CHINA – MEASURES RELATED TO THE EXPORTATION OF RARE EARTHS, TUNGSTEN, AND MOLYBDENUM
(AB-2014-5/DS432, AB-2014-6/DS433)

THIRD PARTICIPANT SUBMISSION OF
THE UNITED STATES OF AMERICA

May 16, 2014

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China – Publications and Audiovisual Products (AB)	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products*, WT/DS363/AB/R, adopted 19 January 2010
China – Publications and Audiovisual Products (Panel)	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products*, WT/DS363/R, adopted 19 January 2010, as modified by Appellate Body Report, WT/DS363/AB/R
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I. INTRODUCTION

1. China's appeals in the disputes brought by the European Union and Japan (DS432 and DS433) are essentially the same as China's other appeal in the dispute brought by the United States (DS431). In particular, China's notice of appeal in DS432 and DS433 is the same as its notice of other appeal in DS431, and the argumentation in China's appellant submission in DS432 and DS433 is in all but one respect the same as the argumentation in China's DS431 other appellant submission. In the U.S. DS431 appellee submission, the United States has explained why each matter raised in China's other appeal in DS431 is without merit. Given that China's appeals in DS432 and DS433 are essentially the same as in DS431, the U.S. DS431 appellee submission likewise demonstrates that each matter raised in China's DS432 and DS433 appeals is without merit.[1]

2. The remainder of this third participant submission will address the only new argumentation (as compared to China's DS431 arguments) contained in China's appellant submission in DS432 and DS433. Those arguments relate to China's claim of legal error in intermediate panel findings concerning the interpretation of Article XII:1 of the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement" or "Marrakesh Agreement"), read in conjunction with Paragraph 1.2 of the *Protocol on the Accession of the People's Republic of China* ("China's Accession Protocol").[2] The United States recalls that the Panel conducted that analysis, now challenged by China on appeal, in response to China's arguments that Article XII:1 of the WTO Agreement and Paragraph 1.2 of China's Accession Protocol required the Panel to determine to which multilateral trade agreement Paragraph 11.3 of

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[1] The United States hereby incorporates by reference its DS431 appellee submission into this third participant submission.

[2] WT/L/432.

the Accession Protocol "intrinsically relates."

3. As will be discussed in detail below, while China's arguments in DS432 and DS433 are somewhat longer than in DS431, China's arguments suffer from the same fundamental flaws: namely, China fails to provide any textual support for its proposed "intrinsic relationship" test, and China fails to show any legal error in the Panel's discussion of Article XII of the WTO Agreement or Paragraph 1.2 of China's Accession Protocol. Accordingly, for the reasons explained in this third participant submission and in the U.S. Appellee Submission in DS431, none of China's grounds for appeal have merit.

II. CHINA'S APPEAL OF THE PANEL'S INTERPRETATION OF ARTICLE XII:1 OF THE WTO AGREEMENT, READ IN CONJUNCTION WITH PARAGRAPH 1.2 OF THE ACCESSION PROTOCOL, SHOULD BE REJECTED

4. China's Notice of Appeal in DS431 presents the same alleged errors of law and legal interpretation as its Notice of Appeal in DS432 and DS433. As noted, the U.S. Appellee Submission in DS431 explains why China's appeal of the Panel's interpretation of Article XII:1 of the WTO Agreement, read in conjunction with Paragraph 1.2 of the Accession Protocol, should be rejected.

5. In its Appellant Submission in DS432 and DS433, China presents two additional lines of argumentation as compared to DS431: (1) the Panel's analysis of Article XII:1 of the WTO Agreement and Paragraph 1.2 of China's Accession Protocol failed to account for the purported significance of the phrase "terms of accession";[3] and (2) the Panel erred in its analysis of the text of Paragraph 1.2 of China's Accession Protocol and of other provisions as context in interpreting

[3] China's Appellant Submission, paras. 69, 82-84, 90, 127.

Paragraph 1.2 and Article XII:1 of the WTO Agreement.[4] As explained in detail below, these arguments suffer from the same flaws as China's arguments in DS431, and add nothing to its appeal.

