CHINA – MEASURES RELATED TO THE EXPORTATION OF RARE EARTHS, TUNGSTEN, AND MOLYBDENUM
(AB-2014-3 / DS431)

APPELLEE SUBMISSION OF
THE UNITED STATES OF AMERICA

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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
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China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. China's appeal continues years of efforts to find a successful road map to accommodate its heavy-handed and blatantly discriminatory raw material export restraints within the WTO rules. As in China's appeal in *China – Raw Materials*, China's appeal in this dispute raises some of the same interpretative issues relating to China's obligations under its Accession Protocol and the applicability and scope of the Article XX exception of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") for the conservation of exhaustible natural resources. This appeal provides the WTO with another opportunity to enforce WTO disciplines and make clear that economic and industrial policies like the ones being persistently pursued by China are not protected under WTO rules.

2. Before discussing the specific issues raised in this appeal, it is important to remember why the United States, the European Union ("EU"), and Japan initiated this dispute. As in the earlier *China – Raw Materials* dispute, here China continues to impose WTO-inconsistent export restraints on raw material inputs for manufacturing. This time, the export duties, export quotas, and export quota administration requirements affect approximately 100 tariff lines of various forms of rare earths, tungsten, and molybdenum. These raw materials are critical to the manufacture of electronics, automobiles, steel, petroleum products, and a variety of chemicals that are used to produce both everyday items and some of today's most highly sophisticated, technologically advanced products, such as hybrid vehicle batteries, wind turbines, and energy efficient lighting.

3. China is the leading producer and consumer of each of these raw materials. As noted by the Panel in this dispute, and the panel in *China – Raw Materials*, the types of export restraints imposed by China have the effect, on the one hand, of increasing the prices that foreign

downstream producers must pay for the raw materials on the world market, and, on the other hand, securing access to, lowering prices for, and increasing the consumption of, the same raw materials for downstream producers in China.[1] They also create strong incentives for foreign users of the raw materials to relocate their manufacturing facilities, technologies, and jobs to China.

4. The effects created by China's WTO-inconsistent export restraints are not accidental. Rather, they *are* the objectives of the policies adopted by China in order to propel its economic and industrial development. Thus, China's strategy to promote its own economic and industrial advancement comes at the expense of other WTO members. They reflect resource nationalism, not resource conservation.

5. In sum, the United States – along with co-complainants the EU and Japan – initiated this dispute in an attempt to preserve their rights under WTO rules and level the playing field for all non-Chinese consumers of the raw materials at issue – consistent with what China agreed to do in entering the WTO. Protection of this level playing field is important to all Members, and it also should be important to China, which is a significant importer and consumer of many other industrial raw materials.

6. During the Panel stage, China did not deny that it maintained export restraints. Instead, China tried to justify its WTO-inconsistent export restraints on environmental protection and resource conservation grounds. As the Panel properly found, China's justification was unconvincing on several grounds. Indeed, China's explanation as to how the restraints contributed to these goals did not appear in the text of the measures, but was instead developed

[1] *See, e.g.*, Panel Report, para. 7.830.

for the purpose of defending China's discriminatory policies in this proceeding. Accordingly, the Panel found in favor of the United States on each and every one of its claims.

7. What has become evident throughout this dispute, as in the *China – Raw Materials* dispute, is China's apparent disregard for or disavowal of key commitments that China made as a part of its accession to the WTO. Specifically, China committed, under Paragraph 11.3 of Part I of its Accession Protocol, not to impose export duties on products not listed in Annex 6 of the Protocol. Yet, despite this clear commitment, China imposes export duties on the raw materials at issue in this dispute.

8. Further, China committed, under both Article XI:1 of the GATT 1994 and paragraphs 162 and 165 of the Working Party Report (as incorporated by the Accession Protocol), not to maintain prohibitions or restrictions on exportation. Despite those commitments, China imposes prohibitive or restrictive export quotas on various forms of rare earths, tungsten, and molybdenum.

9. China also committed, under Paragraphs 5.1 and 5.2 of Part I of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report, to eliminate certain eligibility criteria for obtaining the right to export. Without any regard for these commitments, in administering its WTO-inconsistent export quotas on rare earths and molybdenum, China requires exporters of these raw materials to satisfy precisely the eligibility criteria that China was bound to eliminate.

10. In light of the Panel's well-reasoned decision, which correctly found in favor of the three Co-Complainants, China is following the same litigation strategy that it followed during the panel proceedings. In particular, China is trying to broaden the scope and applicability of the exception for resource conservation contained in the GATT 1994 in such a way that China's

discriminatory and trade-distorting export quotas in the future can be "shoe-horned" into that exception. In other words, even though a successful appeal for China will not lead to an Appellate Body report that no longer finds that China's export quotas on rare earths, tungsten, and molybdenum are WTO-inconsistent, China is trying to divine a roadmap for its future use of trade-distortive export quotas.

11. In these proceedings, the Appellate Body will have the opportunity once again to confirm that GATT 1994 defenses are not available to excuse violations of China's export duty commitments and that the scope of the conservation-related exception of the GATT 1994 does not extend to excusing beggar-thy-neighbor export quota policies. As discussed in detail in this submission, all of the Panel findings challenged by China – which confirm that China must comply with its WTO obligations – should be upheld.

12. With respect to the export duties that China imposes on rare earths, tungsten, and molybdenum, China did not contest that those export duties are inconsistent with Paragraph 11.3 of China's Accession Protocol. Instead, as in the *China – Raw Materials* dispute, China focused its efforts on arguing that the exceptions under Article XX of the GATT 1994 are applicable to its Paragraph 11.3 commitment. China attempted to justify those export duties (which it imposes in combination with export quotas) under the exception provided for in Article XX(b) of the GATT 1994.

13. In the *China – Raw Materials* dispute, both the panel and the Appellate Body interpreted China's obligation to eliminate export duties in Paragraph 11.3 of its Accession Protocol, in a manner consistent with customary rules of treaty interpretation of public international law, and found that Article XX is not available to excuse a breach of Paragraph 11.3. In particular, the

panel and the Appellate Body each correctly found that the text of Paragraph 11.3, which includes a specific commitment to eliminate export duties, provides for specific exceptions applicable to that commitment.

14. China did not present any contrary arguments addressing the meaning of the text of Paragraph 11.3 or relevant context during the panel proceeding in this dispute. Instead, China argued that the well-reasoned conclusion of the Appellate Body in the *China – Raw Materials* dispute was the result of an "overly textualist" approach. China asserted that any provisions of China's Accession Protocol that, in China's view, are "intrinsically related" to the GATT 1994, including Paragraph 11.3, must be treated as an integral part of the GATT 1994, such that the exceptions of Article XX of the GATT 1994 are available to justify breaches of Paragraph 11.3.

15. The Panel in this dispute, like the panel and the Appellate Body in the *China – Raw Materials* dispute, correctly found that Article XX of the GATT 1994 is not available to justify breaches of Paragraph 11.3. The Panel likewise found that China's breach of its export duty commitments is not justified under Article XX(b) of the GATT 1994.

16. China has not appealed either of these findings, and its appeal cannot affect the Panel finding that China's export duties on rare earths, tungsten, and molybdenum are in breach of China's obligations under Paragraph 11.3. China advances no arguments in its appeal that Article XX of the GATT 1994 is applicable to justify a breach of Paragraph 11.3. In fact, Paragraph 11.3 is not even cited in China's Other Appellant Submission.

17. What China has appealed is one aspect – involving the meaning of Article XII of the WTO Agreement, read in conjunction with Paragraph 1.2 of China's Accession Protocol – of

three paragraphs of the Panel report. The Panel's interpretation in this regard is sound. In particular, the Panel correctly rejected China's view that Article XII of the WTO Agreement, read in conjunction with Paragraph 1.2 of the Accession Protocol, makes China's Accession Protocol an integral part of the WTO Agreement and provisions of the Accession Protocol an integral part of the multilateral trade agreements annexed to the WTO Agreement and in turn mandates an examination of to which agreement or agreements provisions of China's Accession Protocol "intrinsically relate." Accordingly, China's appeal of 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 its request that the Panel's findings in paragraphs 7.80, 7.89, and 7.93 be reversed should be rejected.

18. Next, China appeals the Panel's findings that the export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of GATT Article XX(g). Specifically, China claims that the Panel erred when it found that the export quotas on these materials do not relate to conservation because, *inter alia*, they send a non-conservation or "perverse" signal to Chinese consumers. China also argues that the Panel erred when it examined the design, structure, architecture, and text of China's export quotas but prohibited itself from taking into account evidence regarding the effects of their actual operation. Furthermore, China appeals these Panel's findings and conclusions under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") as a failure by the Panel to make an "objective assessment of the facts relating to the existence of 'perverse signals;'" and through the Panel's "incoherent reasoning."

19. China's arguments should be rejected and the Panel's findings and conclusions should be

upheld. As discussed in Section III.A, China's request for legal review of the Panel's conclusion that the export quotas in question do not relate to conservation is based on a flawed representation of a legal standard under Article XX(g) and (as shown in Section III. B) a flawed understanding of the Panel's analysis and reasoning, both of which are sound. In addition, for the reasons set forth in Section III. C, China's appeal under Article 11 of the DSU should also be dismissed because, as a careful review of the Panel's report will show, the Panel's assessment of this issue was objective and the Panel's reasoning coherent.

20. China also appeals the Panel's interpretation of the requirement that the export quotas be "made effective in conjunction with restrictions on domestic production or consumption" in Article XX(g) of the GATT 1994 on the basis of three main arguments.

21. First, China argues that the Panel erred in its interpretation to require the existence of "even-handedness" and a "balance" between the impact of the challenged measures borne by foreign consumers and domestic consumers. As discussed in Section IV.B, China's arguments should be rejected because, among other reasons, they contradict every interpretation of Article XX(g) ever undertaken by the Appellate Body or a panel (WTO or GATT).

22. Second, China argues that the Panel erred by "confining itself" to assessing the structure, design, and architecture of China's measures and not taking into account their empirical effects. For reasons similar to the arguments the United States makes with respect to China's largely identical appeal with respect to the Panel's interpretation and application of the first clause of Article XX(g), the Panel's reasoning and approach are sound and consistent with all interpretations made hitherto on the subject of Article XX(g). These arguments are addressed in Section IV.C.

23. In addition, China appeals the Panel's findings with respect to the second clause of Article XX(g) under Article 11 for failure to properly address evidence related to the actual operation of China's domestic restrictions and export quotas in the even-handedness analysis, and for maintaining inconsistencies and "double standards" in the Panel's reasoning. As illustrated in Section IV. D, the Panel consistently assessed the evidence before it as part of its analysis of the design, structure and architecture of the export quotas and domestic restrictions.

24. In sum, for the reasons outlined above and explained in detail in the body of this submission, 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

25. As the Appellate Body is well aware, the issue of whether China may have recourse to Article XX of the GATT 1994 to justify breaches of the commitment to eliminate export duties set forth in Paragraph 11.3 of its Accession Protocol was thoroughly analyzed in both the panel and the Appellate Body reports in the *China – Raw Materials* dispute. In that dispute, both the panel and the Appellate Body interpreted Paragraph 11.3, in a manner consistent with customary rules of treaty interpretation of public international law, and found that Article XX is not available to excuse a breach of Paragraph 11.3. In particular, the panel and the Appellate Body each correctly found that the text of Paragraph 11.3, which includes a specific commitment to eliminate export duties, provides for specific exceptions applicable to that commitment.[2]

26. During the Panel proceeding in this dispute, China did not present any contrary arguments addressing the meaning of the text of Paragraph 11.3, or addressing relevant context.

[2] *China – Raw Materials (Panel)*, para. 7.126; *China – Raw Materials (AB)*, paras. 284, 303.

Rather, China faulted the Appellate Body in the *China – Raw Materials* dispute for taking an "overly textualist" approach in interpreting the omission of any explicit reference to the GATT 1994 in Paragraph 11.3.[3] China argued that its own interpretation was "the only correct interpretation,"[4] whereas the Appellate Body had "failed to apply the customary rules of interpretation of public international law as codified in the Vienna Convention in a holistic manner" and its conclusions "suggest [a] 'silent' abrogation of China's fundamental sovereign rights."[5] China also argued that any provisions of China's Accession Protocol that – according to China – are "intrinsically related" to the GATT 1994, including Paragraph 11.3, must be treated as an integral part of the GATT 1994, such that the exceptions of Article XX of the GATT 1994 are available to justify breaches of Paragraph 11.3.[6]

27. China's proposed "intrinsically related" test is not any sort of conceptual framework that leads to meaningful results. Rather, it amounts to nothing more than a suggestion that – through the addition of the word "intrinsically" – the results of the interpretive work called for under customary rules of interpretation of public international law might somehow be different. In that regard, the proposed "intrinsically related" test departs from customary rules of interpretation and therefore runs contrary to Article 3.2 of the DSU. And indeed, China failed to show any flaws – nor even to address – the thorough and well-reasoned interpretive work conducted by both the panel and the Appellate Body in the *China – Raw Materials* dispute in examining the relationship between Paragraph 11.3 and the GATT 1994. Thus, China presented no basis

[3] China's First Written Submission, para. 412.
[4] China's Rebuttal Submission Regarding its Preliminary Ruling Request, para. 25.
[5] China's First Written Submission, paras. 446, 457.
[6] China's First Written Submission, paras. 422-431.

supporting any different finding, and the Panel correctly concluded (as did the panel and Appellate Body in the *China – Raw Materials* dispute) that the Article XX exceptions do not apply to China's export duty commitments in Paragraph 11.3 of the Accession Protocol.

28. Turning to the present appeal proceeding, the scope of China's appeal is unusual, and for this reason the starting point of any discussion is to highlight what China has not appealed. First, China has not appealed the Panel finding 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.[7] 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.

29. Second, with one possible caveat addressed below, China has not even 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. 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. *Indeed, Paragraph 11.3 is not discussed – or even cited – anywhere in China's Other Appellant Submission.* Instead, 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

[7] 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.

specific paragraphs (7.80, 7.89, and 7.93) of the Panel's intermediate analysis.[8] China asks that the findings in those three paragraphs "in this regard" (that is, with respect to Article XII:1 of the WTO Agreement, read in conjunction with Paragraph 1.2 of the Accession Protocol) should be "reversed." But those paragraphs, like China's Other Appellant Submission, are not specifically addressed to Paragraph 11.3 of the Accession Protocol. Accordingly,"reversal" of those intermediate interpretations would not lead to the conclusion that Article XX of the GATT 1994 applies to Paragraph 11.3 of the Accession Protocol.

30. The one possible caveat, noted above, is that by "reversal" perhaps China asks the Appellate Body to reach the opposite result to that set out in the Panel finding highlighted below:

> In sum, and based on the foregoing considerations, the Panel concludes 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*.[9]

31. If the highlighted finding were "reversed," then China's Accession Protocol, in its entirety, would be an integral part of *each one of the more than a dozen Multilateral Trade Agreements* annexed to the Marrakesh Agreement. If this were the finding that China sought, then Paragraph 11.3 of the Accession Protocol would be an integral part of the GATT 1994, and all of the other Multilateral Trade Agreements, including, for example, the *Agreement on Agriculture* and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement"). But, even China – in its own argumentation – does not support that interpretation. (Nor is the interpretation tenable on its face.) Rather, as noted, China argues that

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

[9] Panel Report, para. 7.93 (emphasis added), as subject to appeal by paragraph 4 of China's Notice of Appeal.

whether or not a *particular part of the Accession Protocol* is part of a *particular* multilateral trade agreement must be determined based on some undefined "intrinsic relationship" test. And the Panel's findings actually appealed by China do not address the type of relationship (textual versus, as China puts it, "intrinsic") that must exist between a specific provision of the Accession Protocol and a specific exception set out in one of the Multilateral Trade Agreements. Thus, there is nothing in China's appeal, as China itself has framed it, that would lead to reversal of the Panel's conclusion that Article XX of the GATT 1994 is not applicable to justify a breach of Paragraph 11.3 of the Accession Protocol.

