body Reports, *US – Shrimp*, paras. 135-137; *China – Raw Materials*, para. 355 (referring to Appellate Body Report, *US – Shrimp*, para. 136).

<sup>584</sup> Appellate Body Report, *US – Shrimp*, para. 137.

<sup>585</sup> Appellate Body Report, *US – Shrimp*, para. 141.

<sup>586</sup> Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, p. 17.

<sup>587</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 20.

<sup>588</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, p. 20.

<sup>589</sup> United States' appellee's submission, para. 97. As the United States explains, the "vagaries of the market place" would mean that measures that might at one point in time appear, based on empirical effects, to "relate to" conservation might, at a different point in time, with different data, appear not to "relate to" conservation.

<sup>590</sup> Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, p. 18.

answered on a case-by-case basis, through careful scrutiny of the factual and legal context in a given dispute. Due regard must also be paid to the words used by the WTO Members themselves to express their intent and purpose.<sup>591</sup>

5.114. Based on the foregoing, we find that the Panel did not err by considering that it should focus on the design and structure of the measures at issue in its assessment of whether those measures relate to the conservation of exhaustible natural resources within the meaning of Article XX(g) of the GATT 1994. Nor do we consider that the Panel erred in stating that "the analysis under subparagraph (g) does not *require* an evaluation of the actual effects of the concerned measures."<sup>592</sup> However, we also wish to clarify that panels are not precluded from considering evidence relating to the actual operation or the impact of the measure at issue in an assessment under subparagraph (g).

5.115. Before concluding this part of our analysis, we recall that China also expresses the view that a measure relates to conservation whenever the measure "contributes" to the realization of a Member's conservation goals. China further suggests that a measure's contribution to such goals might be demonstrated through a showing of that measure's aptness to contribute to conservation, since the results of regulatory actions aimed at conservation may not be immediately observable.<sup>593</sup> China avers that, owing to the similarities between the language that the Appellate Body has used in discussing the "contribution" element of the "necessity" test in Article XX(b), on the one hand, and that used in the context of the "relating to" test in Article XX(g) of the GATT 1994, on the other hand, the concepts of "relating to" and "contribution" are closely linked.<sup>594</sup>

5.116. Article XX(b) of the GATT 1994 is concerned with measures that are "necessary" to protect human, animal, or plant life or health, whereas Article XX(g) of the GATT 1994 is concerned with measures "relating to" the conservation of exhaustible natural resources. In the light of the different connecting words used, we consider that a mixing of the different tests under Article XX(b) and Article XX(g), absent of context, would result in an approach that ignores the important distinctions between the various subparagraphs of Article XX.<sup>595</sup> Furthermore, we note that "contribution" is only one aspect of the "weighing and balancing" analysis called for in an assessment of "necessity" under Article XX(b).<sup>596</sup> Hence, even if one were to contemplate applying the analytical framework for the "necessity" test to determine whether a measure "relates to" conservation, China has not persuaded us that a piece-meal application of a single element of the "necessity" test, absent of context, suffices.

5.117. We stress that our statements above are not intended to suggest that an examination of the "contribution" that a challenged measure makes to a conservation objective could never be useful in assessing whether a "close and genuine relationship of ends and means" exists between that measure and the conservation objective for the purposes of Article XX(g). Nevertheless, in our view, using a "contribution" test for the "relating to" analysis, is not, by itself, an appropriate

<sup>591</sup> Appellate Body Report, *US – Gasoline*, p. 18, DSR 1996:I, p. 17.

<sup>592</sup> Panel Reports, para. 7.379. (emphasis added)

<sup>593</sup> China's appellant's submission, paras. 15 and 150-152; other appellant's submission, paras. 15 and 81-83.

<sup>594</sup> China's appellant's submission, para. 147; other appellant's submission, para. 78 (referring to Appellate Body Reports, *China – Raw Materials*, para. 355; and *Brazil – Retreaded Tyres*, paras. 145 and 210). We note that these arguments by China, while falling under its general claim that the Panel erred in its interpretation of "relating to", do not seem to challenge or take issue with any specific Panel finding or statement in the Panel Reports. Moreover, according to Japan, China's arguments on "contribution" were introduced for the first time at the appellate review stage. (Japan's appellee's submission, paras. 31 and 32)

<sup>595</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 161 and fn 104 thereto (referring to Appellate Body Reports, *US – Gasoline*, p. 19, DSR 1996:I, p. 18; and *US – Shrimp*, para. 141). See also United States' appellee's submission, para. 91. We also note that the Panel made a similar observation in reaction to arguments made by the complainants to the effect that the availability of alternative measures for conserving rare earths "demonstrates that China's export quotas on downstream products ... are not 'related to' ... conservation". (See Panel Reports, para. 7.417) This, in our view, is yet another illustration that there are key distinctions in the various subparagraphs of Article XX of the GATT 1994 that render inappropriate the mixing of their respective analyses.

<sup>596</sup> See Appellate Body Reports, *EC – Seal Products*, para. 5.169 (referring to Appellate Body Reports, *Korea – Various Measures on Beef*, para. 164; *US – Gambling*, paras. 306 and 307; and *Brazil – Retreaded Tyres*, para. 182).

substitute for a holistic assessment of whether a measure has a close, genuine, and substantial relationship to conservation for the purposes of Article XX(g).

5.118. For the reasons set out above, we reach the following conclusions regarding the Panel's interpretation of the term "relating to" in Article XX(g) of the GATT 1994. We find it inaccurate to characterize the Panel's reasoning as suggesting that it considered itself required to limit its analysis to an examination of the general design and structure of the measures at issue. Nor do we read the Panel's reasoning as suggesting that the Panel considered itself precluded from examining evidence of the effects of China's export quotas as well as of the operation of the other elements of China's conservation scheme in the marketplace. Accordingly, we find that the Panel did not err by considering that it should focus on the design and structure of the export quotas in its assessment of whether those measures relate to the conservation of exhaustible natural resources within the meaning of Article XX(g) of the GATT 1994. In addition, we find that the Panel did not err in stating that "the analysis under subparagraph (g) does not require an evaluation of the actual effects of the concerned measures."<sup>597</sup>

#### **5.2.6 China's claims that the Panel erred in its interpretation of the phrase "made effective in conjunction with" restrictions on domestic production or consumption**

5.119. China alleges that the Panel erred in its interpretation of the second clause of Article XX(g) of the GATT 1994 for two reasons. First, China alleges that the Panel erred in finding an "additional" requirement of "even-handedness", and requiring that the burden of conservation-related measures be distributed in a balanced way between domestic and foreign consumers or producers.<sup>598</sup> Second, China asserts that the Panel erred in limiting its analysis to an examination of the general design and structure of China's export quotas, to the exclusion of evidence regarding the effects of such quotas in the marketplace.<sup>599</sup>

5.120. In support of its first allegation of error, China contends that, in interpreting the clause "made effective in conjunction with restrictions on domestic production or consumption" in subparagraph (g), the Panel identified three separate requirements that a respondent must demonstrate: (i) that the inconsistent border restriction "relates to the conservation of exhaustible natural resources"; (ii) that the inconsistent border restriction is "made effective in conjunction with restrictions on domestic production or consumption"; and (iii) that there is "even-handedness", that is, proof that the burden of conservation is evenly distributed. For China, the Panel's approach is erroneous because there is no such third requirement. "Even-handedness" is a relevant part of an Article XX(g) defence, but not in the way that the Panel defined it. For China, "even-handedness" is simply a shorthand way of referring to the fact that the restrictions on imports or exports must work "in conjunction with" domestic restrictions. In China's view, there is no additional requirement to show that the respective burdens imposed on foreign consumption, on the one hand, and domestic production or consumption, on the other hand, are equivalent or balanced.

5.121. The complainants consider the Panel's approach to be correct and consistent with previous jurisprudence on Article XX(g). The United States contends that subparagraph (g) requires broad structural correspondence between the non-conforming measure and the domestic restriction to determine if the former operated "in conjunction with" the latter.<sup>600</sup> Japan argues that the burden of conservation must be distributed in a balanced manner between foreign and domestic consumers, and that it would be difficult to see how a trade measure can work together with restrictions on domestic production or consumption if this balance is missing.<sup>601</sup> The European Union submits that, where measures pursuing conservation objectives differ for goods intended for export and goods intended for domestic consumption, any substantial structural incoherence between the ways in which each set of restrictions tries to achieve the conservation goal raises doubts as to whether the measures are genuine conservation measures, and that,

<sup>597</sup> Panel Reports, para. 7.379.

<sup>598</sup> China's appellant's submission, paras. 217-245; other appellant's submission, paras. 148-176.

<sup>599</sup> China's appellant's submission, paras. 246-265; other appellant's submission, paras. 177-196.

<sup>600</sup> United States' appellee's submission, paras. 150-160.

<sup>601</sup> Japan's appellee's submission, paras. 101-108.

therefore, the issue of balance or coherence between the two sets of restrictions is a critical part of the assessment to be made under subparagraph (g).<sup>602</sup>

5.122. In our view, China's appeal requires us to consider three distinct questions. First, the question of whether the Panel erred in considering the "even-handedness" requirement to be a separate requirement that had to be fulfilled in addition to the conditions expressly set out in Article XX(g). Second, the substantive question of whether the Panel correctly understood the nature of the balance that Article XX(g) requires. Third, whether the Panel erred in finding that it must limit its analysis under the second clause of Article XX(g) to an examination of the general design and structure of China's export quotas, to the exclusion of evidence regarding the effects of these quotas in the marketplace.

5.123. We begin with the first question, that is, whether the Panel considered the "even-handedness requirement" to be a separate requirement that must be fulfilled in addition to the conditions expressly set out in Article XX(g). We recall that "even-handedness", in the context of Article XX(g), was first referred to by the Appellate Body in *US – Gasoline*. At the end of its interpretation of Article XX(g), the Appellate Body concluded by stating:

[T]he clause "if such measures are made effective in conjunction with restrictions on domestic product or consumption" is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.<sup>603</sup>

5.124. The term "even-handedness" was used in *US – Gasoline* as a synonym or shorthand reference for the requirement in Article XX(g) that restrictions be imposed not only on international trade but also on domestic consumption or production. As we see it, "even-handedness" is not a separate requirement to be fulfilled in addition to the conditions expressly set out in subparagraph (g). Rather, and in keeping with the Appellate Body report in *US – Gasoline*, the terms of Article XX(g) themselves embody a requirement of even-handedness in the imposition of restrictions.

5.125. We note that the Panel explained its understanding of the "even-handedness" requirement in the context of its interpretation of Article XX(g). That section of the Panel Reports contains three subsections: first, a subsection entitled "Meaning of 'relating to the conservation of exhaustible natural resources'"; second, a subsection entitled "Meaning of 'made effective in conjunction with restrictions on domestic production or consumption'"; and, third, a subsection entitled "The 'even-handedness' requirement". Further, we note the Panel's statement that "the even-handedness requirement is to be read together with the requirement that the challenged border restriction be made effective in conjunction with domestic restrictions."<sup>604</sup> These aspects of the Panel's analysis seem to suggest that the Panel regarded the "even-handedness" requirement as a separate and additional requirement to be fulfilled for a defence under subparagraph (g) to succeed. In contrast, the Panel also stated that it understood the "'even-handedness' test to be a synonym for the second part of subparagraph (g)".<sup>605</sup> This statement seems to indicate that the Panel understood the second clause of Article XX(g), itself, to be the "even-handedness" requirement.

5.126. It is therefore not clear from the structure of the Panel Reports and the Panel statements identified above whether the Panel considered the "even-handedness" requirement to be a separate requirement that had to be fulfilled in addition to the conditions expressly set out in subparagraph (g) as China alleges, or whether it considered the second clause of subparagraph (g), itself, to be the "even-handedness" requirement. The Panel's reasoning seems inconsistent in this regard.

5.127. In any event, we emphasize that we do not see the notion of "even-handedness" as imposing a separate requirement that must be fulfilled in addition to the condition that a measure

<sup>602</sup> European Union's appellee's submission, paras. 256-269.

<sup>603</sup> Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, p. 19. (emphasis original)

<sup>604</sup> Panel Reports, para. 7.333. (fn omitted)

<sup>605</sup> Panel Reports, para. 7.331.

be "made effective in conjunction with restrictions on domestic production or consumption". Rather, and in keeping with the Appellate Body report in *US – Gasoline*, the terms of Article XX(g) themselves reflect the notion of even-handedness in the imposition of restrictions. Accordingly, we find that the Panel erred to the extent that it found that "even-handedness" is a separate requirement that must be fulfilled in addition to the condition that a measure be "made effective in conjunction with restrictions on domestic production or consumption".

5.128. Turning to the second question, we consider whether the Panel correctly understood the balance that Article XX(g) requires, and in particular whether such balance requires a Member seeking to justify its GATT-inconsistent measure under Article XX(g) to demonstrate that the burden of conservation is evenly distributed. China alleges that the Panel erred in so finding. China emphasizes that, in discussing the balance required under Article XX(g), the Appellate Body has consistently found that there must be a measure that works together with the impugned measure towards conservation, but has not required, in addition, a balancing of the relative burdens imposed through the foreign and domestic restrictions.<sup>606</sup>

5.129. We begin by noting that, in its analysis of the phrase "made effective in conjunction with", the Panel used a number of different expressions to describe the way in which the GATT-inconsistent measure and the domestic restriction must work together in order to meet the conditions laid down in the second clause of Article XX(g). However, the Panel did not define these various different expressions and it is not clear from the Panel's analysis whether or how the various concepts listed differ, or whether the Panel envisaged that the conditions of the various concepts must be met alternatively or cumulatively. For instance, the Panel stated that the phrase "made effective in conjunction with" requires "cooperation between the two measures", and it found that restrictions on international trade and domestic restrictions must "somehow help or reinforce one another", or "cooperate with" each other.<sup>607</sup> The Panel also found that "working together" requires some "positive interaction, mutual reinforcement, complementarity, and coherent cooperation".<sup>608</sup> These statements appear to be in keeping with the Appellate Body's interpretation of Article XX(g) in previous disputes. In any event, China has not appealed this part of the Panel's analysis.

5.130. Subsequently, in its analysis of the "even-handedness" requirement, the Panel stated that China needed to demonstrate that the export quota was "somehow balanced" with one or more measures imposing restrictions on domestic users.<sup>609</sup> The Panel considered that this required an investigation into the "regulatory" or "structural" balance.<sup>610</sup> The Panel added that subparagraph (g) also requires a Member seeking to justify its measures to:

... show that, in addition to its GATT-inconsistent measures, it has also imposed real conservation restrictions on the domestic production or consumption of the resource subject to its GATT-inconsistent measures. These domestic measures must distribute the burden of conservation between foreign and domestic consumers in an even-handed or balanced manner.<sup>611</sup>

In addition, in its assessment of the measures at issue, the Panel found with respect to all three groups of products that, "[f]rom a structural perspective, China's [extraction and] production restrictions ... do not counterbalance its export restrictions"<sup>612</sup>, and referred, in a general sense, to subparagraph (g) as seeking to ensure that the "burden is distributed in an even-handed manner between foreign and domestic users".<sup>613</sup> The Panel also referred to an "uneven burden ... without any equivalent, counterbalancing burden".<sup>614</sup>

5.131. The meaning of these statements of the Panel is not entirely clear, and they may be read as expressing different concepts. Accordingly, it is difficult to judge whether and to what extent these statements are consistent with the Appellate Body's interpretation of Article XX(g). If

<sup>606</sup> China's appellant's submission, para. 239; other appellant's submission, para. 170.

<sup>607</sup> Panel Reports, para. 7.301.

<sup>608</sup> Panel Reports, para. 7.302.

<sup>609</sup> Panel Reports, para. 7.331.

<sup>610</sup> Panel Reports, para. 7.332.

<sup>611</sup> Panel Reports, para. 7.337.

<sup>612</sup> Panel Reports, paras. 7.595 (rare earths); 7.808 (tungsten); and 7.934 (molybdenum).

<sup>613</sup> Panel Reports, paras. 7.600 (rare earths); 7.810 (tungsten); and 7.936 (molybdenum).

<sup>614</sup> Panel Reports, para. 7.595.



understood as meaning that, in the absence of domestic restrictions, a GATT-inconsistent measure cannot satisfy the second clause of subparagraph (g), the Panel's statement that, "[f]rom a structural perspective, China's extraction and production restrictions do not counterbalance its export restrictions" does not seem problematic. However, when read jointly with the Panel's statement that Article XX(g) seeks to ensure that the "conservation burden is distributed in an even-handed manner between foreign and domestic users", the same statement may be read to imply that the export restrictions and domestic measures must evenly distribute the burden of conservation, for instance, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand. Read in that way, the Panel's statements would raise concerns.

5.132. We recall our interpretation of the clause "made effective in conjunction with restrictions on domestic production or consumption" in Article XX(g). We consider that the phrase "made effective in conjunction with" requires that, when international trade is restricted, effective restrictions are also imposed on domestic production or consumption. Just as GATT-inconsistent measures impose limitations on international trade, domestic restrictions must impose limitations on domestic production or consumption. In other words, to comply with the "made effective" element of the second clause of Article XX(g), a Member must impose "real" restrictions on domestic production or consumption that reinforce and complement the restriction on international trade<sup>615</sup>, and particularly so in circumstances where domestic consumption accounts for a major part of the exhaustible natural resource to be conserved.

5.133. In previous appeals, in which Members sought to justify measures imposing restrictions on imported goods under Article XX(g), the Appellate Body has examined in some detail the restrictive nature of the measures imposed on domestic producers. In *US – Gasoline* and *US – Shrimp*, for example, consideration of the restrictive nature of the measures imposed on domestic producers was relevant to the Appellate Body's analysis of whether the measures affecting domestic producers were restrictions, as well as to the Appellate Body's analysis under the chapeau of Article XX. However, the Appellate Body neither assessed whether the burden of conservation was evenly distributed between foreign producers, on the one hand, and domestic producers or consumers, on the other hand, nor suggested that such an assessment was required.

5.134. In other words, the Appellate Body's reasoning does not suggest that Article XX(g) contains a requirement that the burden of conservation be evenly distributed, for instance, in the case of export quotas, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand. Having said that, we note that it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers and that could still be shown to satisfy all of the requirements of Article XX(g).

5.135. This understanding of subparagraph (g) is also confirmed by the context provided by the chapeau of Article XX.<sup>616</sup> The chapeau of Article XX requires that measures falling within the ambit of Article XX of the GATT 1994 are not applied in a manner that would constitute either a means of arbitrary and unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. In order to comply with Article XX, a measure needs to fulfil cumulatively the conditions specified both in subparagraph (g) and in the chapeau. If, however, subparagraph (g) itself required an analysis of whether the burden of conservation is evenly distributed, this could entail duplication of the analysis to be conducted under the chapeau, in particular in cases involving discriminatory measures. This would not comport with the principle of effective treaty interpretation.

5.136. Accordingly, we consider that the clause "made effective in conjunction with restrictions on domestic production or consumption" requires that, when GATT-inconsistent measures are in place, effective restrictions must also be imposed on domestic production or consumption. Just as GATT-inconsistent measures impose limitations on international trade, domestic restrictions must impose limitations on domestic production or consumption. Such restrictions must be "real" rather

<sup>615</sup> Panel Reports, paras. 7.310, 7.312, and 7.330.

<sup>616</sup> The chapeau of Article XX stipulates:

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[.]

than existing merely "on the books", particularly in circumstances where domestic consumption accounts for a major part of the exhaustible natural resources to be conserved. Moreover, such restrictions on domestic production or consumption must reinforce and complement the restriction on international trade. However, we have also clarified that Article XX(g) does not require a Member seeking to justify its measure to establish that its regulatory regime achieves an even distribution of the burden of conservation. Accordingly, we find that the Panel erred to the extent that it found that the burden of conservation must be evenly distributed, for example, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand.

5.137. Finally, we address China's allegation that the Panel erred in its interpretation in finding that it must limit its analysis under the second clause of subparagraph (g) of Article XX of the GATT 1994 to an examination of the general design and structure of China's export quotas, to the exclusion of evidence regarding the effects of such quotas in the marketplace.<sup>617</sup> China takes issue with, *inter alia*, the following statements made by the Panel:

The Panel's task under subparagraph (g) is limited to determining whether China's regulatory system balances conservation-related regulatory burdens between foreign and domestic users; the Panel is not required under subparagraph (g) to consider the actual effects which a regulatory structure has in the marketplace. Such effects are properly examined under the chapeau of Article XX.<sup>618</sup>

These domestic measures must distribute the burden of conservation between foreign and domestic consumers in an even-handed or balanced manner. However, "even-handedness" under subparagraph (g) does not require the Panel to assess the effects of the concerned restrictions. Instead, the relevant "balance" or "even-handedness" under subparagraph (g) is structural or regulatory. The balanced or even-handed nature of the domestic and foreign restrictions should be evident from the design, structure, and architecture of the challenged measure. Therefore, the Panel believes that issues relating to the effects of China's challenged export quotas on prices, as well as the question why the challenged export quotas were not filled and what effect if any an unfilled export quota has on foreign consumers, are concerned with the application and effects of the challenged export quotas, which are properly assessed under the chapeau of Article XX.<sup>619</sup>

5.138. We begin by noting the similarities between this claim of error by China and its claim that the Panel erred in its interpretation of the "relating to" requirement of Article XX(g). We recall that, in addressing China's claim regarding the interpretation of the term "relating to" above, we have found that, although the assessment under Article XX(g) of the GATT 1994 does not require an examination of the actual effects of the challenged measure, a panel is not precluded from examining evidence of such effects.<sup>620</sup> We also explained that, while the legal characterization of a measure cannot be contingent upon the occurrence of subsequent events, the predictable effects of a measure – those that are discernible from its design and structure – may still be relevant to an assessment of whether a measure satisfies the conditions prescribed in Article XX(g). These considerations apply equally to the assessment of whether the measure at issue "relates to" the conservation of exhaustible natural resources and to the assessment of whether the responding Member imposes real restrictions on domestic producers or consumers that are "made effective in conjunction with" the measure at issue.

5.139. We note that the Panel repeatedly emphasized that it had to focus its analysis on the "structure, design, and architecture" of the measure.<sup>621</sup> The Panel also emphasized that such analysis "does not entail any form of 'effects test'".<sup>622</sup> In addition, the Panel stated that it is "not required under subparagraph (g) to consider the actual effects which a regulatory structure has in

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<sup>617</sup> China's appellant's submission, paras. 247-265; other appellant's submission, paras. 177-196.

<sup>618</sup> Panel Reports, para. 7.332.

<sup>619</sup> Panel Reports, para. 7.337.

<sup>620</sup> See paragraph 5.113 of these Reports.

<sup>621</sup> Panel Reports, para. 7.332. See also *ibid.*, paras. 7.328 and 7.337.

<sup>622</sup> Panel Reports, para. 7.332. See also *ibid.*, paras. 7.328 and 7.337.

the marketplace" and that "[s]uch effects are properly examined under the chapeau of Article XX."<sup>623</sup>

5.140. Contrary to what China suggests, however, the Panel did not state that "a panel is precluded from examining the market 'effects' of domestic and export restrictions under the second clause of Article XX(g)."<sup>624</sup> We read the Panel's explanations of its approach as revealing that, while the Panel considered that evidence relating to the actual operation and impact of the measure at issue was primarily relevant to the analysis under the chapeau of Article XX, it did not consider itself precluded from considering such evidence in the context of the analysis under subparagraph (g). Moreover, we do not read the Panel's statement that effects are properly examined under the chapeau of Article XX as suggesting that effects could *only* be examined under the chapeau.<sup>625</sup> Accordingly, we find that the Panel did not err in focusing on the design and structure of the measures at issue in its analysis under subparagraph (g).

5.141. In sum, we find that the Panel erred to the extent that it found that "even-handedness" is a separate requirement that must be fulfilled in addition to the condition that a measure be "made effective in conjunction with" restrictions on domestic production or consumption, and to the extent that it found that Article XX(g) requires the burden of conservation to be evenly distributed, for instance, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand. However, other elements of the Panel's interpretation of the phrase "made effective in conjunction with" appear to be in keeping with the Appellate Body's interpretation of Article XX(g). We consider that, to the extent that the Panel erred, such error does not taint the remaining elements of the Panel's interpretation of the second clause of subparagraph (g). In any event, we note that China's appeal does not concern those other elements. Furthermore, we find that the Panel did not err in focusing on the design and structure of the measures at issue in its analysis of Article XX(g) of the GATT 1994.

