The Wages of Belonging: Rare Earths from China, and the Return of GATT À LA CARTE

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Available at: https://works.bepress.com/chin_lim/6/
The Wages of Belonging: Rare Earths from China, and the Return of GATT À LA CARTE*

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China has lost the Rare Earths case before a Panel which, however, split 2:1 on whether the Chinese Accession Protocol’s general ban on export duties would allow General Agreement on Tariffs and Trade (GATT) Article XX to be invoked. The question affects whether other Recently Acceded Members’ (RAMs’) WTO-plus terms of accession should generally be read together with the GATT. Export quotas are unproblematic because Article XI is contained in the GATT. China’s quota-based conservation measures were however strictly scrutinized, raising other questions about the room RAMs have to invoke Article XX if they might have to depend upon highly trade-restrictive quotas. This article is about the Panel ruling, China has since appealed.

I INTRODUCTION

China’s imposition of export restrictions, in light of its overwhelming dominance in supplying more than 90% of the world’s rare earth extraction, caused rare earths prices to soar in mid-2011. It was in that context that pressure to challenge China’s restrictions mounted. The questions raised in the long-awaited Rare Earths panel ruling, handed down in March,1 reveals a mixture of broad, ‘systemic’ issues of trade principle regarding the rights of World Trade Organization (WTO) membership, and lingering issues about the jurisprudence of General Agreement on Tariffs and Trade (GATT) Article XX.2

The dispute has to do, partly, with China having undertaken rule obligations beyond those which apply to other WTO members.3 Not least in an area which has been scantily regulated by the GATT-WTO – the regulation of Members’ restrictions on exports through the use of duties, quotas, etc.4 In particular, China – unlike other WTO Members generally – had undertaken not to impose export duties according to the terms of its Accession Protocol (paragraph 11.3). The difficulty caused by the interconnections, or absence of interconnection, between such ‘WTO-plus’ obligations in China’s Accession Protocol and Working Party Report on the one hand, and the GATT 1994 on the other, explains one of the principal controversies underlying this latest ruling which follows in the wake of the Appellate Body and Panel rulings in the Raw Materials case.5 The issue is whether China has a legal right – as with any WTO

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* It was announced on the 7th of August 2014, after this article went to publication, that China has lost the appeal. The report of the Appellate Body will be discussed in a forthcoming article.

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2 For our earlier work on the turn in recent years which export trade restrictive measures have taken from national security, ‘sanctions-based’ measures previously based upon GATT Art. XXI towards their contemporary justification under GATT Art. XX and similar provisions granting a right to take exceptional measures (e.g., under GATT Art. XI), see C.L. Lim & J.H. Senduk, You Don’t Miss Your Water ‘Til Your River Runs Dry: Regulating Industrial Supply Shortages after ‘China-Raw Materials’, 18 Stanford Journal of Law, Business, and Finance 72, 86–92 (2012). Put another way, we see — in GATT-WTO litigation — a turn from ‘Cold War law’ to increased global, industrial competition for natural resources.


4 See further, Lim & Senduk, supra, 79–90.

Member – to invoke environmental and health justifications under GATT Article XX in respect of any export duty measure.

To be sure, the true issue is not whether China would have been successful in its invocation of environmental and health measures, but whether by joining the WTO it had somehow failed to acquire all the rights which other WTO members automatically enjoy. China argued before this latest Panel that by joining the WTO, the GATT therefore became applicable to it. As such, GATT Article XX would have conferred upon China, as it confers upon other WTO members, the right to take environmental, health and conservation measures in appropriate cases. China plainly wishes to have the Appellate Body’s earlier ruling in Raw Materials overturned eventually.6 It is perhaps no surprise that the Panel in Rare Earths declined to depart from that Appellate Body ruling. Nonetheless, the Panel considered that it was required to address what China claimed to be ‘new’ arguments which had not been raised in Raw Materials; in order to ‘complete the analysis’ in the event of an appeal by China.

In dismissing China’s case, the Panel explained that since other Members were not bound by the duty not to impose export taxes, whereas China had undertaken an additional duty not to do so in its Accession Protocol, there was no corresponding GATT obligation applying to those other GATT Contracting Parties against which a legal right to take health, environmental and similar measures could be exercised. There was therefore nothing to link the additional duty which China undertook and the usual rights which Members possess.7 If this is correct, China it seems has gained less than the usual rights of membership because it had, as part of its accession terms, committed to more than the usual array of obligations. This is the first ‘systemic issue’ which the Panel’s ruling – via its ‘GATT à la carte’ form of legal reasoning – now raises.8

According to the Panel, China is not prohibited from taking health and environmental measures, but the way in which it does so is more restricted when compared to other WTO Members. China may take justifiable quota measures but is absolutely prohibited from taking duty measures. The problem with the Panel’s reasoning is that duties are normally less trade restrictive than quotas. The Panel ruling, like the Raw Materials ruling, therefore has the effect (under the Appellate Body’s GATT Article XX jurisprudence) of making the standard for justifying Chinese measures higher in cases where export quota measures may sometimes be the only real substitute for export duty measures.

This latest ruling does, therefore, raise fundamental questions concerning the balance of profit and wages of WTO membership, asymmetric accession terms for recently acceded Members (RAMs), and the jurisprudence of GATT Article XX. We propose to begin with (1) an account of the Raw Materials case. We then propose to turn to (2) China’s failure to convince the Panel of its right to impose export duties for health and conservation reasons, before turning to China’s failure to convince the Panel that it had properly exercised a right to conserve rare earths resources through (3) properly designed export quotas made effective in conjunction with domestic measures and (4) an appropriately tailored regime for the regulation of rare earths companies.

## 2 The raw-materials case: a dress rehearsal

The previous Raw Materials case had concerned measures implemented by China which, complainants argued, restricted the export of a laundry list of raw materials ranging from bauxite, coke, fluor spar, magnesium, manganese, and silicon carbide to silicon metal, yellow phosphorous and zinc. These restrictions, so the complainants feared, would lead to supply contraction and dual-pricing, and therefore affect the competitive position of several of their domestic industries that were dependent on the use of these raw materials.9

Four Chinese measures were at issue in that case: (i) export duties; (ii) export quotas; (iii) minimum export price requirements; and (iv) export licensing requirements.10 China had argued that these measures were fully justified as they related to the conservation of exhaustible natural resources for some of the raw materials.11 With regard to the quotas and duties, China also argued that these were necessary for the protection of the health of its citizens.12 In essence, China was invoking the general exceptions under GATT Article XX which permit conservation measures, and measures to protect human, animal or plant life or health.

The Panel in Raw Materials found that export quotas imposed by China on some of the raw materials were inconsistent with WTO rules. China had agreed not to

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9 Ibid., paras 7.95–7.99.
11 Lim & Senduk, supra, at 91.
13 Ibid., paras 7.312 and 7.356.
14 Ibid., para. 7.470.
apply export quotas, and also to eliminate all export duties under paragraph 11.3 of its Accession Protocol except for those listed in Annex 6. A crucial point of principle arose in relation to China’s obligation not to impose export duties; namely, the earlier Raw Materials Panel’s conclusion that the wording of paragraph 11.3 of China’s Accession Protocol to the WTO (generally prohibiting the use of export duties) prevents China from ever using the general exceptions provision in GATT Article XX to justify its WTO-inconsistent export duties. The Panel did add that even if China had been able to rely on this general exceptions provision to justify export duties, it would still not have complied with the requirements under that provision. As we have seen, it is this same point which has now resurfaced in the latest Rare Earths case.