32. The United States also takes note of China's comment that it is seeking "coherent guidance" on the systemic relationship between post-1994 accession protocols and the WTO Agreement and the multilateral trade agreements annexed thereto. This contention is problematic in at least two respects. First, as the issue stands now, there is no uncertainty in the systemic relationship. Rather, as found by the Panel in this dispute, and by panels and the Appellate Body in prior disputes, the relationship is examined on a case-by-case basis, using the customary rules of interpretation of public international law. Ironically, only if China's suggestion were adopted – namely, that the matter was decided based on undefined "intrinsic" relationships – would uncertainty be introduced. Second, any appeal, of course, is "limited to issues of law covered in the panel report and legal interpretations developed by the panel."[10] It is those specific matters that are at issue in this dispute, as in any dispute.

33. The United States will now turn to what China *has* appealed. As noted, China has appealed and sought reversal of three paragraphs of the Panel report (paragraphs 7.80, 7.89, and

[10] DSU, Article 17.6.

7.93) in regard to China's view of the proper interpretation of Article XII:1 of the WTO Agreement, read in conjunction with Paragraph 1.2 of the Accession Protocol. As will be discussed below, the Panel's intermediate analysis contained in the paragraphs under appeal is sound, and China has failed to show any legal error. Accordingly, China's appeal is without merit.

A. Background

1. China's Commitment to Eliminate Export Duties in Paragraph 11.3 of its Accession Protocol

34. The text of Paragraph 11.3 – which plainly sets forth the exceptions that apply to the export duty commitment therein – and the text of Article XX of the GATT 1994, as well as relevant context, make clear that WTO Members did not intend for the Article XX exceptions to apply to China's commitment to eliminate export duties set forth in Paragraph 11.3 of its Accession Protocol. Paragraph 11.3 of China's Accession Protocol provides,

> China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.[11]

35. Thus, Paragraph 11.3 includes a specific commitment to eliminate export duties and two specific exceptions applicable to that commitment: as provided for in Annex 6 or as applied in

[11] Annex 6 of China's Accession Protocol provides a list of 84 products and corresponding maximum duty rates. Following the list, Annex 6 includes the following text, "China confirmed that the tariff levels in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution." In the first sentence of this note, China committed not to impose export duties on the 84 products listed in the annex above the rates set out in the annex; the rates set forth in the Annex are "maximum levels which will not be exceeded." The second and third sentences of the note impose a further obligation: even if the applied rate for one of the 84 products listed in Annex 6 is below the maximum rate, China is not free to raise the applied rate up to the maximum rate. It may do so only in "exceptional circumstances" and after consulting with other WTO Members.

conformity with Article VIII of the GATT 1994. Paragraph 11.3 includes no language referring to Article XX, the *chapeau* of which refers to "this Agreement," that is, the GATT 1994.

36. This interpretation of the text of Paragraph 11.3 is confirmed by relevant context, in particular, the contrast between the language of Paragraph 11.3 and the language of other commitments made by China in its Accession Protocol.[12] For example, Paragraph 5.1 of China's Accession Protocol includes the introductory clause, "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement . . . ." In *China – Publications and Audiovisual Products*, the Appellate Body interpreted this language to mean that Article XX was available as a defense to the commitments in Paragraph 5.1 of China's Accession Protocol.[13] Paragraphs 11.1 and 11.2, meanwhile, which immediately precede Paragraph 11.3, affirm China's obligations to apply or administer certain measures "in conformity with the GATT 1994."

37. In contrast to the language in Paragraphs 5.1, 11.1, and 11.2, the language of Paragraph 11.3 is specific and circumscribed. Paragraph 11.3 establishes an obligation with respect to export duties, and then sets forth the two exceptions that apply to that obligation. Paragraph 11.3 includes no reference to Article XX, to the GATT 1994, or to WTO obligations more generally.

2. Interpretation of Paragraph 11.3 by the Panel and the Appellate Body in the *China – Raw Materials* Dispute

38. Given the text and context of Paragraph 11.3, as explained above, in *China – Raw*

[12] Paragraphs 155 and 156 of the Report of the Working Party on the Accession of China (Working Party Report), in which Members specifically voiced concerns over taxes and charges that China applied exclusively to exports, and expressed the view that such charges should be eliminated unless applied in conformity with Article VIII of the GATT 1994 or listed in what was then Annex 6 to the Draft Protocol, also confirm that WTO Members did not intend for the Article XX exceptions to apply to China's commitment to eliminate export duties.

[13] *China – Publications and Audiovisual Products (AB)*, paras. 218-230.

Materials, both the panel and the Appellate Body correctly concluded that Article XX of the GATT 1994 does not apply to China's commitment to eliminate export duties. In particular, after examining the plain meaning of the language of Paragraph 11.3, the panel and the Appellate Body each found that the text of Paragraph 11.3, which includes a specific commitment to eliminate export duties, provides for specific exceptions applicable to that commitment.[14]

39. The panel and the Appellate Body also analyzed the context of Paragraph 11.3, including the fact that neighboring provisions in China's Accession Protocol (Paragraphs 11.1 and 11.2), unlike Paragraph 11.3, do include specific references to applying or administering certain measures "in conformity with the GATT 1994."[15] In addition, the panel and the Appellate Body examined Paragraph 5.1 of the Accession Protocol, which includes language that had previously been interpreted to permit recourse to Article XX for breaches of that provision, and noted that there is no similar language in Paragraph 11.3.[16] The panel and the Appellate Body each also noted that the provisions of the Working Party Report that discuss China's export duty commitments (paragraphs 155 and 156), like Paragraph 11.3, do not refer to the availability of an Article XX defense for a breach of those commitments.[17]

40. Finally, the panel and the Appellate Body addressed China's argument that neither its Accession Protocol nor the Working Party Report includes language showing that it had ceded its "inherent right to regulate trade."[18] The Appellate Body, like the panel, noted that the

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[14] *China – Raw Materials (Panel)*, para. 7.126; *China – Raw Materials (AB)*, paras. 284, 303.

[15] *China – Raw Materials (Panel)*, para. 7.138; *China – Raw Materials (AB)*, para. 293.

[16] *China – Raw Materials (Panel)* para. 7.124; *China – Raw Materials (AB)*, para. 291 (citing *China – Publications and Audiovisual Products (AB)*).

[17] *China – Raw Materials (Panel)*, paras. 7.145-7.146; *China – Raw Materials (AB)*, para. 299.

[18] *China – Raw Materials (Panel)*, paras. 7.155-7.160; *China – Raw Materials (AB)*, paras. 300-306.

provisions of Article XX have at times been expressly incorporated into other covered agreements[19] and found significant the fact that Paragraph 11.3 does expressly refer to Article VIII of the GATT 1994, but not to other provisions of the GATT 1994.[20] The Appellate Body also specifically rejected China's arguments that its "right to regulate trade" means that express language is required to exclude the applicability of the Article XX exceptions, concluding instead that neither "the objectives listed [in the Preamble], nor the balance struck between them, provides specific guidance on the question of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol."[21]

3. The Panel's Analysis of China's Arguments Regarding Paragraph 11.3 in this Dispute

41. Despite the exhaustive and well-reasoned findings of the Appellate Body and the panel in *China – Raw Materials*, in this dispute, China asserted that the Panel should reach a different conclusion, based on what it characterizes as arguments that allegedly had not been fully considered by the panel or Appellate Body and new arguments not raised in the previous dispute. In particular, in its first written submission, China requested that the Panel issue a "preliminary ruling" prior to the first meeting with the Panel on the substantive issue of whether Article XX is available to justify breaches of Paragraph 11.3 of China's Accession Protocol based on, among other arguments, China's argument that Paragraph 11.3 has an "intrinsic relationship" with, and is therefore an integral part of, the GATT 1994.[22]

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[19] *China – Raw Materials (AB)*, para. 303; *China – Raw Materials (Panel)*, para. 7.153.

[20] *China – Raw Materials (AB)*, para. 303; *see also China – Raw Materials (Panel)*, para. 7.129.

[21] *China – Raw Materials (AB)*, para. 306; *see also China – Raw Materials (Panel)*, para. 7.160.

[22] China's First Written Submission, paras. 417, 422-435. China did not attempt to substantiate any Article XX defense with respect to the export duties at issue in its December 20, 2012, First Written Submission. Rather, the Panel invited the Co-Complainants to provide comments on China's request for a preliminary ruling, China to provide responses to those comments, and the Co-Complainants to comment on China's comments. Panel Report,

42. In the course of its arguments on this issue, China never addressed the text or context of Paragraph 11.3 itself, notwithstanding that it is the provision at issue in this dispute. Instead China advocated for a nebulous "intrinsic relationship" test that it devised, pursuant to which no analysis of the text or context would be necessary. Under China's view, provisions of its Accession Protocol are automatically an integral part of the multilateral agreement (or agreements) to which they "intrinsically relate."[23] According to China, Paragraph 11.3 "intrinsically relates" to the GATT 1994 and the exceptions of Article XX of the GATT 1994 are therefore necessarily available to justify breaches of Paragraph 11.3 because there is no explicit language to the contrary.[24]

43. After the Co-Complainants pointed out that China's proffered "intrinsic relationship" test lacks any basis in the text of China's Accession Protocol, the WTO Agreement, any covered agreement, or in customary rules of treaty interpretation,[25] China attempted to identify Article XII:1 of the WTO Agreement as a textual basis for its approach. China claimed that Article XII:1, in particular the second sentence, "confirm[s] . . . that China's 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" and therefore provides a basis for China's "intrinsic relationship" test.[26] China suggested that its proposed interpretive

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para. 1.11. The Panel subsequently informed the parties and third parties that it would not issue a ruling prior to the first meeting with the Panel and requested China to provide a substantive defense under Article XX by February 15, 2013. *Id.*

[23] China's First Written Submission, paras. 422, 429, 442.

[24] China's First Written Submission, paras. 413, 415, 422.

[25] U.S. Response to China's Preliminary Ruling Request, paras. 31-34.

[26] China's Rebuttal Submission Regarding its Preliminary Ruling Request , paras. 15-18; *see also* China's Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 23-25; China's Second Written Submission, paras. 208, 211-215.

approach follows from the fact that Article XII refers to accession to the WTO Agreement and the multilateral trade agreements annexed thereto.[27]

44. The Panel rejected China's view that Paragraph 11.3 is an integral part of the GATT 1994.[28] In so doing, the Panel also rejected China's argument that Article XII and Paragraph 1.2 of China's Accession Protocol operate to make both China's Accession Protocol an integral part of the WTO Agreement and the Protocol's component provisions an integral part of one of the multilateral agreements annexed thereto.

45. First, consistent with the customary rules of treaty interpretation, the Panel analyzed the text of Paragraph 1.2 of China's Accession Protocol, in particular the reference to the "WTO Agreement." The Panel noted that the Preamble of China's Accession Protocol refers to the "WTO Agreement" as "the Marrakesh Agreement Establishing the World Trade Organization" and that Paragraph 1.2 provides, in the singular, "This Protocol . . . shall be an integral part of the WTO Agreement."[29] In contrast, Paragraph 1.3, which immediately follows Paragraph 1.2, refers explicitly to "the Multilateral Trade Agreements annexed to the WTO Agreement."[30]

46. The Panel also considered context – namely, the fact that *other* provisions of China's Accession Protocol are expressly made an integral part of the GATT 1994.[31] However, as the Panel noted, this occurs as a result of language in the individual provision, not as a result of Paragraph 1.2.[32] The Panel observed that other provisions of China's accession documents (in

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[27] China's Second Written Submission, paras. 207-208.
[28] Panel Report, paras. 7.78-7.93.
[29] Panel Report, para. 7.82.
[30] Panel Report, para 7.79.
[31] Panel Report, paras. 7.80, 7.84.
[32] Panel Report, paras. 7.80, 7.84. As an example, the Panel cited Paragraph 1 of Part II of China's Accession Protocol, which provides, "The Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the GATT 1994" and noted that Article II:7 of the GATT 1994 provides,

particular, Paragraph 5.1 of the Accession Protocol and Paragraphs 162 and 165 of the Working Party Report) do include language referencing exceptions available under the GATT 1994,[33] and that, as reflected in the Appellate Body report in *China – Raw Materials*, the exceptions of Article XX of the GATT 1994 have been incorporated into other covered agreements.[34] The Panel in this dispute also recalled the statement by the panel in *China – Raw Materials* that China and WTO Members could have agreed to make China's export duty commitments an integral part of the GATT 1994 but did not do so.[35]

47. In addition, the Panel noted that paragraph 1 of the GATT 1994 specifies what the GATT 1994 "shall consist of" and refers to protocols of accession that have entered into force under the GATT 1947 prior to the date of entry into force of the WTO Agreement, but not to other accession protocols. The Panel reasoned that this is consistent with the fact that other protocols of accession often cover issues beyond trade in goods, as the agreements reached during the Uruguay Round go beyond trade in goods.[36]

48. With respect to China's attempt to locate a textual basis for its "intrinsic relationship" test in Article XII, the Panel found nothing in Article XII to support China's position that its Accession Protocol merely serves to specify China's obligations under the WTO Agreement and the multilateral trade agreements annexed thereto and therefore provisions of its Accession Protocol must be an integral part of the covered agreement to which they intrinsically relate.

"The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement." Panel Report, para. 7.84.

[33] Panel Report, paras. 7.86-7.87.

[34] Panel Report, para. 7.80 (citing *China – Raw Materials (AB)*, para. 303).

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

[36] Panel Report, para. 7.83.

The Panel acknowledged that Article XII requires an acceding Member to accede to all of the obligations of the multilateral trade agreements.[37] The Panel reasoned that because China's Accession Protocol specifies both the rights China was afforded and the obligations it undertook in acceding to the WTO, it must look to the Accession Protocol to determine how those rights and obligations are linked to the WTO Agreement and the multilateral trade agreements annexed thereto.[38] The Panel likewise observed that many provisions of the multilateral agreements could be characterized as "specifying" obligations under the GATT 1994, but that does not mean that such provisions are automatically an "integral part" of the GATT 1994.[39]

49. The Panel's analysis and rejection of China's argument that Article XII requires applying an "intrinsic relationship" test, under which Paragraph 11.3 is an integral part of the GATT 1994 and the exceptions of the GATT 1994 are therefore necessarily available to justify breaches of that provision, is sound and grounded in the text and context of the relevant provisions. China's challenge to that analysis should be rejected, as discussed in detail below.