6. Before turning to the specifics of China's new arguments, the United States notes China continues not to address the provision at issue in this dispute – namely, Paragraph 11.3 of its Accession Protocol, or to present any argument that undermines the well-reasoned interpretation of that provision by the Panel in the current disputes, or by the panel and the Appellate Body in the *China – Raw Materials* disputes. And, again, China has not appealed the Panel finding in this dispute that China's breach of its export duty commitments under Paragraph 11.3 of the Accession Protocol is not justified under Article XX(b) of the GATT 1994.[5] Thus, China's appeal cannot affect the Panel finding that China's export duties on rare earths, tungsten, and molybdenum are in breach of China's obligations. Nor has China appealed the Panel finding that Article XX of the GATT 1994 is not applicable as a potential justification for breaches of China's export duty commitments under Paragraph 11.3 of the Accession Protocol.[6] Instead,

[4] China's Appellant Submission, paras. 93-104, 116-126, 128-136.

[5] The Panel's finding in this regard was based on two subordinate findings: (1) that Article XX of the GATT 1994 is not applicable as a possible justification for a breach of Paragraph 11.3 of the Accession Protocol; and (2) even it were applicable, China had failed to demonstrate that its measure was justified under Article XX. These findings, which are set out in paragraph 8.1(b) of the Panel report, are not covered in China's notice of appeal. Instead, China's notice of appeal asks only that the Appellate Body "reverse" the finding in three paragraphs (7.80, 7.89, and 7.93) of the Panel report with respect to certain defined arguments set out in the notice of appeal. Those arguments involve Article XII:1 of the WTO Agreement, read in conjunction with Paragraph 1.2 of the Accession Protocol.

[6] That finding is contained in paragraphs 7.99, 7.115, and 8.1 (with intermediate conclusions in 7.72, 7.99, 7.104, 7.114) of the Panel report, and China has not appealed those findings. The United States noted a caveat in this regard, to the extent by seeking reversal of certain of the Panel's findings China is seeking a finding that its Accession Protocol would be an integral part of each of the multilateral trade agreements annexed to the WTO Agreement. U.S. Appellee Submission, para. 31. Indeed, in its Appellant Submission in DS432 and DS433, China appears to suggest that the term "the WTO Agreement" in Paragraph 1.2 of its Accession Protocol refers to the WTO Agreement and its annexes. China's Appellant Submission, paras. 103, 110. At the same time, however, China continues to argue that its position is that individual provisions of its Accession Protocol are an integral part of whichever multilateral trade agreement to which they "intrinsically relate." China's Appellant Submission, paras.

China appeals one aspect – involving the meaning of Article XII:1 of the WTO Agreement, read in conjunction with Paragraph 1.2 of the Accession Protocol – of three specific paragraphs (7.80, 7.89, and 7.93) of the Panel's intermediate analysis.[7]

7. The following two sections will address and refute China's two new arguments in support of its proposed "intrinsic relationship" test.

A. The Panel Correctly Interpreted Article XII:1 of the WTO Agreement and Paragraph 1.2 of China's Accession Protocol, Including with Respect to the Enforceability of Commitments in the Protocol

8. First, China argues that the Panel somehow failed to appreciate the relevance of Article XII:1 of the WTO Agreement with respect to the application of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") to the obligations set out in China's Accession Protocol.[8,9] China's argument is highly convoluted, and without apparent logic. For example, China's argument artificially separates DSU applicability as a whole from the applicability of one article of the DSU, namely, DSU Article 3.2, providing for the use of customary rules of interpretation of public international law. And, China does not specify precisely what findings in the Panel report were incorrect. Rather, China makes a number of assertions – none of which are well founded – regarding the Panel's statements relating to the

75, 113-114.

[7] China's Notice of Appeal, para. 4.

[8] China's Appellant Submission, paras. 79-84.

[9] The United States has already explained why China's arguments regarding the Panel's finding that Article XII:1 requires a Member to undertake all of the obligations of all of the multilateral trade agreements, including China's assertion that the Panel's finding in this regard renders Article XII redundant in light of Article II:2 of the WTO Agreement, should be rejected. U.S. Appellee Submission, paras. 57-59, n. 50. With respect to China's assertion that the Panel began its Article XII analysis by misstating China's position, the United States notes that, in that analysis, the Panel clearly stated, "We see nothing in Article XII:1 to support China's position that 'respective protocol provision[s] must be considered an integral part of the specific covered agreement to which it intrinsically relates." Panel Report, para. 7.91; *see also* Panel Report, para. 7.76(a). The Panel did not proceed on a misunderstanding of China's position (notwithstanding the way in which China's arguments evolved).

relationship between the Accession Protocol and other WTO provisions.