As for China’s defence under GATT Article XX(g) that some duties and quotas were justified as they were needed for the conservation of exhaustible natural resources for some of the raw materials, the Panel concluded that China had not been able to show that it had imposed these restrictions in conjunction with restrictions on domestic production or consumption of the raw materials so as to conserve the raw materials. As for China’s argument under GATT Article XX(b) that other measures were needed to combat pollution for the protection of the health of its citizens, the Panel cited that China had not demonstrated that its export duties and quotas would lead to a reduction of pollution in the short- or long-term. As such, China had failed to show that these measures would contribute to the improvement of the health of its people. Both arguments were thus rejected.

China went on to appeal the Panel’s findings. One of the issues on which the Panel had erred, in China’s view, was the Panel’s assessment that paragraph 11.3 of China’s Accession Protocol did not allow it to rely on GATT Article XX. In its appeal it asked the Appellate Body to confirm that such an exception would indeed be available to China to justify health and conservation measures. The Appellate Body went on to uphold the Panel’s findings instead. It confirmed the Panel’s assessment that China had no basis for resorting to Article XX. The Appellate Body attached significance to the fact that the text of paragraph 11.3 expressly referred to Article VIII, but did not make any such reference to other provisions of the GATT, including Article XX. In other words, China’s Accession Protocol suffers from inadequate cross-references to the GATT, including the rights which other Members would enjoy under GATT Article XX to impose appropriately designed health and conservation measures.

At first blush, the Appellate Body’s ruling would be inconsistent with the previous assessment of the Appellate Body in the China – Publications and Audiovisual Products case, where it had ruled that China could invoke Article XX to justify certain measures that were inconsistent with its obligations under the Accession Protocol. However, the Appellate Body in the Raw Materials case noted that in China–Audiovisual, the Appellate Body had relied on the introductory clause to paragraph 5.1 of the Accession Protocol which reads: ‘without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement’. Such language according to the Appellate Body in Raw Materials is not found in paragraph 11.3. As paragraph 11.3 does contain an explicit commitment to eliminate export duties, while lacking any textual reference to Article XX, the Appellate Body saw no reason to apply the Article XX general exceptions to duties which are inconsistent with the provisions of paragraph 11.3.

A final point of relevance is that in Raw Materials, China had also referred to the language contained in Preamble to the WTO Agreement, as well as other related agreements, to argue that the Panel’s assessment ‘distorted the balance’ of rights and obligations established in China’s Accession Protocol. The Panel did so, according to China, by ruling that China had abandoned its right to impose export duties to promote certain fundamental non-trade-related interests, such as public health and conservation. The Appellate Body noted that the Preamble to the WTO Agreement does refer to the need to ‘develop an integrated, more viable and durable multilateral trading system’. It assessed that this language reflected a balance that was struck by WTO-Members between trade

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11 Ibid., para. 7.158.
12 Ibid., para. 7.468.
13 Ibid., paras 7.467–7.469.
14 Ibid., para. 7.613–7.617.
19 Ibid., para. 305.
20 These agreements are: the Agreement on the Application of Sanitary and Phytosanitary Measures (the ‘SPS Agreement’), Agreement on Technical Barriers to Trade (the ‘TBT Agreement’), the Agreement on Import Licensing Procedures (the ‘Import Licensing Agreement’), the GATS, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the ‘TRIPS Agreement’).
and non-trade related concerns. None of these objectives however, provided any guidance on the applicability of Article XX under paragraph 11.3.

There was little doubt that China would somehow seek to revisit the question of the linkage — or according to the Appellate Body in Raw Materials, the absence of any linkage — between paragraph 11.3 of China’s Accession Protocol and the GATT Article XX general exceptions, amongst others, to take environmental, health and conservation measures notwithstanding a WTO Member’s trade obligations — whatsoever those obligations were. So it did in the latest Rare Earths case.

3 CHINA’S EXPORT DUTY MEASURES AND THE AVAILABILITY OF THE ARTICLE XX DEFENCE

The latest dispute over rare earths concerns measures implemented by China with regard to the export of rare earths, tungsten, and molybdenum. The complainants — the United States, the European Union and Japan — argue that China had imposed three types of restrictions on the export of these materials: (i) duties (taxes) on the export of various forms of those materials; (ii) an export quota on the amount of those materials that can be exported in a given period; and (iii) limitations on enterprises which are permitted to export the materials.23 According to the complainants, these measures were designed to provide Chinese industries with protected access to rare earths, thereby discriminating against foreign rare earths purchasers and users.

3.1 Export Duties

According to the United States, the EU and Japan, the export duties were a straightforward violation of China’s WTO obligations under its Accession Protocol since none of the products at issue (except for tungsten ores and concentrates) had been included in Annex 6 to the Accession Protocol.24 China however argued that these measures could be justified on the basis of the general exceptions provision in Article XX. In particular, China argued that in this case Article XX(b) was applicable as its measures were required to protect human, animal or plant life, or health against the pollution that occurred during rare earths production.25 As in the China Raw-Materials case, the complainants argued that Article XX was not available to China upon a proper construction of its Accession Protocol, and that the impugned measures were in any case not necessary to protect human, animal or plant life. China argued that:

First, textual silence in the relevant treaty provision(s) on the linkages, if any, between paragraph 11.3 of China’s Accession Protocol and GATT Article XX does not mean that the general exceptions provision would be unavailable to China;

Secondly, ‘[p]aragraph 11.3 of China’s Accession Protocol has to be treated as an integral part of the GATT 1994’;

Thirdly, ‘[t]he terms ‘nothing in this Agreement’ in the chapeau of Article XX of the GATT 1994 do not exclude the availability of Article XX to defend a violation of paragraph 11.3 of China’s Accession Protocol’; and

Fourthly, ‘[a]n appropriate holistic interpretation, taking due account of the object and purpose of the WTO Agreement, confirms that China may justify export duties through recourse to Article XX of the GATT 1994’.26

3.2 The ‘Textual Silence Argument’

China cited the US – Carbon Steel case in support of the proposition that mere silence is an insufficient basis to deny China’s recourse to Article XX.27 In particular, China referred to paragraph 65 of the Appellate Body Report in Carbon Steel: ‘The task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement. Such silence does not exclude the possibility that the requirement was intended to be included by implication.’28

The Panel ruled that there was no incompatibility between the Appellate Body’s reasoning in Raw Materials where it had omitted to cite its US-Carbon Steel ruling and its position in the US – Carbon Steel case.29 This was because the Appellate Body in Raw Materials had not treated textual silence as a dispositive factor.30 The Panel

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23 China – Rare Earths, Request for consultations by the United States, WT/D431/1; G/L/982, 15 Mar. 2012.
24 Ibid., para. 2.9.
25 Ibid., para. 7.31.
26 Ibid., para. 7.62.
27 Ibid., para. 7.65.
30 Ibid., para. 7.66.
observed the ‘striking similarities’ between the facts in the *Raw Materials* and *Rare Earths* cases, and that in any event ‘textual silence’ in a treaty provision cannot, in and of itself, provide a ‘cogent reason’ to depart from prior Appellate Body reasoning.\(^{32}\)

### 3.3 China’s Accession Protocol, the GATT and the Roessler-Jackson Debate

China’s argument was that it joined the GATT and that the terms of its accession (including those in paragraph 11.3) became a part of the GATT. But by a majority the Panel saw no cogent reason to depart from the findings of the Appellate Body in the *China – Raw Materials* case.\(^{33}\)

China’s argument had two textual bases: (i) paragraph 1.2 of its Accession Protocol, which states that “...this Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement”; and (ii) Article XII:1 of the Marrakesh Agreement, which states that a State or separate customs territory possessing full autonomy in the conduct of its external commercial relations ‘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.’ \(^{34}\) The legal effect of these texts, China argued, is that the Accession Protocol had become an integral part of the Marrakesh Agreement, and that each of the Accession Protocol’s specific provisions became an integral part of one of the Multilateral Trade Agreements. The question as to which Multilateral Trade Agreement the Accession Protocol became an integral part of would be based upon an evaluation of which agreement the provision was intrinsically linked to.\(^{35}\)