B. The Panel Correctly Rejected China's Proposed "Intrinsic Relationship" Test, Including China's Suggestion that Such a Test Has a Basis in Article XII:1 of the WTO Agreement and Paragraph 1.2 of China's Accession Protocol

50. In its appeal of the Panel's interpretation of Article XII of the Marrakesh Agreement, China requests the Appellate Body to reverse the Panel's conclusions in paragraphs 7.80, 7.89, and 7.93. In those three paragraphs, the Panel concluded:

> 7.80. The Panel is of the view that the terms "the WTO Agreement", in the second sentence of Paragraph 1.2, means that China's Accession Protocol is made

[37] Panel Report, para. 7.91.
[38] Panel Report, para. 7.91.
[39] Panel Report, para. 7.92.

an integral part of the Marrakesh Agreement. Article II:2 of the Marrakesh Agreement states that the annexed Multilateral Trade Agreements are integral parts of the WTO Agreement. This does not mean that the Multilateral Trade Agreements annexed to the Marrakesh Agreement 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 considers that *individual* provisions of China's Accession Protocol *could* be made an integral part of one or more of the Multilateral Trade Agreements (e.g. GATT 1994). However, this would not occur as a result of Paragraph 1.2. Rather, it would occur if and where such language is contained in the individual provision. The Appellate Body in *China – Raw Materials* states that:

> We note, as did the Panel, that WTO Members have, on occasion, "incorporated, by cross-reference, the provisions of Article XX of the GATT 1994 into other covered agreements."[40] For example, Article 3 of the *Agreement on Trade-Related Investment Measures* (the "*TRIMs Agreement*") explicitly incorporates the right to invoke the justifications of Article XX of the GATT 1994, stating that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement". In the present case, we attach significance to the fact that Paragraph 11.3 of China's Accession Protocol expressly refers to Article VIII of the GATT 1994, but does not contain any reference to other provisions of the GATT 1994, including Article XX.[41]

* * *

7.89. For these reasons, the Panel agrees with the complainants that the term "the WTO Agreement", in the second sentence of Paragraph 1.2 of China's Accession Protocol, means that China's Accession Protocol is made 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.

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7.93. In sum, and based on the foregoing considerations, the Panel concludes 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

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[40] (*Footnote in original*) *China – Raw Materials (Panel)*, para. 7.153.
[41] (*Footnote in original) China – Raw Materials (AB)*, para. 303.

> Agreement. The Panel has also rejected China's argument based on Article XII:1 of the Marrakesh Agreement.

51. China has shown no error in these paragraphs in its appeal. In particular, and as discussed in more detail below, the text and context fully support the Panel's conclusion that the term "WTO Agreement" as used in Paragraph 1.2 of the Accession Protocol means that the Accession Protocol is an integral part of the WTO Agreement, not that individual provisions within the Accession Protocol are integral parts of the multilateral agreements annexed thereto.[42]

52. China has failed to address the fact that its reading of "WTO Agreement" in Paragraph 1.2 to refer to both the WTO Agreement and the multilateral trade agreements annexed thereto: (1) would mean that its Accession Protocol is an integral part of both the WTO Agreement and all of the multilateral trade agreements;[43] (2) cannot be reconciled with Article II:2 of the WTO Agreement, unless that provision were similarly interpreted to make all of the multilateral trade agreements an integral part of one another; (3) cannot be reconciled with the fact that, as previous panel and Appellate Body reports have recognized, some multilateral trade agreements do incorporate the exceptions of another agreement by specific language; and (4) is contrary to the approach taken by the panel and the Appellate Body in analyzing accession commitments in prior disputes. China's appeal of the Panel's analysis in these paragraphs of the Panel Report should be rejected, for the reasons discussed below.

1. China's Proposed Interpretive Approach Is Contrary to the

[42] China's Other Appellant Submission, para. 46 (referring to the conclusions set forth in paragraphs 7.80, 7.89, and 7.93 of the Panel Report).

[43] As noted above, if the findings challenged by China were "reversed," then China's Accession Protocol, in its entirety, would be an integral part of each one of the more than a dozen Multilateral Trade Agreements annexed to the Marrakesh Agreement. However, China states in its appeal that it does not take the position that its Accession Protocol as a whole must be an integral part of the GATT 1994. China's Other Appellant Submission, para. 75.

Approach Called for in the DSU

53. Article 3.2 of the DSU provides that the WTO dispute settlement system "serves to . . . clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law." As previous panel and Appellate Body reports have found, the obligations of China's Accession Protocol are subject to the DSU.[44] As such, the terms of the Protocol shall be interpreted in proceedings under the DSU using customary rules of treaty interpretation, and nothing in the Accession Protocol suggests otherwise. Indeed, in the *China – Raw Materials* dispute, the Appellate Body recognized:

> 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.[45]

54. Notwithstanding the clear expression that the commitments of its Accession Protocol are to be interpreted in accordance with the customary rules of treaty interpretation, China has not explained how searching for an "intrinsic relationship" between China's Accession Protocol and one or more of the covered agreement is consistent with those rules. Nor could it, for those rules do not call for a subjective and speculative exercise. Yet China proposes to abandon those rules and apply this "intrinsic relationship" test of its own invention. Such an approach has no basis in the text of China's Accession Protocol, the WTO Agreement, or any covered agreement, or

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[44] *China – Auto Parts (Panel)*, paras. 7.740-7.741; *China – Publications and Audiovisual Products (Panel)*, para. 7.558*; US – Tyres (AB)*, para. 118; *China – Raw Materials (Panel)*, paras. 7.64, 7.113-7.115; *China – Raw Materials (AB)*, para. 278.

[45] *China – Raw Materials (AB)*, para. 278 (internal citations omitted); *see also US – Tyres (AB)*, para. 118; *China – Raw Materials (Panel)*, paras. 7.112-7.115.

customary rules of treaty interpretation.

2. The Panel Correctly Found that Article XII of the WTO Agreement and Paragraph 1.2 of China's Accession Protocol Provide No Basis for China's Proposed Interpretive Approach

55. As noted above, China appeals the Panel's conclusions in paragraphs 7.80, 7.89, and 7.93 of the Panel report, in which the Panel concluded that the term "the WTO Agreement," in the second sentence of Paragraph 1.2, means that China's Accession Protocol is made "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."[46] According to China, the proper interpretation of Article XII:1 of the WTO Agreement, read in conjunction with Paragraph 1.2, requires the interpreter to determine which agreement a provision of its accession protocol "intrinsically relates" and in turn to treat the provision as an "integral part" of that agreement.[47] As explained above, such an approach has no basis in the customary rules of treaty interpretation and would lead to uncertainty. In addition, as described in detail below, the Panel's interpretation of those provisions is grounded in the text and supported by context, and China's appeal of that interpretation should be rejected.

56. Article XII:1 of the WTO Agreement provides:

> Any State or separate customs territory possessing full autonomy in the conduct of is 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.

In its report the Panel correctly interpreted Article XII for purposes of rejecting China's

[46] Panel Report, paras. 7.89, 7.93.
[47] China's Other Appellant Submission, paras. 11, 65-67.

argument that Article XII dictates that the provisions of China's Accession Protocol are an integral part of the WTO Agreement and the multilateral trade agreements annexed thereto, based on application of its "intrinsic relationship" test.

a. The Panel Correctly Interpreted the Reference to "the WTO Agreement" in Paragraph 1.2 of China's Accession Protocol as a Reference to the Marrakesh Agreement Establishing the World Trade Organization

57. China accuses the Panel of "superficially" interpreting Article XII as "merely serv[ing] to prescribe that newly acceding Members may not 'pick and choose' amongst the covered agreements."[48] However, the Panel nowhere stated that Article XII "merely" provides that an acceding WTO Member must undertake the obligations of the WTO Agreement and the multilateral trade agreements thereto.

58. Rather, in response to China's argument that the reference in the second sentence of Article XII to both the WTO Agreement and the multilateral agreements annexed thereto means that China's Accession Protocol merely serves to specify China's obligations under those agreements,[49] the Panel correctly began its analysis by examining the text of Article XII and explained that:

> By its terms, Article XII . . . stipulates that . . . such accession [to the WTO Agreement] 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 of the Multilateral Trade Agreements – a new Member is not entitled to pick and choose which particular agreements it will

[48] China's Other Appellant Submission, para. 60.

[49] China's Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 24; China's Comments on the Co-Complainants' Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 5.

accede to.[50]

59. The Panel's conclusion in this regard is evident from the text of the second sentence of Article XII, which provides that accession "shall apply" to the WTO Agreement "and" the multilateral trade agreements annexed thereto. Indeed, it appears that China does not dispute that an acceding WTO Member must take on all, and not merely some, of the obligations of the WTO Agreement and its annexes.[51]

60. With respect to whether Article XII, read in conjunction with Paragraph 1.2 of China's Accession Protocol, means something else – namely that China's Accession Protocol is an integral part of the WTO Agreement and the multilateral agreements annexed thereto,[52] the Panel correctly interpreted both provisions in rejecting this argument.

61. China faults the Panel for finding that the reference to the "WTO Agreement" in Paragraph 1.2 refers to the WTO Agreement itself, and not in addition to the multilateral agreements annexed thereto, because China considers that the term "WTO Agreement" in other provisions of its Accession Protocol refers to the WTO Agreement and its annexes.[53] Putting

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[50] Panel Report, para. 7.91. On appeal, China argues that Article XII:1 must be interpreted to require that an Accession Protocol be an integral part of both the WTO Agreement and the multilateral agreements annexed thereto because otherwise Article XII:1 would be redundant of the provision in Article II:2 making the multilateral trade agreements in Annex 1 an integral part of the WTO Agreement. China's Other Appellant Submission, para. 61. However, China overlooks the fact that the first sentence of Article XII:1 provides that a Member accedes to the WTO Agreement, while the second sentence provides that accession "applies" to the WTO Agreement and the multilateral trade agreements annexed thereto and makes clear that those rights and obligations apply. In contrast, under Article XII:3, accession to the plurilateral trade agreements is governed by the provisions of the plurilateral trade agreements themselves. As such, there is no basis for China's assertion that the Panel's interpretation of Article XII:1 renders that provision "excessively narrow, and thus essentially redundant." Moreover, it is worth noting that Article II makes the annexed agreements (regardless of whether they relate to goods, services, intellectual property, or other items) an integral part of the WTO Agreement by virtue of express language, not by virtue of any "intrinsic relationship," which further undermines China's position in this appeal.

[51] China's Other Appellant Submission, para. 61.

[52] China's Other Appellant Submission, para. 63.

[53] China's Other Appellant Submission, para. 63.

aside the question of whether China's characterization of the reference in those provisions (none of which is at issue in this dispute) is correct,[54] China ignores the text and context of Paragraph 1.2 itself. As the Panel observed, Paragraph 1.2 provides:

> 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.[55]

62. Meanwhile, the Preamble of China's Accession Protocol, which precedes Paragraph 1.2, defines "the WTO Agreement" as "the Marrakesh Agreement Establishing the World Trade Organization." And the Decision of the Ministerial Conference similarly provides, "The People's Republic of 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."[56] In contrast, Paragraph 1.3 of the Accession Protocol (which immediately follows Paragraph 1.2) – like Article XII of the WTO Agreement, which governs accessions – distinguishes between the WTO Agreement and its annexes.[57]

63. The Panel properly considered both the ordinary meaning of Paragraph 1.2 and the context in concluding 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." As

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[54] For example, China suggests that the reference to "the WTO Agreement" in Paragraph 8.1 of the Accession Protocol refers to the WTO Agreement and the multilateral trade agreements annexed thereto. However, Paragraph 8.1 refers to "the WTO Agreement and provisions of the Agreement on Import Licensing Procedures." The Agreement on Import Licensing Procedures is one of the multilateral trade agreements annexed to the WTO Agreement. A reference to the Agreement on Import Licensing Procedures would presumably not have been necessary if this agreement was already captured by reference to the WTO Agreement.

[55] Panel Report, paras. 7.79-7.82.

[56] WT/L/432; Panel Report, para. 7.79.

[57] Panel Report, para. 7.79.

the Panel observed, the ordinary meaning of Paragraph 1.2, which refers to "this Protocol" being "an integral part of the WTO Agreement" does not support a reading that individual parts of the protocol might in addition be integral parts of one or more agreements annexed to the WTO Agreement.[58]

64. As the Panel further observed, Article II:2 of the WTO Agreement provides that the Multilateral Trade Agreements annexed to the WTO Agreement are integral parts of the WTO Agreement, but this does not mean that they are integral parts of additional agreements.[59] The Panel also noted that the GATT 1994 specifies what it "consists of," and does not include post-1994 accession protocols, and that there would have been no need for Paragraph 1 of Part II of China's Accession Protocol to make the schedules of tariff concessions contained therein an integral part of the GATT 1994 if all "intrinsically related" provisions were automatically an "integral part" of the GATT 1994.[60]

65. Thus, contrary to China's suggestion, the Panel's interpretation of the reference to "the WTO Agreement" in Paragraph 1.2 of the Accession Protocol reflects an interpretation that takes into account all relevant materials and gives effective meaning to the terms of both Paragraph 1.2 of the Accession Protocol and Article XII of the WTO Agreement. The Preamble and Paragraph 1 of the Accession Protocol make clear that China accedes to "the WTO Agreement" – defined as the Marrakesh Agreement Establishing the World Trade Organization – pursuant to Article XII. The second sentence of Article XII:1, in turn, makes clear that accession applies to both the WTO Agreement itself and to the multilateral agreements annexed thereto. As such, China's

[58] Panel Report, para. 7.82.
[59] Panel Report, para. 7.82.
[60] Panel Report, paras. 7.83-7.84.

assertion that the reference to "the WTO Agreement" in Paragraph 1.2 "cannot be read" as a reference to the WTO Agreement as opposed to the WTO Agreement and the multilateral agreements annexed thereto is baseless.[61]

b. The Panel Correctly Found that the Terms of the Protocol at Issue, not a Supposed "Intrinsic Relationship," Are the Proper Subject of Analysis

66. China continues to insist on appeal that its "intrinsic relationship" test is supported by Article XII because under Article XII:1 its Accession Protocol "serves to specify China's obligations under the *Marrakesh Agreement* and the multilateral trade agreements annexed thereto."[62] In faulting the Panel for failing to reach this conclusion, China ignores the fact that the Panel *agreed* 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.[63] The Panel in turn correctly reasoned that "it is to the Protocol that we must look to find how they are linked to the WTO Agreement and the Multilateral Trade Agreements annexed thereto."[64]

67. The Panel's interpretation does not, contrary to China's suggestion,[65] preclude a provision of the Accession Protocol from being an integral part of a multilateral trade agreement. The Panel expressly recognized that a provision of the Accession Protocol could be an integral part of one or more of the multilateral trade agreements, including the GATT 1994.[66] However, consistent with the fact that a treaty is to be interpreted in accordance with the ordinary meaning

[61] China's Other Appellant Submission, para. 63.
[62] China's Other Appellant Submission, para. 64.
[63] Panel Report, para. 7.91.
[64] Panel Report, para. 7.91.
[65] China's Other Appellant Submission, para. 65.
[66] Panel Report, para. 7.80.

to be given to the terms, in their context and in light of the agreement's object and purpose, the Panel properly recognized that would "not occur as a result of Paragraph 1.2" but, rather,"if and where such language is included in the individual provision."[67] As the Panel explained succinctly, even if Article XII means 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."[68]

68. The fact that under Article XII an acceding Member takes up the obligations of all of the multilateral agreements does not by its terms or by implication require an examination of which agreement or agreements provisions of China's Accession Protocol "intrinsically relate." While various provisions of the multilateral agreements might overlap in subject matter, that does not mean that those different agreements all have an "intrinsic relationship" to one another such that the exceptions of one agreement should be assumed to apply to another. Rather, as the Panel observed and as panels and the Appellate Body have found in previous disputes, where the drafters of China's accession commitments intended to incorporate a provision of the multilateral agreements, they made that intention clear.[69]

69. The Panel's rejection of China's interpretation that Article XII supports its "intrinsic

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[67] Panel Report, para. 7.80; *see also China – Publications and Audiovisual Products (AB)*, paras. 217, 228-230.