## 5.2.7 Application of Article XX(g) of the GATT 1994

### 5.2.7.1 Introduction

5.142. Having addressed China's claims that the Panel erred in its interpretation of the terms "relating to" and "made effective in conjunction with" in Article XX(g) of the GATT 1994, we now direct our attention to China's claims that the Panel erred in its application of the legal standard under Article XX(g) to the facts of this case. First, we examine China's claim that the Panel erred in its application of the legal standard of "relating to" with particular respect to the "signalling function" of China's export quotas on rare earths and tungsten. Second, we address China's claim that the Panel erred in its application of the legal standard for "made effective in conjunction with" to China's export quotas on rare earths, tungsten, and molybdenum.

### 5.2.7.2 China's claim that the Panel erred in its application of the "relating to" requirement

5.143. China requests us to reverse the Panel's findings that China's export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of Article XX(g) of the GATT 1994

<sup>623</sup> Panel Reports, para. 7.332. See also *ibid.*, para. 7.337.

<sup>624</sup> China's appellant's submission, para. 322; other appellant's submission, para. 253.

<sup>625</sup> In this vein, we note that, with respect to the chapeau, the Appellate Body has held that: Although ... the focus of the inquiry is on the manner in which the measure is *applied*, the Appellate Body has noted that whether a measure is *applied* in a particular manner "can most often be discerned from the design, the architecture, and the revealing structure of a measure". It is thus relevant to consider the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

(Appellate Body Reports, *EC – Seal Products*, para. 5.302 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 29, DSR 1996:I, p. 120) (fn omitted))

by virtue of their signalling function.<sup>626</sup> In particular, China challenges the following intermediate finding by the Panel:

The Panel agrees with China that its export quota may signal to the world its limited resources and its conservation policy, but China has not been able to demonstrate how it manages to tackle the perverse signals that export quotas usually send to domestic consumers. The Panel therefore does not accept China's argument that its export quota relates to conservation by virtue of its signalling function.<sup>627</sup>

5.144. China raises two sets of issues in its claim. First, China submits that, because of the Panel's incorrect interpretation that "subparagraph (g) does not require an evaluation of the actual effects of the concerned measures"<sup>628</sup>, the Panel did not move beyond an examination of the design and structure of China's export quotas by testing to see whether: (i) the theoretical "perverse signals" were actually present in the marketplace for rare earths and tungsten; and (ii) there was in fact a risk that "perverse signals" sent by export quotas to domestic users might offset the positive effect of conservation signals to foreign users. Second, China contends that, even limiting the analysis to the elements of design and structure of the export quotas, the Panel erred because: (i) the Panel's own factual findings based on the design and structure were sufficient for it to conclude that China's export quotas relate to conservation based on the finding that the quotas can send effective conservation signals to foreign users; and (ii) even if the Panel were right that the general effect of export quotas is to send a "perverse signal" to domestic users, the Panel also found that China maintains a comprehensive conservation programme and such conservation programme is clearly capable of mitigating such perverse effects.

5.145. The complainants request us to reject China's arguments and to uphold the relevant Panel findings and conclusions. The complainants stress that the reasoning of the Panel with respect to "signalling" is only part of the Panel's analysis of the "relating to" requirement, and that China's appeal focuses on isolated fragments of the Panel's reasoning. The complainants also point out that, contrary to China's assertion, the Panel did not conclude that it was precluded from reviewing China's evidence. Moreover, the Panel did, in fact, review the evidence provided by China, but still found that China had failed to show how its export quotas, in their design and structure, relate to conservation. The complainants also contest China's assertion that the Panel found that China's export quotas on rare earths and tungsten can send effective conservation signals to foreign users.

5.146. Before turning to the two sets of issues raised by China, we consider it useful to underline once again the limited scope of China's appeal in this regard. Although China requests a reversal of the Panel's findings that China's export quotas on rare earths and tungsten do not satisfy the "relating to" requirement of Article XX(g), China's appeal takes issue with only limited aspects of the reasoning underlying these findings.<sup>629</sup> Furthermore, in response to questioning at the oral hearing, China acknowledged that even the requested reversal of the Panel's findings would, if accepted, not affect the ultimate conclusion of the Panel under Article XX(g) of the GATT 1994. According to China, its main concern in challenging these Panel findings is that they suggest that export quotas are *per se* incapable of justification under Article XX of the GATT 1994.

5.147. We start by recalling our finding, in paragraph 5.118 above, that it is inaccurate to characterize the Panel's reasoning as suggesting that the Panel considered itself required to limit its analysis to an examination of the general design and structure of the measures at issue. Nor do we read the Panel's reasoning as suggesting that the Panel considered itself legally compelled to disregard evidence of the effects of China's export quotas as well as of the operation of the other elements of China's conservation scheme in the marketplace. We have also found that the Panel did not err by considering that it should focus on the design and structure of the export quotas in an assessment of whether those measures relate to the conservation of exhaustible natural

<sup>626</sup> China's appellant's submission, paras. 30, 208, 209, 319, and 320; other appellant's submission, paras. 30, 139, 140, 250, and 251. China's request refers to paragraphs 7.444, 7.446-7.448, 7.541, 7.542, 7.604, 7.725, and 7.731 of the Panel Reports. The Panel's analysis of the "signalling function" of China's export quota on rare earths is set out at paragraphs 7.440-7.448 of its Reports. The Panel's analysis of the "signalling function" of China's export quota on tungsten is set out at paragraphs 7.721-7.731 of its Reports.

<sup>627</sup> Panel Reports, para. 7.604. This finding is specific to China's export quota on rare earths. The Panel made a similar finding in respect of China's export quota on tungsten. (Panel Reports, para. 7.725)

<sup>628</sup> China's appellant's submission, paras. 17 and 141; other appellant's submission, paras. 17 and 72 (quoting Panel Reports, para. 7.379).

<sup>629</sup> See paragraph 5.81 of these Reports.

resources within the meaning of Article XX(g) of the GATT 1994. In addition, we have found that the Panel did not err in stating that "the analysis under subparagraph (g) does not require an evaluation of the actual effects of the concerned measures".<sup>630</sup> We have clarified, however, that a panel is not precluded from examining evidence of such effects.

5.148. Bearing these findings in mind, we observe that China argued before the Panel that its export quotas on rare earths and tungsten relate to conservation because they send a conservation "signal" to foreign consumers. China explained that the export quotas contributed to the effectiveness of China's overall conservation policy by signalling to foreign users the need to explore other sources of supply, including substitutes and recycling.<sup>631</sup> The complainants, on their part, argued before the Panel that, while an export quota may send a conservation-related signal to foreign users, it simultaneously signals to domestic consumers that they should increase their consumption of the product concerned. According to the complainants, such "perverse signals" contradicted China's claim that its export quotas relate to conservation<sup>632</sup>, particularly given that most rare earths and tungsten produced in China are consumed in China.

5.149. In respect of China's export quota on rare earths, the Panel found that:

... China has not demonstrated that, in the design of its export quota and its conservation programme more generally, there is any mechanism to ensure that the export quota and the extraction and/or production caps will work together in such a way as to counteract the perverse signals sent by its export quota to domestic consumers. As such, the Panel considers that the risk of perverse signals is real, and this casts doubt on China's claim that the export quota "relates to" conservation.

The Panel takes note of China's indication that various rare earth recycling projects, efforts to modify industrial designs of downstream products so that they use less rare earths, and developments of rare earth substitutes are under way. The Panel acknowledges that these efforts may go a long way towards furthering what all involved in this dispute recognize is China's *bona fide* conservation policy. Nevertheless, our consideration of the design and architecture of China's export quota on rare earths does not convince us that the export quota is designed in such a way as to ensure that domestic demand is not stimulated by low prices. There does not appear to be any mechanism to ensure that the export quota is set at such a level that, in combination with the extraction and/or production caps, no perverse incentives will be sent to domestic consumers.<sup>633</sup>

5.150. With respect to China's export quota on tungsten, the Panel found:

The Panel has dealt with the argument that export quotas send a "signal" to foreign users above in its analysis of the export quota on rare earths, and considers that what was said there applies with equal force here. While the Panel accepts that export quotas do or at least can send conservation-related signals to foreign users, the Panel is concerned that such quotas can also send perverse signals to domestic consumers, and can even stimulate domestic demand, contrary to China's stated conservation goals. Moreover, the Panel has explained above why the imposition of an extraction and/or a production quota may not suffice to counteract or offset such perverse incentives. As was the case in the context of rare earths, the Panel is not convinced that the design and architecture of China's export quotas, even taken together with the extraction and production caps, is such as to counteract the perverse signals which are generally sent by export quotas. As such, the Panel has difficulty concluding that the export quota on tungsten, which risks encouraging or stimulating domestic demand and even leading, in the medium-long-term, to more, rather than less, illegal

<sup>630</sup> Panel Reports, para. 7.379.

<sup>631</sup> Panel Reports, paras. 7.440 and 7.721.

<sup>632</sup> Panel Reports, paras. 7.441, 7.723, and 7.724.

<sup>633</sup> Panel Reports, paras. 7.447 and 7.448 (referring to China's first written submission to the Panel, paras. 143 and 144 (fn omitted)).

extraction and production, can be said to "relate to" conservation for the purposes of Article XX(g).<sup>634</sup>

5.151. On appeal, it is China's contention that, due to the Panel's error of interpretation in holding that "subparagraph (g) does not require an evaluation of the actual effects of the concerned measures"<sup>635</sup>, the Panel failed to go beyond an examination of the design and structure of China's export quotas on rare earths and tungsten to test whether the theoretical "perverse signals" sent by the export quotas were actually present in the marketplace for those products.<sup>636</sup> For China, this error of interpretation also led the Panel to fail to engage with considerable evidence on how China's measures work as part of China's comprehensive conservation policy in the context of the reality of the Chinese and world markets for rare earths and tungsten. As part of this context, China alleges that it: (i) provided extensive evidence on the operation and the effects of domestic extraction and production caps on rare earths; (ii) demonstrated that it has in place mechanisms to enforce these caps and has taken regular enforcement actions to combat illegal mining and production; and (iii) provided evidence demonstrating the effects of these measures, including of a decline in the extraction and production of rare earths.<sup>637</sup>

5.152. Our review of the Panel's analysis reveals that the Panel indeed focused on the design and structure of the export quotas on rare earths and tungsten in arriving at its conclusion that China had not demonstrated that these export quotas do not "relate to" conservation by virtue of their "signalling" function. For the same reasons as set out above in our consideration of the Panel's alleged error of interpretation, this focus, in and of itself, does not constitute an error by the Panel in its application of the "relating to" requirement of Article XX(g). More importantly, we do not agree with China's contention that the Panel's focus on the design and structure of China's export quotas meant that it failed to engage with the evidence submitted by China. Indeed, we note that the Panel in fact considered evidence submitted by China regarding the operation of China's export quotas and its interaction with China's extraction and production quotas. We address this issue in more detail in our analysis of China's claims under Article 11 of the DSU below.

5.153. In sum, we do not agree with China's contention that the Panel applied an incorrect legal standard that limited its analysis to an examination of the design and structure of China's export quotas only, or that this prevented the Panel from engaging with evidence of the broader operation of China's conservation regime.

5.154. We turn to China's second contention that, even limiting the analysis to the elements of design and structure, the Panel erred because: (i) the Panel's own factual findings based on the design and structure of China's export quotas on rare earths and tungsten were sufficient for it to conclude that these export quotas relate to conservation based on the finding that the quotas can send effective conservation signals to foreign users; and (ii) even if the Panel were right that a general effect of export quotas is to send a "perverse signal" to domestic users, the existence of China's comprehensive conservation programme is capable of mitigating such perverse effects.

5.155. China points to paragraphs 7.443 and 7.725 of the Panel Reports in making its allegation that the Panel should have found that the design and structure of China's export quotas "relate to" conservation "based on its finding that the quotas can send effective conservation signals to foreign users".<sup>638</sup> These paragraphs read, in relevant part:

The Panel accepts China's argument that encouraging foreign users and investors to explore alternative sources of supply could relate to the goal of conserving China's exhaustible natural resources, since the development of alternative supply sources would "relieve the pressure on" China's own rare earth supplies.<sup>639</sup>

<sup>634</sup> Panel Reports, para. 7.725 (referring to Panel Reports, *China – Raw Materials*, para. 7.586).

<sup>635</sup> China's appellant's submission, paras. 17 and 141; other appellant's submission, paras. 17 and 72 (quoting Panel Reports, para. 7.379).

<sup>636</sup> China's appellant's submission, para. 143; other appellant's submission, para. 74.

<sup>637</sup> China's appellant's submission, paras. 168-171; other appellant's submission, paras. 99-102 (referring to Panel Exhibits CHN-39 and CHN-85).

<sup>638</sup> China's appellant's submission, para. 175; other appellant's submission, para. 106 (referring to Panel Reports, paras. 7.443 and 7.725).

<sup>639</sup> Panel Reports, para. 7.443. (fn omitted)

The Panel has dealt with the argument that export quotas send a "signal" to foreign users above in its analysis of the export quota on rare earths, and considers that what was said there applies with equal force here. While the Panel accepts that export quotas do or at least can send conservation-related signals to foreign users, the Panel is concerned that such quotas can also send perverse signals to domestic consumers, and can even stimulate domestic demand, contrary to China's stated conservation goals. Moreover, the Panel has explained above why the imposition of an extraction and/or a production quota may not suffice to counteract or offset such perverse incentives. ... As such, the Panel has difficulty concluding that the export quota on tungsten, ... can be said to "relate to" conservation for the purposes of Article XX(g).<sup>640</sup>

5.156. We consider China's representation of the Panel's findings to be inaccurate. The Panel did not find that export quotas can send "*effective* conservation signals to foreign users".<sup>641</sup> Rather, while the Panel acknowledged that "export quotas do or at least can send conservation-related signals to foreign users", the Panel also noted that this was undermined by the "perverse signals" that export quotas are liable to send to domestic consumers. The Panel considered that export quotas also "stimulate domestic consumption by effectively reserving a supply of low-price raw materials for use by domestic downstream industries".<sup>642</sup> The Panel further found that the export quotas "may also encourage relocation of rare earth-consuming industries to China".<sup>643</sup> China's contention that the Panel's finding that "export quotas do or at least can send conservation-related signals to foreign users" should have been sufficient for the Panel to find that China's export quotas relate to conservation fails to acknowledge important elements of the Panel's reasoning in this regard. In particular, while it is accepted that, in principle, encouraging foreign users to explore alternative sources of supply "could" relate to a conservation objective, and that export quotas "can" send such a signal, the Panel did not find that China's export quotas *do* send such signals, much less that such signals are "effective".<sup>644</sup> Furthermore, these Panel findings were coupled with its additional determination that any conservation-related signals sent by the export quotas were, in any event, undermined by the "perverse signals" that the export quotas are liable to send to domestic users.<sup>645</sup> Accordingly, we do not consider that China has demonstrated that the Panel erred in its application of the law to the facts on this point.

5.157. We turn now to China's additional argument that, even if the Panel were right that the general effect of export quotas is to send "perverse signals" to domestic users, the existence of China's comprehensive conservation programme is capable of mitigating such "perverse signals". China's position is that, even if it were relevant to consider the relationship between the "perverse signals" of the export quotas, on the one hand, and domestic conditions that might mitigate such signals to domestic users, on the other hand, the Panel should have found – purely as a matter of design and structure – that China's regime "relates to" conservation, because there are domestic production caps that could mitigate any "perverse signals". Based on this argument that production caps could, in principle, mitigate the "perverse signals" found by the Panel to exist,

<sup>640</sup> Panel Reports, para. 7.725 (referring to Panel Reports, *China – Raw Materials*, para. 7.586) (fn omitted).

<sup>641</sup> China's appellant's submission, para. 175; other appellant's submission, para. 106. (emphasis added)

<sup>642</sup> Panel Reports, para. 7.444 (referring to Panel Reports, *China – Raw Materials*, para. 7.586). (emphasis omitted)

<sup>643</sup> Panel Reports, para. 7.444.

<sup>644</sup> Panel Reports, paras. 7.443 and 7.725.

<sup>645</sup> In a similar vein, we note that, in the context of its analysis of whether China's export quota on rare earths is "made effective in conjunction with" domestic restrictions, the Panel also addressed the significantly large quantity of rare earths consumed in China's domestic market, and the doubts that this raised regarding China's conservation objective. The Panel considered that, if domestic users of a resource are exempted from the domestic restriction, it would be difficult to conclude that a GATT-inconsistent measure supposedly justified under Article XX(g) properly "relates to" conservation, since unregulated domestic exploitation could undermine such conservation – and this would be especially the case when the majority of what is to be conserved is consumed only domestically. The Panel observed that China's domestic consumers represent an important share of world consumption of rare earths. The Panel further noted that an important quantity of rare earths that was initially designated for export was redirected to the domestic market (for which it was not destined under China's original comprehensive conservation policy). To the Panel, this reinforced the fundamental fact that the vast majority of rare earths produced in China are consumed domestically, further raising doubts about the usefulness and effectiveness of export quotas. (See Panel Reports, paras. 7.328 and 7.579)



China contends that the theoretical "sum" of the design and structure of this regulatory regime is that it is one "apt" to make a positive overall contribution to the realization of China's conservation ends.<sup>646</sup>

5.158. In connection with this argument, China challenges the reasoning of the Panel as set out at paragraphs 7.446 and 7.725 of its Reports. These paragraphs read, in relevant part:

... While it may be true that extraction and/or production quotas *could*, in theory, counteract the perverse signals sent by export quotas to domestic consumers, it seems to us that whether or not a production quota coupled with an export quota cuts domestic consumption depends entirely on the level at which the production quota is set and the way in which the export and production quotas interact. According to [the expert report submitted by the complainants as Panel] Exhibit JE-183, if the production quota is very tight, it will reduce domestic consumption. At more generous levels, however, it may not reduce consumption at all, or it may reduce it while still leaving it above the level it would be in the absence of export restrictions.<sup>647</sup>

The Panel has dealt with the argument that export quotas send a "signal" to foreign users above in its analysis of the export quota on rare earths, and considers that what was said there applies with equal force here. While the Panel accepts that export quotas do or at least can send conservation-related signals to foreign users, the Panel is concerned that such quotas can also send perverse signals to domestic consumers, and can even stimulate domestic demand, contrary to China's stated conservation goals. Moreover, the Panel has explained above why the imposition of an extraction and/or a production quota may not suffice to counteract or offset such perverse incentives. As was the case in the context of rare earths, the Panel is not convinced that the design and architecture of China's export quotas, even taken together with the extraction and production caps, is such as to counteract the perverse signals which are generally sent by export quotas. As such, the Panel has difficulty concluding that the export quota on tungsten, which risks encouraging or stimulating domestic demand and even leading, in the medium-long-term, to more, rather than less, illegal extraction and production, can be said to "relate to" conservation for the purposes of Article XX(g).<sup>648</sup>

5.159. The Panel thus found that whether or not the production quotas could counteract the "perverse signals" generated by export quotas to domestic consumers depended on: (i) the level at which each production quota was set; and (ii) the way in which the export and production quotas interact. This shows that, contrary to what China suggests, the Panel considered that the mere existence of China's domestic production caps, alone, would not necessarily mitigate any "perverse signals" that flow from China's export quotas. Indeed, this uncertainty regarding the levels of the export and production quotas led the Panel to highlight its concern about the absence of "any mechanism to ensure that the export quota is set at such a level that, in combination with the extraction and/or production caps, no perverse incentives will be sent to domestic consumers".<sup>649</sup> Hence, following our review of the Panel's analysis, we are not persuaded by China's argument that the Panel should have found – purely as a matter of design and structure – that China's regime relates to conservation because there are domestic production caps that could mitigate any "perverse signals" that exist.

5.160. For all of the reasons discussed above, we do not share China's view that the Panel erred in its application of the "relating to" requirement in Article XX(g) of the GATT 1994. In particular, we do not agree with China's contention that the Panel applied an incorrect legal standard that limited its analysis to an examination of the design and structure of China's export quotas only, and that this prevented the Panel from engaging with evidence of the broader operation of China's conservation regime. We also consider that the Panel did *not*, as suggested by China, find that export quotas can send *effective* conservation signals to foreign users. Additionally, we are not persuaded by China's argument that the Panel should have found – purely as a matter of design

<sup>646</sup> China's appellant's submission, para. 179; other appellant's submission, para. 110.

<sup>647</sup> Panel Reports, para. 7.446 (referring to Panel Exhibit JE-183, p. 5). (emphasis original; fn omitted)

<sup>648</sup> Panel Reports, para. 7.725 (referring to Panel Reports, *China – Raw Materials*, para. 7.586). (fn omitted)

<sup>649</sup> Panel Reports, para. 7.448.

and structure – that China's regime relates to conservation because the existence of domestic production caps mitigate any "perverse signals" sent to domestic consumers by the export quotas.

5.161. Before concluding our analysis, we briefly address China's concern that the Panel's findings suggest that export quotas are *per se* incompatible with Article XX of the GATT 1994, and that this prevents China from having any "realistic implementation options".<sup>650</sup> We take note of the following remarks by the Panel:

[I]n principle, Article XX is available as a defence to any and every kind of GATT-inconsistent trade measure, including export quotas. The Panel's analysis in this case – or, indeed, the analyses of other panels and the Appellate Body in prior cases – should not be understood as suggesting that export quotas can never relate to conservation.<sup>651</sup>

5.162. We concur with these remarks by the Panel. Article XX(g) of the GATT 1994 does not exclude, *a priori*, export quotas or any other type of measure from being justified by a WTO Member pursuing the conservation of an exhaustible natural resource. Instead, Article XX(g) simply prescribes the multiple conditions that must all be satisfied for a WTO Member to justify its GATT-inconsistent measure.

### 5.2.7.3 China's claims that the Panel erred in its application of the "made effective in conjunction with" requirement

5.163. China requests us to reverse the Panel's findings concerning the application of the phrase "made effective in conjunction with" in subparagraph (g) of Article XX of the GATT 1994.<sup>652</sup> China alleges that the Panel erred, first, in applying an additional and separate requirement of "even-handedness", in understanding the balancing that Article XX(g) requires as meaning that the burden of conservation must be evenly distributed between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand; and, second, by focusing on the design and structure of the domestic restrictions, to the exclusion of evidence relating to their operation.<sup>653</sup>

5.164. With regard to its first allegation, China challenges the Panel's reasoning set out at paragraphs 7.594 and 7.595 of its Reports discussing "even-handedness" in the context of the export quota on rare earths; in paragraphs 7.808 and 7.809 discussing "even-handedness" in the context of the export quota on tungsten; and paragraphs 7.934 and 7.935 discussing "even-handedness" in the context of the export quota on molybdenum. For China, the Panel's application of even-handedness as requiring that the burden of conservation be evenly distributed is an error flowing directly from the Panel's flawed interpretative finding that there is such a requirement of an even distribution of the burden of conservation in subparagraph (g).

5.165. We recall our analysis of the Panel's interpretation of the clause "made effective in conjunction with restrictions on domestic production or consumption". We have concluded that Article XX(g) requires the imposition of real limitations on domestic production or consumption that operate so as to reinforce and complement the restriction imposed on international trade. Subparagraph (g) thus requires that the trade measure and the domestic restriction in their joint operation impose effective limitations, both on international trade and on domestic production or consumption. However, we have also found above that Article XX(g) contains no requirement that the burden of conservation be evenly distributed, for example, in the case of the export quotas at issue, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand, and that the Panel erred to the extent that it stated that the burden of conservation must be distributed in that manner.

5.166. Turning back to the Panel's application of the clause "made effective in conjunction with", we note that the Panel addressed the question of "even-handedness" in its separate analyses with

<sup>650</sup> China's response to questioning at the oral hearing.

<sup>651</sup> Panel Reports, para. 7.293. (fn omitted)

<sup>652</sup> China's appellant's submission, para. 322; other appellant's submission, para. 253. China refers specifically to paragraphs 7.301, 7.314-7.337, 7.568-7.599, 7.792-7.809, and 7.919-7.935 of the Panel Reports.

