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CHINA – MEASURES RELATED TO THE EXPORTATION OF RARE EARTHS, TUNGSTEN, AND MOLYBDENUM

REPORTS OF THE PANEL

Note by the Secretariat:

These Panel Reports are in the form of a single document constituting three separate Panel Reports: WT/DS431/R, WT/DS432/R and WT/DS433/R. The cover page, preliminary pages, sections 1 through 7 are common to the three Reports. The page header throughout the document bears the three document symbols WT/DS431/R, WT/DS432/R and WT/DS433/R, with the following exceptions: section 8 on pages USA-252 and USA-253, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS431/R; section 8 on pages EU-254 and EU-255 contains the Panel's conclusions and recommendations in the Panel Report WT/DS432/R; and section 8 on pages JPN-256 and JPN-257, which bears the document symbol for and contains the Panel's conclusions and recommendations in the Panel Report WT/DS433/R. The annexes, which are a part of the Panel Reports, are circulated in a separate document (WT/DS431/R/Add.1, WT/DS432/R/Add.1 and WT/DS433/R/Add.1).

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Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
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Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
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Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
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Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
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Canada – Renewable Energy / Canada – Feed-in Tariff Program	Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R / WT/DS426/R / and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R
Chile – Alcoholic Beverages	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281
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China – Auto Parts	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / and Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, DSR 2009:I, 119-DSR 2009:II, 625
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China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
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EC – Asbestos	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, p. 3305
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bananas III (Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:III, p. 1085
EC – Bananas III (Article 21.5 – US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW/USA and Corr.1, adopted 22 December 2008, upheld by Appellate Body Report WT/DS27/AB/RW/USA, DSR 2008:XIX, p. 7761
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
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EC – Computer Equipment	Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by Appellate Body Report WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, p. 1891
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EC – Hormones (Canada)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, p. 235
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EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, p. 925
EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, p. 1009
Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, adopted 22 February 2012
India – Quantitative Restrictions	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, 1799

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Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
Japan – Semi-Conductors	GATT Panel Report, *Japan – Trade in Semi-Conductors*, L/6309, adopted 4 May 1988, BISD 35S, p. 116
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
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Turkey – Textiles	Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345
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US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4593
US – 1916 Act (Japan)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, p. 4831
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel	Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by Appellate Body Report WT/DS213/AB/R, DSR 2002:IX, p. 3833
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012
US – Clove Cigarettes	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by

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	Appellate Body Report WT/DS406/AB/R
US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R
US – Continued Suspension	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, 3507
US – Continued Suspension	Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, 3891-DSR 2008:XIII, 4913
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, 1291
US – Continued Zeroing	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R, DSR 2009:III, 1481- DSR 2009:IV, 1619
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, p. 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012

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US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Oil Country Tubular Goods Sunset Reviews	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R and Corr.1, adopted 17 December 2004, as modified by Appellate Body Report W/DS/268/AB/R, DSR 2004:VIII, 3421
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
US – Section 211 Appropriations Act	Panel Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R, adopted 1 February 2002, as modified by Appellate Body Report WT/DS176/AB/R, DSR 2002:II, 683
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, p. 815
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Shrimp	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, 2821
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513
US – Stainless Steel (Mexico)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, 599
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012
US – Tuna II (Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Tyres (China)	Panel Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/R, adopted 5 October 2011, upheld by Appellate Body Report WT/DS399/AB/R , DSR 2011:IX, p. 4945

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US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Wool Shirts and Blouses	Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, p. 343

TABLE SHOWING THE SHORT TITLES OF FREQUENTLY CITED MEASURES, EVIDENCE, AND OTHER INSTRUMENTS REFERRED TO IN THESE REPORTS

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2008 Export Licence Administration Measures	Measures for the Administration of Licence for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, promulgated on 7 June 2008, effective on 1 July 2008) (No Chinese Exhibit, Exhibit JE-51)
2010 Amendment of Measures for Administration of Licensing Entities	2010 Decision of the Ministry of Commerce on Amending the Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Order (2010) No. 3, promulgated by MOFCOM on 12 September 2010) (No Chinese Exhibit, Exhibit JE-53)
2012 Application Qualifications and Application Procedures for Molybdenum Export Quota	Public Notice on 2012 Application Qualifications and Application Procedures for Indium, Molybdenum and Tin Export Quota, Notice (2011) No. 79, promulgated by MOFCOM on 11 November 2011 (Exhibits CHN-107, JE-63)
2012 Application Qualifications and Application Procedures of Tungsten Export (or Supply) Enterprises	Public Notice on 2012 Application Qualifications and Application Procedures of the Tungsten, Antimony and Silver State Trading Export Enterprises, and Tungsten and Antimony Export Supply Enterprises, Notice (2011) No. 80, promulgated by MOFCOM on 11 November 2011 (Exhibits CHN-100, JE-62)
2012 Application Qualifications and Procedures for Rare Earth Export Quotas	Public Notice on 2012 Application Qualifications and Application Procedures for Rare Earth Export Quota, Notice (2011) No. 77, promulgated by MOFCOM on 11 November 2011 (Exhibits CHN-38, JE-61)
2012 Circular on Admission to Rare Earth Industry	2012 Circular on Admission to Rare Earth Industry (Ministry of Industry and Information Technology, (2012) No. 33, 26 July 2012) (Exhibit CHN-16, No Joint Exhibit)
2012 Export Licensing Catalogue	Notice on "2012 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2011) No. 98, promulgated on 30 December 2011, effective on 1 January 2012) (Exhibits CHN-8, JE-48)
2012 Export Quota Amounts	Notice Regarding 2012 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2011) No. 71, promulgated on 31 October 2011, effective on 1 January 2012) (Exhibits CHN-97, JE-58)
2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals	Notice Regarding the 2012 List of Export (Supply) Enterprises and First Batch Export Quotas of Tungsten, Antimony and Other Nonferrous Metals (Ministry of Commerce, shangmaohan, (2011) No. 1131, 26 December 2011) (Exhibits CHN-99, JE-59)
2012 First Batch of the Directive Production Plan of Rare Earths	Circular on Distributing the First Batch of the Directive Production Plan of Rare Earth for 2012 (Ministry of Industry and Information Technology, gongxinbuyuan (2012) No.17, 13 January 2012) (Exhibit CHN-22, No Joint Exhibit)
2012 First Batch Rare Earth Export Quotas	Notice Regarding the 2012 List of Rare Earth Export Enterprises and First Batch of Rare Earth Export Quotas (Ministry of Commerce, shangmaohan, (2011) No. 1133, 27 December 2011) (Exhibits CHN-56, JE-55)
2012 First Batch Rare Earth Export Quotas (Supplement)	Notice Regarding the Supplement to the 2012 First Batch of Rare Earth Export Quotas (Ministry of Commerce, shangmaopi, (2012) No. 618, 16 May 2012) (Exhibits CHN-57, JE-56)

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2012 List of Enterprises for the Export (or/and Supply) of Tungsten, and List of Enterprises for the Export of Molybdenum	Notice Publishing the List of the State Trading Export Enterprises of Tungsten, Antimony and Silver, the Enterprises Exporting and Supplying Tungsten and Antimony, and the Enterprises Qualified to Apply for the Export Quotas for Indium and Molybdenum in 2012, (Ministry of Commerce, 14 December 2011) (Exhibits CHN-98, JE-65)
2012 List of Enterprises for the Export of Rare Earths	Notice Publishing the List of Enterprises Applying for the Export Quota for the Rare Earth and Coke in 2012 (Ministry of Commerce, 14 December 2011) (Exhibits CHN-55, JE-66)
2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals	Notice on Distributing the 2012 Second Batch Export Quotas of Tungsten, Antimony and Other Nonferrous Metals (Ministry of Commerce, shangmaohan, (2012) No. 513, 19 July 2012) (Exhibits CHN-165, JE-60)
2012 Second Batch of the Directive Production Plan of Rare Earths	Circular on Distributing the Second Batch of the Directive Production Plan of Rare Earth for 2012 (Ministry of Industry and Information Technology, gongxinbuyuan (2012) No.269, 8 June 2012) (Exhibit CHN-23, No Joint Exhibit)
2012 Second Batch Rare Earth Export Quotas	Notice on Distributing the 2012 Second Batch of Rare Earth Export Quotas (Ministry of Commerce, shangmaohan, (2012) No. 627, 16 August 2012) (Exhibits CHN-58, JE-57)
2012 Tariff Implementation Plan (General Administration of Customs)	Circular of the General Administration of Customs on the 2012 Tariff Implementation Plan (2011) No. 79, promulgated on 23 December 2011, effective on 1 January 2012 (No Chinese Exhibit, Exhibit JE-47)
2012 Tariff Implementation Program (Customs Tariff Commission)	Notice Regarding the 2012 Tariff Implementation Program (State Council Customs Tariff Commission, shuiweihui (2011) No. 27, promulgated on 9 December 2011, effective on 1 January 2012) (No Chinese Exhibit, Exhibit JE-45)
2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores	Circular on Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ore for 2012 (Ministry of Land and Resources, guotuzifa (2012) No. 228, 19 April 2012) (Exhibit CHN-19, No Joint Exhibit)
2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)	Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ore for 2012 (the First Batch) (Ministry of Land and Resources, guotuzifa (2011) No. 227) (Exhibit CHN-20, No Joint Exhibit)
Administration Measures of the Export Operations of Tungsten and Tungsten Products	Provisional Measures on Administration of the Export Operations of Tungsten and Tungsten Products and of Antimony and Antimony Products (Ministry of Foreign Trade and Economic Cooperation, waijingmaoguanfa (2000) No. 649, promulgated on 4 December 2000) (Exhibit CHN-101, No Joint Exhibit)
Administration of Directive Production Plan of Rare Earths	Provisional Measures on the Administration of the Directive Production Plan of Rare Earth (Ministry of Industry and Information Technology, gongxinbuyuan (2012) No. 285, 13 June 2012) (Exhibit CHN-21, No Joint Exhibit)
Administration of Exploration and Mining of the Specified Minerals	Provisional Measures for the Administration of Exploration and Mining of the Specified Minerals of which the Protective Mining is Prescribed (guotuzifa (2009) No. 165, Promulgated by the Ministry of Land and Resources on 24 November 2009) (Exhibit CHN-18, No Joint Exhibit)
Administration of Registration of Mining of Mineral Resources	Measures for the Administration of Registration of Mining of Mineral Resources (Promulgated by the State Council on 12 February 1998, Order 241) (Exhibit CHN-15, No Joint Exhibit)

Short Title	Full Title
Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control	Notice on Printing and Distributing the Provisional Measures on the Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control (Ministry of Land and Resources guotuzifa (2012) No. 44, 2 March 2012) (Exhibit CHN-43, No Joint Exhibit)
Amendment of the Provisional Regulations on Resource Tax	Decision of the State Council to Amend the Provisional Regulations of the People's Republic of China on Resource Tax (State Council (2011) No. 605), 30 September 2011) (Exhibit CHN-26, No Joint Exhibit)
Circular on Adjusting the Applicable Tax Rate of Resource Tax for Tin and Other Ores	Circular on Adjusting the Applicable Tax Rate of Resource Tax for Tin and Other Ores (Ministry of Finance and the State Administration on Taxation caishui (2012) No. 2, 1 February 2012) (Exhibit CHN-112, No Joint Exhibit)
Circular on Environmental Protection Inspection of Rare Earth Industry	Circular on Environmental Protection Inspection of Rare Earth Industry (Ministry of Environmental Protection, (2011) No. 362, 6 April 2011) (Exhibit CHN-33, No Joint Exhibit)
Circular on Environmental Protection Inspection of Tungsten and Molybdenum Enterprises	Circular on Environmental Protection Inspection of Tungsten and Molybdenum Enterprises (General Office of Ministry of Environmental Protection, huanbaohan (2013) No. 442, 24 April 2013) (Exhibit CHN-217, No Joint Exhibit)
Circular on Establishing Team of Mining Zone Assistant Administrators for Ore Districts of Rare Earths and Other Materials	Circular on Establishing Team of Mining Zone Assistant Administrators for Ore Districts of Rare Earths and Other Materials (General Office of Ministry of Land and Resources, guotuzitinghan (2010) No.52, 27 July 2010) (Exhibit CHN-85, No Joint Exhibit)
Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining	Circular of the State Council on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining, guofa (1991) No. 5 (State Council, 15 January 1991) (Exhibits CHN-12, JE-72)
Circular on Overall Rectification and Standardization of Mineral Resources Development Order	Circular on Overall Rectification and Standardization of Mineral Resources Development Order (State Council, guofa (2005) No. 28), 18 August 2005) (Exhibit CHN-215, No Joint Exhibit)
Conditions for Admission to the Molybdenum Industry	Conditions for Admission to the Molybdenum Industry (Ministry of Industry and Information Technology Announcement (2010) No. 30, 17 July 2010) (Exhibit CHN-108, No Joint Exhibit)
Conditions for Admission to Tungsten Industry	Circular on Conditions for Admission to Tungsten Industry (National Development and Reform Commission (2006) No. 94, 22 December 2006) (Exhibit CHN-93, No Joint Exhibit)
Customs Law	Customs Law of the People's Republic of China (adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, amended 8 July 2000) (No Chinese Exhibit, Exhibit JE-54)
Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products	Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products (Zhang Chenyang, Ministry of Commerce, 14 December 2012) (Exhibit CHN-63, No Joint Exhibit)
Developments in Rare Earth-Using Industries	Dr David Humphreys (Report) *Developments in Rare Earth-Using Industries*. April 2013 (CHN-163, No Joint Exhibit)
Emission Standards of Pollutants from Rare Earths Industry	Emission Standards of Pollutants from Rare Earths Industry (Ministry of Environmental Protection, GB 26451—2011, 24 January 2011) (Exhibit CHN-31, No Joint Exhibit)

Short Title	Full Title
Explanation for the Compilation of Emission Standards of Pollutants from Rare Earths Industry (Draft for Comments)	Explanation for the Compilation of "Emission Standards of Pollutants from Rare Earths Industry" (Draft for Comments) June 2009 (No Chinese Exhibit, Exhibit JE-99)
Export Duties as a Means to Address Environmental Externalities	Professor Gene M. Grossman: *Export Duties as a Means to Address Environmental Externalities* (No Chinese Exhibit, JE-136)
Export Quota Administration Measures	Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation (2011) No. 12, adopted at the 9th ministerial office meeting of the Ministry of Foreign Trade and Economic Cooperation of 2001, effective on 1 January 2002) (Exhibits CHN-96, JE-52)
First Batch of the 2012 Directive Production Plan of Rare Metals	Circular on Distributing the First Batch of the 2012 Directive Production Plan of Rare Metals (Ministry of Industry and Information Technology, gongxinbuyuan (2012) No. 19, 13 January 2012) (Exhibit CHN-94, No Joint Exhibit)
Foreign Trade Law	Foreign Trade Law of the People's Republic of China (adopted at the 7th Session of the Standing Committee of the Eighth National People's Congress on 12 May 1994, and amended at the 8th Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004, effective on 1 July 2004) (Exhibits CHN-11, JE-49)
Foreign Trade Law (1994 Version)	Original Version of the Foreign Trade Law of the People's Republic of China, (Adopted at the 7th Session of the Standing Committee of the Eighth National People's Congress and Promulgated on 12 May 1994) (Exhibit CHN-61, No Joint Exhibit)
Guidance for Enhancing the Management of Raw Materials Industries	Guidance for Enhancing the Management of Raw Materials Industries (Ministry of Industry and Information Technology (2009) No. 294) (No Chinese Exhibit, Exhibit JE-12)
Guideline on Gradual Establishment of Responsibility System for Mine Environmental Management and Ecological Recovery	Guideline on Gradual Establishment of Responsibility System for Mine Environmental Management and Ecological Recovery (Ministry of Finance, Ministry of Land and Resources and State Environmental Protection Administration, caijian (2006) No. 215, 10 February 2006) (Exhibit CHN-216, No Joint Exhibit)
Guiding Opinions of Jiangxi Province on the Development of the Rare Earth Industry	Guiding Opinions of Jiangxi Province on the Development of the Rare Earth Industry (2007) (The Office of the Development and Reform Commission of Jiangxi, ganfagaigongyezi (2007) No.32, 15 January 2007) (No Chinese Exhibit, Exhibit JE-18)
Implementation Rules for the Provisional Regulations on Resource Tax	Detailed Rules for the Implementation of the Provisional Regulations of the People's Republic of China on Resource Tax, (Ministry of Finance No. 66, 28 October 2011) (Exhibit CHN-27, No Joint Exhibit)
Inclusion of VAT Invoices Issued by Rare Earth Enterprises into "VAT Anti-Fake System"	Public Notice on Inclusion of VAT Invoices Issued by Rare Earth Enterprises into "VAT Anti-Fake System", (State Administration of Taxation (2012) No. 17, 16 May 2012) (Exhibit CHN-45, No Joint Exhibit)
Inner Mongolia Autonomous Region "Twelfth Five Year" High-Tech Industries Development Plan	Inner Mongolia Autonomous Region "Twelfth Five Year" High-Tech Industries Development Plan (Promulgated by the Development and Reform Commission of Inner Mongolia Autonomous Region, 13 December 2011) (No Chinese Exhibit, Exhibit JE-29)
Measures Limiting the Export of Certain of High-Energy-Consuming, High-Polluting and Resource-Related Products	Circular on Measures Limiting the Export of Certain of High-Energy-Consuming, High-Polluting and Resource-Related Products (National Development and Reform Commission, fagaijingmao(2005) No.2595, 9 December 2005) (Exhibit CHN-62, No Joint Exhibit)

Short Title	Full Title
Mineral Resources Law	Mineral Resources Law of the People's Republic of China, Order No. 74 of the President of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 29 August 1996 (Exhibit CHN-10, No Joint Exhibit)
Monthly Reporting of the Implementation of the Rare Earths Extraction Controlling Quota	Notice on Monthly Reporting of the Implementation of the Rare Earths Extraction Controlling Quota (General Office of Ministry of Land and Resources, guotuzitinghan (2011) No. 791, 2 September 2011) (Exhibit CHN-44, No Joint Exhibit)
Notice on Adjusting the Tax Refund Rates (2006)	Notice on Adjusting the Tax Refund Rates of Certain Commodities and Supplementing the Catalogue of Prohibited Commodities in Processing Trade, caishui (2006) No.139 (Ministry of Finance, National Development and Reform Commission, Ministry of Commerce, General Administration of Customs, State Administration of Taxation) (No Chinese Exhibit, Exhibit JE-75)
Notice on Adjusting the VAT Refund of Certain Products (2005)	Notice on Adjusting the VAT Refund of Certain Products (Department of Finance and the State Administration of Taxation, caishui (2005) No.75, 29 April 2005) (No Chinese Exhibit, Exhibit JE-83)
Notice on Issuing "Export Catalogue of High and New Technology Products"	Notice on Issuing "Export Catalogue of High and New Technology Products" (Ministry of Science and Technology, Ministry of Finance, and State Administration of Taxation, guokefajizi (2000) No. 328 (No Chinese Exhibit, Exhibit JE-155)
Notice on Issuing "Management of Special Fund for Rare Earth Industry Adjustment and Improvement"	Notice on Issuing "Management of Special Fund for Rare Earth Industry Adjustment and Improvement" (Ministry of Industry and Information Technology, Ministry of Finance, caiqi (2012) No. 375, 9 November 2012) (Exhibits CHN-212, JE-114)
Notices Ordering Enterprises Producing Over Quota to Cease Production	15 Notices Ordering Enterprises Producing Over Quota to Cease Production (Commission of Industry and Information Technology of Jiangxi Province) (Exhibit CHN-113, No Joint Exhibit)
Opinions on Enhancing the Ecological Protection and Restoration of Mines	Opinions on Enhancing the Ecological Protection and Restoration of Mines (Ministry of Environmental Protection, huanfa (2011) No. 48, 20 April 2011) (Exhibit CHN-32, No Joint Exhibit)
Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law	Circular on Forwarding the "Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law" Proposed by the State Administration of Work Safety and other Departments (General Office of State Council, guofaban (2012) No. 54, 4 November 2013) (Exhibit CHN-218, No Joint Exhibit)
Preferential Policies Encouraging Investments for Fujian (Longyan) Rare Earth Industrial Zone	Notice Regarding the Preferential Policies Encouraging Investments for Fujian (Longyan) Rare Earth Industrial Zone, longzhengzo (2010) No. 388, 27 September 2010 (No Chinese Exhibit , Exhibit JE-152)
Program of the Rectification of Metal and Non-metal Mines in Hebei Province	Circular on Issuing the Program of the Rectification of Metal and Non-metal Mines in Hebei Province (General Office of the People's Government of Hebei Province, banzi (2012) No. 138, 26 December 2012) (Exhibit CHN-220, No Joint Exhibit)
"Rare Earth Elements: A Review of Production, Processing, Recycling, and Associated Environmental Issues"	Environmental Protection Agency (EPA), "Rare Earth Elements: A Review of Production, Processing, Recycling, and Associated Environmental Issues", August 2012 (Exhibit CHN 72, No Joint Exhibit).
Rare Earth Elements	Roderick G. Eggert: *Rare Earth Elements*, 25 April 2013 (No Chinese Exhibit, JE-129,)

Short Title	Full Title
Regulations on Import and Export Duties	Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council (2003) No. 392, adopted at the 26th executive meeting of the State Council on 29 October 2003, effective on 1 January 2004) (No Chinese Exhibit, Exhibit JE-46)
Regulations on the Administration of the Import and Export of Goods	Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (Order of the State Council No. 332, adopted at the 46th executive meeting of the State Council on 31 October 2001, effective on 1 January 2002) (Exhibits CHN-54, JE-50)
Rules for Implementation of the Mineral Resources Law	Rules for Implementation of the Mineral Resources Law of the People's Republic of China (Promulgated by the Decree No. 152 of the State Council of the People's Republic of China on 26 March 1994, and effective as of the date of promulgation) (Exhibit CHN-14, No Joint Exhibit)
Second Batch of the 2012 Directive Production Plan of Rare Metals	Circular on Distributing the Second Batch of the 2012 Directive Production Plan for Rare Metals, (Ministry of Industry and Information Technology, gongxinbuyuan (2012) No.321), 4 July 2012) (Exhibit CHN-95, No Joint Exhibit)
Selected Economic Issues Regarding Export Quotas and Production Quotas	Professor Jaime de Melo, *Selected Economic Issues Regarding Export Quotas and Production Quotas*, April 2013 (CHN-157, No Joint Exhibit)
Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry	Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry (guofa [2011] No. 12), 10 May 2011 (Exhibit CHN-13, No Joint Exhibit)
Study on Rare Earths and their Recycling	Schuler et al., "Study on Rare Earths and their Recycling, Final Report for The Greens/EFA Group in the European Parliament, Darmstadt, January 2011 (CHN-30, No Joint Exhibit)
Twelfth Five-Year Development Plan for New Materials Industry	Twelfth Five-Year Development Plan for New Materials Industry (Ministry of Industry and Information Technology, 4 January 2012) (No Chinese Exhibit, Exhibit JE-28)
Verification and Rectification of Illegal Conducts in Rare Earth Industry	Notice on Verification and Rectification of Illegal Conducts in Rare Earth Industry (The General Office of Ministry of Industry and Information Technology, gongxintingyuanhan (2012) No. 773, 11 October 2012) (Exhibit CHN-42, No Joint Exhibit)

ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
AoA	Agreement on Agriculture
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
APT	Ammonium paratungstate
ASEAN	Association of South East Asian Nations
China's Accession Protocol	Protocol on the Accession of the People's Republic of China to the WTO, WT/L/432
China's Working Party Report	Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and Corr.1
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Final Act	the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized System
ICSID	International Centre for Settlement of Investment Disputes
Import Licensing Agreement	Agreement on Import Licensing Procedures
MFN	Most-Favoured-Nation treatment
MIIT	Ministry of Industry and Information Technology
MLR	Ministry of Land and Resources
REO	Rare Earth Ore
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
VAT	Value-Added Tax
Vienna Convention	Vienna Convention on the Law of Treaties
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaints by the United States, the European Union, and Japan

1.1. On 13 March 2012, the United States, the European Union, and Japan each requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 25-26 April 2012. These consultations did not resolve the dispute.

1.2 Panel establishment and composition

1.3. On 27 June 2012, the United States, the European Union, and Japan each requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 23 July 2012, the Dispute Settlement Body (DSB) established a single panel pursuant to the requests of the United States, the European Union, and Japan in accordance with Article 9.1 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS431/6, the European Union in document WT/DS432/6, and Japan in document WT/DS433/6 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 12 September 2012, the United States, the European Union, and Japan requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 24 September 2012, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Nacer Benjelloun-Touimi

Members: Mr Hugo Cayrús
Mr Darlington Mwape

1.6. Argentina, Australia, Brazil, Canada, Colombia, the European Union (with respect to WT/DS431 and WT/DS433), India, Indonesia, Japan (with respect to WT/DS431 and WT/DS432), the Republic of Korea, Norway, Oman, Peru, the Russian Federation, the Kingdom of Saudi Arabia, Chinese Taipei, Turkey, the United States (with respect to WT/DS432 and WT/DS433), and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5] and timetable on 18 October 2012.

1.8. The Panel held a first substantive meeting with the parties on 26-28 February 2013. A session with the third parties took place on 27 February 2013. The Panel held a second substantive meeting with the parties on 18-19 June 2013. The Panel sent questions to the parties both before and after the substantive meetings, the questions were sent on 13 February 2013, 1 March 2013, 11 April 2013, 30 May 2013, and 21 June 2013.

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[1] See WT/DS431/1, WT/DS432/1, and WT/DS433/1.
[2] WT/DS431/6, WT/DS432/6, and WT/DS433/6.
[3] See WT/DSB/M/320.
[4] WT/DS431/7, WT/DS432/7, and WT/DS433/7.
[5] See the Panel's Working Procedures in Annex A-1.

1.9. On 31 July 2013, the Panel issued the descriptive part of its Reports to the parties. The Panel issued its Interim Reports to the parties on 23 October 2013. The Panel issued its Final Reports to the parties on 13 December 2013.

1.3.2 Request for enhanced third-party rights

1.10. On 9 October 2012, Canada requested enhanced third-party rights, including third-party access to the entirety of both substantive meetings and all written submissions, and the right to make an oral statement at the second substantive meeting. After considering Canada's request and consulting the parties on the request, the Panel informed Canada on 19 October 2012 that it had decided to decline its request. The Panel concluded that the reasons Canada raised were not among those that would justify departing from the third-party rights established in paragraphs 2 and 3 of Article 10 of the DSU, paragraph 6 of Appendix 3 to the DSU and subsequent panel practice regarding enhanced third-party rights. In its communication, the Panel indicated that it would provide the reasons for its reasoning on this matter in its Reports.[6]

1.3.3 Request for a preliminary ruling on the availability of a defence under Article XX of the GATT 1994 for a violation of Paragraph 11.3 of China's Accession Protocol

1.11. On 20 December 2012, in its first written submission, China requested that the Panel make a preliminary ruling on a substantive legal issue: whether the obligation in Paragraph 11.3 of China's Accession Protocol is subject to the general exceptions contained in Article XX of the GATT 1994. China requested that the Panel rule on this issue on an expedited basis. On 10 January 2013, the Panel informed the parties that it expected to send its decision on China's request for a preliminary ruling by Monday, 11 February 2013.[7] The complainants submitted their response to China's preliminary ruling request on 21 January 2013. China filed its comments on the complainants' responses on 25 January 2013 and the complainants submitted comments on China's comments on 30 January 2013.[8] On 1 February 2013[9], the Panel informed the parties and third parties that it had decided not to issue a ruling on this issue prior to the first Panel meeting. The Panel further stated that if China intended to present a substantive defence under Article XX of the GATT 1994 with respect to Paragraph 11.3 of its Accession Protocol, it should provide a written submission presenting this defence no later than 15 February 2013 so as to allow the parties and third parties to have a meaningful opportunity to respond at the first Panel meeting.

1.12. On 6 February 2013[10], China requested the Panel to make a preliminary ruling on this issue prior to the first meeting. On 8 February 2013[11], the Panel reiterated its decision not to issue a preliminary ruling on this issue prior to the first Panel meeting and recalled its statement in its letter of 1 February concerning the date by which China should present a substantive defence under Article XX of the GATT 1994 with respect to Paragraph 11.3 of its Accession Protocol.

1.13. On 15 February 2013, China submitted its substantive defence under Article XX of the GATT 1994 with respect to Paragraph 11.3 of its Accession Protocol.

1.14. At the first substantive meeting with the parties, the Panel informed the parties that it would not issue a preliminary ruling on this matter. The Panel stated that the reasons were that the request concerned a complex issue of substance as opposed to an issue of procedure or jurisdiction and the Panel required sufficient time to carefully consider the extensive argumentation of the parties and third parties. The Panel indicated that it would address the issue in its Reports.

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[6] See section 7.1 below.
[7] E-mail communication from the Panel dated 10 January 2011.
[8] Several third parties also addressed the substantive and procedural aspects of China's preliminary ruling request, in the context of their third-party written submissions.
[9] Panel's letter to the parties of 1 February 2013.
[10] China's letter to the Panel of 6 February 2013.
[11] Panel's letter to the parties of 8 February 2013.

2 FACTUAL ASPECTS

2.1. This dispute concerns China's use of export quotas and export duties on various forms of rare earths, tungsten, and molybdenum. The complainants also challenge the administration and allocation, including through export licensing, of the export quotas.

2.1 The products at issue

2.2. The products at issue in this dispute are rare earths, tungsten, and molybdenum. The raw materials at issue are either naturally occurring minerals or materials that have undergone some initial processing.

2.3. "Rare earths" is the common name for a group of 15 chemical elements in the periodic table with atomic numbers 57 to 71. These elements are part of the so-called "lanthanide group", composed of: lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium and lutetium. Two other rare earth elements are included in the scope of this dispute, namely, scandium (atomic No. 21) and yttrium (atomic No. 39).[12]

2.4. China divides this group of products into light and medium/heavy rare earths. China considers the following rare earth elements to be medium/heavy rare earths: scandium (atomic No. 21), yttrium (atomic No. 39), samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, and lutetium (atomic Nos. 62-71).[13] The complainants state that the rare earths from lanthanum to europium (atomic Nos. 57-63) are often called light rare earths and that the elements from gadolinium to lutetium (atomic Nos. 64-71), along with yttrium (atomic No. 39), are often referred to as heavy rare earths.[14]

2.5. Once mined, rare earth ores can be processed into concentrates, individual oxides/mixtures of oxides[15], salts and then metals. Rare earth metal can be alloyed with other elements, depending on its intended end-use.[16]

2.6. Tungsten is the name given to the element with the atomic number 74. Tungsten is primarily found in two ores: wolframite and scheelite. Once mined, ores containing tungsten can be processed to produce tungsten concentrates, ammonium paratungstate (APT), and a number of other intermediate products, such as tungsten oxide. Tungsten oxide can also be reduced to form tungsten powder and tungsten carbide.[17]

2.7. Molybdenum is a silvery metallic element with the atomic number 42. Molybdenum is mined from ore containing molybdenite, which is often recovered as a by-product of copper mining. Molybdenite can be concentrated and then roasted to form roasted molybdenite (MoO3) concentrate (Technical Mo Oxide). Roasted molybdenite (MoO3) concentrate can be smelted into

[12] China's first written submission, para. 12, referring to footnote 5; United States' first written submission, para. 38; European Union's first written submission, paras. 26-27; and Japan's first written submission, paras. 21-22.

[13] China's first written submission, para. 12 referring to *2012 Export Licensing Catalogue* (Exhibits CHN-8, JE-48). See also United States' first written submission, paras. 38-39, European Union's first written submission, paras. 27-28, and Japan's first written submission, paras. 21-22.

[14] United States' first written submission, para. 38, European Union's first written submission, para. 27, and Japan's first written submission, para. 21, referring to "*The Mining Journal: Rare Earths*" (Exhibit JE-30).

[15] According to China, the concentrated rare earths ores are in different forms depending on the type of ores: (i) rare earths concentrates produced from iron ores (one type of ores containing mainly light rare earths); and (ii) a mixture of rare earth oxides produced "in-situ" concentrated from ion-absorption-clays (ores abundant in medium/heavy rare earth elements).

[16] United States' first written submission, para. 40; European Union's first written submission, paras. 29-30; Japan's first written submission, para. 24, referring to (Exhibit JE-30); Annex 2 of China's second written submission.

[17] United States' first written submission, paras. 43-44; European Union's first written submission, paras. 36-39; Japan's first written submission, paras. 41-44, referring to (Exhibits JE-33, 34, 35); China's responses to the Panel's question No. 100(a).

ferromolybdenum, further processed into various molybdenum chemicals, or reduced into molybdenum metal.[18]

2.2 The measures at issue

2.8. The United States, the European Union, and Japan identified a number of different instruments in their panel requests in connection with their claims concerning export duties, export quotas, and the administration and allocation of the export quotas.

2.2.1 Export duties

2.9. The complainants assert that China subjects various forms of rare earths, tungsten, and molybdenum to export duties and that those materials are not listed in Annex 6 of China's Accession Protocol. The complainants indicate that these Chinese measures are reflected in the following:

- *Customs Law of the People's Republic of China*
- *Regulations of the People's Republic of China on Import and Export Duties*
- *Announcement No. 27 Issuing the "2012 Tariff Implementation Program"*
- *Announcement No. 79 Regarding the "2012 Tariff Implementation Program"*
- as well as any annexes or schedules thereto, amendments, supplements, or extensions and implementing measures.[19]

2.10. The European Union and Japan also made claims in respect of replacement measures and renewal measures.

2.2.2 Export quotas

2.11. The complainants assert that China subjects the exportation of various forms of rare earths, tungsten, and molybdenum to quantitative restrictions such as quotas. The complainants indicate that these Chinese measures are reflected in the following:

- *Foreign Trade Law of the People's Republic of China*
- *Regulation of the People's Republic of China on the Administration of the Import and Export of Goods*
- *Measures for the Administration of Export Commodities Quotas*
- *Measures for the Administration of the Organs for Issuing the Licences of Import and Export Commodities*
- *Measures for the Administration of Licensing for the Export of Goods*
- *Working Rules on Issuing Export Licences*
- *Rules on the Administration of Import and Export Licence Certificates*
- *Notice on Issuing the "2012 Export Licensing Management Commodities List"*
- *Announcement Issuing the "2012 Graded Licence-Issuing List of Commodities Subject to Export Licence Administration"*

[18] United States' first written submission, paras. 47-48; European Union's first written submission, paras. 40-41; Japan's first written submission, paras. 49-50, referring to (Exhibits JE-38, 39, 40 and 41).
[19] The United States' panel request refers to "implementing measures in force to date".

- *2012 Notice on the Total Export Quota Quantity for Agricultural and Industrial Products in 2012*
- *Notice Publishing the List of Enterprise Applying for the Export Quota for Rare Earths and Coke in 2012*
- *Notice Publishing the List of the State Trading Export Enterprises of Tungsten, Antimony and Silver, the Enterprises Exporting and Supplying Tungsten and Antimony, and the Enterprises Applying for the Export Quotas for Indium and Molybdenum in 2012*
- *2012 Notice on List of Rare Earth Export Enterprises and First-batch Rare Earth Export Quota*
- *2012 Notice on List of Export (Supply) Enterprises and First-batch Export Quota of Tungsten, Antimony and Other Nonferrous Metals*
- *Announcement on 2012 Application Conditions and Procedures for Qualification for Rare Earth Export Quota*
- *Announcement Regarding the Qualification Standards of State Owned Tungsten, Antimony and Silver Trade and Enterprises, Tungsten and Antimony Export and Supply Enterprises and Declaration Procedures in 2012*
- *Announcement on Application Conditions and Procedures for 2012 Indium, Molybdenum and Tin Export Quotas*
- *Notice on the Supplement to the 2012 First Batch of Rare Earth Export Quota*
- as well as any annexes or schedules thereto, amendments, supplements, or extensions and implementing measures.[20]

2.12. The European Union and Japan also made claims in respect of replacement measures and renewal measures.

2.2.3 Export quota administration and allocation

2.13. In their requests for establishment of a panel, the complainants made claims relating to an alleged lack of uniform, impartial, or reasonable administration of the export quotas. The complainants did not develop any argumentation in relation to these claims in their first written submissions, and in response to a Panel question, the complainants confirmed to the Panel that they were no longer pursuing the claims.[21]

2.14. The complainants assert that China imposes restrictions on the trading rights of enterprises seeking to export various forms of rare earths and molybdenum, such as prior export performance and minimum registered capital requirements. The complainants indicate that these Chinese measures are reflected in the following:

- *Foreign Trade Law of the People's Republic of China*
- *Regulation of the People's Republic of China on the Administration of the Import and Export of Goods*
- *Measures for the Administration of Export Commodities Quotas*
- *Measures for the Administration of Licensing for the Export of Goods*

[20] The United States' panel request refers to "implementing measures in force to date".

[21] United States' response to Panel question No. 62 of 11 April 2011; European Union's response to Panel question No. 62 of 11 April 2011, Japan's response to Panel question No. 62 and Japan's second written Submission, footnote 1. See also Japan's response to Panel question No. 138, para. 103.

- *Measures for the Administration of the Organs for Issuing the Licences of Import and Export Commodities*
- *Working Rules on Issuing Export Licences*
- *Rules on the Administration of Import and Export Licence Certificates*
- *Notice on Issuing the "2012 Export Licensing Management Commodities List"*
- *Announcement Issuing the "2012 Graded Licence-Issuing List of Commodities Subject to Export Licence Administration"*
- *2012 Notice on the Total Export Quota Quantity for Agricultural and Industrial Products in 2012*
- *Notice Publishing the List of Enterprise Applying for the Export Quota for Rare Earths and Coke in 2012*
- *Notice Publishing the List of the State Trading Export Enterprises of Tungsten, Antimony and Silver, the Enterprises Exporting and Supplying Tungsten and Antimony, and the Enterprises Applying for the Export Quotas for Indium and Molybdenum in 2012*
- *2012 Notice on List of Rare Earth Export Enterprises and First-batch Rare Earth Export Quota*
- *2012 Notice on List of Export (Supply) Enterprises and First-batch Export Quota of Tungsten, Antimony and Other Nonferrous*
- *Announcement on 2012 Application Conditions and Procedures for Qualification for Rare Earth Export Quota*
- *Announcement on Application Conditions and Procedures for 2012 Indium, Molybdenum and Tin Export Quotas*
- *Notice on the Supplement to the 2012 First Batch of Rare Earth Export Quota*
- as well as any annexes or schedules thereto, amendments, supplements, or extensions and implementing measures.[22]

2.15. The European Union and Japan also made claims in respect of replacement measures and renewal measures.

2.16. The following chart[23] identifies the particular raw materials at issue in this dispute by category, product name, product name short form, and in the case or rare earths, the classification of whether the products are light or heavy rare earths[24], 2012 Chinese Commodity Codes[25] (the basis for the export quotas), Chinese HS Number[26] (the basis for the export duties), and the corresponding export duty rate.[27]

[22] The United States' panel request refers to "implementing measures in force to date".
[23] See (Exhibit JE-3).
[24] See para. 2.4.
[25] See Annex 1 to *2012 Export Licensing Catalogue* (Exhibits CHN-8, JE-48). "N/A" is indicated where the particular Chinese Commodity Code is not included in the quota for rare earths.
[26] See *2012 Tariff Implementation Program (Customs Tariff Commission)*, Annex 6 (Exhibit JE-45).
[27] Chart of raw materials subject to export duties (JE-6), see also *2012 Tariff Implementation Program (Customs Tariff Commission)*, Annex 6 (Exhibit JE-45).

Rare earths

Raw Material	Product Name	Product Name (Short Form)	Heavy or Light[28]	Export Quota	Export Duty	
				Chinese Commodity Code	Chinese HS Code	"Temporary" Export Duty Rate for 2012
Rare Earths	Ores of rare earth metals	Rare earth ores	Heavy	2530902010	2530.9020	15%
			Light	2530902090		
	Thorium ores and concentrates[29]	Thorium	Heavy	2612200000	2612.2000	10%
	Neodymium	Neodymium	Light	2805301100	2805.3011	25%
	Dysprosium	Dysprosium	Heavy	2805301200	2805.3012	25%
	Terbium	Terbium	Heavy	2805301300	2805.3013	25%
	Lanthanum	Lanthanum	Light	2805301400	2805.3014	25%
	Cerium	Cerium	Light	2805301510	2805.3015	25%
			Light	2805301590		
	Praseodymium	Praseodymium	Light	2805301600	2805.3016	25%
	Yttrium	Yttrium	Heavy	2805301700	2805.3017	25%
	Other rare-earth metals, scandium and yttrium, not intermixed or interalloyed	Other rare earth metals	Heavy	2805301913	2805.3019	25%
			Heavy	2805301914		
			Heavy	2805301915		
			Light	2805301990		
	Battery quality rare-earth metals, scandium and yttrium, intermixed or interalloyed	Battery quality rare earth metals	Heavy	2805302110	2805.3021	25%
			Light	2805302190		
	Other rare-earth metals, scandium and yttrium, intermixed or interalloyed	Other mixed rare earth metals	Heavy	2805302910	2805.3029	25%
			Light	2805302990		
	Cerium oxide	Cerium oxide	Light	2846101000	2846.1010	15%
	Cerium hydroxide	Cerium hydroxide	Light	2846102000	2846.1020	15%
	Cerium carbonate	Cerium carbonate	Light	2846103000	2846.1030	15%
	Other cerium compounds	Other cerium compounds	Light	2846109010	2846.1090	15%
				2846109090		
	Yttrium oxide	Yttrium oxide	Heavy	2846901100	2846.9011	25%
	Lanthanum oxide	Lanthanum oxide	Light	2846901200	2846.9012	15%
	Neodymium oxide	Neodymium oxide	Light	2846901300	2846.9013	15%
	Europium oxide	Europium oxide	Heavy	2846901400	2846.9014	25%
	Dysprosium oxide	Dysprosium oxide	Heavy	2846901500	2846.9015	25%

[28] See Exhibit JE-3. JE-3 indicates that the basis for the classification of light or heavy rare earths is China's "2012 Export Licensing Management Commodities List" (i.e. *2012 Export Licensing Catalogue* (Exhibits CHN-8, JE-48)).

[29] The 2012 Export Licensing Management Commodities List includes thorium in the category of medium/heavy rare earths. In its second written submission, the United States argued that thorium is not a rare earth element: see United States' second written submission, para. 144. China did not contest this statement until its Comments on the Complainants' Comments on the Interim Reports of the Panels, where it contended that "thorium" is a chemical element whereas "thorium ores and concentrates" are mineral products consisting of thorium *and also* rare earths: see para. 2. Since China's export quota for medium/heavy rare earths includes thorium, in these Reports references to rare earths and medium/heavy rare earths include thorium.

Raw Material	Product Name	Product Name (Short Form)	Heavy or Light[28]	Export Quota	Export Duty	
				Chinese Commodity Code	Chinese HS Code	"Temporary" Export Duty Rate for 2012
	Terbium oxide	Terbium oxide	Heavy	2846901600	2846.9016	25%
	Praseodymium oxide	Praseodymium oxide	Light	2846901700	2846.9017	25%
	Other rare earth oxides (except for luminescent red phosphors)	Other rare earth oxides	Heavy	2846901920	2846.9019	15%
			Heavy	2846901930		
			Heavy	2846901940		
			Heavy	2846901970		
			Heavy	2846901980		
			Heavy	2846901991		
			Heavy	2846901992		
			Light	2846901999		
	Terbium chloride	Terbium chloride	Heavy	2846902100	2846.9021	25%
	Dysprosium chloride	Dysprosium chloride	Heavy	2846902200	2846.9022	25%
	Lanthanum chloride	Lanthanum chloride	Light	2846902300	2846.9023	25%
	Neodymium chloride	Neodymium chloride	Light	2846902400	2846.9024	15%
	Praseodymium chloride-	Praseodymium chloride	Light	2846902500	2846.9025	15%
	Yttrium chloride	Yttrium chloride	Heavy	2846902600	2846.9026	15%
	Mixed rare earth chlorinates	Mixed rare earth chlorinates	Heavy	2846902810	2846.9028	15%
			Light	2846902890		
	Other unmixed rare earth chlorinates	Other unmixed rare earth chlorinates	Heavy	2846902900	2846.9029	15%
	Terbium fluoride	Terbium fluoride	Heavy	2846903100	2846.9031	15%
	Dysprosium fluoride	Dysprosium fluoride	Heavy	2846903200	2846.9032	15%
	Lanthanum fluoride	Lanthanum fluoride	Light	2846903300	2846.9033	15%
	Neodymium fluoride	Neodymium fluoride	Light	2846903400	2846.9034	15%
	Praseodymium fluoride	Praseodymium fluoride	Light	2846903500	2846.9035	15%
	Yttrium fluoride	Yttrium fluoride	Heavy	2846903600	2846.9036	15%
	Other rare earth fluorides	Other rare earth fluorides	Light	2846903900	2846.9039	15%
	Lanthanum carbonate	Lanthanum carbonate	Light	2846904100	2846.9041	15%
	Terbium carbonate	Terbium carbonate	Heavy	2846904200	2846.9042	25%
	Dysprosium carbonate	Dysprosium carbonate	Heavy	2846904300	2846.9043	25%
	Neodymium carbonate	Neodymium carbonate	Light	2846904400	2846.9044	15%
	Praseodymium carbonate	Praseodymium carbonate	Light	2846904500	2846.9045	15%
	Yttrium carbonate	Yttrium carbonate	Heavy	2846904600	2846.9046	15%
	Mixed rare earth carbonate	Mixed rare earth carbonate	Heavy	2846904810	2846.9048	15%
			Light	2846904890		
	Other unmixed rare earth carbonate	Other unmixed rare earth carbonate	Heavy	2846904900	2846.9049	15%

Raw Material	Product Name	Product Name (Short Form)	Heavy or Light[28]	Export Quota	Export Duty	
				Chinese Commodity Code	Chinese HS Code	"Temporary" Export Duty Rate for 2012
	Other lanthanum compounds	Other lanthanum compounds	Light	2846909100	2846.9091	25%
	Other neodymium compounds	Other neodymium compounds	Light	2846909200	2846.9092	25%
	Other terbium compounds	Other terbium compounds	Heavy	2846909300	2846.9093	25%
	Other dysprosium compounds	Other dysprosium compounds	Heavy	2846909400	2846.9094	25%
	Other praseodymium compounds	Other praseodymium compounds	Light	2846909500	2846.9095	25%
	Other yttrium compounds	Other yttrium compounds	Heavy	2846909600	2846.9096	25%
	Other rare earth compounds, yttrium and scandium	Other rare earth compounds	Heavy	2846909910	2846.9099	25%
			Light	2846909990		
	Rapid setting neodymium-iron-boron (NdFeB) magnet film	NdFeB magnet film	N/A	N/A	7202.9911	20%
	Other NdFeB alloys	Other NdFeB alloys	N/A	N/A	7202.9919	20%
	Ferroalloy containing rare earths with weight of more than 10%	Ferroalloy containing rare earths	Heavy	7202999110	7202.9991	25%
			Light	7202999191		
			Light	7202999199		
	Other ferroalloy	Other ferroalloys	N/A	N/A	7202.9999	20%

Tungsten

Raw Material	Product Name	Product Name (Short Form)	Export Quota	Export Duty	
			Chinese Commodity Code	Chinese HS Code	"Temporary" Export Duty Rate for 2012
Tungsten	Tungsten ore	Tungsten ore	2611000000	N/A[30]	N/A
	Ash and residues containing mainly tungsten	Tungsten ash	2620991000	2620.9910	10%
	Tungsten acid	Tungsten acid	2825901100	2825.9011	5%
	Tungsten trioxide	Tungsten trioxide	2825901200	2825.9012	5%
	Other tungsten oxides and hydroxides	Other tungsten oxides and hydroxides	2825901910	2825.9019	5%
	Ammonium paratungstate	APT	2841801000	2841.8010	5%
	Sodium tungstate	Sodium tungstate	2841802000	2841.8020	5%
	Calcium tungstate	Calcium tungstate	2841803000	2841.8030	5%
	Ammonium metatungstate	Ammonium metatungstate	2841804000	2841.8040	5%
	Other tungstates	Other tungstates	N/A	2841.8090	5%

[30] Tungsten ore is indicated with "N/A" because it is listed in Annex 6 of China's Accession Protocol, and the complainants have not asserted that the export duty rate exceeds the maximum level listed in the Annex.