[68] Panel Report, para. 7.92 (emphasis added) (explaining further that certain of the multilateral trade agreements could be said "to specify" obligations under the GATT 1994, but that does not make them an "integral part" of the GATT 1994).

[69] Panel Report, paras. 7.80, 7.86 (citing Paragraph 5.1 of the Accession Protocol and Paragraphs 162 and 165 of the Working Party Report); *see also China – Raw Materials (Panel)*, para. 7.124; *China – Raw Materials (AB)*, paras. 291 (citing Paragraph 5.1 of the Accession Protocol and *China – Publications and Audiovisual Products (AB)*, 293 (citing Paragraphs 11.1 and 11.2 of the Accession Protocol), 303 (citing incorporation of GATT Article XX in the TRIMs Agreement)).

relationship" test is likewise consistent with the analysis of provisions of China's Accession Protocol in past disputes, in particular the panel and the Appellate Body reports in *China – Raw Materials* and the Appellate Body report in *China – Publications and Audiovisual Products*. In those disputes, the panel and the Appellate Body, respectively, analyzed the provision at issue by applying the customary rules of interpretation, not by reliance on an "intrinsic relationship" between the Protocol writ large and the WTO Agreement and all of its annexes.

70. More specifically, in the panel and Appellate Body reports in the *China – Raw Materials* dispute, as described above, and in the panel report in this dispute, the panels and the Appellate Body found that the text and context of Paragraph 11.3 make clear that Article XX of the GATT 1994 is not available to justify breaches of Paragraph 11.3.[70] China never addresses those findings, and instead attempts to undermine them by suggesting that Article XX is nonetheless applicable by virtue of an "intrinsic relationship" between the Accession Protocol as a whole and the WTO Agreement and the multilateral agreements annexed thereto (including the GATT 1994).

71. China's assertion that its Accession Protocol is not a "self-contained agreement" does not support its call for an "intrinsic relationship" test, either. Neither Article XII of the WTO Agreement, nor any provision of the WTO Agreement or the DSU, uses the terms or concepts of "self-contained" or "non-self-contained" agreements. Contrary to China's suggestion, Appendix 1 of the DSU does not refer to "self-contained" agreements, much less provide an exhaustive list

[70] Panel Report, paras. 7.96-7.98.

of "self-contained" agreements.[71]

72. And China's interpretation is not the "only" explanation for the enforceability of China's Accession Protocol under the DSU.[72] Pursuant to Article 1.1 of the DSU, the DSU applies to disputes brought pursuant to the consultation and dispute settlement provisions of the "covered agreements" listed in Appendix 1 of the DSU, which include the Marrakesh Agreement Establishing the World Trade Organization (defined in paragraph 1.1 of the DSU as the "WTO Agreement"), as well as to "the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization ... (WTO Agreement) ...." and of the DSU "taken in isolation or in combination with any other covered agreement." As noted above, the second sentence of Paragraph 1.2 of China's Accession Protocol states, "[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." And the Protocol, in the first recital of the preamble, defines the "WTO Agreement" as "the Marrakesh Agreement Establishing the World Trade Organization." Accordingly, 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. As noted above, and as the panel

[71] China's Other Appellant Submission, para. 64. China also attempts to distinguish its accession protocol from the "self-contained" covered agreements as identified in Appendix 1 of the DSU on the ground that post-1994 accession protocols do not possess "proper general exceptions, security exceptions or a modification clause." However, as both panels and the Appellate Body have previously recognized, WTO Members have incorporated exceptions of the GATT 1994 into other covered agreements by cross-reference. *China – Raw Materials (AB)*, para. 303; *China – Raw Materials (Panel)*, para. 7.153. In other words, the drafters knew how to incorporate the exceptions of Article XX of the GATT 1994 when they intended to do so. This is not the case with respect to Paragraph 11.3 of China's Accession Protocol.

[72] China's Other Appellant Submission, para. 10.

recognized in this dispute,[73] the justiciability of the commitments set forth in China's Accession Protocol and Working Party Report has been well-accepted – without recourse to China's "intrinsic relationship" approach.

73. China's argument that by virtue of serving to specify an acceding Member's obligations an Accession Protocol must be an integral part of the WTO Agreement and the annexed Multilateral Trade Agreements also ignores the fact that, as recognized by the Panel, there is no obligation in the WTO Agreement to eliminate export duties.[74] That is a feature of Paragraph 11.3 of China's Accession Protocol, the provision at issue in this dispute. As the Panel rightly observed, it is not clear 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."[75]

74. Finally, as the Panel recognized, there is no necessary logic to suggest that, to the extent that its Accession Protocol serves to specify China's obligations under the WTO Agreement and its annexes, the Protocol is automatically an "integral part" of one or more of those agreements.[76] This is particularly true given that, as found in this and previous disputes, there is language in individual provisions of China's accession commitments that does include specific references to being "in conformity with the GATT 1994" or that otherwise have been interpreted to permit

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[73] Panel Report, para. 7.85; *see also, e.g., China – Raw Materials (AB)*, para. 278, *China – Raw Materials (Panel)*, paras. 7.112-7.114; *US – Tyres (AB)*, para. 118.

[74] Panel Report, para. 7.91.

[75] Panel Report, para. 7.91. To be clear, the fact that neither the WTO Agreement nor the multilateral trade agreements annexed thereto obligate a WTO Member to eliminate export duties does not mean that such a commitment in a WTO accession protocol represents an "unbounded" exercise of authority, and the United States does not understand China to argue that this is the case. China's Other Appellant Submission, para. 57.

[76] Panel Report, 7.92.

recourse to Article XX of the GATT 1994.[77]

c. Application of the Customary Rules of Interpretation, by the Panel in this Dispute and by Panels and the Appellate Body in Prior Disputes, Does Not Lead to Uncertainty

75. As China acknowledges, its Accession Protocol covers a range of issues.[78] Under China's proposed approach to interpreting its accession commitments, regardless of the textual commitments provided in the Accession Protocol, and regardless of how long Members spent negotiating those commitments, Members would apparently never know what those commitments actually meant unless and until a panel engaged in the speculative exercise of attempting to determine to which agreement or agreements the commitment "intrinsically relates." Not only does such an approach lack a basis in the customary rules of treaty interpretation, but it could also render the carefully negotiated language of accession commitments, such as the commitment to eliminate export duties in Paragraph 11.3 of China's Accession Protocol, meaningless.

76. To the extent that China is seeking "[c]oherent guidance on the precise legal nature of China's Accession Protocol and the systemic relationship between China's Accession Protocol and the Marrakesh Agreement and the multilateral trade agreements annexed thereto,"[79] the United States notes that the purpose of the dispute settlement system is not to provide "guidance" in the abstract. As the Appellate Body has recognized, "the purpose of WTO dispute

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[77] Panel Report, para. 7.86 (citing Paragraph 5.1 of the Accession Protocol and Paragraphs 162 and 165 of the Working Party Report); *see also China – Raw Materials (Panel)*, para. 7.124; *China – Raw Materials (AB)*, para. 291 (citing *China – Publications and Audiovisual Products (AB)*). The Panel in this dispute also noted that other commitments related to export duties in particular also use different language. Panel Report, para. 7.95.

[78] China's Other Appellant Submission, n.16.

[79] China's Other Appellant Submission, para. 52.

settlement is to resolve disputes in a manner that preserves the rights and obligations of WTO Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law."[80] The Appellate Body has found support for this approach in the DSU, on the ground that:

> Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute . . . Article IX of the WTO Agreement provides that the Ministerial Conference and the General Council have the "exclusive authority" to adopt interpretations of the WTO Agreement and the Multilateral Trade Agreements. This is explicitly recognized in Article 3.9 of the DSU.[81]

77. In this dispute, the Panel interpreted the provision at issue (Paragraph 11.3 of China's Accession Protocol) by applying customary rules of interpretation of public international law under DSU Article 3.2. Panels and the Appellate Body applied those same rules in interpreting the accession commitments at issue in the *China – Publications and Audiovisual Products* and *China – Raw Materials* disputes. The established application of these rules does not call out for further guidance. Rather, it is China's proposed "intrinsic relationship" test that would call into question the meaning of its accession commitments.

C. Conclusion

78. For the reasons discussed above, the United States respectfully requests that the Appellate Body reject China's appeal of 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

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[80] *China – Publications and Audiovisual Products (AB)*, para. 213.
[81] *US – Lead and Bismuth II (AB)*, para. 70 (citing *US – Wool Shirts and Blouses (AB)*, n.22, pp. 19-20).

Protocol and its request that the Panel's findings in paragraphs 7.80, 7.89, and 7.93 be reversed.

79. The United States notes that in its Other Appellant Submission, China reserved the right to file a notice of appeal to the Panel Reports in the disputes DS432 and DS433 and to "develop further the argumentation beyond that" in its Other Appellant Submission in this dispute. Accordingly, the United States will consider and respond to any such arguments as appropriate.

III. THE PANEL CORRECTLY FOUND THAT THE EXPORT QUOTAS ON RARE EARTHS AND TUNGSTEN DO NOT "RELATE TO" CONSERVATION WITHIN THE MEANING OF ARTICLE XX(g) OF THE GATT 1994

80. China appeals the Panel's findings and conclusions that the export quotas on rare earths and tungsten do not "relate to" conservation within the meaning of Article XX(g) of the GATT 1994.[82] China argues that the Panel erred by finding that the rare earths and tungsten export quotas do not "relate to" conservation because, *inter alia*, of the stimulating impact such measures have on domestic consumption, which the Panel found to be contrary to conservation.[83] Specifically, China asserts that the Panel erred when it found that the export quotas on rare earths and tungsten do not relate to conservation because, *inter alia*, they:

> 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 [downstream] industries to China.[84]

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[82] *See* China's Notice of Other Appeal, Section II and China's Other Appellant Submission, Section III. The United States notes that China does not appeal the Panel's findings or conclusions that the export quota on molybdenum does not "relate to" the conservation of exhaustible natural resources under Article XX(g) of the GATT 1994. This may be due to the fact that, as the Panel noted, China's presentation of evidence and arguments in defense of its export quota on molybdenum was very limited relative to the efforts it made to defend the rare earths and tungsten export quotas (*see* Panel Report, paras. 7.848 and 7.874) and that China did not even make the argument for molybdenum that its export quota "sent signals" to foreign users that China was interested in conservation (Panel Report, para. 7.874).

[83] *See* China's Notice of Other Appeal, para. 5; China's Other Appellant Submission, paras. 71-73.

[84] *See* Panel Report, paras. 7.444, 7.725.

81. According to China, it was incorrect for the Panel, in interpreting and applying the "relating to" requirement in Article XX(g): (1) to examine the perverse signals sent by the export quotas to domestic users that might offset the "positive effect of conservation signals" and then "require" China to show how it offset such a risk; and (2) to examine the design, structure, architecture and text of China's export quotas but prohibit itself from taking into account evidence regarding the effects of the actual operation of the export quotas.[85]

82. China also appeals these Panel's findings and conclusions under Article 11 of the DSU as a failure by the Panel "to make an objective assessment" of the matter before it, including: (1) by failing to make an "objective assessment of the facts relating to the existence of 'perverse signals;'" and (2) through the Panel's "incoherent reasoning."[86]

83. China's arguments should be rejected and the Panel's findings and conclusions should be upheld. As will be discussed in detail in the following sections, China's request for legal review of the Panel's conclusion that the rare earths and tungsten export quotas do not relate to conservation is: (1) based on a representation of a legal standard under Article XX(g) that is incorrect, internally contradictory, and liable to produce an absurd result; and (2) premised on either a mischaracterization or simply a fundamental misunderstanding of the Panel's analysis and reasoning, both of which are sound. In addition, China's appeal of the Panel's findings and conclusions as a failure of the Panel in carrying out its mandate under Article 11 of the DSU should also be dismissed because, as a careful review of the Panel's report will show, the Panel's assessment of this issue was objective and the Panel's reasoning coherent.

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[85] *See* China's Notice of Other Appeal, para. 6; China's Other Appellant Submission, paras. 74-75.
[86] China's Notice of Other Appeal, para. 7.

A. The Panel's Interpretation of the Requirement that a Measure "Relate to" Conservation of Exhaustible Natural Resources Under Article XX(g) Is Correct

84. Before addressing China's specific arguments, it is important to recall that Article XX of the GATT 1994 provides for "general exceptions" to the affirmative obligations set forth in the GATT 1994 and that the burden of proof lies with the Member (*i.e.*, China) invoking the exception.[87] Article XX(g) provides an exception for measures that serve conservation goals. Measures excepted under Article XX(g) are those:

> relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

85. 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). On one of the first occasions that a panel was faced with the task of interpreting the requirements of Article XX(g), the GATT panel in *Canada – Herring and Salmon* noted that the provision "raises the question of whether <u>any</u> relationship with conservation and <u>any</u> conjunction with productions restrictions are sufficient for a trade measure to fall under Article XX(g) or whether a <u>particular</u> relationship and conjunction are required."[88] That panel – as well as the Appellate Body and every panel that has interpreted Article XX(g) since – concluded that in fact a very particular relationship is required. The Appellate Body has interpreted this phrase as requiring a "substantial relationship"[89] and that the

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[87] *See, e.g., US – Gasoline (AB)*, at 17, 22-23.
[88] *Canada – Herring and Salmon (GATT)*, para. 4.5.
[89] *US – Gasoline (AB)*, p. 18.

non-conforming measure not be "merely incidentally or inadvertently aimed at" conservation.[90] The Appellate Body has also described this relationship as "a close and genuine relationship of ends and means"[91] which requires an examination of "the relationship between the general structure and design of the measure [] and the policy goal it purports to serve."[92]

86. With respect to China's specific challenge to the Panel's interpretation of the "relating to" requirement of Article XX(g) – it is limited only to the Panel's interpretation that led to an examination of the structure, design, and architecture of China's quotas as applied to China's argument that its export quotas served conservation goals by sending "signals" to consumers. The Panel addressed half a dozen other arguments put forward by China in an attempt to establish the requisite relationship between its export quotas and the policy objective of conservation that Article XX(g) demands. China does not appeal the Panel's findings or conclusions with respect to those arguments.

87. In its appeal of this one aspect of the Panel's interpretation and application of Article XX(g), China attempts to provide legal support to its argumentation by selecting phrases and quotations from Appellate Body reports regarding Article XX(g) and placing them near other phrases and quotations from Appellate Body reports interpreting the requirements of other sub-paragraphs of Article XX of the GATT 1994 – primarily the "necessary to" provisions, *e.g.*, Article XX(a) and Article XX(b)[93] – as well as the *Agreement on Technical Barriers to Trade*

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[90] *US – Gasoline (AB)*, p. 18.

[91] *US – Shrimp (AB)*, para. 136; *China – Raw Materials (AB)*, para. 355.

[92] *US – Shrimp(AB)*, para. 137.

[93] *See* China's Other Appellant Submission, para. 78 and fn. 30; para. 81 and fns. 34 and 35; para. 82 and fns. 37 and 38; para. 84 and fn. 41.

("TBT Agreement").[94] In concocting this melange of Appellate Body statements, China's goal is two-fold.