<sup>653</sup> China's appellant's submission, para. 267; other appellant's submission, para. 198.

regard to the export quotas on rare earths, tungsten, and molybdenum, respectively. The Panel found with respect to all three groups of products that, "[f]rom a structural perspective", China's extraction and production restrictions "do not counterbalance its export restrictions"<sup>654</sup>, and referred, in a general sense, to subparagraph (g) as seeking to ensure that the conservation burden is "distributed in an even-handed manner between foreign and domestic users".<sup>655</sup>

5.167. While the Panel made the above general statements in the course of its analysis that can be read as suggesting that subparagraph (g) requires a Member to establish an even distribution of the burden of conservation, the Panel did not in fact engage in any such assessment in applying Article XX(g). Contrary to what China alleges, the Panel did not apply a requirement that China's measures must evenly distribute the burden of conservation between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand. Rather, the Panel relied primarily on the fact that the challenged export quota had no domestic counterpart<sup>656</sup>, and therefore the Panel's specific findings in this regard were based on the *absence* of restrictions imposed on domestic producers or consumers. Moreover, with respect to each product, the Panel correctly referred to the requirement that the export quota must "work together" with domestic restrictions.<sup>657</sup>

5.168. For these reasons, the Panel's application of Article XX(g) to China's export quotas, which does not contain an inquiry into whether the relative conservation burdens imposed by China on domestic and foreign producers or consumers were evenly distributed, is consistent with our interpretation of the clause "made effective in conjunction with restrictions on domestic production or consumption" set out above. We have found that Article XX(g) requires an effective limitation on domestic production or consumption that operates together with, and so as to reinforce and complement, the restriction imposed on international trade. While subparagraph (g) requires that the trade measure and the domestic restriction in their joint operation impose limitations, not only on international trade but also on domestic production or consumption, subparagraph (g) does not require an inquiry into whether the burden of conservation is evenly distributed between foreign and domestic consumers. In the present disputes, the Panel found, without undertaking an assessment of whether the burden of conservation was evenly distributed between foreign and domestic consumers, that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with restrictions on domestic production or consumption", based primarily on the absence of specific restrictions on domestic production or consumption.<sup>658</sup>

5.169. Accordingly, we consider that, despite certain flaws in the Panel's interpretation, the Panel did not commit legal error in its application of Article XX(g) to the export quotas. We therefore do not disturb the Panel's findings concerning the application of Article XX(g) of the GATT 1994.

5.170. Finally, China alleges that the Panel erred in its application of subparagraph (g) because it failed to explain or demonstrate why evidence submitted by China relating to the export, extraction, and production quotas discounted the restrictive effect on domestic consumers of enforced extraction and production quotas. China emphasizes that its evidence demonstrated that its extraction and production quotas were enforced by a wide range of measures and maintained at levels that placed an overarching limit on total extraction and production.

5.171. We note that China makes essentially the same allegations in relation to its claim that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU. In both its appellant's and other appellant's submissions, China refers to arguments set out in relation to its claims under Article 11 for a "detailed discussion" and "more detailed arguments" in support of its claim that the Panel erred in its application of the clause "made effective in conjunction with restrictions on domestic production or consumption" in Article XX(g).<sup>659</sup> In doing so, China itself acknowledges that its claims relating to the Panel's application of Article XX(g) overlap with its claims under Article 11 of the DSU.

<sup>654</sup> Panel Reports, paras. 7.595 (rare earths); 7.808 (tungsten); and 7.934 (molybdenum).

<sup>655</sup> Panel Reports, paras. 7.600 (rare earths); 7.810 (tungsten); and 7.936 (molybdenum).

<sup>656</sup> Panel Reports, para. 7.610. See also *ibid.*, paras. 7.808 (tungsten) and 7.934 (molybdenum).

<sup>657</sup> Panel Reports, paras. 7.597 (rare earths); 7.808 (tungsten); and 7.934 (molybdenum).

<sup>658</sup> Panel Reports, paras. 7.595 (rare earths); 7.808 (tungsten); and 7.934 (molybdenum).

<sup>659</sup> China's appellant's submission, fn 232 to para. 281, and fn 239 to para. 285; other appellant's submission, fn 187 to para. 212, and fn 194 to para. 216.

5.172. Similarly, with regard to China's claims that the Panel erred in its application of the legal standard for the term "relating to", China has put forward arguments that mirror those presented in support of its claims under Article 11 of the DSU. In particular, China suggests that the Panel's findings that China's export quotas send "perverse signals" to domestic consumers are "theoretical assertions" that lack "any factual evidentiary" basis.<sup>660</sup> In the same vein, China alleges that the Panel arrived at its "'perverse effects' presumption without citing a single piece of evidence".<sup>661</sup> China considers this Panel finding "particularly troubling", given that China provided considerable evidence relevant to the question of whether there actually was a perverse effect from the export quotas.<sup>662</sup> In this regard, China alleges that it provided "extensive evidence" on the operation of the domestic extraction and production caps on rare earths, as well as evidence demonstrating the effects of these measures, including the decline of extraction and production of rare earths.<sup>663</sup> Additionally, China contends that it provided evidence indicating that the 2012 rare earth export quotas did not have any of the perverse effects alleged by the Panel because they neither decreased Chinese domestic rare earth prices nor encouraged relocation of rare earth-consuming industry to China.<sup>664</sup> These arguments and evidence are identical to those that China has put forward in support of its claim that, by failing to consider such evidence, the Panel acted inconsistently with Article 11 of the DSU. Indeed, we note that the footnotes to China's arguments relating to the Panel's application findings reference the corresponding arguments relating to China's claims under Article 11 of the DSU, and vice versa.<sup>665</sup>

5.173. Distinguishing a claim that a panel erred in applying a legal provision to the facts of the case from a claim that a panel failed to make an objective assessment of the matter as required by Article 11 of the DSU may, at times, prove a difficult task. However, as the Appellate Body has previously stated, "[i]n most cases ... an issue will *either* be one of application of the law to the facts *or* an issue of the objective assessment of facts, and not both."<sup>666</sup> Allegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU. By contrast, the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision involves a legal characterization and is therefore a legal question.<sup>667</sup> Importantly, a claim that a panel failed to comply with its duties under Article 11 of the DSU "must stand by itself" and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements.<sup>668</sup> In our view, the opposite is also true.

5.174. We note that, when the Appellate Body was faced with similarly overlapping claims of error in the application of a legal provision to the facts and under Article 11 of the DSU in *China – GOES*, it determined that, as the claims related to the panel's application of the legal standard, there was no basis to have an additional examination of whether the panel had conducted an objective assessment of the facts under Article 11 of the DSU.<sup>669</sup> More recently, the Appellate Body in *EC – Seal Products* noted that, where claims relate to a panel's weighing and appreciation of the evidence, they are primarily factual in nature, and such claims are properly addressed under Article 11 of the DSU as challenges to the objectivity of the panel's assessment of the facts.<sup>670</sup>

5.175. Based on the language used by China in substantiating its claims that the Panel erred in its application of subparagraph (g) of Article XX, we consider that these allegations implicate the Panel's assessment of the facts and evidence and thus should properly be considered under Article 11 of the DSU. For example, we note that China asserts a "lack of any *factual* evidentiary

<sup>660</sup> China's appellant's submission, para. 168; other appellant's submission, para. 99. (emphasis omitted)

<sup>661</sup> China's appellant's submission, para. 183; other appellant's submission, para. 114.

<sup>662</sup> China's appellant's submission, para. 168; other appellant's submission, para. 99.

<sup>663</sup> China's appellant's submission, para. 169; other appellant's submission, para. 100 (referring to China's opening statement at the second Panel meeting, paras. 24 and 39, and Figures 2, 3, and 4).

<sup>664</sup> China's appellant's submission, para. 170; other appellant's submission, para. 101.

<sup>665</sup> China's appellant's submission, fns 95, 109, 110, and 139; other appellant's submission, fns 49, 63, 64, and 93.

<sup>666</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872. (emphasis original)

<sup>667</sup> Appellate Body Report, *China – GOES*, para. 183. (fns omitted)

<sup>668</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>669</sup> Appellate Body Report, *China – GOES*, para. 184.

<sup>670</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.243.

findings" by the Panel<sup>671</sup>, and that the Panel "failed to explain"<sup>672</sup>, "failed to address evidence"<sup>673</sup>, "failed to grapple with arguments"<sup>674</sup>, "did not address or grapple with arguments and evidence"<sup>675</sup>, and that "did not discuss or engage with evidence".<sup>676</sup> All of these statements suggest that the alleged errors concern the Panel's assessment of the facts and evidence rather than the characterization of the consistency or inconsistency of the measures at issue with the requirements of Article XX(g). We therefore address China's allegations in this respect under Article 11 of the DSU in the context of the claims raised by China under that provision.

## 5.2.8 China's claims under Article 11 of the DSU

5.176. China requests us to find that the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU. China alleges multiple failures by the Panel to comply with its duties under Article 11 of the DSU. Due to these alleged failures, China requests us to reverse the Panel's findings that the rare earth and tungsten export quotas send "perverse signals" to domestic consumers and, consequently, do not "relate to" conservation within the meaning of Article XX(g) of the GATT 1994.<sup>677</sup> China further requests that we reverse the Panel's findings that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with" domestic restrictions.<sup>678</sup>

5.177. Article 11 of the DSU provides, in relevant part:

### *Function of Panels*

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

5.178. We begin by recalling the standard articulated by the Appellate Body for establishing a violation of Article 11 of the DSU. In accordance with Article 11, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".<sup>679</sup> Panels may not "make affirmative findings that lack a basis in the evidence contained in the panel record".<sup>680</sup> Within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings"<sup>681</sup>, and the mere fact that a panel did not explicitly refer to each and every piece of

<sup>671</sup> China's appellant's submission, para. 168; other appellant's submission, para. 99. (emphasis original)

<sup>672</sup> China's appellant's submission, para. 281; other appellant's submission, para. 212.

<sup>673</sup> China's appellant's submission, para. 282; other appellant's submission, para. 213.

<sup>674</sup> China's appellant's submission, para. 283; other appellant's submission, para. 214. See also China's appellant's submission, para. 172; and other appellant's submission, para. 103.

<sup>675</sup> China's appellant's submission, para. 284; other appellant's submission, para. 215.

<sup>676</sup> China's appellant's submission, para. 286; other appellant's submission, para. 217.

<sup>677</sup> Panel Reports, paras. 7.444, 7.446-7.448, 7.541, 7.542, 7.604, 7.725, and 7.731.

<sup>678</sup> Panel Reports, paras. 7.568-7.599, 7.792-7.809, and 7.919-7.935.

<sup>679</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185 (referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133). See also Appellate Body Reports, *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141 and 142; *Korea – Alcoholic Beverages*, paras. 161 and 162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; and *EC – Selected Customs Matters*, para. 258.

<sup>680</sup> Appellate Body Report, *US – Carbon Steel*, para. 142 (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 161 and 162).

<sup>681</sup> Appellate Body Report, *EC – Hormones*, para. 135. The Appellate Body has also stated that a panel "must base its findings on a sufficient *evidentiary* basis on the record" (Appellate Body Report, *EC – Fasteners (China)*, para. 441 (emphasis added; fn omitted)); "may not ... appl[y] a double standard of proof" (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 293 (fn omitted)); and its treatment of the evidence must not lack "even-handedness" (*ibid.*, para. 292).

evidence in its reasoning is insufficient to establish a claim of violation under Article 11.<sup>682</sup> Rather, an appellant must explain why such evidence is so material to its case that the panel's failure to explicitly address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment.<sup>683</sup> The Appellate Body has also considered it unacceptable for an appellant to simply recast factual arguments that it made before the panel in the guise of an Article 11 claim.<sup>684</sup> Instead, an appellant must identify specific errors regarding the objectivity of the panel's assessment<sup>685</sup>, and "it is incumbent on a participant raising a claim under Article 11 on appeal to explain *why* the alleged error *meets* the standard of review under that provision".<sup>686</sup>

5.179. The Appellate Body has also held that it will not "interfere lightly" with a panel's fact-finding authority.<sup>687</sup> Rather, for a claim under Article 11 to succeed, the Appellate Body "must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts".<sup>688</sup> In other words, "not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU"<sup>689</sup>, but only those that are so material that, "taken together or singly"<sup>690</sup>, they undermine the objectivity of the panel's assessment of the matter before it.

5.180. Before turning to China's claims under Article 11 of the DSU, we reiterate that China, in elaborating its claims that the Panel erred in its application of Article XX(g) of the GATT 1994, made arguments identical to those in its claims under Article 11 of the DSU, and utilized the following phrases: "lack of any *factual* evidentiary findings"<sup>691</sup>, "failed to explain"<sup>692</sup>, "failed to address evidence"<sup>693</sup>, "failed to grapple with arguments"<sup>694</sup>, "did not address or grapple with arguments and evidence"<sup>695</sup>, and "did not discuss or engage with evidence".<sup>696</sup> As we stated in paragraph 5.175 above, we consider that these types of arguments by China implicate the Panel's assessment of the facts and evidence, rather than its characterization of the consistency or inconsistency of the export quotas with the requirements of Article XX(g). We therefore address China's allegations in this respect as part of its claims under Article 11 of the DSU, bearing in mind, however, that a claim that a panel failed to comply with its duties under Article 11 of the DSU "must stand by itself".<sup>697</sup>

#### 5.2.8.1 Claims that the Panel failed to comply with Article 11 of the DSU in its analysis of whether China's export quotas "relate to" conservation

5.181. China submits that the Panel acted inconsistently with Article 11 of the DSU in two main ways. First, China contends that the Panel's findings lacked a sufficient evidentiary basis and that the Panel failed to "reconcile its findings" with contrary evidence.<sup>698</sup> Second, China argues that the Panel's reasoning was incoherent insofar as the Panel considered that the relevant question was

<sup>682</sup> Appellate Body Reports, *EC – Fasteners (China)*, paras. 441 and 442; *Brazil – Retreaded Tyres*, para. 202.

<sup>683</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>684</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>685</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>686</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442. (emphasis original)

<sup>687</sup> Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *US – Carbon Steel*, para. 142; Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>688</sup> Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>689</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>690</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1318. See also Appellate Body Report, *EC – Fasteners (China)*, para. 499.

<sup>691</sup> China's appellant's submission, para. 168; other appellant's submission, para. 99. (emphasis original)

<sup>692</sup> China's appellant's submission, paras. 164, 281, and 282; other appellant's submission, paras. 95, 212, and 213.

<sup>693</sup> China's appellant's submission, paras. 164 and 282; other appellant's submission, paras. 95 and 213.

<sup>694</sup> China's appellant's submission, para. 283; other appellant's submission, para. 214. See also China's appellant's submission, para. 172; and other appellant's submission, para. 103.

<sup>695</sup> China's appellant's submission, para. 284; other appellant's submission, para. 215.

<sup>696</sup> China's appellant's submission, para. 286; other appellant's submission, para. 217.

<sup>697</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>698</sup> China's appellant's submission, paras. 201 and 203; other appellant's submission, paras. 132 and 134.

whether the "perverse signals" sent by China's export quotas were offset by domestic restrictions, but then declined to examine evidence relevant to precisely that issue. For these reasons, China requests us to reverse the Panel's findings that China's export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of Article XX(g) of the GATT 1994 by virtue of their signalling function.<sup>699</sup>

5.182. The complainants request us to reject China's claims. The complainants assert that the record of these disputes shows that there is no basis for China's claims that the Panel acted inconsistently with Article 11 of the DSU. To the contrary, the Panel Reports illustrate that the Panel undertook a thorough legal and factual analysis of the "relating to" test of Article XX(g), in compliance with its duties under Article 11 of the DSU.

5.183. We discuss China's two sets of arguments in turn.

#### **5.2.8.1.1 Allegations that the Panel's findings were based on a presumption and that the Panel failed to reconcile its findings with contrary evidence**

5.184. China asserts that the Panel's finding that China's export quotas on rare earths and tungsten are liable to send "perverse signals" to domestic consumers is merely a "presumption" and lacks an evidentiary basis.<sup>700</sup> In addition to this assertion, China identifies three instances in which the Panel allegedly failed to "reconcile its finding" of "perverse signals" with contrary evidence submitted by China.

5.185. The complainants disagree with China's assertions. They indicate that the Panel's "perverse signals" finding is not a mere presumption, but is rather based on evidence provided by the complainants establishing the existence of such "perverse signals" not only as a function of economic theory, but also specifically in China. The complainants point, in particular, to evidence that China expressly invited foreign users to relocate to China in order to gain access to unlimited supplies of rare earths at a cheaper price.<sup>701</sup>

5.186. In making its assertion that the Panel's finding lacks an evidentiary basis, China specifically challenges the following statements by the Panel:

Having said that, the Panel considers that export quotas are liable to send a *perverse* signal to *domestic consumers*. Whereas export quotas may reduce foreign demand for Chinese rare earths, it seems likely to the Panel that they will also *stimulate* domestic consumption by effectively reserving a supply of low-price raw materials for use by domestic downstream industries. They may also encourage relocation of rare earth-consuming industries to China.<sup>702</sup>

...

The Panel has dealt with the argument that export quotas send a "signal" to foreign users above in its analysis of the export quota on rare earths, and considers that what was said there applies with equal force here. While the Panel accepts that export quotas do or at least can send conservation-related signals to foreign users, the Panel is concerned that such quotas can also send perverse signals to domestic consumers, and can even stimulate domestic demand, contrary to China's stated conservation goals. Moreover, the Panel has explained above why the imposition of an extraction and/or a production quota may not suffice to counteract or offset such perverse incentives. As was the case in the context of rare earths, the Panel is not convinced that the design and architecture of China's export quotas, even taken together with the extraction and production caps, is such as to counteract the perverse signals which are generally sent by export quotas. As such, the Panel has difficulty concluding that the export quota on tungsten, which risks encouraging or stimulating domestic

<sup>699</sup> China's request refers to the following paragraphs of the Panel Reports, paras. 7.444, 7.446-7.448, 7.541-7.542, 7.604, 7.725, and 7.731.

<sup>700</sup> China's appellant's submission, paras. 25 and 201; other appellant's submission, paras. 25 and 132.

<sup>701</sup> Panel Exhibits CHN-157, JE-112, JE-118, JE-152, JE-183, and JE-196.

<sup>702</sup> Panel Reports, para. 7.444 (referring to Panel Reports, *China – Raw Materials*, para. 7.586). (emphasis original)



demand and even leading, in the medium-long-term, to more, rather than less, illegal extraction and production, can be said to "relate to" conservation for the purposes of Article XX(g).<sup>703</sup>

5.187. We first observe that China is correct in asserting that these paragraphs contain no express references to evidence on the Panel record. However, to properly situate these findings in their context, we look at the structure of the Panel's analysis in the section dealing with the "signalling" arguments presented by China with regard to its export quota on rare earths.

5.188. The Panel started by noting China's arguments to the effect that "the export quota system contributes to the effectiveness of [China's] overall conservation policy by signalling to foreign users of rare earths the need to explore other sources of supply, including substitutes and recycling."<sup>704</sup> The Panel then referred to the complainants' counter-arguments that, "while the export quota may send a conservation-related signal to foreign users, it simultaneously signals to domestic consumers that they should increase their rare earth consumption, contrary to China's claim that the export quota relates to conservation."<sup>705</sup> The Panel also took note of the complainants' arguments that this availability of cheaper domestic rare earths was held out to attract foreign companies to relocate to China.<sup>706</sup> In its summary of the parties' arguments, the Panel referred to evidence submitted by the parties in support of their respective arguments. This included Exhibits JE-118 and JE-152.<sup>707</sup>

5.189. The Panel then made, in the subsequent paragraphs, statements relating to the potential signals that may be broadcast through the price that a commodity commands on the market, as well as through the export, extraction, and production quotas.<sup>708</sup> The Panel did not expressly refer to Exhibits JE-118 and JE-152 in its analysis at paragraphs 7.442-7.444 and 7.447-7.448 of its Reports. Nonetheless we consider that, from a plain reading of the Panel's reasoning in these paragraphs, it is clear that the arguments and evidence proffered by the parties, which the Panel summarized at the beginning of this section of its analysis, informed the Panel's statements and conclusions in these subsequent paragraphs.

5.190. Moreover, the Panel referred expressly to the following reasoning of the panel in *China – Raw Materials*:

The difficulty with China's contention is that export restrictions generally do not internalize the social environmental costs[\*] of EPRs' [Energy-intensive, highly polluting, resource-based products] production in the domestic economy. This is because export restrictions reduce the domestic price of EPRs and therefore they stimulate, instead of reducing, further consumption of polluting EPR products. Indeed, the Panel understands that all parties agree that, in general, export restrictions are not an efficient policy to address environmental externalities when these derive from

<sup>703</sup> Panel Reports, para. 7.725 (referring to Panel Reports, *China – Raw Materials*, para. 7.586).

<sup>704</sup> Panel Reports, para. 7.440.

<sup>705</sup> Panel Reports, para. 7.441 (referring to United States' second written submission to the Panel, paras. 129 and 130; and European Union's second written submission to the Panel, paras. 128 and 129).

<sup>706</sup> Panel Reports, para. 7.441 (referring to United States' second written submission to the Panel, paras. 129 and 130; and European Union's second written submission to the Panel, paras. 128 and 129).

<sup>707</sup> Panel Exhibit JE-118 contains an article from *Xinhua Insight*, entitled "China Tightens Regulation of Rare Earth Industry" (15 June 2011). According to this article, Chen Guiyuan, the Deputy Director of the Hohhot Customs Bureau in North China's Inner Mongolian Autonomous Region, is quoted as saying that "[t]o get past the government regulations, some foreign companies are investing in their own rare earth metal processing centers in China, aiming to obtain more of the metals at a cheaper price." (Ibid., p. 3)

Panel Exhibit JE-152 contains an English translation of the "Preferential Policies Encouraging Investments for Fujian (Longyan) Rare Earth Industrial Park", adopted in 2010 by the Longyan Municipal People's Government. This document, which contains a guarantee of the supply of rare earth raw materials, states its purpose as follows:

In order to encourage businessmen home and abroad to make investments in Fujian (Longyan) Rare Earth Industrial Park, promote rare earth industrial development in Longyan and build Longyan into a first rate fine and further processing industrial base for rare earth as well as a characteristic "West Coast Rare Earth Center of China" as soon as possible, preferential policies have been developed as follows based on related regulations and actual situations of our city.

(Preferential Policies Encouraging Investments for Fujian (Longyan) Rare Earth Industrial Park (Panel Exhibit JE-152), p. 1)

<sup>708</sup> Panel Reports, paras. 7.442-7.444, 7.447, and 7.448.

domestic production rather than exports or imports. This is because generally the pollution generated by the production of the goods consumed domestically is not less than that of the goods consumed abroad. So the issue is the production itself and not the fact that it is traded.<sup>709</sup>

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[\*fn original] <sup>931</sup> The social environmental costs are the costs of polluting the environment while producing EPRs.

5.191. These statements by the panel in *China – Raw Materials* enunciate what that panel found to be a generally accepted principle of economic theory: that export restrictions reduce the domestic price of energy-intensive, highly polluting, resource-based products (EPRs), thereby stimulating, instead of reducing further consumption of these EPRs.<sup>710</sup> As such, export restrictions generally do not internalize the social environmental costs of EPR production in the domestic economy, and are therefore not an efficient policy to address environmental externalities when these derive from domestic production rather than exports or imports.<sup>711</sup> This lends additional credence to this Panel's assertion that export quotas send "perverse signals" to domestic consumers.

5.192. Furthermore, the Panel stated:

China responds that other measures in its comprehensive conservation plan counteract or counterbalance the perverse signal sent to domestic consumers by the export quota. According to China, the export quota is a "balancing tool", since without it the extraction and production quotas would only provide a signal to domestic users, while foreign consumers would have no incentive to explore and develop alternative sources of supply.<sup>712</sup>

The Panel has difficulty accepting this argument. While it may be true that extraction and/or production quotas *could*, in theory, counteract the perverse signals sent by export quotas to domestic consumers, it seems to us that whether or not a production quota coupled with an export quota cuts domestic consumption depends entirely on the level at which the production quota is set and the way in which the export and production quotas interact. According to [the expert report submitted by the complainants as Panel] Exhibit JE-183, if the production quota is very tight[\*], it will reduce domestic consumption. At more generous levels, however, it may not reduce consumption at all, or it may reduce it while still leaving it above the level it would be in the absence of export restrictions.<sup>713</sup>

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[\*fn original] <sup>691</sup> In economics, this means an amount set significantly below demand.