A majority of two on the Panel rejected this argument, with one panelist providing a separate opinion which, while not disagreeing with the ultimate outcome, disagreed that China is prevented from ever invoking GATT Article XX to justify the imposition of export duties.\(^{36}\) Here both the majority panelists and the minority panelist went to greater lengths than did the Appellate Body in the *Raw Materials* case.\(^{37}\) The majority of the Panel disagreed with China’s claim that paragraph 1.2 made the Accession Protocol an integral part of the multilateral trade agreements annexed to the Marrakesh Agreement. According to the majority, the reference to the ‘WTO Agreement’ in paragraph 1.2 only made it an integral part of the Marrakesh Agreement. Individual provisions of the Accession Protocol could be part of one or more of the Multilateral Trade Agreements, but such would only be the case if relevant language is actually contained in the individual provision.\(^{38}\) Assuming that is true, what then – China asked – does the following sentence in Article XII.1 of the Marrakesh Agreement itself mean: ‘Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto?’ It can only refer to the preceding sentence permitting States and autonomous customs territories to ‘accede to this Agreement, on terms to be agreed between it and the WTO’ – i.e., that such accession shall then ‘apply to’ both the Marrakesh Agreement and ‘the Multilateral Trade Agreements annexed to the WTO Agreement’.

However, the majority of the Panel in *Rare Earths* considered that China had misinterpreted Article XII.1. According to the majority, this provision provides for States and customs territories to accede, and stipulated that accession must apply ‘across the board, and not just with respect to one or some WTO Agreements.’ In addition, the majority of the Panel pointed to several other Multilateral Agreements\(^{39}\) which serve to specify obligations under the GATT without, immediately, making the individual provisions of those agreements an integral part of the GATT.\(^{40}\)

If what the majority says is correct, one might have expected the word ‘all’ to be inserted before the phrase ‘the Multilateral Trade Agreements annexed to the WTO Agreement’ for that would have supplied an appropriate textual basis for the majority’s reading. As for the other Multilateral Agreements, it is difficult to see their relevance considering that China’s argument relates to the meaning of the Accession Protocol, not to some other agreement.

In any event, while the majority considered it unnecessary to assess China’s argument that there is an intrinsic link between the Accession Protocol and the WTO Multilateral Agreements, the two panelists considered that it would be beneficial to offer some

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34. *Ibid.*, para. 7.75.
36. For the separate opinion of one anonymous panellist, see *ibid.*, paras 7.118–7.138. While the separate opinion agreed with the ultimate view taken by the majority that China would not have succeeded in justifying its measures under GATT Art. XX anyway, crucially the author of the separate opinion disagreed with the majority view that China’s accession terms had not become an integral part of the GATT.
39. The Panel cited several Multilateral Agreements, such as the AD, SCM and Customs Valuation Agreements as examples.
observations; for the sake of a ‘full exploration of the arguments offered by China’. First, the majority of the Panel disagreed that there was an intrinsic link between paragraph 11.3 and Articles II and XI, as there was no GATT provision requiring Member States to eliminate export duties, nor did paragraph 11.3 relate to the same subject matter as Article II and XI. This is a surprising stance for, in a stroke, the majority has purported to resolve a long-standing, well-known ambiguity surrounding the interpretation of GATT Article II; namely, whether it applies to both import and export duties. Some readers will recall the Roesler-Jackson debate. No thought seems to have been given to the possibility that China’s commitment to eliminate export duties may also be a GATT Article II binding. Secondly, the majority addressed China’s argument that there was no ‘explicit treaty language’ in paragraph 11.3 rejecting the application of Article XX, by which China means that in order for accession terms not to automatically form a part of one or more of the Multilateral Trade Agreements to which the particular term is intrinsically related (in this case the terms of paragraph 11.3 forming a part of the GATT), the treaty parties would have to say so expressly. As in the Raw Materials case, the majority disagreed with this notion and considered that on the contrary the language in paragraph 11.3 was specific in requiring the elimination of 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’. As such, the majority concluded, paragraph 11.3 was not in fact silent on the question of whether the obligation therein was subject to exceptions. According to the majority, the obligations of paragraph 11.3 are not subject to the general exceptions provision in GATT Article XX.

3.4 The Words ‘Nothing in this Agreement’ in GATT Article XX

China’s third argument was also not regarded to be a cogent reason for the majority to depart from the Appellate Body’s reasoning in China – Raw Materials. China had argued that as the Accession Protocol is intrinsically related to the text of GATT 1994, Article XX therefore became available to excuse violations of the Accession Protocol on the basis of the words in the chapeau of Article XX ‘Nothing in this Agreement’. The majority noted that ‘this Agreement’ in the context of Article XX referred to the GATT 1994, and to no other agreement. Since China’s argument was based on the presumption that, what it labels, the ‘WTO Plus’ provisions in its Accession Protocol were an integral part of the GATT 1994, and since the majority had already determined that this was not the case, the point was considered moot.

3.5 The Object and Purpose of the WTO Agreement

Finally, China’s argument, that the non-applicability of the general exceptions would be inconsistent with the object and purpose of the WTO Agreement, was also rejected by the majority of the Panel. In its assessment, the majority noted that this argument rested on a key premise, i.e., that the result of the Appellate Body’s ruling on the non-applicability of Article XX would be the promotion of trade liberalization at any cost – including forcing Members to endure environmental degradation and the exhaustion of their scarce natural resources. Although the majority agreed with the assertion that any interpretation of the agreement that would prevent Member States from using the general exception to implement measures for the protection of environment or human, animal or plant life or health, would be inconsistent with the object and purpose of the WTO Agreement, it considered the premise in China’s argument to be false.

In the view of the majority, the only result of the finding of the Appellate Body that paragraph 11.3 was not subject to the general exception of Article XX, was that.

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51 Ibid., paras 7.94–7.95.
52 See Lim & Senduk, supra, 83–84, revisiting the Roesler-Jackson debate, and citing Professor Melaku Gebrey Desta’s observation that while Dr Roesler could well be correct that Members can use Art. II to bind (i.e., even to eliminate) export duties if they wish, in simple, practical terms few Members have chosen to do so. But China has, and the Panel in Raw Earths has simply assumed Professor Jackson’s view, whether or not it was aware of it – that Art. II has nothing to do with export duties. An equally plausible view is that GATT Art. II and China’s Accession Protocol should be read together, and that China’s commitment to eliminate export duties is a GATT Article II binding; see the separate opinion in China – Rare Earths, Panel Report, WT/DS431/DS432/DS435/R, 26 Mar. 2014, para. 7.138. The same effect as an accession-based ban on export duties has been achieved in at least one other instance under an FTA between Japan and Brunei (Art. 18 of that treaty), see C.L. Lim, What Is To Be Done with Export Restrictions?, in The Trans-Pacific Partnership 211, 217 (C.L. Lim, Deborah Elms & Patrick Low eds, Cambridge University Press 2012).
55 Ibid., para. 7.104.
56 Ibid., para. 7.100.
57 Ibid., para. 7.101.
58 Ibid., para. 7.104.
59 Ibid., para. 7.110.
60 Ibid., paras 7.111–7.112.
61 Ibid., 7.112.
when seeking to address environmental concerns and protect the life and health of its population, China must use instruments and means other than export duties to do so (unless those export duties are imposed on products within the maximum rates ‘specifically provided for’ in Annex 6 of China’s Accession Protocol). Such alternative instruments and means include the entire universe of instruments and means that governments maintain to protect the environment and human health, and that do not violate WTO obligations – or that may violate one or more WTO obligations, but which may be justified under Article XX of the GATT 1994.