88. First, China is attempting to establish that some "contribution" to conservation is enough to satisfy the requirements of Article XX(g) such that the Panel erred either by requiring China to show that sending "signals" to foreign consumers alone was not enough to establish a defense under Article XX(g) or by requiring China to demonstrate some structural or design mechanism through which China could ensure that domestic consumers would not be stimulated or incentivized to waste – *i.e.*, act in a manner contrary to a conservation. China states, as though it were well-accepted as interpretation of Article XX(g) – and tellingly, without any citation to an Appellate Body or panel report: "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."[95] This is, in fact, not how the requisite relationship to conservation in Article XX(g) has been or should be interpreted. In sub-section 1 below, the United States will address the flaws in China's arguments and explain how the Panel's interpretation is correct and well-supported.

89. Second, China is attempting to create some opening through which it can introduce into the interpretation of Article XX(g) a basis requiring the Panel to examine, in determining whether a measure is "related to" conservation, the empirical data or "actual effects" that China considers would have been so helpful to its cause in this dispute.[96] China tries to pass off as a well-accepted truism its own aspirational suggestion that, "[j]ust as under subparagraph (b), the

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[94] *See* China's Other Appellant Submission, paras. 76-85 and fn. 30.
[95] China's Other Appellant Submission, para. 83.
[96] *See* China's Other Appellant Submission, para. 84.

demonstration that a measure contributes to conservation ends under subparagraph (g) "can of course be made by resorting to evidence or data,"citing paragraph 151 of the Appellate Body Report in *Brazil – Tyres (AB)*, which provides the quoted text but does not reference or mention any of the requirements of Article XX(g).[97] But in reality, no interpretation of Article XX(g) has taken the meandering path that China has charted in its argumentation. And in sub-section 2 below, the United States will address the reasons that China is wrong and the Panel is correct.

1. The Panel Correctly Interpreted Article XX(g) to Require that a Measure Requires More than Just "Some Contribution" to a Conservation Objective

90. As noted above, according to China – and only China – through its creative use of quotations, "the concepts of 'relating to' and 'contribution' are . . . closely linked in the jurisprudence."[98] In mixing interpretations of Article XX(g) and Article XX(b)/Article XX(a), China is playing a game of semantics. The result is an approach that ignores important distinctions between the various sub-paragraphs of Article XX. This approach is incorrect under customary rules of treaty interpretation: each of those sub-paragraphs is meant to address a different policy objective deemed important enough to justify deviations from the disciplines of the GATT 1994.

91. Of particular note, the provisions of Article XX of the GATT 1994 that impose a "necessary to" standard are structured very differently from Article XX(g). Not only do those sub-paragraphs provide for other types of "legitimate state policies or interests" for which exceptions are permitted (*e.g.*, the protection of public morals in Article XX(a) or the protection

[97] China's Other Appellant Submission, para. 84.
[98] China's Other Appellant Submission, para. 78.

of human, animal or plant life or health in Article XX(b)), but they also do not set out the conservation-specific condition that is unique to Article XX(g) – that is, that challenged measures can only be excepted in the name of conservation "*if* such measures are made effective in conjunction with restrictions on domestic production or consumption" (emphasis added).

92. As the Panel took pains to elucidate in its interpretation of Article XX(g)'s requirements:

> As the Panel discussed above, subparagraph (g) [of Article XX] includes several elements that together impose requirements that aim at ensuring that measures invoked as exceptions for conservation are really about conservation. . . . [99]

Accordingly, interpretations of Article XX(g) must, as they so far have, remain sensitive to the fact that sub-paragraph (g) has unique characteristics that the other sub-paragraphs, including (a) and (b), do not – and that these characteristics have a significant bearing on the determination of whether a challenged measure can be provisionally justified as one relating to conservation.

93. China's interpretative sleight of hand should therefore be seen for what it is. For a measure to be justified in the name of conservation, the determination must take into account whether the relationship between that measure and the conservation goal is a substantial one of genuine ends and means and whether it is being made effective in conjunction with restrictions that are affecting domestic actors, not just foreign ones. As the Panel stated correctly:

> As the Panel sees it, measures allegedly adopted for the conservation of natural resources situated within a Member's territory cannot be said to 'relate to' conservation if such measures exempt or otherwise do not control domestic actions that deplete or deteriorate the natural resource in question.[100]

This statement comports with the Appellate Body's statement that:

> if no restrictions on domestically-produced like products are imposed at all, and

[99] Panel Report, para. 7.328.
[100] Panel Report, para. 7.328.

> all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals.[101]

It is also consistent with the Appellate Body's statement that Article XX(g) requires an examination into whether restrictions imposed on trade through a challenged measure "are also imposed" in respect of domestic behavior.[102]

94. Indeed, as discussed in the next section, taking into account the existence of perverse signals was useful for the Panel in accurately determining if there is a substantial relationship between the export quotas on rare earths and tungsten and conservation of those raw materials, or if instead these measures serve only to divert access to these resources from foreign consumers to domestic consumers.

95. By the same token, the Panel was correct to examine more factors – as China argues it should have – than the "signals" sent to foreign consumers that their access to these materials would be limited, in determining whether the requisite substantial relationship to a conservation objective were satisfied. The Panel was correct to interpret that Article XX(g) required more in establishing whether a measure can be justified in the name of conservation.

2. The Panel Appropriately Interpreted Article XX(g) to Require an Examination of the Design, Structure, and Architecture of China's Challenged Measures in Determining Whether Those Measures Are "Related to" Conservation

96. Contrary to the thrust of China's arguments, the Appellate Body has consistently found that Article XX(g) does not establish an empirical "effects test."[103] Indeed, China in its own

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[101] *US – Gasoline (AB)*, p. 19 (citing *Canada – Herring and Salmon (GATT)*, which addressed a situation involving challenged export restraints on unprocessed fish).

[102] *US – Shrimp (AB)*, para. 143.

[103] *US – Gasoline (AB)*, p. 21.

submission acknowledges that there is no such test under Article XX(g).[104] 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, and its context."[105]

97. The Panel's focus on the design, structure, architecture, and text of the export quotas is supported not just by guidance from the Appellate Body, but is also appropriate given the nature of the Panel's inquiry. The task under Article XX(g) is to determine whether a measure has as its genuine objective the goal of conservation. To make "actual effects" in the market place a touchstone for making this determination – at heart a teleological inquiry – would render the task meaningless. The vagaries of the market place would mean that measures that at one point time might 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. Furthermore, as the Appellate Body noted in underscoring that Article XX(g)'s requirements do not mandate an "empirical 'effects test,'" "the problem of determining causation, well-known in both domestic and international law, is always a difficult one."[106] Basing such a determination on empirical effects could well undermine the fundamental ability to make any determination at all.

98. Accordingly, the Panel correctly stated that "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."[107] Even China, in the course of its argument in its Other Appellant

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[104] China's Other Appellant Submission, para. 83.
[105] *China – Raw Materials (Panel)*, para. 7.418.
[106] *US – Gasoline (AB)*, p. 21.
[107] Panel Report, para. 7.290.

Submission, is correct to acknowledge that the Panel was "not required" to determine whether a measure can be provisionally justified under Article XX(g) by reference to actual effects in the marketplace.[108]

99. Simply put, a Member's ability to maintain an otherwise non-conforming conservation measure, should not be accidental or determined by random factors outside its control. Determining the purpose of a measure appropriately requires a focus on the evidence of the design, structure, architecture and text of that measure. As the Appellate Body and the Panel have stressed – to be rightfully regarded as conservation-related, a measure "cannot be regarded as merely incidentally or inadvertently aimed at [] conservation."[109]

100. Accordingly, the Panel was correct when it considered that Article XX(g) required China to show that "there is a mechanism to *ensure* that the export quota and the 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.[110] Absent evidence of the existence of structure or design through some sort of a mechanism, the Panel would have had no assurance based solely on a set of empirical data, that China's export quotas have the requisite link to the goal of conservation – *i.e.*, that the exhaustible natural resources of rare earths and tungsten are being conserved by design and not by accident – *i.e.*,

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[108] In China's Other Appellant Submission, para. 83, China states that ". . . the Appellate Body has stressed that a Member invoking Article XX(g) is not *required* to show actual effects in the marketplace in order to provisionally justify a measure" (emphasis in original). By extension, therefore, China acknowledges that the panel before whom a Member is defending its measure under Article XX(g) of the GATT 1994, is not required to examine actual effects in the marketplace in making the determination whether that measure can be provisionally justified under Article XX(g).

[109] *US – Gasoline (AB)*, p. 19; also cited in *US – Shrimp (AB)*, para. 136; Panel Report, paras. 7.250, 283, 285.

[110] China's Other Appellant Submission, para. 83.

incidentally or inadvertently.

B. The Panel's Application of the Article XX(g) "Relating to" Requirement to the Facts at Issue in this Dispute Is Correct

101. Next, China asserts that the Panel erred in refusing to take China's "real world" evidence into account in the "relating to" analysis for Article XX(g).[111] China's argument fails, however, because: (1) the Panel did not conclude, as China argues, that it was forbidden from reviewing China's evidence; (2) 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 "related to" conservation; and (3) the Panel correctly found that China's empirical evidence did not establish a "substantial relationship" to the objective of conservation.

1. The Panel Did Not Prohibit Itself from Reviewing China's Evidence

102. In support if its assertion that the Panel concluded that it was forbidden from reviewing China's evidence, China relies heavily on paragraphs 7.290 and 7.379 of the Panel Report.[112] China's argument fails, however, because a review of these paragraphs (and, indeed, the entire relating to analysis) shows that the Panel did not reject or ignore the arguments and evidence provided by China, as China asserts in its submission.[113] China's argument that the Panel somehow "excluded" evidence regarding the effects of China's conservation regime, or that the Panel ignored how the measures "actually work[]," is simply wrong.[114]

103. This fact is illustrated by contrasting what China asserts the Panel said with what the Panel actually said in the two central paragraphs of the Panel Report relied on by China:

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[111] China's Other Appellant Submission, para. 73.
[112] *See, e.g.*, China's Other Appellant Submission, para. 73.
[113] China's Other Appellant Submission, para. 102.
[114] China's Other Appellant Submission, paras. 86, 90.

What China Asserts the Panel Said	What the Panel Actually Said
China's Other Appellant Submission, para. 86 (citing Panel Report, para. 7.290): "it is appropriate for a panel to consider *solely* the 'general structure and design' of the measure at issue." China's Other Appellant Submission, para. 86 (citing Panel Report, para. 7.290): "the Panel did just that by asserting it was legally bound to examine *only* the text structure and design of the measure, and not how the measure actually works[.]"	Panel Report, para. 7.290 (emphasis added): "Finally, the Panel notes that, 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."
China's Other Appellant Submission, para. 86 (citing Panel Report, para. 7.379): "For the Panel, this 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."	Panel Report, para. 7.379 (emphasis added): "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"

104. Clearly, the Panel correctly focused its attention on the design, structure, architecture, and text of the export quotas. It did not, as China asserts, exclude evidence. Accordingly, China's argument fails.

105. This is further shown by how the Panel addressed China's argument that it had domestic extraction and production targets.[115] The Panel addressed such evidence and found that China had failed to establish that the targets actually restricted Chinese production or, most importantly for the perverse signal issue, consumption.[116] On the latter point, the Panel found that, contrary to China's argument, "the combined effect of the extraction, production, and export quotas does

[115] China's Other Appellant Submission, para. 98.
[116] Panel Report, paras. 7.510, 7.545-7.550,7.757.

not establish a maximum level of domestic consumption, since domestic users can consume any amount of the export quota that has not been used in a given year."[117] China has not contested this point.

106. As an aside, China also objects to the fact that the Panel's findings that China did not have production or consumption restrictions on rare earths and tungsten in the section addressing the "in conjunction with restrictions on domestic production or consumption" prong of Article XX(g) could be relevant to its findings that the export quotas on these materials do not relate to conservation.[118] According to China:

> given that the Panel dealt with subparagraph (g) as a series 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 "relat[es] to" conservation based on its finding that the quotas can send effective conservation signals to foreign users.[119]

107. China has provided no support for its assertion that the Panel was required to segment its analysis of the different requirements under Article XX(g) of the GATT 1994. Indeed, no such support exists.

108. In fact, in the section on domestic restrictions, the Panel reiterated the role of such restrictions on the "relating to" analysis:

> The Panel recalls that the general effect of an export quota is to reduce prices in the domestic market, thus stimulating domestic production and consumption. Indeed, as the Panel understands it, export quotas suggest to domestic consumers that, in principle, the price of rare earths should be pushed down, and that a certain amount of low-cost rare earth products will be "reserved", as it were, for domestic use. This in turn seems likely to encourage the development and

[117] Panel Report, para. 7.547.
[118] China's Other Appellant Submission, para. 106.
[119] China's Other Appellant Submission, para. 106.

> expansion of the domestic rare earth industry on the basis of what might be read as a supply guarantee. The export quota therefore incentivizes the development and expansion of domestic raw-earth consuming industries. In this connection, the Panel agrees with the panel in *China – Raw Materials* that "measures that increase the cost of [a raw material] to foreign consumers, but decrease their costs to domestic users are difficult to reconcile with the goal of conserv[ation]".
>
> China has not demonstrated that its production quota is capable of counteracting this perverse incentive. As such, the Panel doubts whether the 2012 production plan imposed a real restriction.[120]

109. In sum, the Panel evaluated the evidence proffered by China and found that it did not establish that the design, structure, architecture, and text of the export quotas on rare earths and tungsten ensured that they would take into account the perverse signals sent to domestic consumers. None of the "actual effects" evidence on which China relies (*i.e.*, decreased prices in the domestic market and the lack of relocation of downstream-consuming entities to China) speaks to the design, structure, architecture, or text of the export quotas.[121]

2. The Panel Addressed the Evidence Provided by China Appropriately

110. China also asserts that the Panel should have ended its analysis once it found that the export quotas could send conservation-related signals to foreign consumers and producers, thereby wholly ignoring any non-conservation or pro-consumption signals the very same quotas might send to Chinese consumers at the very same time.[122] China provides no support, however, for its argument. Indeed, no such support exists.

111. By way of background, in China's first written submission, China asserted that the export

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[120] Panel Report, paras. 7.541-7.542.

[121] China's Other Appellant Submission, para. 71.

[122] China's Other Appellant Submission, para. 71; *see also Ibid*, para. 21 ("the Panel was not required to determine whether the positive contribution realized under a measure to China's conservation goal was offset by a theoretical risk of 'perverse signals'.").

quota on rare earths and tungsten created signaling effects to foreign consumers and producers.[123] As summarized by the Panel, "China argue[d] that the export quota system contributes to the effectiveness of its overall conservation policy by signaling to foreign users of rare earths [and tungsten] the need to explore other sources of supply."[124]

112. In response, the Co-Complainants argued 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."[125] In support of the latter point, the Co-Complainants provided evidence, accepted by the Panel, of drastic price differences between domestic and foreign prices for rare earths and tungsten,[126] which showed that the export quotas simply shifted consumption to the domestic market, as well as "statements and policy documents from Chinese local governments with a view to 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."[127]

113. China's arguments that the Panel should have ignored this evidence is baseless. The perverse signals sent by the export quotas to Chinese consumers of rare earths and tungsten provided evidence that the export quotas did not bear a substantial relationship to conservation. These perverse signals were a key part of the design of the export quotas. The Panel correctly reasoned that such adverse results on conservation should be part of the Panel's analysis as to

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[123] *See, e.g.*, China's First Written Submission, paras. 89, 139-145.
[124] Panel Report, para. 7.440.
[125] Panel Report, paras. 7.440-7.441.
[126] Panel Report, paras. 7.441, 7.723.
[127] Panel Report, para. 7.441 (citing JE-118, JE-152).

whether there is "a substantial relationship" between the measure and the conservation objective.[128]

114. It should also be noted that China's argument that the Panel should not have examined the perverse signals sent by the export quotas to domestic consumers (while relying exclusively on the signals sent to foreign consumers) introduces an element of discrimination into the "relating to" analysis. Such blatant discrimination is inconsistent with the rest of the subparagraph, specifically the requirement of even-handedness (discussed in Section IV), as well as the *chapeau* of Article XX. For these reasons, China's argument should be rejected.