5.193. We understand the above paragraphs as follows. The Panel took note of China's argument that the export quota is a "balancing tool" that provides a conservation signal to foreign consumers, without which the extraction and production quotas would provide a conservation signal only to domestic consumers. The Panel, in addressing this argument, referred to Exhibit JE-183. This exhibit is a response from the complainants' economic expert (Professor L. Alan Winters) to the statement provided by China's economic expert (Professor Jaime de Melo).<sup>714</sup> Both experts agreed that a binding production quota introduced in isolation is likely to reduce both exports and domestic consumption relative to the unrestricted trade situation as both export and domestic prices would be driven up.<sup>715</sup> However, the experts disagreed on the nature of the interaction between production quotas and export quotas that would be necessary to ensure that no "perverse signals" are sent by the export quotas. The Panel was persuaded by the position

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<sup>709</sup> Panel Reports, *China – Raw Materials*, para. 7.586 and fn 931 thereto. (other fns omitted)

<sup>710</sup> Panel Reports, *China – Raw Materials*, para. 7.586.

<sup>711</sup> Panel Reports, *China – Raw Materials*, para. 7.586.

<sup>712</sup> Panel Reports, para. 7.445 (referring to China's comments on the complainants' responses to Panel question Nos. 71 and 123; and China's second written submission, paras. 51 and 52 ("export quotas are a balancing tool")).

<sup>713</sup> Panel Reports, para. 7.446 (referring to Panel Exhibit JE-183, p. 5).

<sup>714</sup> Panel Exhibit CHN-157.

<sup>715</sup> Panel Exhibit CHN-157, para. 33; Panel Exhibit JE-183, p. 1.

taken by Professor L. Alan Winters, which we note is also supported by the opinion of Professor Grossman, also submitted by the complainants.<sup>716</sup>

5.194. In our view, the summary of the parties' arguments above, the reference to the economic rationale discussed by the panel in *China – Raw Materials*, and the Panel's discussion of economic evidence in this dispute show basis for the Panel's determination that export quotas are liable to send "perverse signals" to domestic consumers. Hence, we are not persuaded by China's assertion that the Panel's finding that China's export quotas on rare earths and tungsten are liable to send "perverse signals" to domestic consumers is merely a "presumption" and lacks an evidentiary basis. Nor do we agree that the Panel failed to undertake an objective assessment of the facts, in breach of Article 11 of the DSU.

5.195. We turn now to the three instances in which, according to China, the Panel failed to "reconcile its finding" of "perverse signals" with contrary evidence submitted by China.

5.196. In the first instance, China considers the Panel's failure to explain the basis for its presumption to be "troubling" because China submitted evidence showing that, in some circumstances, the export quota would have no effect on prices or levels of consumption for either domestic or foreign consumers<sup>717</sup>, as well as evidence showing that any difference between domestic and foreign prices could not have been caused by the export quota. Additionally, China argues that the Panel failed to reconcile its findings with evidence suggesting that domestic prices for rare earths increased, and domestic consumption decreased, between January 2011 and January 2013, and that there was a considerable narrowing of the gap between foreign and domestic prices for several important rare earth metals.<sup>718</sup> The complainants disagree with China's views on the import of the evidence as well as its characterization of the Panel's treatment of that evidence.

5.197. In respect of China's evidence that, in some circumstances, the export quota would have no effect on prices or levels of consumption for either domestic or foreign consumers, we observe that this evidence is contained in the statement of Professor Jaime de Melo.<sup>719</sup> Recalling our discussion in paragraph 5.193 above, we note that the Panel did not ignore this evidence. The Panel was simply more persuaded by the evidence provided by the complainants rebutting Professor de Melo's opinion. With respect to the price differences, we note that, contrary to what China alleges, the Panel explicitly addressed the pricing data contained in Exhibits CHN-196 and CHN-197.<sup>720</sup> In addressing the pricing data, the Panel expressed "concerns about the reliability of the data and the methodology used in China's analysis of the price gap".<sup>721</sup> We find it noteworthy that, in its arguments on appeal, China makes no mention of the Panel's reasoning and questioning of China's data. As we explained above, the Appellate Body will not interfere lightly with a panel's discretion as the trier of facts and will not permit a participant to recast its arguments made before the panel in the guise of an Article 11 claim.<sup>722</sup> Thus, as regards this first issue, we consider that China has not demonstrated that the Panel failed to comply with its duty under Article 11 of the DSU.

5.198. Second, China points to the "substantial evidence" that its export quota signals have a positive conservation effect by demonstrating the considerable increase in the number of new rare earth mining projects starting up outside China and securing investment since 2010.<sup>723</sup> For China, this evidence shows that the export quotas were also linked to the development, in China and abroad, of substitutes and the initiation of recycling efforts. China also highlights that it submitted

<sup>716</sup> Panel Exhibit JE-183, p. 1 (referring to Panel Exhibits JE-141 and JE-164).

<sup>717</sup> China's appellant's submission, para. 189; other appellant's submission, para. 120 (referring to Panel Exhibit CHN-157).

<sup>718</sup> China's appellant's submission, paras. 194-196; other appellant's submission, paras. 125-127 (referring to China's opening statement at the first Panel meeting, Table 1, and paras. 41 and 42; and Panel Exhibits CHN-132, CHN-196, and CHN-197).

<sup>719</sup> Panel Exhibit CHN-157.

<sup>720</sup> Panel Reports, paras. 7.636-7.642.

<sup>721</sup> Panel Reports, para. 7.640.

<sup>722</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>723</sup> China's appellant's submission, paras. 191 and 192; other appellant's submission, paras. 122 and 123 (referring to China's response to Panel question No. 91, paras. 107 and 108; and Panel Exhibits CHN-192, CHN-193, and CHN-214).

specific evidence of rare earth recycling projects conducted by Chinese enterprises and research and development and recycling projects being prepared which, according to China, are linked to the conservation signals produced by the export quotas.

5.199. We observe that, contrary to China's allegations, the Panel did in fact take note of "China's indication that various rare earth recycling projects, efforts to modify industrial designs of downstream products so that they use less rare earths, and developments of rare earth substitutes are under way".<sup>724</sup> The Panel acknowledged that "these efforts may go a long way towards furthering what all involved in this dispute recognize is China's *bona fide* conservation policy".<sup>725</sup> Nonetheless, for the Panel, these efforts did not resolve what the Panel found to be the main problem inherent in the design and structure of China's export quotas: the absence of "any mechanism to ensure that the export quota is set at such a level that, in combination with the extraction and/or production caps, no perverse incentives will be sent to domestic consumers".<sup>726</sup> Once again, we are not convinced that the Panel, by assessing the facts differently from China, breached its duty to conduct an objective assessment of the facts of the case.

5.200. As its third example, China refers to additional relevant evidence that it submitted showing limited investment by foreign companies in downstream industries in China. China repeats arguments that it made to the Panel emphasizing that there is no evidence of such foreign downstream users of rare earths relocating to China after 2007 – i.e. the time when the export quota volumes were cut for the first time.<sup>727</sup> The complainants emphasize that they contested China's evidence before the Panel, and that they disagree with China's views on the import of Exhibits CHN-186 and CHN-191. They point instead to the exhibits that they submitted to rebut China's evidence.<sup>728</sup>

5.201. We observe that the Panel addressed the parties' arguments on whether China's export quotas encouraged the relocation of foreign companies in the rare earths industry to China. The Panel did so in the context of addressing China's contention that the unfilled 2011 and 2012 export quotas showed that there was no discriminatory treatment of foreign consumers as a consequence of the 2012 export quota.<sup>729</sup> In addressing these arguments, the Panel did not specifically refer to Exhibits CHN-186 and CHN-191. Nevertheless, the Panel's reasoning reflects that it took into account the content of these exhibits. For example, the Panel accepted China's argument that relocations to China may not necessarily be wholly attributable to the imposition of export quotas.<sup>730</sup> However, the Panel rejected China's argument, contained in Exhibit CHN-163, and restated in Exhibit CHN-186, that, "since FDI flows did not increase following the tightening of the quota, the quota is not a possible cause of relocation".<sup>731</sup> The Panel eventually concluded as follows:

[T]he Panel is not convinced that industrial relocation is unrelated to China's export quotas. The Panel is of the view that one cannot simply compare the flow of FDI before 2008 to the situation after 2008, and conclude that since FDI flows did not increase following the tightening of the quota, the quota is not a possible cause of relocation, without taking into account the global fall in FDI activity that followed the 2008 economic downturn. Therefore, in the view of the Panel, the evidence provided by China is not sufficient to exclude the possibility that export quotas (and duties)

<sup>724</sup> Panel Reports, para. 7.448.

<sup>725</sup> Panel Reports, para. 7.448.

<sup>726</sup> Panel Reports, para. 7.448.

<sup>727</sup> China's appellant's submission, para. 200; other appellant's submission, para. 131 (referring to China's opening statement at the second Panel meeting, para. 57; and Panel Exhibits CHN-186 and CHN-191).

<sup>728</sup> United States' appellee's submission, paras. 125-128; European Union's appellee's submission, para. 211; Japan appellee's submission, para. 84. The exhibits referred to are Panel Exhibits JE-102, JE-118, JE-145, JE-146, and JE-147.

<sup>729</sup> Panel Reports, para. 7.622.

<sup>730</sup> Panel Reports, para. 7.633 and fn 951 thereto (referring to Panel Exhibit CHN-163).

<sup>731</sup> Panel Reports, paras. 7.632 and 7.633 (referring to Dr David Humphreys, "Developments in rare earth-using industries" (Panel Exhibit CHN-163); and Prof. Jaime de Melo, "Selected Economic Issues Regarding Export Quotas and Production Quotas" (Panel Exhibit CHN-157)). In Panel Exhibit CHN-163, p. 15, Dr Humphreys states: "Consistent ... also with the data provided on the relocation of operations of foreign investors in rare earth-consuming facilities, the shift in the pattern of exports for rare earth-containing products came *before* the lowering of the extraction, production and export quotas in 2008 and 2010, making it difficult to sustain the argument that the tightening of quotas was the cause of the observed industrial and trade trends". Dr Humphreys reiterates this statement in Panel Exhibit CHN-186, p. 2.

were a significant reason for industrial relocation. As China itself acknowledges, if foreign demand shifts inward, the export quota can cease to be "binding", that is, it can remain unfilled, but this is not necessarily an indication that the export quota does not have any discriminatory effect on foreign users. Rather, this could be an indication that the export restriction, which China has applied for over a decade, has distorted international trade and investment. In other words, the effects of the export quota are not being compared to the appropriate counterfactual (China's exports had the quota not been in place).<sup>732</sup>

5.202. We recall that the Appellate Body will not interfere lightly with a panel's discretion as the trier of facts and will not permit a participant to recast its arguments made before the panel in the guise of an Article 11 claim.<sup>733</sup> We note, as we did earlier, that in its arguments on appeal, China does not acknowledge this reasoning by the Panel. China's restatement of its argument before the Panel to the effect that there was limited investment by foreign companies in downstream industries in China, and no evidence of such foreign downstream users of rare earths relocating to China after 2007, cannot suffice to impugn the Panel's reasoning set out above. Thus, we are not persuaded that the Panel fell short of its duty as articulated in Article 11 of the DSU.

5.203. In sum, it appears that China's arguments that the Panel's finding of "perverse signals" was a mere "presumption" and that the Panel failed to reconcile its findings with contrary evidence, are premised primarily on China's disagreement with the Panel's reasoning and weighing of the evidence. However, as set out above, the Appellate Body has consistently held that this does not suffice to establish that a panel acted inconsistently with Article 11 of the DSU. Therefore, we conclude that China has not demonstrated that the Panel failed to conduct an objective assessment of the facts of the case, or otherwise acted inconsistently with Article 11 of the DSU.

#### 5.2.8.1.2 Allegations that the Panel's reasoning was incoherent

5.204. China further contends that the Panel's findings breach Article 11 of the DSU because they are based on incoherent reasoning. On that basis too, China requests us to reverse the Panel's findings. First, China argues that the Panel's reasoning that the export quotas are not capable of making a positive contribution to conservation by virtue of the perverse signals is incoherent with its reasoning that domestic restrictions were capable of mitigating these "perverse signals". Second, China considers it improper for the Panel to have recognized that the key issue of its "relating to" analysis depended on the level at which the production quota is set and the way in which the export and production quotas interact, but to have then refused to consider any evidence of these very alleged effects.

5.205. The complainants disagree and submit that the Panel Reports show that all the Panel's factual findings had a proper basis in the evidence and were accompanied by coherent and adequate reasoning.

5.206. In our view, China's first allegation conflates several of the Panel's statements in its "relating to" analysis of China's export quota on rare earths. To situate these statements in their proper context, we reproduce them in relevant part below.

5.207. The Panel found that China had in place a conservation policy for rare earths and tungsten.<sup>734</sup> The Panel then addressed China's argument that the export quota system contributes to the effectiveness of its overall conservation policy by signalling to foreign users of rare earths the need to explore other sources of supply, including substitutes and recycling.<sup>735</sup> The Panel stated:

The Panel accepts China's argument that encouraging foreign users and investors to explore alternative sources of supply could relate to the goal of conserving China's

<sup>732</sup> Panel Reports, para. 7.633 (referring to Panel Exhibits CHN-157 and CHN-163). See also *ibid.*, para. 7.632.

<sup>733</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>734</sup> Panel Reports, paras. 7.375-7.377 (tungsten) and 7.696-7.698 (molybdenum).

<sup>735</sup> Panel Reports, para. 7.440.

exhaustible natural resources, since the development of alternative supply sources would "relieve the pressure on" China's own rare earth supplies. To the extent that the export quota communicates to foreign rare earth consumers that China will no longer supply all the rare earth products needed, it is logical to assume that it will provide a stimulus to consumers, investors, and innovators to explore and develop alternative sources of supply and thus reduce demand for limited Chinese rare earth reserves.<sup>736</sup>

5.208. The Panel, however, tempered these remarks by acknowledging the perverse signal that export quotas are liable to send, as follows:

[T]he Panel considers that export quotas are liable to send a *perverse* signal to *domestic consumers*. Whereas export quotas may reduce foreign demand for Chinese rare earths, it seems likely to the Panel that they will also *stimulate* domestic consumption by effectively reserving a supply of low-price raw materials for use by domestic downstream industries. They may also encourage relocation of rare earth-consuming industries to China.<sup>737</sup>

5.209. The Panel then acknowledged China's argument that "other measures in its comprehensive conservation plan counteract or counterbalance the perverse signal sent to domestic consumers by the export quota".<sup>738</sup> China argued that the export quota is a "balancing tool", since without it the extraction and production quotas would provide a signal only to domestic users, while foreign consumers would have no incentive to explore and develop alternative sources of supply.<sup>739</sup> However, contrary to what China suggests, the Panel did not accept China's argument in its entirety. Rather, the Panel observed as follows:

The Panel has difficulty accepting this argument. While it may be true that extraction and/or production quotas *could*, in theory, counteract the perverse signals sent by export quotas to domestic consumers, it seems to us that whether or not a production quota coupled with an export quota cuts domestic consumption depends entirely on the level at which the production quota is set and the way in which the export and production quotas interact. According to Exhibit JE-183, if the production quota is very tight, it will reduce domestic consumption. At more generous levels, however, it may not reduce consumption at all, or it may reduce it while still leaving it above the level it would be in the absence of export restrictions.<sup>740</sup>

5.210. Based on the reasons provided above, the Panel concluded as follows:

The Panel takes note of China's indication that various rare earth recycling projects, efforts to modify industrial designs of downstream products so that they use less rare earths and developments of rare earth substitutes are under way. The Panel acknowledges that these efforts may go a long way towards furthering what all involved in this dispute recognize is China's *bona fide* conservation policy. Nevertheless, our consideration of the design and architecture of China's export quota on rare earths does not convince us that the export quota is designed in such a way as to ensure that domestic demand is not stimulated by low prices. There does not appear to be any mechanism to ensure that the export quota is set at such a level that, in combination with the extraction and/or production caps, no perverse incentives will be sent to domestic consumers.<sup>741</sup>

5.211. Thereafter, the Panel, in the context of its analysis of whether China had in place restrictions on domestic production or consumption within the meaning of Article XX(g) of the

<sup>736</sup> Panel Reports, para. 7.443. (fn omitted)

<sup>737</sup> Panel Reports, para. 7.444. (emphasis original; fn omitted)

<sup>738</sup> Panel Reports, para. 7.445 (referring to China's comments on the complainants' responses to Panel question Nos. 71 and 123; and China's second written submission to the Panel, para. 52).

<sup>739</sup> Panel Reports, para. 7.445 (referring to China's second written submission to the Panel, paras. 51 and 52).

<sup>740</sup> Panel Reports, para. 7.446 (referring to Professor L. Alan Winters, "Response to Professor de Melo" (Panel Exhibit JE-183), p. 5). (emphasis original; fn omitted)

<sup>741</sup> Panel Reports, para. 7.448. (fn omitted)

GATT 1994, found that China had *not* demonstrated that its "production quota" was capable of counteracting the perverse signal broadcast by China's rare earth export quota.<sup>742</sup> We therefore do not agree with China's assertion that the Panel reasoned that China's domestic restrictions are capable of mitigating the perverse signal of China's export quotas. In the light of the foregoing, we are not persuaded by China's first allegation and find that China has not demonstrated that the Panel engaged in incoherent reasoning.

5.212. Second, we address China's assertion that, while the Panel correctly recognized that it was essential to examine the level at which the production quota was set and the way in which the production quota and the export quota interact, the Panel then failed to do so.<sup>743</sup> We note that in support of this argument China points to evidence in the Panel record that allegedly demonstrates how the quotas interact. This is the same evidence relating to pricing that was the subject of our discussion at paragraph 5.197 above, and our analysis in that paragraph applies equally here. The Panel considered the evidence relating to alleged differences in foreign and domestic prices. Such evidence was submitted, in part, to demonstrate the effects of the export and production quotas. The Panel expressed concerns about the reliability of the evidence submitted by China. It follows that we see no "incoherence" in the reasoning employed by the Panel in dealing with these issues and evidence.

5.213. For the reasons set out above, and having reviewed the Panel's findings identified by China in its claims under Article 11 in their proper context, we do not agree that the Panel engaged in incoherent reasoning. Consequently, we are not persuaded that China has demonstrated that the Panel breached its duty under Article 11 of the DSU to conduct an objective assessment of the facts.

#### **5.2.8.2 Claims that the Panel failed to comply with Article 11 of the DSU in its analysis of whether China's export quotas were "made effective in conjunction with" restrictions on domestic production or consumption**

5.214. With regard to the Panel's analysis of the second clause of subparagraph (g) of Article XX of the GATT 1994, China raises numerous allegations under Article 11 of the DSU, which it groups into the following three categories: (i) allegations relating to the Panel's treatment of the evidence; (ii) allegations of incoherent reasoning; and (iii) allegations of a "double standard" in the Panel's application of Article XX(g) to the facts of the case.

5.215. The complainants request the Appellate Body to reject China's claims under Article 11 of the DSU relating to the Panel's treatment of the evidence, to allegations of incoherent reasoning, as well as China's allegation that the Panel employed a "double standard" in applying Article XX(g) of the GATT 1994 to the facts of the case. For the complainants, the Panel undertook a thorough legal and factual analysis and thus complied with its duty under Article 11 of the DSU.

5.216. Below, we address each of the three categories of allegations raised by China in turn.

##### **5.2.8.2.1 Allegations relating to the Panel's treatment of evidence**

5.217. China alleges, first, that the Panel lacked objectivity in its treatment of the evidence it considered relevant to determine how domestic restrictions and export quotas work together. China asserts, in particular, that the Panel ignored evidence submitted by China, failed to reflect arguments made by China, and failed to explain how, in the light of evidence submitted by China, the conclusions of the Panel were nonetheless valid.<sup>744</sup> China refers specifically to evidence regarding the timing of the quotas, suggesting that there was indeed coordination among export quotas, production quotas, and extraction quotas.<sup>745</sup> Second, with regard to the levels of quotas, China refers to its argument that unfilled export quotas need not necessarily be redirected for domestic consumption, and that this was not a relevant factor in determining whether the export

<sup>742</sup> Panel Reports, para. 7.542. In this regard, we take note of the Panel's statement casting doubt on whether China's 2012 production plan imposed a "real restriction".

<sup>743</sup> China's appellant's submission, para. 205; other appellant's submission, para. 136.

<sup>744</sup> China's appellant's submission, para. 293; other appellant's submission, para. 224.

<sup>745</sup> China's appellant's submission, para. 293; other appellant's submission, para. 224 (referring to Panel Reports, para. 7.577).



quota worked in conjunction with the domestic restrictions.<sup>746</sup> Third, China contends that the Panel failed to address arguments and evidence submitted by China explaining why China did not adopt a domestic consumption quota or why there was no need for such a quota.<sup>747</sup> Fourth, China alleges that the Panel failed to address certain evidence submitted by China showing a temporal connection in the way that the domestic caps and export quotas work together.<sup>748</sup>

5.218. First, with regard to the manner in which the Panel analysed the timing of the 2012 export, extraction, and production quotas, China alleges that the Panel failed to address evidence submitted by China as to the manner in which allocation of the quotas is coordinated between the competent Ministries, and contends that all quota levels are set by the competent Ministries at the same time, even if the actual publication of the respective amounts may differ in time.<sup>749</sup>

5.219. We note that the Panel considered the timing of the quota setting relevant because it "could affect the certainty of the rare earths market and enterprises' capacity to make business plans for 2012".<sup>750</sup> The Panel considered relevant the fact that the total export quota for 2012 was not set at the end of 2011 or at the beginning of 2012, but that it was set only in late 2012.<sup>751</sup> The Panel also observed that the export, extraction, and production quotas for 2012 were set in several batches at different times between the end of 2011 and August 2012.<sup>752</sup> The Panel considered that setting the export quota for 2012 only late in the year led to uncertainty for market participants, and that such uncertainty cast doubt on China's contention that its domestic and foreign restrictions "work together". The Panel further found that "uncertainty and unpredictability caused by determining the level of the export quota only late in the year do not help rare earth users to rationally utilize the available amounts of rare earths."<sup>753</sup> Moreover, the Panel observed that each batch of the production quota was announced after the export quota was set. The Panel found that this contributed to the unfilled export quota and the unpredictability of the export market for rare earths, and the Panel considered it illogical to determine a level for the export quota before the extraction and production quotas are determined.<sup>754</sup>

5.220. In our view, evidence presented by China indicating that there was coordination in the legislative process leading up to the setting of the three categories of quotas does not detract from the Panel's analysis described above. The Panel was concerned with uncertainty in the marketplace created by the fact that quota levels were made known only late in the year and by the sequence in which the export and production quotas were published. Also, contrary to what China alleges, the Panel did not simply find that "there was no coordination among the three categories of quotas".<sup>755</sup> Rather, "[t]he Panel fail[ed] to see any coordination among the three categories of quotas that would suggest that they work together, be it for conservation of rare earths or for other reasons".<sup>756</sup> Significantly, the Panel's statement about the apparent lack of coordination is qualified by the clause "that would suggest that".

5.221. For the Panel, this lack of coordination was also evidenced by the fact that each batch of the production quota was announced only after the export quota was set. The Panel considered this sequence of setting the quotas illogical and saw in this sequence a reason for the unpredictability of the export market for rare earths.<sup>757</sup> It is not clear to us that the evidence identified by China on appeal was relevant to these considerations of the Panel. The fact that the Panel did not refer to this evidence therefore is no indication of a failure by the Panel to undertake

<sup>746</sup> China's appellant's submission, paras. 283 and 293; other appellant's submission, paras. 214 and 224 (referring to China's response to Panel question No. 123(b), paras. 258-261).

<sup>747</sup> China's appellant's submission, paras. 284 and 293; other appellant's submission, paras. 215 and 224 (referring to China's second written submission to the Panel, paras. 84 and 86-100; opening statement at the second Panel meeting, paras. 40-45; and response to Panel question No. 123, paras. 262-265).

<sup>748</sup> China's appellant's submission, para. 294; other appellant's submission, para. 225.

<sup>749</sup> China's appellant's submission, para. 282; other appellant's submission, para. 213 (referring to Panel Exhibits CHN-13, CHN-21, and CHN-63).