Raw Material	Product Name	Product Name (Short Form)	Export Quota	Export Duty	
			Chinese Commodity Code	Chinese HS Code	"Temporary" Export Duty Rate for 2012
	Tungsten carbide	Tungsten carbide	2849902000	2849.9020	5%
	Ferro-tungsten	Ferro-tungsten	N/A	7202.8010	20%
	Ferro-silico-tungsten	Ferro-silico-tungsten	N/A	7202.8020	20%
	Tungsten powder	Tungsten powder	8101100010	8101.1000	5%
			8101100090		
	Unwrought tungsten	Unwrought tungsten	8101940000	8101.9400	5%
	Tungsten waste and scrap	Tungsten waste	8101970000	8101.9700	15%

Molybdenum

Raw Material	Product Name	Product Name (Short Form)	Export Quota	Export Duty	
			Chinese Commodity Code	Chinese HS Code[31]	"Temporary" Export Duty Rate for 2012
Molybdenum	Roasted molybdenum ores & concentrates	Roasted molybdenum ores & concentrates	2613100000	2613.1000	15%
	Other molybdenum ores & concentrates	Other molybdenum ores & concentrates	2613900000	2613.9000	15%
	Molybdenum oxides and hydroxides	Molybdenum oxides and hydroxides	2825700000	2825.7000	5%
	Ammonium molybdate	Ammonium molybdate	2841701000	2841.7010	5%
	Other molybdates	Other molybdates	2841709000	2841.7090	5%
	Ferro-molybdenum	Ferro-molybdenum	7202700000	7202.7000	20%
	Molybdenum powder	Molybdenum powder	8102100000	8102.1000	5%
	Unwrought molybdenum	Unwrought molybdenum	8102940000	8102.9400	5%
	Molybdenum waste and scrap	Molybdenum scrap	8102970000	8102.9700	15%

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States, the European Union, and Japan request that the Panel find that:

a. In respect of export duties, the measures reflected in the instruments listed under section 2.2.1 above are inconsistent with China's obligations under Paragraph 11.3 of Part I of the Accession Protocol.

b. In respect of export quotas, the measures reflected in the instruments listed under section 2.2.2 above are inconsistent with Article XI:1 of the GATT 1994 and China's obligations under the provisions of Paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments in Paragraphs 162 and 165 of the Working Party Report on the Accession of China.

c. In respect of export quota administration and allocation, the measures reflected in the instruments listed under section 2.2.3 above are inconsistent with Paragraph 5.1 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments in paragraphs 83 and 84 of the Working Party Report.

3.2. China requests the Panel to find that:

[31] As indicated in Table 6 to *2012 Tariff Implementation Program (Customs Tariff Commission)* (Exhibit JE-45).

a. The general exceptions of Article XX of the GATT 1994 are available to China to defend a potential violation of Paragraph 11.3 of China's Accession Protocol, and the export duties on rare earths, tungsten, and molybdenum are justified under Article XX(b) of the GATT 1994.

b. The 2012 export quotas on rare earths, tungsten, and molybdenum are justified under Article XX(g) of the GATT 1994.

c. The trading rights commitments in Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of the Working Party Report do not prevent the use of prior export performance and minimum registered capital requirements as criteria to administer the rare earths and molybdenum export quotas.

3.3. The United States, the European Union, and Japan further request, pursuant to Article 19.1 of the DSU, that the Panel recommend that China brings its measures into conformity with its WTO obligations.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 18 of the Working Procedures adopted by the Panel (see Annexes B-1 to B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Australia, Brazil, Canada, Colombia, the Republic of Korea, Norway, Oman, Peru, the Russian Federation, the Kingdom of Saudi Arabia, and Turkey are reflected in their executive summaries, provided in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes C-1 to C-11).[32] Chinese Taipei, India, Oman and Viet Nam did not submit written or oral arguments to the Panel. Indonesia submitted a written submission and made an oral statement. However, it did not provide an executive summary of its arguments for inclusion in the Panel report.

6 INTERIM REVIEW

6.1. On 22 October 2013, the Panel issued its Interim Reports to the parties. On 14 November 2013, China, the United States, the European Union, and Japan submitted written requests for review of precise aspects of the Interim Reports pursuant to Article 15.2 of the DSU. On 21 November 2013, China, the United States, the European Union, and Japan submitted written comments on each other's requests for interim review. No party requested an additional meeting with the Panel.

6.2. The numbering of paragraphs and footnotes in the Final Reports has changed from the Interim Reports. The text below refers to the paragraph numbers in the Final Reports. References to paragraph numbers include a reference to relevant footnotes. The Panel notes that this section forms an integral part of its findings in this matter. The Panel notes the highly complex nature of many of the legal and factual issues in this dispute. It has thoroughly reviewed the parties' comments, their original arguments, and its own interim findings before issuing these Final Reports.

[32] The Panel's working procedures set 21 March 2013 as the deadline for the third parties to submit integrated executive summaries of their arguments. On 23 May 2013, Peru requested the Panel to consider its oral statement as its executive summary. The Panel asked for parties' and third parties comments' on Peru's request. On 24 May 2013, the United States noted that "delegations may for any number of reasons on occasion provide a document after the deadline". Accordingly, the United States "do[es] not have any difficulty with Peru's request in this particular instance". On 27 May, the European stated that it is "firmly attached to the strict observance of timelines in WTO dispute settlement" but trusted "that the panel will exercise its discretion when addressing Peru's request accordingly". Peru's integrated executive summary was accepted by the Panel on 30 May 2013.

6.1 Comments on the Panel's interim findings

6.1.1 General

6.3. Throughout its comments on the Interim Reports, China alleges that the Panel has acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the matter, including of the facts of the case. The Panel has seriously and attentively considered each one of China's allegations in this regard, as they go to the integrity of the Panel and the quality of its Reports. In the end, the Panel believes that each of China's allegations under Article 11 is based either on a disagreement with the Panel's assessment of the evidence, or with the way in which the Panel has clarified and applied the applicable provisions of the WTO Agreement. In light of China's allegations under Article 11, the Panel feels it appropriate to make some comments on the standard that it is required to apply.

6.4. First, Article 11 requires a Panel to "determine the facts of the case and to arrive at factual findings".[33] In fulfilling this mandate, a panel must "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".[34] As the trier of facts in the WTO dispute settlement system, a panel is required to treat all the evidence "even-handedly"[35] and may not apply a double standard of proof.[36] The Panel must also be careful not to disregard or ignore evidence that is relevant to one or another party's case.[37] Having said that, it is well-established that "panels enjoy a margin of discretion in their assessment of the facts"[38], and this discretion includes the prerogative both to "decide which evidence it chooses to utilize in making its findings" and "how much weight to attach to the various items of evidence placed before it by the parties".[39] As long as a panel provides "reasoned and adequate explanations"[40] as to its decisions in this respect, it will not violate Article 11 merely because one or more of the parties disagrees with its treatment of the evidence or would have liked the panel to come to a different conclusion. In this regard, we recall the Appellate Body's finding that panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties".[41]

6.5. Second, the Panel notes that, according to the Appellate Body, an allegation that a Panel has acted inconsistently with Article 11 must "stand on its own", and parties to a dispute should not simply "recast" their arguments "under the guise of an Article 11 claim" where they are unhappy with the panel's findings and disposition.[42] In this regard, a party should not allege a violation of Article 11 as a "subsidiary argument" merely in support of an assertion that a panel erred in its application of a provision.[43]

6.6. As is evident in the following paragraphs, the Panel has carefully considered all of the parties' assertions regarding the Panel's appreciation of the facts and the relevant legal provisions, and adjusted its Reports where appropriate. The Panel of course respects the right of the parties to comment at the interim review stage, and is grateful for the helpful clarification provided by all parties. Nevertheless, the Panel is of the view that China's comments regarding the Panel's failure to act consistently with Article 11 constitute subsidiary arguments in support of an assertion that the Panel has erred in its application of the relevant provisions.

6.7. The Panel also notes that it has revised the text in footnote 32 to reflect more accurately the timing of third parties' submissions.

6.8. The Panel will now proceed to discuss the parties' comments on the Panel's Interim Reports.

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[33] Appellate Body Report, *Korea – Dairy*, para. 137.
[34] Appellate Body Reports, *US – COOL*, para. 299.
[35] Appellate Body Report, *EC – Fasteners*, para. 441.
[36] Appellate Body Report, *EC – Fasteners*, para. 441.
[37] Appellate Body Report, *EC – Fasteners*, para. 441.
[38] Appellate Body Reports, *China – Raw Materials*, para. 341.
[39] Appellate Body Report, *US – Tuna II (Mexico)*, para. 272.
[40] Appellate Body Reports, *Philippines – Distilled Spirits*, para. 136.
[41] Appellate Body Reports, *US – COOL*, para. 403.
[42] Appellate Body Report, *EC – Fasteners*, para. 442.
[43] Appellate Body Reports, *US – COOL*, para. 301.

6.9. The parties submitted several editorial revisions as well as other linguistic changes, which were not contested by the other parties. We have made these adjustments. The Panel also made minor editorial and non-substantive consequential changes as a result of other adjustments. The Panel has also corrected typographical and other non-substantive errors throughout the Report, including those identified by the parties. These are not referred to specifically below.

6.10. In addition to minor typographical errors, the parties pointed to a number of wording and numbering errors in the Panel's findings. The Panel has adjusted its Reports accordingly and also made related changes, including in footnote 77 of paragraph 7.30 and paragraphs 7.57, 7.60, 7.85, 7.98, 7.266, 7.268, 7.271, 7.276, 7.321, 7.322, 7.326, 7.327, 7.332, 7.336, 7.353, 7.354, 7.356, 7.357, 7.375, 7.380 (including footnote 580), 7.423(b), 7.436, footnote 689 of paragraph 7.445, 7.473, 7.486, 7.495, 7.509, 7.510, 7.518, 7.520, 7.524, 7.526, 7.528, 7.555, 7.587, 7.588, 7.589, 7.591, 7.593, 7.600, 7.603, 7.610, 7.611, 7.612, 7.622, 7.625, 7.630, 7.633, 7.643, 7.646, 7.648, 7.650, 7.652, 7.656, 7.662, 7.683, footnote 1030 of paragraph 7.695, 7.798, 7.809, 7.828, 7.829, 7.835, 7.926, 7.935, 7.953, 7.956, 7.960, 7.981, 7.985, 7.1008, and footnote 1359 of paragraph 7.1037. The title of section 7.6.2.2.2.3 has been adjusted to better reflect its contents. Finally, in order to ensure consistency in its Reports, the panel has inserted a new title at 7.8.1.3.1.6.

6.11. All parties requested that the Panel adjust its Reports to more fully and/or accurately reflect their arguments on specific points. The Panel has generally accepted these requests, and has also made related changes including at paragraphs 7.3 (concerning the United States' arguments on enhanced third party rights), footnote 77 of paragraph 7.30 (concerning whether any of the products concerned is listed in Annex 6 of China's Accession Protocol), 7.87 and 7.90, (concerning China's argument on the existence of a link between the WTO Agreement and GATT 1994 and its Accession Protocol and Working Party Report), 7.172 (concerning China's argument on the relationship between its export duties and its resource tax and *Deposit for Ecological Recovery*, and other environmental regulations), 7.184 (concerning the United States' argument regarding China's implementation of alternative measures), 7.302 (concerning one of China's arguments on the meaning of "work together"), 7.372 (concerning one of China's arguments as to how its conservation policy restricts extraction of rare earths), 7.380 (including footnote 580) (concerning China's signalling argument in the context of tungsten), 7.386 (including footnote 595), 7.399, 7.405, and 7.407 (concerning China's argument on the nature of the various instruments that form part of and/or relate to its conservation policy on rare earths), 7.413 (concerning China's "domestic supply squeeze" argument), footnote 699 of paragraph 7.450 (concerning Japan's argument on the use of export quotas as a safeguard), 7.479 (including footnote 745), 7.481 (including footnote 749) and 7.482 (including footnote 750) (concerning China's allocation of its export quota in "light" and "medium/heavy" rare earths), 7.484, 7.485, and 7.654 (concerning the formula by which China allocates export quota shares), 7.495, 7.743, and 7.885 (concerning China's arguments on the benefits of consolidation in the mining industry), 7.545 (concerning China's argument that domestic consumption cannot exceed the production quota minus actual exports), 7.550 (concerning China's argument on the method by which it sets the level of its extraction and production quotas), 7.651 (concerning the different product scopes of China's various quotas), 7.725 (concerning China's argument on signalling), 7.830 and 7.955 (concerning the reliability of data from *Metal Pages*), 7.1000 (concerning the Panel's agreement with China's argument on the non-existence of pre-conditions in the revised *Foreign Trade Law*).

6.12. The parties requested that the Panel clarify some of its descriptions (including in the descriptive part) and factual conclusions. The Panel has adjusted its Reports accordingly and made a number of related revisions, including at footnote 29 of paragraph 2.16, paragraph 7.210 (concerning penalties related to the obligation to return unused export quota shares), 7.252 (concerning China's argument on the meaning of conservation), 7.292 (clarifying that the quota system under consideration is the one challenged by the complainants), footnote 611 of paragraph 7.398 (concerning the different versions of China's *Foreign Trade Law*), 7.440 (concerning China's signalling argument in the context of rare earths), 7.473 (concerning the alleged simultaneity of China's quotas), footnote 797 of paragraph 7.509, 7.510 and 7.550, (concerning the method by which China allegedly set the level of its extraction and production quotas), footnote 863 of paragraph 7.543, 7.549, 7.612, and 7.779 (including footnote 1127) (concerning China's VAT rebate system), 7.554 (concerning China's evidence on Baiyun Obo ores), 7.547 (concerning the existence of a volume restriction on domestic consumption), 7.574 and 7.579 (concerning the timing of China's first and second export quota batches), 7.596, (concerning the goals of China's export quota on rare earths), 7.668, 7.676, and 7.677 (concerning proposed alternative measures

to China's rare earths export quota), 7.672 (concerning China's allegation that certain alternative measures proposed by the complainants would impose administrative costs), 7.748, 7.889 (concerning access conditions) , 7.629 (concerning the United States' argument about the division of China's rare earth export quota into two categories), 7.695 (concerning the European Union's argument that China's export quota on tungsten does not "relate to" its conservation policy), 7.759 (concerning sanctions on over-quota production), 7.765, 7.771 (concerning the tungsten extraction and production quotas), 7.829 (concerning price differences for tungsten), and 7.989 (including footnote 1316) (concerning China's trading rights requirements).

6.13. The parties requested the Panel to clarify some provisions of its findings. The Panel has adjusted its Reports accordingly, and made a number of related revisions, including at paragraphs. 7.186 (concerning alternative measures under Article XX(b)), 7.256 and 7.451 (concerning the Panel's understanding of "conservation"), 7.322 and 7.323 (concerning the Panel's use of jurisprudence and concepts developed in other international legal systems), 7.333 (concerning the meaning of "even-handed"), footnote 515 of 7.335 (concerning the use of "even-handedness" in recent WTO jurisprudence), footnote 723 of paragraph 7.462 (concerning the positive and negative signalling effects of export quotas), 7.453 (concerning the Appellate Body's interpretation of Article XI.2 of the GATT 1994), 7.487 (concerning China's right to pursue industrial policies within the limits of its conservation programme), 7.510, 7.526, and 7.528 (concerning whether or not China's extraction and/or production quotas were "restrictive"), 7.798 (concerning the Panel's assessment of the implications of China's setting different levels in different quotas), and 7.885 (concerning the Panel's assessment of China's access restrictions).

6.1.2 Specific comments

6.1.2.1 Export duties

6.14. The United States requested that the Panel delete the paragraphs in its Interim Reports discussing the legal value of the Appellate Body's decision in *China – Raw Materials* on the applicability of Article XX of the GATT 1994 to Article 11.3 of China's Accession Protocol, which is again at issue in this dispute. The Panel believes that it is important to have regard to earlier findings of the Appellate Body that are directly relevant to the dispute. The Panel's discussion in section 7.3.2.1.1 is therefore appropriate, and we have maintained it in our Final Reports.

6.1.2.2 Export quotas

6.15. The parties requested the Panel to revise its reference to the relevance of simultaneity in its discussion of the legal test relating to "work together" and in its description of China's export quota. The Panel has adjusted its Reports accordingly, including at paragraphs 7.300 and 7.473.

6.16. China requested the Panel to review its description of the reasons why China allocates its export quota on rare earths in two broad categories. The complainants disagreed in part with China's request. The Panel has adjusted its findings taking into account the parties' interim comments, and has made adjustments as appropriate, including in paragraphs 7.479, 7.481, and 7.482.

6.17. All parties requested the Panel to review its description of the export quota system with particular reference to the fact that unused quota shares are required to be returned to the Chinese authorities by 31 October each year and may not be exchanged among or between exporters. The Panel has reviewed its findings and made some adjustments, including at paragraphs 7.488, 7.594, 7.627, 7.656, 7.659, 7.661, 7.734, 7.808, 7.835, 7.926, 7.956 and 7.960. To reflect these changes, the Panel has also adjusted titles at 7.6.2.1.3.9, 7.7.2.1.3.3, and 7.8.1.2.3.2.

6.18. China requested that its argument on industrial relocation be discussed more extensively by the Panel. The Panel has accepted this request, and modified its findings accordingly, including in section 7.6.3.1.2.

6.19. China claimed that no evidence in the record would support the Panel's conclusion that "exporting firms tend to deal in one or a few products". According to China, "[i]t is obvious and logical that theoretical and speculative potential problems do not constitute evidence of actual

problems".[44] The Panel agrees with China that a Panel must not reach a conclusion purely on the basis of speculation. We have not done so. Our conclusions are based on evidence and analysis, of the design, structure, and architecture of the measures at issue, considered in light of the relevant economic environment. The Panel's view that because some firms, for whatever reason (including specialization, technical capacity, and/or business strategy) may not export every product contained in the light and/or medium/heavy categories – coupled with the fact that exporters cannot exchange their export licences *inter se* – could lead to discrimination even though the overall export quota is unfilled, is, as the European Union observed, a conceptual and structural analysis based on the parties' arguments and evidence. It is also based on China's explanations regarding the export quota's structure and operation, and is supported by the parties' descriptions of the rare earths market and associated practices.

6.20. In paragraphs 50 and 51 of its comments on the Panel's Interim Reports, China argued for the first time that "exporting firms, even if not allowed to sell export quota shares among themselves, can always purchase individual rare earths elements that are in demand on the market and export until their quota share is filled". According to China, "[i]f exporters consider that a particular type of rare earth is needed more than another element by their clients, it is undisputed that they can buy this rare earth element on the market and export it to clients". This new argument was not supported by any reference or other evidence. For this reason, the Panel cannot, in keeping with its obligations under Article 11 of the DSU, properly assess the implications of China's statement that exporters can always purchase individual products on the market without reopening its investigation, asking further questions, and allowing the parties to debate further on this issue. Nevertheless, we take note of China's point, and we have adjusted our reasoning so that it will be clear that our findings are not based on the Panel's understanding that some exporters may not export all products. Section 7.6.2.2.2.3 of the Interim Reports has been partially revised and merged into section 7.6.3.1.1. of the Final Reports. Additionally, in light of the parties' comments, the Panel has modified paragraphs 7.926 and 7.927 concerning the Panel's understanding of the molybdenum export quota. Regarding the United States' request to extend this analysis to tungsten, the Panel has declined to accept the United States' request, since the export quota on tungsten was more fully used. The Panel has also made consequential adjustments to paragraphs 7.638 (including footnote 962), 7.639 (including footnote 963), 7.640, 7.641, 7.642, 7.643, 7.646, and 7.648.

6.21. China asked the Panel to deal more directly with its arguments concerning industrial relocation under the chapeau of Article XX. The Panel has accepted China's request, and has adjusted its descriptions and findings as necessary and in light of the comments made by all the parties on this issue, including at paragraphs 7.621, 7.622, 7.623, 7.632, 7.633, 7.634, and 7.635. The Panel has also adjusted other of its findings that relate to relocation, including paragraph 7.444.

6.22. China complained that it had not been asked to clarify its pricing analysis on molybdenum. In this connection, the Panel recalls that on 17 June 2013 at 17.00, on the eve of the second meeting, the Panel sent an email to the parties *inter alia*, revising the scope of question No. 85 – which originally referred to price information on rare earths - to include price information on tungsten and molybdenum. The revised question sent in the email was in the following terms:

> **To China:** The analysis of price differences for rare earth products, tungsten and molybdenum that China provides in Annex 1 of its second written submission appears to suggest that in some cases, domestic prices are higher than adjusted foreign prices (examples include specific periods for Cerium oxide, Dysprosium metal, Europium oxide, Europium metal, Terbium oxide, Terbium metal. Yttrium metal, Praseodymium metal). Could China explain how domestic prices of exported goods can be higher than foreign prices?

6.23. The Panel recalls that China made reference to this revised question at the second meeting with the Panel.

6.24. It was evident that one of the objects of the email of 17 June was to extend the scope of question 85 to include tungsten and molybdenum. China responded to the Panel's question in writing on 8 July 2013. China's discussion in its response is very general, and, especially at

[44] China's comments on the interim reports of the Panel, paras. 47, 48 and 171.

paragraphs 71, 72, and 73, made a number of general observations, including on the relevance and reliability of data from *Metal Pages*. Since China has relied on data from *Metal Pages* with respect to all three products, the Panel was entitled to understand that these observations concerned the three products, and not just rare earths. The Panel was therefore entitled to conclude that China's response to question No. 85, and especially in paragraphs 71, 72, and 73, referred to all products at issue.

6.25. If, at this late stage, China suggests that it intentionally declined to answer the Panel's question with regard to tungsten and molybdenum, the Panel is still entitled to raise the same doubts with respect to the reliability of the *Metal Pages* data on those products as it raised with respect to the data on rare earths. This is because, as we explained in the preceding paragraph, *Metal Pages* contains data on all three products, and China has relied on *Metal Pages* data in its arguments on all three products. Therefore, the Panel maintains the same position on this issue.

6.26. Moreover, there is nothing in these paragraphs to suggest that China's answer was limited to rare earths and was not relevant to tungsten or molybdenum as well.

6.27. Finally, the Panel recalls that the burden of proof is on China, since it raised the absence of price discrimination to demonstrate the compliance of its export quotas with the chapeau of Article XX of the GATT 1994.

6.28. In light of the above, the Panel has slightly modified its language in paragraphs 7.830 and 7.955, and added text to footnotes 1165 and 1287.

6.2 Allegations of violation of confidentiality of the Interim Reports

6.29. We would like to address the issue of the confidentiality of the Interim Reports. When we transmitted our Interim Reports to the parties on 23 October 2013, we clearly indicated that such Reports were confidential. In addition, paragraph 23 of the Panel's working procedures clearly states that "The interim reports as well as the final reports before translation shall be kept strictly confidential and shall not be disclosed". Therefore, we are very concerned that information concerning the Interim Reports or their contents appears to have been disclosed by one or more parties. Based on the information subsequently provided to us by the parties, it appears that aspects of the Interim Reports were leaked to the press.[45] The Panel does not have any evidence as to the source of this leak to the press. The Panel also notes that one party to the dispute alleged that an official of another party to the dispute leaked details of the Interim Reports. Ultimately, while the Panel is not in a position to take any action regarding these leaks, it wishes to emphasize its disappointment and concern that the confidentiality of the Interim Reports was not respected.

7 FINDINGS[46]

7.1 Request for enhanced third-party rights

7.1. On 9 October 2012, Canada requested[47] the following rights for itself and the other third parties in these proceedings: (i) to receive copies of the parties' written submissions, their oral statements, rebuttals, and answers to questions from the Panel and each other, through all stages of the proceedings; (ii) to be present for the entirety of all substantive meetings of the Panel with the parties; (iii) to make a second written submission, and/or to present an oral statement, in a special session set aside for this purpose, during the second substantive meeting, should such a special session be held; and (iv) to review the draft summary of its own arguments in the descriptive part of the Panel Report. After considering Canada's request and consulting the parties on this request, the Panel informed Canada on 19 October 2012 that it had decided to decline its request. The Panel concluded that the reasons Canada raised were not among those that would

[45] China's Comments on the Interim Reports of the Panel, para. 5. Comments of the United States on the Comments of China on the Interim Reports of the Panel, paras. 4 and 5. See also European Union's comments on China's requests to review precise aspects of the Panel's Interim Reports, para. 3; Comments of Japan on China's comments on the Interim Reports of the Panel, paras. 4 and 5.

[46] In this section and throughout these Reports, the Panel will refer to the main arguments advanced by the parties.

[47] Letter from Canada dated 9 October 2012.

justify departing from the third-party rights established in paragraphs 2 and 3 of Article 10 of DSU, paragraph 6 of Appendix 3 to the DSU and panel practice regarding enhanced third-party rights. In its communication, the Panel indicated that it would provide its reasoning on this matter in its Reports. Our reasons are provided below.

7.2. Canada argues that it has, along with the other third parties, "significant direct legal and systemic interests" in the outcome of this dispute, given both the "nature" of the measures at issue (i.e. export restrictions), and the provisions of the WTO Agreement under which these measures are challenged. Canada argues that it, along with the other third parties, is a significant producer and consumer of the materials in this dispute, "or of other resources that are similar or analogous to these", such that the Panel's interpretation of the WTO obligations in question may have "significant and sustained implications" for their economic interests. Canada notes that the Panel's interpretation of the availability and application of defences under the GATT 1994 may affect its own rights and obligations. Canada stresses that arguments on this point may not receive attention until the late stages of the dispute, to which third parties are not given access under standard Working Procedures. Canada also makes systemic arguments in favour of its position. Canada argues that negotiations on amending the DSU, though incomplete, demonstrate a "broad consensus" that the traditional framework for third party participation is inadequate, and that such inadequacy is evident from the increasing tendency of panels to grant enhanced third-party rights on an *ad hoc* basis. Canada cites the panel reports in *Canada – Renewable Energy / Canada – Feed-In Tariff Program*, *US – COOL*, *EC – Tariff Preferences* and *EC – Export Subsidies on Sugar* as evidence of this tendency, and argues that these cases are unified by the recognition of the "inherent and significant interests" of third parties in each case. Canada argues that granting its request would not disturb the balance between parties and third parties.[48]

7.3. All parties request that the Panel deny Canada's request for enhanced third-party rights. The United States asserts that under Article 12.1 of the DSU, any departure from the Working Procedures in Appendix 3 to the DSU should only be decided "after consulting the parties to the dispute." The United States considers that with the agreement of the parties granting a request for enhanced third-party rights could be seen as contributing to securing a positive solution to the dispute. However, the United States asserts that as the parties had not agreed to support Canada's request in this dispute, the Panel should decline that request. In addition, the United States argues that neither *Canada – Renewable Energy / Canada – Feed-In Tariff Program* nor *US – COOL* provides reasoning that supports Canada's request, given that the Reports in *Canada – Renewable Energy / Canada – Feed-In Tariff Program* had yet to be circulated as of the time of Canada's request in these proceedings, and that the panel in *US – COOL* provided no explanation of why it granted enhanced third-party rights, thus rendering impossible an evaluation of either panel's reasoning. The United States also distinguishes the reports in *EC – Tariff Preferences* and *EC – Export Subsidies on Sugar*, on the basis that enhanced third-party rights were granted in those cases to Members that were at risk of losing the benefits of the EC measures at issue, such that "their interests could almost be characterized as those of co-responding parties", which is not the case in this dispute. The United States disagrees with the other assertions made by Canada in support of its request. The United States argues that the DSU already provides certain rights for Members with a substantial interest in a dispute, and articulates which opportunities they shall enjoy. The United States disputes Canada's assertion that its rights and obligations might be implicated by this dispute, given that Canada is not a party to this dispute and therefore any DSB recommendations and rulings cannot affect Canada's rights and obligations. Finally, the United States argues that Canada's arguments would tend to justify the granting of third-party rights in most, if not all, disputes, and if Canada advocates such a model for enhanced third-party rights, it should do so through DSU negotiations rather than pre-empting them and adopting a model not agreed to by Members.[49]

7.4. The European Union submits that Canada cannot demonstrate that it will experience direct legal and economic consequences as a result of this dispute, thus distinguishing this case from *EC – Export Subsidies on Sugar* and *EC – Bananas III*, in which third parties were granted enhanced rights. The European Union argues that Canada's concerns are shared by at least the majority of WTO Members, such that their interest does not substantially exceed the interests of other Members. Moreover, the granting of such rights would unduly interfere with the smooth

[48] Letter from Canada dated 9 October 2012.
[49] Letter from the United States dated 16 October 2012.

functioning of the dispute, considering the complexities associated with having three co-complainants and 19 third parties.[50]

7.5. Japan did not make written submissions to the Panel regarding Canada's request. However, at the organizational meeting of the parties on 11 October 2012, Japan expressed its opposition to the granting of enhanced rights to Canada.

7.6. China notes that Canada already has, under existing procedures, the opportunity to articulate its views to the Panel, and that Canada retains the right to initiate its own dispute. However, China's primary opposition to Canada's request is based on the additional burden that the granting of enhanced third-party rights would place on China's participation in this dispute. China faces time, cost, and resource burdens in responding to the evidence and arguments of three separate complainants. Such burdens are magnified by the "extraordinary" number of third parties, which increase the burden on China, the complaining parties, and the Secretariat. China submits that the basis for Canada's request would render it "difficult" for the Panel to grant such enhanced rights without granting similar rights to the other third parties given that all parties have a systemic interest in, for example, the interpretation of Article XX of the GATT 1994. China therefore expresses concern that it will be required to respond to the first *and* second submissions of all 19 third parties, thus creating a "significant additional burden on China at a time in the proceedings when its resources will already be fully deployed". China submits that the consequence of granting such rights is that China requires an additional 30 days to prepare for the second substantive meeting.[51]

7.7. The Panel recalls that Articles 10.2 and 10.3 of the DSU and paragraph 6 of Appendix 3 of the DSU provide for the rights of third parties in a dispute. It is well established that these are minimum guarantees, and that a panel may exercise the discretion afforded to it under Article 12.1 of the DSU to grant "enhanced" third-party rights in a dispute, provided that such enhanced rights are consistent with the provisions of the DSU and the principles of due process.[52] Panels have exercised this discretion in granting enhanced rights in several disputes. Although the Panel considers that this should be done on a case-by-case basis, we think that our decision on whether or not to grant such enhanced rights should nonetheless be informed by the same factors considered in previous disputes. We also recall the need to maintain the distinction drawn in the DSU between parties and third parties.[53]

7.8. Enhanced third-party rights have been granted on the basis of a number of factors including the following: (i) whether the third parties enjoyed certain economic benefits that were directly implicated by the measure at issue[54]; (ii) the economic and social impact of the measures in third countries[55]; (iii) whether enhanced third-party rights had been granted in previous disputes relating to the measure[56]; (iv) the impact of the dispute on other Members maintaining similar measures[57]; (v) the similarity of the dispute to related disputes[58]; and/or (vi) the imperative of avoiding repetition.[59] Conversely, in previous cases, enhanced third-party rights were denied on the basis of one or more of the following: (i) the failure of the third party to demonstrate that it participates in the market sector in question[60]; (ii) the failure of the third party to demonstrate that it maintains measures analogous to those in dispute[61]; (iii) the failure of the third party to demonstrate that its systemic interest in the interpretation of the WTO provisions in question is different from that of any other Member[62]; (iv) the delay that would be caused by granting

[50] Letter from the European Union dated 16 October 2012.
[51] Letter from China dated 16 October 2012.
[52] Appellate Body Reports, *US – 1916 Act*, para. 150, *EC – Hormones*, para. 154, and *US – FSC (Article 21.5 – EC)*, para. 243.
[53] Panel Reports, *US – 1916 Act (EC)*, para. 6.33, and *US – 1916 (Japan)*, para. 6.33, and *EC – Export Subsidies on Sugar*, para. 2.5.
[54] Panel Reports, *EC – Bananas III*, para. 7.8, and *EC – Tariff Preferences*, Annex A, para. 7(a).
[55] Panel Reports, *EC – Bananas III*, para. 7.8, *EC – Export Subsidies on Sugar*, para. 2.5, and *EC – Bananas III (Article 21.5 – US)*, para. 7.722.
[56] Panel Reports, *EC – Bananas III*, para. 7.8.
[57] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7(b).
[58] Panel Reports, *EC – Bananas III*, para. 7.8.
[59] Panel Report, *EC – Hormones (Canada)*, para. 8.18.
[60] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.167.
[61] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.167.
[62] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.167.

enhanced rights[63]; (v) the unanimous rejection of the request by the parties to the dispute[64]; (vi) the imposition of additional burdens on the parties to the dispute[65]; and (vii) the risk of blurring the distinction between parties and third parties.[66]

7.9. In the Panel's view, and taking all of these factors into account, Canada has not identified grounds that warrant the granting of enhanced third-party rights in this dispute. Notably, although Canada may have a "direct legal and systemic interest" in the provisions of the WTO Agreement under which this measure is challenged, such an interest does not distinguish Canada from any other third party to this case, or indeed any other WTO Member. Even accepting that Canada is a "significant" producer and consumer of the materials in dispute, "or of other resources that are similar or analogous to these", this does not necessarily distinguish Canada from the other third parties, such that the Panel would as a matter of due process be required to extend similar rights to at least some, if not all, third parties. Given that there are 19 third parties in this proceeding, that would seriously impede the prompt settlement of this dispute, and create undue additional burdens for the parties. The Panel also notes the disputing parties' unanimous objection to Canada's request.

7.10. For these reasons, the Panel declines Canada's request.[67]

7.2 Evidence submitted on 17 July 2013

7.11. Before proceeding to analyse the main issues in this matter, there is an important issue that the Panel must address. This relates to China's request regarding certain exhibits submitted by the complainants together with their responses to the Panel's questions after the second meeting on 17 July 2013. On 18 July 2013, China wrote the Panel expressing its "strong objection" to this evidence, which consists of 10 exhibits[68] including four expert reports[69], and asked the Panel to reject it and the arguments that are based on it.

7.12. On 20 July 2013, the Panel wrote to the parties regarding China's letter. The Panel noted that the relevant exhibits were submitted together with the complainants' comments on China's responses to the Panel's questions after the second meeting, rather than with the complainants' answers to those questions. The Panel also extended to China the option of responding to the exhibits by 17.00 on 24 July 2013, but reserved its right to decide whether the relevant exhibits should be considered as late evidence under WTO law in its final reports.

7.13. On 22 July 2013, the complainants jointly sent a response to China's letter and the Panel's communication. In their letter, the complainants asked the Panel to reject China's request. They noted that the Working Procedures in this dispute specifically provide that parties may submit evidence for purposes of rebuttal or comments on answers provided by other parties, and argued that each exhibit submitted by them together with their comments on China's responses to the Panel's questions after the second meeting was in accordance with the said Working Procedures.

7.14. Finally, on 24 July 2013, China submitted its comments on the complainants' exhibits, and repeated its contention that all of the exhibits should have been submitted earlier. China also explained that it had not had sufficient time to respond to all of the points raised by the exhibits, and claimed that the time period provided by the Panel was too short.

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[63] Panel Reports, *China – Raw Materials*, para. 1.7, and *Dominican Republic – Safeguard Measures*, para. 1.8.

[64] Panel Reports, *Dominican Republic – Safeguard Measures*, para. 1.8.

[65] Panel Reports, *Dominican Republic – Safeguard Measures*, para. 1.8.

[66] Panel Reports, *Dominican Republic – Safeguard Measures*, para. 1.8.

[67] Among the "enhanced" third-party rights requested by Canada is the right to review the draft summary of its own arguments in the descriptive part of the Panel Report. This has not been afforded to any other party in any previous dispute and we do not consider that it falls within the type of concerns usually addressed in the grant of enhanced third-party rights. See, e.g. Panel Reports, *EC – Bananas III*, para. 7.9, and *US – Large Civil Aircraft (2nd complaint)*, footnote 1025.

[68] See the Table of Exhibits included in Complainants' Comments of 17 July 2013.

[69] Prof. L Alan Winters, *Comments on China's replies to Questions 76 and 87*, (Exhibit JE-193); Prof. L Alan Winters, *Comments on China's replies to Questions 78 and 86*, (Exhibit JE-194); Prof. L Alan Winters, *Response to Prof. De Melo*, Exhibit CHN-206 and certain points in China's Answers of 8 July 2013, (Exhibit JE-195); and Prof. Gene Grossman, *Response to Prof. Jaime de Melo*, (Exhibit JE-197).

7.15. The exhibits challenged by China are:

a. *Web-Published Notice on the 2013 Initial Approval List of Enterprises Qualified to Export Rare Earths in the Annual Review* (Ministry of Commerce, Department of Foreign Trade, December 17, 2012), (Exhibit JE-188).

b. Sina.com.cn, *Rare Earth Mining Controls said to "might as well not exist", real production remains over-quota every year* (April 1, 2011), (Exhibit JE-189).

c. Yancheng Evening News, *Rare Earth Industry Reorganizing, Guandong Staking an Early Claim* (February 28, 2012), (Exhibit JE-190).

d. Xinhuanet.com, *China Minmetals Proposes Production Freeze, Revealing Unspoken Rules inside RE Industry*, (Exhibit JE-191).

e. Quotes from *China's Export Quotas and Measures Promoting Downstream Industries*, (Exhibit JE-192).

f. Professor L Alan Winters: *Comments on China's replies to Questions 76 and 87*, (Exhibit JE-193).

g. Professor L Alan Winters: *Comments on China's replies to Questions 78 and 86,* (Exhibit JE-194).

h. Professor L Alan Winters: *Response to Professor De Melo, Exhibit CHN-206 and certain points in China's Answers of 8th July* 2013, (Exhibit JE-195).

i. Dudley Kingsnorth, "*Rare Earths: An Industry Undergoing Rejuvenation*," June 2013, published jointly by Curtin University and IMCOA, (Exhibit JE-196).

j. Professor Gene Grossman: *Response to Professor Jaime de Melo*, (Exhibit JE-197).

7.16. The Panel will now proceed to determine whether or not it should accept China's request to reject the relevant exhibits. The Panel begins by recalling that, pursuant to paragraph 7 of its Working Procedures,

> Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party(ies). Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party(ies) a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

7.17. The Panel acknowledges that, ideally, panel proceedings should progress in two stages: "the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit 'rebuttals' by each party of the arguments and evidence submitted by the other parties".[70] After the first meeting, the submission of new evidence is generally not acceptable, although rebuttal evidence may be admitted. Thus, the Panel considers that there is no absolute bar against the submission of new evidence. In a finding that was not appealed, the panel in *Canada – Aircraft* held that:

> [A]n absolute rule excluding the submission of evidence by a complaining party after the first substantive meeting would be inappropriate, since there may be circumstances in which a complaining party is required to adduce new evidence in

[70] Appellate Body Reports, *Argentina – Textiles and Apparel*, paras. 79-81 and *Thailand – Cigarettes (Philippines)*, para. 149.

> order to address rebuttal arguments made by the respondent…[W]e are not bound to exclude the submission of new allegations after the first substantive meeting.[71]

7.18. Moreover, the Panel is aware that in the context of a dispute where the respondent invokes Article XX, the first meeting may be the first occasion for the complainant to learn about the respondent's arguments and evidence related to that defence. As such, it may, depending on the circumstances, be appropriate to allow the submission of new evidence after the first meeting, in order to allow the complainants sufficient opportunity to file evidence in response.

7.19. Nevertheless, as a general rule, panels have a degree of discretion on questions relating to the admission of evidence, though they must constantly bear in mind that their role is to make an "objective assessment of the facts of the case".[72] It seems to this Panel that, with respect to questions regarding the admission of evidence challenged by one party for lateness, due process is the vitally important general principle by which panels must be guided. As the Appellate Body explained in *Thailand – Cigarettes (Philippines)*:

> Due process is a fundamental principle of WTO dispute settlement. It informs and finds reflection in the provisions of the DSU. In conducting an objective assessment of a matter, a panel is bound to ensure that due process is respected. Due process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules. The protection of due process is thus a crucial means of guaranteeing the legitimacy and efficacy of a rules-based system of adjudication.[73]

7.20. In the Panel's opinion, due process in this case requires that the exhibits submitted by the complainants with their comments on China's responses to the Panel's questions after the second meeting not be admitted. This is so for a number of reasons.

7.21. First, the Panel believes that the vast majority of this evidence could and should have been submitted at an earlier date. For instance, the Panel does not understand why the complainants waited until the middle of July to submit Yangcheng Evening News, Rare Earth Industry Reorganizing, Guandong Staking an Early Claim, (Exhibit JE-190), since that document was published on 28 February 2012. The same is true of Sina.com.cn, Rare Earth Mining Controls Said to "Might As Well Not Exist", Real Production Remains Over-Quota Every Year, (Exhibit JE-189), which was published on 1 April 2011, and of Xinhuanet.com, China Minmetals Proposes Production Freeze, Revealing Unspoken Rules inside RE Industry, (Exhibit JE-191), which was published on 2 August 2011. Finally, the Web-Published Notice on the 2013 Initial Approval List of Enterprises Qualified to Export Rare Earths in the Annual Review, (JE-188) was released by MOFCOM on 17 December 2012.

7.22. The complainants have alleged that these exhibits rebut new arguments made by China at the second meeting with the Panel. We disagree. The Panel is rather of the view that these exhibits contain facts and evidence supporting the complainants' statements at the second meeting. It is not clear why the complainants did not submit these exhibits with their responses to the Panel's questions after the second meeting, rather than with their comments on China's responses to those questions.

7.23. The Panel notes that, in *Thailand – Cigarettes (Philippines)*, the Appellate Body stated that "[d]ue process may be of particular concern in cases where a party raises *new facts* at a late stage of the panel proceedings".[74] As the Panel will explain further below, it does not believe that any of the exhibits submitted by the complainants on 17 July 2013 contain "new facts". Nevertheless, the Panel considers that even where challenged evidence does not contain new facts, the submission by any party of a large bundle of evidence at a very late stage in the proceedings, especially when such evidence could have been provided earlier, raises due process issues for the opposing party

[71] Panel Report, *Canada – Aircraft*, paras. 9.73 and 9.74.
[72] DSU, Article 11.
[73] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.
[74] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 149 (emphasis in original).

(here, China), whose opportunity to make its defence could be undermined, and complicates a panel's task of resolving disputes in a timely manner.

7.24. Second, the Panel is concerned by the submission of new expert reports at this late stage. The Panel understands the complainants' desire to rebut China's arguments as effectively as possible. However, as is recognized in Article 3.3 of the DSU, the "prompt settlement" of disputes is "essential to the effective functioning" of the WTO dispute resolution system, and panels have an interest in seeing that cases are "brought to a close" in a timely manner.[75] In the Panel's opinion, allowing the submission of new expert reports at this late stage in the proceedings could prolong the dispute unnecessarily, since China would no doubt wish to submit expert reports of its own that the complainants would then wish to rebut with new expert reports, and so on. Endless rounds of expert reports, while they may "rebut" each other, are not in the interests of prompt dispute settlement.

7.25. Finally, the Panel notes that Quotes from China's Export Quotas and Measures Promoting Downstream Industries, (Exhibit JE-192) consists, as its name suggests, entirely of quotes from exhibits already submitted as evidence to the Panel. With respect to this exhibit, the Panel recalls that Paragraph 7 of the Panel's Working Procedures does not allow the submission of *any* rebuttal evidence. Instead, the paragraph is explicit that only evidence "necessary for purposes of rebuttal" should be admitted. In the Panel's opinion, Exhibit JE-192 adds nothing substantial to the evidence already submitted. It does not change the outcome of the case or the Panel's analysis. Accordingly, the Panel does not consider that it is "necessary for purposes of rebuttal".

7.26. Indeed, and more generally, the Panel considers that none of the challenged exhibits are "necessary for purposes of rebuttal". In the Panel's opinion, the media reports and complainants' new expert reports, the Web-Published Notice on the 2013 Initial Approval List of Enterprises Qualified to Export Rare Earths in the Annual Review, and as we have said, the compilation of quotations generally restate arguments or evidence that is already stated elsewhere. As such, the Panel does not consider that these exhibits are "necessary" to enable the complainants to rebut China's case. While they may be helpful or confirmatory, this, in the Panel's opinion, does not rise to the required level of necessity.

7.27. In sum, the Panel believes that the relevant exhibits were submitted too late; they could have been submitted earlier and in a manner consistent with due process. Additionally, these exhibits do not supplement the evidence already accepted by the Panel. They do not, as far as the Panel can see, say anything substantially new or different from what is said in the exhibits that the complainants submitted prior to 17 July 2013.

7.28. In conclusion, the Panel accepts China's request that the exhibits submitted by the complainants on 17 July 2013 be rejected. The Panel will therefore proceed to analyse this dispute without reference to such exhibits.[76]

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[75] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

[76] The Panel notes that, in its comments on China's responses to the Panel's questions following the second meeting, the European Union expressed its "surprise[]" that China submitted Exhibit CHN-217, which is a circular entitled "Environmental Protection Inspection of Tungsten and Molybdenum" and is one of the environmental measures that China argues constitutes a restriction on domestic production, "at this late stage in the proceedings" (para. 106), i.e. after the Panel's second meeting. Later on in its comments, the European Union also states that Exhibit CHN-219 is "very late". In the Panel's opinion, these remarks do not constitute a formal challenge for lateness, and the European Union has not asked the Panel to exclude these exhibits from consideration. Nevertheless, pursuant to its obligation to make an "objective assessment" of the matter, the Panel has considered whether Exhibits CHN-217 and CHN-219 should be excluded for lateness.

The Panel recalls first that Paragraph 7 of the Panel's Working Procedures, which provide that"[e]ach party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party(ies)." Second, we note that these exhibits were not filed during the first meeting, but were filed in support of China's response to one of the Panel's questions. In the Panel's opinion, Exhibits CHN-217 and 219 should not be excluded from consideration for lateness. This is for two reasons. First, unlike the complainants' exhibits challenged by China for lateness, Exhibits CHN-217 and CHN-219 were both included in China's responses to the Panel's questions, rather than in China's comments on the complainants' responses. This means that the complainants had a full opportunity in their comments on China's

7.3 Export duties

7.3.1 Introduction and claim under Paragraph 11.3 of China's Accession Protocol

7.29. Paragraph 11.3 of China's Accession Protocol states that "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."

7.30. The complainants assert that, in 2012, China imposed export duties on 363 products, including 58 rare earths products, 15 tungsten products[77], and nine molybdenum products.[78] The complainants submit that these latter 82 products are not identified in Annex 6 of China's Accession Protocol, and that China's imposition of export duties on these products is therefore inconsistent with Paragraph 11.3 of its Accession Protocol.

7.31. China does not dispute the complainants' allegation that it has acted inconsistently with Paragraph 11.3 of its Accession Protocol.[79] However, China argues that the obligation in Paragraph 11.3 is subject to the general exceptions in Article XX of the GATT 1994, and submits that the export duties at issue are justified under Article XX(b) of the GATT 1994 because they are "necessary to protect human, animal or plant life or health".

7.32. The complainants respond that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994, and that China has in any event failed to demonstrate that its export duties are necessary to protect human, animal or plant life or health.

7.33. The Panel will begin by determining whether the measures at issue are inconsistent with Paragraph 11.3 of China's Accession Protocol, and will then turn to China's defence under Article XX(b) of the GATT 1994.

7.34. The Panel will begin its analysis with a brief review of the obligation contained in Paragraph 11.3 of China's Accession Protocol. The Panel will then review the evidence provided by the complainants in support of their claim, which is uncontested by China, that China has imposed export duties in violation of this obligation.

7.3.1.1 The obligation in Paragraph 11.3 of China's Accession Protocol

7.35. When China was negotiating its accession to the WTO, some Members raised concerns over taxes and charges that China applied exclusively to exports.[80] As a result, the following legal obligation was included in Paragraph 11.3 of China's Accession Protocol:

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responses to rebut these exhibits. Therefore, they do not raise due process concerns, as do the complainants' late exhibits.