3. The Panel Correctly Found that China's Empirical Evidence Did Not Establish a "Substantial Relationship" to the Objective of Conservation

115. China's argument is also flawed because it asks the trier of fact to accept mere correlation (*i.e.*, an increase in the domestic price of rare earths and decreased domestic demand) as evidence of a substantial relationship between the measure (*i.e.*, the export quotas) and conservation. For example, China asserts (without a basis in the design, structure, architecture and text of the export quotas) that the domestic price for rare earths rose between January 2011 and January 2013, and that domestic demand for rare earths decreased, and that these two phenomenon were the "actual effect" of its production and extraction targets eliminating the pro-consumption signals sent by the export quotas.

116. This flaw in China's argument is best summarized in paragraph 84 of China's Other Appellant Submission. In that paragraph, China asserts that:

> [i]t would be strange indeed if the "predictable effects of a measure" can shed

[128] *US – Gasoline (AB)*, p. 19.

> useful light on whether the measure is *related to* conservation goals, but the actual effects could not.

117. China's argument fails because it does not take into account the number of other factors that could have impacted the domestic price for Chinese rare earths between January 2011 and January 2013 as well as demand. One prominent factor impacting demand for all raw materials, which was wholly unrelated 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. And as noted by the Panel, China 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."[129] As a result, China could not establish that any such "actual effects" in the domestic market was caused by its supposed conservation regime as opposed to something else, such as Chinese measures to stimulate domestic consumption through subsidies to downstream consuming industries,[130] which would of course be contrary to conservation and, more generally, China's argument that the export quotas did not send a pro-consumption signal to the domestic market.

118. Indeed, the more general problem with China's argument was addressed by the Appellate Body in *US – Gasoline (AB)* when it observed that:

> [i]n 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. The legal characterization of such a measure is not reasonably made contingent upon occurrence of

[129] Panel Report, para. 7.447.
[130] *See, e.g.*, Panel Report, para. 7.544.

subsequent events.[131]

In order to avoid determining causation, and the "well-known" problems with such an approach, the Appellate Body has focused its analysis under the "relating to" prong of Article XX(g) to the "design and structure" of the measures at issue.[132] Here, the Panel focused on the design and structure of China's conservation regime, and correctly found that the design and structure did not address the perverse signals sent by the export quotas to Chinese consumers.

C. The Panel's Findings and Conclusions that China's Rare Earths and Tungsten Export Quotas Do Not "Relate to" Conservation Are Made Consistently with the Panel's Duty Under Article 11 of the DSU

119. China also argues that the Panel violated Article 11 of the DSU by presuming, without evidence, that export quotas were liable to send a perverse signal to domestic consumers[133] and by ignoring evidence to the contrary provided by China.[134] Specifically, China asserts that the Panel ignored data provided by China related to pricing and foreign direct investment ("FDI").[135] China further asserts that the Panel erred by engaging in "incoherent reasoning."

120. The Appellate Body has made clear that an Article 11 claim is a "very serious allegation,"[136] and requires a demonstration of "egregious error."[137] To rise to the level of an Article 11 violation, a mistake on the part of the Panel must constitute a deliberate disregard of evidence or gross negligence amounting to bad faith.[138] As the Appellate Body in *EC – Fasteners (China)* observed:

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[131] *US – Gasoline (AB)*, p. 21.
[132] *US – Shrimp (AB)*, para. 141.
[133] China's Other Appellant Submission, para. 119.
[134] China's Other Appellant Submission, paras. 120-.
[135] China's Other Appellant Submission, paras. 124-134.
[136] *E.g., US – Zeroing (EC) (AB)*, para. 253.
[137] *EC – Hormones (AB)*, para. 133.
[138] *EC – Hormones (AB)*, paras. 133 and 138.

> not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. 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. An attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision. In particular, when alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11. Rather, a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment. It is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment. [139]

121. On the record of this dispute, 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. To the contrary, the record shows that the Panel undertook a thorough examination of the evidence before it and the arguments of the parties. China's assertions to the contrary are unfounded and should be rejected.

122. First, the Panel had ample support for its determination that the export quotas send perverse signals. As discussed above, the evidence showed that there were drastic differences between domestic and foreign prices for rare earths and tungsten,[140] which showed that the export quotas simply shifted consumption to the domestic market, as well as "statements and policy documents from Chinese local governments with a view to 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."[141] Put another way, the Panel's qualitative

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[139] *EC – Fasteners (China) (AB)*, para. 442.
[140] Panel Report, paras. 7.441, 7.723.
[141] Panel Report, para. 7.441 (citing JE-118, JE-152).

reasoning (that export quotas stimulate domestic consumption based on, *inter alia*, the panel report in *China – Raw Materials*) was supported by evidence – *i.e.*, the two-tiered pricing structure.[142]

123. Regarding China's domestic extraction and production targets,[143] the Panel addressed such evidence and found that China had failed to establish that the targets actually restricted Chinese production or, most importantly for the perverse signal issue, consumption.[144] On the latter point, the Panel found that, contrary to China's argument, that "the combined effect of the extraction, production, and export quotas does not establish a maximum level of domestic consumption, since domestic users can consume any amount of the export quota that has not been used in a given year."[145]

124. Moreover, for rare earths, China failed to provide the "industry forecasts" for 2012 that China allegedly used to set the extraction and production targets at a level below demand.[146] For tungsten, China provided no data whatsoever.[147] Accordingly, the Panel was wholly justified in relying on Professor Winters' report, which found that the domestic extraction and production targets would not negate the pro-consumption signals because, as noted by Professor Winters, "a loose production quota could leave domestic consumption quite unscathed."[148]

125. And while China asserts that the Panel ignored its pricing data, the Panel found that China's analysis suffered from significant methodological failures – *i.e.*, the fact that China has

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[142] *Brazil – Tyres (AB)*, para. 151.
[143] China's Other Appellant Submission, para. 98.
[144] Panel Report, paras. 7.510, 7.545-7.550,7.757.
[145] Panel Report, para. 7.547.
[146] Panel Report, para. 7.510.
[147] Panel Report, para. 7.757.
[148] Response to Professor De Melo, 1 (JE-183).

failed to justify a downward revision to foreign prices based on fees associated with export and the fact that China had deducted, without justification, the export duties on rare earth and tungsten exports.[149] China has not offered any explanation as to how the Panel erred when it found that China's data were unreliable based on these failures.

126. Regarding relocation of industries to China, China asserts that the export quotas did not send signals to foreign consumers to relocate to China, which would have increased the extraction of rare earths.[150] First, there was ample support for the Panel's finding that the export quotas on rare earths encouraged relocation of downstream consuming industries to China. In fact, the United States and the EU supplied documents, cited by the Panel, from Chinese officials in which they suggested that industries relocate to China in order to avoid the export quotas.[151] The Co-Complainants provided additional evidence in the form of statement from non-Chinese consumers regarding relocation to China to ensure access to rare earths. For example, a U.S. rare earth magnet producer noted that "[d]ifferential raw material pricing provides a cost advantage to companies located in China, encouraging additional western companies to relocate product manufacturing to China."[152]

127. According to China, 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.[153] The Panel fully addressed China's argument and rightly rejected China's unwarranted cherry-picking of the data to a comparison of pre and post-2008. According to the Panel:

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[149] Panel Report, paras. 7.642-7.643, 7.831.
[150] China's Other Appellant Submission, para. 101.
[151] Exhibits JE-118, JE-152.
[152] Exhibit JE-112.
[153] China's Other Appellant Submission, para. 131.

> [it] 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) were a significant reason for industrial relocation.[154]

128. Clearly, the Panel addressed China's arguments related to industrial relocation, and it was correct it rejecting China's argument based on, *inter alia*, the acute flaws in its analyses.

129. China's argument that the Panel engaged in incoherent reasoning fares no better. While China's argument is difficult to follow, it appears that China asserts that the Panel could not have found that China had a bona fide conservation plan and, at the same time, also find that China's conservation regime does not account for the perverse signals sent by the export quotas to domestic consumer.[155] China's argument is flawed on its face – 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, the Member may not have a domestic consumption restriction, or may not set its domestic production restriction at a level that actually restricts demand.[156]

D. Conclusion

130. For all of the foregoing reasons, the United States asks the Appellate Body to reject China's arguments and uphold the Panel's findings and conclusions challenged by China that its export quotas on rare earths and tungsten did not satisfy the relationship that Article XX(g)

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[154] Panel Report, para. 7.633.

[155] China's Other Appellant Submission, para. 135.

[156] China's other argument that the Panel's reasoning was inconsistent in a rehashing of its previous argument that the Panel ignored China's evidence. China's Other Appellant Submission, para. 136.

requires between those measures and the policy objective of conservation.

IV. THE PANEL WAS CORRECT IN ITS INTERPRETATION AND APPLICATION OF THE PHRASE "MADE EFFECTIVE IN CONJUNCTION WITH" IN ARTICLE XX(G) OF THE GATT 1994

131. In Section IV of its Other Appellant Submission, China appeals the Panel's interpretation of the requirement that the non-conforming measure be "made effective in conjunction with restrictions on domestic production or consumption" in Article XX(g) of the GATT 1994 on the basis of three main arguments. First, China argues that the Panel erred in its interpretation of the second part of Article XX(g) – the additional condition specific to conservation that is unique to the structure of sub-paragraph (g) – to require the existence of "even-handedness" and a "balance" between the impact of the challenged measures borne by foreign consumers and domestic consumers.[157] China's arguments contradict every interpretation of Article XX(g) ever undertaken by the Appellate Body or a panel (WTO or GATT) and it is astonishing how China can cite to and excerpt selected statements by the Appellate Body and argue that the words on the page mean the opposite of what they convey. The Panel's interpretation is correct and supported by the text and prior interpretations of Article XX(g). United States will address China's arguments in more detail in sub-section B below.

132. Second, similar to its allegation of error in Section III of its Other Appellant Submission, China argues that in both interpretation and application of the second clause of Article XX(g), the Panel erred by "confining itself" to assessing the structure, design, and architecture of China's measures and not taking into account the empirical effects that China proffered in

[157] *See* China's Notice of Other Appeal, para. 11; *see* China's Other Appellant Submission, paras. 36-37 and Section IV.B.1.

finding that China's export quotas on rare earths, tungsten, and molybdenum were not made effective in conjunction with restrictions on domestic production or consumption.[158] For reasons similar to the arguments the United States has made above with respect to China's largely identical appeal with respect to the Panel's interpretation and application of the first clause of Article XX(g), the United States considers that the Panel's reasoning and approach are sound and consistent with all interpretations made hitherto on the subject of Article XX(g). The United States will address China's arguments in more detail in sub-section C below.

133. Finally, and similar again to its allegations of error with respect to the "relating to" clause of Article XX(g), China appeals the Panel's findings with respect to the second clause of Article XX(g) under Article 11 for failure to properly address evidence related to the actual operation of China's domestic restrictions and export quotas in the even-handedness analysis,[159] and for maintaining inconsistencies and "double standards" in the Panel's reasoning.[160] In actuality, the Panel consistently assessed the evidence before it as part of its analysis of the design, structure and architecture of the non-conforming and domestic restrictions. As the United States did in the preceding section of this submission, it will explain below in sub-section D that the Panel did not violate Article 11 of the DSU when it conducted the even-handed analysis.

A. Background from the Panel Proceeding

134. Before addressing China's specific arguments on appeal, it is useful to recall the specific

[158] *See* China's Notice of Other Appeal, para. 11; *see* China's Other Appellant Submission, paras. 38-3o and Section IV.B.2 and 3.

[159] *See* China's Notice of Other Appeal, para. 12; *see* China's Other Appellant Submission, para. 43 and Section IV.B.4.a.

[160] *See* China's Notice of Other Appeal, para. 12; *see* China's Other Appellant Submission, para. 43 and Section IV.B.4.b and c.

steps that the Panel took in interpreting the second clause of Article XX(g) in order to demonstrate how closely they align with the interpretations made thus far by the Appellate Body and panels of this second element of Article XX(g).

135. The Panel, relying on the Appellate Body report in *China – Raw Materials*, found that "made effective in conjunction with" meant that the non-conforming measure must "work together" with domestic restrictions to conserve exhaustible natural resources.[161] The Panel then elaborated that "work together" looks to both the procedural and substantive connections between the non-conforming measure and the domestic restrictions, again by relying on the Appellate Body report in *China – Raw Materials*.[162]

136. As to the procedural connections, the Panel noted that it would examine, *inter alia*, whether the non-conforming and domestic measures were "operative" at the same time – *e.g.*, whether they covered calender year 2012.[163] As to the substantive connections, the Panel observed that there must be "substantive complementarity between the foreign and domestic restrictions in their operation 'so as to conserve an exhaustible natural resource'."[164] Expanding on the concept of substantive complementarity, and based on the Appellate Body reports in *US – Gasoline* and *US – Shrimp*, the Panel found that the requirement that the non-conforming measure be "made effective in conjunction" with domestic restrictions is a requirement of even-handedness.[165]

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[161] Panel Report, para. 7.295 (citing *China – Raw Materials (AB)*, para. 360).
[162] Panel Report, para. 7.299.
[163] Panel Report, para. 7.300.
[164] Panel Report, para. 7.301.
[165] Panel Report, paras. 7.317, 7.333 ("[t]his is also the reason why the Panel is of the view that to show even-handedness in the imposition of domestic restrictions, China also needs to establish that its export restraints *work together with a corresponding domestic restriction*.").