<sup>750</sup> Panel Reports, para. 7.575.

<sup>751</sup> Panel Reports, para. 7.574.

<sup>752</sup> Panel Reports, para. 7.576.

<sup>753</sup> Panel Reports, para. 7.578.

<sup>754</sup> Panel Reports, para. 7.580.

<sup>755</sup> China's appellant's submission, para. 282; other appellant's submission, para. 213 (referring to Panel Reports, para. 7.577).

<sup>756</sup> Panel Reports, para. 7.577.

<sup>757</sup> Panel Reports, para. 7.580.

an objective assessment of the evidence. Rather, the fact that the Panel did not specifically refer to this evidence simply indicates that the Panel did not consider it relevant to the specific issue before it, or did not attribute to it the weight or significance that China considers it should have.

5.222. Second, with respect to the levels of the quotas, China maintains that the Panel erred in focusing on the fact that export quota shares not used by foreign users were redirected to the domestic market, and that it failed to address arguments made by China that the unfilled export quota amounts need not necessarily be redirected and that, in any event, redirection of quota shares was not a relevant factor in determining whether the export quotas worked in conjunction with the domestic restrictions.<sup>758</sup>

5.223. We note that, in the context of its analysis of the levels and timing of the 2012 export, extraction, and production quotas, the Panel also observed that an important quantity of rare earths that was initially designated for export was redirected to the domestic market, even though it had not been destined for the domestic market under China's original comprehensive conservation plan. On this issue, the Panel considered that the redirection of unfilled export quota shares of one batch of a quota to the domestic market upon issuance of a new batch of the same quota effectively lowered the overall export quota amount, and increased the amounts available for domestic consumption.

5.224. Regarding China's allegation that the Panel failed to address arguments made by China that the unfilled export quota amount need not necessarily be redirected to the domestic market, we note, first, that China does not allege that the Panel failed to consider the evidence. Rather, China maintains that the Panel did not address an argument made by China. In this respect, we note that a panel has no obligation under Article 11 of the DSU to address in its report every argument raised by a party.<sup>759</sup>

5.225. Furthermore, the Panel noted that, in 2012, an important quantity of rare earths that was initially designated for export was redirected to the domestic market, and that this raised doubts about the usefulness and effectiveness of export quotas, and also suggested that export restrictions and domestic restrictions do not "work together" for the goal of conserving exhaustible natural resources. The Panel stated:

The Panel understands that the total legal supply of rare earths is determined by the extraction quota, which, as we have noted, was determined in April 2012. However, the Panel notes that an important quantity of rare earths that was initially designated for export was redirected to the domestic market (for which it was not destined under China's original comprehensive conservation plan). To the Panel, this reinforces the fundamental fact that the vast majority of rare earths produced in China is consumed domestically, further raising doubts about the usefulness and effectiveness of export quotas. It also suggests that, if the export and domestic restrictions "work together" at all, they tend to do so to secure the supply of rare earths to downstream domestic users, rather than for the goal of conserving exhaustible natural resources.<sup>760</sup>

5.226. Contrary to what China alleges, this reasoning by the Panel does address China's argument that the redirecting of quota shares to the domestic market was not a relevant factor in determining whether the export quotas worked in conjunction with the domestic restrictions. Indeed, the Panel rejected this argument by stating the opposite. The Panel considered that redirection of quota shares to the domestic market was *not* irrelevant, but that it was a factor suggesting export restrictions and domestic restrictions did *not* "work together" for the goal of conserving exhaustible natural resources. The fact that the Panel disagreed with China's argument does not establish that it committed an error under Article 11 of the DSU.

5.227. Third, China contends that the Panel failed to address arguments and evidence submitted by China explaining why China did not adopt a domestic consumption quota or why there was no need

<sup>758</sup> China's appellant's submission, paras. 283 and 293; other appellant's submission, paras. 214 and 224 (referring to Panel Reports, para. 7.579; and China's response to Panel question No. 123(b), paras. 258-261).

<sup>759</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 511.

<sup>760</sup> Panel Reports, para. 7.579.

for such a quota.<sup>761</sup> China's submissions in this regard are extremely brief. China does not identify a particular section or specific paragraphs of the Panel Reports with which it takes issue, and China does not develop its arguments beyond the mere allegation that the Panel failed to grapple with China's evidence. We recall that the Appellate Body has found that a challenge under Article 11 of the DSU cannot be made out simply by asserting that a panel did not agree with arguments or evidence<sup>762</sup>, in particular given that a simple error of judgement in the appreciation of evidence does not, alone, suffice to establish panel error under this provision.<sup>763</sup> Rather, an allegation that a panel has failed to conduct the "objective assessment of the matter before it" required by Article 11 is "a very serious allegation".<sup>764</sup> As such, an Article 11 claim must be clearly articulated and substantiated with specific arguments<sup>765</sup>, including an explanation of why the alleged error has a bearing on the objectivity of the panel's assessment.<sup>766</sup> This Article 11 claim raised by China does not meet these requirements and we therefore reject it.

5.228. We emphasize that, in so finding, we do not wish to suggest that participants should simply present more extensive argumentation in support of claims under Article 11 of the DSU. Rather, we wish to encourage appellants to consider carefully when and to what extent to challenge a panel's assessment of a matter pursuant to Article 11, bearing in mind that an allegation of violation of Article 11 is a very serious allegation. This is in keeping with the objective of the prompt settlement of disputes, and the requirement in Article 3.7 of the DSU that Members exercise judgement in deciding whether action under the WTO dispute settlement procedures would be fruitful.

5.229. Fourth, China alleges that the Panel failed to address evidence submitted by China showing a temporal connection in the way that the domestic and export quotas work together. In particular, China criticizes the Panel for taking into consideration the "non-existence of domestic extraction quotas between 2002 and 2006" and alleges that the Panel failed to address evidence demonstrating that between 2006 and 2012, China did have an extraction quota in place and has significantly increased its enforcement measures.<sup>767</sup> China has included three different graphs in its other appellant's submission to demonstrate that extraction levels of rare earths in China declined significantly since 2006.<sup>768</sup>

5.230. This allegation relates to the Panel's reasoning under the subheading "Temporal disconnect between the export quota and the domestic restrictions referred to by China".<sup>769</sup> This is one factor considered by the Panel in its assessment of whether the 2012 export quota on rare earths was "made effective in conjunction with" restrictions on domestic production or consumption. In this subsection, the Panel discussed the fact that China has imposed quotas on the export of rare earth products since at least 2002, but has, according to its own arguments, only maintained restrictions on domestic extraction since 2006 and on domestic production since 2007.<sup>770</sup> The Panel recalled China's argument that one of the goals of its export quota on rare earths is to enforce its domestic extraction and production quotas. The Panel considered that China's argument that the export quota is aimed at enforcing domestic quotas is difficult to reconcile with the fact that, between 2002 and 2007, China did not impose any domestic restrictions.

5.231. The Panel then stated that:

[t]his raises doubts in the Panel's mind about the nature and, indeed, the existence of any coordination and interaction between the export quota and any domestic restrictions between at least 2002 and 2006.<sup>771</sup>

<sup>761</sup> China's appellant's submission, paras. 284 and 293; other appellant's submission, paras. 215 and 224 (referring to China's second written submission to the Panel, paras. 84 and 86-100; opening statement at the second Panel meeting, paras. 40-45; and response to Panel question No. 123, paras. 262-265).

<sup>762</sup> Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238.

<sup>763</sup> Appellate Body Report, *EC – Hormones*, para. 133.

<sup>764</sup> Appellate Body Report, *EC – Poultry*, para. 133.

<sup>765</sup> Appellate Body Reports, *US – Steel Safeguards*, para. 498; *US – Tyres (China)*, para. 321.

<sup>766</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 499 and 500.

<sup>767</sup> China's appellant's submission, para. 294; other appellant's submission, para. 225.

<sup>768</sup> China's appellant's submission, paras. 295-297; other appellant's submission, paras. 226-228.

<sup>769</sup> Panel Reports, paras. 7.596-7.599.

<sup>770</sup> Panel Exhibit CHN-137.

<sup>771</sup> Panel Reports, para. 7.596.

5.232. The Panel further considered that:

... the mere fact that a restriction on foreign trade was enacted prior to domestic restrictions does not, without more, preclude a regulating Member from arguing that such measure began 'working together' with domestic restrictions at a later date (in this dispute, in 2012) and so from relying on the exception in Article XX(g) as of that date.<sup>772</sup>

Nevertheless, the fact that China's export restrictions pre-date its extraction and production restrictions by 4 and 5 years respectively raises doubts as to whether these two sets of restrictions are designed to work together for conservation.<sup>773</sup>

5.233. It is apparent from the above quoted statements that the Panel was concerned with a "temporal disconnect" of four and five years between the introduction of the export quota and the introduction of the measures alleged to constitute domestic restrictions, that is, prior to 2006. Arguments and evidence submitted by China as to the "temporal connection between the domestic restriction and export quotas *since China introduced its extraction quota in 2006*"<sup>774</sup> related to a subsequent period of time and, as such, were not relevant to the issue the Panel was considering in that part of its analysis. Accordingly, the fact that the Panel did not explicitly address these arguments in its Reports does not cast doubt on the objectivity of the Panel's assessment. We therefore do not see that the Panel failed objectively to assess evidence submitted by China.

#### 5.2.8.2.2 Allegations that the Panel's reasoning was incoherent

5.234. China further alleges that the Panel breached its duties under Article 11 of the DSU because its finding that China did not impose domestic restrictions is based on incoherent reasoning. China refers to statements by the Panel that "China has demonstrated that it has a comprehensive conservation policy" by developing "a series of interconnected measures and programmes, including extraction and production caps and enforcement actions, which are designed to manage the extraction and supply of rare earth resources through a conservation policy."<sup>775</sup> Elsewhere in its Reports, however, the Panel found that none of the domestic measures imposed by China constituted "restrictions".<sup>776</sup> China alleges that, in making these two statements, the Panel engaged in incoherent reasoning.

5.235. China takes issue, first, with the Panel's statement that "China has failed to place before [the Panel] evidence or other demonstration sufficient to support the conclusion that China set its domestic production quota below the expected level of demand in 2012."<sup>777</sup> China submits that it provided testimony that the Ministries, in setting the 2012 extraction, production, and export quotas "did rely on market reports".<sup>778</sup> Furthermore, China contends that it provided the Panel with a report in which a rare earth industry expert predicted that, by the end of 2011, the expected level of demand for rare earths would increase.<sup>779</sup> China explains that the Ministries thereafter set the 2012 quota levels below that predicted level of rare earth demand.<sup>780</sup> China alleges that the Panel failed to assess the relevance of this evidence.

<sup>772</sup> Panel Reports, para. 7.596.

<sup>773</sup> Panel Reports, para. 7.597.

<sup>774</sup> China's appellant's submission, para. 294; other appellant's submission, para. 225.

<sup>775</sup> China's appellant's submission, para. 299; other appellant's submission, para. 230 (referring to Panel Reports, para. 7.375).

<sup>776</sup> China's appellant's submission, para. 302; other appellant's submission, para. 233 (referring to Panel Reports, paras. 7.526 and 7.528).

<sup>777</sup> China's appellant's submission, para. 302; other appellant's submission, para. 233 (referring to Panel Reports, para. 7.526).

<sup>778</sup> China's appellant's submission, para. 302; other appellant's submission, para. 233 (referring to Declaration on the Setting of 2012 Export Quotas on Rare Earth Products (Panel Exhibit CHN-63)).

<sup>779</sup> China's appellant's submission, para. 302; other appellant's submission, para. 233 (referring to "Current situation of China rare earth industry and outlook for 2011-2015", *China Rare Earths Information Journal*, Vol. 17, No. 12 (December 2011), and Vol. 18, No. 1 (January 2012) (Panel Exhibit CHN-64), p. 4).

<sup>780</sup> China's appellant's submission, para. 302; other appellant's submission, para. 233 (referring to "Current situation of China rare earth industry and outlook for 2011-2015", *China Rare Earths Information Journal*, Vol. 17, No. 12 (December 2011), and Vol. 18, No. 1 (January 2012) (Panel Exhibit CHN-64), p. 4).

5.236. This allegation relates to the Panel's analysis of whether China has imposed restrictions on domestic production or consumption of rare earths and, in particular, whether the production quota applicable to rare earths imposes a restriction on domestic production or consumption. China argued before the Panel that its production quota is a domestic restriction imposed in conjunction with its export quota and therefore consistent with Article XX(g) of the GATT 1994. The Panel referred to Paragraph 24 of the Declaration on the Setting of 2012 Export Quotas on Rare Earth Products.<sup>781</sup> The Panel observed that this document states that "in setting the production quota, the relevant Ministries 'considered that the overall domestic and foreign demand for the rare earths would continue to be significant', in particular because 'prices for rare earths were falling from the levels that they had rapidly achieved in late 2010 and early 2011'."<sup>782</sup> Nevertheless, the Panel explained that:

... it is very difficult to assess whether a measure such as China's constitutes a "restriction" without evidence showing how China's reasoning, which appears to run contrary to the trend towards reduced domestic demand, is justified. Accordingly, the Panel's view is that China has not provided sufficient evidence as to the expected level of demand for 2012 on the basis of which the Panel would be able to assess whether the 2012 production plan constituted a "restriction" for the purposes of Article XX(g). In this dispute such evidence is especially important, since in 2012 all consumption levels (both domestic and foreign) for ores and smelted and separated products declined significantly from the 2010 and 2011 levels. This suggests to the Panel that *demand* for such products was especially low in 2012 independently of China's restrictions.<sup>783</sup>

5.237. We note that the Declaration on the Setting of 2012 Export Quotas on Rare Earth Products, from which the Panel quoted in the above paragraph, is Exhibit CHN-63, with which China alleges the Panel did not engage. Moreover, contrary to what China alleges, it is clear from paragraph 7.526 that the Panel did engage with this Panel Exhibit and evidence relating to demand for rare earths in 2012 in general. The Panel considered the statement that demand for rare earths would continue to be significant. However, the Panel also noted an overall trend of significantly declining consumption levels in 2012 for rare earths as compared to the 2010 and 2011 levels. On this basis, the Panel concluded that China had not provided sufficient evidence regarding the expected level of demand for 2012, on the basis of which the Panel would have been able to assess whether the 2012 production plan constituted a "restriction" for the purposes of Article XX(g). Accordingly, we do not see that this reasoning by the Panel can be characterized as "incoherent".

5.238. Second, China alleges that the Panel engaged in incoherent reasoning in, on the one hand, finding that it should assess only the design, structure, and architecture and not the impact of China's resource tax, and, on the other hand, acknowledging that by design and structure the increased costs caused by the tax could lead to a reduction in demand and therefore limit production of rare earth ores and work to reduce extraction of rare earths.<sup>784</sup> Paragraph 7.554 of the Panel Reports sets out the following reasoning by the Panel:

Nevertheless, the Panel acknowledges that increased costs caused by the tax could, in the long run, lead to a reduction in demand and therefore limit production of rare earth ores. Thus, resources taxes could work to reduce extraction of rare earths. However, in the Panel's opinion, China has not adduced sufficient evidence to persuade the Panel that the tax at issue here would be capable of having a limiting effect.

5.239. In our reading of paragraph 7.554 of the Panel Reports, the first sentence of the paragraph, which uses the conditional mode "could, in the long run, lead to ...", sets out a hypothetical. The third sentence contrasts that to the concrete measure at issue in this case with the words "However, ... the tax at issue here ...". As we see it, these are not two conflicting statements relating to one and the same measure. Rather, the Panel contrasts a hypothetical with

<sup>781</sup> Panel Reports, para. 7.526.

<sup>782</sup> Panel Reports, para. 7.526.

<sup>783</sup> Panel Reports, para. 7.526.

<sup>784</sup> China's appellant's submission, para. 303; other appellant's submission, para. 234 (referring to Panel Reports, paras. 7.554 and 7.555).

the specific measure invoked by China in support of its defence. In addition, the Panel specifically explains, why, in its view, China had not established "that the resource tax was designed in such a way as to increase the costs, and thus decrease demand for, rare earth products." The Panel explained that the increase in costs might also have been caused by enlargement of production. The Panel also explained what evidence China would have had to provide in order to properly support its argument. In addition, the Panel emphasized in the subsequent paragraph that it was not assessing the *impact* of China's resource tax, but rather its design and structure. Accordingly, we do not see that the Panel engaged in incoherent reasoning in paragraphs 7.554 and 7.555.

5.240. Third, China alleges that the Panel engaged in incoherent reasoning because it failed to assess the trends in rare earth extraction and production data objectively. China alleges that the Panel failed to address China's arguments that the extraction, production and consumption data suggest that the decreased production and consumption levels are the result of China's overall conservation policy.

5.241. In connection with this claim, China refers to arguments set out in connection with its claim that the Panel lacked objectivity in its treatment of the evidence in determining how domestic restrictions and export quotas work together. We have addressed these arguments at paragraphs 5.229 through 5.233 above in the context of the claim concerning the temporal connection between domestic restrictions and export quotas. China does not advance any additional argumentation in regard to its further claim that the Panel failed to assess the trends in rare earth extraction and production data objectively, and China does not explain whether or how this claim is distinct from its claim concerning the Panel's error in considering the temporal connection between domestic restrictions and export quotas. Accordingly, we do not see that China has established that the Panel was incoherent in its reasoning or acted inconsistently with Article 11 of the DSU.

#### **5.2.8.2.3 Allegation of a "double standard" in the Panel's analysis of "even-handedness"**

5.242. Finally, China alleges that the Panel acted inconsistently with Article 11 of the DSU because it employed a "double standard" in its analysis of even-handedness. China argues that, with respect to the export quotas, the Panel failed to address the extent to which China's export quotas impose an actual and not merely a theoretical burden on foreign consumers. In contrast, with regard to domestic restrictions, the Panel focused on whether these restrictions are actually enforced and have actual restrictive effects. In particular, China alleges that Panel erred in failing to assess the question of why the challenged export quotas were not filled but according significant weight to the effects of the domestic restrictions.

5.243. We have already explained, in the context of another claim under Article 11 of the DSU, that the Panel did address the effects of under-filled export quotas when addressing China's contention that the unfilled 2011 and 2012 export quotas showed that there was no discriminatory treatment of foreign consumers as a consequence of these quotas.<sup>785</sup> The Panel rejected that contention and was not convinced that, in this case, unfilled quota shares were evidence of non-discrimination.<sup>786</sup> Accordingly, for the same reasons as set out above, we do not see that the Panel failed to address the question of the effects of the unfilled export quotas, or employed a "double standard" in its analysis of "even-handedness".

#### **5.2.9 Overall summary and conclusion on Article XX(g) of the GATT 1994**

5.244. We recall that, with respect to the "relating to" requirement in Article XX(g) of the GATT 1994, China requests us to find that the Panel erred in its interpretation and application of this requirement, and acted inconsistently with Article 11 of the DSU, in finding that China's export quotas on rare earths and tungsten do not "relate to" conservation. China therefore requests us to reverse the Panel's intermediate findings that China's export quotas on rare earths and tungsten

<sup>785</sup> See paragraph 5.201 of these Reports.

<sup>786</sup> Panel Reports, paras. 7.630-7.635.

are not measures "relating to" conservation within the meaning of Article XX(g) of the GATT 1994 by virtue of their "signalling" function.<sup>787</sup>

5.245. As explained above, we have found that the Panel did not interpret the "relating to" requirement in Article XX(g) as obliging it to limit its analysis to an examination of the design and structure of the measures at issue. Nor did the Panel, either in its interpretation or its application of the "relating to" requirement, consider itself precluded from taking account of evidence of the effects of China's export quotas and other elements of China's conservation regime in the marketplace. We have also found that the Panel did not fail to comply with its duty to make an objective assessment of the matter. Accordingly, we do not accept China's request for reversal of the relevant Panel findings setting out its interpretation and application of Article XX(g). Instead, we find that the Panel did not err in its reasoning regarding the signals sent to foreign and domestic consumers by China's export quotas on rare earths and tungsten, or in rejecting China's argument that, by virtue of their signalling function, China's export quotas on rare earths and tungsten relate to conservation.

5.246. With respect to the "made effective in conjunction with" requirement under Article XX(g) of the GATT 1994, China also requests us to find that the Panel erred in its interpretation and application of this requirement, and that it failed to make an objective assessment of the matter in accordance with Article 11 of the DSU. China requests us, in consequence, to reverse the relevant findings of the Panel.<sup>788</sup>

5.247. As explained above, we have found that the Panel did not interpret Article XX(g) as requiring it to limit its analysis to an examination of the design and structure of the measures and did not, either in its interpretation or its application of Article XX(g), consider itself precluded from taking account of evidence of the effects of the export quotas and domestic measures in the marketplace. However, we further determined that the Panel erred to the extent that it interpreted Article XX(g) as imposing a separate requirement of "even-handedness" that must be fulfilled in addition to the condition that a measure must be "made effective in conjunction with restrictions on domestic production or consumption". We also found that the Panel erred to the extent it found that Article XX(g) requires a showing that the burden of conservation is evenly distributed. Nevertheless we have found that this error of the Panel does not taint the remainder of its interpretation of Article XX(g), which also contains elements that China has not appealed.

5.248. In addition, we found that, despite certain flaws in the Panel's interpretation, the Panel did not commit legal error in its application of the "made effective in conjunction with" requirement of Article XX(g) to the export quotas, because it did not engage in an assessment of whether China's export quotas on rare earths, tungsten, and molybdenum evenly distribute the burden of conservation. Further, we found that the Panel did not fail to make an objective assessment of the matter in this regard. Accordingly, we do not accept China's request for reversal of the relevant Panel findings setting out its interpretation and application of Article XX(g). Instead, we find that the Panel did not err in rejecting China's argument that the export quotas on rare earths, tungsten, and molybdenum are "made effective in conjunction with" restrictions on domestic production or consumption.

5.249. China further requests reversal of the Panel's overall conclusions regarding Article XX(g) of the GATT 1994 "[t]o the extent that the Panel's errors" in connection with its analysis of the "relating to" element and/or the "made effective in conjunction with" requirement of subparagraph (g) of Article XX "taint" the Panel's conclusions, in such paragraphs, that China's export quotas on rare earths, tungsten and molybdenum cannot be provisionally justified under subparagraph (g) of Article XX of the GATT 1994.<sup>789</sup>

<sup>787</sup> China's appellant's submission, paras. 30, 208, 209, 319, and 320; other appellant's submission, paras. 30, 139, 140, 250, and 251 (referring to Panel Reports, paras. 7.279-7.293, 7.444, 7.446-7.448, 7.541-7.542, 7.604, 7.725, and 7.731).

<sup>788</sup> China seeks reversal of paragraphs 7.301, 7.314-7.337, 7.568-7.599, 7.792-7.809, and 7.919-7.935. (China's appellant's submission, paras. 44, 313, 314, 315, 322, and 323; other appellant's submission, paras. 44, 244, 245, 246, 253, and 254)

<sup>789</sup> China seeks reversal of paragraphs 7.600-7.614, 7.810-7.820, and 7.936-7.944 of the Panel Reports; and US Panel Report, para. 8.2.c; EU Panel Report, para. 8.7.c; and Japan Panel Report, para. 8.12.c. (China's appellant's submission, paras. 31, 45, 210, 288, 316, 321, and 324; other appellant's submission, paras. 31, 45, 141, 219, 247, 252, and 255)



5.250. The paragraph ranges cited by China set out the Panel's summary of the entirety of its Article XX(g) analysis with respect to the export quotas on rare earths<sup>790</sup>, tungsten<sup>791</sup>, and molybdenum.<sup>792</sup> China also refers to the Panel's ultimate conclusion that China had not established that these export quotas are justified under Article XX(g) of the GATT 1994.<sup>793</sup> We recall that we have rejected China's requests for reversal of the intermediate findings made by the Panel with respect to the "relating to" and the "made effective in conjunction with" elements of Article XX(g).