Secondly, unlike the complainants' exhibits, which the Panel does not consider to be necessary for the purposes of rebutting China's arguments, CHN-217 is a legal instrument that, according to China, forms part of its conservation policy. Exhibit CHN-219 is related to China's enforcement "on the ground". In the Panel's opinion, this evidence is "necessary" under Paragraph 7 of the Panel's Working Procedures to enable China to rebut the complainants' arguments. Indeed, these exhibits respond directly to questions asked to China by the Panel. The Panel also believes that consideration of these exhibits is important in discharging its obligation under Article 11 of the DSU to make an "objective assessment of the matter". Exhibit CHN-217 is not a media report or an expert opinion offering an interpretation of the facts, but a part of the regulatory structure that forms context to the challenged measures. The Panel therefore considers that it is appropriate to refer to it in its findings.

[77] The complainants exclude China's application of an export duty on tungsten ores and concentrates (HS No. 2611.00) from the scope of their claim, on the grounds that this product is identified in Annex 6 of China's Accession Protocol and that the export duty rate does not exceed the maximum level listed in Annex 6. See European Union's first written submission, para. 48, Japan's first written submission, footnote 77, and the United States' first written submission, footnote 76.

[78] The individual products at issue are specified below at para. 7.46.

[79] China's response to Panel question No. 9.

[80] Paragraphs 155 and 156 of China's Working Party Report read as follows:

> 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.

7.36. In *China – Raw Materials*, the Appellate Body saw no ambiguity in the text of Paragraph 11.3 of China's Accession Protocol:

> By its terms, Paragraph 11.3 of China's Accession Protocol requires China to "eliminate all taxes and charges applied to exports" unless one of the following conditions is satisfied: (i) such taxes and charges are "specifically provided for in Annex 6 of [China's Accession] Protocol"; or (ii) such taxes and charges are "applied in conformity with the provisions of Article VIII of the GATT 1994".[81]

7.37. Thus, Paragraph 11.3 of China's Accession Protocol requires China to eliminate taxes and charges applied to exports unless such taxes and charges are "specifically provided for in Annex 6" of China's Accession Protocol. Annex 6 in turn "specifically provides for" maximum export duty levels on 84 listed products. Annex 6 is entitled "Products Subject to Export Duty". It contains a table listing the 84 different products (each identified by an eight-digit Harmonized System (HS) number and product description), and specifies a maximum export duty rate for each.

7.38. Following the table listing the 84 different products that are subject to the continued imposition of export duties, Annex 6 includes the following text (Note to Annex 6):

> 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.

7.39. In *China – Raw Materials*, the Appellate Body confirmed the ordinary meaning of the terms of the Note to Annex 6:

> The Note to Annex 6 clarifies that the maximum rates set out in Annex 6 "will not be exceeded" and that China will "not increase the presently applied rates, except under exceptional circumstances". The Note therefore indicates that China may increase the "presently applied rates" on the 84 products listed in Annex 6 to levels that remain within the maximum levels listed in the Annex.[82]

7.40. The second sentence of Paragraph 1.2 of China's Accession Protocol states that provisions of the Protocol are "an integral part of the WTO Agreement". Thus, the provisions of the Accession Protocol, including Paragraph 11.3, are enforceable in WTO dispute settlement proceedings.[83]

7.3.1.2 The measures at issue

7.41. The measures at issue in this dispute are the so-called temporary export duties that China imposed on various rare earths, tungsten, and molybdenum products for 2012. China's system of export duties is composed of framework legislation, implementing regulations, other applicable laws and the specific annual measures imposing the export duties. The Panel recalls in this respect that the panel and the Appellate Body in *China – Raw Materials* also made findings on a series of

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> Some members of the Working Party raised concerns over taxes and charges applied exclusively to exports. In their view, such taxes and charges should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Draft Protocol.
>
> The representative of China noted that the majority of products were free of export duty, although 84 items, including tungsten ore, ferrosilicon and some aluminum products, were subject to export duties. He noted that the customs value of exported goods was the F.O.B. price of the goods.

[81] Appellate Body Reports, *China – Raw Materials*, para. 280.
[82] Appellate Body Reports, *China – Raw Materials*, para. 284.
[83] See, e.g. Panel Reports, *China – Raw Materials*, para. 7.114.

measures.[84] Accordingly, the Panel will make findings and recommendations with respect to the series of measures comprising the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific annual measures imposing the export duties existing at the date of the Panel's establishment.

7.42. Chapter V, Article 53 of the *Customs Law of People's Republic of China* gives China's Customs the authority to collect export duties.[85]

7.43. The *Regulations on Import and Export Duties*[86] provide that China's Customs authority shall "collect import or export duties on all goods permitted by the People's Republic of China to be imported into or exported out of the Customs territory".[87] The Tariff Commission of China, which is established by the State Council, has various responsibilities referred to specifically in the *Regulations on Import and Export Duties.* According to Article 4 of the *Regulations on Import and Export Duties*, the Tariff Commission is responsible for adjusting and interpreting tariff items and duty rates, as well as for "determining the goods subject to temporary duty rates" and "determining the application of duty rates under special circumstances". Article 9 of the *Regulations on Import and Export Duties* states that "[d]uty rates on export goods are designed to collect export duty. Temporary duty rates may apply to export goods within a specific time limit". Article 11 states further that: "[w]here there are temporary duty rates on export goods to which the export duty rates are applicable, such temporary duty rates shall apply". Thus, the *Regulations on Import and Export Duties* envisage at least three types of export duty rates in China: (i) "regular" export duty rates which are generally applicable; (ii) "temporary" export duty rates which are established for a limited period of time[88]; and (iii) "special" export duty rates, which are established under special circumstances.[89]

7.44. On 9 December 2011, the Tariff Commission issued the *2012 Tariff Implementation Program (Customs Tariff Commission)*. The *2012 Tariff Implementation Program (Customs Tariff Commission)* took effect on 1 January 2012. The *2012 Tariff Implementation Program (Customs Tariff Commission)* outlines adjustments to export duties, providing that in 2012 the "export tariff" export tax rates in effect for 2011 will remain unchanged.[90] Annex 6 of the *2012 Tariff Implementation Program (Customs Tariff Commission)* is entitled "Table of Duty Rates for Exported Commodities".

7.45. On 23 December 2011, the Customs Administration issued the *2012 Tariff Implementation Plan (General Administration of Customs)*.[91] This instrument came into effect on 1 January 2012, and implemented the aforementioned *2012 Tariff Implementation Program (Customs Tariff Commission)*.[92] The export duties imposed on rare earths, tungsten, and molybdenum are identical in the two measures.

7.46. The *Table of Duty Rates for Exported Commodities* contained in Annex 6 of the *2012 Tariff Implementation Program* identifies, by HS number, 363 products subject to export duties beginning 1 January 2012.[93] The complainants have provided a copy of the relevant parts of the *Table of Duty Rates for Exported Commodities* in the form of Exhibit JE-45. The complainants have also reproduced the relevant information therein in a "Chart of Raw Materials Subject to Export Duties", submitted as Exhibit JE-6. These exhibits set forth the 'temporary' export duty rates imposed on 58 rare earths products, 15 tungsten products[94], and nine molybdenum products.

[84] Panel Reports, *China – Raw Materials*, para. 7.33; see also Appellate Body Reports, *China – Raw Materials*, para. 266.

[85] *Customs Law of the People's Republic of China*, adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, amended 8 July 2000, Exhibit JE-54.

[86] *Regulations of the People's Republic of China on Import and Export Duties* (Order of the State Council No. 392, adopted at the 26th Executive Meeting of the State Council on 29 October 2003, effective 1 January 2004), (Exhibit JE-46).

[87] *Regulations on Import and Export Duties*, Article 2 (Exhibit JE-46).

[88] *Regulations on Import and Export Duties*, Articles 4, 9 and 11 (Exhibit JE-46).

[89] *Regulations on Import and Export Duties*, Article 4 (Exhibit JE-46).

[90] *2012 Tariff Implementation Program (Customs Tariff Commission)*, Section A in the second part (Exhibit JE-45).

[91] *2012 Tariff Implementation Plan (General Administration of Customs)*, (Exhibit JE-47).

[92] *2012 Tariff Implementation Program (Customs Tariff Commission)*, (Exhibit JE-45).

[93] *2012 Tariff Implementation Program (Customs Tariff Commission)*, Annex 6 (Exhibit JE-45).

[94] As we have already noted, the complainants exclude China's application of an export duty on tungsten ores and concentrates (HS No. 2611.00) from the scope of their claim, because this product is

These 82 products, along with the individual rates ranging from 5 to 25% *ad valorem*, are as follows:

Raw Material	Duty List Item No.	Product Name (Short Form)	HS Code	"Temporary" Export Duty Rate for 2012
Rare Earths	29	Rare earth ores	2530.9020	15%
	47	Thorium	2612.2000	10%
	87	Neodymium	2805.3011	25%
	88	Dysprosium	2805.3012	25%
	89	Terbium	2805.3013	25%
	90	Lanthanum	2805.3014	25%
	91	Cerium	2805.3015	25%
	92	Praseodymium	2805.3016	25%
	93	Yttrium	2805.3017	25%
	94	Other rare earths	2805.3019	25%
	95	Battery quality rare earths	2805.3021	25%
	96	Other mixed rare earths	2805.3029	25%
	123	Cerium oxide	2846.1010	15%
	124	Cerium hydroxide	2846.1020	15%
	125	Cerium carbonate	2846.1030	15%
	126	Other cerium compounds	2846.1090	15%
	127	Yttrium oxide	2846.9011	25%
	128	Lanthanum oxide	2846.9012	15%
	129	Neodymium oxide	2846.9013	15%
	130	Europium oxide	2846.9014	25%
	131	Dysprosium oxide	2846.9015	25%
	132	Terbium oxide	2846.9016	25%
	133	Praseodymium oxide	2846.9017	25%
	134	Other rare earth oxides	2846.9019	15%
	135	Terbium chloride	2846.9021	25%
	136	Dysprosium chloride	2846.9022	25%
	137	Lanthanum chloride	2846.9023	25%
	138	Neodymium chloride	2846.9024	15%
	139	Praseodymium chloride	2846.9025	15%
	140	Yttrium chloride	2846.9026	15%
	141	Mixed rare earth chlorinates	2846.9028	15%
	142	Unmixed rare earth chlorinates	2846.9029	15%
	143	Terbium fluoride	2846.9031	15%
	144	Dysprosium fluoride	2846.9032	15%
	145	Lanthanum fluoride	2846.9033	15%
	146	Neodymium fluoride	2846.9034	15%
	147	Praseodymium fluoride	2846.9035	15%
	148	Yttrium fluoride	2846.9036	15%
	149	Other rare earth fluorides	2846.9039	15%
	150	Lanthanum carbonate	2846.9041	15%
	151	Terbium carbonate	2846.9042	25%
	152	Dysprosium carbonate	2846.9043	25%
	153	Neodymium carbonate	2846.9044	15%
	154	Praseodymium carbonate	2846.9045	15%
	155	Yttrium carbonate	2846.9046	15%
	156	Mixed rare earth carbonate	2846.9048	15%
	157	Unmixed rare earth carbonate	2846.9049	15%
	158	Other lanthanum compounds	2846.9091	25%
	159	Other neodymium compounds	2846.9092	25%
	160	Other terbium compounds	2846.9093	25%
	161	Other dysprosium compounds	2846.9094	25%
	162	Other praseodymium compounds	2846.9095	25%
	163	Other yttrium compounds	2846.9096	25%
	164	Other rare earth compounds	2846.9099	25%
	232	NdFeB magnet film	7202.9911	20%
	233	Other NdFeB alloys	7202.9919	20%

identified in Annex 6 of China's Accession Protocol and the export duty rate does not exceed the maximum level listed in Annex 6.

Raw Material	Duty List Item No.	Product Name (Short Form)	HS Code	"Temporary" Export Duty Rate for 2012
	234	Ferroalloy containing rare earths	7202.9991	25%
	235	Other ferroalloys	7202.9999	20%
Tungsten	70	Tungsten ash	2620.9910	10%
	105	Tungsten acid	2825.9011	5%
	106	Tungsten trioxides	2825.9012	5%
	107	Other tungsten oxides and hydroxides	2825.9019	5%
	118	APT	2841.8010	5%
	119	Sodium tungstate	2841.8020	5%
	120	Calcium tungstate	2841.8030	5%
	121	Ammonium metatungstate	2841.8040	5%
	122	Other tungstates	2841.8090	5%
	165	Tungsten carbide	2849.9020	5%
	227	Ferro-tungsten	7202.8010	20%
	228	Ferro-silico-tungsten	7202.8020	20%
	347	Tungsten powder	8101.1000	5%
	348	Unwrought tungsten	8101.9400	5%
	349	Tungsten waste	8101.9700	15%
Molybdenum	48	Roasted molybdenum ores & concentrates	2613.1000	15%
	49	Other molybdenum ores & concentrates	2613.9000	15%
	104	Molybdenum oxides and hydroxides	2825.7000	5%
	116	Ammonium molybdate	2841.7010	5%
	117	Other molybdates	2841.7090	5%
	226	Ferro-molybdenum	7202.7000	20%
	350	Molybdenum powder	8102.1000	5%
	351	Unwrought molybdenum	8102.9400	5%
	352	Molybdenum scrap	8102.9700	15%

7.47. The Panel considers that these export duties constitute, by definition, "taxes and charges applied to exports" within the meaning of Paragraph 11.3 of China's Accession Protocol. China has not argued otherwise. The Panel observes that none of the 82 products at issue are included among the 84 products identified by HS number in Annex 6 of China's Accession Protocol. The Panel notes that China does not dispute the complainants' assertions or evidence regarding the application of these "temporary" export duties, and that China does not dispute that the measures at issue are inconsistent with Paragraph 11.3 of its Accession Protocol.

7.3.1.3 Conclusion

7.48. In the light of the foregoing, the Panel concludes that in 2012, China imposed export duties ranging from 5 to 25% *ad valorem* on 58 rare earths products, 15 tungsten products, and nine molybdenum products.[95] The Panel concludes that these products are not included in Annex 6 of China's Accession Protocol. Accordingly, the Panel finds that China's imposition of export duties[96] on those products is inconsistent with Paragraph 11.3 of its Accession Protocol.

7.3.2 China's defence under Article XX(b) of the GATT 1994

7.49. China argues that the obligation in Paragraph 11.3 of its Accession Protocol is subject to the general exceptions in Article XX of the GATT 1994, and that the export duties at issue are justified under Article XX(b) of the GATT 1994 because they are necessary to protect human, animal or plant life or health.

7.50. The complainants respond that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994, and that the export duties at issue are in any event not justified under Article XX(b) of the GATT 1994 because

[95] These products are specified above at para. 7.46.

[96] In view of the nature of the export duty system described above, the Panel's finding is with respect to the series of measures comprising the relevant framework legislation, the implementing regulations, other applicable laws and the specific annual measures imposing the export duties existing at the date of the Panel's establishment.

China has failed to demonstrate that they are necessary to protect human, animal or plant life or health.

7.51. The Panel will begin by considering whether the obligation in Paragraph 11.3 of China's Accession Protocol is subject to the general exceptions in Article XX of the GATT 1994.

7.52. The parties have submitted extensive arguments on this issue. The Panel also received extensive arguments on this same issue from the third parties. Argentina[97] and the Russian Federation[98] take the position that the obligation in Paragraph 11.3 of China's Accession Protocol is subject to the general exceptions in Article XX of the GATT 1994. Australia[99], Canada[100], Norway[101], and Turkey[102] agree with the complainants' position. Korea[103] and Saudi Arabia[104] submit that the Panel should be guided by the relevant findings of the Appellate Body in *China – Raw Materials*. Brazil considers that while "restrictions on the Member's right to promote its sustainable development cannot be presumed or inferred"[105], it "takes no definite position"[106] on the issue, and clarifies that "it does not necessarily disagree with the ultimate conclusions of the Panel and the Appellate Body in *China-Raw Materials* on the application of Article XX in that case".[107] Colombia "takes no definitive position on the issue of whether Paragraph 11.3 of China's Accession Protocol is subject to Article XX", and considers that "there are compelling arguments to rule on either way".[108]

7.3.2.1 Whether the obligation in Paragraph 11.3 of China's Accession Protocol is subject to the general exceptions in Article XX of the GATT 1994

7.3.2.1.1 Adopted panel and Appellate Body reports addressing the same legal issue

7.53. In *China – Raw Materials*, the complainants in that case[109] claimed that China imposed export duties on certain raw materials, and that this violated Paragraph 11.3 of its Accession Protocol. In response, China argued that the obligation in Paragraph 11.3 is subject to the general exceptions in Article XX of the GATT 1994. Following a lengthy analysis of this issue, the panel concluded that "there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of the Accession Protocol".[110] China appealed that finding. Following its own lengthy analysis of this issue, the Appellate Body ultimately found that "a proper interpretation of Paragraph 11.3 of China's Accession Protocol does not make available to China the exceptions under Article XX of the GATT 1994", and accordingly upheld the panel's finding that "there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of the Accession Protocol".[111] The DSB adopted the Appellate Body reports in *China – Raw Materials*, and the Panel Reports as modified by the Appellate Body, on 22 February 2012.[112]

7.54. In the present dispute, China requests that the Panel re-examine the same question of law, and find that Article XX of the GATT 1994 is available to justify a violation of Paragraph 11.3 of its Accession Protocol.[113] In support of its position, China presents arguments that are, in its view, "new arguments that have not been asserted previously, or arguments which were neither argued nor addressed fully by the panel and the Appellate Body in *China – Raw Materials*".[114] In the light of these arguments, China asks the Panel to "undertake its own independent interpretation" of the

[97] See, e.g. Argentina's response to Panel question No. 1.
[98] Russian Federation's oral statement.
[99] See, e.g. Australia's response to Panel question No. 1.
[100] See, e.g. Canada's response to Panel question No. 1.
[101] See Norway's oral statement.
[102] See, e.g. Turkey's oral statement.
[103] Korea's oral statement, para. 12.
[104] Saudi Arabia's response to Panel question No. 1.
[105] Brazil's response to Panel question No. 1.
[106] Brazil's response to Panel question No. 1.
[107] Brazil's oral statement, para. 4.
[108] Colombia's oral statement, para. 33.
[109] The complainants in *China – Raw Materials* were the European Union, Mexico, and the United States.
[110] Panel Reports, *China – Raw Materials*, para. 7.159.
[111] Appellate Body Reports, *China – Raw Materials*, para. 307.
[112] WT/DSB/M/112, para. 125.
[113] China's first written submission, paras. 408-461.
[114] China's first written submission, paras. 416 and 460.

issue.[115] In this respect, China asked the Panel to issue a preliminary ruling on the availability, to China, of general exceptions enshrined in the GATT 1994, more specifically the general exceptions enshrined in Article XX of the GATT 1994, to excuse a potential violation of Paragraph 11.3 of China's Accession Protocol. China requested the Panel to make such a ruling on an "expedited basis".[116] We declined China's request for a preliminary ruling on the grounds that the request concerned a complex issue of substance as opposed to an issue of procedure or jurisdiction, and we required sufficient time to carefully consider the extensive argumentation of the parties and third parties. Having now considered carefully the argumentation, we set out our ruling on this matter below.

7.55. At the outset, the Panel recalls that, according to Article 17.14 of the DSU, "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute" unless the DSB decides by consensus not to adopt it. In *US – Stainless Steel (Mexico)*, the Appellate Body stated that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case". In that case, the Appellate Body expressed its deep concern over the panel's decision to depart from prior Appellate Body rulings on the same question of law:

> Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.[117]
>
> In the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the DSU, the Appellate Body is vested with the authority to review "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, Article 17.13 provides that the Appellate Body may "uphold, modify or reverse" the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members" rights and obligations under the covered agreements as contemplated under the DSU. Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted

[115] China's first written submission, para. 460.

[116] China's first written submission, paras. 6 and 409. See section 1.3.3 above.

[117] (*footnote original*) See H. Lauterpacht, "The so-called Anglo-American and Continental Schools of Thought in International Law" (1931) 12 *British Yearbook of International Law* 53, who points out that adherence to legal decisions "is imperative if the law is to fulfil one of its primary functions, i.e. the maintenance of security and stability". Consistency of jurisprudence is valued also in dispute settlement in other international fora. In this respect we note the Decision of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14/1-A, *Prosecutor* v. *Aleksovski*, Judgement of 24 March 2000, para. 113, which states that "the right of appeal is ... a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. This will not be achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and decide the law as it sees fit." Furthermore, we note the Decision of 21 March 2007 of the ICSID (International Centre for Settlement of Investment Disputes) Arbitration Tribunal, Case No. ARB/05/07, *Saipem S.p.A.* v. *The People's Republic of Bangladesh*, ICSID IIC 280 (2007), p. 20, para. 67, which states that "[t]he Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."

> Appellate Body reports is not limited to the application of a particular provision in a specific case.
>
> We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above.[118]

7.56. In *US – Continued Zeroing*, the Appellate Body reiterated that ensuring "security and predictability" in the dispute settlement system requires an adjudicatory body, absent "cogent reasons", to "resolve the same legal question in the same way in a subsequent case".[119]

7.57. The Panel is well aware of the "distinct roles"[120] that panels and the Appellate Body play, and is mindful of the fact that China's request for a re-examination of the issue comes shortly after the DSB adopted the Appellate Body's ruling on the same legal issue.[121] The Panel has therefore given very careful consideration to how it should proceed in these circumstances and has been guided by the following considerations.

7.58. First, where a party asks a panel to deviate from a prior Appellate Body finding on a question of law on the basis of novel legal arguments, a full exploration of those arguments may assist the Appellate Body in the event of an appeal, particularly where those arguments raise complex legal issues. In this regard, there have been cases in which the Appellate Body found that it could not resolve certain complex legal issues on appeal in the absence of a "full exploration of the issues" before the Panel.[122] Insofar as its full exploration of novel legal arguments presented by a party could assist the Appellate Body in the event of an appeal, a panel might thereby "assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" as mandated by Article 11 of the DSU.

7.59. Second, in deciding how to proceed, the Panel has taken into account the following particular circumstances of this dispute: (i) no party or third party has argued that the Panel is legally precluded from re-examining this issue; (ii) the parties to this dispute are not identical to the parties in *China – Raw Materials* (which did not include Japan but did include another Member); (iii) this legal issue is "a central aspect of this dispute" that is "of fundamental systemic importance"[123], as evidenced by the extensive argumentation of the issue by the parties as well as many of the third parties in this dispute; and (iv) it is the Panel's view that China's argument regarding the systemic relationship between the provisions of its Accession Protocol and those of the GATT 1994 is a new argument, and one that raises complex legal issues.

7.60. The foregoing considerations have led the Panel to thoroughly examine the issue in the light of the specific arguments developed by China in the context of this dispute. However, none of these considerations lead the Panel to view its role as conducting a so-called *de novo*[124] determination of the issue, in the sense of according zero deference to the panel and Appellate Body reasoning, and ultimate finding, in *China – Raw Materials*. Such an approach would be difficult to reconcile with the "distinct roles"[125] that panels and the Appellate Body play. Thus, in re-examining this issue, the Panel will generally confine its analysis to the specific arguments that have been presented to us by China in this dispute. Furthermore, in the context of addressing those specific arguments, we will attempt to discern whether they are the same arguments that were already presented to, and rejected by, the panel and the Appellate Body in *China – Raw Materials*. In addressing these specific arguments, some of which are new and some of which appear to be similar to those addressed by the panel and the Appellate Body in *China – Raw Materials*, we may be led to repeat some of the same points made by the panel and the Appellate

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[118] Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 160-162.
[119] Appellate Body report, *US – Continued Zeroing*, para. 362.
[120] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.
[121] China's request for a preliminary ruling is contained in its first written submission of 20 December 2012, and the DSB adopted the Appellate Body Reports in *China – Raw Materials* earlier in the same year, on 22 February 2012. WT/DSB/M/112, para. 125.
[122] See, e.g. Appellate Body Reports, *EC – Asbestos*, para. 82, *EC – Export Subsidies on Sugar*, footnote 537 to para. 339, and *Canada – Renewable Energy / Feed-in Tariff Program*, paras. 5.224 and 5.244.
[123] See, e.g. Argentina's third-party submission, para. 4, and Brazil's third-party oral statement.
[124] China's first written submission, para. 448.
[125] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.

Body in *China – Raw Materials*. The fact that we may refer to certain elements of the panel or Appellate Body reasoning in *China – Raw Materials*, but not others, should not be understood to reflect any disagreement with those other elements of the reasoning. We see nothing that would be gained if we were to reproduce all of the reasoning of the panel and Appellate Body in *China – Raw Materials* in the context of responding to the specific arguments presented by China in this dispute.

7.61. Finally, when reviewing China's specific arguments, we consider the relevant legal question to be whether those arguments present "cogent reasons" for departing from the prior adopted finding, by the Appellate Body, on the same question of law presented to this Panel. The Appellate Body has not attempted to define the concept of "cogent reasons". The word "cogent" means "[a]ble to compel assent or belief; *esp.* (of an argument, explanation, etc.) persuasive, expounded clearly and logically, convincing".[126] The Panel considers that the expression "cogent reasons" may be understood as referring generally to a high threshold.[127]

7.3.2.1.2 Overview of China's arguments in this dispute

7.62. In its first written submission, China argues that while there is no explicit textual language linking Paragraph 11.3 of its Accession Protocol to Article XX of the GATT 1994, "such textual silence does not mean that it was the Members' common intention that no such defence should be available to China".[128] China then presents three specific arguments in support of its position that the obligation in Paragraph 11.3 of its Accession Protocol is subject to the general exceptions in Article XX of the GATT 1994. China presents its arguments under the following headings: (i) "Paragraph 11.3 of China's *Accession Protocol* has to be treated as an integral part of the GATT 1994"[129]; (ii) "The 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*"[130]; and (iii) "An appropriate holistic interpretation, taking due account

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[126] *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 443.

[127] We note that the Appellate Body introduced the concept of "cogent reasons" in *US – Stainless Steel (Mexico)*, and the footnote accompanying this passage of the Appellate Body report (reproduced at footnote 117 above) referred to the Judgement of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor* v. *Aleksovski.* While the Appeals Chamber in that case did not attempt to define the concept of "cogent reasons" in the abstract, the following passage from that judgement suggests that the threshold is high:

> Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law." (Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-14/1-A, *Prosecutor* v. *Aleksovski*, Judgement of 24 March 2000, para. 108 (internal footnote omitted).)

Likewise, it appears that the European Court of Human Rights has adopted a high threshold for finding that "cogent reasons" exist for it to depart from one of its prior decisions. In the *Cossey Case*, the Court stated that:

> It is true that … the Court is not bound by its previous judgments … However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions. (European Court of Human Rights, Cossey Judgement of 27 September 1990, Series A, vol. 184, para. 35.)

[128] China's first written submission, para. 411.

[129] China's first written submission, Section V.C, paras. 422-435. See also China's rebuttal submission on the availability of Article XX of the GATT 1994, Section III, paras. 13-34.

[130] China's first written submission, Section V.D, paras. 436-444. See also China's rebuttal submission on the availability of Article XX of the GATT 1994, Section IV, paras. 35-42.

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".[131]

7.3.2.1.3 China's argument regarding the interpretation of omissions in the covered agreements

7.63. In its first written submission, China "accepts the Appellate Body's findings in *China – Raw Materials* that there is *no explicit textual link* in China's *Accession Protocol* that would make the exceptions of Article XX of the GATT 1994 available for excusing a potential violation of Paragraph 11.3 of China's *Accession Protocol*".[132] However, China argues that while there is no explicit textual link between Paragraph 11.3 of its Accession Protocol and Article XX of the GATT 1994, "such textual silence does not mean that it was the Members' common intention that no such defence should be available to China".[133] In this regard, China quotes the following passage from the Appellate Body report in *US – Carbon Steel*:

> [T]he 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.[134]

7.64. China has elsewhere referred to this passage from *US – Carbon Steel* in its submissions to this Panel.[135] China has also made various statements to the same effect. For example, it has argued that "[t]he mere fact" that Paragraph 11.3 of its Accession Protocol does not explicitly reference Article XX of the GATT 1994 "is not a sufficient basis" to deny its applicability.[136] In its third-party submission, Brazil comments on "some aspects regarding the interpretation of omissions in the covered agreements", and likewise refers to various panel and Appellate Body reports interpreting omissions and silences in the covered agreements, including this same passage from the Appellate Body report in *US – Carbon Steel.*[137] Brazil submits that "the mere fact" that there is no specific reference to the right of a member to regulate trade in a manner consistent with its WTO obligations "should not be automatically assumed" to mean that Article XX is not available to China.[138] China states that it agrees with Brazil's statement that whether there is an explicit reference in Paragraph 11.3 of China's Accession Protocol to the WTO Agreement is not "dispositive" of whether China may invoke Article XX of the GATT 1994 to justify a potential violation of its export-duty commitments.[139] In this regard, China submits that "[i]t cannot be stressed often enough that textual silence in a treaty provision is not, in and of itself, dispositive".[140]

7.65. The Panel observes that in *China – Raw Materials*, the Appellate Body did not refer to its approach to interpreting "silence" in *US – Carbon Steel*. In the interest of undertaking a full exploration of the issues raised by China's specific arguments, we have undertaken a review of the Appellate Body's analysis in *China – Raw Materials* in the light of the Appellate Body's analysis in *US – Carbon Steel*. We have done so to determine whether there is any incompatibility, as the argument of China implies, between the Appellate Body's position in *China – Raw Materials* and *US – Carbon Steel*. In the Panel's view, there is none.

7.66. In *US – Carbon Steel*, the Appellate Body stated that "[t]he 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 … [s]uch silence does not exclude the possibility that the requirement was intended to be included by implication."[141] In *China – Raw Materials*, the Appellate Body did not reach its conclusion on the non-availability of Article XX of

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[131] China's first written submission, Section V.E, paras. 445-458. See also China's rebuttal submission on the availability of Article XX of the GATT 1994, Section IV, paras. 43-55.
[132] China's first written submission, para. 411. (emphasis original)
[133] China's first written submission, para. 411.
[134] Appellate Body Report, *US – Carbon Steel*, para. 65.
[135] China's rebuttal submission on the availability of Article XX of the GATT 1994, para. 26.
[136] China's first written submission, para. 415.
[137] Brazil's third-party submission, paras. 5-21.
[138] Brazil's third-party submission, para. 18.
[139] China's rebuttal submission on the availability of Article XX of the GATT 1994, para. 27.
[140] China's rebuttal submission on the availability of Article XX of the GATT 1994, para. 26.
[141] Appellate Body Report, *US – Carbon Steel*, para. 65.

the GATT 1994 to Paragraph 11.3 of China's Accession Protocol by treating the absence of an express reference to Article XX as "dispositive". Rather, the Appellate Body explained that this conclusion followed from an analysis that proceeded in a "holistic manner".[142] In the course of its analysis, the Appellate Body expressly considered: (i) the rules of treaty interpretation that apply to China's Accession Protocol[143]; (ii) a prior Appellate Body Report that provided guidance on the availability of Article XX as a defence to claims under China's Accession Protocol (i.e. *China – Publications and Audiovisual Products*[144]); (iii) the ordinary meaning of the terms of Paragraph 11.3[145], including the fact that Paragraph 11.3 refers to justifications under GATT Article VIII but not GATT Article XX; (iv) the ordinary meaning of the terms of Annex 6 of China's Accession Protocol[146]; (v) China's argument regarding the applicability of Article XX to Article VIII of the GATT, which is referenced in Paragraph 11.3[147]; (vi) the context provided by the wording of other provisions of China's Accession Protocol, including Paragraphs 5.1, 11.1 and 11.2, as well as the context provided by other provisions of China's Working Party Report, including Paragraphs 155, 156, 169, and 170[148]; (vii) the context provided by other provisions of the WTO Agreement[149]; and (viii) the preamble of the WTO Agreement.[150] Thus, the Appellate Body did not treat the absence of an express reference to Article XX as "dispositive".

7.67. In fact, upon closer examination, there are some striking parallels between the Appellate Body's reasoning in the earlier *US – Carbon Steel* case and its reasoning in *China – Raw Materials*. First, both cases involved a similar problem of treaty interpretation. In *US – Carbon Steel*, the question was whether the *de minimis* standard contained in Article 11.9 of the SCM Agreement, which applies to the investigation phase of a countervailing duty proceeding, is applicable to Article 21.3 of the SCM Agreement, which applies to sunset reviews, even though Article 21.3 does not expressly refer to Article 11.9; the Appellate Body ultimately found that it is not. In *China – Raw Materials*, the question was whether the general exceptions contained in Article XX of the GATT 1994 are applicable to Paragraph 11.3 of China's Accession Protocol, even though Paragraph 11.3 does not expressly refer to Article XX; the Appellate Body ultimately concluded that they are not.

7.68. Second, the analysis in both cases began with the text of the provision at issue. In *US – Carbon Steel*, the Appellate Body commenced by observing that the text of Article 21.3 of the SCM Agreement does not make any express reference to the *de minimis* standard set forth in Article 11.9 of the SCM Agreement.[151] In *China – Raw Materials*, the Appellate Body began by determining whether there is language in Paragraph 11.3 or Annex 6 of China's Accession Protocol that could be read as indicating that China can have recourse to the provisions of Article XX of the GATT 1994.[152]

7.69. Third, the analysis in both cases attached weight to the technique of cross-referencing as reflected in other provisions of the instrument in question. In *US – Carbon Steel*, the Appellate Body observed that "the technique of cross-referencing is frequently used in the SCM Agreement", and explained that "[t]hese cross-references suggest to us that, when the negotiators of the SCM Agreement intended that the disciplines set forth in one provision be applied in another context, they did so expressly"; the Appellate Body observed that Article 11.9 is specifically referred to in Article 15.3 of the SCM Agreement, and noted that the provisions of Article 11 more generally are referred to in a number of other provisions of the SCM Agreement; the Appellate Body reasoned that "[i]n the light of the many express cross-references made in the SCM Agreement, we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9."[153] In *China – Raw Materials*, the Appellate Body agreed with 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'" and identified examples of several

[142] Appellate Body Reports, *China – Raw Materials*, para. 307.
[143] Appellate Body Reports, *China – Raw Materials*, para. 278.
[144] Appellate Body Reports, *China – Raw Materials*, para. 304.
[145] Appellate Body Reports, *China – Raw Materials*, paras. 279-280.
[146] Appellate Body Reports, *China – Raw Materials*, paras. 281-287.
[147] Appellate Body Reports, *China – Raw Materials*, paras. 288-290.
[148] Appellate Body Reports, *China – Raw Materials*, paras. 291-299.
[149] Appellate Body Reports, *China – Raw Materials*, para. 303.
[150] Appellate Body Reports, *China – Raw Materials*, paras. 305-306.
[151] Appellate Body Report, *US – Carbon Steel*, para. 64.
[152] Appellate Body Reports, *China – Raw Materials*, paras. 279-284.
[153] Appellate Body Report, *US – Carbon Steel*, para. 69.

provisions in China's Accession Protocol and the WTO covered agreements, such as Article 3 of the TRIMs Agreement, that expressly cross-reference Article XX of the GATT 1994; the Appellate Body reasoned that "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".[154]

7.70. Fourth, the analysis in both cases involved an inference drawn from the absence of a cross-reference in one paragraph of an article that is contained in one or more immediately adjacent paragraphs of the same article. In *US – Carbon Steel*, and as part of its analysis of the use of cross-references in the SCM Agreement, the Appellate Body drew an inference from the cross-reference contained in Article 21.4, a paragraph of Article 21 that formed part of the "immediate context" of Article 21.3, the provision at issue.[155] In *China – Raw Materials*, the Appellate Body drew an inference from the inclusion of an express cross-reference to the GATT 1994, found in both Paragraphs 11.1 and 11.2 of China's Accession Protocol, but not in Paragraph 11.3.[156]

7.71. Finally, the analysis in both cases explained why consideration of the need to strike an overall balance between WTO rights and obligations did not provide specific guidance on the interpretative problem at issue. In *US – Carbon Steel*, the Appellate Body concluded that Part V of the SCM Agreement "is aimed at striking a balance" between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so, but that "[w]hile Part V strikes such a balance, this alone does not assist us" in the task of determining whether the 1% *de minimis* standard in Article 11.9 is intended to be applied in reviews carried out pursuant to Article 21.3.[157] In *China – Raw Materials*, the Appellate Body concluded that the WTO Agreement "reflect[s] the balance struck by WTO Members between trade and non-trade-related concerns", but that "none of the objectives listed above, 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.[158]

7.72. In the light of the foregoing, we fail to see any incompatibility between the Appellate Body's analysis in *China – Raw Materials* and its earlier analysis in *US – Carbon Steel.* Rather, we find striking similarities. Accordingly, the Panel finds that China's reliance on *US – Carbon Steel* is misplaced and its argument that "textual silence in a treaty provision is not, in and of itself, dispositive" cannot be regarded as a "cogent reason" for departing from the Appellate Body's finding that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994.

7.3.2.1.4 China's argument regarding the systemic relationship between the provisions of China's Accession Protocol and those of the GATT 1994

7.73. China's next specific argument is based on the systemic relationship between the provisions of post-1994 accession protocols and the GATT 1994.

7.74. In *China – Raw Materials*, the panel and the Appellate Body both engaged in an in-depth analysis of the series of arguments that China presented in support of its position that Article XX of the GATT 1994 is available as a defence for measures found to be inconsistent with Paragraph 11.3 of its Accession Protocol. In the context of its analysis, the panel in *China – Raw Materials* remarked that Members "could have agreed that China's export duty commitments were an integral part of China's commitments under the GATT 1994", for example "by incorporating China's export duties commitments into China's GATT 1994 Schedule", in which case Article XX would have been applicable.[159]

7.75. In this case, China presents the novel argument that Members *did* make Paragraph 11.3, along with various other provisions of its Accession Protocol, an "integral part" of the

[154] Appellate Body Reports, *China – Raw Materials*, para. 303.
[155] Appellate Body Report, *US – Carbon Steel*, para. 72.
[156] Appellate Body Reports, *China – Raw Materials*, para. 293.
[157] Appellate Body Report, *US – Carbon Steel*, para. 74.
[158] Appellate Body Reports, *China – Raw Materials*, para. 306.
[159] Panel Reports, *China – Raw Materials*, para. 7.140.

GATT 1994.[160] In presenting this argument, China initially argued that Paragraph 11.3 is an integral part of the GATT 1994 on the grounds that it has an "intrinsic relationship" with the GATT 1994. China subsequently elaborated on the basis for its argument, in the context of responding to the complainants' arguments that China's "intrinsic relationship" theory lacked any basis in the text of the covered agreements, and in China's responses to questions from the Panel. In this regard, China identified two textual bases for its view that provisions of an accession protocol can be deemed as integral parts of one or more of the Multilateral Trade Agreements annexed to the Marrakesh Agreement (in this case, the GATT 1994). According to China, the first textual basis in support of its overall argument regarding the relationship between Paragraph 11.3 and the GATT 1994 is Paragraph 1.2 of is Accession Protocol, which states that "[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*".[161] China's second textual basis in support of its overall argument is Article XII:1 of the Marrakesh Agreement, which provides 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."

7.76. The Panel recalls that China argues that "Paragraph 11.3 of China's *Accession Protocol* has to be treated as an integral part of the GATT 1994"[162], and therefore the relevant question before the Panel is the relationship between Paragraph 11.3 of China's Accession Protocol and the GATT 1994. However, as explained above, China arrives at this conclusion by invoking two provisions that relate to the relationship between accession protocols and the "WTO Agreement" more generally. China's overall argument can usefully be broken down into the following underlying premises:

a. The legal effect of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement is to make China's Accession Protocol an "integral part" of the Marrakesh Agreement, and also to make each of the Accession Protocol-specific provisions[163] an integral part of one of the Multilateral Trade Agreements (e.g. GATT 1994) annexed to the Marrakesh Agreement.

b. The determination of *which* Multilateral Trade Agreement(s) (e.g. GATT 1994) a particular provision of the Accession Protocol is an "integral part" must be based on an evaluation of which Multilateral Trade Agreement(s) the provision at issue is "intrinsically" related to. Paragraph 11.3 of China's Accession Protocol contains an obligation regarding trade in goods, and in particular regulating the use of export duties. Therefore, it is "intrinsically related" to the GATT 1994, and in particular the provisions of GATT 1994 regulating the use of export duties – which, in China's view, are Articles II and XI of the GATT 1994. Accordingly, Paragraph 11.3 must be treated as an "integral part" of the GATT 1994. Paragraph 11.3 is therefore subject to the general exceptions in GATT Article XX unless there is explicit treaty language to the contrary.

7.77. It is through this chain of reasoning that China arrives at the conclusion that Paragraph 11.3 of its Accession Protocol is an integral part of the GATT 1994. Accordingly, in order to resolve the issue of whether Paragraph 11.3 is an integral part of the GATT 1994, the Panel needs to analyse the premises above. The Panel will begin by considering the first premise of China's argument above, which concerns the relationship between accession protocols and the WTO Agreement in general. This first premise is that the legal effect of Paragraph 1.2 of China's Accession Protocol and Article XII:1 of the Marrakesh Agreement is to make China's Accession Protocol an "integral part" of the Marrakesh Agreement, and also to make each of the Accession Protocol-specific provisions an integral part of one of the Multilateral Trade Agreements (e.g. GATT 1994) annexed to the Marrakesh Agreement. For the reasons that follow, the Panel is unable to agree with China.

[160] China's first written submission, Section V.C, paras. 422-435. See also China's rebuttal submission on the availability of Article XX of the GATT 1994, Section III, paras. 13-34.

[161] Emphasis added.

[162] China's first written submission, Section V.C, paras. 422-435. See also China's rebuttal submission on the availability of Article XX of the GATT 1994, Section III, paras. 13-34.

[163] China and others have called this sort of provision a "WTO-plus" provision. In this panel report, the Panel will rather use the expression "accession Protocol-specific provision".

7.78. As regards Paragraph 1.2 of its Accession Protocol, China argues that the reference to "the WTO Agreement" in Paragraph 1.2 means the Marrakesh Agreement, and the Multilateral Trade Agreements annexed thereto. In contrast, the complainants argue that the reference to "the WTO Agreement" means the Marrakesh Agreement.

7.79. Paragraph 1.2 of China's Accession Protocol 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." The Preamble of China's Accession Protocol refers to the "WTO Agreement" as "the Marrakesh Agreement Establishing the World Trade Organization." The Decision of the Ministerial Conference of 10 November 2001 (WT/L/432) provides that: "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." In contrast, Paragraph 1.3 of China's Accession Protocol refers explicitly to "the Multilateral Trade Agreements annexed to the WTO Agreement".

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 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* also 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".[164] 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.[165]

7.81. An example, discussed further below, is Paragraph 1 of Part II of China's Accession Protocol, which contains language that, when read together with Article II:7 of the GATT 1994, makes the Schedules annexed to China's Accession Protocol an "integral part" of the GATT 1994. The Panel is persuaded of this interpretation for the following reasons.

7.82. First, the ordinary meaning of the words used in Paragraph 1.2 does not support the interpretation that this language makes the *individual* provisions of the Accession Protocol integral *parts* of different Multilateral Trade Agreements. The second sentence of Paragraph 1.2 provides – in the singular – that "*This Protocol*, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be *an* integral *part* of the WTO Agreement". The ordinary meaning is that the Accession Protocol in its *entirety* is made an integral part of *one* other agreement, i.e. that the Accession Protocol as a whole is made an integral part of the Marrakesh Agreement. The ordinary meaning is not consistent with the view that, in addition, the individual *provisions* thereof are also made integral *parts* of other *agreements* annexed to the Marrakesh Agreement. Support for this interpretation is found in the context offered by other "integration" provisions in the covered agreements. For example, Article II:2 of the Marrakesh Agreement provides that the Multilateral Trade Agreements annexed to the Marrakesh Agreement are made an integral part of the Marrakesh Agreement. This language suggests that each of those instruments, in its entirety, is made an integral part of *one* other agreement, i.e. the Marrakesh Agreement.

[164] (*footnote original*) Panel Reports, para. 7.153.
[165] Appellate Body Reports, *China – Raw Materials*, para. 303.

7.83. Second, paragraph 1 of the GATT 1994 specifies what the GATT 1994 "shall consist of".[166] Paragraph 1 of the GATT 1994 appears to be an exhaustive, closed list. Paragraph 1(b)(ii) refers specifically to the provisions of protocols of accession "that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement". This is consistent with the fact that the Uruguay Round Agreements went beyond trade in goods and, as a result, post-1994 accession protocols cover services and intellectual property issues not covered by the GATT 1994. China's interpretation that Paragraph 11.3 of China's Accession Protocol has to be treated as an integral part of the GATT 1994 is difficult to reconcile with the express terms of paragraph 1, and in particular paragraph 1(b)(ii) of the GATT 1994.

7.84. Third, Paragraph 1 of Part II of China's Accession Protocol provides that "[t]he Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the GATT 1994 and the Schedule of Specific Commitments annexed to the GATS relating to China". Article II:7 of the GATT 1994 provides that [t]he Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement". Read together, these provisions expressly make "[t]he Schedules annexed to this Protocol" an "integral part" of the GATT 1994. There would have been no need to state this explicitly if all GATT-related provisions of the Accession Protocol were implicitly made an "integral part" of the GATT 1994. Moreover, the wording of Paragraph 1 of Part II refers only to "[t]he Schedules annexed to this Protocol", which does not include the obligation contained in Paragraph 11.3 of China's Accession Protocol.

7.85. Fourth, prior panel and Appellate Body reports do not support China's interpretation that the term "the WTO Agreement" as used in Paragraph 1.2 of China's Accession Protocol refers to something other than the Marrakesh Agreement. Although this is the first occasion on which a panel or the Appellate Body has been called upon to interpret the meaning of the terms "the WTO Agreement" as used in Paragraph 1.2 of China's Accession Protocol, we observe that in all prior cases involving the interpretation and application of China's Accession Protocol, panels and the Appellate Body have proceeded on the assumption that Paragraph 1.2 has the following functions: (i) to make the obligations of China's Accession Protocol (and specified provisions of the Working Party Report) enforceable under the DSU; and (ii) to ensure that those obligations are interpreted in accordance with the "customary rules of interpretation of public international law"

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[166] Paragraph 1 reads as follows:

1. The General Agreement on Tariffs and Trade 1994 (GATT 1994) shall consist of:
   (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;
   (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:
      (i) protocols and certifications relating to tariff concessions;
      (ii) protocols of accession (excluding the provisions (*a*) concerning provisional application and withdrawal of provisional application and (*b*) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);
      (iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement;
      (iv) other decisions of the CONTRACTING PARTIES to GATT 1947;
   (c) the Understandings set forth below:
   (i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;
   (ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;
   (iii) Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;
   (iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;
   (v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;
   (vi) Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and
   (d) the Marrakesh Protocol to GATT 1994.

pursuant to Article 3.2 of the DSU.[167] These two functions are fully achieved in interpreting "the WTO Agreement" as a reference to the Marrakesh Agreement. This is because the Marrakesh Agreement is listed in Appendix 1 to the DSU as an agreement covered by the DSU, and hence that agreement, and any instrument that is an "integral part" of it, is enforceable under the DSU.[168] For the same reason, the Marrakesh Agreement and any instrument that is an integral part thereof must be interpreted in accordance with the "customary rules of interpretation of public international law", pursuant to Article 3.2 of the DSU. The interpretation of Paragraph 1.2 advocated by China in this dispute appears to depart significantly from the understanding of the legal effect of this provision, as reflected in prior panel and Appellate Body reports.