The majority went on to state that even if there were a situation in which export duties would be able to make a material contribution to any of the concerns addressed by the general exceptions, China has never presented an argument to support the premise that export duties are the only measure that could be used to protect this particular type of concern.\(^{52}\)

The majority has elided over two essential points. The first concerns the anomaly of some countries having a full panoply of tools to achieve environmental and health measures, while others like China – at least according to the Panel’s reading, and the reading of the Appellate Body and Panel in Raw Materials – do not. The question is whether, and how, the WTO’s objects and purposes clause might speak to this issue. A second issue has to do with an important point of GATT-WTO principle – duties are less restrictive than quotas and we have seen, over the course of the history of the GATT, a grand effort aimed precisely at the objective of ‘tarrifying’ trade restrictions, at least on the import side, and the conduct over several decades of round after round of global trade negotiations following such tarrification, precisely in order to bring those tariffs down. The underlying principle and belief inherent in the GATT system has been that quotas should generally be banned but duties should be permitted so long as they are bound and subjected to negotiations to bring their levels down.\(^{53}\) Moreover, the jurisprudence of GATT Article XX has confirmed the principle that WTO members should adopt the least trade restrictive measure in determining proportionate responses to achieve the non-trade objectives listed in Article XX.\(^{54}\) In essence, the majority of the Panel’s conclusion neglects such fundamental principles, prevents a WTO Member from taking less trade restrictive measures, and in this regard – with the greatest respect – lacks a basis in sound trade law principle.

### 3.6 Export Duties and GATT Article XX(b)

The Panel nonetheless went on – for the purpose of completing the analysis – to examine China’s arguments in arguendo.\(^{55}\) China pleaded that the export duties were justified under the exceptions of Article XX(b) as they were necessary to protect human, animal or plant life or health. Its plea was rejected with the whole Panel concluding that the export duties would not in any case have been covered by this exception.\(^{56}\) The Panel proceeded in the now well-established manner of first analysing the measure by reference to the specific exception sought to be relied upon – in this case the exception under paragraph (b) of GATT Article XX – before proceeding ‘upwards’ to analyse the measure under the Article XX chapeau.\(^{57}\)

(i) Were the Duties ‘Necessary’ to Protect Human, Animal or Plant Life or Health?

According to the Panel, for a measure to be justified under the Article XX(b) exception, it must be ‘necessary’ to protect human, animal or plant life or health,\(^{58}\) and it must meet the requirements of the chapeau of Article XX – i.e., that the measure does not cause arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and should not be a disguised restriction on international trade.

The necessity of a challenged measure is determined by: (i) looking at its ‘design’ and ‘structure’ to decide whether its ‘objective’ is in fact the protection of life and health; (ii) determining whether it is ‘necessary’ to fulfil this policy objective; and (iii) comparing it with possible alternative measures identified by the complainants.\(^{59}\) Only then will compliance with the anti-discrimination rule in the chapeau be assessed. But while China had demonstrated that rare earths mining processes are harmful to the environment,\(^{60}\) China had neither shown that the duties had been designed and structured to reduce environmental

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52 Ibid., para. 7.113.
53 See, e.g., Azizur Hoda, Tariff Negotiations and Renegotiations under the GATT and the WTO 7 (Cambridge University Press 2001).
56 Ibid., para. 7.195.
58 Our emphasis.
60 Ibid., para. 7.156.
pollution, nor that export duties would contribute to that stated policy objective. Although the measure served to increase prices, an export tax by definition increases the price of the products for consumption outside China. According to the Panel: ‘the mere fact that the export of such products would be taxed does not demonstrate the existence of a link between such taxes and the goal of reducing pollution’; i.e., notwithstanding China’s argument that increased prices entail a reduction in demand, and ultimately a reduction in production and pollution.

To recall the Appellate Body’s ruling in Brazil – Tyres, ‘necessary’ does not however mean ‘indispensable’. A sliding scale analysis is to be applied. That earlier case had involved an import ban, thus an argument that in order to reduce a health risk exposure to the maximum, even a marginal or insignificant contribution can be regarded as necessary was rejected. According to the sliding scale analysis, a duty – being less restrictive than a quota or a ban – will be subject to a different analysis – to more ‘lenient’ rather than ‘strict’ scrutiny. What the sliding scale analysis which the Appellate Body in Brazil-Tyres has referred to above (i.e., that the legality of a measure has to be ‘weighed’ against its trade restrictiveness) now requires, in light of what the majority of the Rare Earths Panel has said about the a priori unavailability of export duties, is a higher standard which China has to meet if it attempts to redesign its rare earths regime where quotas are substituted for duties.

More importantly, there is also the earlier ruling of the Appellate Body in Brazil-Tyre stating that it would not necessarily have been wrong for the Panel in that case to proceed on the basis of Brazil’s hypothesis that fewer waste tyres would result from an import ban on retreaded tyres than would otherwise have been the case. Likewise, in China – Audiovisual Products, the Appellate Body considered that ‘quantitative projections’ and ‘qualitative reasoning’ are alternative bases of reasoning. The Panel’s analysis in that case had offered neither of the two bases of reasoning. The Panel in Rare Earths seems at times to have ignored these warnings of the Appellate Body.

China’s attempt to justify its export duties would have failed anyway, according to the Panel. This is since China had also not been able to identify any corresponding measures which served to increase prices for consumption inside China. So far as the issue of Chinese export duties was concerned, China had also failed to explain why it could not, as an alternative to export duties, increase volume restrictions, pollution controls, the resource tax and/or the pollution tax instead. China had failed to show that these alternative, WTO-consistent measures were either not reasonably available or would not have been as effective as export duties.

(ii) The Article XX Chapeau Requirements

Finally, China argued that all the requirements in the Article XX chapeau had been met. While the Panel agreed that the measure did not ‘arbitrarily’ or ‘unjustifiably discriminate’ between countries where the same conditions prevailed, it recalled that the chapeau also prohibited discrimination in the treatment afforded to a product when destined for export, as compared to a like product when destined for domestic consumption. According to the Panel, the mere assertion by China that the export duty was not a ‘disguised restriction on international trade’ was not proof that it was not.

(iii) Did China Join the WTO?

Some readers might recall what the Appellate Body once said in Brazil-Tyre, that the facts of that case had illustrated:

the tensions that may exist between on the one hand, international trade, and, on the other hand, public health and environmental concerns…In this respect, the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context.

Were environmental and public health justifications declared a priori to be unavailable to China, we would question whether it truly is a ‘fundamental principle’ that there is such a right which ‘WTO Members’ all (A-L-L)
possess, or ask if — after all these years — China is yet to become a full Member of the WTO. The majority of the Panel were alive to the dangers of such criticism. Their holding is more subtle; namely, that ‘entire universe of instruments and means’ other than export duties would still be open to China. After all, China had never said that only export duties would do the job. The seemingly neat manner in which the majority tries to circumvent the problem is, as we have said, not unproblematic and may even be deceptive. Rather than belabour this point, we propose to return to it in the concluding section.

4 China’s Quota Measures and GATT Article XX(g)

China had also put in place measures which served as de facto export quotas on the amount of rare earths, tungsten, and molybdenum which could be exported during a given period. It sought to justify its measures under GATT Article XX(g) as measures related to the conservation of exhaustible natural resources, which — China argued — were made effective in conjunction with restrictions on domestic production and consumption. In order to assess this argument, the Panel noted that — again — it would first have to assess the measure under paragraph (g) of GATT Article XX before proceeding to an analysis of the chapeau to that article.