5.251. For a GATT-inconsistent measure to be justified under Article XX(g), the Member maintaining such a measure must demonstrate compliance with all the different elements prescribed in Article XX(g). China has not, in its arguments on appeal, elaborated how or to what extent it considers the Panel's ultimate conclusions to be "tainted" by its alleged errors. In any event, we have found that the Panel did not err in its analysis and findings with respect to the "relating to" element. We have also found that the Panel did not commit reversible legal error in its analysis and findings with respect to the "made effective in conjunction with" requirement. Moreover, the Panel found that China had not established an additional key element of its asserted defence under Article XX(g), namely, that China's extraction and production caps for rare earths, tungsten, and molybdenum constitute "restrictions" within the meaning of Article XX(g) of the GATT 1994<sup>794</sup>, and China has not appealed this finding. Finally, the Panel's ultimate finding that China had not demonstrated that its export quotas are justified under Article XX(g) also rested on its finding that China had not demonstrated that its 2012 export quotas on rare earths, tungsten, and molybdenum were applied in a manner consistent with the chapeau of Article XX.<sup>795</sup> This finding is also not challenged on appeal. Accordingly, there is no basis for disturbing the Panel's ultimate conclusions under Article XX(g) of the GATT 1994.

5.252. For all of the above reasons, we uphold the Panel's conclusion that "China has not demonstrated that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum are justified pursuant to subparagraph (g) of Article XX of the GATT 1994."<sup>796</sup>

### 5.3 Exclusion of Panel Exhibits JE-188 through JE-197 in DS431 (Appeal by the United States)

5.253. In its Reports, the Panel decided to reject 10 exhibits that had been jointly submitted by the complainants at a late stage of the Panel proceedings, on 17 July 2013. The Panel did so in response to a request made by China immediately after the exhibits in question were submitted. The Panel summarized the reasons for its decision as follows:

... the relevant exhibits were submitted too late; they could have been submitted earlier and in a manner consistent with due process. Additionally, these exhibits do not supplement the evidence already accepted by the Panel. They do not, as far as the Panel can see, say anything substantially new or different from what is said in the exhibits that the complainants submitted prior to 17 July 2013.<sup>797</sup>

5.254. On appeal, the United States requests us to find that the Panel's decision to reject this evidence was inconsistent with Articles 11 and 12.4 of the DSU.<sup>798</sup> Although the 10 exhibits at issue were jointly submitted to the Panel by all three complainants, neither the European Union nor Japan has appealed the Panel's decision to exclude them.<sup>799</sup> Accordingly this issue on appeal pertains only to DS431 (complaint by the United States), and not to DS432 (complaint by the European Union) or DS433 (complaint by Japan).

<sup>790</sup> Panel Reports, paras. 7.600-7.614.

<sup>791</sup> Panel Reports, paras. 7.810-7.820.

<sup>792</sup> Panel Reports, paras. 7.936-7.944.

<sup>793</sup> US Panel Report, para. 8.2.c; EU Panel Report, para. 8.7.c; Japan Panel Report, para. 8.12.c.

<sup>794</sup> Panel Reports, paras. 7.609, 7.816, and 7.940.

<sup>795</sup> Panel Reports, paras. 7.679 (rare earths); 7.844 (tungsten); and 7.969 (molybdenum).

<sup>796</sup> US Panel Report, para. 8.2.c; EU Panel Report, para. 8.7.c; Japan Panel Report, para. 8.12.c. See also Panel Reports, paras. 7.614 and 7.680 (rare earths); 7.820 and 7.845 (tungsten); and 7.944 and 7.970 (molybdenum).

<sup>797</sup> Panel Reports, para. 7.27.

<sup>798</sup> United States' appellant's submission, para. 12.

<sup>799</sup> Although each of the three complainants in the three disputes prepared its written submissions and answers to questions separately, they submitted a single, joint set of exhibits to the Panel numbered from Joint Exhibit JE-1 to JE-197.

5.255. This appeal by the United States is made on a conditional basis. In its Notice of Appeal, the United States indicates that we need not rule on its appeal if either of two scenarios were to arise, that is, if "China were not to appeal the Panel Report" or if "the Appellate Body were not to modify or reverse the legal findings or conclusions of the Panel pursuant to an appeal by China".<sup>800</sup> The first of these scenarios did not arise because China filed an other appeal in DS431 on 13 April 2014.

5.256. We have not, in our above findings, reversed or modified any of the ultimate findings and conclusions made by the Panel. Indeed, with respect to the "Conclusions and Recommendations" set out by the Panel in Section 8 of its Reports, China's appeal related to only one legal conclusion – that "China has not demonstrated that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum are justified pursuant to subparagraph (g) of Article XX of the GATT 1994" – and we have upheld that conclusion.<sup>801</sup>

5.257. At the same time, the United States also clarified, in response to questioning at the oral hearing, that the second condition on which its appeal is premised does not relate solely to the Panel's ultimate findings and conclusions, expressed in Section 8 of its Reports, but also to "intermediate findings" made by the Panel. We recall, in this regard, that although we have not, in our reasoning above, reversed any intermediate findings of the Panel, we have, in considering the Panel's interpretation of the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994, identified certain erroneous statements made by the Panel in the course of its interpretation and application of "made effective in conjunction with", and expressed the view that the Panel erred to the extent that such statements could be read as suggesting that Article XX(g) imposes a requirement of even-handedness that is separate and additional to the conditions expressly prescribed in that provision, or as suggesting that Article XX(g) requires an assessment of whether the burden of conservation is evenly distributed. We found, however, that, notwithstanding such erroneous statements, the Panel did not commit reversible legal error in its analysis and findings with respect to the "made effective in conjunction with" requirement. Moreover, several other elements of the Panel's Article XX(g) analysis are in any event not appealed. Therefore, we have not identified any legal findings or conclusions of the Panel that must be reversed or modified.

5.258. In these circumstances, we consider that one of the conditions on which the United States' appeal is made is not satisfied. Accordingly, we do not rule on whether the Panel erred and acted inconsistently with Articles 11 and/or 12.4 of the DSU in excluding Panel Exhibits JE-188 through JE-197.

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<sup>800</sup> As explained in section 1.3.2 above, China challenged the United States' Notice of Appeal and requested us to issue a preliminary ruling rejecting the United States' Notice of Appeal due to its "conditional" nature. We rejected China's request in our Procedural Ruling of 13 April 2014, attached as Annex 4 to these Reports.

<sup>801</sup> See paragraph 5.252 of these Reports; and US Panel Report, para. 8.2.c; EU Panel Report, para. 8.7.c; and Japan Panel Report, para. 8.12.c.

## 6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT IN DS431

6.1. In the appeal of the Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS431/R) (US Panel Report), for the reasons set out in section 5.1 of this Report, with respect to the relationship between specific provisions of China's Accession Protocol, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other hand, the Appellate Body:

- a. rejects China's interpretation of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement as making each specific provision of China's Accession Protocol an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements to which such provision intrinsically relates;
- b. finds that the Panel did not err in stating that "the legal effect of the second sentence of Paragraph 1.2" of China's Accession Protocol is *not* that "the individual provisions thereof are ... integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement"<sup>802</sup>;
- c. finds it unnecessary to opine on the scope of the term "WTO Agreement" in the second sentence of Paragraph 1.2 of China's Accession Protocol; and
- d. finds that questions concerning the specific relationship between an individual provision in China's Accession Protocol and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, including whether exceptions under those agreements may apply to a breach of the Protocol provision, must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute. The analysis must start with the text of the relevant provision in China's Accession Protocol and take into account its context, including that provided by the Protocol itself and by relevant provisions of the Accession Working Party Report, and by the agreements within the WTO legal framework. The analysis must also take into account the overall architecture of the WTO system as a single package and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.

6.2. For the reasons set out in section 5.2 above, with respect to Article XX(g) of the GATT 1994, the Appellate Body:

- a. regarding the Panel's finding that China's export quotas on rare earths and tungsten are not measures "relating to" conservation and, in particular, its reasoning regarding the signals sent by those export quotas to foreign and domestic consumers:
  - i. finds that the Panel did not interpret Article XX(g) as requiring it to limit its analysis to an examination of the design and structure of the measures at issue and did not, either in its interpretation or in its application of Article XX(g), consider itself precluded from taking account of evidence of the effects of China's export quotas and other elements of China's conservation regime in the marketplace; and
  - ii. finds that the Panel did not fail to comply with its duty, under Article 11 of the DSU, to make an objective assessment of the matter;
- b. regarding the Panel's finding that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with restrictions on domestic production or consumption" and, in particular, its reasoning regarding the "even-handedness" requirement:
  - i. finds that the Panel did not interpret Article XX(g) as requiring it to limit its analysis to an examination of the design and structure of the measures at issue and did not, either in its interpretation or in its application of Article XX(g), consider itself

<sup>802</sup> Panel Reports, para. 7.93. See also *ibid.*, paras. 7.80 and 7.89.

precluded from taking account of evidence of the effects of China's export quotas in the marketplace;

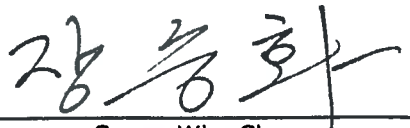
- ii. finds that the Panel erred, to the extent that it interpreted Article XX(g) as imposing a separate requirement of "even-handedness" that must be fulfilled in addition to the conditions expressly specified in subparagraph (g), and to the extent that it interpreted Article XX(g) as requiring Members seeking to invoke Article XX(g) to prove that the burden of conservation is evenly distributed, for example between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand, but also finds that these errors do not taint the Panel's interpretation of the phrase "made effective in conjunction with";
  - iii. finds that, despite certain flaws in its interpretation of Article XX(g), the Panel did not commit legal error in its application of Article XX(g) to the export quotas, because the Panel did not, in reaching its findings, engage in an assessment of whether the burden of conservation is evenly distributed between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand<sup>803</sup>; and
  - iv. finds that the Panel did not fail to comply with its duty, under Article 11 of the DSU, to make an objective assessment of the matter; and
- c. taking account of the above, together with the Panel's findings, which China has not appealed, *inter alia*, that China does not impose restrictions on the domestic production or consumption of rare earths, tungsten, and molybdenum, and that China did not establish that its 2012 export quotas on rare earths, tungsten, and molybdenum were applied in a manner consistent with the chapeau of Article XX:
- i. upholds the Panel's finding, in paragraph 8.2.c of the US Panel Report, that China has not demonstrated that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue<sup>804</sup> are justified pursuant to subparagraph (g) of Article XX of the GATT 1994.<sup>805</sup>

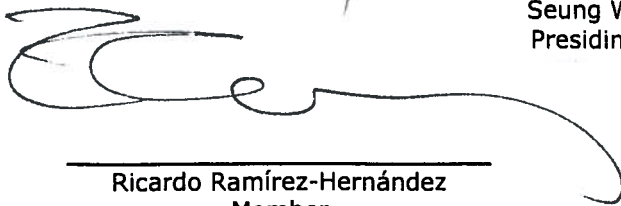
6.3. For the reasons set out in section 5.3 above, with respect to the Panel's decision to exclude Exhibits JE-188 through JE-197, the Appellate Body:

- a. does not rule on whether the Panel erred and acted inconsistently with Article 11 and/or Article 12.4 of the DSU in excluding Exhibits JE-188 through JE-197.

6.4. The Appellate Body recommends that the DSB request China to bring its measures, found in the US Panel Report, as upheld by this Report, to be inconsistent with China's Accession Protocol, China's Accession Working Party Report, and the GATT 1994 into conformity with its obligations thereunder.

Signed in the original in Geneva this 14th day of July 2014 by:

  
Seung Wha Chang  
Presiding Member

  
Ricardo Ramírez-Hernández  
Member

  
Yuejiao Zhang  
Member

<sup>803</sup> Panel Reports, paras. 7.614, 7.820, and 7.944.

<sup>804</sup> See paragraph 4.4 of these Reports.

<sup>805</sup> See also Panel Reports, paras. 7.614 and 7.680 (rare earths); 7.820 and 7.845 (tungsten); and 7.944 and 7.970 (molybdenum).

## 6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT IN DS432

6.1. In the appeal of the Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS432/R) (EU Panel Report), for the reasons set out in section 5.1 of this Report, with respect to the relationship between specific provisions of China's Accession Protocol, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other hand, the Appellate Body:

- a. rejects China's interpretation of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement as making each specific provision of China's Accession Protocol an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements to which such provision intrinsically relates;
- b. finds that the Panel did not err in stating that "the legal effect of the second sentence of Paragraph 1.2" of China's Accession Protocol is *not* that "the individual provisions thereof are ... integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement"<sup>802</sup>;
- c. finds it unnecessary to opine on the scope of the term "WTO Agreement" in the second sentence of Paragraph 1.2 of China's Accession Protocol; and
- d. finds that questions concerning the specific relationship between an individual provision in China's Accession Protocol and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, including whether exceptions under those agreements may apply to a breach of the Protocol provision, must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute. The analysis must start with the text of the relevant provision in China's Accession Protocol and take into account its context, including that provided by the Protocol itself and by relevant provisions of the Accession Working Party Report, and by the agreements within the WTO legal framework. The analysis must also take into account the overall architecture of the WTO system as a single package and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.

6.2. For the reasons set out in section 5.2 above, with respect to Article XX(g) of the GATT 1994, the Appellate Body:

- a. regarding the Panel's finding that China's export quotas on rare earths and tungsten are not measures "relating to" conservation and, in particular, its reasoning regarding the signals sent by those export quotas to foreign and domestic consumers:
  - i. finds that the Panel did not interpret Article XX(g) as requiring it to limit its analysis to an examination of the design and structure of the measures at issue and did not, either in its interpretation or in its application of Article XX(g), consider itself precluded from taking account of evidence of the effects of China's export quotas and other elements of China's conservation regime in the marketplace; and
  - ii. finds that the Panel did not fail to comply with its duty, under Article 11 of the DSU, to make an objective assessment of the matter;
- b. regarding the Panel's finding that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with restrictions on domestic production or consumption" and, in particular, its reasoning regarding the "even-handedness" requirement:
  - i. finds that the Panel did not interpret Article XX(g) as requiring it to limit its analysis to an examination of the design and structure of the measures at issue and did not, either in its interpretation or in its application of Article XX(g), consider itself


<sup>802</sup> Panel Reports, para. 7.93. See also *ibid.*, paras. 7.80 and 7.89.

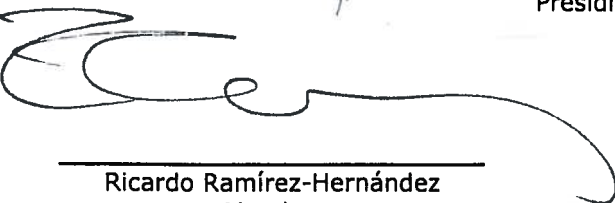
precluded from taking account of evidence of the effects of China's export quotas in the marketplace;

- ii. finds that the Panel erred, to the extent that it interpreted Article XX(g) as imposing a separate requirement of "even-handedness" that must be fulfilled in addition to the conditions expressly specified in subparagraph (g), and to the extent that it interpreted Article XX(g) as requiring Members seeking to invoke Article XX(g) to prove that the burden of conservation is evenly distributed, for example between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand, but also finds that these errors do not taint the Panel's interpretation of the phrase "made effective in conjunction with";
  - iii. finds that, despite certain flaws in its interpretation of Article XX(g), the Panel did not commit legal error in its application of Article XX(g) to the export quotas, because the Panel did not, in reaching its findings, engage in an assessment of whether the burden of conservation is evenly distributed between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand<sup>803</sup>; and
  - iv. finds that the Panel did not fail to comply with its duty, under Article 11 of the DSU, to make an objective assessment of the matter; and
- c. taking account of the above, together with the Panel's findings, which China has not appealed, *inter alia*, that China does not impose restrictions on the domestic production or consumption of rare earths, tungsten, and molybdenum, and that China did not establish that its 2012 export quotas on rare earths, tungsten, and molybdenum were applied in a manner consistent with the chapeau of Article XX:
- i. upholds the Panel's finding, in paragraph 8.7.c of the EU Panel Report, that China has not demonstrated that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue<sup>804</sup> are justified pursuant to subparagraph (g) of Article XX of the GATT 1994.<sup>805</sup>

6.3. The Appellate Body recommends that the DSB request China to bring its measures, found in the EU Panel Report, as upheld by this Report, to be inconsistent with China's Accession Protocol, China's Accession Working Party Report, and the GATT 1994 into conformity with its obligations thereunder.

Signed in the original in Geneva this 14th day of July 2014 by:

  
Seung Wha Chang  
Presiding Member

  
Ricardo Ramírez-Hernández  
Member

  
Yuejiao Zhang  
Member

<sup>803</sup> Panel Reports, paras. 7.614, 7.820, and 7.944.

<sup>804</sup> See paragraph 4.4 of these Reports.

<sup>805</sup> See also Panel Reports, paras. 7.614 and 7.680 (rare earths); 7.820 and 7.845 (tungsten); and 7.944 and 7.970 (molybdenum).



## 6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT IN DS433

6.1. In the appeal of the Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS433/R) (Japan Panel Report), for the reasons set out in section 5.1 of this Report, with respect to the relationship between specific provisions of China's Accession Protocol, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other hand, the Appellate Body:

- a. rejects China's interpretation of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement as making each specific provision of China's Accession Protocol an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements to which such provision intrinsically relates;
- b. finds that the Panel did not err in stating that "the legal effect of the second sentence of Paragraph 1.2" of China's Accession Protocol is *not* that "the individual provisions thereof are ... integral parts of Multilateral Trade Agreements annexed to the Marrakesh Agreement"<sup>802</sup>;
- c. finds it unnecessary to opine on the scope of the term "WTO Agreement" in the second sentence of Paragraph 1.2 of China's Accession Protocol; and
- d. finds that questions concerning the specific relationship between an individual provision in China's Accession Protocol and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, including whether exceptions under those agreements may apply to a breach of the Protocol provision, must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and the circumstances of the dispute. The analysis must start with the text of the relevant provision in China's Accession Protocol and take into account its context, including that provided by the Protocol itself and by relevant provisions of the Accession Working Party Report, and by the agreements within the WTO legal framework. The analysis must also take into account the overall architecture of the WTO system as a single package and any other relevant interpretative elements, and must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation.

6.2. For the reasons set out in section 5.2 above, with respect to Article XX(g) of the GATT 1994, the Appellate Body:

- a. regarding the Panel's finding that China's export quotas on rare earths and tungsten are not measures "relating to" conservation and, in particular, its reasoning regarding the signals sent by those export quotas to foreign and domestic consumers:
  - i. finds that the Panel did not interpret Article XX(g) as requiring it to limit its analysis to an examination of the design and structure of the measures at issue and did not, either in its interpretation or in its application of Article XX(g), consider itself precluded from taking account of evidence of the effects of China's export quotas and other elements of China's conservation regime in the marketplace; and
  - ii. finds that the Panel did not fail to comply with its duty, under Article 11 of the DSU, to make an objective assessment of the matter;
- b. regarding the Panel's finding that China's export quotas on rare earths, tungsten, and molybdenum are not "made effective in conjunction with restrictions on domestic production or consumption" and, in particular, its reasoning regarding "the even-handedness requirement":
  - i. finds that the Panel did not interpret Article XX(g) as requiring it to limit its analysis to an examination of the design and structure of the measures at issue and did not, either in its interpretation or in its application of Article XX(g), consider itself

<sup>802</sup> Panel Reports, para. 7.93. See also *ibid.*, paras. 7.80 and 7.89.

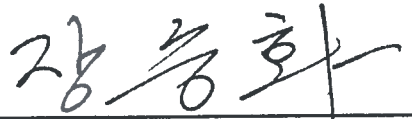


precluded from taking account of evidence of the effects of China's export quotas in the marketplace;

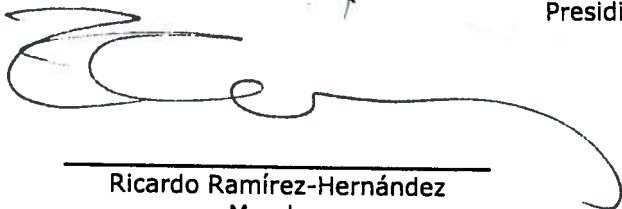
- ii. finds that the Panel erred, to the extent that it interpreted Article XX(g) as imposing a separate requirement of "even-handedness" that must be fulfilled in addition to the conditions expressly specified in subparagraph (g), and to the extent that it interpreted Article XX(g) as requiring Members seeking to invoke Article XX(g) to prove that the burden of conservation is evenly distributed, for example between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand, but also finds that these errors do not taint the Panel's interpretation of the phrase "made effective in conjunction with";
  - iii. finds that, despite certain flaws in its interpretation of Article XX(g), the Panel did not commit legal error in its application of Article XX(g) to the export quotas, because the Panel did not, in reaching its findings, engage in an assessment of whether the burden of conservation is evenly distributed between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand<sup>803</sup>; and
  - iv. finds that the Panel did not fail to comply with its duty, under Article 11 of the DSU, to make an objective assessment of the matter; and
- c. taking account of the above, together with the Panel's findings, which China has not appealed, *inter alia*, that China does not impose restrictions on the domestic production or consumption of rare earths, tungsten, and molybdenum, and that China did not establish that its 2012 export quotas on rare earths, tungsten, and molybdenum were applied in a manner consistent with the chapeau of Article XX:
- i. upholds the Panel's finding, in paragraph 8.12.c of the Japan Panel Report, that China has not demonstrated that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue<sup>804</sup> are justified pursuant to subparagraph (g) of Article XX of the GATT 1994.<sup>805</sup>

6.3. The Appellate Body recommends that the DSB request China to bring its measures, found in the Japan Panel Report, as upheld by this Report, to be inconsistent with China's Accession Protocol, China's Accession Working Party Report, and the GATT 1994 into conformity with its obligations thereunder.

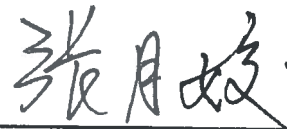
Signed in the original in Geneva this 14th day of July 2014 by:



Seung Wha Chang  
Presiding Member



Ricardo Ramírez-Hernández  
Member



Yuejiao Zhang  
Member

<sup>803</sup> Panel Reports, paras. 7.614, 7.820, and 7.944.

<sup>804</sup> See paragraph 4.4 of these Reports.

<sup>805</sup> See also Panel Reports, paras. 7.614 and 7.680 (rare earths); 7.820 and 7.845 (tungsten); and 7.944 and 7.970 (molybdenum).

## ANNEX 1



WORLD TRADE  
ORGANIZATION

WT/DS431/9

11 April 2014

(14-2276)

Page: 1/1

Original: English

**CHINA – MEASURES RELATED TO THE EXPORTATION OF  
RARE EARTHS, TUNGSTEN, AND MOLYBDENUM**

**NOTIFICATION OF AN APPEAL BY THE UNITED STATES  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 8 April 2014, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (WT/DS431/R) and certain legal interpretations developed by the Panel in this dispute. If China were not to appeal the Panel Report, or if the Appellate Body were not to modify or reverse the legal findings or conclusions of the Panel pursuant to an appeal by China, then the Appellate Body would not need to reach the following issues.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that it should reject exhibits submitted by the complainants with their comments on China's responses to the Panel's questions after the second meeting pursuant to Article 3.3 of the DSU and paragraph 7 of the Panel's Working Procedures.<sup>1</sup> This finding is in error and is based on erroneous findings on issues of law and legal interpretations, including, for example: the Panel's conclusion that acceptance of such evidence would have presented "due process" concerns for China;<sup>2</sup> the Panel's conclusion that "the submission of new expert reports" would have interfered with the prompt settlement of the dispute;<sup>3</sup> and the Panel's conclusion that to be accepted as rebuttal evidence an exhibit must "rise to the required level of necessity."<sup>4</sup> In reaching these conclusions, the Panel erroneously applied DSU Article 3.3 and failed to provide sufficient time to the United States to prepare its submissions pursuant to DSU Article 12.4.

2. The United States also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts by excluding exhibits submitted by the complainants with their comments on China's responses to the Panel's questions after the second meeting; by finding that "the evidence [in question] could and should have been submitted at an earlier date;"<sup>5</sup> and by finding that the evidence in question does not rebut arguments made by China at the second meeting of the Panel.<sup>6</sup>

<sup>1</sup> See Panel Report, paras. 7.11-7.28.

<sup>2</sup> *Id.*, para. 7.23.

<sup>3</sup> *Id.*, para. 7.24.

<sup>4</sup> *Id.*, para. 7.25.

<sup>5</sup> *Id.*, para. 7.21.

<sup>6</sup> *Id.*, para. 7.22.