7.86. Fifth, accepting China's interpretation of the term "the WTO Agreement" as used in Paragraph 1.2 of its Accession Protocol would render redundant the explicit language throughout the Accession Protocol and Working Party Report specifically making Article XX exceptions applicable in the case of certain WTO commitments. In such case, there would be no need for an explicit textual reference to such exceptions in specific provisions of China's Accession Protocol and Working Party Report. However, there are several such explicit cross-references, including the introductory language to Paragraph 5.1 of the Accession Protocol and the language in Paragraphs 162 and 165 of the Working Party Report. Indeed China itself relies on such an explicit reference as the legal basis for invoking Article XX(g) of the GATT 1994 as a defence to the complainants' claims regarding export quotas and export quota administration.[169] Moreover, the explicit reference in Paragraph 5.1 was the basis for the Appellate Body's finding, in *China – Publications and Audiovisual Products*, that China could invoke Article XX of the GATT 1994 as a defence to a claim under Paragraph 5.1.[170] Following a detailed analysis, the Appellate Body concluded:

> For all these reasons, we consider that the provisions that China seeks to justify have a clearly discernable, objective link to China's regulation of trade in the relevant products. In the light of this relationship between provisions of China's measures that are inconsistent with China's trading rights commitments, and China's regulation of trade in the relevant products, *we find that China may rely upon the introductory clause of paragraph 5.1* of its Accession Protocol and seek to justify these provisions as necessary to protect public morals in China, within the meaning of Article XX(a) of the GATT 1994.[171]

7.87. In its response to Panel question No. 3, China provides detailed explanations as to why certain provisions in China's Accession Protocol and Working Party Report contain explicit textual references to the WTO Agreement and/or the GATT 1994 and why other provisions do not. Essentially, China argues that there are some provisions in China's Accession Protocol and Working Party Report for which it was necessary for the drafters to include an explicit textual reference to the WTO Agreement and/or the GATT 1994, whereas for other provisions, including Paragraph 11.3, such an explicit reference would have merely restated the obvious and would thus have been redundant. According to China, the reason why such an explicit reference would have merely restated the obvious and been redundant in the case of Paragraph 11.3 is that this provision is an "integral part" of the GATT 1994. The Panel is unable to accept this distinction, because for the reasons set forth above and below, the Panel does not agree that Paragraph 11.3 is an "integral part" of the GATT 1994.

7.88. Finally, the Panel observes that China's interpretation of the term "the WTO Agreement" squarely contradicts the view of the panel in *China – Raw Materials*. In that dispute, the panel observed that China and WTO Members could have agreed that China's export duty commitments were "an integral part of China's commitments under the GATT 1994", but "this is not what China and WTO Members chose to do". The panel explained:

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[167] Panel Report, *China – Auto Parts*, paras. 7.652, 7.740-7.741; Appellate Body Report, *China – Auto Parts*, paras. 213-214; Panel Report, *China – Publications and Audiovisual Products*, para. 7.555; Panel Reports, *China – Raw Materials*, paras. 7.64, 7.113-7.115, 7.621, 7.647, 7.962; Appellate Body Reports, *China – Raw Materials*, para. 278; and Appellate Body Report, *US – Tyres (China)*, para. 118.

[168] See responses of the complainants and third parties to Panel question No. 7.

[169] China's first written submission, paras. 256, 270, and 275.

[170] Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 216-233.

[171] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 233. (emphasis added)

> If China and WTO Members wanted the defences of GATT Article XX to be available to violations of China's export duty commitments, they could have said so in Paragraph 11.3 or elsewhere in China's Accession Protocol.[172] In addition, China and the WTO Members could have agreed that China's export duty commitments were an integral part of China's commitments under the GATT 1994. For instance, WTO Members could have done this by incorporating China's export duties commitments into China's GATT 1994 Schedule. If China's export duties commitments were part of China's GATT 1994 Schedule, the general defences of Article XX of the GATT 1994 would be available to justify potential violations. However, this is not what China and WTO Members chose to do.[173]

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.

7.90. Turning now to Article XII:1 of the Marrakesh Agreement, the second provision invoked by China in support of its broader argument that China's Accession Protocol is an integral part of the GATT 1994, this provision stipulates that any State or customs territory "may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement, and to the Multilateral Trade Agreements annexed thereto". China argues that, contrary to the covered agreements annexed to the WTO Agreement, post-1994 accession protocols are not self-contained and that by virtue of the accession process, there is an intrinsic link between the provisions contained in post-1994 accession protocols on the one side and those enshrined in the WTO Agreement and the Multilateral Trade Agreements annexed thereto on the other. China contends that Article XII:1 "provides a strong textual basis requiring panels dealing with a provision in a post-1994 accession protocol, including 'WTO-plus' provisions, to examine which covered agreement a given provision intrinsically relates to"[174] and argues that this language confirms China's view that its 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".[175]

7.91. In our view, China misconstrues the import of Article XII:1. By its terms, Article XII:1 provides for States and customs territories to accede to the WTO Agreement and stipulates that when this occurs, such accession 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 the Multilateral Trade Agreements – a new Member is not entitled to pick and choose which particular Agreements it will accede to. We see nothing in Article XII:1 to support China's position that "respective protocol provision[s] must be considered as an integral part of the specific covered agreement to which it intrinsically relates."[176] Nor do we find in Article XII:1 language to support China's assertion that its Accession Protocol is not a self-contained agreement and that it "merely serves to specify" China's obligations under the WTO Agreement and the Multilateral Trade Agreements annexed thereto. In our view, China's Accession Protocol does indeed specify the obligations China undertook as well as the rights it was accorded upon accession, and thus 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. In considering China's argument regarding Article XII:1 of the Marrakesh Agreement, the Panel also has some difficulty understanding the proposition that Accession Protocol-specific commitments in an Accession Protocol, which by definition go beyond the obligations contained in the Multilateral Trade Agreements annexed to the Marrakesh Agreement, "merely serve to specify" a Member's obligations under the existing provisions of the Multilateral Trade Agreements annexed to the Marrakesh Agreement. In the case of Paragraph 11.3 of China's Accession Protocol, all of the parties in this case agree that there is no obligation in the GATT 1994 (or elsewhere in the covered

[172] (*footnote original*) As discussed, the WTO Members and China did make such a reference to the availability of GATT Article XX to justify export quotas.
[173] Panel Reports, *China – Raw Materials*, para. 7.140.
[174] China's rebuttal submission on the availability of Article XX of the GATT 1994, para. 18.
[175] China's rebuttal submission on the availability of Article XX of the GATT 1994, para. 17.
[176] China's rebuttal submission on the availability of Article XX of the GATT 1994, para. 18.

agreements) to "eliminate export duties".[177] China itself argues that this obligation is a so-called "WTO-plus" obligation, and is "uniquely onerous".[178]

7.92. In the Panel's view, there is a third difficulty with China's argument that Article XII:1 of the Marrakesh Agreement means that an accession protocol "merely serves to *specify*, including by means of Accession Protocol-specific commitments, China's obligations under the *WTO Agreement* and the multilateral trade agreements annexed thereto". Assuming for the sake of argument that this were correct, 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. In this regard, the Panel observes that many of the Multilateral Agreements on Trade in Goods can be said to "serve to specify" the obligations under the GATT 1994. To offer but a few examples, the Anti-Dumping Agreement serves to specify Members' obligations under Article VI of the GATT 1994 (the full title of this agreement is the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994"); the Customs Valuation Agreement serves to specify Members' obligations under Article VII of the GATT 1994 (the full title of this agreement is the "Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994"); the SCM Agreement serves to specify Members' obligations under Articles VI and XVI of the GATT 1994; and the Agreement on Safeguards serves to specify Members' obligations under Article XIX of the GATT 1994. This does not mean that the individual provisions of these agreements are automatically "integral parts" of the GATT 1994.

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

7.94. The Panel therefore disagrees with the first main premise of China's argument regarding the systemic relationship between its Accession Protocol and the GATT 1994, i.e. that the Accession Protocol-specific provisions in post-1994 accession protocols that relate to trade in goods, including Paragraph 11.3 of China's Accession Protocol, automatically became an "integral part" of the GATT 1994. Accordingly, it is not strictly necessary for the Panel to address the remaining elements of China's argument, which include the propositions that (i) the obligation in Paragraph 11.3 is "intrinsically" related to Articles II and XI of the GATT 1994; and (ii) assuming that Paragraph 11.3 is an "integral part" of the GATT 1994, Paragraph 11.3 is therefore subject to the general exceptions in Article XX of the GATT 1994 "unless there is explicit treaty language" to the contrary. However, the Panel considers it useful to offer the following observations in the interest of providing a full exploration of the issues raised by China's specific arguments.

7.95. As for the proposition that the obligation in Paragraph 11.3 is "intrinsically" related to Articles II and XI of the GATT 1994, the Panel observes that there is no provision of the GATT 1994 that requires Members to eliminate export duties. Article II:7 of the GATT 1994 provides that the schedules annexed to the GATT 1994 are an integral part thereof. It would appear to be possible for Members to include commitments regarding the use of export duties in such schedules. Indeed, some Members have done so.[179] However, the export duty commitments at issue were not inscribed in China's schedule. With respect to Article XI:1, we note that this provision concerns prohibitions or restrictions on the exportation (or importation) of any product "other than duties, taxes or other charges". The obligation in Paragraph 11.3 of China's Accession Protocol does not relate to the same subject-matter as Articles II or XI of the GATT 1994.

7.96. The Panel offers the following observations on China's argument that there is no "explicit treaty language" in Paragraph 11.3 indicating that the general exceptions in Article XX of the GATT 1994 do not apply. First, China advanced the same argument in *China – Raw Materials*. Before the panel in that case, China framed the issue in terms of there being no "explicit language" in Paragraph 11.3 that "excludes" the applicability of Article XX.[180] Before the Appellate

[177] See also below, para. 7.95.
[178] China's first written submission, paras. 421, 427, and 459.
[179] See, e.g. *WTO Analytical Index, 3rd edition* (Cambridge: 2012), Volume 1, page 136, para. 135.
[180] Panel Reports, *China – Raw Materials*, para. 7.155 and Annex D-5, Page D-36, para. 11.

Body, China again argued that Article XX of the GATT 1994 is nonetheless available as a defence to a claim under Paragraph 11.3. China again framed the issue in terms of the absence of language excluding the availability of Article XX, stating that "the appropriate interpretative question" is whether Paragraph 11.3 "explicitly excludes" the Article XX exceptions, and "not whether the language explicitly reaffirms this right".[181] Neither the panel nor the Appellate Body found China's argument persuasive.

7.97. Second, it appears to the Panel that there *is* such "explicit treaty language" in Paragraph 11.3. Specifically, Paragraph 11.3 states that "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" (emphasis added). The word "unless" means "[e]xcept for, with the exception of" and is "[u]sed before a statement expressing a case in which an exception to a preceding statement may or will exist".[182] The word "specifically" means "clearly or explicitly defined; precise, exact; definite" and, when used as an adverb, as is the case here, "in a clearly defined manner, definitely, precisely".[183] Thus, the text of Paragraph 11.3 is not "silent" on whether the obligation therein is subject to exceptions: it sets forth a general rule (i.e. to eliminate export duties), followed immediately by two exceptions, the first of which is introduced by the words "unless specifically provided for". In addition, the Note to Annex 6 contains further "explicit treaty language". Annex 6 of China's Accession Protocol is entitled "Products Subject to Export Duty". As noted further above, it sets out a table listing 84 different products (each identified by an eight-digit HS number and product description), and a maximum export duty rate for each product. Following the table, Annex 6 includes the following Note:

> 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.

7.98. Thus, Annex 6 provides that for the products listed therein, China may increase the "presently applied" rate up to the "maximum rate" set forth in Annex 6, but only under "exceptional circumstances". In its arguments before the Panel, China argues that "it would be particularly unfortunate if China's far-reaching 'WTO-plus' commitments, such as those on export duties, would be enforced without any consideration of whether *exceptional circumstances* may exist to justify a deviation from those commitments".[184] China reiterates that it "rejects the view that China has not only assumed uniquely onerous obligations regarding export duties on goods, but that it has also abandoned its right to use export duties under *exceptional circumstances* to promote fundamental non-trade interests explicitly recognized by the *WTO Agreement*."[185] The language of the Note to Annex 6, which was analysed by the Appellate Body in *China – Raw Materials*[186], seems to contradict China's argument that in "exceptional circumstances", China may impose export duties on products *not* specified in Annex 6, or on those products specified in Annex 6 *above* the specified maximum rate. In other words, it appears from the language of Annex 6 and the Note to Annex 6 that China and WTO Members *did* foresee that China would need an "exception" clause for the commitment it had taken as regards export duties. The drafters included an exception clause, built in to Annex 6 itself, in the form of the Note to Annex 6. This Note states, in explicit language, what China may do in "exceptional circumstances". Thus, the Panel considers that Paragraph 11.3 of China's Accession Protocol does contain "explicit treaty language" contemplating precisely which exceptions are applicable to the obligation contained therein.

7.99. In the light of the foregoing, the Panel finds that China's argument regarding the systemic relationship between its Accession Protocol and the GATT 1994 is not a "cogent reason" for

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[181] Appellate Body Reports, *China – Raw Materials*, paras. 39, 300.

[182] *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 3451.

[183] *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 2946.

[184] China's first written submission, para. 456. (emphasis added)

[185] China's first written submission, para. 459. (emphasis added)

[186] Appellate Body Reports, *China – Raw Materials*, para. 284.

departing from the Appellate Body's finding that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994.

7.3.2.1.5 China's argument regarding the terms "nothing in this Agreement" in Article XX of the GATT 1994

7.100. We turn to China's next specific argument, which is that "[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*".[187] In this regard, China submits that the exceptions under Article XX of the GATT 1994 are also available to excuse violations of what it labels intrinsically GATT-related "WTO-plus" provisions contained in post-1994 accession protocols. China clarifies that what it terms "intrinsically GATT-related 'WTO-plus' provisions contained in post-1994 accession protocols" consists of "those provisions that are not part of the text of the GATT 1994 as it entered into force on 1 January 1995 but that nevertheless have to be treated as an *integral part* of the latter as set out above and in relevant parts of China's First Written Submission".[188] China clarifies that it "does not argue that the phrase 'nothing in this Agreement' makes the exceptions of Article XX of the GATT 1994 available to violations of provisions contained in (i) other multilateral agreements on trade in goods, (ii) China's Accession Protocol taken as a whole, or (iii) the WTO Agreement as a whole."[189] China "acknowledges that, at least at first sight, there seem to be strong indicators that the exceptions enshrined in Article XX of the GATT 1994 are not available in the same manner across all multilateral agreements on trade in goods listed in Annex 1A of the *WTO Agreement*."[190]

7.101. The Panel recalls that the chapeau of Article XX of the GATT 1994 provides that nothing in "this Agreement" prevents the adoption or enforcement of certain measures. In the context of Article XX of the GATT 1994, the ordinary meaning of the term "this Agreement" is the GATT 1994. In this regard, we agree with the panel in *China – Raw Materials* that "the reference to *this* 'Agreement' suggests that the exceptions therein relate only to the GATT 1994, and not to other agreements".[191] We note that interpreting the term "this Agreement" in accordance with its ordinary meaning is consistent with the Appellate Body's statement, in *US – Shrimp*, that the general exceptions in Article XX are "exceptions to substantive obligations established in the GATT".[192]

7.102. The Panel does not understand China to argue that the term "this Agreement" in the chapeau of Article XX of the GATT 1994 should be interpreted to mean the WTO Agreement including all of its Annexes, or to anything beyond the GATT 1994. Rather, China's argument is that the terms "this Agreement" should be interpreted to mean the GATT 1994, which must include any provisions of post-1994 accession protocols that are legally an "integral part" of the GATT 1994. In the course of this proceeding, China has clarified that it is not arguing that the term "this Agreement" means anything beyond the GATT 1994, or provisions of post-1994 accession protocols that are not legally an "*integral part*" of the GATT 1994. For example, in response to a question from the Panel, China clarifies that:

> China reiterates that, despite tireless efforts by the Complainants to misrepresent China's nuanced argument on this important issue, China does *not* argue that the phrase "nothing in this Agreement" makes the exceptions of Article XX of the GATT 1994 available to violations of provisions contained in (i) other multilateral agreements on trade in goods, (ii) China's *Accession Protocol* taken as a whole, or (iii) the *WTO Agreement* as a whole. … While China does not take any firm position on this issue in the present dispute, China acknowledges that, at least at first sight, there seem to be strong indicators that the exceptions enshrined in Article XX of the

[187] China's first written submission, section V.D, paras. 436-444. See also China's rebuttal submission on the availability of Article XX of the GATT 1994, section IV, paras. 35-42.
[188] China's rebuttal submission on the availability of Article XX of the GATT 1994, para. 39. (emphasis added).
[189] China's rebuttal submission on the availability of Article XX of the GATT 1994, para. 42.
[190] China's response to Panel question No. 15, para. 83.
[191] Panel Reports, *China – Raw Materials*, para. 7.153.
[192] Appellate Body Report, *US – Shrimp*, para. 121.

> GATT 1994 are not available in the same manner across all multilateral agreements on trade in goods listed in Annex 1A of the *WTO Agreement*.[193]

7.103. Thus, China's argument regarding the term "this Agreement" in the chapeau of Article XX of the GATT 1994 is predicated on the presumption that what it labels "WTO-plus" provisions in post-1994 accession protocols that relate to trade in goods are an "*integral part*" of the GATT 1994. We recall that the Panel has found that Paragraph 11.3 of China's Accession Protocol (an Accession Protocol-specific provision regarding export duties) is *not* an "integral part" of the GATT 1994; China's Accession Protocol is – according to its Paragraph 1.2 – an integral part of the WTO Agreement.[194]

7.104. Based on the foregoing, the Panel finds that China's argument regarding the terms "nothing in this Agreement" in the chapeau of Article XX of the GATT 1994 is moot as a consequence of the Panel's finding that Paragraph 11.3 of China's Accession Protocol (an Accession Protocol-specific provision regarding export duties) is *not* an "integral part" of the GATT 1994; China's Accession Protocol is – according to its Paragraph 1.2 – an integral part of the WTO Agreement. Accordingly, the Panel finds that China's argument cannot be regarded as a "cogent reason" for departing from the Appellate Body's finding that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994.

7.3.2.1.6 China's argument relating to the object and purpose of the WTO Agreement

7.105. China argues that the result of the Appellate Body's ruling in *China – Raw Materials* on the non-applicability of Article XX as a defence to a violation of Paragraph 11.3 is that "trade liberalization must be promoted at whatever cost – including forcing Members to endure environmental degradation and the exhaustion of their scarce natural resources".[195] China considers this result to be inconsistent with the object and purpose of the WTO Agreement. China argues that "[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".[196]

7.106. We note that China advanced the same argument before the panel and the Appellate Body in *China – Raw Materials*. For example, in the prior dispute China argued that "Members have always had the right to promote fundamental societal interests besides trade liberalization under the *WTO Agreement*"[197]; in this dispute, China argues that "the international trade obligations Members have assumed do not prevent them from taking measures to promote other fundamental societal interests recognized in the covered agreements".[198] In the prior dispute, China argued that "China rejects the view that China has not only assumed uniquely onerous obligations regarding export duties on goods, but that it has also abandoned its right to use export duties under exceptional circumstances to promote fundamental non-trade interests explicitly recognized by the *WTO Agreement*"[199]; in this dispute, China argues that "China finds repugnant the argument that it has not only assumed uniquely onerous obligations, but also that it is denied its 'inherent power' to take measures in relation to these uniquely onerous obligations to promote other fundamental interests, such as conservation and public health."[200]

7.107. In *China – Raw Materials*, the Appellate Body rejected China's argument relating to the object and purpose of the WTO Agreement. The Appellate Body reasoned as follows:

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[193] China's comments on the complaining parties' responses to Panel question No. 15.

[194] In paragraph 427 of its first written submission, China states that "…China's Accession Protocol, in which its export duty commitments are stipulated, has become an integral part of the WTO Agreement – not an integral part of the GATT 1994. This conclusion necessarily follows from the fact that the Accession Protocol contains commitments not only with regard to goods but also with regard to services and intellectual property".

[195] China's first written submission, para. 455.

[196] China's first written submission, section V.E, paras. 445-458. See also China's rebuttal submission on the availability of Article XX of the GATT 1994, section IV, paras. 43-55.

[197] China's first written submission, para. 414.

[198] Panel Reports, *China – Raw Materials*, Annex D-5, Page D-36, para. 9.

[199] China's first written submission, para. 459.

[200] Panel Reports, *China – Raw Materials*, Annex D-2, Page D-17, para. 24.

> China refers to language contained in the preambles of the WTO Agreement, the GATT 1994, and 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") to argue that the Panel distorted the balance of rights and obligations established in China's Accession Protocol by assuming that China had "abandon[ed]" its right to impose export duties "to promote fundamental non-trade-related interests, such as conservation and public health."
>
> The preamble of the WTO Agreement lists various objectives, including "raising standards of living", "seeking both to protect and preserve the environment" and "expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development." The preamble concludes with the resolution "to develop an integrated, more viable and durable multilateral trading system". Based on this language, we understand the WTO Agreement, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns. However, none of the objectives listed above, 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. In the light of China's explicit commitment contained in Paragraph 11.3 to eliminate export duties and the lack of any textual reference to Article XX of the GATT 1994 in that provision, we see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3.[201]

7.108. In this case, China argues that the Appellate Body's "summary dismissal of the interpretative value of the WTO's fundamental objectives without any further explanation" does not rise to the level of a proper objective assessment of legal issues before it.[202] In asking this Panel to reverse the Appellate Body's finding that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994, China explains that it is presenting arguments that, in its view, are "new arguments that have not been asserted previously, or arguments which were neither argued or addressed fully by the panel and the Appellate Body in *China – Raw Materials*".[203] We understand China's argument relating to the object and purpose of the WTO Agreement to fall into the latter category, i.e. an argument that, in China's view, was not "addressed fully by the panel and the Appellate Body" in the prior dispute.

7.109. In our view, the Appellate Body's analysis in *China – Raw Materials* cannot be characterized as a "summary dismissal of the interpretative value of the WTO's fundamental objectives without any further explanation". However, in the interest of providing a full exploration of the issues raised by China's specific arguments, and in the light of China's view that the Appellate Body did not fully address its argument related to the object and purpose of the WTO Agreement, we provide the following observations.

7.110. China's argument related to the object and purpose of the WTO Agreement rests on a key premise: that the result of the Appellate Body's ruling on the non-applicability of Article XX as an exception to the obligation in Paragraph 11.3 is that "trade liberalization must be promoted at whatever cost – including forcing Members to endure environmental degradation and the exhaustion of their scarce natural resources".[204] China argues that this result is inconsistent with the object and purpose of the WTO Agreement. More specifically, China argues that such a result cannot be reconciled with the requirement to interpret treaties in a "holistic manner"[205], with the requirement to give due meaning to a treaty's "object and purpose"[206], with the specific reference

[201] Appellate Body Reports, *China – Raw Materials*, paras. 305-306.
[202] China's first written submission, para. 448.
[203] China's first written submission, paras. 416 and 460.
[204] China's first written submission, para. 455.
[205] See, e.g. China's first written submission, para. 446.
[206] See, e.g. China's first written submission, para. 447.

to "the objective of sustainable development" in the preamble of the WTO Agreement[207], and the need to "balance trade liberalization with non-trade-related objectives".[208]

7.111. The Panel agrees with China that an interpretation of the covered agreements that resulted in sovereign States[209] 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".

7.112. However, the Panel considers that the premise underlying China's argument is false. The Appellate Body found that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994. Paragraph 11.3 of China's Accession Protocol concerns one type of instrument only – export duties. Thus, the only result that follows from this finding is that 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.

7.113. In the Panel's view, assuming for the sake of argument[210] that there could be situations in which the imposition of export duties could make a material contribution to addressing environmental concerns and to protecting the life and health of a population, China, notwithstanding its extensive argumentation on the applicability of Article XX of the GATT 1994 to Paragraph 11.3 in this dispute, has never presented any argument in support of the premise that export duties are the *only* type of instrument and means that can be used to address environmental concerns and protect the life and health of its population. Indeed, in response to a question from the Panel, China itself indicated that it "would find it difficult to conceive that export duties are the *only instrument* that can be used to protect the environment or to conserve exhaustible natural resources and China's position is indeed not based on such an assumption."[211]

7.114. In sum, the Panel agrees with China 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. However, the Panel disagrees with China that this is the result of the Appellate Body's finding that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994. Accordingly, the Panel finds that China's argument cannot be regarded as a "cogent reason" for departing from that finding.

7.3.2.1.7 Conclusion

7.115. In its prior adopted reports in *China – Raw Materials*, the Appellate Body found that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of China's Accession Protocol.[212]. For the reasons set forth

[207] See, e.g. China's first written submission, paras. 449-454.
[208] See, e.g. China's first written submission, para. 454.
[209] We agree with the panel in *China – Raw Materials* that the principle of permanent sovereignty over natural resources is a relevant rule of international law that may be taken into account when interpreting the WTO covered agreements. (Panel Reports, *China – Raw Materials*, paras. 7.377-7.383.) However, China has not referred to this principle in the context of arguing that Paragraph 11.3 of its Accession Protocol is subject to Article XX of the GATT 1994, or in the context of arguing that its export duties are justified under Article XX(b) of the GATT 1994. Rather, China invokes the principle in the context of defending its export quotas under Article XX(g) of the GATT 1994. The Panel will therefore address China's arguments regarding the principle of permanent sovereignty over natural resources when addressing China's defence under Article XX(g).
[210] The Panel notes that in the context of addressing the merits of China's Article XX(b) defence for export duties, we conclude that China has not demonstrated that its export duties are apt to make a material contribution to the achievement of the stated objective. See paras. 7.172 to 7.179 below.
[211] China's response to Panel question No. 5.
[212] Appellate Body Reports, *China – Raw Materials*, para. 362(c).

above, the Panel concludes that China has not presented this Panel with any cogent reason for departing from the Appellate Body's finding. Accordingly, the Panel finds that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994.

7.116. The Panel wishes to emphasize two points. The first is the narrow scope of this finding. The question that has been presented to the Panel, and the only question that we have addressed, is the applicability of Article XX of the GATT 1994 to the obligation contained in Paragraph 11.3 of China's Accession Protocol. The Panel has not expressed, in this respect, any view, and its findings should not be understood as implying any view, on whether Article XX of the GATT 1994 is applicable to other provisions of China's Accession Protocol, other provisions of other Members' protocols of accession, or other provisions contained in the Multilateral Trade Agreements annexed to the WTO Agreement.

7.117. Second, the Panel wishes to underscore how limited the implications of this finding are in terms of China being able to adopt and maintain measures to protect the environment and the life and health of its population. When seeking to address environmental concerns and protect the life and health of its population, China must, according to Paragraph 11.3 of its Accession Protocol, use instruments and means other than export duties to do so (except to the extent it has provided for in its Accession Protocol). That is the only implication of this finding. In our view, this finding in no way impairs China's ability to pursue those legitimate objectives.

7.3.2.1.8 Separate opinion by one panelist

7.118. One panelist is unable to agree with some of the findings and conclusions contained in paragraphs 7.63 to 7.117 above. This section reflects the views of that panelist.

7.119. I agree with the ultimate conclusion reached by this Panel that, in this dispute, China cannot justify its export duties on rare earths, tungsten, and molybdenum products pursuant to Article XX(b) of the GATT 1994 (GATT Article XX(b)). However, contrary to the finding made by the Panel's majority, I believe that a proper interpretation of the relevant provisions at issue leads to the conclusion that the obligations in Paragraph 11.3 of China's Accession Protocol are subject to the general exceptions in Article XX of the GATT 1994.

7.120. 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 Panel's majority has undertaken a long and careful evaluation of the parties' arguments concerning this matter. I agree with many parts of the Panel's majority's analysis of this issue and I respect this Panel's majority decision. Nonetheless, I respectfully disagree with certain key aspects of its reasoning and findings. I offer, below, my different views on some of the legal issues concerned with this Panel's conclusion.

7.3.2.1.8.1 The structure of the WTO Agreement

7.121. China admits that its export duties on rare earths, tungsten, and molybdenum are inconsistent with Paragraph 11.3 of its Accession Protocol.[213] The disagreement between the parties concerns the availability of Article XX of GATT to a violation of a WTO-plus provision i.e. Paragraph 11.3 of China's Accession Protocol regarding export duties. In my view, a proper determination of the availability of GATT Article XX to justify violations of Paragraph 11.3 of China's Accession Protocol must begin with an understanding of the components and functioning of the WTO Agreement as a Single Undertaking.

7.122. There are different components to what are considered to be the "Results of the Uruguay Round Negotiations".

a. First, there is the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act) that was signed by representatives of the Members in

[213] China's response to Panel question No. 9.

Marrakesh in April 1994; its main text is a six-paragraph document that describes the results of the Uruguay Round negotiations. Attached to the Final Act are (a) the Marrakesh Agreement Establishing the World Trade Organization and all its components discussed below, and (b) Ministerial Decisions and Declarations and finally (c) the Understanding on Commitments on Financial Services.

b. The second component is the Marrakesh Agreement Establishing the World Trade Organization (which is referred to as the "WTO Agreement"), an agreement that establishes the WTO as a new international organization. . The first 16 Articles of the WTO Agreement (made up of Articles I to XVI), I will call the "Marrakesh Agreement". Article II:2 of the Marrakesh Agreement provides that the agreements and associated legal instruments (referred to as the "Multilateral Trade Agreements") included in its Annexes 1, 2 and 3 of that WTO Agreement are "integral parts" of the Marrakesh Agreement. According to Article II:3, the legal instruments included in Annex 4 (referred to as Plurilateral Trade Agreements) are also part of the Marrakesh Agreement for those Members that have accepted them. In my discussion, I use the term Marrakesh Agreement to refer to the institutional agreement of the WTO entitled the Marrakesh Agreement Establishing the World Trade Organization, which contains Articles I to XVI. When I use the term Marrakesh Agreement, I do not include its Annexes 1, 2 and 3 or the Plurilateral Agreements (Annex 4). The Members' schedules of commitments are also an integral part of the WTO agreements – for example, the schedules on trade in goods are an integral part of the GATT 1994 and the schedules on services commitments are integral parts of the General Agreement on Trade in Services (GATS). All these elements are integral parts of what we refer to as the WTO Agreement.

7.123. This dispute is concerned, *inter alia*, with the provisions of a WTO protocol of accession. In that context, I note that Article XII of the Marrakesh Agreement provides that a Member's accession shall apply to "this Agreement and the Multilateral Trade Agreements annexed thereto". I also note that Paragraph 1.2 of China's Accession Protocol provides that the Protocol "shall be an integral part" of the WTO Agreement. Therefore, in my discussion I will use the term the "WTO Agreement" to refer to the overall agreement that constitutes the entirety of the WTO legal treaty provisions and which includes the Marrakesh Agreement, its four annexes, Members' schedules of commitments, and the commitments included in WTO accession protocols.[214] When I use the term "WTO agreements" without a capital "A", I refer to the legal instruments in Annexes 1, 2, 3 or 4. When I refer to "a specific WTO agreement" within the WTO Agreement, I mention the name of the agreement concerned. Finally, in my discussion about the relationship between the provisions of China's Accession Protocol, in particular Paragraph 11.3, and GATT Article XX, I refer to the provisions of the existing GATT 1994, or the existing WTO Agreement. I do so to distinguish conceptually the provisions of the GATT 1994 or the WTO Agreement from the new and additional provisions of China's Accession Protocol that are now integral parts of the WTO Agreement.

7.124. The Appellate Body has made it clear that the WTO Agreement is a "Single Undertaking" - that is, a single treaty for which there are no reservations and where all WTO provisions are generally simultaneously and cumulatively applicable.[215] In that regard, a single measure may be subject, at the same time, to several WTO provisions imposing different disciplines.[216] Moreover, as noted by the United States[217], within the WTO Agreement, provisions of different multilateral agreements may overlap in application, while other WTO provisions are mutually exclusive. The WTO treaty has rules regarding conflicts in the application of specific provisions[218], and the jurisprudence has clarified the conflict rules between WTO provisions. It has also been determined

[214] I will not discuss here whether secondary acts of bodies established pursuant to the WTO Agreement are an integral part of the WTO Agreement.

[215] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 12.

[216] For instance, there are measures that involve a service relating to a particular good or a service supplied in conjunction with particular goods. Therefore, the measure in question could be scrutinized under both the GATT 1994 and the GATS. See also, Appellate Body Report, *EC – Bananas III*, para. 221.

[217] United States' second written submission, para. 24.

[218] For instance, *General interpretative note to Annex 1A* provides as follows:

> "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization […], the provision of the other agreement shall prevail to the extent of the conflict."

that the provisions of Members' schedules are to be interpreted as treaty provisions[219] but they can only develop and yield to – and not contradict – related provisions of the GATT, the Agreement on Agriculture (AoA) or the GATS.[220]

7.125. Finally, in WTO law, only provisions of the "covered agreements" can form the basis of a claim of violation that can be brought before the DSB in the form of a request for establishment of a panel to examine the issues between the parties in dispute. Appendix 1 of the DSU lists which of the agreements of the WTO Agreement are "covered agreements" for the purposes of the DSU. It includes the Marrakesh Agreement and the multilateral agreements contained in Annex 1 and the DSU found in Annex 2. Accession protocols are not mentioned directly in Appendix 1 of the DSU. Nonetheless, no party in this dispute has expressed any doubt that violations of China's Accession Protocol commitments, and in particular violations of Paragraph 11.3 of China's Accession Protocol, can be taken to the DSB and be the subject of a request for the establishment of a panel.[221] Therefore, this implies that all parties consider that Paragraph 11.3 is an integral part of one of the WTO covered agreements.

7.126. However, the parties disagree whether Paragraph 11.3 is integrated into, and part of, the GATT 1994, as suggested by China, or whether it is to be interpreted and applied as part of the Marrakesh Agreement *per se*, or, alternatively, as an integral part of the overall WTO Agreement but outside the GATT 1994, either as a stand-alone provision or as part of an accession agreement such that, upon China's entry into the WTO, it became a new annex to the WTO Agreement. For China, Paragraph 11.3 is concerned with a GATT issue – the use of tariffs at its borders – and has thus become an integral part of the GATT 1994. China is of the view that it can therefore invoke GATT Article XX to justify violations of Paragraph 11.3, as Article XX is available to justify all otherwise-inconsistent breaches to all provisions of the GATT.[222] For the complainants, Paragraph 11.3 cannot be interpreted as forming an integral part of the GATT 1994.[223] For example, the United States argues that China's Accession Protocol is akin to a new annexed multilateral agreement, parallel to Annexes 1A, 1B, and 1C, and an integral part of the WTO Agreement.[224]

7.3.2.1.8.2 The relationship between the terms of an accession package and provisions of the WTO Agreement

7.127. To appreciate how the provisions of China's Accession Protocol, and in particular Paragraph 11.3, interact with the provisions of the existing WTO Agreement (including the Marrakesh Agreement, the GATT 1994 and the other Multilateral Trade Agreements), and of which covered agreement(s) they are an integral part, it is necessary to understand the nature of WTO accession protocols.

7.128. In this discussion, I use the term "accession package" to refer to the results of a WTO accession process. An accession package includes at least four documents: a protocol of accession, a working party report, different schedules, and a decision of the Ministerial Conference/General Council confirming that the Members agree to the accession on the terms set out in the other three documents.

7.129. The Protocol of Accession is annexed to the decision of the Ministerial Conference and the working party report is attached to the Protocol of Accession. An accession protocol stipulates the terms under which a new Member accedes to the WTO. According to Article XII:1 of the Marrakesh Agreement, "[s]uch accession *shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto*". In other words, a WTO accession protocol serves to specify the terms of application of the WTO Agreement to the acceding Member, in particular those of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto.[225] A working party report contains a summary of proceedings leading to the accession and the conditions of entry, some of

[219] See also Appellate Body Report, *EC – Computer Equipment*, para. 84.
[220] See also Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 220-223, Appellate Body Report, *EC – Bananas III*, paras. 155-158.
[221] See also parties and third parties' responses and comments to Panel question No. 7.
[222] China's second written submission, paras. 207-210.
[223] United States' responses to the Panel question No. 64; European Union's second written submission, paras. 329-333; Japan's second written submission, para. 237.
[224] United States' responses to the Panel question No. 64, para. 27.
[225] China's Rebuttal Submission Regarding its Request for a Preliminary Ruling, paras. 13-28.

which are binding commitments when incorporated into the protocol of accession, while other provisions are explanations and statements provided by the acceding Member and the working party. The obligations contained in the working party report overlap with, or complement, those contained in the accession protocol. In the case of China's accession, Paragraph 1.2 of its Accession Protocol provides that the commitments embodied in those paragraphs referred to in paragraph 342 of the Working Party Report are incorporated into the Protocol. Provisions of China's Accession Protocol and its Working Party Report have been agreed to by the WTO pursuant to Article XII of the Marrakesh Agreement through the Decision adopted by the Ministerial Conference or the General Council.[226]

7.130. Each term of an accession package calls for a distinct interpretation analysis and the determination of each term's relationship with provisions of the WTO Agreement requires a specific analysis. In some cases, it may be that an acceding Member and WTO Members wanted a provision of an accession package to become an integral part of a specific WTO agreement because they wanted that accession provision to be interpreted and applied together with, and as an integral part of, the balance of rights and obligations of that specific WTO agreement. In other cases, it may be that an acceding Member and the WTO Members wanted a specific provision of an accession package to be a stand-alone provision within the WTO Agreement while other provisions of an accession package would have a horizontal application.

7.131. There are various ways for the acceding Member and WTO Members to express their common intention on the relationship between a provision of the accession package and the WTO Agreement, or a specific WTO agreement or provision. Some provisions of accession protocols have explicitly been made part of a specific existing WTO agreement. This is the case with the goods and agriculture schedules of acceding Members, which are considered to be integral parts of the GATT 1994. In the case of China's accession package, I observe that some of its provisions reiterate obligations already included in the Multilateral Trade Agreements and thus overlap with them. For instance, Paragraph 96 of the Working Party Report, which sets out China's obligations with respect to "other duties and charges", reaffirms certain obligations embodied in a similar language under GATT 1994. Some provisions of an accession package may clarify and elaborate on specific obligations of the Multilateral Trade Agreements. For example, Paragraphs 92 and 93 of the Working Party Report of China's accession package set out China's commitments with respect to the tariff treatment of certain products. Some provisions of an accession package may go beyond the WTO Members' basic obligations and rights set out in the Marrakesh Agreement and the Multilateral Trade Agreements. All parties agree that this is the case with Paragraph 11.3 of China's Accession Protocol, which sets out China's obligations with respect to export duties. I consider that Paragraph 11.3 is a *WTO-plus provision* regarding export tariffs/duties. Further, as I will explain hereafter, this additional obligation on export tariffs/duties exists and works in conjunction with other existing WTO obligations applicable to trade in goods, including provisions of the GATT 1994, and in particular those related to border tariff measures.

7.132. I agree with China that, when a dispute involves a WTO-plus provision of a WTO accession protocol, the Panel has to determine, in light of the subject matter and the underlying rationale of a given accession commitment, whether the WTO-plus provision has become (i) an integral part of a specific WTO agreement, like the GATT 1994; or (ii) a new provision that is part of the Marrakesh Agreement itself or the Member's schedules, or (iii) is somehow within the WTO Agreement, meaning the entire package of WTO rights and obligations. As argued by all parties, the determination of whether GATT Article XX can be invoked to justify a breach of a provision of an accession protocol is to be determined on a case-by-case basis. Thus, it is for the interpreter to determine the common intention of the parties as to how the WTO-plus provision of an accession package interacts with existing WTO provisions. It is only after this analysis that the interpreter can determine of which covered agreement, if any, the specific WTO-plus provision is an integral part. Taking into account the institutional principles of the WTO Single Undertaking discussed above, I am of the view that the determination of whether Paragraph 11.3 of China's Accession Protocol is an integral part of GATT 1994, and can therefore benefit from the GATT Article XX exceptions, requires a holistic interpretation of the concerned provisions.

[226] Pursuant to WTO/L/93.

7.3.2.1.8.3 The relationship between Paragraph 11.3 of China's Accession Protocol and the GATT 1994

7.133. Paragraph 11.3 of China's Accession Protocol sets out China's obligation in relation to trade in goods and, in particular, commitments to eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of its Accession Protocol. It is worth noting that Paragraphs 155 and 156 China's Working Party Report include provisions that use language similar to that of Paragraph 11.3 and which reflect the Working Party and China's discussion on this subject. Paragraphs 155 and 156 are found under the subheading, "Customs Tariffs, Fees and Charges for Services Rendered, Application of Internal Taxes to Export", as part of Part IV of China's Working Party Report entitled "Policies Affecting Trade in Goods". Annex 1A of the WTO Agreement establishes disciplines on trade in goods.

7.134. All parties agree that China is bound by the provisions of Paragraph 11.3 and those of the existing GATT 1994 Agreement. Moreover, all parties agree that Paragraph 11.3 adds to the existing GATT obligations, including the GATT disciplines on tariffs; that is why it is often referred to as a WTO-plus provision, the term I have already used above. Paragraph 11.3 of China's Accession Protocol prohibits the use of export duties, except for certain listed products which are subject to prescribed maximum levels. As distinguished from Russia's Accession Protocol, where its export duty commitments are included in its goods schedule and considered to be an integral part of GATT 1994[227], China's Accession Protocol is silent as to which WTO covered agreement, if any, is considered to include Paragraph 11.3.

7.135. I also note that, other than referring to GATT Article VIII, the text of Paragraph 11.3 is silent on its relationship with the provisions of GATT 1994. However, as submitted by Brazil, the Appellate Body has stated in previous WTO disputes that omissions in different contexts may have different meanings, and an omission, in and of itself, is not necessarily dispositive.[228] For instance, although for different reasons, no party in this dispute has any doubt that China must comply with GATT Article I (MFN), even though there is no reference to Article I of the GATT 1994 in Paragraph 11.3 of China's Accession Protocol.[229] Therefore, to address the availability of GATT Article XX to justify violations of Paragraph 11.3, I am of the view that other contextual elements of Paragraph 11.3 should be examined, taking into account the object and purpose of the WTO Agreement. As I have said before, only a holistic interpretation of the relevant provisions can resolve such a fundamental issue.

7.136. As observed by Argentina[230], the obligation with respect to export duties under Paragraph 11.3 is specific to China. This specific obligation modifies the general rule contained in GATT Article XI:1 – that is, China waived its right to apply export duties except on those products listed in Annex 6 of its Accession Protocol. I also note that China's export tariff commitments under Paragraph 11.3, by their nature, expand China's obligations in the area of trade in goods; in particular, Paragraph 11.3 adds to the provisions of Articles II and XI:1 of the GATT 1994, which deal, *inter alia*, with the overlapping subject matter of border tariff duties. Paragraph 11.3 of China's Accession Protocol expands China's obligations in respect of these two GATT provisions. Given the close relationship between these provisions, I believe that, for the purpose of determining China's rights and obligations, Articles II and XI of the GATT 1994 must be read together with Paragraph 11.3 of China's Accession Protocol. It seems to me that provisions from an accession protocol prohibiting border export tariffs must be interpreted and applied together with the GATT provision allowing Members to use them. Interpreting and applying rights and obligations of an accession package together with the related provisions of an existing WTO

[227] Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, para. 638.

In its oral statement at the first substantive meeting of the Panel with the third parties, Russia recalled its accession negotiation history with respect to the availability of the WTO Agreement exceptions to acceding Members. In response to Panel question No. 49, the Panel received parties' and other third parties' comments on the oral statement made by Russia.

[228] Brazil's third party's submission, para. 11; Brazil's oral statement at the first substantive meeting of the Panel with the third parties, paras. 11-12.

[229] See parties and third parties' responses and comments to the Panel's question No. 6; complainants argue that China's export duties not prohibited by Paragraph 11.3 of China's Accession Protocol must be in conformity with Article I of the GATT 1994. China comments that the applicability of Article I of the GATT 1994 to China's use of export duties confirms the intrinsic relationship between Paragraph 11.3 and the GATT 1994.

[230] Argentina's third party's submission, paras. 17-18.

agreement facilitates the coherent implementation of an acceding Member's obligations. Consequently, in my view, Paragraph 11.3 of China's Accession Protocol became, upon accession, an integral part of the GATT 1994 as GATT 1994 applies between China and the WTO Members.[231] In other words, China must comply with all GATT-related provisions of its Accession Protocol as they operate together with the existing relevant provisions of the GATT 1994 (such as GATT Article I), in a simultaneous and cumulative manner. When China implements its WTO tariff-border measures, it must interpret and implement *together* all of its associated obligations relating and applicable to border tariffs, included those within the WTO Agreement – no matter whether such obligations stem from its Accession Protocol, or from the existing GATT 1994. Under the circumstances, I believe that it was the common intention of the parties to treat the provisions of Paragraph 11.3 as an integral part of the GATT 1994 system of rights and obligations applicable to export tariffs – and thus as an integral part of the GATT 1994 covered agreement.

7.137. I am also of the view that the defences provided in the GATT 1994 are automatically available to justify any GATT-related obligations, including border tariff-related obligations - unless a contrary intention is expressed by the acceding Member and WTO Members.[232] In light of the preamble of the WTO Agreement, which embodies the purpose and objective of the WTO, the fundamental importance of the flexibilities provided in GATT Article XX, GATT Article XXI, GATT Article XXIV and GATT Article XVIII(C) is incontrovertible. These provisions strike a balance between the policy space governments enjoy to pursue legitimate objectives and their obligations under the GATT 1994. It may be possible to have situations where an acceding Member waives its rights to have recourse to the exception provisions contained in a specific WTO covered agreement. For instance, in Paragraph 7.3 of China's Accession Protocol, China explicitly agrees not to have recourse to notification and transitional arrangements under Article 5 of the TRIMs Agreement. In my view, if China and WTO Members had wanted to exclude a benefit generally provided with respect to all GATT obligations, they could and should have done so explicitly. Members did not provide in Paragraph 11.3 or elsewhere that GATT Article XX was not available to justify violations of Paragraph 11.3 obligations. Therefore, I agree with China[233], Argentina[234], Brazil[235] and Russia[236] that if it had been the common intention of China and the WTO Members that China should not have access to Article XX of the GATT 1994 to defend a violation of an integral element of the GATT 1994, namely Paragraph 11.3 of its Accession Protocol, they would have said so explicitly. I see nothing in China's Accession Protocol that clearly indicates that it was the negotiating parties' common intention that China should not have access to the general exceptions of Article XX of the GATT 1994 to defend violations of the export duty commitments it made upon acceding to the WTO. In that context, I believe that the flexibilities provided in GATT Article XX, GATT Article XXI, GATT Article XVIII(C), or GATT Article XXIV, which are generally applicable to GATT violations, can in principle be invoked to justify violations of Paragraph 11.3.

7.138. In sum, I believe that Paragraph 11.3 of China's Accession Protocol is an integral part of China's obligations on trade in goods in the sense that it adds to the basic obligations of the GATT 1994 relating to border tariffs. A proper interpretation on the availability of Article XX of the GATT 1994 to Paragraph 11.3 of China's Accession Protocol should take into account the fact that Paragraph 11.3 must be read cumulatively and simultaneously with related GATT Articles II and XI and as an integral part of the GATT system of rights and obligations. Therefore, in my view, unless China explicitly gave up its right to invoke Article XX of GATT 1994, which it did not, the general exception provisions of the GATT 1994 are available to China to justify a violation of

[231] With respect to the relationship between the GATT 1994 and the other goods agreements in Annex 1A, the Appellate Body in *Brazil – Desiccated Coconut* stated that "[such a relationship] is complex and must be examined on a case-by-case basis." The Appellate Body also noted that "the general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the GATT 1994 […]." It is not my intention to elaborate further on this issue; however, I am convinced that the fact that Paragraph 11.3 of China's Accession Protocol establishes an obligation of China in respect of trade in goods builds a solid ground upon which to consider the relationship between Paragraph 11.3 of the Protocol and the GATT 1994.

[232] The Working Party Report for Russia's accession expresses a similar view; see oral statement of Russia at the first substantive meeting of the Panel with the third parties;

See also Brazil's third-party's submission, para. 18; Argentina's third-party's submission, para. 26, integrated executive summary, paras. 6 and 11.

[233] China's second written submission, para. 210.

[234] Argentina's third-party's submission, para. 26.

[235] Brazil's third-party's submission, para. 18.

[236] Russia's oral statements at the first substantive meeting of the Panel with the third parties, paras. 8-9.