9. First, China argues that:

> [P]rovisions of China's Accession Protocol need to be interpreted according to the rules of the Vienna Convention not because of the 'integral part' clause in Paragraph 1.2 alone but because they are "terms of accession", i.e. Member-specific WTO law, agreed to and approved under Article XII of the Marrakesh Agreement. It is for that same reason that an accession commitment is enforceable under the rules of the DSU, provided it is characterized by an integral relationship to the subject matter of one of the covered agreements.[10]

Second, China challenges the "assumption" that Paragraph 1.2 serves to make obligations in China's Accession Protocol enforceable under the DSU and to ensure that those obligations are interpreted "in accordance with the 'customary rules of interpretation of public international law.'"[11] Third, China challenges the Panel's conclusion that prior panel and Appellate Body reports do not support China's interpretation regarding the meaning of Paragraph 1.2 of China's Accession Protocol because, according to China, "[T]here are no prior panel or Appellate Body reports that contradict China's interpretation of the terms 'the WTO Agreement' as used in Paragraph 1.2 . . . ."[12]

10. China's additional argument amounts no nothing more than an unexplained and illogical leap from the existence in Article XII:2 of the phrase "terms of accession" to the proposition that the actual terms set out in an Accession Protocol should be ignored, and replaced with an unspecified "intrinsic relationship test." To the contrary, the only way to interpret the terms upon which China in fact acceded to the WTO Agreement is to examine the language that China and all Members actually agreed to in the Accession Protocol. Moreover, China has failed to

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[10] China's Appellant Submission, para. 90; *see also* paras. 82-84.
[11] Panel Report, para. 7.85.
[12] China's Appellant Submission, Heading II.C.2.d.

show any legal error in the Panel's well-supported explanation of how Accession Protocol obligations are enforceable under the DSU. To the contrary, the Panel's interpretation – unlike the one advocated by China – reflects the application of customary rules of treaty interpretation, provides a coherent basis for the enforceability of China's accession commitments (such as Paragraph 11.3 of the Accession Protocol), and is consistent with prior panel and Appellate Body reports.

11. The Panel in this dispute clearly explained how provisions of China's Accession Protocol are enforceable under the DSU:

> [T]he Marrakesh Agreement is listed in Appendix 1 to the DSU as an agreement covered by the DSU, and hence that agreement, and any instrument that is an "integral part" of it, is enforceable under the DSU. For the same reason, the Marrakesh Agreement and any instrument that is an integral part thereof must be interpreted in accordance with the 'customary rules of interpretation of public international law', pursuant to Article 3.2 of the DSU.[13]

12. Because China's Accession Protocol is an integral part of the WTO Agreement – as the Panel found[14] – the commitments therein are enforceable under the DSU. As similarly explained in the previous U.S. Appellee Submission, the commitments of China's Accession Protocol are enforceable by virtue of being an integral part of the WTO Agreement, which is in turn enforceable under Article 1.1 of the DSU.[15]

13. The Panel's reasoning echoes that of prior panel and Appellate Body reports regarding commitments made in China's Accession Protocol. In *China – Raw Materials*, for example, the

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[13] Panel Report, para. 7.85.

[14] *E.g.*, Panel Report, paras. 7.80, 7.85

[15] U.S. Appellee Submission, paras. 53, 72 (citing *China – Raw Materials (AB)*, para. 278; *China – Raw Materials (Panel)*, paras. 7.64, 7.113-7.115; *US – Tyres (China) (AB)*, para. 118; *China – Auto Parts (Panel)*, paras. 7.740-7.741).