## ANNEX 2



WORLD TRADE  
ORGANIZATION

WT/DS431/10

24 April 2014

(14-2489)

Page: 1/3

Original: English

**CHINA – MEASURES RELATED TO THE EXPORTATION OF  
RARE EARTHS, TUNGSTEN, AND MOLYBDENUM**

**NOTIFICATION OF AN OTHER APPEAL BY CHINA  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 17 April 2014, from the Delegation of the People's Republic of China, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and 23 of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010) ("*Working Procedures*"), the People's Republic of China ("China") hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS431) ("Panel Report").

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**I. APPEAL OF THE PANEL'S INTERPRETATION OF ARTICLE XII:1 OF THE *MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION*, READ IN CONJUNCTION WITH PARAGRAPH 1.2, SECOND SENTENCE, OF CHINA'S *ACCESSION PROTOCOL***

2. China seeks review by the Appellate Body of the Panel's interpretation of Article XII:1 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*Marrakesh Agreement*"), read in conjunction with the second sentence of Paragraph 1.2 of China's *Accession Protocol*.<sup>1</sup>

3. The Panel's interpretation is in error, *inter alia*, because:

- the Panel failed to give effective meaning to the second sentence of Article XII:1 which does not merely prescribe that newly acceding Members may not pick and choose among the various covered agreements but have to accept the WTO legal framework as a single undertaking;
- the Panel failed properly to read Article XII:1 of the *Marrakesh Agreement* together with the second sentence of Paragraph 1.2 of China's *Accession Protocol*;

<sup>1</sup> The relevant analysis by the Panel is contained in paras. 7.73-7.93 of the Panel Report.

- the Panel erred in interpreting the terms contained in the second sentence of Paragraph 1.2 of China's *Accession Protocol*;
- the Panel unduly found that the words "shall be an integral part of the WTO Agreement" in the second sentence of Paragraph 1.2 of China's *Accession Protocol* leads to the conclusion that China's *Accession Protocol* is thereby made an integral part of the *Marrakesh Agreement* excluding the multilateral trade agreements annexed thereto.

4. Accordingly, China requests that the Appellate Body reverse the Panel's findings in paragraphs 7.80, 7.89 and 7.93 of the Panel Report in this regard.

## **II. APPEAL OF THE PANEL'S FINDINGS THAT CHINA'S EXPORT QUOTAS ON RARE EARTHS AND TUNGSTEN DO NOT "RELAT[E]" TO CONSERVATION UNDER ARTICLE XX(G) OF THE GATT 1994**

5. China seeks review by the Appellate Body of the Panel's findings and conclusions that export quotas for rare earths and tungsten do not "relat[e]" to conservation within the meaning of subparagraph (g) to Article XX of the GATT 1994 because they send a perverse signal to domestic users.<sup>2</sup>

6. The Panel's findings are based on errors in the interpretation and application of the "relating to" element of subparagraph(g) of Article XX, *inter alia*, because the Panel:

- focused on the design structure and architecture of China's export quotas to the exclusion of evidence regarding the operation of the export quotas together with other elements of China's comprehensive conservation policy, in circumstances where China submitted substantial evidence on the operation of the conservation programme in the marketplace; and
- required China to show that there is no risk that perverse signals to domestic users might offset the positive effect of conservation signals to foreign users.

7. In addition, China submits that the Panel acted inconsistently with Article 11 of the DSU in relation to these issues by failing to make an objective assessment of the matter, including an objective assessment of the facts relating to the existence of "perverse signals" and through providing incoherent reasoning.

8. Accordingly, China requests the Appellate Body to reverse the Panel's interpretation in paragraphs 7.279-7.293 to the extent that this interpretation required the Panel to examine solely the structure and design of China's export quotas, as well as the Panel's failure to apply the proper legal standard and make an objective assessment in paragraphs 7.444, 7.446-7.448, 7.541-7.542, 7.604, 7.725 and 7.731 of the Panel Report.

9. To the extent that these errors taint the Panel's conclusions, in paragraphs 7.600-7.614, 7.810-7.820, 8.2(c), 8.7(c) and 8.12(c) of the Panel Report, that China's export quotas on rare earths and tungsten cannot be provisionally justified under subparagraph (g) of Article XX of the GATT 1994, China requests the Appellate Body also to reverse these findings of the Panel.

## **III. APPEAL OF THE PANEL'S FINDINGS THAT THE CHINA'S EXPORT QUOTAS ON RARE EARTHS, TUNGSTEN AND MOLYBDENUM ARE NOT "MADE EFFECTIVE IN CONJUNCTION WITH" DOMESTIC RESTRICTIONS UNDER ARTICLE XX(G) OF THE GATT 1994**

10. China seeks review by the Appellate Body of the Panel's findings and conclusions that China's export quotas on rare earths, tungsten and molybdenum are not "made effective in

<sup>2</sup> The relevant Panel findings are contained, *inter alia*, in paras. 7.279-7.293, 7.444, 7.446-7.448, 7.541-7.542, 7.604, 7.725, 7.731. The relevant Panel conclusions are contained, *inter alia*, in Panel Report, paras. 7.600-7.614, 7.810-7.820, 8.2(c), 8.7(c) and 8.12(c).

conjunction with" domestic restrictions within the meaning of subparagraph (g) of Article XX of the GATT 1994.<sup>3</sup>

11. The Panel's findings are based on errors in the interpretation and application of the "made effective in conjunction with" domestic restrictions element of subparagraph (g) of Article XX because the Panel erroneously interpreted and applied the term "made effective in conjunction with" domestic restrictions to mean that the Panel was:

- required to engage in a separate and distinct enquiry to determine whether, and find that, China "distributes the burden of conservation-related measures between domestic and foreign consumers in a balanced way";<sup>4</sup> "counterbalance[ed]"<sup>5</sup> the restrictions on domestic and foreign users; or achieved "substantive complementarity"<sup>6</sup> between foreign and domestic restrictions; and
- confined to assessing the "objective structure, design and architecture"<sup>7</sup> of China's regulatory system of conservation measures and it was precluded from having regard to "the actual effects which a regulatory system has in the market place",<sup>8</sup> in circumstances where China submitted substantial evidence on the operation of the conservation programme in the marketplace.

12. In addition, China submits that the Panel acted inconsistently with Article 11 of the DSU in relation to these issues by failing to make an objective assessment of the matter, including an objective assessment of the facts, through its lack of objectivity in the treatment of evidence it considered relevant; through its inconsistent reasoning in finding that none of the domestic measures advanced by China amounts to a "domestic restriction"; and by relying on inconsistent reasoning as well as a double standard of proof in comparing the relative burden of China's restrictions on foreign and domestic users.

13. Accordingly, China requests that the Appellate Body reverse the Panel's interpretation in paragraphs 7.301 and 7.314-7.337 with respect to the Panel's additional enquiry regarding the relative burdens borne by domestic and foreign interests under relevant conservation measures, as well as the Panel's failure to apply the proper legal standard and make an objective assessment in paragraphs 7.568-7.599, 7.792-7.809, and 7.919-7.935 of the Panel Report.

14. To the extent that these errors taint the Panel's conclusions, in paragraphs 7.600-7.614, 7.810-7.820, 7.936-7.944, 8.2(c), 8.7(c) and 8.12(c) of the Panel Report, that China's export quotas on rare earths, tungsten and molybdenum cannot be provisionally justified under subparagraph (g) of Article XX of the GATT 1994, China requests the Appellate Body also to reverse these findings of the Panel.

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<sup>3</sup> The relevant Panel findings are contained, *inter alia*, in Panel Report, paras. 7.301, 7.314-7.337, 7.568-7.599, 7.792-7.809, and 7.919-7.935. The relevant Panel conclusions are contained in Panel Report, paras. 7.600-7.614, 7.810-7.820, 7.936-7.944, 8.2(c), 8.7(c) and 8.12(c).

<sup>4</sup> Panel Report, para. 7.332.

<sup>5</sup> See, e.g., Panel Report, para. 7.595.

<sup>6</sup> Panel Report, para. 7.301.

<sup>7</sup> Panel Report, para. 7.332.

<sup>8</sup> Panel Report, para. 7.332.

## ANNEX 3



WORLD TRADE  
ORGANIZATION

WT/DS432/9  
WT/DS433/9

30 April 2014

(14-2646)

Page: 1/3

Original: English

**CHINA – MEASURES RELATED TO THE EXPORTATION OF  
RARE EARTHS, TUNGSTEN, AND MOLYBDENUM**

**NOTIFICATION OF AN APPEAL BY CHINA  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 25 April 2014, from the Delegation of the People's Republic of China, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010) ("*Working Procedures*"), the People's Republic of China ("China") hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Reports in *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS432, WT/DS433) ("Panel Reports").

**I. APPEAL OF THE PANEL'S INTERPRETATION OF ARTICLE XII:1 OF THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, READ IN CONJUNCTION WITH PARAGRAPH 1.2, SECOND SENTENCE, OF CHINA'S ACCESSION PROTOCOL**

2. China seeks review by the Appellate Body of the Panel's interpretation of Article XII:1 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*Marrakesh Agreement*"), read in conjunction with the second sentence of Paragraph 1.2 of China's *Accession Protocol*.<sup>1</sup>

3. The Panel's interpretation is in error, *inter alia*, because:

- the Panel failed to give effective meaning to the second sentence of Article XII:1 which does not merely prescribe that newly acceding Members may not pick and choose among the various covered agreements but have to accept the WTO legal framework as a single undertaking;
- the Panel failed properly to read Article XII:1 of the *Marrakesh Agreement* together with the second sentence of Paragraph 1.2 of China's *Accession Protocol*;
- the Panel erred in interpreting the terms contained in the second sentence of Paragraph 1.2 of China's *Accession Protocol*;

<sup>1</sup> The relevant analysis by the Panel is contained in paras. 7.73-7.93 of the Panel Reports.

- the Panel unduly found that the words "shall be an integral part of the WTO Agreement" in the second sentence of Paragraph 1.2 of China's *Accession Protocol* leads to the conclusion that China's *Accession Protocol* is thereby made an integral part of the *Marrakesh Agreement* excluding the multilateral trade agreements annexed thereto.

4. Accordingly, China requests that the Appellate Body reverse the Panel's findings in paragraphs 7.80, 7.89 and 7.93 of the Panel Reports in this regard.

## **II. APPEAL OF THE PANEL'S FINDINGS THAT CHINA'S EXPORT QUOTAS ON RARE EARTHS AND TUNGSTEN DO NOT "RELAT[E] TO" CONSERVATION UNDER ARTICLE XX(G) OF THE GATT 1994**

5. China seeks review by the Appellate Body of the Panel's findings and conclusions that export quotas for rare earths and tungsten do not "relat[e]" to conservation within the meaning of subparagraph (g) to Article XX of the GATT 1994 because they send a perverse signal to domestic users.<sup>2</sup>

6. The Panel's findings are based on errors in the interpretation and application of the "relating to" element of subparagraph(g) of Article XX, *inter alia*, because the Panel:

- focused on the design structure and architecture of China's export quotas to the exclusion of evidence regarding the operation of the export quotas together with other elements of China's comprehensive conservation policy, in circumstances where China submitted substantial evidence on the operation of the conservation programme in the marketplace; and
- required China to show that there is no risk that perverse signals to domestic users might offset the positive effect of conservation signals to foreign users.

7. In addition, China submits that the Panel acted inconsistently with Article 11 of the DSU in relation to these issues by failing to make an objective assessment of the matter, including an objective assessment of the facts relating to the existence of "perverse signals" and through providing incoherent reasoning.

8. Accordingly, China requests the Appellate Body to reverse the Panel's interpretation in paragraphs 7.279-7.293 to the extent that this interpretation required the Panel to examine solely the structure and design of China's export quotas, as well as the Panel's failure to apply the proper legal standard and make an objective assessment in paragraphs 7.444, 7.446-7.448, 7.541-7.542, 7.604, 7.725 and 7.731 of the Panel Reports.

9. To the extent that these errors taint the Panel's conclusions, in paragraphs 7.600-7.614, 7.810-7.820, 8.2(c), 8.7(c) and 8.12(c) of the Panel Reports, that China's export quotas on rare earths and tungsten cannot be provisionally justified under subparagraph (g) of Article XX of the GATT 1994, China requests the Appellate Body also to reverse these findings of the Panel.

## **III. APPEAL OF THE PANEL'S FINDINGS THAT CHINA'S EXPORT QUOTAS ON RARE EARTHS, TUNGSTEN AND MOLYBDENUM ARE NOT "MADE EFFECTIVE IN CONJUNCTION WITH" DOMESTIC RESTRICTIONS UNDER ARTICLE XX(G) OF THE GATT 1994**

10. China seeks review by the Appellate Body of the Panel's findings and conclusions that China's export quotas on rare earths, tungsten and molybdenum are not "made effective in conjunction with" domestic restrictions within the meaning of subparagraph (g) of Article XX of the GATT 1994.<sup>3</sup>

<sup>2</sup> The relevant Panel findings are contained, *inter alia*, in Panel Reports, paras. 7.279-7.293, 7.444, 7.446-7.448, 7.541-7.542, 7.604, 7.725, 7.731. The relevant Panel conclusions are contained, *inter alia*, in Panel Reports, paras. 7.600-7.614, 7.810-7.820, 8.2(c), 8.7(c) and 8.12(c).

<sup>3</sup> The relevant Panel findings are contained, *inter alia*, in Panel Reports, paras. 7.301, 7.314-7.337, 7.568 -7.599, 7.792-7.809, and 7.919-7.935. The relevant Panel conclusions are contained in Panel Reports, paras. 7.600-7.614, 7.810-7.820, 7.936-7.944, 8.2(c), 8.7(c) and 8.12(c).



11. The Panel's findings are based on errors in the interpretation and application of the "made effective in conjunction with" domestic restrictions element of subparagraph (g) of Article XX because the Panel erroneously interpreted and applied the term "made effective in conjunction with" domestic restrictions to mean that the Panel was:

- required to engage in a separate and distinct enquiry to determine whether, and find that, China "distributes the burden of conservation-related measures between domestic and foreign consumers in a balanced way";<sup>4</sup> "counterbalance[ed]"<sup>5</sup> the restrictions on domestic and foreign users; or achieved "substantive complementarity"<sup>6</sup> between foreign and domestic restrictions; and
- confined to assessing the "objective structure, design and architecture"<sup>7</sup> of China's regulatory system of conservation measures and it was precluded from having regard to "the actual effects which a regulatory system has in the market place",<sup>8</sup> in circumstances where China submitted substantial evidence on the operation of the conservation programme in the marketplace.

12. In addition, China submits that the Panel acted inconsistently with Article 11 of the DSU in relation to these issues by failing to make an objective assessment of the matter, including an objective assessment of the facts, through its lack of objectivity in the treatment of evidence it considered relevant; through its inconsistent reasoning in finding that none of the domestic measures advanced by China amounts to a "domestic restriction"; and by relying on inconsistent reasoning as well as a double standard of proof in comparing the relative burden of China's restrictions on foreign and domestic users.

13. Accordingly, China requests that the Appellate Body reverse the Panel's interpretation in paragraphs 7.301 and 7.314-7.337 with respect to the Panel's additional enquiry regarding the relative burdens borne by domestic and foreign interests under relevant conservation measures, as well as the Panel's failure to apply the proper legal standard and make an objective assessment in paragraphs 7.568-7.599, 7.792-7.809, and 7.919-7.935 of the Panel Reports.

14. To the extent that these errors taint the Panel's conclusions, in paragraphs 7.600-7.614, 7.810-7.820, 7.936-7.944, 8.2(c), 8.7(c) and 8.12(c) of the Panel Reports, that China's export quotas on rare earths, tungsten and molybdenum cannot be provisionally justified under subparagraph (g) of Article XX of the GATT 1994, China requests the Appellate Body also to reverse these findings of the Panel.

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<sup>4</sup> Panel Reports, para. 7.332.

<sup>5</sup> See, e.g., Panel Reports, para. 7.595.

<sup>6</sup> Panel Reports, para. 7.301.

<sup>7</sup> Panel Reports, para. 7.332.

<sup>8</sup> Panel Reports, para. 7.332.

**ANNEX 4****ORGANISATION MONDIALE  
DU COMMERCE****ORGANIZACIÓN MUNDIAL  
DEL COMERCIO****WORLD TRADE ORGANIZATION****APPELLATE BODY***China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*

AB-2014-3

**Procedural Ruling****1 BACKGROUND**

1.1. On Tuesday, 8 April 2014, the United States notified the Dispute Settlement Body and filed a Notice of Appeal with the Appellate Body Secretariat with respect to the Panel Report in *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS431/R). In its Notice of Appeal, the United States challenges the Panel's decision to dismiss certain exhibits submitted by the United States, arguing that the Panel erroneously applied Articles 3.3 and 12.4 of the DSU, and acted inconsistently with Article 11 of the DSU. The United States further states that the Appellate Body would not need to reach the issues raised on appeal in one of two scenarios: (i) if China were not to appeal the Panel Report; or (ii) if the Appellate Body were not to modify or reverse the legal findings or conclusions of the Panel pursuant to an appeal by China.

1.2. By letter of 9 April 2014, China requested the Appellate Body to reject the Notice of Appeal on the grounds that, due to its "conditional" nature, the Notice of Appeal does not constitute a proper Notice of Appeal within the meaning of the Working Procedures for Appellate Review (Working Procedures). In the event that the Appellate Body were not to reject the Notice of Appeal, China requested the Appellate Body to extend the time-limits for filing relevant documents pursuant to Rule 16(2) of the Working Procedures.

1.3. By letter of 10 April 2014, the Chair of the Appellate Body invited the participants and third participants to provide their comments on China's requests by noon on 11 April 2014. Australia, Brazil, Canada, Japan, and the United States submitted comments within the deadline. China and the European Union did not submit comments on 11 April. Instead, they referred to their respective letters of 10 April concerning the separate procedural issue of the sequencing of the appeals in this dispute and in *United States – Countervailing and Anti-Dumping Measures on Certain Products from China* (DS449).

1.4. China maintains that the United States' Notice of Appeal is deficient because it is conditional upon China exercising its right to appeal on issues unrelated to those raised by the United States in its Notice of Appeal. In China's view, the documents filed by the United States on 8 April represent merely an attempt to force China to file an appeal of the Panel Report earlier than it had otherwise intended. China emphasizes that allowing the United States to resort to such litigation tactics would lead to serious systemic implications, because it sets a precedent according to which a Member could file a specious appeal, conditional upon the other party's filing of an other appeal, and thereby dictate the timing of the latter. China further submits that the "exceptional circumstances" present in this dispute mean that strict adherence to the regular deadlines would result in "manifest unfairness" within the meaning of Rule 16(2) of the Working Procedures, effectively denying China a proper opportunity to develop its arguments on appeal.

1.5. The United States requests the Appellate Body to deny China's request to reject the United States' Notice of Appeal. The United States disagrees with China's assertion that the United States has made the exercise of its right to appeal conditional upon China exercising its right to appeal. Rather, the United States explains that its appeal is formulated such that the Appellate Body would not be compelled to reach the issues raised in certain circumstances. The United States further requests the Appellate Body to deny China's request to extend the deadlines for filing documents. The United States disagrees with China that the circumstances of this dispute are "exceptional" in the sense of Rule 16(2) of the Working Procedures or that they result in "manifest unfairness" to China.

1.6. Australia notes that Rule 20 of the Working Procedures sets out the requirements for a Notice of Appeal, and the question for the Appellate Body is whether the Notice of Appeal conforms to those requirements. Moreover, it is within the purview of the Appellate Body to extend the time-limits under Rule 16(2) of the Working Procedures. Brazil argues that, apart from the requirements in Article 17.6 of the DSU and Rule 20 of the Working Procedures, there are no limits on the subject matter or the length of an appeal. Brazil argues, however, that the Appellate Body should bear in mind the systemic implications of allowing notices of appeal to shorten the timeframe available to all parties for their submissions. Canada considers that the Appellate Body should treat the United States' appeal as an other appeal that would follow an eventual appeal by China. Moreover, requiring the third participants to file written submissions on 29 April 2014 would result in manifest unfairness, due to the fact that they have had access to the Panel Report for only a few days. The European Union contends that China mischaracterizes the United States' appeal as conditional. The European Union submits, instead, that the United States has filed an unconditional appeal while indicating that such appeal may effectively be withdrawn if a particular condition is satisfied. Japan maintains that the United States has filed its Notice of Appeal and notification to the DSB of its decision to appeal in a manner fully consistent with the relevant provisions of the DSU and the Working Procedures. Moreover, the time-limits decided by the Appellate Body should not prejudice the rights of any party to defend its interests effectively.

## **2 CHINA'S REQUEST TO REJECT THE UNITED STATES' NOTICE OF APPEAL AS IMPROPERLY FILED**

2.1. Rule 20(1) of the Working Procedures provides that "[a]n appeal shall be commenced by notification in writing to the DSB" in accordance with Article 16.4 of the DSU "and simultaneous filing of a Notice of Appeal with the Secretariat". Furthermore, Rule 20(2) specifies the required contents of a Notice of Appeal, namely: the title of the panel report, the name of the party filing the Notice, the service list, and a brief statement of the nature of the appeal, including: (i) identification of the alleged errors in the panel report; (ii) a list of the legal provisions of the covered agreements that the panel is alleged to have erred in interpreting or applying; and (iii) an indicative list of the paragraphs of the panel report containing the alleged errors.

2.2. We note that China has not identified any of the above provisions as the basis for its request that the Appellate Body reject the United States' Notice of Appeal. Indeed, China does not claim that the United States' Notice of Appeal fails to conform to the requirements set out in Rule 20 regarding the form and content of a Notice of Appeal, or is otherwise insufficient to provide proper notice to China concerning the scope of the appeal.

2.3. Our examination of the United States' Notice of Appeal also confirms that the Notice contains all of the required elements listed in Rule 20 of the Working Procedures. On its face, the Notice contains the title of the Panel Report, an indication that it is filed by the United States, and the service list. Moreover, it is clear from the contents of the Notice that the issues subject to the United States' appeal are whether, in dismissing certain exhibits submitted by the United States on 17 July 2013, the Panel: (i) erred in applying Article 3.3 of the DSU, and failed to provide sufficient time to the United States to prepare its submissions pursuant to Article 12.4 of the DSU; and (ii) acted inconsistently with Article 11 of the DSU by failing to conduct an objective assessment of the facts. These issues appear, on their face, to be "issues of law" within the meaning of Article 17.6 of the DSU. Moreover, the United States' Notice of Appeal identifies the relevant provisions of the DSU that the Panel is alleged to have erred in applying, as well as the paragraphs of the Panel Report in which these alleged errors are found.

2.4. It follows that, in our view, the United States' Notice of Appeal conforms to the formal requirements prescribed by Rule 20 of the Working Procedures, and sufficiently sets out a brief

statement of the nature of the United States' appeal. We are further of the view that, on their face, the issues appealed by the United States fall within the scope of appellate review pursuant to Article 17.6 of the DSU. We therefore consider that our jurisdiction to consider the issues raised in the United States' appeal has been validly established.

2.5. In this regard, we note that nothing in Articles 17.6 or 17.13 of the DSU prevents a party from appealing even a favourable finding or conclusion of a panel. A party may choose to exercise its right to appeal even in respect of a favourable ruling in order to challenge, for example, an intermediate finding or a legal interpretation developed by the panel. It may do so even when an alternative legal interpretation developed by the Appellate Body, or the outcome of an appeal raised for systemic reasons, would not change the ultimate conclusion of the panel.

2.6. China maintains, however, that the conditional nature of the United States' Notice of Appeal is a substantial flaw and that, as a result, the Notice of Appeal cannot be considered properly filed under the Working Procedures. We recall that the United States' Notice of Appeal states that:

If China were not to appeal the Panel Report, or if the Appellate Body were not to modify or reverse the legal findings or conclusions of the Panel pursuant to an appeal by China, then the Appellate Body would not need to reach the ... issues [raised on appeal].

2.7. The United States' Notice of Appeal thus identifies two scenarios in which the Appellate Body need *not* reach a finding on the issues raised on appeal. Should one of these two scenarios arise, the Appellate Body may determine that it need not address the issues raised by the United States' appeal further, and need not reach a finding or make a recommendation on such issues. In our view, the possibility that the Appellate Body may find it unnecessary to rule on these issues at a later stage of these appellate proceedings, however, does not undermine either the validity of the United States' Notice of Appeal or the jurisdiction of the Appellate Body over the United States' appeal established by that Notice of Appeal.