4.1 Measures ‘Relating to the Conservation of Exhaustible Natural Resources’

Article XX(g) concerns exceptions for measures ‘relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.’ For a measure to be justified under this exception, as the Panel explained, it should: (i) relate to the conservation of an exhaustible natural resource; and (ii) be made effective in conjunction with restrictions on domestic production or consumption, i.e., the measure needs to show a degree of even-handedness.

The Panel acknowledged that China has a comprehensive conservation policy consisting of a panoply of measures. The issue was whether the quota measure ‘related to’ conservation — which some readers may observe is generally viewed to impose a lesser threshold than the ‘necessity’ clause under Article XX(b). However, the mere use of the term ‘conservation’ cannot insulate a measure from challenge as to the object and purpose of its design. China advanced six reasons to demonstrate the relation between the export quota measures and their conservation objective under the ‘relate to’ clause.

First, China argued that the export quota prevented smuggling and the illegal exportation of extracted rare earth products, but the Panel failed to see how quantitative restrictions on legally produced goods could help to advance this goal.

Second, China argued that export quotas reduced domestic demand for illegally gained rare earth products, thereby helping to enforce accompanying domestic extraction and production quotas. According to the Panel, China’s explanation was inadequate.

Third, China argued that export quotas had a signalling effect, putting consumers on notice that they should look for other sources of supply. Here the Panel found that China had not demonstrated that, in the design of its export quota and its conservation programme in general, there was a mechanism to ensure that the export quota and the extraction and production caps would work together in such a way as to counteract the contradictory signals sent by these various measures to domestic consumers.

Fourth, China argued that the export quota served as a ‘safeguard’ against ‘speculative surges’ in demand, which would undermine sustainable development. The Panel responded that protecting the domestic industry from speculative surges in foreign demand relates not to conservation but industrial policy. Such industrial policy objectives could be better met through other WTO-lawful

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76 Ibid., para. 7.237. See further, on the requisite ‘two-tier’ analysis, United States – Standards for Reformulated and Conventional Gasoline, Appellate Body, WT/DS2/AB/R, 29 Apr. 1996, 22; US – Shrimp, Appellate Body, WT/DS58/AB/R, 23 Oct. 1998, paras 119-120, where the Appellate Body had declared that: ‘The task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter (like the Panel in this case) has not first identified and examined the specific exceptions threatened with abuse…’
81 Ibid., para. 7.425.
82 Ibid., para. 7.434.
83 Ibid., para. 7.448.
84 Ibid., paras 7.451–7.452.
means – e.g., critical supply shortage measures adopted under GATT Article XI:2(a).83

China’s fifth argument was that the export quota enabled China to ‘allocate’ the limited supply of rare earth resources between foreign and domestic producers. China asserted that this was more in the nature of a responsibility in light of China’s dominance over global rare earths supply. Significantly, China also claimed this to be an inherent sovereign right, arguing that it had not relinquished its right of permanent sovereignty over its natural resources by joining the WTO, and that conservation need not be the conservation of rare earths ores in their natural state.84 However, the Panel clarified what the Panel in Raw-Materials had said and considered that ‘sustainable economic development’ is not a goal which ‘in itself’ can be pursued under the rubric of conservation. Such economic development measures ‘are not automatically measures “relating to the conservation of exhaustible natural resources”. China’s policy measures were instead designed to pursue an industrial policy objective.85 The Panel went on to declare that once resources had been extracted and had entered the marketplace – once they have been injected into the stream of commerce – no party can claim to have a right, or even the responsibility, to allocate the available stock between different users as these resources would now be subject to WTO disciplines, including the conservation exception. The Panel failed to see how China’s allocative policies enhanced the conservation objective.86

Finally, China argued that the manner in which the export quota was set demonstrated that it was related to conservation. The Panel considered that the manner in which the quota was set could potentially have related to conservation.87 However, China needs to demonstrate that the export quota was ‘substantially connected’ to the goal of conservation; the Panel having earlier applied the Appellate Body ruling in US–Shrimp (the ‘Shrimp-Turtle’ case)88 and rejected the US claim that GATT law requires a restrictive measure to be ‘primarily related to’ the non-trade objective pursued under Article XX.89 The Panel had also rejected the US argument that the existence of a comprehensive conservation policy would be an irrelevant consideration and had ruled that, on the contrary, the existence of such a comprehensive policy is relevant towards showing a ‘close and substantial relationship between the objective(s) pursued and the means in the form of the measure(s) adopted’.90 However, the Panel failed to see the existence of such a ‘close and genuine’,91 or ‘substantial’ (i.e., a ‘substantial, close and real’),92 connection between the ends pursued and the means adopted; stating that China’s measure seemed instead to have been more focussed on industrial policy concerns.93

Crucially, China had argued that in allocating its export quotas, it had taken into account the natural resources, their production, and consumption patterns as well as international market conditions. The Panel considered that the critical question is not what China’s subjective intent was, but – as readers will recall from the Appellate Body’s ruling in US–Shrimp94 – what is shown by the impugned measure’s overall design. China must show how the considerations it says it took into account actually appear in the actual design of the impugned measure.95 As the Appellate Body in US–Shrimp once put it, the test is one which looks to the ‘general design and structure’ of the measure in question. However, the Panel’s analysis arguably leaves some lingering questions. For the Panel in Rare Earths to discount any and all evidence of subjective intent, how much consideration should be given to the fact that a quota looks like any other quota? Arguably, the Panel in Rare Earths, by adopting this further interpretation, has risked conflating the test for establishing a substantial relationship between the measure adopted and the objective sought to be pursued – i.e., the structure and the design of the measure – with an evidentiary requirement limiting the range of admissible evidence concerning the general design and structure of a measure. The Panel could have rejected China’s evidence of its intentions, but this is not what the Panel said.

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81 Ibid., para. 7.453–7.454.
82 Ibid., para. 7.455–7.457.
83 Ibid., para. 7.460.
84 Ibid., para. 7.462.
85 Ibid., para. 7.471.
86 US–Shrimp, Appellate Body, WT/DS58/AB/R, 21 Oct. 1998, para. 141 (the measure must not be ‘disproportionately wide’ in relation to the policy objective, the ‘means’ must be ‘reasonably related to the ends’, there must be a ‘close and real relationship’ between the measure and the objective).
91 Ibid., para. 7.485.
Panels have a broad latitude as tribunals—or in more recognizable GATT-speak, as ‘tries’—of fact.96 However, a Panel’s task remains nonetheless that of striking a balance between the emasculation of the Article XI discipline on the one hand, and the Article XX right on the other.97 It remains to be seen whether the Panel’s application of the ‘relate to’ clause has been too stringent. As with the Brazil-Tyres case, the complexity involved in assessing the individual parts of comprehensive measures where those individual aspects take the form of garden variety trade restrictions (e.g., quotas, duties, etc.)—as opposed to a specially-tailored measure, such as, say, section 609 of the US law in Shrimp-Turtle case. Such garden variety measures do not easily permit evaluation on the basis of some special design characteristic. Instead, they compel Panels to, at least to some extent, peer behind facially neutral quota, duty and other traditional trade measures. In assessing whether a measure—including a measure which is part of a larger slew of environmental measures—contributes to the stated objective, the Panel must ask how it does so. It remains to be seen on appeal whether, at least in parts of the Panel’s analysis above, the Panel’s scrutiny has been too stringent in asking how individual measures might relate to the environmental objective.