Appellate Body explained:

> Paragraph 1.2 of China's Accession Protocol provides that the Protocol 'shall be an integral part' of the *WTO Agreement*. As such, the customary rules of interpretation of public international law, as codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the '*Vienna Convention*'), are, pursuant to Article 3.2 of the DSU, applicable in this dispute in clarifying the meaning of Paragraph 11.3 of the Protocol.[16]

14. China does not explain why this analysis is in error or insufficient. In fact, China acknowledges that:

> [T]he Panel rightly observed, "in all prior cases involving the interpretation and application of China's Accession Protocol, panels and the Appellate Body have proceeded on the assumption that Paragraph 1.2 has the following functions: (i) to make the obligations of China's Accession Protocol (and specified provisions of the Working Party Report) enforceable under the DSU; and (ii) to ensure that those obligations are interpreted in accordance with the 'customary rules of interpretation of public international law' pursuant to Article 3.2 of the DSU."[17]

While China discounts statements such as that made by the Appellate Body in *China – Raw Materials* as an "assumption," as noted above, this interpretation is consistent with the plain language of Paragraph 1.2 of China's Accession Protocol and Article 1.1 of the DSU.[18]

15. In addition, China provides no basis for its assertion that Article XII:1 of the WTO Agreement somehow indicates that the Accession Protocol is an integral part of each one of the agreements set out in the three annexes to the WTO Agreement. To the contrary, as discussed in

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[16] *China – Raw Materials (AB)*, para. 278 (internal footnote omitted); *see also US – Tyres (China) (AB)*, para. 118; *China – Raw Materials (Panel)*, paras. 7.64, 7.113-7.115; *China – Publications and Audiovisual Products (Panel)*, paras. 7.8-7.9; *China – Auto Parts (Panel)*, paras. 7.740-7.741.

[17] China's Appellant Submission, para. 89 (quoting Panel Report, para. 7.85).

[18] U.S. Appellee Submission, paras. 53, 72. In previous cases involving an interpretation of provisions of China's Accession Protocol – in particular, *China – Publications and Audiovisual Products and China – Raw Materials* – panels and the Appellate Body interpreted the provision at issue, applying the customary rules of treaty interpretation, to determine whether China may have recourse to the exceptions of Article XX of the GATT 1994 to justify breaches of the provision. *See, e.g., China – Raw Materials (Panel)*, para. 7.117. Those panel and Appellate Body reports did not contemplate or require the existence of an "intrinsic (or integral) relationship" between China's Accession Protocol and the GATT 1994 or hinge upon China's concept of "terms of accession."

the U.S. Appellee Submission, this reading is untenable.[19]

16. Moreover, the United States notes with concern that China's position that commitments of its Accession Protocol are enforceable only by virtue of being "terms of accession" to an unspecified agreement contained in one of the annexes to the WTO Agreement – with such agreement being identified only through a vague "intrinsic relationship" test – amounts to a request by China that the Appellate Body find that some of China's commitments in the Accession Protocol may not in fact be binding at all. That is, under China's proposed interpretation, China would be positioned to argue that an "intrinsic relationship" between a commitment in China's Accession Protocol and any specific multilateral trade agreement was lacking and therefore that the commitment is unenforceable.

17. For all of these reasons, China's arguments that, in rejecting China's "intrinsic relationship" test, the Panel erred by failing to interpret properly Article XII:1 of the WTO Agreement and Paragraph 1.2 are baseless.

B. China's Textual and Contextual Critiques Are Without Merit

18. China's second line of additional argumentation involves the allegation that the Panel erred in its analysis of the text of Paragraph 1.2 of China's Accession Protocol and of other provisions as context in interpreting Paragraph 1.2 and Article XII:1 of the WTO Agreement. These additional arguments, like China's arguments presented in DS431, are without merit.

19. Indeed, as previously explained in the U.S. DS431 Appellee Submission, the text and context fully support the Panel's conclusion that the term "WTO Agreement" as used in Paragraph 1.2 of China's Accession Protocol means that the Accession Protocol is an integral

[19] U.S. Appellee Submission, paras. 61-65, 67, 71.

part of the WTO Agreement, not that individual provisions within the Accession Protocol are integral parts of the multilateral agreements annexed thereto.[20]

1. The Panel's Interpretation Does Not Undermine the Meaning of the Term "Integral Part"

20. First, China claims that the Panel failed to give meaning to the language in Paragraph 1.2 of China's Accession Protocol that the Protocol is an "integral part" of the WTO Agreement. In particular, China suggests that the Panel failed to appreciate the distinction between an "integral part" and simply a "part."