2.8. Moreover, at present, the Appellate Body is not in a position to speculate as to whether either of the two scenarios that the United States identifies would materialize. Until either scenario occurs, the prerequisite for the Appellate Body *not* to rule on the issues raised by the United States is not fulfilled. The fact that the Appellate Body might find itself in a situation where it is unnecessary to rule on the issues raised on appeal, alone, does not provide a legal basis for the Appellate Body to reject that appeal at the outset of these appellate proceedings when its jurisdiction to hear the issues appealed has been properly established.

2.9. The Appellate Body has taken a similar approach in the analogous situation of "conditional appeals", whereby a participant requests the Appellate Body to make a certain finding in the event that specific conditions identified by the participant are fulfilled. The Appellate Body has declined to review or to make a finding on issues when the conditions on which the appeals of those issues were predicated were not met.<sup>1</sup> We also consider useful the analogy to those appeals in which certain appealed issues have been withdrawn pursuant to Rule 30(1) of the Working Procedures, thus rendering a ruling by the Appellate Body unnecessary.<sup>2</sup> Indeed, in at least one instance conditional appeals were explicitly withdrawn once it became clear to the party that had raised

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<sup>1</sup> For example, in *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, the Appellate Body declined to rule on Argentina's claim that the measure at issue was inconsistent with Article II:1(b) of the GATT 1994. The claim was conditioned on the Appellate Body reversing the panel's finding that the measure was inconsistent with Article 4.2 of the *Agreement on Agriculture*. The Appellate Body concluded that, because that condition had not been fulfilled, it was not "necessary" to rule on the conditional claim under the first sentence of Article II:1(b). (Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, para. 286)

<sup>2</sup> For example, in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, the European Union withdrew the part of its appeal relating to subsidies contingent upon export approximately one month after having initiated the appeal. (Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, para. 28)

them that the conditions on which they were predicated would not materialize.<sup>3</sup> Importantly, the Appellate Body has never rejected an appeal, or declared that the appeal is not properly filed, simply because the claims of error raised were of a conditional nature. Rather, similar to our approach here, the Appellate Body has considered that it has jurisdiction over claims on appeal that are predicated on certain conditions, notwithstanding that it may subsequently transpire that a ruling on such claims of panel error is not required or requested.

2.10. In sum, we consider that the United States' Notice of Appeal conforms to the requirements of Rule 20 of the Working Procedures. Consequently, our jurisdiction to hear the United States' appeal is validly established. The possibility that we may not need to rule on the issues due to the occurrence of the scenarios identified by the United States does not provide a valid legal basis for us to reject the United States' appeal. However, we are mindful of the systemic implications that China has raised. We will turn to address those implications in the context of our decision regarding China's request to extend time-limits for filing documents.

### 3 CHINA'S REQUEST TO EXTEND TIME-LIMITS FOR FILING DOCUMENTS

3.1. China further requests that the Appellate Body extend pursuant to Rule 16(2) of the Working Procedures the deadlines for filing relevant documents that would otherwise apply under the Working Procedures. China submits that strict adherence to the regular deadlines would result in manifest unfairness and deny China a proper opportunity to develop its arguments on appeal. China alleges that the United States' appeal was an attempt to try to force China to file an appeal of the Panel Report earlier than it had otherwise intended. China is concerned that this may set a precedent whereby a Member could file a specious appeal, conditional upon the other party's filing of an other appeal, and thereby dictate the timing of the appellate proceedings.

3.2. The United States requests the Appellate Body to deny China's request to extend the deadlines for filing documents. The United States disagrees with China that the circumstances of this dispute are "exceptional" in the sense of Rule 16(2) of the Working Procedures or that they would result in "manifest unfairness". The United States argues that neither the limited scope of its appeal nor its timing constitute exceptional circumstances. The United States maintains that Article 17.6 of the DSU does not impose limitations on a party's right to appeal issues of modest scope and that the parties have been aware of the Panel's conclusions for months and that, therefore, China has had sufficient time to prepare its appeal.

3.3. Rule 16 of the Working Procedures provides as follows:

- (1) In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.
- (2) In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.

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<sup>3</sup> In *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, for example, the European Union presented certain conditional appeals that would be triggered by an other appeal of the United States. As the conditions on which these appeals were premised did not arise, the European Union withdrew these conditional appeals pursuant to Rule 30(1) of the Working Procedures. (Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, fn 77 to para. 21)

3.4. In considering China's request we find it useful to begin by observing that, while a party to the dispute has the right to initiate an appeal at any time during the 60-day period stipulated in Article 16.4 of the DSU, in practice, in most disputes, Members have appealed panel reports towards the end of this 60-day period. Presumably they do so in order to maximize the time that they have to consider the panel report, to decide whether to appeal it, and to prepare their appeal. We also observe that, in most cases, one of the parties to the dispute places the adoption of a panel report on the agenda of a DSB meeting that falls within the 60-day period under Article 16.4 of the DSU, and that the date of such DSB meeting thus becomes a *de facto* deadline by which any other party must appeal the panel report. We also note that Article 16.1 of the DSU provides that the panel report shall not be considered for adoption by the DSB until 20 days after the date it has been circulated to Members.

3.5. In this dispute, the Panel circulated a voluminous report on 26 March 2014. In its Report, the Panel found in favour of the United States as the complainant on virtually all claims. Accordingly, China as the respondent appears to have principal cause to appeal. The first regular DSB meeting scheduled after the circulation of the Panel Report will occur on 25 April 2014. Neither of the parties to this dispute placed the adoption of the Panel Report on the agenda of that DSB meeting and, in any event, the United States initiated its appeal before the date on which the agenda closed for the 25 April meeting. The United States launched a limited appeal of the Panel Report 13 days after its circulation, seemingly in reaction to the intention expressed by China to appeal a panel report in a different dispute early in the 60-day period applicable to that other dispute. As we have already stated, the United States has the legal right to initiate an appeal at any time during the 60-day period provided for in Article 16.4 of the DSU. Nevertheless, in the circumstances of this case, the early initiation of an appeal by the United States, which largely prevailed in the claims that it raised before the Panel, may adversely affect the ability of China as the respondent to exercise its right to appeal in a meaningful and effective way. This may be so in this dispute, in particular to the extent that the timing of the appeal was unexpected, because the initiation of the appeal by the United States triggers the five-day deadline under Rule 23(1) of the Working Procedures for China to file a Notice of Other Appeal and an other appellant's submission. Accordingly, in order to participate in the United States' appeal as an other appellant China must, pursuant to Rule 23(1) of the Working Procedures, file its other appeal 18 days after the circulation of the Panel Report. We note that this is a period even shorter than the minimum period of time provided for under Article 16.1 of the DSU before a circulated panel report can be considered for adoption by the DSB.

3.6. In addition, we take into account that the dispute at hand involves a number of complex and systemic issues of WTO law. The Panel Report is voluminous and contains numerous findings in favour of the complainant. Moreover, additional procedural issues stemming from the exceptional situation of a simultaneous filing of two appeals had to be resolved at the beginning of this appeal. The deadline set out in Rule 23(1) and (3) for the filing of a Notice of Other Appeal and an other appellant's submission falls on a date only two and a half weeks after circulation of the Panel Report. This may be too short for China to effectively exercise its rights under the DSU as an other appellant in the United States' appeal. Accordingly, we consider that strict adherence to the time-period set out in Rule 23(1) and (3) would result in manifest unfairness in the particular circumstances of the case at hand.

3.7. With respect to third party rights, it is important to note, as Canada pointed out in its comments of 11 April 2014, that the third parties obtained access to the final report of the Panel only once that Report was circulated to the Membership in all three official languages, that is, on 26 March 2014. In contrast, the Panel Report was issued to the parties several months earlier, once it was completed and sent to translation. The United States' initiation of its appeal also triggers the deadline under Rule 24(1) of the Working Procedures for third participants to file written submissions within 21 days. Within that period, third parties must review all the appellants', other appellants', and appellees' submissions and prepare their own submissions in response to the Panel Report and these other submissions. We consider therefore, in the circumstances of this case, and taking account of the early initiation of the appeal by the United States, that this 21-day period may be insufficient to allow the third parties a meaningful opportunity to comment and sufficient time to finalize their submissions.

3.8. Finally, we take note of our duty, consistent with Rule 16(1) of the Working Procedures, to ensure fairness and orderly procedure in the conduct of appeals. This consideration, among others, contributed to the Appellate Body's decision of 10 April 2014 resolving certain procedural issues

raised by the simultaneous filings of Notices of Appeals in this dispute and in *United States – Countervailing and Anti-Dumping Measures on Certain Products from China* (DS449). In contrast to those two appeals, the panel reports in two other disputes (DS432 and DS433) have *not* been *simultaneously* appealed together with the appeal in the present dispute. Indeed, the panel reports in the latter two disputes have yet to be appealed or adopted. This fact, too, has implications for the fair and orderly conduct of appellate proceedings.

3.9. In this regard, we note that the United States, the European Union, and Japan each challenged the same measures imposed by China. The DSB established a single panel to hear these disputes, and the Panel issued three separate reports in a single document. As stated above, apart from the United States, the other two co-complainants have not yet initiated appeal proceedings. However, in the event that China or either or both of the other co-complainants decides to initiate appeal proceedings in the other two disputes (DS432 and DS433), it will likely be in the interest of fairness and orderly procedure in the conduct of the appellate proceedings in these closely related disputes to facilitate the harmonization of working schedules and to proceed in a consolidated manner to the extent possible.

3.10. In the light of the above considerations, and taking account of the timelines specified in the Working Procedures, we have decided to extend the time-period for China to file its Notice of Other Appeal and other appellant's submission in this dispute to Thursday, 17 April 2014. As a consequence of this decision, and in order to preserve the sequence of and periods between the other deadlines prescribed under the Working Procedures, it is also necessary to modify the dates for the filings of other submissions set out in the Working Schedule. We take note that the Working Procedures provide for all appellees' submissions to be submitted by the same deadline, and consider, in the circumstances of this case, that such deadline should be extended for all appellees irrespective of whether they are responding to the appeal or to the other appeal. We, therefore, also extend the time-period for the filing of appellees' submissions to Thursday, 1 May 2014, and we extend the time-period for third participants in this dispute to file their submissions to Monday, 5 May 2014. The Appellate Body may provide additional reasons for this decision at a later point in time in its eventual report.

#### Modified Dates for the Submission of Documents

<u>Process</u>	<u>Rule</u>	<u>Date</u>
Notice of Other Appeal	Rules 16 and 23(1)	Thursday, 17 April 2014
Other appellant's submission	Rules 16 and 23(3)	Thursday, 17 April 2014
Appellees' submissions	Rules 16, 22 and 23(4)	Thursday, 1 May 2014
Third participants' submissions	Rules 16 and 24(1)	Monday, 5 May 2014
Third participants' notifications	Rules 16 and 24(2)	Monday, 5 May 2014

Signed in Geneva this 13th day of April 2014 by:

\_\_\_\_\_  
Seung Wha Chang  
Presiding Member

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Ricardo Ramírez-Hernández  
Member

\_\_\_\_\_  
Yuejiao Zhang  
Member



**ANNEX 5****ORGANISATION MONDIALE  
DU COMMERCE****ORGANIZACIÓN MUNDIAL  
DEL COMERCIO****WORLD TRADE ORGANIZATION****APPELLATE BODY***China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*

DS431, DS432, DS433

AB-2014-3  
AB-2014-5  
AB-2014-6**Procedural Ruling****1 BACKGROUND**

1.1. On Tuesday, 8 April 2014, the United States notified the Dispute Settlement Body and filed a Notice of Appeal with the Appellate Body Secretariat with respect to the Panel Report in *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS431/R). On 13 April 2014, the Division hearing the appeal in DS431 sent the participants and the third participants a Working Schedule for the appellate proceedings relating to that dispute. That Working Schedule specified the deadlines for the filing of written submissions, and indicated that the date of the oral hearing in that appeal would be communicated on a subsequent date.

1.2. On Friday, 25 April 2014, China notified the Dispute Settlement Body and filed a Notice of Appeal with the Appellate Body Secretariat with respect to the Panel Reports in *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS432/R, WT/DS433/R). On the same day, the Division hearing the appeals in DS432 and DS433 sent the participants and the third participants in those disputes a Working Schedule specifying the deadlines for the filing of written submissions, and indicating that the date of the oral hearing in that appeal would be communicated on a subsequent date.

1.3. The participants and third participants in DS431 were notified on Friday, 11 April 2014 that the Division hearing the appeal is composed of: Mr. Ricardo Ramírez-Hernández, Ms. Yuejiao Zhang, and Mr. Seung Wha Chang, as Presiding Member. On Friday, 25 April 2014, participants and third participants were notified that the Division hearing the appeals in DS432 and DS433 is composed of the same three Appellate Body Members.

1.4. On Tuesday, 15 April 2014, Japan requested an extension of the deadline for filing its third participant's submission in DS431 from 5 May to 7 May. Japan explained that 3 May through 6 May 2014 are consecutive holidays in Japan and it would therefore be difficult for Japan to file its submission on 5 May 2014.

1.5. On 25 April 2014, the Appellate Body gave the participants and third participants in these disputes an opportunity to comment on both Japan's request for an extension and on the consolidation of these appellate proceedings, including by holding a single oral hearing. In this respect, the Division referred to the interests of "fairness and orderly procedure", as referred to in Rule 16(1) of the Working Procedures for Appellate Review (Working Procedures) and noted the

significant overlap in the content of these disputes and the fact that, at the Panel stage, they were heard by a single Panel in accordance with Article 9.1 of the DSU.

1.6. On Monday, 28 April 2014, China, the United States, the European Union, Japan, Australia, Brazil, Canada, and Saudi Arabia submitted comments.

1.7. China had no objection to the consolidation of the proceedings. China submitted that since the disputes were heard by a single Panel, the Panel issued its reports in a single document, and China had filed appeals in relation to all disputes, it was in the interests of fairness and orderly procedure to convene a single oral hearing. In addition, China requested the Appellate Body to set the date for the oral hearing in June 2014, preferably later in that month. In that regard, China submitted that the matters covered in these proceedings concern the competence of many distinct authorities within China and that organizing its delegation would involve complex and time-consuming internal approval procedures and logistical arrangements. China had no objection to Japan's request for the extension of the deadline for its third participant's submission in the appeal in DS431 from 5 May 2014 to 7 May 2014.

1.8. The United States indicated that it supported holding a single oral hearing in these proceedings. However, the United States did not consider that consolidating deadlines for submissions in these disputes was necessary. The United States noted that it was prepared to file its appellee's submission in DS431 as scheduled on 1 May 2014. The United States noted that its appeal in DS431 alleges errors of law and legal interpretation that have not been raised in the other two disputes. The United States added that, while China alleges the same errors of law and legal interpretation in respect of all three Panel Reports, China has provided different arguments in its submissions in the respective proceedings. As such, the United States expressed the view that providing separate responses to those arguments may assist the Appellate Body's consideration of those arguments. The United States did not object to Japan's request for an extension of the deadline of its third participant's submission in the appeal in DS431 from 5 May 2014 to 7 May 2014.

1.9. The European Union requested the Appellate Body to consolidate the proceedings to the greatest extent possible, including by holding a single oral hearing. The European Union also requested that the dates for the filing of third participants' submissions be consolidated to Friday, 16 May 2014, and that an Appellate Body report be issued as a single document, with separate pages for the findings and conclusions in each of the disputes. Furthermore, the European Union requested that the complainants be granted the option of electing that the submission in the dispute in which they are a participant be deemed to be their third participant's submission in each of the other two disputes. The European Union had no objection to Japan's request for the extension of the deadline for the filing of its third participant's submission in the appeal in DS431 from 5 May 2014 to 7 May 2014, but noted that this request would be rendered moot in the event that the Appellate Body accepted the European Union's request that the filing of third participants' submissions be consolidated to Friday, 16 May 2014.

1.10. Japan had no objection to the consolidation of these proceedings, including by having a single oral hearing. In the event that the Division decided to consolidate the proceedings, Japan submitted that the Working Schedule and the date for the oral hearing should be set in a manner that would ensure sufficient time for all those involved in the appellate proceedings to prepare for the oral hearing, pursuant to the relevant provisions of the DSU and the Working Procedures.

1.11. Australia, Brazil, Canada, and Saudi Arabia were in favour of holding a single oral hearing in respect of all these appellate proceedings. In particular, Australia noted the significant overlap in the content of these disputes and expressed a strong preference for a single oral hearing. Brazil referred to the fact that the proceedings were consolidated at the panel stage and submitted that, notwithstanding the exceptional circumstances regarding the timing of appeals in these disputes, consolidation was desirable, for it would ensure coherence, expediency, and predictability. Canada maintained that, in the light of the significant overlap in the content of these disputes, and in the interest of an efficient allocation of the resources of all parties, a single oral hearing should be held in these proceedings. Furthermore, Canada considered that it would be preferable and appropriate, in the interests of "orderly procedure in the conduct of an appeal", for there to be a single consolidated deadline (Friday, 16 May 2014) for the filing of the third participants' submissions in all disputes. For Canada, a requirement to comment on the appellees' submissions in DS432 and DS433 in a separate and later submission than the comments on the appellees' submissions in

DS431 raises the prospect of multiple and unnecessarily duplicative submissions. Saudi Arabia referred to the fact that the proceedings were consolidated at the panel stage and that the issues arising in these proceedings are very similar, and maintained that, therefore, it was preferable to consolidate the appeal proceedings.

1.12. Australia and Brazil had no objection to Japan's request for the extension of the deadline for its third participant's submission in the appeal in DS431 from 5 May 2014 to 7 May 2014. Saudi Arabia also did not object to Japan's request, on the understanding that acceptance of this request would entail that this new deadline would apply to all third participants' submissions in DS431.

1.13. Rule 16(1) of the Working Procedures provides as follows:

- (1) In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.

1.14. We note that this provision enables us, where a procedural question arises that is not covered by the Working Procedures, "to adopt an appropriate procedure for the purposes of that appeal only". We acknowledge that this discretion is accompanied by the duty to not only ensure "fairness and orderly procedure" in the conduct of the appeals, but to also ensure that any adopted procedure is not inconsistent with the DSU, the other covered agreements, and the Working Procedures. We recall that the Appellate Body has, in the past, relied on Rule 16(1) of the Working Procedures in consolidating appellate proceedings.<sup>1</sup>

1.15. We observe that the disputes DS431, DS432, and DS433 were heard by a single Panel in accordance with Article 9.1 of the DSU. The Panel circulated a single document constituting three separate Panel Reports for these disputes, pursuant to Article 9.2 of the DSU, and there is significant overlap in the content of these disputes. We further note that China has alleged the same errors of law and legal interpretation in respect of all three Panel Reports – as an other appellant in DS431 and as an appellant in DS432 and DS433. Furthermore, we observe that all the comments received from the participants and third participants support the consolidation of these appellate proceedings, particularly as regards the convening of a single oral hearing for all these disputes.

1.16. Having considered all the above, we have decided, pursuant to Rule 16(1) of the Working Procedures, to consolidate the appeals of the Panel Reports in *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS431/R, WT/DS432/R, and WT/DS433/R).

1.17. Given this consolidation, and taking account of the requests of the participants and third participants, we find it necessary to make some modifications to the Working Schedules in order to ensure fairness and orderly procedure in the conduct of these appeals. These modifications are set out below.

1.18. With respect to the appeal of the Panel Report WT/DS431/R, the Working Schedule communicated to the participants and third participants on Friday, 11 April 2014 specified Monday, 5 May 2014 as the deadline for the filing of third participants' submissions. With respect to the appeal of the Panel Reports WT/DS432/R and WT/DS433/R, the Working Schedule communicated to the participants and third participants on Friday, 25 April 2014 specified Friday, 16 May 2014 as the deadline for the filing of third participants' submissions. We take note of the requests by the European Union and Canada to have a single deadline for all third participants' submissions, namely, Friday, 16 May 2014.

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<sup>1</sup> See, for example, Appellate Body Reports, *US/Canada – Continued Suspension*, para. 27; *EC – Bananas III (Article 21.5 – Ecuador II)* / *EC – Bananas III (Article 21.5 – US)*, para. 23; and *US – Shrimp (Thailand)* / *US – Customs Bond Directive (India)*, para. 16.

1.19. In our Procedural Ruling of 13 April 2014 in the appeal in DS431, we expressed the concern that, in the present circumstances, and taking account of the early initiation of the appeal by the United States, the 21-day period for filing third participants' submissions "may be insufficient to allow third parties a meaningful opportunity to comment and sufficient time to finalize their submissions."<sup>2</sup> Moreover, we consider that it would enhance efficiency and thus facilitate the orderly conduct of these appeals if third participants provided their submissions in respect of all aspects of the appeals in these consolidated proceedings in a single document. Accordingly, we have decided to set a single deadline for third participants' submissions in these disputes on **Friday, 16 May 2014**. Nevertheless, to the extent that the third participants are in a position to file a single submission in all three disputes before this date, we encourage such early filing, as it would assist the Division's preparation for the oral hearing.

1.20. In light of this new deadline for the filing of all third participants' submissions, it is not necessary for us to deal separately with Japan's request that we extend the deadline for the filing of its third participant's submission in DS431 from 5 May 2014 to 7 May 2014.

1.21. We also take note of the European Union's request that "the parties have the option of electing that their party submissions in one dispute be deemed to be their third participant submissions in the other disputes". We accept this request and have decided that the United States, the European Union, and Japan may elect to have their submissions filed in the capacity of participant in their respective disputes also serve as their third participants' submissions in the other disputes. The deadlines for the appellees' submissions remain as follows: (i) with respect to the appeal in DS431, the deadline for the appellees' submissions is **Thursday, 1 May 2014**; and (ii) with respect to the appeal in DS432 and DS433, the deadline for the appellees' submissions is **Tuesday, 13 May 2014**.

1.22. The above is without prejudice to the right of the European Union (as third participant in DS431 and DS433), Japan (as third participant in DS431 and DS432), and the United States (as third participant in DS432 and DS433), should they so wish, to file third participants' submissions by **Friday, 16 May 2014**, in the event that they do not elect to have their submissions filed in the capacity of participant in one dispute serve as a third participant's submission in the other disputes.

1.23. With regard to the oral hearing, the Division will hold a single oral hearing for all these appellate proceedings. In setting the date for this single oral hearing, we have tried to adhere, to the greatest extent possible, to the timeframes set out in Annex I of the Working Procedures. Accordingly, the oral hearing will take place on **Wednesday, 4 June 2014** and **Thursday, 5 June 2014**. If necessary, the oral hearing will continue on **Friday, 6 June 2014**.

1.24. In sum, we have decided to consolidate the appeals of the Panel Reports in *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS431/R, WT/DS432/R, WT/DS433/R). As a consequence of this consolidation:

- a. The single deadline for the third participants' submissions in respect of all these disputes is set as **Friday, 16 May 2014**. To the extent that the third participants are in a position to file their submissions earlier than this deadline, we encourage such early filing as it would assist the Division's preparation for the oral hearing;
- b. The United States, the European Union, and Japan may elect to have their submissions filed in the capacity of participant in their respective disputes also serve as their third participants' submissions in the disputes in which they are third participants. This is without prejudice to the right of the European Union (as third participant in DS431 and DS433), Japan (as third participant in DS431 and DS432), and the United States (as third participant in DS432 and DS433), should they so wish, to file third participants' submissions, separate from their appellees' submissions, by **Friday, 16 May 2014**.
- c. The Division will hold a single oral hearing for all these appellate proceedings. It will take place on **Wednesday, 4 June 2014** and **Thursday, 5 June 2014**. If necessary, the oral hearing will continue on **Friday, 6 June 2014**.

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<sup>2</sup> See Procedural Ruling in AB-2014-3, 13 April 2014, para. 3.7.

1.25. Pursuant to Rule 26 of the Working Procedures, we annex to this Procedural Ruling a revised consolidated Working Schedule for the appellate proceedings in DS431, DS432, and DS433.

1.26. The Appellate Body may provide additional reasons for this decision at a later point in time in its eventual Reports.

Signed in Geneva this 1st day of May 2014 by:

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Seung Wha Chang  
Presiding Member

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Ricardo Ramírez-Hernández  
Member

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Yuejiao Zhang  
Member

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