4.2 Domestic Restrictions on Domestic Consumption and Production

The Panel also rejected China’s arguments regarding the manner in which the measures were allegedly made effective in conjunction with restrictions on domestic production and consumption. The Panel considered it pertinent to look at whether: (i) China had imposed restrictions on domestic production or consumption of rare earths; and (ii) the export quota was made effective in conjunction with such restrictions on domestic production or consumption.98 China identified, amongst others, the following measures: (a) access conditions; (b) resource taxes; (c) volume restrictions; and (d) environmental requirements.99 It is worth recalling the rule as stated in the Appellate Body’s seminal ruling in United States—Standards for Reformulated and Conventional Gasoline. The Appellate Body had construed ‘made effective’ to mean ‘operative’, ‘in force’ or that a particular domestic measure had ‘come into effect’, and ‘in conjunction with’ to mean ‘together with’ or ‘jointly with’.100 Moreover, the Appellate Body on US–Gasoline had considered that ‘in conjunction with’ does not mean that domestic and foreign measures must be identical, but only that there should be ‘even-handedness’.101 It should also not matter if the domestic restriction is a restriction of production or consumption as either should suffice.102

The Panel in Rare Earths found that while imposing access conditions limited opportunities for new enterprises to enter into the industry, they did nothing to control production by existing industries.103 As for resource taxes, the Panel noted that while these increase costs and, in the long run, could lead to a reduction in demand and thereby limit production of rare earth ores, China had failed to submit sufficient evidence to show that resource taxes would be capable of having such a limiting effect.104 Regarding volume restrictions, the Panel had difficulty concluding that these were capable of restricting the production of rare earth oxides. In addition, the Panel noted that China did not provide any evidence demonstrating that it had imposed domestic consumption quotas or other forms of regulatory control over the level of domestic consumption, nor had China provided evidence that it imposed enforcement measures on the domestic downstream industry to ensure that domestic users did not exceed the consumption cap.105 With respect to environmental requirements the Panel considered that environmental costs are ordinary costs imposed on enterprises to address market externalities caused by rare earth extraction and production. China had failed to establish that the environmental measures at issue were capable of having a limiting effect on domestic production or consumption.106

If the Panel’s analysis is correct, a WTO Member must not only show, for example, that the accompanying domestic measures are ‘operative’, ‘in force’ or had ‘come into effect’, or even that these laws and measures are enforced, but that each domestic measure is also capable of being effective in practical terms. In this regard, readers will

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99 Ibid., para. 7.493 (‘Enforcement action’ had constituted a fifth argument advanced by China).
101 Ibid., 21.
102 Ibid.
104 Ibid., para. 7.554.
105 Ibid., para. 7.550.
106 Ibid., paras 7.563–7.566.

In the first place, the problem of determining causation...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.

But then the Appellate Body went on to say:\footnote{Ibid. (our emphasis).}

In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any effect on conservation goals, it would probably be because the measure was not designed as a conservation regulation to begin with.

It was for China to show that the measures were at least capable of the effect sought, arguably it did, and it now remains to be seen if the Panel has ended up scrutinizing China's measures too strictly in light of the appropriate standard. To be sure, this is not merely to quibble with the Panel, but reflects the need – should China appeal, lose and eventually refuses to dismantle the current regime in favour of refining it – to know where the threshold lies based on the facts presented by China's rare earths measures.

4.3 Whether Export Quotas Were Made Effective in Conjunction with the Domestic Measures: Substantive and Procedural Complementarity

According to the Panel, China had also failed to explain how the export quota operates and works together with domestic restrictions. The Panel identified two dimensions to the 'conjunction' issue – the impugned measure and the domestic measures it has allegedly been made effective in conjunction with must be, first, \textit{substantively} and secondly, \textit{procedurally} complementary.\footnote{China – Rare Earths, Panel Report, WT/DS431/DS432/DS433/R, 26 Mar. 2014, paras 7.300–7.301, 7.568.} As to the former, the impugned measure and the domestic measures do not apply to the same products.\footnote{Ibid.} Regarding the latter 'procedural' requirement, the timing of the quota and other measures do not show that they acted together; instead, quotas were set late in the year 'probably to take into account evolving domestic needs'.\footnote{Ibid., para. 7.584.} According to the Panel, the impugned measure and the domestic measures must form a rational system; it is insufficient that the domestic measures do not undermine the impugned quota measure.\footnote{Ibid., para. 7.574, also paras 7.579–7.581.}

The Panel found that the quota and restrictions did not seem to work coherently towards the goal of conservation.\footnote{Ibid., paras 7.301–7.302.} The fact that the measures did not work together with the export quotas also led the Panel to conclude that a criterion of 'even-handedness' – for which readers will recall the Appellate Body's pronouncement in US–Gasoline,\footnote{United States – Gasoline, Appellate Body, WT/DS2/AB/R, 29 Apr. 1996, 20–21.} cited earlier – had not been satisfied.\footnote{China – Rare Earths, Panel Report, WT/DS431/DS432/DS433/R, 26 Mar. 2014, para. 7.602.} Instead, the overall effect of the foreign and domestic restrictions has been to encourage domestic extraction, and to secure preferential use of the materials by domestic, Chinese manufacturers.\footnote{Ibid., para. 7.594.} Applying the Appellate Body rulings in US–Gasoline and \textit{US-Shrimp},\footnote{US – Shrimp, Appellate Body, WT/DS58/AB/R, 21 Oct. 1998, para. 144.}\footnote{China – Rare Earths, Panel Report, WT/DS431/DS432/DS433/R, 26 Mar. 2014, para. 7.337.} the Panel emphasized that the even-handedness requirement which China had failed to meet was not about effects, but about a \textit{structural} or regulatory concern with distributing the burden of trade restrictions between foreign and domestic trade restrictions.\footnote{For the chapeau analysis, see (e.g.) Arwel Davies, \textit{Interpreting the Chapeau of GATT Article XX in light of the ‘New’ Approach in Brazil – Tyres}, 43(3) Journal of World Trade 507 (2009).}


The Panel then proceeded ‘upwards’ from the conservation clause located in paragraph (g) of GATT Article XX to an analysis of GATT Article XX's chapeau requirements. The Panel adopted the usual 'three-step analysis’.\footnote{See \textit{US – Shrimp}, Appellate Body, WT/DS58/AB/R, 21 Oct. 1998, para. 150.} It would first determine whether there was ‘discrimination and/or a disguised restriction on international trade’. Should it...
conclude that there was discrimination, it would still have to determine whether this was based upon or explained by a conservation rationale. Finally, it would have to consider whether alternative WTO-consistent measures might have been available.

**Step One.** China considered its measures to be non-discriminatory and GATT-compliant since: (i) the 2012 export quota had been unfulfilled; and (ii) the export quota had not had any price-discriminatory effects on the foreign price of rare earth products. The Panel was not persuaded that this evidence was sufficient to establish non-discrimination. China’s argument also ignored the fact that a large portion of demand for rare earths exports was satisfied illegally. It was China’s burden to show that its measures were not intended to have a price-discriminatory effect.

With regard to the second argument, the Panel cited the persistent price gap between foreign and domestic prices. The export quota measures seemed to favour domestic users while simultaneously restricting foreign access — Chinese quotas allowed only less concentrated forms of rare earths to be exported and the quotas only affected foreign as opposed to domestic purchasers. The Panel also noted that the criteria used for the allocation of quotas between domestic and foreign users were based on different standards, and that annual changes to the formula by which the quota was calculated has meant that exporters faced uncertainty.

The Panel concluded that the export quota had therefore been applied in a manner which was discriminatory.