Paragraph 11.3 of its Accession Protocol. I see nothing in China's Accession Protocol that clearly indicates such a waiver. In my view, finding that the obligation in Paragraph 11.3 is subject to the general exceptions in Article XX of the GATT 1994 allows China to exercise its rights and obligations with a view to favouring its sustainable development. This concludes my separate opinion.

7.3.2.2 The application of Article XX(b) of the GATT 1994 with respect to China's export duties

7.139. China argues that the export duties at issue are justified under Article XX(b) of the GATT 1994 because they are "necessary to protect human, animal or plant life or health". The complainants disagree.

7.140. The Panel has found that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT 1994.[237] In *China – Raw Materials*, the panel addressed the merits of China's Article XX defence for export duties, even after having found that the obligation in Paragraph 11.3 of China's Accession Protocol was not subject to the general exceptions in Article XX of the GATT 1994.[238] While this case is distinguishable in certain respects, we consider it appropriate to proceed in the same manner, i.e. on an *arguendo* basis for the majority of the Panel.

7.141. In seeking to defend its export quotas under Article XX(g) of the GATT 1994, China has separately analysed the three groups of products at issue, i.e. rare earths, tungsten, and molybdenum. When analysing whether China's export quotas are justified under Article XX(g), we have taken a similar approach in our Report. In contrast, China has not separately addressed these three groups of products when seeking to justify under Article XX(b) its imposition of export duties. We will follow suit and not separately analyse these three groups of products either. In this regard, our approach takes into account the fact that, as mentioned, China did not provide a separate analysis of the three groups of products in its defence under Article XX(b), the relative brevity of China's arguments under Article XX(b)[239], and the fact that the parties' arguments on export duties are virtually identical with respect to rare earths, tungsten, and molybdenum. Of course, insofar as it is necessary to our analysis, we will identify any evidence or argumentation that is specific to only one of these three groups of products.

7.142. The Panel will begin its analysis with a brief review of the exception contained in Article XX(b) of the GATT 1994. We will then address each of the specific arguments advanced by China, in the order advanced by China, in support of its position that the challenged export duties are necessary to protect human, animal or plant life or health within the meaning of Article XX(b).

7.3.2.2.1 The interpretation of Article XX(b) of the GATT 1994

7.143. Article XX(b) of the GATT 1994 reads as follows:

> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> …
>
> (b) Necessary to protect human, animal or plant life or health;

[237] As explained above, one panelist is of the view that the obligation in Paragraph 11.3 of China's Accession Protocol is subject to the general exceptions in Article XX of the GATT 1994.

[238] Panel Reports, *China – Raw Materials*, paras. 7.229-7.230.

[239] After submitting a brief defence of its export duties under Article XX(b) of the GATT 1994 on 15 February 2013, China did not advance any additional arguments on this issue in its oral statement at the first meeting with the Panel, nor in its second written submission, nor in its oral statement at the second meeting with the Panel.

7.144. To be justified under Article XX(b) of the GATT 1994, a measure must be "necessary to protect human, animal or plant life or health" and it must also meet the requirements of the chapeau of Article XX. It is well established that the party invoking Article XX(b), in this case China, bears the burden of demonstrating that the challenged measure is "necessary to protect human, animal or plant life or health" and complies with the chapeau of Article XX.

7.145. In examining a defence under Article XX(b) of the GATT 1994, the first issue is whether the challenged measure falls within the range of policies designed to protect human, animal or plant life or health.[240] Panels and the Appellate Body have examined both the "design" and "structure" of a challenged measure to decide whether its "objective" is the protection of life and health, generally showing a degree of deference to Members' policies designed to "protect human, animal or plant life or health". A broad range of policies have been recognized as protecting human, animal, and plant life or health.

7.146. If a panel finds that the objective of the challenged measure is to protect human, animal or plant life or health, the next issue is whether the measure is "necessary" to fulfil this policy objective. Article XX(b) of the GATT 1994 requires that a challenged measure be "necessary" to achieve the objective it pursues. In *Brazil – Retreaded Tyres*, the Appellate Body explained that "[i]n order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness."[241] The Appellate Body concluded that a measure is apt to contribute to the achievement of its objective "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue[242]," and explained that a measure is necessary if it is "apt to make a material contribution to the achievement of its objective".[243] In this regard, the Appellate Body report in *Brazil – Retreaded Tyres* distinguished between two types of measures: those that "bring[] about" a material contribution to the achievement of their objective; and those that are "apt to produce" a material contribution to the objective pursued.[244] In *China – Publications and Audiovisual Products*, the Appellate Body emphasized again that "the greater the contribution a measure makes to the objective pursued, the more likely it is to be characterized as 'necessary'".[245] The Appellate Body also accepted that a measure could be considered "necessary" even if the contribution of the measure "is not immediately observable".[246] The Appellate Body has observed that "certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures".[247] With respect to such complex problems, the Appellate Body has left open the possibility that a "necessary" measure could contribute to one of the objectives protected under Article XX(b) as part of a policy framework comprising different measures, resulting in possible synergies between those measures.[248] The Appellate Body in *Brazil – Retreaded Tyres* confirmed that "in the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy".[249] The Appellate Body explained that the contribution of the measure can be demonstrated quantitatively and/or qualitatively:

> Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental

[240] For instance, the panel in *EC – Tariff Preferences* set out the requirements of Article XX(b) of the GATT 1994 in this way: "Following this jurisprudence, the Panel considers that, in order to determine whether the Drug Arrangements are justified under Article XX(b), the Panel needs to examine: (i) whether the policy reflected in the measure falls within the range of policies designed to achieve the objective of or, put differently, whether the policy objective is for the purpose of, 'protect[ing] human … life or health'. In other words, whether the measure is one designed to achieve that health policy objective ...". Panel Report, *EC – Tariff Preferences*, para. 7.199.

[241] Appellate Body Report, *Brazil – Retreaded Tyres*, para 178.

[242] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

[243] Appellate Body Report, *Brazil – Retreated Tyres*, para 150, 151.

[244] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

[245] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 251; Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

[246] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

[247] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

[248] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

[249] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

> objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. …. [A] demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.[250]

7.147. Where the analysis described above results in a preliminary conclusion that the measure is necessary, the next step is to compare the challenged measure with possible alternative measures identified by the complainants.[251] The *US – Gambling* and *Brazil – Retreaded Tyres* disputes established how the burden of proof would be allocated when examining whether a reasonably available alternative exists. In the first instance, the burden is upon the complaining party to identify possible alternatives to the measure at issue that the responding Member could have taken; the burden then shifts to the responding party to demonstrate that the measure proposed by the complaining party is not a genuine alternative or is not "reasonably available", taking into account the interests or values being pursued and the responding Member's desired level of protection.[252] As the Appellate Body has recently confirmed, in the context of addressing the necessity requirement in Article 2.2 of the TBT Agreement, a comparison of the challenged measure with possible alternative measures is not required when the challenged measure makes *no* contribution to the achievement of the stated objective.[253]

7.148. Finally, for a measure to be justified under Article XX(b) of the GATT 1994, the measure must comply with the chapeau of Article XX. The chapeau requires that the measure not be applied in a manner which would constitute a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", or "a disguised restriction on international trade". As regards the first requirement, "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", the chapeau of Article XX covers not only MFN-type discrimination among different countries to which an exported product is destined (for example whether export duties on rare earths accord Japan less favourable treatment than the United States), but also national treatment-type discrimination arising from the difference in treatment accorded to the like product when destined for export, as compared with the treatment of the like product when destined for domestic consumption. The Panel understands China to agree with this view.[254]

7.3.2.2.2 The measures at issue

7.3.2.2.2.1 Harm arising from the mining and production of the products at issue

7.149. China asserts that the mining and production of rare earths, tungsten, and molybdenum cause grave harm to the environment and, as a consequence, to the health of humans, animals and plants in China. The European Union and the United States do not dispute that the mining and processing of the materials at issue can cause environmental damage; Japan "defers to the Panel" on whether the mining and processing of rare earths, tungsten, and molybdenum have a negative effect on the environment.[255]

7.150. The Panel considers that China has provided the Panel with sufficient evidence to substantiate this assertion that the mining and production of rare earths, tungsten, and molybdenum have caused grave harm to the environment in China, and, as a consequence, to the health of humans, animals and plants in China. We review the evidence provided by China below,

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[250] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[251] Appellate Body Reports, *US – Gambling*, para. 311.
[252] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.
[253] Appellate Body Reports, *US – COOL*, footnote 748, and *US – Tuna II (Mexico)*, footnote 647.
[254] China's response to Panel question No. 47. Specifically, the Panel put the following question to China: "Complainants argue that discrimination between "countries" within the chapeau of Article XX of the GATT 1994 includes not only MFN-type discrimination, but also NT-type discrimination (see, e.g. paragraph 54 of the European Union's oral statement at the first substantive meeting). Does China agree?" China responded that it "agrees that the requirement not to apply an export quota system in a manner that would constitute 'arbitrary discrimination' also covers arbitrary discrimination between domestic and foreign consumers."
[255] Parties' responses to Panel question No. 45.

beginning with the evidence related to rare earths and then turning to China's evidence that is more specific to tungsten and molybdenum.[256]

7.151. China explains that the different environmental risks that may occur along the production chain of rare earth products are described in detail in a 2011 Study for The Greens/EFA Group in the European Parliament[257], as well as in a 2012 Study by the United States' Environmental Protection Agency.[258] Rare earth production starts with mining of crude ore, which is next milled into fine powder. In order to separate the valuable rare earth metals from the rest of the ore, this powder is floated on water to which chemicals are added. Flotation creates large waste streams, called "tailings", which lead to large ponds called "impoundment areas".[259] These tailings contain toxic substances, including radioactive substances (such as uranium and thorium), fluorides, sulphites, acids, and heavy metals and constitute a major environmental health risk.[260] In particular, if the ponds are not sufficiently leak-proof, the tailing ponds may pollute groundwater, affecting humans, animals, and plants in the areas that rely on this water.[261] Moreover, tailing ponds may flood when exposed to heavy storm water or when dams collapse, thus polluting the surrounding soil and water.[262] Water pollution may also arise from exposure of waste rock stockpiles, and the mining pit, to rainwater.[263]

7.152. In addition to water pollution, air may also be polluted due to toxic and radioactive dust from the tailings and waste rock stockpiles.[264] The air pollution may occur long after the mining site is closed if the site is not adequately cleaned up and tailings and stockpiles remain.[265] Analysis of the plants and soil of the Bayan Obo area, where the world's largest rare earths mine is located, showed that radioactivity was 32 times higher in plants and 1.7 times higher in soil.[266] Research also found that 61.8 tonnes of radioactive dust is emitted each year as a result of the milling of the ores.[267] Radioactive elements, including thorium, cause cancers of the lungs and pancreas as well as leukaemia.[268] Reports indicate that in areas near rare earth mines, plants grow more slowly, flower poorly, and bear bad fruits or no fruits at all; animals get sick; and humans suffer from bone and chest illnesses.[269]

7.153. Rare earth separation and refining through a process called "saponification" produces further wastewater. Studies have found that the entire rare earth refining industry in China annually produces approximately 20,000 to 25,000 tonnes of wastewater, containing toxic ammonia nitrogen concentrations ranging between 300mg/L and 5000 mg/L.[270] The rare earth elements themselves also have a negative impact on human health. For instance, cerium oxide and cerium compounds negatively affect the human heart and lungs.[271] Inhalation of lutetium creates lesions of the lungs.[272] The use of gadolinium increases the risk of skin diseases.[273] Chronic exposure to lanthanum may affect the central nervous system.[274]

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[256] China's Substantive Defence of its Export Duties on Rare Earths, Tungsten and Molybdenum, paras. 3-13.
[257] D. Schuler *et al.*, "*Study on Rare Earths and their Recycling*", January 2011 (Exhibit CHN-30).
[258] EPA, "*Rare Earth Elements: A Review of Production, Processing, Recycling, and Associated Environmental Issues*", August 2012 (Exhibit CHN-72).
[259] D. Schuler *et al.*, "*Study on Rare Earths and their Recycling*", January 2011, pp. 42-43 (Exhibit CHN-30).
[260] Ibid. p. 44.
[261] Ibid. p. 44 and EPA, "*Rare Earth Elements: A Review of Production, Processing, Recycling, and Associated Environmental Issues*", August 2012, pp. 6-6 and 6-7 (Exhibit CHN-72).
[262] D. Schuler *et al.*, "*Study on Rare Earths and their Recycling*", January 2011, p. 44 (Exhibit CHN-30).
[263] Ibid. p. 45.
[264] EPA, "*Rare Earth Elements: A Review of Production, Processing, Recycling, and Associated Environmental Issues*", August 2012, pp. 6-8 and 6-9 (Exhibit CHN-72).
[265] D. Schuler *et al.*, "*Study on Rare Earths and their Recycling*", January 2011, p. 45 (Exhibit CHN-30).
[266] Ibid. p. 50.
[267] D. Schuler *et al.*, "*Study on Rare Earths and their Recycling*", January 2011, p. 50 (Exhibit CHN-30).
[268] *Rare-earth mining in China comes at a heavy cost for local villages*, *The Guardian*, 7 August 2012 (Exhibit CHN-114).
[269] Ibid.
[270] EPA, "*Rare Earth Elements: A Review of Production, Processing, Recycling, and Associated Environmental Issues*", August 2012, pp. 4-8 (Exhibit CHN-72).
[271] Ibid. p. 6-15.
[272] Ibid. p. 6-16.
[273] Ibid. p. 6-18.
[274] Ibid. p. 6-19.

7.154. China submits that the risks to human, animal or plant life or health and the costs of controlling such risks are key reasons why rare earth production was shut down outside China. In this regard, China submits that companies outside of China that were producing, or had the capability to produce, rare earths were not ready to bear the high costs of implementing technology that would tackle environmental harm and meet national regulatory environmental requirements. For instance, according to China, the Mountain Pass rare earths mine in the United States ceased production in 2002, largely as a result of environmental damage that had occurred as well as cost issues resulting from the requirement to use environment-friendly technologies.[275]

7.155. With respect to tungsten and molybdenum, China refers to a number of mining studies in China showing that production of those minerals entails significant environmental risks. One study found that every year 2.2 million cubic meters of solid waste are dumped into rivers by tungsten ore processors, and that dozens of tonnes of arsenicum are discharged with the waste water from producing tungsten alloys/materials.[276] Another study on molybdenum mining activities in Northeast China found that concentrations of heavy metals in river sediments around the mines are significantly higher than the reference values.[277]

7.156. Based on the foregoing, the Panel considers that China has demonstrated that the mining and production of rare earths, tungsten, and molybdenum have caused grave harm to the environment and to the life and health of humans, animals, and plants in China. However, this does not suffice to demonstrate that the export duties are necessary to protect human, animal or plant life or health. To answer that question, the Panel must consider China's specific arguments and evidence regarding the design and structure of the export duties, whether they are apt to make a material contribution to their stated objective, and whether there are alternative measures available to China.

7.3.2.2.2.2 The design and structure of the export duties

7.157. In the context of discussing the design and structure of its export duties, China claims that its export duties on rare earths, tungsten, and molybdenum products are "an integral part of a comprehensive policy that has the goal to reduce pollution and protect the health of China's population, its animals and plants".[278]

7.158. China asserts that its export duties are part of its "comprehensive policy to protect the environment".[279] This policy, according to China, includes a number of other measures besides export duties. It includes environmental requirements on the treatment of these materials when they are being processed, requirements for compliance with the *Emission Standards of Pollutants from Rare Earths Industry*, a *Deposit for Ecological Recovery* after a mine has stopped operations, and a *Resource Tax* paid by the mining companies on the materials mined.[280]

7.159. In the Panel's view, the mere assertion by China that the export duties form part of a broader "comprehensive policy for environmental protection" in China is not sufficient to demonstrate that the export duties themselves are measures "designed to achieve" this objective. None of the cited elements of China's comprehensive environmental policy shows a link between export duties and a pollution reduction objective.

7.160. The Panel observes that in its defence of certain export duties and quotas in the *China – Raw Materials* dispute, China also asserted that it had a comprehensive environmental framework

[275] M. Humphries, "*Rare Earth Elements: The Global Supply Chain*", *Congressional Research Service*, 6 September 2011, p. 14 (Exhibit CHN-6) and EPA, "Rare Earth Elements: A Review of Production, Processing, Recycling, and Associated Environmental Issues", August 2012, pp. 4-9 (Exhibit CHN-72).

[276] J. Wen, "Pollution in Tungsten Production Shall be Reduced", *China Land and Resources News*, 14 June 2005 (Exhibit CHN-115).

[277] C. Yu, "Molybdenum pollution and speciation in Nver River sediments impacted with Mo mining activities in Western Liaoning, Northeast China", *International Journal of Environmental Research*, Winter 2011, p. 211 (Exhibit CHN-116).

[278] China's Substantive Defence of its Export Duties on Rare Earths, Tungsten and Molybdenum, para. 20.

[279] China's Substantive Defence of its Export Duties on Rare Earths, Tungsten and Molybdenum, para. 22.

[280] China's Substantive Defence of its Export Duties on Rare Earths, Tungsten and Molybdenum, paras. 22-30.

with respect to the products at issue in that dispute, and offered a number of measures that purported to relate to pollution resulting from the production of the products. However, the panel found that China "still need[ed] persuasive evidence *of a connection* between environmental protection standards and export restrictions."[281] We have come to the same conclusion with respect to China's arguments and evidence in this dispute.

7.161. In this dispute, China asserts that its intention to use export duties to protect the environment has been consistently expressed by China's Ministry of Finance each time a new list of export duties was adopted.[282] For instance, China notes that when the list of export duties for 2009 was adopted in December 2008, the Ministry stated:

> Meanwhile, to further restrict the exports of "high-polluting, high-energy-consuming and resource-dependent" products, China will continue with the practice of imposing temporary taxes on the exports of coals, crude oil, metallic mineral ores, ferroalloys, steel billets, etc.[283]

7.162. On 15 December 2009, when the 2010 duties were adopted, the Ministry announced the continuation of this policy:

> In [2010], China will continue with the practice of imposing temporary taxes on the exports of petroleum, rare earths, wood pulp, steel billet, etc….[284]

7.163. On 14 December 2010, the Ministry noted:

> In 2011, China will continue with the practice of imposing temporary taxes on the exports of "high-polluting, high-energy-consuming and resource-dependent" products, including coals, crude oil, fertilizers, non-ferrous metals, etc. In order to discipline rare earth exports …, export duties for certain rare earth products have been raised.[285]

7.164. When adopting the 2012 export duties, the Ministry stated:

> To promote sustainable development and to contribute to the efforts of building a resource-conserving and environment-friendly society, China will continue with the practice of imposing temporary taxes on the exports of "high-polluting, high-energy-consuming and resource-dependent" products, including coals, crude oil, fertilizers, ferroalloys, etc.[286]

7.165. In the Panel's view, these extracts from the Ministry of Finance's press releases do not demonstrate that the export duties have the objective of protecting human, animal or plant life or health. They simply state that exports of "high energy-consumption commodities, high-pollution commodities and resource-based commodities" would be taxed. 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.

7.166. In this regard, our reasoning and conclusion is similar to that reached by the panel in *China – Raw Materials* when presented with very similar evidence. That Panel observed that "[t]he reference to serious pollution is descriptive of the products affected by the restrictions, but there is no explanation of how such measures operate together with export restriction policies on raw materials to reduce pollution caused by their production."[287] In addition, that panel observed that

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[281] Panel Reports, *China – Raw Materials*, para. 7.507.

[282] China's Substantive Defence of its Export Duties on Rare Earths, Tungsten and Molybdenum, paras. 26-29.

[283] *China to Further Adjust Certain Import and Export Tariffs from 1 January 2009*, Ministry of Finance, 17 December 2008, http://finance.sina.com.cn/g/20081217/16165649494.shtml (Exhibit CHN-118).

[284] *China to Adjust Certain Import and Export Tariffs in 2010*, Ministry of Finance, 15 December 2009, http://gss.mof.gov.cn/zhengwuxinxi/zhengcejiedu/200912/t20091215_246832.html# (Exhibit CHN-119).

[285] *China to Adjust Certain Import and Export Tariffs in 2011*, Ministry of Finance, 14 December 2010, http://www.mof.gov.cn/zhengwuxinxi/caizhengxinwen/201012/t20101214_372941.html (Exhibit CHN-120).

[286] *China to Adjust Certain Import and Export Tariffs in 2012*, Ministry of Finance, 15 December 2011, http://www.mof.gov.cn/zhengwuxinxi/caizhengxinwen/201112/t20111215_615746.html (Exhibit CHN-121).

[287] Panel Reports, *China – Raw Materials*, para. 7.508.

certain documents submitted by China in that dispute "contain language stressing the importance of controlling the export of 'highly energy-consuming, highly polluting and resource-intensive' products without indicating whether and how controlling the exports will contribute to a decrease in pollution as part of a comprehensive environmental framework".[288] The panel in *China – Raw Materials* stated that:

> [W]e do not find evidence that the export measures at issue in this dispute form part of any such framework. This is not to say that Members can only succeed in justifying their measures under Article XX(b) by producing one or more instruments stating explicitly that a challenged measure has been put in place because it is necessary to protect human, animal or plant life or health, or that such instrument details the manner in which its objective will be achieved. However, in our view, a Member must do more than simply produce a list of measures referring, *inter alia*, to environmental protection and polluting products.[289]

7.167. Unlike the press releases from prior years, we note that the announcement for the 2012 export duties contains the language "to promote sustainable development and to contribute to the efforts of building a resource-conserving and environment-friendly society". In response to a question from the Panel, China did not explain why the press release issued in 2012 by China's Ministry of Finance – regarding the export duties China imposes – refers to the conservation of resources and sustainable development, while press releases issued in previous years do not.[290] In any event, the additional language does not support China's contention that the 2012 export duties on rare earths, tungsten, and molybdenum are part of a comprehensive environmental policy. Again, the language does not explain how duties can achieve the purported goals of "promot[ing] sustainable development and … contribut[ing] to the efforts of building a resource-conserving and environment-friendly society".

7.168. In addition, the Panel notes that the measures imposing export duties on rare earths, tungsten, and molybdenum indicate no link between the duties and any environmental or health objective. Neither the *2012 Tariff Implementation Program* issued by the Tariff Commission, nor the *2012 Tariff Implementation Program (Customs Tariff Commission)* issued by Customs, identifies any objective of protecting life and health. Similarly, the *Regulations on Import and Export Duties* do not state that the export duties serve health or environmental purposes.

7.169. Furthermore, some of the evidence submitted by the complainants seems to indicate that, contrary to China's assertions, the export duties at issue are designed and structured to promote increased domestic production of high value-added downstream products that use the raw materials at issue in this dispute as inputs. First, the complainants have submitted, as JE-136, an expert opinion by Professor Gene M. Grossman on "*Export Duties as a Means to Address Environmental Externalities".* According to this analysis, "a tax on exports of a good generates an increase in price in foreign markets, a fall in price in the home market, and an increase in domestic consumption that offsets the fall in foreign consumption".[291] Professor Grossman concludes that "the expansion of domestic sales that results from an export tax is an undesirable consequence for a policy designed to further environmental goals".[292] Second, the complainants draw the Panel's attention to certain statements contained in high-level Chinese documents.[293] China's State Council acknowledged that the export duties operate to "support the export of deeply processed products with high technology content and high value added".[294] China's Ministry of Industry and Information Technology also stated that the export duties are designed to "encourage the export of high value-added products and deep processing products and at the same time strictly control the export of … rare metal products involved in national strategic security".[295] Third, the complainants have submitted evidence pointing to the growth in China's downstream products

[288] Panel Reports, *China – Raw Materials*, para. 7.510.
[289] Panel Reports, *China – Raw Materials*, para. 7.511.
[290] China's response to Panel question No. 54.
[291] (Exhibit JE-136), p. 2, para. 2.
[292] (Exhibit JE-136), p. 3, para. 1.
[293] Japan's second written submission, para. 258.
[294] *Adjustment and Revitalization Plan for Non-Ferrous Industries* (State Council 2009), para. 3.1 (Exhibit JE-14).
[295] The Ministry of Industry and Information Technology, *Guidance for Enhancing the Management of Raw Materials Industries* (2009), para. 6 (Exhibit JE-12).

manufactured with rare earths, tungsten, and molybdenum from the early 2000s to 2010.[296] Fourth, the complainants have pointed out that the export duties do not apply to most downstream, value-added products derived from rare earth, molybdenum, or tungsten materials. As a consequence, the complainants argue that the export duties are not a deterrent to overall consumption of rare earths, molybdenum, and tungsten; rather, in conjunction with other measures maintained by China, the duties serve to incentivize their domestic use for the production of value-added products, as opposed to their exportation.

7.170. We do not consider that China has rebutted this evidence.

7.171. Based on the foregoing, the Panel finds that China has failed to demonstrate that its export duties are designed and structured to protect human, animal or plant life or health. Having reached this conclusion, the Panel could, at this point, end its analysis of China's defence under Article XX(b) of the GATT 1994. However, we consider it appropriate to continue and examine the remainder of China's arguments.

7.3.2.2.2.3 Existence of a material contribution

7.172. China argues that its export duties are "apt to make a material contribution" to the protection of human, animal and plant life and health. In this regard, China argues that export duties, "in a synergetic relationship with the resource tax and the *Deposit for Ecological Recovery*, as well as the imposition and enforcement of costly environmental regulations increase the prices of these products consumed in China and abroad". According to China, "[b]y increasing the price of the domestic and foreign-bound products, demand for these products will decrease and, therefore, production of rare earth, tungsten and molybdenum products in China will be reduced, resulting in less pollution connected with both mining and production".[297]

7.173. The Panel understands China's argument to be that *if* a Member adopts measures that increase the price at which a product is sold – both domestically *and* abroad – then demand for that product may well decrease, thereby reducing production, and thereby reducing pollution associated with the production of the product. The fact that the intended result is achieved *indirectly* would not, in and of itself, undermine the validity of this argument. At the same time, the Panel notes that China has not provided any evidence in support of its economic theory. We recall that in *Brazil – Retreaded Tyres*, the Appellate Body stated that a demonstration of the "material contribution" of the measure to its stated objective should "consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are *tested and supported by sufficient evidence*".[298]

7.174. At any rate, the Panel is unable to accept China's argument in this case for a very simple reason: the effect of an export tax is, by definition, to increase the price of the products at issue when destined for consumption *outside* China. China has not identified any corresponding measure that it applies to increase the price of the products at issue when destined for consumption *inside* China. The Panel gave China an opportunity to explain its position on this issue by asking China why, "If it is true that a price measure could help to internalize the environment cost … China only appl[ies] an export duty, which increases the price only for foreign consumers, without any corresponding tax on sales to domestic consumers?"[299] China's response to this question was as follows:

> China uses export duties to increase the price of the products at issue for foreign consumers, in order to reduce consumption by these foreign consumers and thus to reduce production of the rare earth, tungsten and molybdenum resources. In turn, this will reduce the pollution following from the mining and production of these resources.

[296] Japan's second written submission, para. 259.
[297] China's Substantive Defence of its Export Duties on Rare Earths, Tungsten and Molybdenum, para. 36.
[298] Appellate Body report, *Brazil – Retreaded Tyres*, para. 151. (emphasis added)
[299] Panel question No. 44.

7.175. We agree with Japan's observation[300] that China's answer to this question fails to address the Panel's question, and that China has not offered any explanation why, when its export duties are allegedly designed to internalize the environmental costs of producing the raw materials, China imposes export duties which increase prices only for foreign consumers, without any corresponding tax on sales to domestic consumers.

7.176. In addition, the complainants have repeatedly argued that the imposition of a tax only on exports, without any corresponding tax on the like product destined for domestic consumption, will not make any contribution to the achievement of China's stated objective. More specifically, the complainants argue that the decrease in foreign demand arising from the imposition of export duties results in the diversion of production to the Chinese domestic market. Thus, the complainants argue, the export duty "*per se*" would in reality lead to a downward pressure on the prices of these materials in the Chinese domestic market, relative to the situation without export duties. This could offset in the Chinese marketplace the effects of other measures that China claims to have put in place to make the prices of these materials better reflect the environmental costs. The complainants argue that this in turn provides an incentive for more intensive use of such raw materials by China's domestic downstream industries, making the Chinese economy in the long run even more dependent on the use of such inputs.[301]

7.177. The Panel also sought to elicit a response from China on these points. China's response to this question was as follows:

> As explained in its answer to Question 44, above, and in China's substantive defence of the export duties of 15 February 2013, China uses export duties to increase the price of the products at issue for foreign consumers. The Complainants have not demonstrated that the domestic prices for these products experienced any downward pressure as a consequence of the duties.[302]

7.178. We agree with the following observations by the European Union and the United States regarding China's answer to this question. First, it is not clear whether China's answer can be characterized as responding to the Panel's question, and thereby to the complainants' arguments. Second, as the party invoking Article XX(b) of the GATT 1994, China bears the burden of producing evidence and argument to substantiate its defence. In this regard, we recall that it is China that asserts that its export duties are apt to make a material contribution to the achievement of the stated objective, and that in support of this assertion it is China that advances the economic theory (unsupported by any evidence) quoted at paragraph 7.172 above.[303] In any event, even if the Panel were to reject the United States' observation that "the effect of an export restriction on domestic prices is a matter of standard economic principles"[304], and require instead that the complainants produce evidence on this issue, the complainants have done so. As discussed above in the context of addressing the design and structure of the export duties, the complainants have submitted, as Exhibit JE-136, an expert opinion by Professor Gene M. Grossman on "*Export Duties as a Means to Address Environmental Externalities".* According to this analysis, "a tax on exports of a good generates an increase in price in foreign markets, a fall in price in the home market, and an increase in domestic consumption that offsets the fall in foreign consumption."[305] Professor Grossman concludes that "the expansion of domestic sales that results from an export tax is an undesirable consequence for a policy designed to further environmental goals."[306] China has offered no response to refute this evidence and we see no reason not to accept it. More importantly, however, China has not met its burden of proof in asserting that its export duties are "apt to make a material contribution" to the protection of human, animal and plant life and health.

7.179. Based on the foregoing, the Panel finds that China has not demonstrated that its export duties are "apt to make a material contribution" to the achievement of the stated objective.

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[300] Japan's comments on China's response to Panel question No. 44.

[301] See, e.g. United States' opening oral statement at the first meeting of the Panel, para. 17; Japan's opening oral statement at the first meeting of the Panel, para. 69; the European Union's opening oral statement at the first meeting of the Panel, para. 78.

[302] China's response to Panel question No. 46.

[303] European Union's and United States' comments on China's response to Panel question No. 46.

[304] European Union's and United States' comments on China's response to Panel question No. 46.

[305] (Exhibit JE-136), p. 2, para. 2.

[306] (Exhibit JE-136), p. 3, para. 1.

7.3.2.2.2.4 Existence of alternative measures

7.180. China argues that the complainants must identify reasonably available alternative measures that would make the same contribution to the protection of human, animal and plant life or health. China recognizes that "if the complainants identify alternative measures, the burden would then be on China to demonstrate that they are not reasonably available or do not make the same contribution".[307]

7.181. For the reasons set forth above, the Panel has already found that China has failed to demonstrate that the objective of the export duties is to protect human, animal or plant life or health, or that the export duties are "apt to make a material contribution" to the achievement of that objective.[308] In these circumstances, it may not be necessary for the complainants to identify alternative measures.[309]

7.182. In any event, the complaints have identified alternative measures. The European Union notes that China has confirmed that it is already using a "diverse range of complementary measures" to achieve its objective of environmental protection. These measures include its requirement of strict compliance with environmental requirements as a condition for access to the rare earth, tungsten, and molybdenum industry and for obtaining a share of the production and export quotas; compliance with the *Emission Standards of Pollutants from Rare Earths Industry*; the requirement for mines to make a deposit for ecological recovery; and the imposition of a resource tax. In this regard, the European Union states that China has already enacted an impressive number of legal measures to protect its environment. In the opinion of the European Union, "these are the measures that can actually make a 'material contribution' to protect China's environment, and consequently the health of human, animal or plant life in China".[310]

7.183. Japan identifies several alternative measures that China could apply to address the harm caused by the mining and production of the products at issue. First, China could increase the resource tax on ores significantly enough to deter domestic production. Second, China could impose a pollution tax or "Pigouvian tax" whereby producers are made to pay for each unit of pollution they generate, thus matching the social cost of pollution.[311]

7.184. The United States contends that China could increase volume restrictions on mining and production or establish effective pollution controls on how mining or production takes place. The United States also refers to China's existing measures, including its existing environmental regulations related to production, such as pollution controls on production, a resource tax, and a mining deposit, and notes that China might need to adjust those measures to make them more effective. With respect to China's resource tax, the United States argues that "[i]t is unclear why China could not rely upon the resource tax to help ensure that the price of rare earths, tungsten, and molybdenum reflects environmental costs, rather than insisting that only products intended for foreign consumers be subject to export duties (that, as the United States noted, are significantly higher than the existing resource tax)."[312]

7.185. China offered no response to these arguments in its statement at the first meeting of the Panel, in its second written submission, or in its statement at the second meeting of the Panel. In its second set of questions, the Panel invited China to comment on the complainants' arguments, and in particular their suggestions that China could (i) increase volume restrictions on mining and production; (ii) establish effective pollution controls on mining and production; (iii) impose a resources tax on consumption; (iv) impose a pollution tax; and (v) develop and impose an export licensing system.

7.186. In its response to Panel question No. 123, China argued that the alternative measures identified by the complainants are not in fact "alternatives", since China already imposes such measures. The Panel accepts that China already imposes such measures. However, China has not

[307] China's Substantive Defence of its Export Duties on Rare Earths, Tungsten and Molybdenum, para. 37.
[308] See paras. 7.171 and 7.179 above.
[309] See para. 7.147 above.
[310] European Union's second written submission, para. 362.
[311] Japan's second written submission, paras. 270-272.
[312] United States' second written submission, paras. 67-70.

explained why it could not, as an alternative to the export duties (which the Panel has found are WTO-inconsistent and not apt to make a material contribution to the protection of human, animal, or plant life or health), *increase* the volume restrictions on mining and production, *increase* the pollution controls on mining and production, *increase* the resource tax, and/or *increase* the pollution tax. In this regard, the fact that China already imposes these types of measures does not explain why *increasing the rates* (e.g. on the resource tax) is not an "alternative" to export duties. We agree with Japan that "China could *increase* the resource tax on ores significantly enough to deter domestic production. China has failed to respond to Japan's WTO-consistent alternative of an *increased* resource tax instead of the export duties."[313]

7.187. Based on the foregoing, the Panel finds that China has not met its burden of demonstrating that the alternative measures identified by the complainants are not reasonably available to China, or do not make the same contribution as the challenged measure.

7.3.2.2.2.5 The chapeau of Article XX of the GATT 1994

7.188. China argues that its export duties are applied in a manner that satisfies the requirements of the chapeau of GATT Article XX.

7.189. First, with respect to the question of whether the export duties are applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", China argues that the "export duties do not make a distinction according to the destination of the products being exported", and that "[in the absence of any distinction based on origin or destination, there is no cause to consider that the export duty is applied 'in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail'."[314]

7.190. The Panel agrees with China that the export duties do not make a distinction according to which country the *exported* products are destined. However, and as set out above in the context of discussing the legal standard under Article XX of the GATT 1994, the terms "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" in the chapeau of Article XX covers not only MFN-type discrimination among different countries to which an exported product is destined (for example whether export duties on rare earths accord Japan less favourable treatment than the United States), but also national treatment-type discrimination arising from the difference in treatment accorded to the like product when destined for export, as compared with the treatment of the like product when destined for domestic consumption. China agrees with this interpretation of the chapeau of Article XX[315] and has advanced no other arguments to discharge its burden of demonstrating that the export duties are not applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

7.191. Second, China argues that its export duties are not applied in a manner that constitutes a "disguised restriction on international trade". In support, China advances a one-sentence argument that these measures "are tailored to, and are an intrinsic part of, China's policy aimed at protecting the environment against the harms following from excessive mining and production of rare earth, tungsten and molybdenum products".[316]

7.192. In the Panel's view, a mere assertion is not proof and this one-sentence argument fails to meet China's burden of proof. In addition, it appears to the Panel that the export duties are not actually "tailored to" protecting the environment against the harm that results from excessive mining and production of rare earth, tungsten, and molybdenum products. In this regard, China has not provided any explanation of the criteria it has used to set the level of the export duties, or to determine what specific effects on production would be expected from a specific duty level. We recall that China imposes export duties on 82 different rare earth, tungsten, and molybdenum products, ranging from 5-25% *ad valorem*.

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[313] Japan's comments on China's response to Panel question No. 123, para. 84.

[314] China's Substantive Defence of its Export Duties on Rare Earths, Tungsten and Molybdenum, para. 42.

[315] See above, para. 7.148.

[316] China's Substantive Defence of its Export Duties on Rare Earths, Tungsten and Molybdenum, para. 43.

7.193. Based on the foregoing, the Panel finds that China has not demonstrated that its export duties are applied in a manner that satisfies the requirements of the chapeau of Article XX.

7.3.2.2.3 Conclusion on the chapeau of Article XX of the GATT 1994

7.194. The Panel concludes that China has demonstrated that the mining and production of rare earths, tungsten, and molybdenum have caused grave harm to the environment and to the life and health of human, animals, and plants in China. The Panel recognizes that in recent years China has considerably enhanced the scope of the environmental measures it has adopted with a view to addressing this harm. In this regard, the Panel recalls the Appellate Body's statement that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and that protecting the environment is no less important".[317]

7.195. However, the Panel finds that China has not demonstrated that its export duties are designed to address this problem, or that they are apt to make a material contribution to addressing this problem, or that the alternative measures identified by the complainants are not reasonably available or would not make the same contribution to addressing this problem. In addition, the Panel finds that China has not demonstrated that the measures are applied in a manner that satisfies the chapeau of Article XX of the GATT 1994. For these reasons, the Panel finds that China has not demonstrated that its imposition of export duties on the products at issue are justified under Article XX(b) as measures necessary to protect human, animal or plant life or health.

7.3.3 Overall conclusion on claims relating to export duties

7.196. For the reasons set forth above, the Panel finds that: (i) China's imposition of export duties on the products at issue[318] is inconsistent with Paragraph 11.3 of China's Accession Protocol; (ii) the obligation in Paragraph 11.3 is not subject to the general exceptions in Article XX of the GATT 1994[319]; and even if it were, (iii) China has not demonstrated that its export duties on the products at issue are justified under Article XX(b) of the GATT 1994 as measures necessary to protect human, animal or plant life or health.

7.4 Export quotas

7.4.1 Introduction and Claims of violation of Article XI:1 of the GATT 1994 and Paragraphs 162 and 165 of China's Working Party Report

7.197. The complainants assert that China subjects various forms of rare earths, tungsten, and molybdenum to quantitative restrictions, including quotas. According to the complainants, such measures are inconsistent with Article XI:1 of the GATT 1994 and with Paragraph 1.2 of Part I of China's Accession Protocol, which incorporates commitments in Paragraphs 162 and 165 of China's Working Party Report[320], because they constitute export restrictions other than duties, taxes, or other charges.[321]

7.198. Article XI:1 of the GATT 1994 provides that:

> No prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

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[317] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 144 and 179.

[318] These products are specified above at para. 7.46. The Panel recalls that in view of the nature of the export duty system described above, the Panel's finding is with respect to the series of measures comprising the relevant framework legislation, the implementing regulations, other applicable laws and the specific annual measures imposing the export duties existing at the date of the Panel's establishment.

[319] As explained above, one panelist is of the view that the obligation in Paragraph 11.3 of China's Accession Protocol is subject to the general exceptions in Article XX of the GATT 1994.

[320] See Report of the Working Party on the Accession of China (WT/MIN(01)/3, 10 November 2001).

[321] United States' request for the establishment of a panel, part. II.

7.199. Paragraphs 162 and 165 of China's Working Party Report provide that:

> 162. The representative of China confirmed that China would abide by WTO rules in respect of non-automatic export licensing and export restrictions. The Foreign Trade Law would also be brought into conformity with GATT requirements. Moreover, export restrictions and licensing would only be applied, after the date of accession, in those cases where this was justified by GATT provisions. The Working Party took note of these commitments.
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> 165. The representative of China confirmed that upon accession, remaining non-automatic restrictions on exports would be notified to the WTO annually and would be eliminated unless they could be justified under the WTO Agreement or the Draft Protocol. The Working Party took note of this commitment.

7.200. China does not dispute that it imposes export quotas on the products at issue. It also does not contest that these quotas violate Article XI:1 of the GATT and Paragraphs 162 and 165 of China's Working Party Report. The Panel therefore finds that China's export quotas on rare earths, tungsten, and molybdenum are inconsistent with Article XI:1 of the GATT and Paragraphs 162 and 165 of China's Working Party Report. China argues, however, that the obligation in Article XI:1 is subject to the general exceptions in Article XX of the GATT 1994, and submits that the export quota measures at issue are justified under Article XX(g) of the GATT 1994 because they "relat[e] to the conservation of exhaustible natural resources", are "made effective in conjunction with restrictions on domestic production or consumption", and comply with the requirements of the chapeau of Article XX.[322]

7.201. In the opinion of the complainants, China has failed to demonstrate that its export quotas fall within the scope of subparagraph (g) of Article XX, or that they comply with the requirements of the chapeau of Article XX. According to the complainants, China's export quota measures on rare earths, tungsten, and molybdenum are primarily designed to serve China's industrial policies.

7.4.1.1 Burden of proof and management of the evidence by the Panel

7.202. Before examining the relevant evidence and argumentation of the parties with respect to China's export quotas on rare earths, tungsten, and molybdenum, the Panel recalls that it is the Member invoking Article XX that bears the burden of proof to demonstrate that the measure at issue is justified under that Article.[323] In relation to China's defence of its export quotas under Article XX(g), the Panel has been required to assess a considerable amount of evidentiary material (including expert evidence). It is well settled that panels enjoy a broad margin of discretion – as the triers of fact – in assessing the value of the evidence before them and in ascribing weight to that evidence.[324] At the same time, panels must respect the standard of review set out in Article 11 of the DSU.

7.203. With these principles in mind, the Panel proceeds to describe China's export quota measures.

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[322] China's first written submission, para. 11.

[323] Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, 3, p. 20-21.

[324] We agree with the following observations at footnote 637 in Panel Reports, *China – Raw Materials*:

> If it is clear that panels have exclusive jurisdiction over the evaluation of factual and expert evidence, "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case" (Appellate Body Report, *US – Wool Shirts and Blouses*, p. 335) as "[the Appellate Body] cannot second-guess the Panel in appreciating either the evidentiary value of … studies or the consequences, if any, of alleged defects in [the evidence]". (Appellate Body Report, *Korea – Alcoholic Beverages*, para. 161). There are, however, no criteria or specific standards concerning the credibility and weight that the Panel should ascribe to the different elements of evidence. Criteria such as "balance of probabilities" or "preponderance of evidence" were rejected in favour of panels' discretion, a discretion that must nonetheless respect the provisions of Article 11 of the DSU for an "objective" assessment of the facts and the law.

7.4.1.2 Description of China's export quota measures

7.4.1.2.1 China's export quota regime – China's legal framework for quota imposition

7.204. China's *Foreign Trade Law* allows for the imposition of restrictions or prohibitions on the exportation of goods in pursuance of certain specific objectives, such as protecting human life or health, or conserving exhaustible natural resources.[325] Article 19 of the *Foreign Trade Law* provides that China may restrict or prohibit exportation through export quotas.[326] The *Regulations on the Administration of the Import and Export of Goods* prescribe rules governing the administration of the export and import of goods[327], while the *Export Quota Administration Measures* specify further aspects of the administration of export quotas.[328] The Annex to the *Export Quota Administration Measures* excludes its application to certain agricultural products and industrial products, such as rare earths.

7.205. China's *Foreign Trade Law* grants to MOFCOM the authority to administer all Chinese export quotas.[329]

7.206. MOFCOM, in collaboration with Customs, is responsible for "formulating, adjusting, and publishing" catalogues of goods the import or export of which is restricted or prohibited.[330] MOFCOM also determines and announces the amount of the annual export quota for each restricted product.[331]

7.207. China's *2012 Export Licensing Catalogue* identifies all goods subject to export quotas.[332] Article 38 of the *Regulations on the Administration of the Import and Export of Goods* provides that the relevant Ministry shall publish annual quota amounts for products on this list by 31 October of the preceding year.[333]

7.208. China published the *2012 Export Quota Amounts*[334] on 31 October 2011. This document indicates the total export quota for certain agricultural and industrial products, such as tungsten and molybdenum.

7.209. Pursuant to the *2012 Export Licensing Catalogue*[335], concentrates and a variety of processed and alloyed products of rare earths, tungsten, and molybdenum are all subject to export quota licensing administration. This means that quota shares are directly assigned by MOFCOM and require MOFCOM approval.

7.210. China maintains a series of criminal and administrative penalties for the exportation of restricted goods in a manner inconsistent with the quota regime. Under China's *Regulation on Import and Export Administration*, the holder of an export quota is required to return any unused quota volume by 31 October of the year for which the export quotas have been issued.[336] Exporting enterprises may be subject to sanction if they fail to do so and also fail to fully use their quota by the end of the year.[337] Enterprises may also face sanctions for exporting without permission, exceeding the quantitative limitations, or buying or selling quota certificates or other

[325] *Foreign Trade Law*, (Exhibit CHN-11, JE-49), Articles 16 and 17.
[326] *Foreign Trade Law*, (Exhibits CHN-11, JE-49), Article 19; *Regulations on the Administration of the Import and Export of Goods* (Exhibits CHN-54, JE-50), Article 4.
[327] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 36.
[328] *Export Quota Administration Measures*, (Exhibits CHN-96, JE-52), Article 1.
[329] *Foreign Trade Law*, (Exhibits CHN-11, JE-49), Article 20.
[330] *Foreign Trade Law*, (Exhibits CHN-11, JE-49), Article 18; *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 35; 2008 *Export Licence Administration Measures*, (Exhibit JE-51), Article 3 para. 2.
[331] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50). Article 38; *Export Quota Administration Measures*, (Exhibits CHN-96, JE-52), Articles 9-11.
[332] *2012 Export Licensing Catalogue*, (Exhibits CHN-8, JE-48).
[333] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 38.
[334] *2012 Export Quota Amounts*, (Exhibits CHN-97, JE-58).
[335] *2012 Export Licensing Catalogue*, (Exhibits CHN-8, JE-48), para. I(iii).
[336] *Regulations on the Administration of the Import and Export of Goods*, (Exhibit CHN-54), Article 42.
[337] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 42.

documents without approval.[338] Sanctions include refusal to handle the offending enterprise's Customs inspection;[339] revocation of the non-complying enterprise's business licence for foreign trade; a reduction in the offending enterprise's quota allocation, and possible criminal punishment.[340] Quota administering authorities that distribute quotas exceeding their authority may also be subject to sanction.[341]

7.211. Each qualifying company receives a quota for light or heavy/medium rare earths. An export quota holder is free to assign its quota on different rare earth products (light or medium/heavy) with the consequence that a quota holder may assign its entire quota to one or several rare earth products. In practice, exporting firms may export only a few rare earth products.[342]

7.4.1.3 Application of the quota system

7.4.1.3.1 Export quotas for rare earths

7.212. The *2012 Export Licensing Catalogue* details those rare earth concentrates[343] and processed or alloyed products that are subject to export quota licensing administration.[344] Accordingly, any firm seeking to export rare earths must apply for an export quota share and meet certain criteria in order to be eligible.[345] Firms approved to export rare earths receive a quota certificate. After obtaining a quota certificate, exporters apply to MOFCOM for an export licence, which can be presented to the Chinese customs authorities.[346]

7.213. On 26 December 2011, China published the *2012 First Batch Rare Earth Export Quotas*, announcing that MOFCOM was distributing the "first batch" export quota on rare earths to specific enterprises listed therein. According to the notice, the first batch allocation represented approximately 80% of the total amount of the 2012 export quota for rare earths.[347] In this notice, China distinguished the allocation of the more than 50 items covered by the rare earths quota between (1) light rare earths and (2) medium/ heavy rare earths. Specifically, China allocated 9,095 metric tonnes[348] of light rare earths and 1,451 tonnes of medium/heavy rare earths in terms of gross weight in the first batch. In addition, MOFCOM conditionally allocated an additional 12,605 tonnes of light rare earths and 1,753 tonnes of medium/heavy rare earths to "pending enterprises", to be granted on the basis of whether those enterprises could satisfy by July 2012 environmental reviews conducted by the Ministry of Environmental Protection.[349]

7.214. On 16 May 2012, MOFCOM allocated an additional 9,490 tonnes of light rare earths and 1,190 tonnes of medium/heavy rare earths in gross weight to companies previously labelled as

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[338] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 42; *Foreign Trade Law*, (CHN-11), Articles 64, 65, and 66.