21. Contrary to China's suggestion, the Panel's conclusion that China's Accession Protocol is an "integral part" of the WTO Agreement, and not the WTO Agreement and each one of the multilateral trade agreements annexed thereto, does not undermine the meaning of the term "integral part." Being an "integral part" of the WTO Agreement does not preclude the terms of China's Accession Protocol from being interpreted in a coherent manner. Both panels and the Appellate Body have in fact interpreted provisions of China's Accession Protocol – for example, Paragraph 5.1 and Paragraph 11.3, the provision at issue in this dispute – in the past, by applying the customary rules of interpretation. And to the extent that China considers that its Accession Protocol cannot be an "integral part" of the WTO Agreement because its Accession Protocol cannot be read harmoniously with the WTO Agreement, it provides no support for this position.[21] In fact, China acknowledges that pursuant to Article II of the WTO Agreement, the multilateral agreements annexed thereto (which themselves cover a range of subjects, and provisions of which have been the subject of hundreds of disputes) are an integral part of the

[20] U.S. Appellee Submission, paras. 50-51, 61-65.
[21] China's Appellant Submission, para. 96.

WTO Agreement, yet China does not appear to dispute that those agreements are somehow incapable of harmonious interpretation.[22]

2. The Panel's Interpretation of Paragraph 1.2 Is Consistent with the Ordinary Meaning of the Terms Used Therein

22. China also objects to the Panel's analysis of the ordinary meaning of Paragraph 1.2 as "a superficial, grammatical analysis" and suggests that in analyzing ordinary meaning the Panel failed to take account of the context and the object and purpose.[23] However, the Panel report makes clear that the Panel did consider context. In the paragraph reproduced only partially by China in its submission,[24] the Panel explained as follows:

> First, the ordinary meaning of the words used in Paragraph 1.2 does not support the interpretation that this language makes the *individual* provisions of the Accession Protocol integral *parts* of different Multilateral Trade Agreements. The second sentence of Paragraph 1.2 provides – in the singular – that "*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." The ordinary meaning is that the Accession Protocol in its *entirety* is made an integral part of *one* other agreement, i.e. that the Accession Protocol as a whole is made an integral part of the Marrakesh Agreement. The ordinary meaning is not consistent with the view that, in addition, the individual *provisions* thereof are also made integral *parts* of other *agreements* annexed to the Marrakesh Agreement. Support for this interpretation is found in the context offered by other "integration" provisions in the covered agreements. For example, Article II:2 of the Marrakesh Agreement provides that the Multilateral Trade Agreements annexed to the Marrakesh Agreement are made an integral part of the Marrakesh Agreement. This language suggests that each of those instruments, in its entirety, is made an integral part of *one* other agreement, i.e. the Marrakesh Agreement.[25]

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[22] China's Appellant Submission, paras. 97, 116. Given that the multilateral trade agreements are an integral part of the WTO Agreement, it is not clear why China asserts that its Accession Protocol cannot be an integral part of the WTO Agreement because its provisions "do not concern the institutional relationship to the WTO".

[23] China's Appellant Submission, para. 120.

[24] China's Appellant Submission, para. 119. China omits all but the second, third, and fourth sentences from this paragraph.

[25] Panel Report, para. 7.82 (emphasis in original).

23. The Panel discusses other context – paragraph 1 of the GATT 1994, Paragraph 1 of Part II of China's Accession Protocol, and language throughout China's Accession Protocol (for example, Paragraph 5.1) – in subsequent paragraphs of its report.[26] China's overlooking or discounting of the Panel's analysis of context does not negate the fact that it actually conducted such an analysis, much less mean that its interpretive approach was merely a "superficial grammatical" one. The Panel's interpretation of Paragraph 1.2, which started with the ordinary meaning of the terms used therein, and considered context, reflects a proper application of the customary rules of treaty interpretation.[27]

24. Unlike the Panel's interpretation, China's proposed interpretation cannot be reconciled with the ordinary meaning of Paragraph 1.2. As noted in the U.S. Appellee Submission, China asks the Appellate Body to reverse the Panel's finding that:

> [T]he 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.[28]

25. While, in its Appellant Submission in DS432 and DS433, China submits that the reference to the "WTO Agreement" in Paragraph 1.2 "must include the annexed multilateral trade agreements,"[29] at the same time, China also explains that China does not take the position that its Accession Protocol as a whole is an integral part of the WTO Agreement and the

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[26] Panel Report, paras. 7.83, 7.84, 7.86.