**Step Two.** Having established that the measures were discriminatory, the Panel proceeded to the second step in the analysis and asked if such ‘discrimination’ may be provisionally justified by being rationally related to the conservation policy which China claimed, and whether the discriminating measure was indeed based upon a conservation policy. How could an export quota be a rational (i.e., an effective) measure when the most important threat to conservation came from domestic users, the Panel asked? It found that the export quota had the effect instead of providing domestic consumers with a guaranteed minimum amount of rare earths. The Panel thus concluded that China had not demonstrated that, notwithstanding its comprehensive conservation policy, the apparently discriminatory effects of the measures were based upon conservation objectives.

It is useful, at this juncture, to recall what the Appellate Body in Brazil – Retreaded Tyres had to say about the Panel’s reasoning in that case:

The Panel’s interpretation implies that the determination of whether discrimination is unjustifiable depends on the *quantitative impact* of this discrimination on the achievement of the objective of the measure at issue…analysing whether discrimination is ‘unjustifiable’ will usually involve an analysis that relates primarily to the *cause* or the *rationale* of the discrimination. By contrast, the Panel’s interpretation of the term ‘unjustifiable’ does not depend on the cause or rationale of the discrimination but, rather, is focused exclusively on the assessment of the effects of the discrimination. The Panel’s approach has no support in the text of Article XX and appears to us inconsistent with the manner the Appellate Body has interpreted and applied the concept of ‘arbitrary or unjustifiable discrimination’ in previous cases.

The test is whether the measures bear a ‘rational connection’ with the conservation objective, assessed in light of the measure’s objective. Thus, in Brazil-Tyres, Brazil’s argument that it was complying with a

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130 Ibid., para. 7.635.
131 Ibid., paras 7.637–7.639. In future, this aspect of the Panel report may be revisited in disputes over the meaning of express ‘price-discrimination clauses’ which may be found in some, especially US-party, FTAs — see (e.g.) Lim, ‘What Is To Be Done with Export Restrictions?’, supra, 214 et seq. (discussing NAFTA Art. 315, and its subsequent analogues). It is interesting that NAFTA Art. 315(b) would, on its face, go against the interpretation given by the Rare Earths Panel (i.e., that the true test is one of what China intended) — ‘the Party does not impose a higher price for exports of a good to that other Party than the price charged for such good when consumed domestically, by means of any measure, such as licenses, fees, taxation and minimum price requirements’ (our emphasis). It may be that this aspect of the Rare Earths Panel Report is about the law of GATT Art. XX, and nothing more, but we cannot escape the sense of a GATT-based non-price discrimination rule in the making as the GATT’s regulation of export restrictions.
132 Ibid., para. 7.650–7.654.
133 Ibid., para. 7.655.
136 Ibid., paras 7.659–7.663.
The Panel thus concluded that China had not provided extensive comments on these measures, or explained why they were not available in China. The Panel thus concluded that China had not demonstrated that its 2012 export quota on rare earths products was applied in a manner that did not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

4.5 **Tungsten and Molybdenum**

The Panel repeated these steps in its evaluation of China’s export quotas for tungsten and molybdenum, applying what it had said on export quotas mutatis mutandis. The Panel concluded that China had failed to provide any justification of its measures.

First, China had to prove that the measures were linked to its conservation goals. In both cases, the Panel noted that the mere reference to a conservation objective in the text was not sufficient without also explaining how the measures actually related to the conservation of tungsten and molybdenum. Second, it assessed the manner in which China’s measures had restricted the level of domestic production. As with its policies and measures on rare earths, China pointed out four measures it had put into place, i.e., (a) access conditions for companies; (b) resource taxes; (c) volume restrictions; and (d) a deposit for ecological recovery, which served this purpose. For both materials the Panel, as with its analysis of China’s rare earths measures, failed to see how the measures were made effective in conjunction with domestic production and consumption. Finally the Panel looked at the ‘even-handedness’ of the measures and also concluded that the export restrictions did not seem to work well together with the domestic measures.

The Panel went on to apply the chapeau. China’s arguments that its measures were non-discriminatory were rejected for lack of evidence. Having concluded that the measures were discriminatory, it turned its attention to their justification. As the Panel concluded that, for both materials, the main threat to conservation was domestic, it failed to understand how the use of an export quota would aid China’s conservation goals, concluding that the measures seemed closer to being industrial policy measures. Finally, the Panel looked at whether there were other WTO-consistent measures that were less trade restrictive but which may also be suited towards achieving the same conservation goals. The Panel concluded that the effects of the measures could have been reduced, and that China had neither fully explored nor justifiably rejected these alternative measures.

5 **China’s export licensing system**

Finally, China’s panoply of measures also required an assessment of export performance and experience, and China imposed capital adequacy requirements, in the licensing of rare earths companies. It argued that, in doing so, it was permitted to depart from some of its trading rights commitments under the general exceptions provision in Article XX(g). To determine whether this measure could indeed be justified under the general exception, the Panel first considered whether China’s commitments under paragraphs 83 and 84 of China’s Working Party Report were indeed subject to the general...
exception. Paragraph 83 states *inter alia* that China will progressively liberalize the scope and availability of trading rights; that for both Chinese and foreign-invested enterprises, China would eliminate export performance, trade-balancing, foreign exchange-balancing and prior experience requirements (e.g., experience in import and export) as a prerequisite to granting the right to engage in importation and exportation. It also committed to remove capital adequacy requirements for wholly Chinese invested enterprises. As for paragraph 84 of the Working Party Report, it states that within three years of China’s accession, China would permit all enterprises to export and import all goods except listed products under Annex 2A of the Protocol which are reserved for importation and exportation by China’s state-owned enterprises; trading rights for foreign enterprises will be granted on a non-discriminatory and non-discretionary basis; that requirements for the grant of trading rights would only be imposed for customs and fiscal purposes and will not constitute a barrier to trade; and that foreign enterprises and individuals still had to comply with all WTO-consistent requirements related to importation and exportation, but that minimum capital adequacy and prior experience requirements would no longer apply.

The Panel considered that China’s right to regulate trade was unimpaired by its trading right commitments so long as the eligibility criteria imposed on such trade could be justified under GATT Article XX, but that it would have to assess whether the qualified nature of China’s trading rights obligations under paragraph 5.1 of China’s Accession Protocol extended to the obligations under paragraphs 83 and 84 of China’s Working Party Report. Paragraphs 83 and 84 do not contain the same introductory language as paragraph 5.1, which begins with the words ‘without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement’. For the obligations in paragraphs 83 and 84 to be covered by the general exceptions under GATT Article XX, some other basis, textual or otherwise, would need to be found.

The Panel found three bases. First, paragraph 5.1 and paragraphs 83 and 84 all deal with the same subject matter (i.e., trading rights), and paragraphs 83 and 84 were essentially elaborations upon China’s general obligation under paragraph 5.1. In addition, the Panel referred to the reasoning of the Appellate Body in the China – Publications and Audiovisual Products case, where it had interpreted the obligations in paragraphs 83(d) and 84(a) so as to be consistent with paragraph 5.1. In that case, the Appellate Body had stated that it would be inappropriate to permit a Member to assert a claim under only the Working Party Report provisions and thereby circumvent a defence offered by paragraph 5.1. As such, the Panel established that breaches of China’s trading rights commitments in paragraphs 83 and 84 could be justified under Article XX. Where China asserted such an exception, it would have to show a clearly discernible and objective link to the regulation of trade in rare earths and molybdenum.

China however took the position that the eligibility criteria in the measures at issue were related to the administration of WTO-consistent export quotas, and were not in reality limitations on the right to trade. The Panel however, considered that breaches of GATT Article XI (export quotas) were different and that these were breaches of trading rights which require separate justification. In assessing China’s claim that these measures were justified, the Panel found that it did not have to engage in a protracted analysis. China had not provided any specific arguments to clarify why the eligibility criteria in the disputed measures at issue related to the conservation of exhaustible natural resources at all. China never sought to justify the eligibility criteria separately from its justifications for the export quotas. As such, China had not established that its violations of trading rights commitments could be justified under GATT Article XX (g).