[339] The Panel notes that, according to Articles 61 and 64 of the *Foreign Trade Law*, (Exhibit CHN-11), this sanction only applies to export without permission.

[340] *Foreign Trade Law*, (Exhibits CHN-11, JE-49), Articles 61 and 64; *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Articles 64 and 65.

[341] *Export Quota Administration Measures*, (Exhibits CHN-96, JE-52), Article 29; *2010 Amendment of Measures for Administration of Licensing Entities*, (Exhibit JE-53), Articles 40 and 41.

[342] See parties' responses to Panel question Nos. 21, 23, 28, and 43; see also United States' opening statement at the first meeting of the Panel, para. 51.

[343] China states that its export quota does not cover crude ores of rare earth. See also China's response to Panel question No. 141.

[344] *2012 Export Licensing Catalogue*, (Exhibits CHN-8, JE-48), Annex 1.

[345] *2012 Application Qualifications and Procedures for Rare Earth Export Quotas* (Exhibits CHN-38, JE-61).

[346] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Articles 41 and 43.

[347] *2012 First Batch Rare Earth Export Quotas* (Exhibits CHN-56, JE-55); *2012 First Batch Rare Earth Export Quota (Supplement)* (Exhibits CHN-57, JE-56).

[348] Throughout these Reports, all references to "tonnes" are references to metric tonnes. The Panel notes that in its written submissions the United States sometimes uses the spelling "ton" to mean "metric tonne".

[349] *2012 First Batch Rare Earth Export Quotas* (Exhibits CHN-56, JE-55).

"pending enterprises". According to the notice, this represented a supplement to the "first batch" of the rare earth quota.[350]

7.215. On 16 August 2012, China issued the "second batch" quota allocation for rare earths. MOFCOM allocated 8,537 tonnes of light rare earths and 1,233 tonnes of medium/heavy rare earths.[351] As a result, in total, China's rare earth export quota for 2012 was 30,996 tonnes in gross weight.

7.4.1.3.1.1 Application requirements for manufacturing enterprises

7.216. The *2012 Application Qualifications and Procedures for Rare Earth Export Quotas* provide that manufacturing enterprises must be registered as a foreign trade operator and have independent legal status. In addition they must obtain the rare earth materials from an eligible mining enterprise and have environmental treatment facilities suitable to the production scale of the applicant. Further, enterprises must have export performance in each year from 2008-2010 and for those enterprises who acquired a quota after 2010, they must have export performance in each year up to 2010 (for those enterprises whose export quotas were acquired after 2008, the export performance is based on all years from the year in which the quota was acquired up to 2010).[352]

7.217. Annex 1 of the *2012 First Batch Rare Earth Export Quotas* provides that the rare earth quota for manufacturing enterprises is to be allocated based on a formula that takes into account a manufacturing enterprise's export performance.[353]

7.4.1.3.1.2 Application requirements for trading enterprises

7.218. The *2012 Application Qualifications and Procedures for Rare Earth Export Quotas* provide that a trading enterprise applying for quota rights must have export performance from 2008 to 2010. Trading enterprises are also required to have a minimum registered capital of more than RMB 50 million.[354]

7.219. Annex 1 to the *2012 First Batch Rare Earth Export Quota* provides that the rare earth quota for trading enterprises is to be allocated based on a formula that takes into account a trading enterprise's export performance.[355]

7.4.1.3.2 Export quota for tungsten and tungsten products

7.220. The *2012 Export Licensing Catalogue* subjects tungsten concentrates[356] and a variety of processed tungsten products to direct export quota administration in the same manner as rare earths and molybdenum.[357] The *Catalogue* requires enterprises seeking to export tungsten and tungsten products to apply to MOFCOM under the *2012 Application Qualifications and Application Procedures of Tungsten Export (or Supply) Enterprises*. According to this regulation, MOFCOM directly assigns a share of the export quota to approved enterprises.[358]

7.221. The *2012 Export Quota Amounts*[359] indicates that the 2012 total annual export quota for tungsten is 15,400 tonnes in metal content.[360] The export quota for tungsten was further allocated in two batches among four categories of tungsten products: (a) tungstic acid and its salts;

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[350] *2012 First Batch Rare Earth Export Quota (Supplement)* (Exhibits CHN-57, JE-56).
[351] *2012 Second Batch Rare Earth Export Quotas* (Exhibits CHN-58, JE-57).
[352] *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, (Exhibits CHN-38, JE-61).
[353] *2012 First Batch Rare Earth Export Quotas* (Exhibits CHN-56, JE-55).
[354] *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, (Exhibits CHN-38, JE-61), paras. II(ii)2 and II(ii)(3).
[355] *2012 First Batch Rare Earth Export Quotas* (Exhibits CHN-56, JE-55).
[356] China states that its export quota does not cover crude ores of tungsten. See also China's response to Panel question No. 141.
[357] *2012 Export Licensing Catalogue*, (Exhibits CHN-8, JE-48), Annex 1.
[358] *2012 Application Qualifications and Application Procedures of Tungsten Export (or Supply) Enterprises*, (Exhibits CHN-100, JE-62), Article IV(iv).
[359] *2012 Export Quota Amounts* (Exhibits CHN-97, JE-58)
[360] See also Exhibit CHN-223.

(b) tungstic trioxide and blue tungsten oxide; (c) tungsten powder and its products; and (d) ammonium metatungstate and paratungstate.[361]

7.222. On 26 December 2011, China published a notice announcing the distribution of 2012 "first batch" export quota shares for tungsten, indicating the specific amount of specific categories of tungsten allocated to specific enterprises.[362] According to the notice, the "first batch" allocation covered approximately 60% of the 2012 quota for non-ferrous metals, including tungsten. MOFCOM allocated, in gross weight, 3,036 tonnes to ammonium metatungstate and paratungstate, 377 tonnes to tungstic acid and its salts, 5,380 tonnes to tungsten trioxide and blue tungsten oxide, and 2,587 tonnes to tungsten powder and its products.

7.223. On 19 July 2012, China issued the "second batch" quota allocation for tungsten. MOFCOM allocated an additional 7,587 tonnes in gross weight to the tungsten products listed above in similar proportions.[363] In total, China's tungsten quota for 2012 was 18,967 tonnes.

7.224. In addition, the notice announcing the "second batch" export quota clarified that, as of 1 August 2012, the export companies allocated quota allowances for specific tungsten products may adjust the export quota allowances to apply to tungsten products higher in the industrial chain[364], without first seeking MOFCOM authorization. According to the notice, such quota shares may be freely allocated to tungsten products higher in the industrial chain, but may not be reallocated to tungsten products with a lesser degree of processing.

7.4.1.3.3 Export quota for molybdenum

7.225. Under the *2012 Export Licensing Catalogue*, molybdenum concentrates[365] and a variety of processed molybdenum products are subject to direct export quota administration.[366] Shares of the export quota are therefore assigned directly by MOFCOM to individual companies whose applications for molybdenum quota shares have been approved.

7.226. Exporters apply for export quota shares under procedures spelled out by MOFCOM in the *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*.[367]

7.227. The *2012 Export Quota Amounts* [368] indicates that the 2012 total annual export quota for all molybdenum products is 25,000 tonnes in metal content. The export quota for molybdenum is further allocated among the following three molybdenum product categories: (a) primary raw molybdenum; (b) chemical molybdenum products; and (c) molybdenum products.[369]

7.228. On 26 December 2011, China published a notice announcing the distribution of 2012 "first batch" export quota shares for molybdenum, indicating the specific amount of specific categories of molybdenum allocated to the specific enterprises.[370] According to the notice, the first batch allocation covered approximately 60% of the 2012 quota for non-ferrous metals, including molybdenum. MOFCOM allocated, in gross weight, 19,914 tonnes to primary raw molybdenum,

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[361] *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-99, JE-59), annex 2; *2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals* (Exhibits CHN-165, JE-60); *2012 Export Quota Amounts*, (Exhibits CHN-97, JE-58).

[362] Annex 2 of Exhibits CHN-99 and JE-59.

[363] *2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-165, JE-60).

[364] The Notice indicates the industrial chain for tungsten proceeds as follows: tungsten oxide → ammonium paratungstate → tungsten trioxide and blue tungsten oxide → tungsten powder. See *2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals* (Exhibits CHN-165, JE-60).

[365] China states that its export quota does not cover crude ores of molybdenum. See also China's response to Panel question No. 141.

[366] *2012 Export Licensing Catalogue*, (Exhibits CHN-8, JE-48), annex 1.

[367] *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* (Exhibits CHN-107, JE-63).

[368] *2012 Export Quota Amounts* (Exhibits CHN-97, JE-58).

[369] *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-99, JE-59); *2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-165, JE-60).

[370] *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-99, JE-59).

2,353 tonnes to chemical molybdenum products, and 2,250 tonnes to other molybdenum products.[371]

7.229. On 19 July 2012, China issued the "second batch" quota allocation for the export of molybdenum. MOFCOM allocated an additional 16,345 tonnes in gross weight to the molybdenum products listed above in similar proportions.[372] In total, China's molybdenum quota for 2012 was 40,862 tonnes in gross weight.

7.230. In announcing the second batch export quota for 2012, China indicated that as of 1 August 2012, the export companies allocated quota allowances for specific molybdenum products may adjust the export quota allowances to apply to molybdenum products higher in the industrial chain, without first seeking authorization from MOFCOM.[373] These quota shares may be freely allocated to molybdenum products higher in the industrial chain, but may not be reallocated to molybdenum products with a lesser degree of processing.

7.4.1.3.3.1 Application requirements for manufacturing enterprises

7.231. The *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* provide that, *inter alia*, an applicant must have approved production that is in compliance with current industry policies, be qualified to engage in foreign trade operations, have independent legal status and have acquired an ISO 9000 quality management system certificate. The procedures also state that a manufacturing enterprise must have actual export performance from 2008-2010 if the enterprise had previously acquired export quota or, if a new applicant, successfully met the production requirements from 2008-2010.[374]

7.232. The *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* also provide that molybdenum export quota is to be allocated based on a formula that takes into account a manufacturing enterprise's export performance over a three-year period.[375]

7.4.1.3.3.2 Application requirements for trading enterprises

7.233. The *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* lays down similar requirements as stated for manufacturing enterprises and also provides that a trading enterprise applying for quota rights previously must have acquired export quotas and had actual export performance from 2008 to 2010. Further, trading enterprises must have a minimum registered capital of more than RMB 30 million.[376]

7.234. The *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* also provide that molybdenum export quota is to be allocated based on a formula that takes into account a trading enterprises export performance over a three-year period.[377]

7.4.1.4 Series of measures

7.235. In view of the quotas applicable to rare earths, tungsten, and molybdenum described above, the Panel has determined that as the panel in *China – Raw Materials* did, the Panel will make findings and recommendations with respect to the series of measures comprising the relevant framework legislation, the implementing regulation(s), other applicable laws and the

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[371] *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-99, JE-59).

[372] *2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-165, JE-60).

[373] The Notice indicates the industrial chain for molybdenum proceeds as follows: molybdenum furnace materials (primary raw molybdenum) → molybdenum chemical products → molybdenum products. See *2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-165, JE-60).

[374] *2012 Application Qualifications and Application Procedures for Molybdenum Export*, (Exhibits CHN-107, JE-63).

[375] *2012 Application Qualifications and Application Procedures for Molybdenum Export*, (Exhibits CHN-107, JE-63).

[376] *2012 Application Qualifications and Application Procedures for Molybdenum Export*, (Exhibits CHN-107, JE-63).

[377] *2012 Application Qualifications and Application Procedures for Molybdenum Export*, (Exhibits CHN-107, JE-63)

specific annual measures imposing the export quotas existing at the date of the Panel's establishment.[378]

7.5 China's defence under Article XX(g) of the GATT 1994

7.236. As the Panel noted above, China argues that its export quotas on rare earths, tungsten, and molybdenum are justified under Article XX(g) of the GATT 1994 because they "relate to the conservation of exhaustible natural resources" and are "made effective in conjunction with restrictions on domestic production or consumption". In the following section, the Panel proceeds to consider the interpretation of Article XX(g) to determine the legal test to be applied in considering China's Article XX(g) defence. The Panel will look first at the interpretation of subparagraph (g) of Article XX, and will then proceed to address the interpretation of the chapeau. Thereafter, the Panel will apply this legal test to China's export quotas to determine whether China has met its burden to demonstrate that its measures are justified under Article XX(g).

7.5.1 Introduction

7.237. The Panel now turns to discuss the interpretation of Article XX(g), beginning with subparagraph (g) and followed by the requirements of the chapeau of Article XX. Following this, the Panel will turn to analyse whether China has demonstrated that the challenged export restrictions on rare earths, tungsten, and molybdenum can be justified under Article XX(g). In other words, the Panel will examine whether China has demonstrated that its export restrictions on these three products relate to the conservation of an exhaustible natural resource, and are made effective in conjunction with domestic restrictions on production or consumption. The Panel will then consider whether the measures comply with the requirements of the chapeau of Article XX.

7.238. A measure that is inconsistent with one or more obligations in the GATT 1994 may nevertheless be justified under Article XX.[379] As the Appellate Body stated in *US – Gasoline*, in order to be justified under Article XX:

> [T]he measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two tiered: first, provisional justification by reason of characterization of the measure under [the sub-paragraph]; second, further appraisal of the same measure under the introductory clauses of Article XX.[380]

7.239. The various subparagraphs of Article XX lay out the manner in which a Member may adopt measures pursuing "legitimate state policies or interests"[381] that will justify the imposition of GATT-inconsistent measures. Article XX(g) reads as follows:

> Subject to [requirements regarding non-discrimination and disguised restriction on trade] nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

7.240. Therefore, for a measure to be justified under Article XX(g), the measure at issue must (i) "relate to" the "conservation" of an "exhaustible natural resource", and (ii) be "made effective" "in conjunction" with "restrictions" on "domestic production or consumption". The Panel notes that,

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[378] Panel Reports, *China – Raw Materials*, para. 7.33; see also Appellate Body Reports , *China – Raw Materials*, para. 266.

[379] Appellate Body Reports, *US – Gasoline*, p. 24, DSR 1996:I, 3, at 22, and *China – Raw Materials*, para. 334 ("Members can resort to Article XX of the GATT 1994 as an exception to justify measures that would otherwise be inconsistent with GATT obligations").

[380] Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20.

[381] Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3, at 16.

although a measure's compliance with each of these elements must be shown, Article XX(g) ultimately lays down a single test, the entirety of which must be satisfied if a measure is to be maintained pursuant to that provision. The Panel is of the view that a measure's compliance with Article XX(g) can be determined only on the basis of a holistic assessment of whether the challenged measure relates to the conservation of rare earths, tungsten, or molybdenum and is made effective in conjunction with domestic restrictions on consumption or production. Additionally, and because of the unitary nature of the test, facts and arguments may be relevant in more than one part of the Panel's analysis. For example, in *US – Gasoline*, the Appellate Body observed that where there were no "restrictions" on domestically produced like products "at all", the measure could not be accepted "as primarily or even substantially designed for implementing conservationist goals".[382]

7.241. The Panel recalls that, as China invoked Article XX(g), it bears the burden of establishing that its measures come within the scope of that provision.[383] As the Appellate Body explained in *US – Wool Shirts and Blouses*:

> [T]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[384]

7.242. Accordingly, China bears the burden in the first instance of showing that its export quota measures comply with the terms of Article XX(g), including the chapeau. If China provides sufficient evidence to demonstrate a justification, the burden shifts to the complainants to show that China's measures are not justified under Article XX(g).

7.243. Pursuant to Article 3.2 of the DSU and Article 31 of the Vienna Convention, the Panel turns now to consider the ordinary meaning of the words used in subparagraph (g) in their context.

7.5.2 Interpretation of Article XX(g) of the GATT 1994

7.244. Article XX(g) of the GATT 1994 reads as follows:

> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> …
>
> (g) Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

7.5.2.1 Meaning of "relating to the conservation of exhaustible natural resources"

7.245. The first part of Article XX(g) requires that the challenged measure is one "relating to the conservation of exhaustible natural resources". The Panel begins by considering the meaning of "exhaustible natural resources". We then continue to examine the meaning of "conservation" and "relating to".

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[382] Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at 19.

[383] Panel Report, *US – Gasoline*, para. 6.35; Appellate Body Report, *US – Gasoline*, p. 23 (confirming that the burden of proof "rests on the party invoking the exception"), DSR 1996:I, 3, at 21.

[384] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335.

7.5.2.1.1 "exhaustible natural resources"

7.246. It is not entirely clear whether the parties agree on the meaning of "exhaustible natural resources". The European Union and Japan both consider that the term is limited to resources in their raw form and excludes semi-processed and processed materials.[385] The United States also doubts that processed or semi-processed materials are included within the term "exhaustible natural resource".[386] China does not deal directly with the question whether and when processed materials cease to be classifiable as "exhaustible natural resources", but argues that the "product scope covered by this exception is broad".[387]

7.247. Although the parties appear to differ on the scope of "exhaustible natural resources", the Panel notes their apparent agreement that, whatever the term's precise definition, measures can "relate to the conservation of exhaustible natural resources" even if they do not explicitly apply to those resources.[388] In other words, the parties seem to agree that a measure may "relate to the conservation of" an exhaustible natural resource even if that resource in its raw form is not the direct subject of the measure.

7.248. The Panel begins by observing that there is no internationally agreed definition of "exhaustible natural resources". Although the Appellate Body has held that the term encompasses clean air[389], sea turtles[390], petroleum[391], and various mineral resources[392], the precise point at which processed raw materials cease to be considered "exhaustible natural resources" for the purposes of Article XX(g) has never been addressed in WTO dispute settlement.

7.249. At the same time, the Panel believes that "exhaustible natural resources" cannot be interpreted so broadly as to include resources or other products that are unrelated to, or have no connection with, "exhaustible natural resources". As the complainants have noted[393], the drafters of Article XX(g) rejected a proposal to include the words "or other" after the words "exhaustible natural"[394], indicating an intention that the exception should not apply to all resources. An unduly broad interpretation of the term "natural resource" would not, in the Panel's opinion, respect this intention to limit the scope of the provision, but would instead deprive the qualifier "exhaustible natural" of meaning, contrary to the principle of effective treaty interpretation.[395]

7.250. The Panel considers that it need not decide the precise meaning or scope of the term "exhaustible natural resources" to resolve this dispute. The Panel agrees with the parties that measures may "relate to the conservation of exhaustible natural resources" even if they are not imposed directly upon those resources. In *US – Gasoline*, the Appellate Body accepted the panel's finding that, as clean air is a "natural resource" susceptible to depletion, "a policy to reduce the depletion of clean air was a policy to conserve an exhaustible natural resource".[396] Since the measures at issue in that case were designed to support "the objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990", the Appellate Body found that such measures were "primarily"[397] and not "merely incidentally or inadvertently aimed at the conservation of clean air".[398] In our view, this means that the measures for which Article XX(g) is invoked need not be imposed directly on an "exhaustible natural resource", provided that they support or contribute to the conservation of an exhaustible natural resource. In the Panel's view, therefore, the subject matter of measures contemplated by Article XX(g) is not limited to raw natural resources, so long as the object of the concerned measures is to conserve,

[385] Japan's second written submission, para. 53; European Union's response to Panel question No. 129.
[386] United States' second written submission, para. 149.
[387] China's first written submission, para. 43.
[388] China's second written submission, para. 11; United States' response to Panel question No. 127; Japan's response to Panel question No. 122; European Union's response to Panel question No. 129.
[389] Appellate Body Report, *US – Gasoline*, p. 14, DSR 199:I, 3, at 13.
[390] Appellate Body Report, *US – Shrimp*, para. 131.
[391] Appellate Body Report, *US – Shrimp*, para. 128.
[392] Appellate Body Report, *US – Shrimp*, para. 128; Panel Reports, *China – Raw Materials*, para. 7.369.
[393] Japan's second written submission, para. 54; European Union's executive summary (part II), para. 7.
[394] United Nations Economic and Social Council, *Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment* (E/PC/T/34, 5 March 1947), p. 31.
[395] See, e.g. Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at 21.
[396] Appellate Body Report, *US – Gasoline*, p. 14, DSR 1996, 3 at 13.
[397] Appellate Body Report, *US – Gasoline*, p. 18, DSR 1996, 3 at 17.
[398] Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996, 3 at 18.

directly or indirectly, such raw natural resources. This interpretation of the term "exhaustible natural resources" seems consistent with the object and purpose of subparagraph (g) and Article XX more generally, which is to allow for WTO-inconsistent measures where they relate to the conservation of exhaustible natural resources.

7.251. The Panel will therefore focus its analysis on the question whether China's export quota measures "relate to" the "conservation" of an exhaustible natural resource, rather than the distinct question whether the products on which China's measures operate are themselves exhaustible natural resources.

7.5.2.1.2 "conservation"

7.252. China argues that the policy goal of "conservation" under GATT Article XX(g) is not limited to preserving exhaustible natural resources in their current state, but also covers the use and management of those resources in line with a Member's sustainable economic development.[399] In China's view, its argument is supported by the interpretation and conclusion reached by the panel in *China – Raw Materials*. China recalls that the panel in that case did not stop its examination at the dictionary definition of "conservation" (defining the term to mean an "act of preserving and maintaining the existing state of something"), but considered also the context of the term and the preamble of the WTO Agreement, recognizing that WTO Members have "a large measure of autonomy" to make policy choices and select priorities in designing policies, provided they respect the requirements of Article XX(g). China further recalls that the panel in *China – Raw Materials* also took account of principles of general international law applicable to WTO Members. In particular, the panel noted that the principle of permanent sovereignty over natural resources affords Members the opportunity to use their natural resources to promote their own development while regulating the use of these resources to ensure sustainable development, and recognized that conservation and economic development should "operate in harmony".[400] Moreover, China stresses that a narrow interpretation along the lines proposed by the complainants, which would limit the meaning of "conservation" to "controlling the pace of extraction" of natural resources, would amount to a *per se* prohibition of the use of export quotas as part of a conservation policy, and is contrary to the object and purpose of Article XX(g).[401]

7.253. According to the complainants, the term "conservation" under Article XX(g) should not be interpreted to incorporate the notion of promoting a WTO Member's own economic development.[402] First, the complainants argue that the dictionary definitions of the word "conservation" listed by the panel and repeated by the Appellate Body in *China – Raw Materials* all refer to keeping exhaustible natural resources from harm, loss or waste, but say nothing about protecting or promoting domestic downstream industries.[403] The complainants also argue that the panel in *China – Raw Materials* made clear, by referring to the context provided by Article XX(i), that the exception under Article XX(g) cannot be read so as to extend the meaning of conservation to cover economic goals, since such a reading would bring Article XX(g) into conflict with the requirement under Article XX(i) that measures "not operate to increase the exports of or the protection afforded to such domestic industry".[404]

7.254. With respect to the context of Article XX(g), Japan also takes issue with China's reliance on the preamble of the WTO Agreement to support its argument that "conservation" entails or includes the "use and management" of natural resources for industrial development. In Japan's view, such reliance is based on a selective reading of the WTO preamble and a failure to consider the context of the overall balance struck under the WTO agreements and reflected in the preamble as a whole.[405] The European Union also argues that China's interpretation reads protectionism into the Article XX(g) exception, whereas the exception is really about the legitimate non-economic objective of conservation. According to the European Union, China's interpretation thus deprives

[399] China's first written submission, para. 60; China's second written submission, paras. 17, 18, 20.
[400] China's first written submission, paras. 47-60.
[401] China's second written submission, paras. 16 and 19-20.
[402] United States' second written submission, paras. 88 and 90; European Union's second written submission, para. 48; Japan's second written submission, para. 60.
[403] United States' second written submission, paras. 85-88; European Union's second written submission, para. 38; Japan's second written submission, paras. 28, and 59-60.
[404] United States' second written submission, paras. 90-92; European Union's second written submission, para. 41; Japan's second written submission, paras. 33-35.
[405] Japan's second written submission, paras. 43-46.

the chapeau of Article XX of its effect and purpose as a safeguard against abuse of rights and protectionism.[406] Regarding China's interpretation of the principle of sovereignty over natural resources, the European Union stresses that the panel in *China – Raw Materials* clearly stated that WTO Members must exercise their sovereignty over natural resources "consistently with their WTO obligations".[407]

7.255. Finally, the complainants recall that the GATT negotiators rejected a proposal to allow, under Article XX(g), trade-restrictive measures enacted or imposed in order to ensure domestic access to ample supplies of exhaustible natural resources. The complainants argue that the negotiators did not intend to allow Article XX(g) to be used to justify export restrictions for the protection of domestic industry.[408]

7.256. The Panel notes that although the term "conservation" was discussed in detail by the panel in *China – Raw Materials*,[409] the Appellate Body has not yet had the opportunity to definitively address the meaning of this word.

7.257. The Panel will proceed to consider the meaning of "conservation" according to the customary rules of interpretation of public international law.[410] We begin by considering the ordinary meaning of the word in light of its context and object and purpose.

7.258. Like the panel in *China – Raw Materials*, this Panel recalls that the dictionary definition of the noun "conservation" is "the action of keeping from harm, decay, loss or waste; careful preservation. The preservation of existing conditions … The preservation of the environment, esp. of natural resources".[411] The verb "conserve" is defined as "[k]eep from harm, decay, or loss esp. with view to later use; preserve with care. Maintain (energy etc.) unchanged in total quantity according to a conservation law".[412] The noun "preservation" is defined as "[t]he action or an act of preserving or protecting something; the fact of being preserved".[413] To "preserve", is to "[k]eep from harm, injury; take care of, protect...keep from decay; maintain (a state of things)".[414] In sum, these dictionary definitions define "conservation" as the act of preserving and maintaining the existing state of something, in this case "natural resources" covered by Article XX(g).[415]

7.259. Having considered the ordinary meaning of "conservation", the Panel now turns to the context and purpose of Article XX(g). Article 31(2) of the Vienna Convention makes clear that the context of a treaty includes its "text, including its preamble and annexes"; therefore, the preamble forms part of the context of Article XX(g). Indeed, the role of the WTO preamble as relevant context for interpreting Article XX(g) was confirmed by the Appellate Body in *US – Shrimp*, where

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[406] European Union's second written submission, para. 48.

[407] European Union's second written submission, paras. 43-45.

[408] United States' responses to Panel questions, 25 April, 2013, paras. 1-4; European Union's second written submission, paras. 50-51; Japan's second written submission, paras. 37-38.

[409] Panel Reports, *China – Raw Materials*, paras. 7.372 – 7.386.

[410] DSU Article 3.2 and the Vienna Convention on the Law of Treaties (Vienna Convention), done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679, Articles 31 and 32.

[411] *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 492.

[412] *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 493.

[413] *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2333.

[414] *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2333.

[415] Other definitions of the term "conservation" are reflected in international agreements and conventions which tend to define the term "conservation" in light of the scope of the agreement or in relation to other obligations, meaning the act of preserving and maintaining the existing state of something in this case "natural resources". For instance, the Convention on Biological Diversity defines the "conservation of biological diversity" as "the *in situ* conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings …" The preamble of the 1940 Western Hemisphere Convention expressed an intention "to protect representatives of all species and genera of their native flora and fauna … over areas extensive enough to assure them from becoming extinct through any agency within man's control". Further, the parties to the Association of South East Asian Nations (ASEAN) Agreement aimed to "ensur[e] the survival and promoting the conservation of all species under their jurisdiction and control". The 1979 Bonn Convention defines "conservation status" as "the sum of the influences acting on the migratory species that may affect its long term distribution and abundance".

it stated that the preamble gives "colour, texture, and shading to [the] interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994".[416]

7.260. The preamble recognizes that WTO Members' trade relations should, *inter alia*:

> [allow] for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

7.261. Thus, a proper reading of Article XX(g) in the context of the GATT 1994 and the WTO Agreement should take into account the objective of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while at the same time not interfering with economic development. In other words, the objective of sustainable development is relevant to the interpretation of Article XX(g). However, this does not mean that sustainable development can be invoked as a basis to deviate from the requirements of subparagraph (g) of Article XX.

7.262. Pursuant to Article 31(3)(c) of the Vienna Convention, the Panel next considers the international law principles of sovereignty over natural resources and sustainable development, which, in the Panel's opinion, should also be taken into account when interpreting subparagraph (g) and, for the purposes of this case, especially, the term "conservation".[417] In the Panel's view there is no doubt that the general principle of States' sovereignty over their natural resources is a "relevant" rule of international law applicable between the parties.[418]

7.263. As indicated above, the Panel believes that the international law principles of sovereignty over natural resources and sustainable development[419], which allow States to "freely use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development"[420], are relevant to our interpretive exercise in this dispute. These two principles, which the Panel considers to be closely interrelated, are embodied in a number of international agreements. For example, the 1992 Rio Declaration on Environment and Development provides in Principles 2 and 4 that:[421]

> 2. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.
>
> …
>
> 4. In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

7.264. Similarly, UN General Assembly Resolution 626 (VII) provides that States may freely exploit their natural resources "wherever deemed desirable by them for their own progress and economic development"; and UN General Assembly Resolution 2158 (XXI) recognizes that:

> The natural resources of the developing countries constitute a basis of their economic development in general and of their industrial progress in particular … it is essential that their exploitation and marketing should be aimed at securing the highest possible

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[416] Appellate Body Report, *US – Shrimp*, para. 153.
[417] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.67.
[418] Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, para. 841.
[419] United Nations General Assembly Resolution 1803 (XVII), *Permanent Sovereignty Over Natural Resources* (14 December 1962).
[420] United Nations General Assembly Resolution 626 (VII), *Right to Exploit Freely Natural Wealth and Resources* (21 December 1952).
[421] Rio Declaration on Environment and Development, done at Rio de Janeiro, 14 June 1992,; 31 International Legal Materials 874.

> rate of growth of the developing countries … this aim can better be achieved if the developing countries are in a position to undertake themselves the exploitation and marketing of their natural resources.

7.265. The principle of sovereignty over natural resources thus recognizes that WTO Members have the right to use their natural resources to promote their own development while also encouraging the regulation of such use to ensure sustainable development. According to the principle, then, conservation and economic development are not mutually exclusive policy goals; they can operate in harmony.

7.266. The Panel recognizes the permanent sovereignty that every WTO Member has, as a matter of fundamental principle, over its own natural resources. As noted above, the Panel believes that the principle of sovereignty over natural resources is a relevant rule of international law applicable in this case, and that it assists us with our interpretation of Article XX(g), and especially the word "conservation". The Panel acknowledges that, pursuant to their permanent sovereignty over natural resources, WTO Members may adopt conservation measures that are not merely concerned with "preserv[ing] the natural resources in their current state".[422] Resource-endowed WTO Members are entitled to develop conservation policies on the basis of, or taking into account, a full range of policy considerations and goals, including the need to preserve resources in their current state as well as the need to use them in a sustainable manner. Moreover, given States' permanent sovereignty over natural resources, WTO Members, of course including China, are entitled to determine their own conservation objectives. Additionally, a Member's permanent sovereignty over its natural resources means that, in principle, it is entirely in that Member's discretion whether its conservation measures should "decrease the absolute quantity" of materials extracted or "control the speed" of such extraction, provided that its measures do not cause damage to the environment of other States or of areas beyond the limits of the regulating Member's national jurisdiction.[423] Thus, understood in the light of every State's permanent sovereignty over their own natural resources, the Panel believes that conservation as used in Article XX(g) does not simply mean placing a moratorium on the exploitation of natural resources, but includes also measures that regulate and control such exploitation in accordance with a Member's development and conservation objectives. In this connection, we agree with China that "conservation" as used in Article XX(g) is not limited to mere "preservation of natural resources".[424]

7.267. In recognition of the permanent sovereignty that every Member exercises over its natural resources, WTO law recognizes the right of Members to adopt conservation measures should they wish to do so, in the light of their own objectives and policy goals, including economic and sustainable development. In other words, resource-endowed WTO Members are entitled to design conservation policies that meet their development needs, determine how much of a resource should be exploited today and how much should be preserved for the future, including for use by future generations, in a manner consistent with their sustainable development needs and their international obligations.

7.268. This permanent sovereignty over natural resources and the right of WTO Members to adopt conservation programmes pursuant to Article XX(g) allows WTO Members to develop and implement processes, means, or tools that put into practice a conservation policy in a way that responds to a Member's development and conservation concerns. It is not, however, a general right to regulate and control a natural resource market for any purpose. As the Appellate Body recognized in *US – Softwood Lumber IV*, natural resource products that will necessarily enter the market and are available for sale are subject to GATT disciplines in the same way as any other product. As such, no WTO Member has, under WTO law, the right to dictate or control the allocation or distribution of rare earth resources to achieve an economic objective. WTO Members' right to adopt conservation programmes is not a right to control the international markets in which extracted products are bought and sold.

7.269. The Panel also agrees with the panel in *China – Raw Materials* that, as China has emphasized throughout this dispute, the conservation objective in Article XX(g), understood in light of States' sovereignty over their natural resources, is broad enough to allow "resource-

[422] China's comments on the complainants' responses to Panel question No. 69.
[423] China's response to Panel question No. 112.
[424] China's first written submission, paras. 49 and 88 (referring to Panel Reports, *China – Raw Materials* paras. 7.372 and 7.375).

endowed countries … to manage the supply and use of those resources".[425] At the same time, we recall that panel's reference was made in the context of a longer sentence that reads as follows: "… resource endowed countries are entitled to manage the supply and use of those resources through conservation-related measures that foster the sustainable development of their domestic economies consistently with general international law and WTO law".[426] In other words, the right to adopt "conservation programmes" does not permit the exercise of boundless discretion such that WTO Members may adopt GATT-inconsistent measures as they see fit. Members cannot, for instance, regulate under Article XX(g) in a way that achieves indirectly what other subparagraphs of Article XX, including Article XX(i), prohibit directly.[427]

7.270. As noted by the panel in *China – Raw Materials*, a State's sovereignty is also expressed in its decision to ratify an international treaty and accept the benefits and obligations that such ratification entails. In becoming a WTO Member, China has of course not forfeited permanent sovereignty over its natural resources, which it enjoys as a natural corollary of its statehood. Nor, as the Panel explains in more detail below, has China or any other WTO Member "given up" its right to adopt export quotas or any other measure in pursuit of conservation. China has, however, agreed to exercise its rights in conformity with WTO rules, and to respect WTO provisions when developing and implementing policies to conserve exhaustible natural resources.

7.271. Before concluding our discussion of the meaning of "conservation" under Article XX(g), we consider the drafting history of Article XX(g) to determine whether it confirms our interpretation of the word.

7.272. On the one hand, the early records make clear that the negotiators did not intend to allow conservation measures to be used to protect or promote domestic industries. During the London session of the Preparatory Committee held on 11 November 1946, a Brazilian proposal to allow the imposition of export restrictions on exhaustible natural resources when a regulating Member does not restrict domestic production or consumption of the resource was rejected. In arguing against the proposal, the United Kingdom emphasized that "it would be in the interests of the development of the general objective of the Charter if export prohibitions for industrial purposes were not allowed".[428] Along the same lines, in 1950 the *Working Party D on Quantitative Restrictions* released a report reaffirming that the GATT as drafted did "not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage for that industry for the purchase of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means".[429]

7.273. On the other hand, and especially from the 1970s onwards, the principle of "permanent sovereignty over natural resources" was increasingly articulated within the GATT context by a number of developing countries. For instance, in 1979, in the context of "reassessing" GATT disciplines on export controls, India stated that:

> [I]t would be our understanding that when the CONTRACTING PARTIES address themselves to the task of reassessing the GATT provisions relating to export restrictions and charges, two of the guiding principles would be the sovereignty of States over their natural resources and the need for developing countries to utilize their resources for their development in the most optimal manner as considered

[425] Panel Reports, *China – Raw Materials*, para. 7.404.
[426] Panel Reports, *China – Raw Materials*, para. 7.404.
[427] Panel Reports, *China – Raw Materials*, para. 7.386. Article XX(i) provides an exception for measures "involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such material is held below the world price as part of a governmental stabilization plan; *Provided* that such restriction shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination".
[428] United Nations Social and Economic Council, Preparatory Committee of the International Conference on Trade and Employment, Verbatim Report of the First Meeting of the Sub-Committee of Committee II on Quantitative Restrictions and Exchange Controls (EPCT/C.II/QR/PV/1, 11 November 1946), pp. 20-21.
[429] General Agreement on Tariffs and Trade, "Report of Working Party "D" on Quantitative Restrictions (GATT/CP.4/33, 28 March 1950), para. 12.

> appropriate by them, including processing of their raw materials, setting up industries to diversify their economies and ensuring supplies to domestic industries.[430]

7.274. Similarly, Mexico maintained that:

> On the question of export restrictions and charges, it is the view of my delegation that…any consideration or examination of the subject of export restrictions should be undertaken within the context of United Nations Resolution 3201 (S-VI) which emphasizes the full permanent sovereignty of every State over its natural resources and all economic activities. Further, such consideration or examination should be undertaken with a view to giving effect to United Nations Resolution 3202 (S-VI) which states that all efforts should be made to "take measures to promote the processing of raw materials in the producer developing countries.[431]

7.275. We consider these statements instructive, and believe that the sentiments reflected therein can be taken into account in interpreting words such as "conservation", given that, as the Appellate Body has said, the language of Article XX(g) is "not 'static' in its content or reference but is rather 'by definition, evolutionary'".[432]

7.276. The Panel considers that while all of the foregoing suggests a need to balance the goals of trade liberalization, sovereignty, and sustainable development, it does not indicate precisely how such a balance could or should be struck.

7.277. In the Panel's opinion, the definition of "conservation" we have set out above, based on dictionaries and taking into account the WTO preamble and other general rules of international law applicable to the parties to the dispute, strikes an appropriate balance between trade liberalization, sovereignty over natural resources, and the right to sustainable development. As the Panel has noted, the drafting history of Article XX(g) does not provide unequivocal guidance on the term's precise meaning, but does seem to suggest that some balance between preservation and development is required, and the Panel's suggested interpretation of the term "conservation" takes into account both concerns. In our view, the approach adopted by the Panel in this dispute and in *China – Raw Materials*, which gives a rather broad meaning to the term conservation, strikes an appropriate balance between these various legitimate policies.

7.278. The Panel now proceeds to examine the meaning of the term "relating to".

7.5.2.1.3 "relating to"

7.279. With respect to interpretation of the term of "relating to" under Article XX(g), China and the complainants all refer to the test established by the Appellate Body in *US – Shrimp* and followed by the panel in *China – Raw Materials*, that is, whether the challenged measure's structure and design show a "close and genuine relationship" to the goal of conservation of exhaustible natural resources. The United States also suggests that measures must be "primarily aimed at" conservation in order to "relate to" that objective.

7.280. In China's view, to assess the existence of a "close and genuine" relationship between a measure and the conservation objective, the Panel is required to determine whether the measure is part of a comprehensive conservation policy.[433] In its written submissions, China examines the text, design, structure and context of its export quota measurers to show that they relate to the operation of what China characterizes as its "comprehensive conservation programme".[434] The United States responds that the Appellate Body used the language of a "comprehensive policy" only in interpreting the requirements of Article XX(b), and that moreover the notion of a "comprehensive policy" in the Article XX(b) jurisprudence was developed alongside a further requirement that responding parties demonstrate that their measures make a "material

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[430] General Agreement on Tariffs and Trade, Multilateral Trade Negotiations Group "Framework", Statement by the Delegation of India (MTN/FR/W/23, 6 April 1979).

[431] General Agreement on Tariffs and Trade, Trade Negotiations Committee (MTN/P/5, 9 July 1979), p. 63.

[432] Appellate Body Report, *US – Shrimp*, para. 130 (internal citations omitted).

[433] Appellate Body Report, *US – Shrimp*, para. 131.

[434] China's first written submission, para. 3.

contribution" to the achievement of the claimed policy objective. The United States therefore rejects what it sees as China's selective use of jurisprudence developed under other subparagraphs of Article XX.[435]

7.281. In the Panel's opinion, the parties are correct to refer to the test developed by the Appellate Body in *US – Shrimp*. In *US – Gasoline*, the Appellate Body referred to the legal test developed by a GATT Panel in the unadopted *Canada – Herring and Salmon* case[436], namely that measures "relate to" the conservation objective when they are "primarily aimed at" that objective.[437] However, the Appellate Body appeared to adopt that test primarily because "all the participants and the third participants in the appeal" adopted it in their submissions. Indeed, the Appellate Body emphasized that "the phrase 'primarily aimed at' is not itself treaty language and was not designed as a simple litmus test for inclusion of exclusion from Article XX(g)".[438]

7.282. The Appellate Body revisited the "relating to" test in its decision in *US – Shrimp*. In that dispute, the Appellate Body began by explaining that, in determining whether the challenged measures relate to conservation, "the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources".[439] Moreover, the Appellate Body clarified that the relationship in question is to be established on the basis of "the general structure and design of the measure … at stake".[440] In relation to the measures at issue, the Appellate Body held that:

> … Section 609, cum implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible and, in fact, endangered species is observably a close and real one, a relationship that is every bit as substantial as that which we found in *US – Gasoline* … [441]

7.283. It seems to the Panel that the rational connection test endorsed by the Appellate Body in *US – Shrimp* is potentially less strict than the previously employed "primarily aimed at" standard. However, it is important to note that the Appellate Body in *US – Shrimp* appeared to retain the "substantial relationship" test developed in *US – Gasoline*. This suggests that, while measures need not be primarily aimed at conservation, they must still bear a substantial, close, and real relationship to the conservation objective; as the Appellate Body said in *US – Gasoline*, a merely incidental or inadvertent connection will not suffice.[442]

7.284. This same legal test was applied by the panel in *China – Raw Materials*. Although the panel in that case referred to the "primarily aimed at" test[443], it proceeded to determine whether China's measures related to the conservation of bauxite and fluorspar by examining and analysing "the relationship between" the measures and the conservation objective, thus following the test established by the Appellate Body in *US – Shrimp*.[444] Likewise, in *China – Raw Materials*, the Appellate Body recalled that "for a measure to relate to conservation in the sense of Article XX(g), there must be 'a close and genuine relationship of ends and means'".[445]

7.285. The Panel therefore considers that the United States is not entirely correct in arguing that China's measures must be "primarily aimed at" conservation in order to "relate to conservation". While the Panel considers that many conservation measures will, as a practical matter, be "primarily aimed at" conservation, it believes, on the basis of the Appellate Body's guidance, that measures should be considered to "relate to" conservation even where they are not "primarily

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[435] United States' second written submission, paras. 97-99
[436] Appellate Body Report, *US – Shrimp*, para. 128; Panel Reports, *China – Raw Materials*, para. 7.639.
[437] Panel Reports, *China – Raw Materials*, para. 7.369.
[438] Appellate Body Report, *US – Gasoline*, p. 18-19, DSR 1996:I, 3, at 17.
[439] Appellate Body Report, *US – Shrimp*, para. 135.
[440] Appellate Body Report, *US – Shrimp*, para. 137.
[441] Appellate Body Report, *US – Shrimp*, para. 141.
[442] Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996, 3 at 18.
[443] Panel Reports, *China – Raw Materials*, para. 7.370.
[444] Panel Reports, *China – Raw Materials*, para. 7.371.
[445] Appellate Body Reports, *China – Raw Materials*, para. 355 (citing Appellate Body Report, *US – Shrimp*, para. 136.)

aimed" at conservation, provided that the regulating Member can show a "substantial", "close", and "genuine" relationship between the measure and the conservation objective. As noted by the panel in *China – Raw Materials*, the Appellate Body in *US – Gasoline* ruled that a measure was "relate[d] to" conservation if there was a substantial relationship between the export measures and conservation.[446] It further added that a measure that is "merely incidentally or inadvertently" aimed at conservation cannot meet the requirement of "relating to" in Article XX(g).[447] Further, as already noted by the Panel, the Appellate Body commented that the phrase "primarily aimed at" was "not designed as a simple litmus test for inclusion or exclusion from Article XX(g)".[448] In *US – Shrimp*, the Appellate Body also described this relationship as "a close and genuine relationship of ends and means"[449] that requires an examination of the relationship between the general structure and design of a measure and the policy goal it purports to serve.[450] The Appellate Body explained that:

> Article XX(g) requires that the measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources.[451]

7.286. The Panel also considers that the United States is not entirely correct in arguing that the notion of a "comprehensive policy" is irrelevant in determining whether a challenged measure "relates to" conservation under Article XX(g). In fact, in *US – Gasoline*, the Appellate Body did take account of the challenged measures' wider regulatory context; although it did not use the term "comprehensive conservation policy", it did, in examining the "relating to" test, observe that:

> The baseline establishment rules [i.e. the challenged measures], taken as a whole … need to be related to the "non-degradation" requirements set out elsewhere in the Gasoline Rule. Those provisions can scarcely be understood if scrutinized strictly by themselves, totally divorced from other sections of the Gasoline Rule which certainly constitute part of the context of these provisions … Without baseline rules of some kind … the Gasoline Rule's objective of stabilizing and preventing further deterioration of the level of air pollution prevailing in 1990, would be substantially frustrated.[452]

7.287. It is clear that the Appellate Body did not consider the mere existence of a wider conservation plan incorporating the challenged measures to be itself sufficient to satisfy the "relating to" criterion. But the Appellate Body did suggest that the question whether the challenged measures related to conservation could not be answered in the abstract; to the contrary, the Appellate Body suggested that the question could only be answered in the light of the broader policy and regulatory framework in which those measures operated.

7.288. This position was affirmed by the panel in *China – Raw Materials*. After noting that States often adopt "a comprehensive policy comprising a multiplicity of interacting measures" in response to the "challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development"[453], the panel stated that "these different policy objectives cannot be viewed in isolation: they are related facets of an integrated whole. Moreover, the 'interacting measures' chosen by a Member will reflect and integrate these related policy goals".[454] Thus, the panel seemed to affirm that measures cannot be considered in isolation from their regulatory and policy context.

7.289. In sum, while the mere existence of a comprehensive conservation policy cannot, in and of itself, establish that every measure adopted pursuant to that policy "relates to" conservation, the

[446] Appellate Body Report, *US – Gasoline*, p. 18, DSR 1996:I, 3, at p. 17.
[447] Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, 3, at p. 18.
[448] Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, 3, at p. 17.
[449] Appellate Body Report, *US – Shrimp*, para. 136.
[450] Appellate Body Report, *US – Shrimp*, para. 137.
[451] Appellate Body Report, *US – Shrimp*, para. 135.
[452] Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, 3, at p. 17 .
[453] Panel Reports, *China – Raw Materials*, para. 7.375.
[454] Panel Reports, *China – Raw Materials*, 7.376.

jurisprudence suggests that the "relating to" criterion must be considered by looking at the challenged measures in their policy and regulatory context, and not only in isolation.[455]

7.290. 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.[456] It is these which, taken together with the measure's text, must demonstrate a clear link with the conservation objective.