137. In applying even-handedness, the Panel looked first to the Appellate Body report in *US – Gasoline*, where the term "even-handedness" was first used in the context of "made effective in conjunction with" under Article XX(g), and then to the Appellate Body report in *US – Shrimp*.[166] The Panel observed that:

> to determine even-handedness, the Appellate Body seems to have focused on a broad structural correspondence of key elements of the US regulatory requirements applied to domestic and imported shrimp. The Appellate Body did not compare the domestic regulation's effects to those of the import restriction. In other words, the Appellate Body did not read an effects test in the second phrase of Article XX(g). Most importantly, the Appellate Body did not, after establishing the existence of a real and effective domestic restriction, proceed to examine the "relative treatment of domestic and foreign interests" in order to determine whether that treatment was itself even-handed. As the Panel understands it, even-handedness seems in the *US – Shrimp* case (as in *US – Gasoline*) to have been established by the fact that the US import restriction had indeed, as a matter of fact, been made effective in conjunction with parallel and corresponding restrictions on domestic production or consumption. In sum, the Panel therefore does not believe that "even-handedness" requires an assessment of the actual impact or effects of the measures imposed by a regulating Member to restrict domestic production or consumption.[167]

138. In assessing whether there was a "broad structural correspondence of key elements" of the export quotas with the domestic restriction, the Panel found that the export quotas guaranteed "the availability of a minimum amount of rare earths [*i.e.*, the difference between the production targets and the export quota, plus any unused export quota share] for China's domestic consumers."[168] The Panel also found that:

> the restrictions imposed on producers of rare earth ores, concentrates, oxides, and salts affect both domestic and foreign consumers, while the export quota on rare earths affects only foreign consumers. From a structural perspective, China's extraction and production restrictions therefore do not counterbalance its export

[166] Panel Report, paras. 7.324-7.325.
[167] Panel Report, para. 7.326 (emphasis added).
[168] Panel Report, paras. 7.594 (rare earths), 7.809 (tungsten), 7.935 (molybdenum).

restrictions.[169]

The Panel noted that this lack of structural complementarity meant that the export quotas and the production targets "do not appear therefore to work well together" and, therefore, were not even-handed.[170]

B. The Panel's Interpretation That the "Made Effective In Conjunction With" Clause of Article XX(g) Requires an Assessment of "Even-Handedness" or "Balance" with Respect to Foreign and Domestic Interests Is Correct

139. China's first argument is that the Panel erred in requiring to China demonstrate "even-handedness" in satisfying the requirement of Article XX(g) that China's export quotas – *i.e.*, quantitative restrictions on foreign access – impose on rare earths, tungsten, and molybdenum are "made effective in conjunction with" restrictions imposed on domestic production or consumption of rare earths, tungsten, and molybdenum. In expressing the need to fulfill the requirement of "even-handedness," the Panel stated that "China needs to demonstrate that the export quota on foreign users is somehow balanced with one or more measures imposing restrictions on domestic users."[171] China argues that the term "even-handedness" is not found in the text of Article XX(g) of the GATT 1994 and, therefore, use of the term by the Panel constitutes legal error.[172] China further argues that the Panel erred when it interpreted even-handedness as a requirement to determine a "balance" – *i.e.,* for the Panel to analyze the relative burdens borne by domestic and foreign consumers, in the name of conservation.[173]

1. The Panel Correctly Found That "Made Effective In Conjunction

[169] Panel Report, paras. 7.595 (rare earths), 7.808 (tungsten), 7.934 (molybdenum).
[170] Panel Report, para. 7.808.
[171] Panel Report, para. 7.331.
[172] China's Other Appellant Submission, paras. 43, 155.
[173] China's Other Appellant Submission, paras. 159, 203-207.

With" is a Requirement of "Even-Handedness"

140. Contrary to China's assertions, and for the reasons set forth below, the Panel's interpretation and application of the "made effective in conjunction with" prong of 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, as provided under the general rule of treaty interpretation set forth in Article 31 of the *Vienna Convention on the Law of Treaties*. It is also consistent with and supported by the interpretation of the same phrase made by the Appellate Body.

141. China's interpretation, in contrast, renders the "if such measures are made effective in conjunction with" portion of Article XX(g) wholly superfluous. Accordingly, it should be rejected. According to China, "[i]t is sufficient [to meet the "made effective in conjunction with" requirement of Article XX(g)] if a Member imposes domestic restrictions which are apt to have a restrictive effect on domestic production or consumption," without more. Put another way, China states its view that a Member can satisfy this requirement of Article XX(g) so long as the Member imposes "genuine domestic restrictions"[174] and that "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."[175]

142. At first glance, China's statement of its Article XX(g) interpretation does not appear different from the Panel's approach, and thus is not supportive of any appeal from the Panel's findings. However, to understand China's reasoning and its challenge to the Panel's

[174] China's Other Appellant Submission, para. 149.
[175] China's Other Appellant Submission, para. 160.

interpretation, one must appreciate that China's interpretation of the phrase "working together with" means something different from the Appellate Body's interpretation of "made effective in conjunction with." For China, "working together with" means simply that a domestic restriction is working and a trade restriction is working – that is, that the two restrictions do not need to bear any particular conjunctive relationship to each other.

143. China's arguments fail for a number of reasons. First, China's argument is flawed because it would read the requirement that the non-conforming measure be "made effective in conjunction with" restrictions on domestic production or consumption out of Article XX(g) of the GATT 1994. And because it renders the "made effective in conjunction with" language superfluous, China's interpretation is inconsistent with general rules of treaty interpretation.

144. The fact that China's interpretation would render sections of Article XX(g) superfluous is succinctly captured in paragraphs 33 and 163 of China's Other Appellant Submission:

> [a] measure is 'made effective in conjunction with' domestic restrictions within the meaning of subparagraph (g) if, in addition to trade-restrictive measures found to be inconsistent with the GATT 1994 which 'relat[e] to' conservation, it imposes restrictions with respect to domestic production or consumption. ... It is sufficient if a Member imposes domestic restriction which are apt to have a restrictive effect on domestic production or consumption.[176]

> [f]or the Appellate Body, the requirement to impose restrictions evenhandedly was therefore met once domestic restrictions that relat[e] to conservation were imposed.[177]

145. China's argument that a Member need only impose a domestic restriction is, however, in direct tension with the text of Article XX(g) and the requirement that the non-conforming measure be made effective "in conjunction with" domestic restrictions. According to China's

[176] China's Other Appellant Submission, para. 33.
[177] China's Other Appellant Submission, para. 163.

interpretation that "in conjunction with" domestic restrictions only means "genuine" domestic restrictions,[178] Article XX(g) could have been drafted to read:

> (g) relating to the conservation of exhaustible natural resources, ~~if such measures are made effective in conjunction with~~ if restrictions on domestic production or consumption also exist.

Article XX(g) was not so drafted, and China's attempt to ignore the actual text that was drafted by Members, thereby rendering "made effective in conjunction with" superfluous, is without merit.

146. Put another way, when "the Panel found that the second element of subparagraph (g) of Article XX requires *more* than the existence of a burden on both foreign and domestic users" (a criticism of the Panel's reasoning lodged by China),[179] its reasoning was consistent with the text of Article XX(g) and, as discussed below, guidance from the Appellate Body. Both the text of Article XX(g) and guidance from the Appellate Body show that more is required than simply a "genuine" or biting domestic restriction.

147. In order to try to get around the interpretation of the Appellate Body, China asserts that the Panel treated the use of the even-handedness standard articulated in *US – Gasoline (AB)* and *US – Shrimp (AB)* "as if it were treaty text" and, as a result, improperly looked at the substantive complementarity between the measures.[180] According to China, "even-handedness" was a term that merely ensured that restrictions were imposed on both domestic and imported products.[181]

148. As an initial matter, the mere fact that "even-handedness" is not treaty text does not

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[178] China's Other Appellant Submission, para. 149.
[179] China's Other Appellant Submission, para. 158.
[180] China's Other Appellant Submission, para. 43.
[181] China's Other Appellant Submission, para. 163.

render it void as a mechanism to inquire if the non-conforming measure is "made effective in conjunction with" domestic restrictions. Indeed, if this particular phrase was not used to summarize the conjunctive relationship required by the text of Article XX(g), the treaty interpreter would necessarily use similar phrases and concepts in interpreting and applying Article XX(g). In addition, China's argument simply "proves too much" and would nullify a number of the widely used interpretive devices frequently employed by the Appellate Body. For example, "substantial relationship" as a method to determine "relating to" in Article XX(g) (discussed above)[182] and "reasonably available alternatives" as a method to examine "necessary to" in Article XX(b)[183] would all be rendered void by China's logic, notwithstanding their frequent use by both panels and the Appellate Body.

149. From the time when the eyes of Article XX(g) interpreters were fresh, the second clause of Article XX(g) – unique to Article XX(g) and its conservation purpose and, in particular, distinguishing it from the structure of some of the other sub-paragraphs of Article XX that do not impose additional specific conditions – has been correctly interpreted as a fail-safe requirement that ensures that the protection afforded by the Article XX exception applies only to legitimate conservation measures[184] – that is, measures that reflect 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. The Panel's use of the term "balance" reflects the same concept that is reflected in the following findings:

- "we believe that the clause 'if such measures are made effective in conjunction

[182] *US – Gasoline (AB)*, p. 18.
[183] *See, e.g.*, *Brazil – Tyres (AB)*, para. 156.
[184] *See US – Gasoline (AB)*, p. 18.

> with restrictions on domestic production 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." *US – Gasoline (AB)*, pp. 20-21.

- "[I]f no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals." *US – Gasoline (AB)*, p. 19 (citing *Canada – Herring and Salmon (GATT)*, which addressed a situation involving challenged export restraints on unprocessed fish).

- "In this case, we need to examine whether the restrictions imposed by [the challenged measure] with respect to [imports] are also imposed in respect of [domestic products]." *US – Shrimp (AB)*, para. 143.

Accordingly, it is China's interpretation of what "made effective in conjunction with restrictions on domestic production or consumption" that is in error and should be dismissed.

2. The Panel Correctly Examined the Broad Structural Correspondence Between the Export Quotas and the Domestic Restrictions

150. Similar to its argument discussed above in the context of the "relating to" analysis, China appeals the Panel's interpretation and application of the "even-handedness" standard to the facts at issue in this dispute on the same grounds – *i.e.*, that the Panel erred in examining the structure and design of China's measures and either in not being persuaded that China's "actual effects" evidence or by requiring China to show something more than the mere simultaneous existence of restrictions.[185] In particular, China argues that:

> the Panel erred by finding that the analysis of "even-handedness" is limited to an examination of "structure and design," to the exclusion of evidence regarding the measures' "effects", including its actual operation and impact. In so finding, the Panel relied on the Appellate Body's statement in *US – Gasoline* that

[185] *See, e.g.*, China's Other Appellant Submission, paras. 182-194 and 199-219.

> subparagraph (g) does not require a respondent to meet an "empirical 'effects test'", as well as on its consideration that an assessment of actual effects would render inutile the analysis under the chapeau.[186]

151. China's argument ignores the fact the Appellate Body in both *US – Gasoline* and *US – Shrimp* did not just use the term "even-handedness" as a buzzword. Rather, the Appellate Body took great pains to look at the broad structural correspondence between the non-conforming measure and the domestic restriction to determine if the former operated "in conjunction with" the latter.[187] In other words, the Panel did not merely rely on the existence of the term "even-handedness," rather it followed the Appellate Body's actual analysis of the "made effective in conjunction with" prong of Article XX(g). Accordingly, China's argument that the Panel erred when it interpreted even-handedness as a requirement to analyze the structural burdens borne by domestic and foreign consumers is incorrect.[188]

152. For example, in *US – Gasoline*, the Appellate Body found that the baseline establishment rules, which included the non-conforming measure (a restriction on imported gasoline), "affect[ed] both domestic gasoline and imported gasoline, providing for – generally speaking – individual baselines for domestic refiners and blenders and statutory baselines for importers."[189] Accordingly, the non-conforming measures were found to be even-handed.

153. Also in *US – Gasoline,* the Appellate Body contrasted the baseline establishment rules,

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[186] China's Other Appellant Submission, para. 38.

[187] Indeed, at one point in its analysis, China asserts that its objection to the Panel's reasoning has less to do with use of the term "even-handedness" and more to do with the fact that the even-handedness analysis looked to the structural burdens borne by domestic and foreign consumers. China's Other Appellant Submission, paras. 159, 203-207. Regardless, the Appellate Body has used the term "even-handed" on a number of occasions and, as discussed in this section, conducted an analysis of the structural correspondence between the non-conforming measure and the domestic restriction under the rubric of "even-handedness."

[188] China's Other Appellant Submission, paras. 159, 203-207.

[189] *US – Gasoline (AB),* p. 21.

where the non-conforming measure corresponded (and, indeed, was materially the same as) the domestic restriction, with the facts at issue in *Canada – Herring and Salmon*, in which a ban was imposed on exports of certain unprocessed fish but no ban was imposed on domestic sales.[190]

154. Likewise, in *US – Shrimp*, the Appellate Body found that the non-conforming measure (*i.e.*, an import ban on shrimp that were caught not using TEDs or something comparable in effectiveness to TEDs)[191] was made effective in conjunction with the domestic restriction based on structural correspondence – specifically the fact that there was a regulation requiring all US shrimp trawl vessels to use a TED and the same measure on imported shrimp.[192] This was also found to be even-handed.

155. As to *US – Shrimp*, China asserts that Appellate Body report actually supports its interpretation because the domestic restriction at issue in that dispute operated differently from the non-conforming measure.[193] China cites paragraph 121 of the Appellate Body report, but that provides no support whatsoever for China's argument. Rather, that section addressed whether the United States could unilaterally proscribe access conditions to the US market, not structural differences between the non-conforming measure and the domestic restriction.[194]

156. China also asserts that the Appellate Body in US – Gasoline eschewed an examination of even-handedness when it found that "[t]here is, of course, no textual basis for requiring *identical* treatment of domestic and imported products."[195] Nothing could be further from the truth.

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[190] *US – Gasoline (AB)*, n. 42.
[191] *US – Shrimp (AB)*, para. 4.
[192] *US – Shrimp (AB)*, para. 144.
[193] China's Other Appellant Submission, para. 164.
[194] *US – Shrimp (AB)*, para. 121 (asking whether the non-conforming measures "fell within that class of excluded measures because Section 609 conditions access to the domestic shrimp market of the United States on the adoption by exporting countries of certain conservation policies prescribed by the United States.").
[195] China's Other Appellant Submission, para. 164.

157. In *US – Gasoline*, the measure at issue affected imports of gasoline and was challenged as being inconsistent with the national treatment obligation in Article III:4 of the GATT 1994. The Appellate Body's observation regarding identical treatment was made in the context of identifying the boundaries of the "even-handedness" requirement. The Appellate Body considered that the situation at one end of the spectrum, *i.e.*, where domestic and foreign interests were being treated strictly identically, presented a simple analysis where parties would likely not find themselves disputing the consistency of a measure because, "where there is identity of treatment – constituting real, not merely formal, equality of treatment – it is difficult to see how inconsistency with Article III:4 would have arisen in the first place."[196]

158. The Appellate Body then considered the situation at the other end of the spectrum, *i.e.*, where only foreign interests were being negatively affected and domestic interests suffered no negative impact. The Appellate Body found that this situation also presented a simple analysis under Article XX(g) of the GATT 1994 because in such a circumstance, the responding party would not have even a colorable argument that the measure at issue would meet the "even-handedness" requirement. As the Appellate Body concluded, in a situation where no restrictions are imposed on domestic interests and restrictions are only being imposed on foreign interests, the measure at issue "cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods."[197]

159. The Appellate Body's discussion of the even-handedness requirement in *US – Gasoline*

[196] *US – Gasoline (AB)*, p. 21.
[197] *US – Gasoline (AB)*, p. 21.

only identifies the logical boundaries of the requirement. 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."

160. The Appellate Body's reasoning in *US – Gasoline* certainly does not stand for the proposition that China argues it stands for, *i.e.*, that Article XX(g) permits a Member to impose measures that advantage their own domestic interests at the expense of the interests of other Members as long as it imposes some level of restriction on domestic supply that is greater than nothing. Indeed, China's contention in this regard was wholly rejected by the panel in *China – Raw Materials* when it observed that "the mere existence of a production restriction does not automatically imply even-handedness between the export restriction and the domestic restriction."[198]

161. Lastly, China asserts that the Panel's even-handedness analysis renders the *chapeau* to Article XX superfluous, as the later is designed to determine "the respective conservation burdens borne by different" Members.[199] China's argument fails, however, because it improperly conflates the structural correspondence inquiry under even-handedness with the application inquiry under the *chapeau*.[200]

C. The Panel Correctly Applied the Even-Handedness Test to the Facts at Issue

162. In the alternative, China argues that the Panel erred in its analysis of whether the export quotas are "made effective in conjunction with" domestic restrictions by failing to take into account "the actual effects" that China's export quotas and domestic restrictions have in the

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[198] *China – Raw Materials (Panel)*, para. 7.464.
[199] China's Other Appellant Submission, paras. 171-73.
[200] Panel Report, para. 7.326.