### 6 Conclusion

First, China’s official statements following the Panel ruling suggest that China will, come hell or high water, seek to preserve its environmental, health and conservation measures in the future. According to the Panel’s reasoning,
however, this would be no mean feat. While the 'exceptions' under GATT Article XX should never be made easily available, the right to invoke these exceptions exists.\(^156\) To be sure, the right should not 'erode or render naught' a Member's trade obligations, and the various Article XX exceptions are only 'limited and conditional', yet similarly that right should also not be rendered illusory by a Member's GATT trade commitments.\(^157\) The following points, regarding the quota measures which China had sought to justify under GATT Article XX (g), would appear especially relevant to any attempt at re-designing China's current measures:

(1) Regarding the 'relating to' requirement, a traditional trade measure such as a quota – unlike a specially designed measure – would look like any other quota or restrictive measure. Its 'structure and design' may be revealed only in light of the other elements in, say, a comprehensive conservation policy. While the Panel acknowledged the importance of this point, (i) it appears to have refused to treat evidence of China's subjective intent underlying its quota measures as admissible as a matter of GATT law, while (ii) simply re-writing each measure so as to state, on the face of these measures, their relation to each other and to the overall policy would likely be insufficient.

(2) The Panel appears, at times, almost to neglect the Appellate Body's view in Brazil-Tyres that when trade restrictive measures are assessed as to whether they would make a 'material contribution' to the non-trade objective, providing evidence or data of such effectiveness will suffice, but that this 'is not, however, the only type of demonstration that could establish such a contribution'. This point may not make much practical difference to China in facing the need to re-adjust the timing of annual quota announcements, and in ensuring that its various measures cover the same list of products. But it could be critical in any re-assessment of the role source taxes and environmental requirements could play, or of the porosity of volume restrictions. It may be sufficient, according to the Appellate Body in Brazil-Tyres, to show that 'an import ban is necessary' – i.e., in the case of the 'necessity clause' under Article XX(b), in that case – by showing 'that the import ban is apt to produce a material contribution to the achievement of its objective'.\(^158\) This approach, which does not require empirical proof of the effect of adopted measures, arose in the context of an analysis of Article XX(b) in Brazil-Tyres but a similar analysis has been applied to Article XX(g) where, arguably, Article XX(g)'s 'relating to' clause also imposes a lower threshold of proof than Article XX(b)'s 'necessity' clause. So where is the legal threshold on the facts of the Rare Earths case? According to the Appellate Body in US–Gasoline, it must be 'clear' that practically speaking, the measure 'cannot in any possible situation have any effect on conservation goals'.\(^159\) Arguably China has gone further to meet that test than the Panel in Rare Earths would admit.

(3) As to the chapeau's requirements, similar difficulties with showing the capability of particular measures to produce the desired effects resurface in this context. The chapeau analysis is also particularly significant to China due to China's failure, in the eyes of the Panel, to respond adequately to the claimants' identification of reasonably available alternative measures;\(^160\) for here the threshold of protection ultimately sought by the respondent is always subject to a contrary assessment by a WTO Panel or the Appellate Body.\(^161\) Second, China's point need not equate 'sustainable economic development' with 'conservation'. As the Appellate Body in US–Shrimp had put it, the Preamble of the WTO Agreement 'must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994'.\(^162\) China's argument appears to be that this includes how we should interpret the requirements of the conservation exception under Article XX(g); namely, that even if 'conservation' is not synonymous with 'sustainable development' the former cannot be read independently of the latter, and this – China might argue – is what the Panel has done. However, it may simply be the case that 'sustainable development' adds nothing here to the interpretation of the conservation clause in Article XX(g);


the Panel’s factual finding being that China’s measures have nothing to do with either conservation or sustainable development.

Third, the Panel’s notion that permanent sovereignty over natural resources ends with their extraction goes to the commercial and industrial heart of the case. Rare earths are not rare. Requiring China to trade its own rare earths, while others sit on their stocks in the ground, especially in light of the acknowledged environmental effects, partly explains China’s position on the matter. The obligation to trade extracted resources – i.e., by not imposing quota barriers – is not an unqualified obligation. Aside from the possibility of Members invoking the GATT Article XI exceptions, there is GATT Article XX (and also Article XXI). The fact that Article XX was unavailable to China in respect of its obligation not to impose export duties made the permanent sovereignty argument significant to China’s defence. But it can hardly be imagined that other WTO Members, let alone China, would easily concede that, under a proper interpretation of the GATT, the permanent sovereignty doctrine is spent once resources have been extracted and injected into the stream of domestic commerce.

Finally, the central issue in this case has to do with the idea that there is one GATT for all and another ‘GATT’ for China – i.e., GATT à la carte. It is also difficult to comprehend how China’s accession terms in the goods sphere are not automatically an integral part of the GATT. According to the separate opinion in Rare Earths, the key question is whether the absence of any reference in an Accession Protocol to a Multilateral Trade Agreement should be construed to mean the automatic divorce of the two treaties, or whether such a divorce can only be achieved by express terms in which case accession terms involving the goods trade become automatically a part of the GATT. We should not overlook the fact that the Rare Earths Panel ruling as a whole is valuable precisely because it explores this systemic issue further than any analysis hitherto offered by either a WTO Panel or the Appellate Body. Perhaps we cannot do better than to quote the separate opinion of the minority panellist in Rare Earths:

I am well aware of the findings of the Panel and the Appellate Body in the China – Raw Materials dispute regarding the availability of Article XX of the GATT 1994 (GATT Article XX) to justify violations of paragraph 11.3 of China’s Accession Protocol. In my view, China has submitted new arguments in this dispute that have helped the Panel to appreciate the legal complexity of this issue.

The majority, while adopting the view that China can still resort to ‘means other than duties’ to address its environmental concerns, did at least concede that ‘an interpretation of the covered agreements that resulted in sovereign States being legally prevented from taking measures that are necessary to protect the environment or human, animal or plant life or health would likely be inconsistent with the object and purpose of the WTO Agreement. In the Panel’s view, such a result could even rise to the level of being “manifestly absurd or unreasonable”’. Yet the true issue, which seems not to have been directly addressed, is whether a more restrictive measure – e.g., a ban – should be resorted to when a less restrictive measure such as an export duty might otherwise have been available. If the answer is ‘yes’, that would fly in the face of known jurisprudence. But if the answer in practice is ‘no’, then China’s policy options – in comparison with other WTO Members – shrink even further to the point where it may not be realistic to suggest that the majority’s view is only meant as a restriction of ‘means’ not ‘ends’. Cutting off one policy avenue (i.e., duties) might seem plausible, but practically cutting off two, and distinguishing that as a ‘restriction of means’ from ‘censorship of the ends pursued’ risks accusations of sophistry.

The lone voice of the Rare Earths separate opinion was at least a moral victory of sorts.

Notes

163 There is no apparent basis for this reading of customary international law. Were that basis to lie in GATT treaty law instead, there is at least the question of the way in which custom may impinge upon the proper interpretation of GATT law – see, for example, Art. 31(3)(c), Vienna Convention on the Law of Treaties 1969. Whether the Appellate Body will be impressed with an attempt to invoke Art. 31(3)(c) is another matter, see Isabelle van Damme, Treaty Interpretation by the WTO Appellate Body (Oxford U. Press 2009), 371.

164 China – Rare Earths, Panel Report, WT/DS433/DS432/DS433/R, 26 Mar. 2014, para. 7.120.

165 Ibid., para. 7.111–7.112.

166 For a ban would be that much harder to justify.
Author Guide

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