7.291. Before proceeding to examine the second part of Article XX(g), the Panel will address the argument made by China at various points in this dispute that, if the Panel were to accept the arguments advanced by the complainants with respect to the phrase "relating to the conservation of exhaustible natural resources", it would remove all possibilities of WTO Members using export quotas to manage the supply of limited resources for the benefit of domestic and foreign users[457] The complainants for their part have vigorously denied that they are "challenging export quotas and their potential role in conservation in the abstract"[458], and urge that "[t]his case is not about an absolute prohibition or an absolute right to export quotas as conservation policy tools. According to the complainants, the Panel should instead objectively assess the facts before it concerning the very concrete export restrictions at issue in this dispute".[459]

7.292. The Panel agrees that this case is not about a theoretical right of Members to use export quotas for conservation. Under the terms of reference, the Panel is tasked to consider the WTO conformity of, *inter alia*, the challenged export quota system[460] on rare earths, tungsten, and molybdenum. It is neither required nor empowered to pass any general judgement on when export quotas can, as a matter of economic or legal theory, "relate to" conservation. In the Panel's view, the question whether a given export quota relates to the conservation of exhaustible natural resources can only ever be answered "on a case-by-case basis, by careful scrutiny of the factual and legal context in a given dispute."[461]

7.293. Having said that, the Panel emphasizes that, in principle, Article XX is available as a defence to any and every kind of GATT-inconsistent trade measure, including export quotas.[462] The Panel's analysis in this case – or, indeed, the analyses of other panels and the Appellate Body in prior cases – should not be understood as suggesting that export quotas can never relate to conservation. To the contrary, the Panel agrees with China that "nothing in the text of Article XX(g) supports an interpretation that export quotas could never be justified under Article XX(g) of the GATT 1994".[463]

7.5.2.2 Meaning of "made effective in conjunction with restrictions on domestic production or consumption"

7.294. The Panel now turns to the interpretation of the second part of Article XX(g).

7.5.2.2.1 "made effective in conjunction with"

7.295. Regarding the meaning of "made effective in conjunction with", China recalls the Appellate Body's finding in *China – Raw Materials* that the measures at issue must "work together" with restrictions on domestic production or consumption to conserve exhaustible natural resources.[464]

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[455] See paras. 7.158-7.159 of the section on export duties. There, the findings reason that "the mere assertion by China that the export duties form part of a broader 'comprehensive policy for environmental protection' in China is not sufficient to demonstrate that the export duties themselves are measures 'designed to achieve' this objective".

[456] Panel Reports, *China – Raw Materials*, para. 7.418.

[457] China's second written submission, para. 1.

[458] European Union's opening oral statement at the second meeting of the Panel, para. 5.

[459] European Union's opening oral statement at the second meeting of the Panel, para. 6.

[460] In this connection, the Panel recalls its discussion on the "series of measures": see above section 7.4.1.4.

[461] Appellate Body Report, *US – Gasoline*, pp. 16-17, DSR 1996:I, 3, at p. 17.

[462] Appellate Body Report, *US – Gasoline*, p. 24, DSR 1996, 3 at 22.

[463] China's second written submission, para. 20.

[464] Appellate Body Reports, *China – Raw Materials*, para. 360.

7.296. The United States also recalls and adopts the Appellate Body's finding in *China – Raw Materials* that the phrase "made effective in conjunction with" means that measures must "work together with restrictions on domestic production or consumption, which operate so as to conserve natural resources".[465] In Japan's view, the term "work together with" means that conservation-related trade restrictions must be part of a "rational regulatory scheme" that leads to parallel restrictions on both exports (or imports) and domestic production or consumption.[466] Japan also recalls that the Appellate Body in *China – Raw Materials* required trade-restrictive measures to "operate jointly with the restrictions on domestic production or consumption" for them to be justifiable under Article XX(g).[467]

7.297. The Panel begins its analysis by recalling the Appellate Body's finding in *China – Raw Materials* that "the term 'made effective', when used in connection with a legal instrument, describes measures brought into operation, adopted or applied".[468] The Appellate Body further held that the term "in conjunction" means "together with" or "jointly with"[469], and concluded 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".[470]

7.298. The Panel notes that the Appellate Body did not set out a test to determine when measures "work together with" domestic restrictions. The Appellate Body did say, however, that "Article XX(g) does not contain an additional requirement that the conservation measure be primarily aimed at making effective the restrictions on domestic production or consumption". It follows from this that the phrase "work together with" cannot be read to require that a Member's GATT-inconsistent measures "be aimed at ensuring the effectiveness of domestic restrictions".[471]

7.299. While the Appellate Body has not explained the "work together with" criterion in detail, its discussion in *China – Raw Materials* suggests that the requirement looks to both the procedural and the substantive connections existing between the challenged trade-restrictive measures and the domestic production or consumption restrictions.

7.300. With respect to procedural connections, the Appellate Body suggested that the challenged measure will be "made effective in conjunction with domestic restrictions" when the former is "promulgated or brought into effect together with" the latter. This language suggests to the Panel that one relevant factor in the analysis of the "structure and design" of the domestic and foreign restrictions is whether the measures were brought into effect concurrently as a matter of legislative or regulatory process. Put another way, the Panel understands the Appellate Body's language to suggest that a major gap between the passage or "promulgat[ion]" of the relevant foreign and domestic restrictions through the regulating Member's law-making apparatus (e.g. Parliament) may raise questions as to whether the foreign restrictions are applied "in conjunction with" the domestic restrictions and whether the foreign and domestic restrictions are actually "operative" at the same time. This understanding is supported by the Appellate Body's adoption in *China – Raw Materials* of the language of the Appellate Body's *US – Gasoline* report. In that case, the Appellate Body had held that the term "in conjunction with" "quite plainly" means "together with" or "jointly with", while the term "made effective" refers to a measure as being "operative", "in force", or "having come into effect".

7.301. At the same time, the phrase "work together with" also suggests a degree of substantive complementarity between the foreign and domestic restrictions in their operation "so as to conserve an exhaustible natural resource".[472] While the Panel does not think it useful to lay down a hard-and-fast rule about the form such complementarity may take, the Panel believes that there must be some meaningful correspondence or cooperation between the two measures, and that they must somehow help or reinforce one another, or further one another's goals or operation. China thus needs to bring evidence that its quota system is designed in such a way that the

[465] United States' second written submission, para. 103.
[466] Japan's second written submission, para. 112.
[467] Japan's second written submission, para. 123 (citing Appellate Body Reports, *China – Raw Materials*, para. 356).
[468] Appellate Body Reports, *China – Raw Materials,* para. 356.
[469] Appellate Body Reports, *China – Raw Materials,* para. 356.
[470] Appellate Body Reports, *China – Raw Materials,* para. 356.
[471] Appellate Body Reports, *China – Raw Materials*, para. 360.
[472] Appellate Body Reports, *China – Raw Materials*, para. 360.

foreign and domestic restrictions are somehow related to one another, are operational together, and reinforce or support or, as it were, "cooperate with", each other in pursuit of conservation. In sum, in the present dispute, China must demonstrate that its export quota on rare earths "works together" with its relevant domestic restriction on production or consumption, which operate so as to conserve rare earths, tungsten, and molybdenum.

7.302. China argues[473] that foreign and domestic restrictions will "work together" where achievement of the conservation objective – by means of export quotas – is not undermined by unlimited domestic production or consumption.[474] The Panel of course agrees that a domestic measure that worked to undermine or undercut the conservation goal embodied in a trade-restrictive measure would clearly not "operate jointly" or "work together" with that trade-restrictive measure. The Panel believes that "working together" and "operating jointly" require some positive interaction, mutual reinforcement, complementarity, and coherent cooperation. The measures should "work together" in the sense of forming together a rational system that works to further a stated objective. Showing that two or more measures do not undermine each other is, in the Panel's view, not sufficient to demonstrate that such measures "work together" in the way Article XX(g) requires.

7.303. The Panel also emphasizes that, in the words of the Appellate Body, the foreign and domestic measures should work together "so as to conserve exhaustible natural resources".[475] Obviously, measures that work together for purposes other than conservation cannot be considered to comply with Article XX(g), as the goal of Article XX(g) is to excuse or justify measures put in place for conservation.

7.304. The Panel notes that the "work together" criterion does not impose an effects or impact test. In the Panel's view, the relative impact of China's foreign and domestic restrictions are not assessed under Article XX(g), but may instead be relevant in an assessment of compliance under the chapeau of Article XX.

7.5.2.2.2 "restrictions"

7.305. In interpreting the term "restriction", China refers to the finding of the panel in *China – Raw Materials* that Members can demonstrate their compliance with this requirement by showing that their domestic measures have a "limiting effect" on either domestic production or domestic consumption. In China's view, measures can produce a "limiting effect" by direct means, i.e. by limiting the amount of the resources that are allowed to be produced or consumed, or by indirect means, i.e. by increasing the costs of domestic production or consumption.[476]

7.306. The complainants seem to understand the *China – Raw Materials* panel and Appellate Body interpretation of the terms "restrictions on domestic production and consumption" in different ways.[477] The United States draws on dictionary definitions to argue that "restrictions" on domestic production or consumption are "actions confining or fixing definitely the extent, amount, duration, etc. of domestic production or consumption that is permitted"; it stresses that the restrictions must actually restrict or limit domestic production or consumption.[478] According to the European Union, the term requires that "a certain limiting effect … be felt on the domestic side in order to counter-balance the impact (or limiting effect) of the export restrictions on foreign users".[479]

7.307. The Panel begins by noting that in *China – Raw Materials*, the Appellate Body did not address the meaning of "restriction" in the context of Article XX(g). However, in the context of defining the term "restriction" in GATT Article XI, it essentially endorsed an interpretation that is identical to that given the term by the *China – Raw Materials* panel in its Article XX(g) analysis, namely:

[473] China's response to Panel question No. 71.
[474] China's response to Panel question No. 71.
[475] Appellate Body Reports, *China – Raw Materials*, para. 360.
[476] China's first written submission, paras. 64-65, (citing Panel Reports, *China – Raw Materials*, para. 7.394 and Appellate Body Reports, *China – Raw Materials*, para. 319).
[477] United States' second written submission, paras. 102-103; European Union's second written submission, para. 139; Japan's second written submission, para. 106.
[478] United Sates' second written submission, para. 102.
[479] European Union's second written submission, para. 62.

> The term "restriction" is defined as "A thing which restricts someone or something, a limitation on action, a limiting condition or regulation" and as "the action or fact of limiting or restricting someone or something", specifically "deliberate limitation of industrial output [,] the action or fact of confining or binding the extent, amount, duration, etc. of permitted - in the case of Article XX(g) – domestic production or consumption. The Panel considers that the ordinary meaning of "restriction" is that which has a limiting effect.[480]

7.308. We would like to emphasize that, in our opinion, a "restriction" on domestic production or consumption is not necessarily the same as a "constriction" or a "reduction" on domestic production or consumption. The word "restriction" in Article XX(g) requires the positive establishment of a quantitative limit on domestic production or consumption, but does not necessarily require that such limit *reduce* or *constrict* domestic production or consumption below the level of any previous year. Rather, the quantitative restriction must be set at a level that is lower than the expected demand for the period of time over which the restriction is intended to apply.

7.309. Importantly, the Panel considers that the phrase "made effective in conjunction with domestic restrictions" was not intended to establish an empirical effects test. Although, as the Appellate Body said in *US – Gasoline* that "consideration of the predictable effects of a measure" may be relevant in assessing a measure's compliance with subparagraph (g) of Article XX, the availability of Article XX(g) is not dependent upon a regulating Member showing that its domestic restrictions have had "a positive effect on conservation goals", for example by reducing domestic demand and/or supply. Instead, the Panel agrees with Japan that, to meet its burden of proof, a regulating Member must show that its domestic restrictions are capable of limiting the amount of production or consumption below the amount that would be produced or consumed but for that measure.

7.310. The Panel understands the term "capable of limiting" to require more than just a restriction "on the books". A restriction embodied in a legal instrument, if not accompanied by actual enforcement, cannot be a real "restriction" capable of limiting domestic production or consumption. Instead, Article XX(g) requires that domestic restrictions be effective. Although the words "made effective in conjunction with" in Article XX(g) relate directly to the measure being challenged (here, the export quotas), they imply that both the foreign restriction and the domestic restriction must be "effective" before subparagraph (g) can be satisfied. In the Panel's opinion, a domestic restriction that is not enforced cannot be considered "effective".

7.311. In the Panel's view, when a party challenges a legal instrument that appears on its face (that is, in its text) to constitute or embody a restriction on domestic production or consumption (in the sense of imposing a quantitative limit below the level of expected demand in the relevant period) as not being actually enforced, that party bears the burden of showing that the non-enforcement is such that it transforms what appears to be a restriction into a measure that has not been capable of having a limiting effect. Non-enforcement will affect the restrictive character or nature of an apparent restriction where such non-enforcement is so important as to be considered systemic.

7.312. To clarify, under Article XX(g) the Panel examines the extent to which a domestic restriction is enforced not to determine its impact. Any discriminatory impact it may have will be considered under the chapeau in the context of assessing whether the challenged measures are applied in a discriminatory manner or in a way that constitutes a disguised restriction on international trade, since a foreign restriction that is enforced more severely than a domestic restriction may be discriminatory. But under Article XX(g), the Panel examines the enforcement of a domestic restriction as a means of determining the real or actual *nature* of what is claimed to be a domestic restriction. In other words, serious systemic non-enforcement goes not to the way in which an apparent domestic restriction is applied, but more fundamentally to its character *qua* restriction. In the Panel's opinion, an apparent domestic restriction that is systemically unenforced is, as a matter of law, no "restriction" at all, at least for the purposes of Article XX(g). To hold

[480] This definition was adopted by the Appellate Body: Appellate Body Reports, *China – Raw Materials*, para. 320 (referring to Panel Reports, *China – Raw Materials*, para. 7.394) ("Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported").

otherwise would be to open a serious lacuna by allowing Members to invoke Article XX(g) where their claimed domestic restrictions exist "on the books" but are never applied to domestic producers or consumers of the natural resource in question.

7.313. In sum, the Panel understands the term "restrictions on domestic production or consumption" to require a measure that is capable of limiting the quantity of domestic production or consumption below the level of expected demand. Such measure, in order to be considered a real restriction, must actually be enforced.

7.5.2.3 The "even-handedness" requirement

7.314. China argues that, regardless of how challenged measures impact upon or affect foreign users, the "even-handedness" requirement in Article XX(g) is satisfied when the regulating Member ensures that some of the impact of its conservation policy is also imposed upon domestic users, either through restrictions on domestic production or restrictions on domestic consumption.[481] In China's view, the Appellate Body in *US – Gasoline* and the panel in *China – Raw Materials* have made clear that the requirement of "even-handedness" does not mean that domestic and foreign users must receive identical treatment.[482] Moreover, the "even-handedness" requirement cannot be understood by reading the words "restrictions on domestic *production*" out of the text of Article XX(g), since "the second clause of Article XX(g) speaks disjunctively of 'domestic production or consumption'".[483] China considers that it is the sovereign authority of every WTO Member to decide what is the most appropriate and practical way to allocate the restrictive effect of its conservation policy as between foreign and domestic trade, taking into account, *inter alia*, the technical and market realities of the resources at issue.[484]

7.315. The complainants disagree. For the United States, the Appellate Body's discussion in *US – Gasoline* relied on by China identified only the logical boundaries of the "even-handedness" requirement, and not the level of relative treatment of domestic and foreign interests that must be afforded under the test. According to the complainants, the Panel must assess the impact of the overall conservation policy on both domestic and foreign interests to ensure that it is even-handed. They do not accept China's argument that Article XX(g) permits a Member to impose measures that advantage its own domestic users at the expense of foreign users as long as it imposes some level of restriction on domestic supply that is "greater than nothing".[485] In the European Union's view, the second part of Article XX(g) requires a certain limiting effect to be felt on the domestic side in order to counter-balance the impact of the export restrictions to foreign users.[486] The European Union argues that the "even-handedness" test as developed in WTO jurisprudence is essentially also a "fairness" or "impartiality test".[487] Japan submits that where domestic and foreign users do not receive the same treatment under the regulatory system in question, any disparities must have a rational basis in light of the relevant conservation purpose.[488]

7.316. The Panel notes that, according to China, these issues should be dealt with as part of the Panel's assessment of China's export quota measures under the chapeau requirements of GATT Article XX.[489] The complainants have varied positions on the concept of even-handedness in subparagraph (g), and on whether some of the issues raised by China under the chapeau of Article XX should be discussed there, or rather under subparagraph (g). In the opinion of the United States, "even-handedness" is not especially concerned with determining whether a Member's treatment of its trading partners takes into account the similarity or difference of conditions prevailing in the partners' territories.[490] Rather, the United States argues that "even-handedness" is primarily about the credibility of the challenged measures as truly serving a conservation purpose. The European Union submits that the non-discrimination principles and

[481] China's second written submission, para. 84.
[482] China's first written submission, para. 60 and China's second written submission, para. 83.
[483] China's second written submission, para. 85.
[484] China's second written submission, para. 84.
[485] United States' second written submission, paras. 109-110.
[486] European Union's second written submission, para. 62.
[487] European Union's second written submission, para. 179.
[488] Japan's second written submission, para. 127.
[489] China's response to the Panel question No. 63, in para. 102 of China's second written submission.
[490] United States' response to Panel question No. 63.

relevant jurisprudence provide guidance on the "even-handedness" test under Article XX(g).[491] Japan argues that since it is not relevant where the natural resources are consumed from the perspective of conservation of natural resources[492], the principle that "discrimination may result when countries where different conditions prevail are treated the same" set forth in the chapeau is not relevant in assessing even-handedness under GATT XX(g).[493]

7.317. The Panel recalls that, according to the Appellate Body, the requirement that trade-restrictive measures "be made effective in conjunction with domestic restrictions" is essentially a requirement of "even-handedness".

7.318. The precise meaning of "even-handedness", and especially the relative treatment of foreign and domestic consumers required by that standard, is one of the most extensively-debated issues in this case. It is also one of the most difficult from a legal perspective, since the Appellate Body has, as the United States has rightly noted, articulated only the "logical boundaries"[494] of this concept. We have also been unable to find, in either the GATT negotiating history or in other areas of international law, any material to illuminate and guide our interpretation of this term.

7.319. In this regard, the Panel observes that in French the Appellate Body stated that "Cette clause établit une obligation d'*impartialité* dans l'imposition de restrictions, au nom de la conservation, à la production ou à la consommation de ressources naturelles épuisables". In Spanish, the Appellate Body also used the term "imparcialidad " to say "Esa cláusula establece una obligación de *imparcialidad* en los casos en que se impongan restricciones, en beneficio de la conservación, a la producción o al consumo de recursos naturales agotables. In the English language, words such as "fair", "impartial" or "balanced" are used as synonyms for even-handedness.[495] Some international investment tribunals have acknowledged that the ordinary meaning of the terms "fair" and "equitable" in a "fair and equitable" clause commonly found in bilateral investment treaties would include "even-handedness".[496]

7.320. The Panel also notes that the concepts of equity and even-handedness are quite closely related inasmuch as the Oxford English Dictionary defines "equity" with reference to fairness, impartiality and even-handedness.[497] International courts and tribunals including the International Court of Justice have had occasion to apply principles of equity, considering in one case that the principle of equity required "an equitable result".[498]

7.321. The Panel notes also that the Appellate Body made clear that "even-handedness" cannot require that imported and domestic products be subject to *identical* treatment as the goal of Article XX provisions is to be used as an exception to the national treatment obligation which requires such no less-favourable treatment. Indeed as noted by the Appellate Body "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".[499]

7.322. The Panel has sought to illuminate its understanding of the principle of even-handedness by reference to different sources of international law. The only explicit reference to the even-handedness principle is available in international investment law. The Panel does observe however that in substance, its own understanding of even-handedness or fairness is not essentially different from that of other international tribunals. In international investment arbitration cases, in applying

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[491] European Union's second written submission, paras. 78-79.
[492] Panel Reports, *China – Raw Materials*, para. 7.428.
[493] Japan's second written submission, para. 145.
[494] United States' second written submission, para. 109.
[495] New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 2007), Vol. I, p. 877.
[496] Arbitral Tribunal, Award on Merits, *MTD Equity Sdn. Bhd. And MTD Chile S.A.*, ICSID CASE NO. ARB/01/7, para 13.
[497] New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 2007), Vol. I, p. 856.
[498] International Court of Justice, *Continental Shelf (Libya v. Malta)*, 1982, ICJ Reports, para. 70.
[499] *US – Gasoline*, Appellate Body Report, at p. 23 " There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, 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. On the other hand, if 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. The measure would simply be naked discrimination for protecting locally-produced goods."

even-handedness requirements, for example, tribunals have been willing to show a degree of deference to the fact that governments have the right to choose the way in which they resolve their national problems.[500] They have nevertheless assessed whether the processes governments adopt to resolve their problems are fair to foreign interests or show a predisposition towards favouring domestic interests.[501] Moreover, tribunals have found that host state measures violate the even-handedness standard when no justifiable explanation for the uneven treatment is available.[502] The Panel has not relied on these sources to clarify the meaning of even-handedness, because they do not add any further clarification to the existing jurisprudence on Article XX(g).

7.323. The Panel has also considered whether concepts such as "equity" or "equitable share" could shed some light on the meaning of "even-handedness" in the context of Article XX(g). In the first place, the fact that the concept of equity is explicitly invoked in Article XX(j) of the GATT 1994 but is not used in Article XX(g) leads to the Panel to conclude that this concept is not directly relevant in interpreting subparagraph (g). Moreover, the Panel finds that the concept of "equity" offers no real or additional insight or assistance in understanding the meaning of even-handedness under Article XX(g).

7.324. The Panel continues its analysis by recalling that the words "even handed" do not appear in the text of Article XX(g), but were introduced for the first time by the Appellate Body in *US – Gasoline*.[503] In that case, the Appellate Body stated:

> [W]e believe that the clause "if such measures are made effective in conjunction 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.
>
> There is, of course, no textual basis for requiring identical treatment of domestic and imported products…On the other hand, if 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.[504]

7.325. The Panel also notes the Appellate Body's treatment of "even-handedness" in *US – Shrimp*. In that case, the Appellate Body repeated the passage quoted above and continued:

> We earlier noted that Section 609, enacted in 1989, addresses the mode of harvesting imported shrimp only. However, two years earlier, in 1987, the United States issued regulations pursuant to the Endangered Species Act requiring all United States shrimp trawl vessels to use approved TEDs, or to restrict the duration of tow-times, in specified areas where there was significant incidental mortality of sea turtles in shrimp trawls. These regulations became fully effective in 1990 and were later modified. They now require United States shrimp trawlers to use approved TEDs "in areas and at times when there is a likelihood of intercepting sea turtles", with certain limited exceptions. Penalties for violation of the Endangered Species Act, or the regulations issued thereunder, include civil and criminal sanctions. The United States government currently relies on monetary sanctions and civil penalties for enforcement. The government has the ability to seize shrimp catch from trawl vessels fishing in the United States and has done so in cases of egregious violations. We believe that, in principle Section 609 is an even-handed measure.[505]

7.326. In this passage, 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

[500] Permanent Court of Arbitration, Partial Award, Saluka Investments BV v. The Czech Republic, UNCITRAL, para 411.
[501] Ibid.
[502] Ibid. para. 416.
[503] Appellate Body Report, *US – Gasoline*, p. 20 *et seq*, DSR 1996:I, 3, at 20.
[504] Appellate Body Report, *US – Gasoline*, pp. 20-21, DSR 1996:I, 3, at 20.
[505] Appellate Body Report, *US – Shrimp*, para. 144.

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.

7.327. The Panel is of the view that in requiring even-handedness under Article XX(g), the Appellate Body sought to ensure that GATT-inconsistent measures allegedly taken for conservation reasons are really about conservation. In this regard, the "even-handedness" concept was referenced in the context of the second part of subparagraph (g), and in the context of its analysis, the Appellate Body observed that where there were no "restrictions" on domestically produced products, the measure could not be accepted "as primary or even substantially designed for implementing conservationist goals".[506]

7.328. In the Panel's view, the assessment of compliance with subparagraph (g) should focus on the architecture and the design of the challenged measure to determine whether it has a substantial link with conservation, e.g. whether it supports, assists, or contributes to conservation of the resources at issue since the object of the analysis under subparagraph (g) is for the Panel to determine whether China's export quotas on rare earths, tungsten, and molybdenum are about conservation. As the Panel discussed above, subparagraph (g) includes several elements that together impose requirements that aim at ensuring that measures invoked as exceptions for conservation are really about conservation. In the Panel's view, the even-handedness requirement of subparagraph (g) mentioned by the Appellate Body serves as an analytical tool to help in assessing whether the challenged measure assists, supports, or contributes to conservation of the concerned natural resources. 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. In other words, if domestic users of a resource are exempted from the domestic restriction, it will be difficult to conclude that a GATT-inconsistent measure supposedly justified under Article XX(g) properly "relates to" conservation, since unregulated domestic exploitation could undermine such conservation – and this would be especially the case when the majority of what is to be conserved is consumed only domestically. In the present case, the Panel recalls that China's consumers represent an important share of world consumption of rare earths that China says it wants to conserve; China, accordingly, must be able to demonstrate that it is taking action to regulate the domestic consumption that constitutes a significant share of the global usage of rare earths and that is a serious threat to conservation.

7.329. In the Panel's view, this is consistent with the panel's approach in *China – Raw Materials* when it observed:

> This is, in fact, the very essence of the conservation objective set forth in Article XX(g): if a WTO Member is not taking steps to manage the supply of natural resources domestically, it is not entitled to seek the cover of Article XX(g) for the measures it claims are helping to conserve the resource for future generations.[507]

7.330. For the Panel, this observation is especially valid where, as in this dispute, the natural resources being conserved are essentially and mainly consumed by domestic users. The Panel agrees with the United States that "even-handedness" "scrutinizes whether the measure at issue is truly undertaken for purposes of conservation". In a sense, then, even-handedness in the imposition of domestic restrictions is a way for regulating Members to demonstrate that measures are really about conservation. By reading subparagraph (g) as requiring, in addition to the existence of restrictions that "relate to" conservation, that Members impose real or actual domestic restrictions that work together with the GATT-inconsistent measures for conservation, WTO law

[506] Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, p.19.
[507] Panel Reports, *China – Raw Materials*, para. 7.406.

ensures that measures adopted under Article XX(g) truly are measures taken or adopted for the purpose of conserving exhaustible natural resources. The Panel also agrees with the panel in *China – Raw Materials*[508] that resource-endowed countries are entitled to manage the supply and use of their resources through conservation-related measures that foster the sustainable development of their domestic economies consistently with general international law and WTO law. So long as even-handed restrictions are imposed on domestic production or consumption – and especially so when the resources sought to be protected are located and consumed mainly domestically – Article XX(g) does not oblige resource-endowed countries to ensure that the economic development of other user-countries benefits identically from the exploitation of the resources of the endowed countries.

7.331. Therefore, the Panel understands the "even-handedness" test to be a synonym for the second part of subparagraph (g) of Article XX. The question whether measures are applied in an "even-handed" manner should shed light on whether the measures are "made effective in conjunction with restrictions on domestic production or consumption". To show even-handedness, China needs to demonstrate that the export quota on foreign users is somehow balanced with one or more measures imposing restrictions on domestic users. In the Panel's view, the WTO Member imposing the trade restrictions allegedly related to conservation must be able to show that the relevant regulatory framework imposed on domestic and foreign interests has a legitimate and impartial conservation-based rationale.

7.332. In the Panel's opinion, the requirement of "even-handedness" calls for an investigation of the "regulatory" or "structural" balance. The question is whether, as a matter of objective structure, design, and architecture, the regulatory system distributes the burden of conservation-related measures between domestic and foreign consumers in a balanced way. The Panel emphasizes again that this systemic or regulatory analysis does not entail any form of "effects test" that would require the Panel to assess whether the measures are even-handed in their effects on the actual treatment of foreign and domestic like users. The Panel's task under subparagraph (g) is limited to determining whether China's regulatory system balances conservation-related regulatory burdens between foreign and domestic users; the Panel is not required under subparagraph (g) to consider the actual effects which a regulatory structure has in the marketplace. Such effects are properly examined under the chapeau of Article XX.

7.333. Additionally, the Panel recalls that the even-handedness requirement is to be read together with the requirement that the challenged border restriction be made effective in conjunction with domestic restrictions.[509] Together, these two terms are a kind of "proxy" for detecting the purpose of an alleged conservation objective: by requiring domestic restrictions, subparagraph (g) prevents GATT-inconsistent measures that are not really about conservation from being brought within its scope. This 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*.

7.334. In the Panel's view, this requirement of even-handedness is also compatible with China's permanent sovereignty over its natural resources. We agree with the panel in *China – Raw Materials* that "[a]s long as even-handed restrictions are imposed on domestic supply, Article XX(g) does not oblige resource-endowed countries to ensure that the economic development of other user-countries benefits identically from the exploitation of the resources of the endowed countries".[510]

7.335. The Panel is aware that in the recent "trilogy" of TBT cases (*US – Clove Cigarettes*[511], *US – Tuna II*[512], and *US – COOL*[513]), the Appellate Body articulated an "even-handedness" test in the context of Article 2.1 of the TBT Agreement. Specifically, the Appellate Body held that panels must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue," in order to

[508] Panel Reports, *China – Raw Materials*, para. 7.404.

[509] Van den Bossche, P. and Zdouc, W. The Law and Policy of the World Trade Organization, 3rd edn. (Cambridge University Press, 2013), p. 567: "Basically, the third element of the Article XX(g) test is a requirement of 'even-handedness' in the imposition of restrictions on imported and domestic products."

[510] Panel Reports, *China – Raw Materials*, para. 7.404.

[511] Appellate Body Report, *US – Clove Cigarettes*.

[512] Appellate Body Report, *US – Tuna II (Mexico)*.

[513] Appellate Body Report, *US – COOL*.

determine whether the challenged regulation "is designed or applied in a manner that constitutes a means of arbitrary and unjustifiable discrimination".[514] This language appears to envisage a sort of "effects test", insofar as it would require panels to closely examine the actual operation and application of a challenged measure in addition to its design and architecture. Consideration of "even-handedness" in the context of Article 2.1 of the TBT Agreement thus seems to incorporate an assessment similar to that which is conducted under the chapeau of GATT Article XX.[515] This makes sense in the context of Article 2.1 of the TBT Agreement, given that the TBT Agreement does not have a general exceptions clause like that found in Article XX of the GATT. In addition, the Appellate Body interpreted Article 2.1 in light of the sixth recital of the preamble of the TBT Agreement, which explicitly refers to "the requirement that [technical regulations] are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade"; we recall that preambles constitute an important element of the context that must be considered by a treaty interpreter.[516]

7.336. However, transposing this "applied" even-handedness test developed in the particular context of Article 2.1 of the TBT Agreement into Article XX(g) of the GATT would effectively require the Panel to deal with requirements contained in the chapeau of Article XX within subparagraph (g) of Article XX. Such an approach would, in our view, amount to a legal error. It would render the Article XX chapeau *inutile* in the context of an Article XX(g) exception, contrary to the rule of effective treaty interpretation.[517] It is not at all clear how the "even-handedness" test articulated in the context of Article 2.1 of the TBT Agreement could be distinguished from the Article XX chapeau analysis, since the language used to explain the former appears to have been drawn directly from the sixth recital of the preamble of the TBT Agreement, which is in turn drawn directly from the chapeau of Article XX of the GATT. It appears to us, therefore, that the Appellate Body's explanation of what "even-handedness" means in the context of Article 2.1 of the TBT Agreement cannot be transposed into Article XX(g) based merely on the fact that the Appellate Body used the same word when interpreting Article XX(g) in *US – Gasoline*.

7.337. In sum, the Panel finds that the "even-handedness" criterion is satisfied where the regulating Member can show that, in addition to its GATT-inconsistent measures, it has also imposed real conservation restrictions on the domestic production or consumption of the resource subject to its GATT-inconsistent measures. These domestic measures must distribute the burden of conservation between foreign and domestic consumers in an even-handed or balanced manner. However, "even-handedness" under subparagraph (g) does not require the Panel to assess the effects of the concerned restrictions. Instead, the relevant "balance" or "even-handedness" under subparagraph (g) is structural or regulatory. The balanced or even-handed nature of the domestic and foreign restrictions should be evident from the design, structure, and architecture of the challenged measure. Therefore, the Panel believes that issues relating to the effects of China's challenged export quotas on prices, as well as the question why the challenged export quotas were not filled and what effect if any an unfilled export quota has on foreign consumers, are concerned with the application and effects of the challenged export quotas, which are properly assessed under the chapeau of Article XX.

7.5.3 Interpretation of the chapeau of Article XX of the GATT 1994

7.5.3.1 Introduction

7.338. As the Panel has noted, China argues that several of the complainants' arguments under subparagraph (g) of GATT Article XX refer to the manner in which a (the) measure(s) are applied, and should therefore be assessed under the application of the chapeau of Article XX.[518] The chapeau addresses the manner in which a challenged measure is *applied*. China refers to the Appellate Body Report in *Brazil – Retreaded Tyres* and stresses that a measure should only be considered arbitrarily or unjustifiably discriminatory if it discriminates against countries where the

[514] Appellate Body Report, *US – COOL*, para. 271.
[515] This approach was also followed in the recent Panel Report, *EC – Seal Products*.
[516] Appellate Body Report, *US – Shrimp*, para. 153.
[517] Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at 21.
[518] Recall that for China, to satisfy the requirement of even-handedness in Article XX(g), it is sufficient to show that it has imposed effective restrictions on domestic production or consumption. For China, there is no assessment of the impact of the measure under (g) so long as the measure demonstrate a reasonable relation of means with the policy goal.

same conditions prevail. Moreover, China contends that even where the same conditions prevail, differential treatment may still be justified where it has a rational connection to the objective pursued by the measure. In that case, the measure would still meet the requirement of not imposing any arbitrary or unjustifiable discrimination under the chapeau of GATT Article XX.[519]

7.339. The complainants submit that China's export quotas are inconsistent with Article XX(g), and thus that the Panel does not need to assess whether the export quotas are consistent with the provisions of the chapeau of Article XX. Nonetheless, the complainants argue that should the Panel consider that China's export quotas comply with the requirements of Article XX(g), those quotas nevertheless do not comply with the provisions of the chapeau of Article XX.

7.340. The complainants see three prohibitions in the chapeau of Article XX: (i) against arbitrary discrimination; (ii) against unjustifiable discrimination; and (iii) against a disguised restriction on trade. With respect to the first two of these prohibitions (considered together by China), the complainants refer to the Appellate Body report in *US – Gasoline*, and state that the requirement that a measure not be "applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail" is a requirement that measures not discriminate between other Members or between other Members and the regulating Member.[520] Moreover, the European Union refers to the Appellate Body's statements in *US – Gasoline* and *Brazil – Retreaded Tyres* that the determination of a measure's discriminatory impact under the chapeau of Article XX should not depend exclusively on its quantitative impact, and that discrimination can also be arbitrary or unjustifiable in cases where it is avoidable and foreseeable – in that context, the availability of WTO-consistent alternatives is important.[521] Japan submits that there should not be any effects test under the chapeau of Article XX, and points to the availability of WTO-consistent alternatives to replace export quotas or at least improve their even-handedness.[522]

7.341. China submits that, under the chapeau, the Panel's role is to assess the actual operation of China's export quota system. Hence, in contrast to the requirement of even-handedness in Article XX(g) of the GATT 1994, the question of how China allocates the limited supply to domestic and foreign users through the export quota system becomes relevant only in the chapeau analysis.[523] According to China, the allocation of quantitative export restrictions should take into account the specific conditions prevailing in each WTO Member, including their respective needs.[524] China argues that the principles in Article XIII of the GATT 1994 provide guidance in assessing whether an export quota system is applied in a manner that constitutes "arbitrary or unjustifiable discrimination."[525]

7.342. Concerning the difference between even-handedness and the chapeau of Article XX, the United States submits that, taking into account the different roles and purposes of the Article XX(g) even-handedness requirement and the chapeau of Article XX, the factors that might be relevant to each test are likely to be highly case- and fact-specific. The United Sates accepts that facts that could be relevant for the Article XX(g) even-handedness inquiry could also be relevant to the analysis under the chapeau, and vice versa.[526] Similarly, in the European Union's view no facts are *per se* excluded from the Panel's analysis under the even-handedness test or under the chapeau. It is, however, for the party that relies upon a certain set of facts to explain why they should be considered relevant under either of the tests.[527] Japan argues that the requirements of Article XX(g) should be assessed separately before the Panel proceeds with its application of the provisions of the chapeau. In Japan's opinion, it would weaken the requirements

[519] China's first written submission, para, 73, (citing Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227).
[520] United Sates' second written submission, para. 294; European Union's second written submission, para. 86; and Japan's second written submission, para. 167.
[521] European Union's second written submission, paras. 88-89, (citing Appellate Body Reports, *Brazil-Retreaded Tyres*, paras. 227, 229 - 230 and *US – Gasoline*, pp. 28-29); Japan's second written submission, paras. 179-180.
[522] Japan's second written submission, paras. 99 and 180.
[523] China's second written submission, para. 102.
[524] China's second written submission, para. 108.
[525] China's second written submission, para. 108.
[526] United States' responses to Panel question No. 63, paras. 16-20.
[527] European Union's second written submission, paras. 71-73.

under Article XX(g) if the scope of that provision were defined by referring to the scope of the chapeau.[528]

7.343. Referring to the Appellate Body's report in *US – Gasoline*, China points out that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of measures formally within the terms of an exception listed in Article XX. According to China, while the term "disguised restriction" covers situations where the application of a measure amounts to "arbitrary or unjustifiable discrimination", it seeks to identify, more broadly, situations where there is "abuse or illegitimate use of the exceptions to substantive rules available in Article XX".[529] China notes that the chapeau is thus meant to detect "*concealed* or *unannounced*" restrictions on international trade, disguised as measures formally within the terms of a subparagraph of Article XX.[530] Recalling the panel report in *EC – Asbestos*, China points out that whether the application of a measure constitutes a "disguised restriction on international trade" may be determined on the basis of an examination of the "design, architecture and revealing structure" of the measure at issue.[531]

7.344. With respect to the prohibition of "disguised restrictions", the complainants recall the Appellate Body's statement in *US – Gasoline* that "concealed or unannounced restriction or discrimination" in international trade does not exhaust the meaning of "disguised restriction."[532] Referring to the panel report in *EC – Asbestos*, the European Union points out that the protectionist objective of a measure can frequently be discerned from its "design, architecture and revealing structure".[533] Japan also notes that in evaluating whether a measure "complies with the chapeau" of GATT Article XX, the Appellate Body has indicated that the structure, design, and application of the measure must be examined.[534]

7.5.3.1.1 Meaning of "arbitrary or unjustifiable discrimination or disguised restriction on international trade"

7.345. As the Panel has noted, a measure that is inconsistent with obligations in the GATT 1994 may nevertheless be permitted under Article XX. As the Appellate Body stated in *US – Gasoline*, and confirmed in *Brazil – Retreaded Tyres*, to be justified under Article XX:

> [T]he measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two tiered: first provisional justification by reason of characterization of the measure under [the sub-paragraph]; second, further appraisal of the same measure under the introductory clauses of Article XX.[535]

7.346. The various subparagraphs of Article XX delineate the manner in which a Member may adopt measures pursuing "legitimate state policies or interests".[536] Such measures must then satisfy the requirements in the chapeau of Article XX, that is, they must not be applied in a manner that would constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

7.347. The Appellate Body has explained that "[t]he burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests

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[528] Japan's second written submission, paras. 136-140.
[529] China's first written submission, para. 75, (citing Appellate Body Report, *US – Gasoline*, p. 25).
[530] China's first written submission, para. 75 (citing Appellate Body Report, *US – Gasoline*, p. 25) (emphasis in original).
[531] China's first written submission, para. 75 (citing Panel Report, *EC – Asbestos*, para. 8.236).
[532] United Sates' second written submission, para. 300, (citing Appellate Body Report, *US – Gasoline*, p. 25) and Japan's second written submission, para. 177.
[533] European Union's second written submission, para. 95 (referring to Panel report, *EC – Asbestos*, para. 8.236).
[534] Japan's second written submission, para. 165.
[535] Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, p. 20.
[536] Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3, p. 16.

on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue".[537]

7.348. In *US – Gasoline*, the Appellate Body confirmed that the purpose of the chapeau was not to address "…the questioned measure or its specific contents as such, but rather *the manner* in which that measure is applied".[538] Referring to the negotiating history of Article XX, the Appellate Body explained that the purpose and object of the introductory clauses of Article XX is generally the prevention of "abuse of the exceptions of [what was later to become] Article [XX]."[539]

7.349. In other words, if the exceptions under Article XX are not to be abused or misused, measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal obligations of the party claiming the exception and the legal rights of the other parties concerned.[540] The chapeau imposes three requirements for the application of measures that have been found to be consistent with one of the subparagraphs of Article XX of the GATT 1994: specifically, the measure cannot be applied in a manner which would constitute: (i) a means of arbitrary…discrimination between countries where the same conditions prevail; (ii) a means of…unjustifiable discrimination between countries where the same conditions prevail; and, (iii) a disguised restriction on international trade.[541] These three requirements in the chapeau of Article XX of the GATT 1994 reflect the principle of international law that treaties must be complied with in good faith.[542] Additionally, the Appellate Body has confirmed that these concepts may overlap:

> "Arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade may, accordingly, be read side-by-side; they impart meaning to one another. It is clear to us that "disguised restriction" includes disguised *discrimination* in international trade. It is equally clear that *concealed* or *unannounced* restriction or discrimination in international trade does *not* exhaust the meaning of "disguised restriction." We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.[543]

7.350. The Appellate Body in *US – Shrimp* elaborated three conditions for applying the "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" clause: first, the application of the measure must result in *discrimination*. As the Appellate Body stated in *US – Gasoline*, the nature and quality of this discrimination is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994. Second, the discrimination must be *arbitrary* or *unjustifiable* in character. Third, this discrimination must occur *between countries where the same conditions prevail*.[544]

7.351. The Appellate Body has made clear that the discrimination mentioned in the chapeau of Article XX "could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned."[545] In other words, the discrimination mentioned in the chapeau covers not only MFN-type discrimination among different countries to which an

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[537] Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, p. 22-23.
[538] Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, p. 20.
[539] E/PC/T/C.11/50, p. 7; quoted in GATT, Analytical Index: Guide to GATT Law and Practice, Volume I, p. 564 (1995).
[540] Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, p. 21.
[541] Appellate Body Report, *US – Shrimp*, para. 150.
[542] Appellate Body Reports, *US – Shrimp*, para. 158; *US – Gambling*, para. 339; and *Brazil – Retreaded Tyres*, para. 215.
[543] Appellate Body Report, *US – Gasoline*, DSR 1996:I, 3, at 16.
[544] Appellate Body Report, *US –Shrimp*, para. 150.
[545] Appellate Body Report, *US – Shrimp*, para. 150.

exported product is destined, but also national treatment-type discrimination arising from the difference in treatment when the like product is destined for export or for domestic consumption. The Panel understands China to acknowledge this point in response to a question from the Panel.[546]

7.352. Of particular significance is that the Appellate Body noted in *Brazil – Retreaded Tyres* that the analysis of whether a measure's application results in arbitrary or unjustifiable discrimination should be based on the *cause of the discrimination and not exclusively on the effects of such discrimination.* The Appellate Body then explained that arbitrary or unjustifiable discrimination exists when the "reasons given for this discrimination bear no *rational connection* to the objective falling within the purview of a paragraph of Article XX, or would go against that objective.[…]".[547] In the present dispute, this requirement implies that the discrimination, if any, should be justified on the basis of conservation-related criteria.

7.353. Having said that, the Appellate Body has also recognized in *Brazil – Retreaded Tyres* that panels may have to assess the *effects* of challenged measures to determine compliance with the chapeau of Article XX:

> Having said that, we recognize that in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable. The effects of discrimination might be relevant, depending on the circumstances of the case, because, as we indicated above, the chapeau of Article XX deals with the manner of application of the measure at issue. Taking into account as a relevant factor, among others, the effects of the discrimination for determining whether the rationale of the discrimination is acceptable is, however, fundamentally different from the Panel's approach, which focused exclusively on the relationship between the effects of the discrimination and its justifiable or unjustifiable character.[548]

7.354. The Panel recalls additionally that discrimination may also be arbitrary or unjustifiable in cases where it is avoidable and foreseeable. This will be the case where *alternative measures* exist which would have avoided or at least diminished the discriminatory treatment.[549] In sum, the chapeau of Article XX allows for a degree of discrimination provided it is justified and not arbitrary and where the complainants are unable to demonstrate the availability of a WTO-consistent alternative measure.

7.355. The Panel notes that the prohibition against discrimination is a general principle that is reflected in a number of WTO provisions, including GATT 1994 provisions. For example, when GATT rules allow for quotas, Article XIII makes clear that the general principle of non-discrimination in the allocation of such quotas remains. It may, however, be difficult to determine the best method for the non-discriminatory allocation of quotas, with and between other Members. For example, Article XIII, which deals with the "non-discriminatory administration of quantitative restrictions", provides that in applying restrictions to any product, WTO Members shall aim at allocating the quota in shares approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such a quota. We see here no prescription or methodology for setting particular quota allocations other than the principle that quota

[546] China's response to Panel question No. 47. Specifically, the Panel put the following question to China: "Complainants argue that discrimination between "countries" within the chapeau of Article XX of the GATT 1994 includes not only MFN-type discrimination, but also NT-type discrimination (see, e.g. para. 54 of the European Union's oral statement at the first substantive meeting). Does China agree?" China responded that it "agrees that the requirement not to apply an export quota system in a manner that would constitute 'arbitrary discrimination' also covers arbitrary discrimination between domestic and foreign consumers".

[547] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227.

[548] Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 229-230. (footnotes omitted)

[549] Appellate Body Report, *US – Gasoline*, pp. 28-29, DSR 1996:I, 3, at 26-27. In the case of those Article XX exceptions that apply to measures "necessary to" the achievement of a particular objective, alternatives are considered during the analysis under the paragraph at issue. However, in the context of Article XX(g), alternatives may be considered during the chapeau analysis.

allocations should reflect as closely as possible the shares that Members would likely obtain in the absence of such quotas.[550]

7.356. The principle that restrictions should, so far as possible, maintain the relative market shares that all Members would have in the absence of restrictions is also echoed in Article XI:2 of the GATT, although in the somewhat narrower context of import restrictions on agricultural and fisheries products. The final paragraph of Article XI:2 provides that

> [A]ny restrictions applied … shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.

7.357. We note that no parties in the current dispute have relied on this Article – and, indeed, in their response to a question from the Panel on the relevance of this provision, the complainants urge that the principles it embodies cannot be used to interpret "even-handedness". The Panel is simply observing that this general principle appears to underpin the GATT regime.

7.358. The Panel recalls that GATT Article XXVIII:4 *Ad* Note also seems to recognize that, in determining the substantial suppliers of a Member intending to modify its tariff commitments, that Member must look at the shares that other contracting parties could reasonably be expected to have *in the absence of discriminatory quantitative restrictions*. The Panel sees once again embodied in this provision the principle that GATT disciplines on non-discrimination intend to protect legitimate competitive opportunities that should be available to WTO Members.

7.359. Finally, we note that Article XX(j) provides that where a product is in short supply, measures for the acquisition and distribution of the product should ensure that all Members have access to an "equitable share" of the product. There is no requirement for any equal or strictly non-discriminatory allocation. Although the special circumstances that Article XX(j) was drafted to handle (severe shortages caused by war and other emergencies[551]) counsel against the provision's direct use in the interpretation of Article XX(g), what is important to note is that this Article too seems to us to reflect a general principle that, in the case of restrictions on trade, Members' access to goods and materials should reflect as closely as possible the situation that would prevail in the absence of these restrictions. Articles XI:2, XIII, XXVIII, and XX(j) of the GATT 1994 together suggest that the overarching goal or concern of WTO rules in this area is to reduce distortion in trade flows caused by such restrictions and ensure that Members maintain their relative position *vis-à-vis* each other with respect to their market shares and access to goods and materials.

7.360. In this regard, no WTO provision suggests that the purpose of WTO disciplines on export restrictions is to equalize Members' access to goods and resources. The WTO disciplines on justifiable trade restrictions are not redistributive; instead, they seem to aim for the maintenance of what the relative market situation would be absent the challenged restriction. This suggests that where, in the absence of restrictions, different Members would have naturally unequal shares of goods and resources, it is not the purpose of WTO law to "correct" such inequalities. In the Panel's view, the WTO concern for non-discrimination is limited to ensuring that equality in competitive opportunities is maintained when non-trade considerations are regulated.

7.361. The Panel now proceeds to apply the legal test explained above to the facts in this case.

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[550] The Panel is aware that the Import Licensing Agreement includes some criteria for the allocation of tariff rate quotas.