[27] *See, e.g., US – Softwood Lumber IV (AB)*, para. 58 ("The meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used."); *Japan – Alcoholic Beverages (AB)*, p. 17 ("[T]he words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation.").

[28] Panel Report, para. 7.93, subject to appeal by China's Notice of Appeal, para. 4.

[29] China's Appellant Submission, para. 103.

multilateral trade agreements annexed thereto, but rather that provisions of the Accession Protocol are an integral part of the agreement to which they intrinsically relate.[30] In other words, under China's various interpretations, the reference to "this Protocol" in Paragraph 1.2 might not refer to the Protocol itself, but rather to select provisions thereof, while "the WTO Agreement" might refer to "the WTO Agreement and the multilateral trade agreements annexed thereto," or perhaps only "to those provisions of the WTO Agreement or multilateral trade agreements annexed thereto to which the provision of the protocol bears an intrinsic relationship." Of course, the words actually used in Paragraph 1.2 say nothing to this effect, and such an approach is untenable.

3. The Panel Correctly Analyzed the Context Provided by Other Provisions Regarding China's Proposed Interpretation of Article XII:1 and Paragraph 1.2

26. In its additional arguments regarding perceived errors in the Panel's interpretation of Article XII:1 of the WTO Agreement and Paragraph 1.2 of China's Accession Protocol, China continues to miss the point of the Panel's analysis of the context provided by other provisions.

27. With respect to China's argument about the WTO Agreement provision that incorporates the multilateral trade agreements (namely, Article II:2), the Panel reasonably looked to that provision as context given that, like Paragraph 1.2 of China's Accession Protocol, it includes language providing that agreements (in the case of Article II:2, the multilateral trade agreements) are an "integral part" of the WTO Agreement. The Panel correctly observed, as even China acknowledges, that this language does not make the multilateral trade agreements an integral part of one another – regardless of any "intrinsic relationship" there might be between the provisions

[30] China's Appellant Submission, para. 75.

of one multilateral trade agreement and the provisions of another. This analysis is therefore responsive to, and effectively counters, China's argument that Paragraph 1.2 requires that provisions of its Accession Protocol be treated as an "integral part" of whichever agreement (or agreements) to which they "intrinsically relate."

28. Similarly, with respect to paragraph 1 of the GATT 1994, and Paragraph 1 of Part II of China's Accession Protocol, as the Panel recognized, those provisions reflect that the drafters of the GATT 1994 and China's Accession Protocol knew how to, and did, use language to incorporate provisions of an accession protocol into the GATT 1994 when that was intended.[31] The inclusion of such language undermines China's argument that the drafters instead chose to rely upon Article XII:1 of the WTO Agreement to make provisions of accession protocols other than those specifically listed in paragraph 1 of the GATT 1994 an integral part of the GATT 1994.[32] Moreover, China's argument that it makes sense for Paragraph 1 of its Accession Protocol to incorporate China's tariff and services schedules explicitly into the GATT and the GATS, respectively,[33] is inconsistent with China's position that provisions of its Accession Protocol are automatically an "integral part" of the multilateral trade agreement to which they intrinsically relate (unless China takes the position that its tariff commitments do not bear an "intrinsic relationship" to the GATT 1994, for example). And China fails to explain why the fact that scheduled tariffs and services commitments may be subject to periodic negotiation means that specific language referring to the GATT 1994 and the GATS, respectively, would have been required when apparently it was not required for other provisions of China's Accession Protocol,

[31] Panel Report, paras. 7.83-7.84.
[32] China's Appellant Submission, para. 123.
[33] China's Appellant Submission, paras. 125-126.

such as the Paragraph 11.3 obligation to eliminate export duties.

