

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"⁸⁰²;
- 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

⁸⁰² 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;

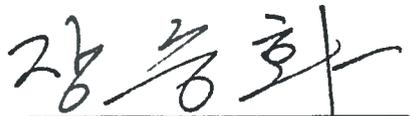
- ii. finds that the Panel erred, to the extent that it interpreted Article XX(g) as imposing a separate requirement of "even-handedness" that must be fulfilled in addition to the conditions expressly specified in subparagraph (g), and to the extent that it interpreted Article XX(g) as requiring Members 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 hand⁸⁰³; 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 issue⁸⁰⁴ are justified pursuant to subparagraph (g) of Article XX of the GATT 1994.⁸⁰⁵

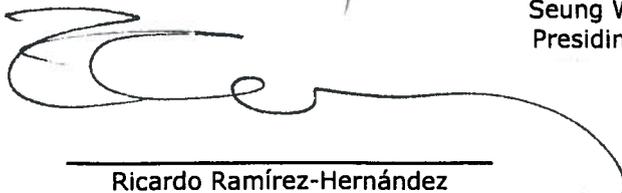
6.3. For the reasons set out in section 5.3 above, with respect to the Panel's decision to exclude Exhibits JE-188 through JE-197, the Appellate Body:

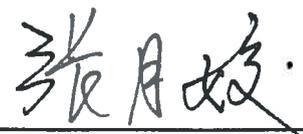
- a. does not rule on whether the Panel erred and acted inconsistently with Article 11 and/or Article 12.4 of the DSU in excluding Exhibits JE-188 through JE-197.

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

⁸⁰³ Panel Reports, paras. 7.614, 7.820, and 7.944.

⁸⁰⁴ See paragraph 4.4 of these Reports.

⁸⁰⁵ 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"⁸⁰²;
- 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

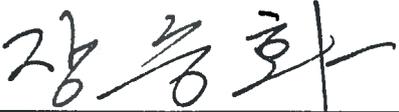
⁸⁰² Panel Reports, para. 7.93. See also *ibid.*, paras. 7.80 and 7.89.

precluded from taking account of evidence of the effects of China's export quotas in the marketplace;

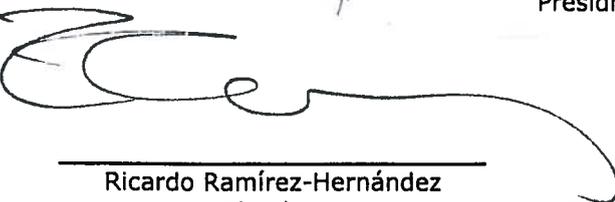
- ii. finds that the Panel erred, to the extent that it interpreted Article XX(g) as imposing a separate requirement of "even-handedness" that must be fulfilled in addition to the conditions expressly specified in subparagraph (g), and to the extent that it interpreted Article XX(g) as requiring Members 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 hand⁸⁰³; 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 issue⁸⁰⁴ are justified pursuant to subparagraph (g) of Article XX of the GATT 1994.⁸⁰⁵

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.

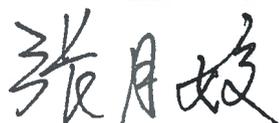
Signed in the original in Geneva this 14th day of July 2014 by:



Seung Wha Chang
Presiding Member



Ricardo Ramírez-Hernández
Member



Yuejiao Zhang
Member

⁸⁰³ Panel Reports, paras. 7.614, 7.820, and 7.944.

⁸⁰⁴ See paragraph 4.4 of these Reports.

⁸⁰⁵ 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"⁸⁰²;
- 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

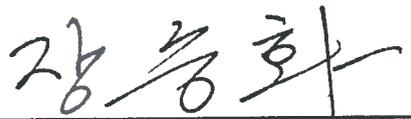
⁸⁰² Panel Reports, para. 7.93. See also *ibid.*, paras. 7.80 and 7.89.

precluded from taking account of evidence of the effects of China's export quotas in the marketplace;

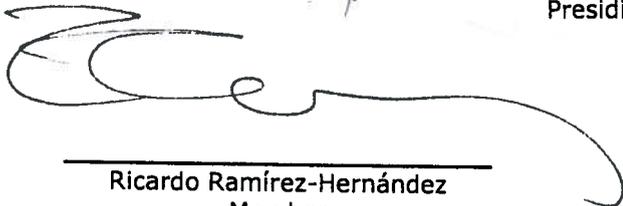
- ii. finds that the Panel erred, to the extent that it interpreted Article XX(g) as imposing a separate requirement of "even-handedness" that must be fulfilled in addition to the conditions expressly specified in subparagraph (g), and to the extent that it interpreted Article XX(g) as requiring Members 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 hand⁸⁰³; 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 issue⁸⁰⁴ are justified pursuant to subparagraph (g) of Article XX of the GATT 1994.⁸⁰⁵

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.

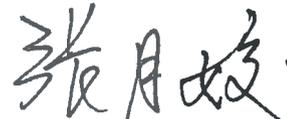
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