

CHINA – RARE EARTHS¹

(DS431, 432, 433)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	United States, European Union, Japan	Accession Protocol, Working Party Report, Marrakesh Agreement, GATT Arts. XI and XX	Establishment of Panel	23 July 2012
			Circulation of Panel Report	26 March 2014
Respondent	China		Circulation of AB Report	7 August 2014
			Adoption	29 August 2014

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Export restrictions on a number of rare earths, tungsten, and molybdenum. The export restrictions comprised export duties, export quotas, and certain limitations on the enterprises permitted to export the products.
- **Products at issue:** Various forms of rare earths, tungsten, and molybdenum

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **Accession Protocol (export duties)/Marrakesh Agreement/GATT Art. XX (general exceptions):** The Panel found that China's export duties on rare earths, tungsten, and molybdenum were inconsistent with its Accession Protocol. In its examination of this issue and China's defence under Art. XX, the Panel was mindful of the Appellate Body ruling that absent "cogent reasons an adjudicatory body will resolve the same legal question in the same way in a subsequent case". The Panel concluded that none of China's arguments constituted cogent reasons for departing from the Appellate Body's finding in *China – Raw Materials* that the obligation in para. 11.3 of China's Accession Protocol is not subject to the general exceptions in Art. XX of the GATT 1994. China appealed an intermediate finding made by the panel in reaching its conclusion that Art. XX of the GATT 1994 was not available to justify a breach of para. 11.3 of its Accession Protocol regarding export duties. In upholding the panel's finding, the Appellate Body found that the Marrakesh Agreement, the Multilateral Trade Agreements, and China's Accession Protocol form a single package of rights and obligations that must be read together. However, the questions whether there is an objective link between an individual provision in China's Accession Protocol and existing obligations under the Marrakesh Agreement and the Multilateral Trade Agreements, and whether China may rely on an exception provided for in those agreements to justify a breach of its Accession Protocol, must be answered through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation and in light of the circumstances of the dispute.
- **GATT Art. XI (quantitative restrictions)/GATT Art. XX(g) (general exceptions – exhaustible natural resources):** The Panel found that China's export quotas on rare earths, tungsten, and molybdenum were inconsistent with GATT Art. XI. The Panel also concluded that the export quotas were not justified under the exception in GATT Art. XX(g), which allows WTO Members to implement GATT-inconsistent measures "relating to the conservation of exhaustible natural resources". China did not appeal the panel's overall finding, but appealed limited aspects of the panel's interpretation and application of Art. XX(g), in connection with its findings that the export quotas at issue were not measures "relating to" the conservation of exhaustible natural resources, and were not "made effective in conjunction with" restrictions on domestic production or consumption. The Appellate Body found that the panel rightly considered that it should focus on the measures' design and structure rather than on their effects in the marketplace, although it was not precluded from considering market effects. The Appellate Body further concluded that the burden of conservation did not have to be evenly distributed, for example, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand.
- **Working Party Report (trading rights):** The Panel found that China maintained restrictions (minimum registered capital, prior export experience and export performance) on the trading rights of enterprises exporting rare earths and molybdenum contrary to paras. 83 and 84 of China's Working Party Report. The Panel found that China was entitled to seek to justify these breaches pursuant to Art. XX(g). However, China failed to make a prima facie case that such requirements were justified pursuant to Art. XX(g). In this respect, the Panel considered that China's trading rights obligations were distinct obligations and that breaches of these obligations had to be justified separately from the justifications that China had advanced for the imposition of export quotas in violation of Art. XI of the GATT 1994.

¹ *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*