29. China's arguments with respect to the Panel's rejection of its "nuanced explanations" regarding the inclusion of explicit references in China's Accession Protocol and the Working Party Report to the GATT 1994 fail for similar reasons.[34] The language in each of the provisions cited by the Panel – Paragraphs 5.1, 11.1, and 11.2 of China's Accession Protocol, and Paragraph 160 of the Working Party Report – provide examples demonstrating that Members knew when and how to include a reference to the GATT 1994 when they wanted to do so. Indeed, consistent with the analysis of both the panel and the Appellate Body in the *China – Raw Materials* dispute, the Panel in this dispute noted that "there are several . . . explicit cross-references [to the exceptions of Article XX of the GATT 1994]" in provisions of China's accession commitments.[35] The Panel further quoted the observation of the panel in *China – Raw Materials* that "[i]f China and WTO Members wanted the defences of GATT Article XX to be available to violations of China's export duty commitments, they could have said so in Paragraph 11.3 or elsewhere in China's Accession Protocol. [36]

30. Moreover, China's arguments with respect to the language of these provisions are inconsistent, in light of China's position that provisions of its Accession Protocol that have an "intrinsic relationship" to the GATT 1994 are necessarily an integral part of the GATT 1994.[37] For example, China argues that language referring to the GATT 1994 was necessary in

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[34] China's Appellant Submission, paras. 128-135.

[35] Panel Report, para. 7.86; *see also* para. 7.66 (noting that, in the *China – Raw Materials* dispute, the Appellate Body considered "the context provided by the wording of other provisions of China's Accession Protocol, including Paragraphs 5.1, 11.1 and 11.2, as well as Paragraphs 155, 156, 169, and 170"); *see also China – Raw Materials (AB)*, paras. 293, 299; *China – Raw Materials (Panel)*, paras. 7.138-7.140, 7.145-7.146.

[36] Panel Report, para. 7.88 (quoting *China – Raw Materials (Panel)*, para. 7.140).

[37] *E.g.*, China's Appellant Submission, para. 75.

Paragraphs 11.1 and 11.2 because "the policy tools covered by these paragraphs are subject to the various detailed provisions of the GATT 1994."[38] However, according to China, any provision of its Accession Protocol that has an "intrinsic relationship" to the GATT 1994 – which would presumably include paragraphs that (in contrast to the commitment to eliminate export duties in Paragraph 11.3) cover measures that are subject to the GATT 1994 – is automatically an integral part of the GATT 1994. China's arguments regarding paragraphs 160 and 162 of the Working Party Report demonstrate similar inconsistencies.[39]

31. With respect to Paragraph 5.1 of China's Accession Protocol, China argues that the language "in a manner consistent with the WTO Agreement" is necessary to "ensure[] that China's 'WTO-plus' commitment to grant the right to trade does not undermine China's rights and obligations under the GATT 1994. . . . .if, based on a case-by-case analysis, it emerges that the measure at issue has a clearly discernable, objective link to the *objective* of regulating trade in the goods at issue."[40] But if the obligations of Paragraph 5.1 stand to "undermine China's rights and obligations under the GATT 1994," it is not clear why Paragraph 5.1 is not, under China's "intrinsic relationship" test, necessarily an integral part of the GATT 1994. And China's analysis of Paragraph 5.1 ignores the fact that the Appellate Body did not rely upon any "intrinsic relationship" test or absence thereof in analyzing the introductory language of Paragraph 5.1 in the *China – Publications and Audiovisual Products* dispute.

C. Conclusion

32. For the reasons discussed above, and in the U.S. Appellee Submission in DS431, China

[38] China's Appellant Submission, para. 133.
[39] China's Appellant Submission, para. 134.
[40] China's Appellant Submission, para. 135 (emphasis in original).

has failed to show any legal error in the Panel's interpretation set forth in paragraphs 7.73 to 7.93 relating to Article XII:1 of the WTO Agreement and Paragraph 1.2 of China's Accession Protocol, and China has no basis for requesting that the Panel's findings in paragraphs 7.80, 7.89, and 7.93 be reversed.

III. CONCLUSION

33. For the reasons given in this submission, and in the U.S. Appellee Submission in DS431, the United States respectfully requests the Appellate Body to reject China's appeals in DS432 and DS433 in their entirety.