Chinese market for rare earths, tungsten and molybdenum.[201] Similar to its argument vis-à-vis the "relating to" analysis, China asserts that the Panel imposed on itself an unwarranted "evidentiary straightjacket" that prevented it from examining the following:[202] China's domestic production targets;[203] the lack of quota fill for rare earths; the absence of differences between domestic and foreign prices for the materials; and the pro-conservation signals sent by the export quotas.[204]

163. As discussed below, the Panel did not err by focusing on the structure, design and architecture of the export quotas and domestic restrictions when assessing whether they "work together" for purposes of Article XX(g). In particular, the Panel's analysis was supported by the Appellate Body report in *US – Gasoline,* which specifically eschewed the type of "effects test" articulated by China, and the fact that China's interpretation would render the *chapeau* inutile. It should also be noted that the alleged "actual effects" proffered by China in its appeal were specifically addressed, and rejected, by the Panel in the course of the proceedings.

164. First, the Panel correctly focused its examination on the structure, design and architecture of the export quotas and domestic restrictions. As discussed in the context of the "relating to"

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[201] China's Other Appellant Submission, paras. 145, 177. China also asserts that a number of (alleged) application errors by the Panel in the "made effective in conjunction with" standard "flow directly from its interpretive finding" that there is a requirement of even-handedness. *Ibid*, paras. 197-207. The United States addressed these specific arguments in Section B and will not address them again here, with one exception. Specifically, China asserts that the Panel erred in the application of even-handedness standard by examining whether the "foreign and domestic restrictions were 'balanced' or 'evenly' distributed." *Ibid*, para. 209. China asserts the Panel erred in this regard because, according to China, such an examination is one of looking for discrimination, which belongs in the *chapeau.* The Untied States observes that China's argument is inconsistent, elsewhere China accuses the Panel of drawing undue bright-lines between the *chapeau* and subparagraph (g) (*see ibid*, paras. 171-73), but here, China's advocates for such a bright-line. Nevertheless, the type of analysis conducted by the Panel pursuant to even-handedness (i.e., a review of the structural correspondence) is the same type of analysis conducted by the Appellate Body in both *US – Gasoline (AB)* and *US – Shrimp (AB).*

[202] China's Other Appellant Submission, para. 209.

[203] China's Other Appellant Submission, paras. 210-212.

[204] China's Other Appellant Submission, paras. 181, 200, 210, 217.

section (above), China's assertion that the Panel should have simply looked at the state of the domestic market, without first establishing how the domestic market could have been influenced by the structure, design and architecture of the measures at issue, is fatally flawed because: (i) it leaves the determination as to whether even-handedness is met to the vagaries of the marketplace and (ii) it asks the trier of fact to accept correlation (*e.g.*, a lack of quota fill for rare earths) as evidence of the export quota and the domestic restriction working together to promote conservation.

165. China's argument fails, of course, because it does not account for the numerous other factors that could have impacted the rate at which the export quotas on rare earths (as one example) were used, or China's domestic demand for rare earths, tungsten and molybdenum (as another example). In particular, one prominent factor impacting demand for all raw materials, which was wholly unrelated the question of whether the export quotas and domestic restrictions worked together to promote conservation, was the lingering effects of the 2008 global crises.

166. As discussed above, the problem with China's argument, and more generally the use of the empirical effects test promoted by China, was addressed by the Appellate Body in *US – Gasoline* when it rejected arguments similar to the argument being made by China in this dispute:

> [i]n 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. The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events.[205]

[205] *US – Gasoline (AB)*, p. 21.

In order to avoid determining causation, and the "well-known" problem with such an approach, the Panel rightly focused on the structure, design and architecture of China's export quotas and domestic restrictions, and correctly found that these characteristics did not demonstrate that they worked together towards the goal of conservation. Of note, China never addresses the causation problem, which is the natural result of its argument, in its other appellant submission.[206]

167. China's argument also fails to address how its analysis under subparagraph (g) would substantively differ from the subsequent analysis that must be conducted pursuant to the *chapeau* to Article XX, in which the panel focuses on the application of the non-conforming measure. While China complains about an "evidentiary straightjacket" caused by the Panel's approach,[207] it fails to provide a concrete analysis as to what should be the practical differences in the *chapeau* and in the subparagraph under China's proposed approach. For this reason as well, China's argument should be rejected.

168. In sum, the Panel's approach – to determine first if the measures' structure, design and architecture show that they work together to support conservation under subparagraph (g) before turning, in the *chapeau*, to an analysis of the application of the measures – is sound. China's approach – to look simply at the market without a basis in structure, design or architecture to determine whether the measures actually impacted the market – is unsound.

169. China also asserts that use of the term "operate" by the Appellate Body in *China – Raw Materials* supports its argument that the Panel erred in focusing on the structure, design and architecture of the non-conforming measures and domestic restrictions.[208] In *China – Raw*

[206] China's Other Appellant Submission, para. 188.
[207] China's Other Appellant Submission, paras. 191-94.
[208] China's Other Appellant Submission, paras. 183-184.

Materials, the Appellate Body observed 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."[209] China's argument fails, however, because the best way to determine how a measure operates, especially in complicated international markets for raw materials that react to various economic factors, is to focus on the measure's structure, design and architecture. Accordingly, the Appellate Body report in *China – Raw Materials* provides no support whatsoever for China's argument.

170. In addition, China claims that the Appellate Body's finding in *US – Gasoline* that "predictable effects" may be relevant to the analysis under Article XX(g) supports its position.[210] This particular argument is directly contradicted by China's previous argument in the "relating to" section of its submission. In that section, which criticized the Panel's analysis of the structure, design and architecture of the non-conforming measure, China claimed that "[i]t would be strange indeed if the 'predictable effects of a measure' can shed useful light on whether the measure is related to conservation goals, but the actual effects could not."[211]

171. Thus, in the "relating to" section of its submission, China associated "predictable effects" with an analysis of the structure, design and architecture of a measure, as is correct. Now, China distinguishes "predictable effects" from the Panel's analysis of structure, design and architecture. China's first instinct was the correct one – the "predictable effects" of a measure are shown by these characteristics, and the Appellate Body report in *US – Gasoline* does not support, but

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[209] *China – Raw Materials (AB)*, para. 356 (emphasis added).
[210] China's Other Appellant Submission, para. 186; *US – Gasoline (AB)*, pp. 18-19.
[211] China's Other Appellant Submission, para. 84.

rather directly contradicts, China's argument.

172. More generally, China's argument conflates "predictable effects" of a measure, which are discovered through a review of structure, design and architecture, with the state of being of the market, which China mis-characterizes as the "actual effects" of the measure. For example, at paragraph 145, China asserts that the Panel erred by not reviewing "the actual effects which a regulatory system has in the market place."[212] Elsewhere, China cites the Appellate Body's statement that "[w]e are not ... suggesting that consideration of the predictable effects of a measure is never relevant."[213] Again, China's argument fails because it asks the trier of fact to accept that the state of being of the market is the actual, or predictable, effect of the measure at issue even thought such results are not the logical result of the structure, design and architecture.

173. It should also be noted that the Panel addressed, and rejected, the arguments raised by China elsewhere in its report. Regarding China' production targets, the Panel found that China had not set them at a level that actually restricted demand.[214] Thus, China's argument that the "Panel failed to explain or demonstrate why [the different scope, level and timing of the export quotas and domestic restrictions] discounted the restrictive effect on domestic Chinese consumers of enforced extraction and production quotas"[215] is based on a flawed premise – there was no "restrictive effect."

174. As to the lack of quota fill for rare earths, the Panel explicitly rejected China's assertion and noted the problem with China's "actual effects" arguments:

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[212] China's Other Appellant Submission, para. 145 (emphasis added).
[213] China's Other Appellant Submission, para. 189 (citing *US – Gasoline (AB)*, p. 22) (emphasis added).
[214] *See, e.g.*, Panel Report, para. 7.510.
[215] China's Other Appellant Submission, para. 212 *see also* paras. 226-229.

> [i]t is difficult to determine in the case before us precisely the degree to which the lack of quota fill [for rare earths] is attributable to, on the one hand, the international financial crisis and, on the other hand, the quota's long-term market distorting effects; at any rate, the important point is that China has not convinced the Panel that its 2012 export quota did not have distorting effects that discouraged and reduced export trade of rare earths. The Panel is of the view that, under these circumstances, the evidence that the export quota was not fully utilized in 2012 does not demonstrate that China's quota has been applied in a non-discriminatory manner.[216]

175. Regarding the alleged lack of price differences in rare earths, tungsten and molybdenum between the foreign and Chinese markets, the Panel rejected China's flawed methodology, as discussed above.[217] As to the pro-conservation signals sent by China's export quotas, (and also as discussed above) the Panel noted that the export quotas also sent perverse – *i.e.*, pro-consumption – signals to domestic consumers.

D. The Panel's Findings and Conclusions Regarding Even-Handedness Are Made Consistently with the Panel's Duty Under Article 11 of the DSU

176. In addition, China asserts that the Panel violated Article 11 of the DSU when it reviewed the different levels, timing and scope of the export quotas and the domestic restriction is baseless.[218] It should be noted up-front that China has offered no specific argument as to how the Panel erred in taking into account the fact that the export quotas covered a number of rare earth, tungsten and molybdenum products that were not covered by the domestic restrictions.

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[216] *See, e.g.*, Panel Report, para. 7.634.

[217] China also criticizes the Panel for questioning the reliability of the price data from Metal Pages, given the Untied States correctly noted that such data are "the best data available." China's Other Appellant Submission, fn. 199. China's argument ignores the fact that it was China that had the burden of proof and, regardless of the quality of the data, China's analysis suffered from methodological flaws outline above.

[218] China's Other Appellant Submission, para. 223; *see also* paras. 213, 216. China also asserts that the Panel ignored China's argument that the unused export quotas "need not necessarily be redirected" to the domestic market. China's Other Appellant Submission, para. 224. It should be noted up-front that statements like "need not necessarily" do not meet China's burden of proof. But more importantly, China's argument ignores the fact that, as found by the Panel, there was nothing in the structure, design and architecture of the measures at issue to prevent unused export quotas from being sold in the domestic market, and that this fact "favour[s] domestic over foreign users." Panel Report, para. 7.594

177. The Appellate Body has made clear that an Article 11 claim is a "very serious allegation,"[219] and requires a demonstration of "egregious error."[220] To rise to the level of an Article 11 violation, a mistake on the part of the Panel must constitute a deliberate disregard of evidence or gross negligence amounting to bad faith.[221] As the Appellate Body in *EC – Fasteners (China)* observed:

> not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. 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. An attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision. In particular, when alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11. Rather, a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment. It is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment. [222]

178. Regarding the timing of the export quotas and the domestic restrictions, the Panel's approach is supported by the Appellate Body report in *China – Raw Materials*, in which the Appellate Body examined whether the non-conforming measurers "were promulgated or brought into effect 'together with' restrictions on domestic production or consumption of natural resources."[223] And while China points to self-serving statements prepared exclusively for

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[219] *E.g.*, *US – Zeroing (EC) (AB)*, para. 253.
[220] *EC – Hormones (AB)*, para. 133.
[221] *EC – Hormones (AB)*, paras. 133 and 138.
[222] *EC – Fasteners (China) (AB)*, para. 442.
[223] *China – Raw Materials (AB)*, para. 358. China also asserts that the Panel violated Article 11 of the DSU when it took into account the fact that China has imposed quotas on the export of rare earths since 2002, but did not imposed domestic restriction until 2006-2007. China's Other Appellant Submission, paras. 224, 235. Not surprisingly, China would have preferred that the Panel limit its analysis to 2006-2012 when China had both export quotas and domestic targets for extraction and production of rare earths. *Ibid*, para. 225. China has provided no

litigation that state that the export quotas and domestic restrictions were "coordinated,"[224] China has failed to show that the Panel's assignment of greater valuation to certain facts, such as the fact that the export quotas on rare earths had existed for years without corresponding production restrictions, was in error.

179. In its claim under Article 11 of the DSU, China also argues that the Panel was inconsistent in assessing the facts at issue because, when it was disadvantageous to China, the Panel would ignore the structure, design and architecture of the measure at issue in favor of the "actual effects." In support of this argument, China observes that the resource tax on rare earths was found to be too low to restrict extraction.[225] China's argument grossly mis-states the Panel's reasoning. In assessing the resource tax, the Panel explicitly found that "China's [evidence] is insufficient to establish to the Panel's satisfaction that the resource tax was designed in such a way as to increase the costs, and thus decrease demand for, rare earth products."[226]

180. Similarly, China asserts that the Panel was inconsistent in examining whether the domestic production targets were filled.[227] Again, China ignores the fact that the Panel explicitly analyzed the design of the domestic restrictions and found, for example, that "these circumstances cast doubt on the assertion that the extraction quota in 2012 was designed by China to limit extraction (*i.e.*, production of rare earth concentrates)."[228] In sum, the Panel was not inconsistent in focusing on the structure, design and architecture of the measures at issue in

support for its argument that the Panel should have cherry-picked the data – nor does any support exist.

[224] China's Other Appellant Submission, 224.
[225] China's Other Appellant Submission, para. 234.
[226] Panel Report, para. 7.554.
[227] China's Other Appellant Submission, para. 233.
[228] Panel Report, para. 7.509 (emphasis added).

this dispute.

181. China also asserts that the Panel erred because it found that China had developed a "bona fide" conservation regime for rare earths, tungsten and molybdenum, yet did not find that the conservation regime was sufficient to invoke Article XX(g).[229] As such, China stipulates that this finding alone was sufficient to meet its burden under Article XX(g). China's argument is baseless – the standard under GATT Article XX(g) is whether the Member maintains "domestic restrictions on production or consumption," not if it has a conservation regime.

182. Lastly, China broadly asserts that the Panel applied a double standard in the even-handedness analysis in that the Panel ignored quantitative data in one case (with the export quotas, it ignored such data as the lack of quota fill) but reviewed such data in another case (with the production restrictions, it examined the fact that the restrictions were set above demand).[230] This argument lacks merit. The Panel, as discussed above, looked at the design, structure and architecture of the measures at issue – both the non-conforming measures as well as the domestic restrictions.[231] Accordingly, the Panel did not apply a double standard, as China alleges.

E. Conclusion

183. For all of the foregoing reasons, the United States ask the Appellate Body to reject China's arguments and uphold the Panel's interpretation and application of the clause "made effective in conjunction with" in Article XX(g).

V. CONCLUSION

[229] *See, e.g.*, China's Other Appellant Submission, para. 210.
[230] China's Other Appellant Submission, paras. 238-243.
[231] *See, e.g.*, Panel Report, paras. 7.447 (design of the export quota), 7.509 (design of the domestic restrictions), 7.554 (design of the resource taxes).

184. For the reasons given in this submission, the United States respectfully request the Appellate Body to reject China's appeal in its entirety.