[551] See, e.g. General Agreement on Tariffs and Trade, Summary of the Third Meeting held at the Palais des Nations, 8 March 1965, at 2.30pm, SR.22/3, 16 March 1965, pp. 24-25.

7.6 Application of Article XX(g) to China's export quota on rare earths

7.6.1 Introduction

7.362. The Panel will now apply the legal test discussed above to China's export quota on rare earths. The Panel will first assess whether the export quota complies with subparagraph (g), and will then proceed to consider whether the export quota is justified under the chapeau of Article XX, before reaching an overall conclusion on the quota's WTO-consistency.

7.6.2 Application of subparagraph (g) to China's rare earth export quota

7.363. Before proceeding, the Panel recalls that, in its view, to comply with the legal test under subparagraph (g), the challenged measures must be genuinely related to, that is to say really *about*, conservation, and if they are, any conservation-related burden must be imposed even-handedly on foreign and domestic users.[552] As the Panel explained in its legal analysis above, the test under Article XX(g) is unitary in nature, and a regulating Member seeking to rely on the provision must show that its measure conforms with all of the Article's requirements. The Panel is of the view that a measure's compliance with Article XX(g) can be determined only on the basis of a holistic assessment of whether the challenged measure relates to the conservation of rare earths and is made effective in conjunction with restrictions on domestic production or consumption. Having said that, the Panel notes that the Appellate Body in its interpretation of subparagraph (g) has often examined Article XX(g) by dealing with its first and second phrases separately and sequentially.[553] For ease of exposition, we examine China's export quota measures under each of the first and second clauses of the Article before reaching a final, overall conclusion at the end of our analysis on whether the challenged export quota relates to the conservation of rare earths and is made effective in conjunction with domestic restrictions.

7.6.2.1 First part: whether China's export quota on rare earths "relates to the conservation of exhaustible natural resources"

7.6.2.1.1 "exhaustible natural resources"

7.364. In our discussion of the legal test under Article XX(g), we noted that the parties appear to disagree about the scope of the term "exhaustible natural resources". While the complainants suggest that semi-processed and processed raw materials fall outside the scope of "exhaustible natural resources", China argues that the term should be understood broadly.

7.365. The Panel indicated that, in its opinion, it is not necessary to decide the precise scope of the term in this dispute, since all parties agree that measures can "relate to the conservation of exhaustible natural resources" even if they are not imposed directly on the exhaustible natural resource in question. Moreover, in the specific context of this dispute, both the complainants and China agree that, at the very least, rare earth, tungsten, and molybdenum *ores* are "exhaustible natural resources" – a position that, the Panel observes, finds support in previous jurisprudence[554] and in the history of Article XX(g).[555] The question that the Panel does need to address, however, is whether China's export quota measures "relate to the conservation" of rare earth ores.

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[552] In this Panel report, when the Panel uses the terms "users" it is also referring to consumers.

[553] By analogy, the Appellate Body has emphasized that "[i]nterpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components": Appellate Body Report, *EC – Chicken Cuts*, para. 176. However, for ease of exposition and analysis, panels and the Appellate Body frequently examine the relevant elements of the general rule of interpretation separately, and sequentially. In this regard, the panel in *US – Section 301 Trade Act* understood that "the elements referred to in Article 31 – text, context and object-and-purpose as well as good faith – are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order." Notwithstanding, that panel explained that "for pragmatic reasons", the normal way of applying this general rule is to examine the elements of the general rule sequentially: Panel Report, *US – Section 301 Trade Act*, para. 7.22.

[554] Appellate Body Report, *US – Shrimp*, para. 128; Panel Reports, *China – Raw Materials*, para. 7.369.

[555] See the Panel's discussion of the legal test under Article XX(g).

7.6.2.1.2 "conservation"

7.366. China must demonstrate that its export quota relates to the *conservation* of rare earth ores in order to fall within the exception in Article XX(g). As the Panel explained above, our interpretation of the term "conservation" in this context should take into account the international principles of sovereignty over natural resources and sustainable development.

7.367. China argues that it has a "comprehensive conservation policy" whose purpose is to ensure the "effective protection and rational utilization" of China's rare earth reserves.[556] China points to the *1991 Circular* to support its argument that its comprehensive conservation policy is designed to "reasonably develop, utilize, and protect"[557] its "limited rare earth resources".[558] Moreover, China argues that its comprehensive conservation policy, including its extraction, production, and export quotas, are designed to "control[] the depletion rate of the rare earth resources".[559]

7.368. China explains that its rare earth conservation policy came into existence in 1991, when the State Council designated rare earths as "special minerals under national protective mining" that China must "reasonably develop, utilize and protect".[560] In 2005, the State Council specified in another Circular that "[f]or the purpose of conserving domestic resources [including rare earths], it is necessary to control the export amount of certain exhaustible resource products while controlling the domestic production and consumption of them".[561] In its *2011 Several Opinions* – a high-level policy-setting instrument that is legally binding for all ministries, agencies, commissions, and provincial and local Chinese authorities[562] – the State Council articulated a rare earths policy requiring "effective protection and a rational utilization"[563] of rare earths by all responsible authorities within China.

7.369. China explains[564] that its rare earths conservation policy consists of (a) strict control of access to the rare earth industry; (b) taxation measures; (c) tackling harm to the environment caused by rare earth mining and production; (d) strict quantitative control of extraction, production of smelted and separated rare earth products, and export restrictions, all three of which are interconnected and reinforcing; and (e) strict enforcement of laws and regulations relating to the rare earths industry.

7.370. According to China, its conservation policy starts with the rare earths in the ground. The extraction quota controls the annual depletion rate of the rare earth resources.[565] This quota is split between light and medium/heavy rare earths according to the main types of ores and their geographical location in China. This quota is monitored by the Ministry of Land and Resources (MLR).[566]

7.371. China also imposes a production quota on smelted and separated rare earth products in addition to the extraction quota. This quota is set and administered by the Ministry of Industry and Information Technology (MIIT). It covers approximately the same total volume as the extraction quota, with a slight adjustment for the rare earth concentrates that are lost during further processing.[567] China argues that this second quota – imposed at the smelting and separating stage of the rare earths supply chain – facilitates the enforcement of the extraction quota against illegal mining. According to China, were there only an extraction quota, and given the difficulty of

[556] China's second written submission, para. 29.
[557] China's second written submission, para. 29 and *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining* (Exhibit CHN-12, JE-72).
[558] China's second written submission, para. 34.
[559] China's second written submission, para. 36.
[560] 1991 Circular, (Exhibit CHN-12, JE-72), second introductory paragraph.
[561] *Measures Limiting the Export of Certain of High-Energy-Consuming, High-Polluting and Resource-Related Products*, (Exhibit CHN-62), Section III.
[562] *The Status and Effect of Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry in China's Domestic Law System*, 9 June 2013 (Exhibit CHN-185).
[563] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13) Introductory Paragraph.
[564] China's first written submission, para. 19.
[565] China's second written submission, para. 36; China's first written submission, paras. 24 and 175.
[566] China's Answers of 14 March 2013, para. 94; China's second written submission, para. 36.
[567] China's second written submission, para. 37 and footnote 94; China's first written submission, paras. 24 and 176-183.

detecting illegal mining, illegal mines could sell their ore products to smelting and separating enterprises, who could process unrestrained quantities of these illegal products without being inspected.[568] China further urges that the monitoring and enforcement of the production quota by a different Chinese Ministry (MIIT) than the one that monitors the extraction quota (i.e. the MLR), enhances the enforcement of China's rare earth conservation goal.

7.372. China explains that the production quota also furthers China's conservation policy by effectively placing an annual limit on extraction in cases where smelting and separating enterprises have unused stocks of unprocessed rare earth concentrates due to lack of demand in the previous year. In the absence of a production quota, these enterprises could produce unrestrained amounts of smelted and separated products from (a) these older concentrate stocks, in addition to (b) the full amount of rare earth concentrate that is produced according to the new extraction quota for the running calendar year. However, China argues that because China imposes a production quota, in the new year, the smelting and separating enterprises will only need to use a part of the new ores that can be produced according to the extraction quota for that year. According to China, these enterprises will use their stockpiles first. Thus, argues China, the result of the production quota is that demand for newly extracted ores will be limited, which will keep ores in the ground.

7.373. Finally, China also imposes an export quota to "manage what is effectively the world supply of the volume of rare earth products determined in the extraction and production quotas".[569] China asserts that the export quota applies to the rare earth products that are traded internationally and thus drive the depletion of the resources. According to China, these products are rare earth oxides, metals and salts.[570] China maintains that the export quota "relates to" conservation in a number of ways, each of which will be discussed by the Panel below.

7.374. The complainants do not accept China's characterization of the objective of its export quota measures. According to Japan, China's export regime "serves no purpose other than" benefiting Chinese rare earth consumers at the expense of foreign users.[571] The European Union does not contest "China's objective to conserve exhaustible natural resources", but argues that the export quota measures "do not form part of that policy".[572] The United States similarly does not contest the existence of a comprehensive conservation policy, but argues that the question for the Panel is whether "the export quotas have a close and genuine relationship of ends and means with respect to the goal of natural resource conservation", and not whether China "has in place a comprehensive conservation policy".[573] The United States urges that China's reliance on its "comprehensive conservation policy" misconstrues language developed by the Appellate Body in the context of interpreting Article XX(b)[574], and stresses that "China [is] attempt[ing] to articulate a new test for "relating to" under Article XX(g) … [which] would effectively alter and lower the standard that a measure must meet in order to be considered a conservation measure".[575]

7.375. In our view, China has demonstrated that it has a comprehensive conservation policy, and we recognize that it is in China's economic interests not to exhaust or deplete its exhaustible rare earth resources. The Panel also considers that China has demonstrated that it has developed a series of interconnected measures and programmes, including extraction and production caps and enforcement actions, which are designed to manage the extraction and supply of rare earth resources through a conservation policy.

7.376. The Panel observes, however, that this dispute is not concerned with whether China has an appropriate conservation policy, or whether its conservation programmes are comprehensive. None of the complainants challenges China's extraction or production quota as such[576], or the many forms of enforcement, including site and documentary checks, that China claims to have implemented to enforce its conservation policy.

[568] China's second written submission, para. 37.
[569] China's executive summary (part II), para. 8.
[570] China's second written submission, paras. 12-13 and 70-71.
[571] Japan's second written submission, para. 4.
[572] European Union's second written submission, para. 19.
[573] United States' second written submission, para. 96.
[574] United States' second written submission, paras. 97-98.
[575] United States' second written submission, para. 99.
[576] See, e.g. European Union's second written submission, paras. 4 and 7.

7.377. Instead, this dispute is about whether specific measures – export quotas – claimed to be part of this conservation policy are inconsistent with China's obligations under the WTO Agreement, as alleged by the complainants. The parties agree that genuine conservation measures on rare earths, potentially including export quotas in certain circumstances, could be covered by subparagraph (g), so long as they comply with the other requirements of (g) and the chapeau of Article XX. The first question the Panel must address, therefore, is whether the specific export quota on rare earths "relates to" the "conservation" of exhaustible rare earths. While the Panel will consider the export quota in the context of China's "comprehensive conservation policy", it is the export quota itself, and not the conservation policy more broadly, that will be scrutinized to determine its compatibility with WTO law. The other measures that comprise China's comprehensive conservation policy are relevant to the Panel's inquiry only insofar as they shine light on the design and architecture of the challenged export quota and its role in China's comprehensive conservation policy.

7.6.2.1.3 "relating to"

7.378. The Panel now turns to consider whether China's export quota measures "relate to" the conservation of rare earths. As the Panel noted in its discussion of the legal test under Article XX(g), the Panel will conclude that China's measures "relate to" the goal of conserving rare earth ores if China can establish that the design and architecture of the export quota show or manifest a "close", "real", "rational", and "substantial" relationship with the conservation objective.

7.379. China argues that its measures make a "substantial contribution" to conservation, and are therefore "related to" conservation. The Panel recalls, however, that according to the Appellate Body, the test for whether a challenged measure "relates to" conservation turns on an examination of its "general design and structure", and in particular on whether the measure is "disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation" or whether, conversely, it is "reasonably related" to the conservation objective, such that its relationship with conservation is "close and real" and "substantial".[577] 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, and its operation, while under the chapeau of Article XX the Panel will review the manner in which the quota system is applied. As the Panel noted, the analysis under subparagraph (g) does not require an evaluation of the actual effects of the concerned measures. The Panel is thus not required to examine whether a challenged measure has in fact improved the level of conservation of exhaustible natural resources. There is therefore no need for the Panel to decide, in quantitative or qualitative terms, precisely what level of contribution a challenged measure has made to the conservation objective. Instead, the Panel looks at the nature of the challenged measures to determine whether, as a matter of design and architecture, they assist, support or further the goal of conservation.

7.380. China advances a number of arguments to show that its export quota measures "relate to" conservation. First, it argues that the texts of the challenged measures refer to the goal of conservation.[578] Second, China argues that its export quota "relates to" conservation because it (a) enforces China's extraction and production caps[579]; (b) sends a signal that China intends to reduce its rare earth extraction,[580] and thus that new sources of supply need to be developed[581]; and (c) encourages stability in the international rare earth market by acting as a safeguard against "demand surges".[582] Third, China argues that the export quota is necessary to enable China to "manage what is effectively the world supply of the volume of rare earth products"[583] by allocating the limited amount of rare earth products that are legally produced in China each year between Chinese and foreign consumers in a way that responds to China's and the world's "sustainable development" needs.[584] Although this argument underpins all of China's other arguments, China seems to raise this in part II of its executive summary as an additional basis justifying the export quota. The Panel will thus deal with this argument independently from the first and second

[577] Appellate Body Report, *US –Shrimp*, para. 141.
[578] China's first written submission, paras. 91-98.
[579] China's second written submission, paras. 44-49.
[580] The Panel notes that China also made this 'signalling' argument in the context of tungsten: see below, section 7.7.2.1.3.2 of the Panel's reports.
[581] China's second written submission, paras. 50-52.
[582] China's second written submission, paras. 53-61.
[583] China's executive summary (part II), para. 8.
[584] China's second written submission, para. 53.

arguments. Finally, China argues that the manner in which the export, extraction, and production quotas are set demonstrates that the export quota "relates to" conservation. China argues that its export quota relates to conservation and is not a measure imposed with a view to benefiting its domestic industry. According to China, the export quota is "central"[585] to China's conservation policy and to its sovereignty over natural resources.

7.381. The complainants' take issue with China's claim that its export measures "relate to" conservation. They argue that the textual references to conservation are ambiguous, and that a close examination of the design and architecture of the export quota measure shows that they "relate to" industrial policy rather than conservation.

7.382. As the Panel explained above, an export quota can, in principle, be justified under subparagraph (g) of Article XX. The parties discussed this issue briefly in their written submissions and during the meetings with the Panel, and all seem to agree with this proposition. In this dispute, China bears the burden of persuading the Panel that its export quota measures relate to the conservation of exhaustible natural resources and are made effective jointly with domestic restrictions.

7.383. The Panel will now address in turn each of the justifications raised by China with respect to the first part of subparagraph (g) – that is, those that relate to the conservation of exhaustible natural resources.

7.6.2.1.3.1 Textual references to conservation

7.384. The Panel begins by considering China's argument that the texts of the five measures[586] constituting its export quota on rare earths indicate the existence of a substantial, close, and real relationship between that quota and the objective of conservation. According to China, the text of those measures explicitly refers to the objective of "protecting resources", and clearly links the export quota with China's policy of conserving resources by cross-referencing to the quota's legal basis (i.e. to the *Foreign Trade Law* and Regulations).[587] In addition, China points to a number of State Council policy documents, in particular the *1991 Circular* designating rare earths as a "specified mineral subject to protective mining" and the *2011 Several Opinions*, which, China argues, explicitly state that the export quota is part of a comprehensive conservation programme.[588]

7.385. In response to the argument made by the complainants during the first substantive meeting that China's comprehensive conservation policy "post-dates" the establishment of the export quota, China points out that each of the *Circular* documents and *Several Opinions* of the State Council pre-dates the 2012 quota system. Moreover, China argues that the addition of textual references to "conservation" in its 2012 export quota system reflects its efforts to bring its laws and regulations into conformity with WTO law[589], including the decision in *China – Raw Materials*.

7.386. The complainants disagree with China on several counts regarding the value of the textual references to "conservation" in China's export quota measures. First, the complainants suggest that, as a matter of fact, only a small number of China's measures reference conservation.[590] Second, they argue that the references that do exist do not explain the contribution to the conservation goal of the measures in which they appear.[591] The complainants also note that the State Council's *Several Opinions* white paper, which China discussed at length in its first written submission, fails to provide any explanation about how the export quota relates to the

[585] China's response to Panel question No. 93.

[586] *2012 Export Licensing Catalogue*, (Exhibits CHN-8, JE-48); 2*012 Application Qualifications and Procedures for Rare Earth Export Quotas*, (Exhibits CHN-38, JE-61); *2012 List of Enterprises for the Export of Rare Earths*, (Exhibits JE-66, CHN-55); *2012 First Batch Rare Earth Export Quotas*, (Exhibits CHN-56, JE-55); and *2012 First Batch Rare Earth Export Quotas (Supplement)*, (Exhibits CHN-57, JE-56). See also China's first written submission, paras. 79 and 91.

[587] China's first written submission, paras. 89 and 91-98; China's second written submission, para. 41.

[588] China's second written submission, para. 41.

[589] China's second written submission, paras. 22-23.

[590] Japan's second written submission, para. 86.

[591] United States' second written submission, paras. 117 and 121; European Union's second written submission, para. 105; Japan's second written submission, para. 86.

conservation of rare earths.[592] Third, in the complainants' view, the limited references to conservation in the measures imposing, implementing, and administrating the export quota, and in particular in those measures promulgated in 2012 and late 2011 after the issuance of the panel reports in *China – Raw Materials*, do not provide sufficient support for China's argument.[593] Fourth, the complainants contend that cross-references to legal instruments such as the *Foreign Trade Law* and *Regulations* in the export quota measures is insufficient to meet China's burden of proof under Article XX(g), since those instruments also list reasons other than "conservation" for which the export quotas might have been imposed.[594] Finally, the complainants list a number of China's legal and policy instruments[595] to demonstrate that China's export quota on rare earths serves the purpose of promoting China's industrial policy goals.[596]

7.387. The Panel examines first whether the challenged legal instruments that China claims constitute its "comprehensive conservation policy" refer to the objective of conserving exhaustible natural resources. We recall that in previous disputes, panels have indeed had regard to the text of a challenged measure. For instance, the panel in *China – Raw Materials* recognized that "[t]o determine whether a challenged export restriction relates to conservation, a panel should examine the text of the measure itself".[597]

7.388. As such, we think that explicit references to "conservation" in the text of a measure may, depending on the nature of the reference, provide evidence that the measure in fact relates to conservation. While it seems correct to us that "a mere reference to 'conservation' in a measure is not necessarily an indication that the measure is related to a legitimate conservation goal", and while we agree that, as a general rule, something "beyond just a mention of conservation" will be needed to establish the existence of the required relationship between a challenged measure and the conservation objective, the Panel believes that such references could help to demonstrate that the measure relates to conservation. Such references provide evidence of the regulating WTO Member's concerns, and can support a finding by the Panel that the measure in which they appear is "related to" conservation. References to conservation are part of the "design and architecture" of a challenged measure, and as such may shed light on the policy considerations and goals that underpin it.

7.389. Moreover, and in the particular context of the measures at issue, we think that even if the complainants are correct that China rewrote its export restrictions and added new references to conservation in response to the *China – Raw Materials* Reports, this fact does not undermine their legitimacy or evidentiary value.[598] The mere fact that textual references to conservation were included in the text of China's export measures following the Reports in *China – Raw Materials* does not indicate to us that those references are necessarily, as Japan contends, "self-serving".[599] Indeed, it is to be expected that a Member will seek to improve and update measures found to be WTO-inconsistent to bring them into conformity with WTO law. Allowing the complainants' argument that China's textual references are "self-serving" would, we think, put unsuccessful respondents in the unfortunate position of not being able to reflect a new policy or justification in measures previously challenged in another dispute.

7.390. Finally on this point, we recall the Appellate Body's admonition that "Members of the WTO should not be assumed, in any way, to have continued previous protection or discrimination

[592] United States' second written submission, para. 120; European Union's second written submission, paras. 110-112.

[593] United States' second written submission, para. 118; European Union's second written submission, paras. 103-104; Japan's second written submission, paras. 86-87.

[594] United States' second written submission, para. 119; European Union's second written submission, para. 107.

[595] The Panel notes that, according to China, the *Several Opinions*, though a "policy statement", nevertheless mandate[s] the local governments, Ministries, Commissions and Agencies affiliated to the State Council to implement a policy to ensure'effective *protection* and a rational utilization of rare earths'": China's first written submission, para. 102 (internal citations omitted). The Panel therefore considers that whether or not this policy document is strictly a legal instrument, is related to the implementation of China's rare earth conservation policy.

[596] United States' second written submission, para. 121; European Union's second written submission, para. 114–116.

[597] Panel Reports, *China – Raw Materials*, para. 7.418.

[598] *Cf* European Union's second written submission, paras. 103 and 112.

[599] Japan's second written submission, para. 88.

through the adoption of a new measure. This would be close to a presumption of bad faith".[600] We understand this statement as instructing panels to read new measures adopted by a Member in response to a negative panel or Appellate Body finding in light of a presumption of good faith. The mere fact that China might, at a previous point in time, have imposed export quotas that were WTO-inconsistent does not in itself justify treating the measures challenged in this dispute (i.e. the 2012 export quota) as a mere continuation of its previous policies. To the contrary, and in line with the presumption of good faith, China is presumed to be "abid[ing] by [its] treaty obligations in good faith, as required by the principle of pacta sunt servanda articulated in Article 26 of the Vienna Convention".[601] The references to "conservation" in China's export quota under challenge in this dispute are thus to be regarded as an indication of China's efforts to adopt WTO-consistent measures in conformity with previous decisions against its export quotas. We reiterate, however, that references to "conservation" are not sufficient on their own to prove that the challenged measures are "related to" conservation. They are but one factor that the Panel will consider. In this regard, we consider that references to conservation cannot insulate measures from challenge on the basis that their design and architecture do not "relate to the conservation of exhaustible natural resources".

7.391. The Panel will now proceed to examine the text of each of China's five export quota measures. As the Panel has explained, China argues that these measures themselves contain references to the objective of conserving natural resources, and so establish the existence of a close, real, and substantial relationship between the export quota system and the goal of conserving exhaustible rare earth resources.

7.392. First, the Panel notes that China's *2012 Application Qualifications and Procedures for Rare Earth Export Quotas* indicates that the objective of the 2012 export quota system for rare earths is to "protect resources". It also cross-references the legal basis for conservation measures:

> In order to protect the resources and the environment, further strengthen the rare earth export administration, and regulate the export operation order, according to the relevant provisions of the "Foreign Trade Law of the People's Republic of China", "Regulations of the People's Republic of China on the Administration of the Import and Export of Goods", the "Public Notice of the Application Standards and Application Procedures for the 2012 Rare Earth Export Quota" is hereby published.[602]

7.393. Second, the Panel observes that the *2012 List of Enterprises for the Export of Rare Earths* also sets out the goal of "protect[ing] resources" and refers to the legal basis for conservation measures in its introductory paragraph:

> In order to protect resources and environment, and to further enhance the administrations on exports of rare earth and coke, and to regularize the order of export business, in accordance with the Foreign Trade Law of the People's Republic of China and the Regulations of the People's Republic of China on Administration of Import and Export of Goods, the List Publishing Online Export Enterprises of Rare Earth of 2012 … are hereby published.[603]

7.394. Third, the Panel notes that the *2012 Export Licensing Catalogue*, which specifies the goods subject to quota licences, does not explicitly refer to the conservation objective. However, like the first two measures described above, it refers to the measures providing its legal basis[604], which, according to China, explicitly links export restraints and conservation:

> Pursuant to the Foreign Trade Law of the People's Republic of China and the Regulations on the Administration of the Import and Export of Goods of the People's

[600] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74 (footnote omitted).
[601] Appellate Body Report, *EC – Sardines*, para. 278.
[602] *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, Introductory Paragraph, (Exhibit CHN-38, JE-61).
[603] *2012 List of Enterprises for the Export of Rare Earths*, Introductory Paragraph, (Exhibit CHN-55, JE-66).
[604] These are *Foreign Trade Law*, (Exhibits CHN-11, JE-49) and *Regulations on the Administration of the Import and Export of Goods*, (Exhibit CHN-54, JE-50).

> Republic of China, the 2012 Export Licensing Management Goods List is hereby promulgated.[605]

7.395. Fourth, the Panel observes that the 2012 Notices specifying the different batches of the 2012 rare earths export quota (i.e. approvals of export quota shares) do not explicitly refer to the conservation objective. However, they do cross-reference to the measures providing the legal basis for using export quotas. According to China, these measures (i.e. *Foreign Trade Law* and *Regulations on the Administration of the Import and Export of Goods*) make explicit the link between export restraints and the goal of conservation. The introductory paragraph of the *2012 First Batch Rare Earth Export Quotas* provides as follows:

> In accordance with the Regulations of the People's Republic of China on the Administration of the Import and Export of Goods, the list of rare earth exporting enterprises of 2012 is hereby published and the first batch of rare earth export quota is hereby allocated.[606]

7.396. The Panel notes that the same cross-references appear in the measures specifying the supplement to the first batch as well as the second batch of the 2012 rare earth export quota.[607]

7.397. Having determined that all of the 2012 export quota measures explicitly state that they are adopted "in accordance with" *Foreign Trade Law* and *Regulations on the Administration of the Import and Export of Goods*, the question before us is whether these legal measures serve to link China's export restraints with China's conservation objective, such that the challenged export quota may be considered to be "related to" conservation.

7.398. The Panel has difficulty accepting China's claim that textual references to the *Foreign Trade Law* and/or the *Regulations on the Administration of the Import and Export of Goods* establish the necessary connection between China's export quota and the goal of conserving exhaustible natural resources. The Panel acknowledges that Article 16(4) of the *Foreign Trade Law*[608] provides that the export of goods may be restricted "in order to effectively conserve exhaustible natural resources". However, it is Article 35 of the *Regulations on the Administration of the Import and Export of Goods* that sets out the circumstances in which the export of goods "shall be restricted". Specifically, Article 35 allows for the imposition of restrictions in the circumstances "set forth in subparagraphs (1), (2), (3) and (7) of Article 16 of the Foreign Trade Law".[609] However, these subparagraphs concern restrictions for the purposes of (1) safeguarding national security, social and public interests, or public morals; (2) protecting human or animal health, or to protect the environment, (3) controlling the import and export of gold and silver; and (7) establishing or accelerating the establishment of specific domestic industries.[610] As the Panel has noted, subparagraph 16(4) of the *Foreign Trade Law* refers to "effectively conserv[ing] exhaustible natural resources", but this subparagraph is not explicitly mentioned in the Regulations. As such, the Panel does not consider that Article 35 of the Regulations supports China's contention that its export quota on rare earths is linked to the conservation objective.[611] Moreover, because the

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[605] *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, Introductory Paragraph, (Exhibit CHN-38).

[606] *2012 First Batch Rare Earth Export Quotas*, Introductory Paragraph, (Exhibits CHN-56, JE-55).

[607] *2012 First Batch Rare Earth Export Quotas (Supplement)*, Introductory Paragraph, (Exhibits CHN-57, JE-56) (referring to the *2012 First Batch Rare Earth Export Quotas*, Introductory Paragraph, (Exhibits CHN-56, JE-55), which itself refers to the *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50): see *2012 Second Batch Rare Earth Export Quotas*, (Exhibits CHN-58, JE-57) ("In accordance with the *Regulations of the People's Republic of China on the Administration of the Import and Export of Goods*, the second-batch of rare earth export quota is hereby passed down").

[608] *Foreign Trade Law*, (Exhibits CHN-11, JE-49).

[609] *Regulations on the Administration of the Import and Export of Goods*, Article 35, (Exhibits CHN-54, JE-50).

[610] *Foreign Trade Law*, (Exhibits CHN-11, JE-49).

[611] The Panel notes that Article 35 of the *Regulations*, when enacted in 2002, must have referred to the 1994 version of the *Foreign Trade Law* (Exhibit CHN-61). The 1994 version of the law does authorize, in Article 16(2), the imposition of import and export restrictions "where the export shall be restricted on account of domestic shortage in supply or effective protection of exhaustible domestic resources". However, this version of the law was repealed and replaced by a new *Foreign Trade Law* adopted in 2004 (Exhibit CHN-11), which, in subparagraphs (1), (2), (3), or (7), as the Panel has noted, does not contemplate the application of export or import restrictions for the purpose of protecting exhaustible resources (although this is contemplated in subparagraph (4) of Article 16). Without any information on this point from China, the Panel struggles to

Foreign Trade Law contains a range of provisions allowing for the imposition of export (and import) restrictions for a wide variety of reasons, the Panel cannot find that bare references to that instrument in China's export quota measures are capable of establishing the relationship required under Article XX(g).

7.399. The Panel accepts that some of China's export quota measures contain references, whether direct or indirect, to the goal of conserving exhaustible natural resources. However, in examining the legal and policy instruments submitted in evidence by China, the Panel has also found a number of references to goals other than conservation. The complainants too have noted some of these in their written submissions.

7.400. The Panel begins by taking note of the *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*[612] which places rare earths under "national protective mining".[613] In our view, the focus of this document is on the prevention of illegal mining to ensure that the "comparative advantage" China enjoys in these non-ferrous metal minerals is not illegally exploited and that the State does not "suffer from significant losses".[614] Although the goal of maintaining a "comparative advantage" may not necessarily be contrary to the goal of conservation, the Panel considers that it is primarily an industrial policy goal, since it relates to the competitive relationship between Chinese and foreign industries rather than the pace at which natural resources are consumed.

7.401. Next, the Panel observes that China's *Twelfth Five-Year Development Plan for New Materials Industry*, published in January 2012, articulates China's policy goal of ensuring that "RMB2 Trillion Yuan of output value is reached with an average annual growth rate of over 25%". Regarding rare earths, this Plan adds that "[t]aking the improvement of performance of rare earth new materials, the expansion of application in high-end fields and the increase of added value of products as key points, it would give full play to the advantages of rare earths resources in China to strengthen the industrial scale of rare earths new materials." As the Panel understands it, this is clearly a reference to industrial rather than conservation policy.

7.402. The *Twelfth Five-Year Hi-Tech Industry Development Plan for Inner Mongolia*, published in December 2011, projects a 60% average annual growth rate for the region's rare earth industry and identifies the "acceleration of the development of the new materials industry" as a "major task and developmental focal point".[615] This too seems to be a reference to the goal of utilizing rare earth resources for the purpose of industrial development.

7.403. The Panel next notes that the *Several Opinions*, which China presented as the foundation of its rare earth conservation policy, refers to the goal of "vigorously develop[ing] rare earth new materials and industry applications" and also indicates that "development of new products and the application of new technology shall be accelerated. Rare earth new materials shall increasingly support and secure the downstream industries." In the Panel's view, these statements regarding the industrial goals of the measures sit in tension with China's stated objective of reducing domestic consumption for the purpose of conserving exhaustible natural resources.

7.404. Moreover, and as noted above, the Panel recalls that the *Foreign Trade Law*[616] lists several policy grounds for the imposition of export restrictions, including "national security", "human health", "shortage of domestic supply", "limited market capacity of the importing countries",

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understand how Article 35 of the *Regulations*, as it existed and was applied in 2012, could be read as referring to Article 16 of the now-repealed version of the *Foreign Trade Law*. To the contrary, our understanding is that the *new* version of the *Foreign Trade Law* must be the reference point when it comes to applying Article 35 of the *Regulations* today and in 2012. The Panel observes that in its argument on trading rights, China has made clear that the new version of the *Foreign Trade Law* superseded the 1994 version. In light of this, the Panel has difficulty understanding how Article 35 could properly be read to refer to a law that is no longer in force.

[612] China's first written submission, para. 100, (referring to *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*), (Exhibit CHN-12, JE-72).

[613] China's first written submission, para. 100, (referring to *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*), (Exhibit CHN-12, JE-72).

[614] *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*, Second Paragraph, (Exhibit CHN-12, JE-72).

[615] *Inner Mongolia Autonomous Region "Twelfth Five Year" High-Tech Industries Development Plan*, Table 1 in para. 3, (Exhibit JE-29).

[616] *Foreign Trade Law*, (Exhibits CHN-11, JE-49).

"export operation orders," and "other circumstances" in addition to "conservation". Hence in our view, references to "conservation" in that document offer little support for China's position that its measures are "related to" conservation.

7.405. Having reviewed the various documents placed in evidence before us, the Panel concludes that some documents relating to China's export quota measures make reference to conservation goals, while others refer to China's industrial policy. The Panel considers that these references do not provide a clear basis to conclude that the measures are "related to" conservation.

7.406. Adding to this lack of clarity is the fact that, in the Panel's view, the texts of the export quota measures fail to make clear precisely how the challenged export quota relates to the goal of conserving exhaustible rare earth ores. While use of words like "conservation" might go some way towards establishing a connection between the measures and the conservation objective, they cannot substitute for a full and proper explanation of how the export quotas are designed to promote conservation. In the Panel's opinion, simple references to "conservation", while not unimportant, do not explain the nature of the relationship between the export quota and the goal of conserving exhaustible natural resources. For instance, the Panel notes that the State Council's *Several Opinions*, which China has presented as the foundation of its rare earth conservation policy, does not explain how export quotas relate to the goal of conservation. As the Panel understands it, the *Several Opinions* merely states that quantitative restrictions on extraction, consumption, and export will be imposed simultaneously, but it does not explain the relationship between these three kinds of restriction.

7.407. In sum, the Panel finds the various references to conservation in the texts of China's export quota and related documents to be inconclusive. The Panel is also of the view that references to terms such as "conservation" in the preamble or the text of a legal instrument cannot insulate measures from challenge where the design and architecture of such measures appear to indicate that the measures "relate to" an objective other than conservation. While the text of a measure is, as the panel in *China – Raw Materials* said, the starting-point of the examination under Article XX(g), the "design and architecture" of the measure are also central indicators of whether a challenged measure "relates to" conservation. It is therefore to the design and architecture of China's measures that the Panel now turns.

7.6.2.1.3.2 Do the design and architecture of China's export quota on rare earths "relate to" the conservation of exhaustible natural resources?

7.408. In its various submissions to the Panel, China has advanced a number of arguments purporting to show that the design and architecture of its measures "relate to" the conservation of exhaustible natural resources. The Panel observes that China's argumentation on this issue has evolved over the course of this dispute; for the sake of clarity, we set out China's arguments in the following paragraphs.

7.409. The Panel begins with China's arguments as articulated in China's most recent submission. In Part IV of the second part of its executive summary, China, explains that its export quota "relates to" conservation for two reasons: first, because the export quota "send[s] the correct conservation signals to the market"[617]; and second, because the text, context, and architecture of the 2012 export quota demonstrates that it relates to conservation.[618]

7.410. With respect to sending the "correct conservation signals to the market", China makes the following arguments: (a) by preventing a "domestic supply squeeze", the export quota reduces domestic demand for illegally produced rare earth products, and thus reduces incentives for illegal extraction. Through the export quota, China signals to would-be illegal producers that it is not worth investing in illegal extraction and production programmes[619]; (b) by indicating to foreign consumers that unlimited supplies of China's rare earth products cannot and will not last. This encourages investment in rare earth projects in other countries[620]; and (c) by signalling to foreign and domestic consumers what volume of rare earth products they can expect to have access to in any given year, the export quota reduces the likelihood of panic, speculative and pre-emptive

[617] China's executive summary (part II), paras. 14-17.
[618] China's executive summary (part II), paras. 18-23.
[619] China's executive summary (part II), para. 15.
[620] China's executive summary (part II), para. 16.

buying, to which the rare earth market is especially vulnerable. By preventing "speculative surges", China ensures that access to rare earth supplies is not cut off, and thus that sustainable development is not threatened.[621]

7.411. With respect to the "text, context, and architecture" of the 2012 export quota, China argues that the texts of the export quota measures themselves confirm the quota's relationship with the conservation objective.[622] The Panel has dealt with this issue above. Additionally, China argues that (a) the way in which the export quota is set, and especially the fact that the export, extraction, and production quotas are set simultaneously, show that the export quota relates to conservation[623]; (b) the fact that the export quota is applied at the level of smelted and separated products, which are the products "actually traded" on the rare earth market, show that the export quota relates to the conservation objective[624] ; and (c) the fact that China does not apply its export quota to downstream processed products demonstrates that the export quota "relates to" conservation.[625]

7.412. China's second written submission presents China's arguments somewhat differently. There, China argues that the export quota "relates to" conservation because it "facilitates the enforcement and operation of China's 2012 rare earth conservation policy". It does this, according to China, in three ways: first, by helping China to crack down on smuggling[626]; second, by signalling the need for exploring other sources of supply[627]; and third, by safeguarding against uncertainty in the market, which could interfere with China's sustainable development.[628] China also argues that the product scope of its export quota "relates to" conservation.[629]

7.413. The Panel also notes that while enforcement, signalling, and safeguarding are three separate heads of argument in China's second written submission, in its executive summary, China argues that enforcement (by preventing a domestic supply squeeze) and safeguarding against a "demand surge" are themselves aspects of the quota's signalling function. Thus, until China's executive summary, reducing incentives for illegal extraction, signalling, and safeguarding against market disruptions are presented as separate and distinct arguments, rather than as elements of a broader "signalling" operation.

7.414. China's argumentation in its first written submission is similar to that in its second written submission. China divides its argument on the "relating to" criterion into three sections. China argues that its State Council rare earth policy measures, and especially the *Several Opinions*, establish the link between China's export quota and the goal of conserving rare earth ores.[630] Next, China argues that the way in which the export quota volumes were set, and especially the fact that the export, production, and extraction quotas were set simultaneously, shows that the export quota "relates to" conservation.[631] Finally, China argues that the export quota relates to conservation because it (a) reduces incentives for illegal extraction and production of rare earth products[632]; (b) signals the need for other sources of supply[633] and (c) "safeguards" against "speculative surges" and thus ensures that sustainable development is not threatened.[634]

7.415. As the Panel understands it, China has advanced six distinct arguments in its various submissions which, it submits, prove that the export quota "relates to" the conservation of rare earth ores. These arguments are that (a) the export quota prevents smuggling and/or the export of illegally extracted rare earth products; (b) the export quota reduces domestic demand for illegally extracted and/or produced rare earth products, and thus enforces and strengthens the extraction and production quotas; (c) the export quota "signals" to rare earth consumers that

[621] China's executive summary (part II), para. 16.
[622] China's executive summary (part II), para. 18.
[623] China's executive summary (part II), para. 20.
[624] China's executive summary (part II), para. 21.
[625] China's executive summary (part II), para. 23.
[626] China's second written submission, paras. 44-49.
[627] China's second written submission, paras. 50-53.
[628] China's second written submission, paras. 53-62.
[629] China's second written submission, paras. 62-79.
[630] China's first written submission, paras. 99–112.
[631] China's first written submission, paras. 113–130.
[632] China's first written submission, paras. 133–138.
[633] China's first written submission, paras. 139–145.
[634] China's first written submission, paras.146–154.

additional sources of supply must be found; (d) the export quota works as a "safeguard" against "speculative surges" in demand, which would undermine sustainable development; (e) the export quota enables China to "allocate" the limited supply of rare earth resources; and (f) the way in which the export quota is established "relates to" conservation.

7.416. The complainants contest China's claims.[635] They argue that the export quota is overbroad[636] and that alternative, WTO-consistent or at least less trade-restrictive measures could have curtailed the export of illegally produced materials.[637] They point to inconsistencies[638] in the design and architecture of the quota, and argue that China has failed to establish the required connection between the quota and the goal of conservation. They submit that, in fact, the quota encourages smuggling, and so undermines China's alleged conservation goals.[639]

7.417. Before proceeding, the Panel notes that, in its opinion, the availability of alternative WTO-consistent or less trade-restrictive measures that would or might achieve a Member's stated objective does not necessarily deprive a challenged measure of its connection to the conservation objective. If a challenged measure can be shown to have a "substantial relationship"[640] to the conservation of exhaustible natural resources, then the existence of other measures that would achieve the same objective does not affect that specific conclusion. Unlike other paragraphs of Article XX, subparagraph (g) does not require that measures be "necessary" to achieve their stated goal, but only that they "relate" to it.[641] As such, we cannot agree with the complainants that the existence of hypothetical alternatives "demonstrates that China's export quotas on downstream products … are not 'related to' … conservation".[642] While the existence of alternative measures that could be adopted may be relevant in other aspects of the Article XX(g) analysis or under the chapeau of Article XX, we do not agree that alternatives necessarily undercut the existence of a demonstrated "reasonable relationship of means and ends"[643] between a challenged measure and the conservation objective – provided, of course, that such relationship has been proven by the respondent and not rebutted by the complainant. As such, the Panel emphasizes that the fact that complainants have in their submissions on the issue of "related to" suggested alternative ways for China to achieve its alleged goals is not relevant at this point of the analysis. At this stage, the Panel's task is to determine whether the measures in fact adopted by China "relate to the conservation of exhaustible natural resources" on their own terms.

7.418. The Panel now proceeds to analyse each of China's arguments in turn. While the Panel recognizes that its order of analysis may not correspond exactly to China's presentation of its case, the Panel believes that an argument-by-argument approach is the best way to ensure that all of China's arguments receive appropriate attention.

7.6.2.1.3.3 Does China's export quota prevent smuggling and/or the export of illegally extracted rare earth products?

7.419. According to China, "the export quota system enables the Chinese authorities to trace the sources of the exported rare earth products and thus to identify illegally produced rare earth products when they are exported".[644] Moreover, China argues that "the quantitative restrictions embedded within the export quota system reduce incentives for domestic illegal production. By imposing a maximum limit on the amount of rare earth products that can be exported and will be

[635] United States' second written submission, para. 126; Japan's second written submission, para. 74 (both citing Appellate Body Report, *US – Shrimp*, para. 141).
[636] United States' second written submission, para. 126.
[637] United States' second written submission, para. 125; European Union's second written submission, para. 123.
[638] European Union's second written submission, para. 124 (referring to China's response to Panel question Nos. 13 and 27); Japan's second written submission, para. 97.
[639] United States' second written submission, para. 127; European Union's second written submission, para. 125; Japan's second written submission, para. 96.
[640] Appellate Body Report, *US – Shrimp*, para. 141. See also the Panel's discussion of the legal test under Article XX(g) above.
[641] China's response to Panel question No. 123.
[642] Japan's response to Panel question No. 121; see also United States' response to Panel question 121 ("Examples by the complainants about what China could have done in lieu of export quotas illustrate how these particular measures are not 'primarily aimed at' conservation because they show that there are alternative measures … whose design and structure are more closely aligned with conservation").
[643] Appellate Body Report, *US – Shrimp*, para. 141.
[644] China's second written submission, para. 46.

satisfied by legal producers, the quota sends a signal to domestic producers that it is not worth starting up illegal mining or production".[645]

7.420. In its first written submission, China describes its rare earths export quota in the following way[646]:

> The export quota measures further enhance the effectiveness of China's comprehensive conservation policy by facilitating the enforcement of existing domestic production and extraction quotas in other ways….specific export quota measures require the production of documentation that assists Chinese authorities to identify and enforce domestic production that occurs outside of permitted production and mining quotas. Thus, manufacturing enterprises that seek to export rare earth products must provide the list of the mining enterprises that are the sources of supply of rare earth raw materials, the quantities purchased and the relevant VAT invoices and proof of sources of mining enterprises.[647] Trading enterprises must provide the relevant supporting materials and relevant VAT invoices demonstrating that they purchased exported rare earth products from manufacturing enterprises that meet all applicable requirements.[648] These specific requirements are tied to and dependent on the existence of the export quotas. Their effect is to help China enforce its conservation policy by curbing rare earth production outside permitted production quotas.

7.421. According to China, smugglers sometimes use "false declarations, concealed reports of commodity names, exports from different ports in batches, and exports without proof of the legality of production or extraction" to smuggle illegally produced rare earths out of China.[649] In China's view, the export quota, which is administered as a series of documentary and physical inspections, primarily at the point of exportation (i.e. at the border), helps China to overcome such attempts to "circumvent and avoid the costs of China's conservation measures". As China explains it, "in the face of this illegal demand, China must also control at the border what quantities of the rare earth products that are exported and determine whether their origin is legal or illegal".[650]

7.422. Referring to the Appellate Body's analysis in *US – Shrimp*, which requires that conservation-related trade measures be narrowly targeted to achieve their purpose, the United States and Japan consider that China's export quota is overly broad, in particular because it applies not just to illegally extracted rare earths but also equally to legally extracted rare earths.[651] Japan also suggests that the fact that "recipients of China's export quotas can readily sell or transfer their export quotas" means that "the export quota system cannot ensure that rare earths actually exported were legally produced".[652] Moreover, the complainants argue that sourcing and documentation requirements or on-the-spot-checks at the mines and processing facilities, without the export quota, could have served the purpose of curtailing the export of illegally produced materials.[653] According to the European Union and Japan, China fails to demonstrate that there is a necessary link between illegally mined rare earths and the exportation of rare earths, as illegally mined rare earths can be sold and consumed within China, as China itself concedes.[654] Japan stresses that domestic purchasers of refined and separated rare earths products are not subject to enforcement measures, which serve as a critical component of China's enforcement structure.[655]

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[645] China's second written submission, para. 47; China's first written submission, para. 135.
[646] China's first written submission, paras. 136-137.
[647] *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, Article III.4(2), (Exhibit CHN-38, JE-61).
[648] *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, Articles I.2.3 and III.5, (Exhibit CHN-38, JE-61).
[649] China's first written submission, para. 221.
[650] China's response to Panel question No. 30.
[651] United States' second written submission, para. 126.
[652] Japan's executive summary (part II), para. 70.
[653] United States' second written submission, para. 125; European Union's second written submission, para. 123.
[654] European Union's second written submission, para. 124, (referring to China's response to Panel questions, 14 March 2013, in paras. 72 and 129); Japan's second written submission, para. 97.
[655] Japan's second written submission, para. 98.

Finally, the complainants argue that, in essence, the export quota (and export duties) result in two markets with different prices, which actually *creates* an incentive for smuggling.[656]

7.423. The Panel understands that China is concerned about two different kinds of rare earth "smuggling":

a. legally or illegally extracted or produced goods could be exported illegally, i.e. outside of the regulated chain of commerce;

b. illegally extracted or produced goods, or legally extracted or produced goods destined to be exported above the export quota level, being exported fraudulently through the regulated chain of commerce (for instance, exporters might use false declarations to pass their illegal consignments through Customs controls).

7.424. The Panel agrees with China that, in the face of such smuggling, it is important that border authorities verify the provenance of all rare earth products destined for export. Measures designed to verify that rare earths destined for export were legally sourced, and to interdict shipments of illegally produced rare earth products do, in the Panel's view, "relate" to conservation. The Panel accepts that the various border inspections, controls, and checks that China carries out on export consignments of rare earths are appropriate for the task of interdicting consignments of illegally extracted or produced rare earth products (including products produced above quota levels). By enabling Chinese authorities to detect shipments that contain illegally produced products, or products produced by legal enterprises in excess of the extraction and production quotas, these border controls reduce the incentive for illegal or over-quota rare earth extraction and/or production, and thus help to reinforce China's rare earths conservation policy.

7.425. The Panel fails to understand, however, why the clear need to prevent the export of illegally produced goods entails or justifies the imposition of quantitative restrictions on the amount of *legally produced* rare earth products that can be exported. While it may well be necessary to check that all rare earth products leaving China have been produced legally (i.e. within the extraction and production caps and in accordance with China's various environmental regulations) and to stop attempted exports of illegally extracted or produced products, the Panel struggles to see how a quantitative limit on the amount of *legally produced* goods that can be exported "relates to" China's efforts to suppress smuggling. The Panel accepts China's argument that border checks and controls could intercept illegally produced rare earths that are exported through the regular export channel, including where they are accompanied by false declarations or other kinds of fraud. The Panel understands that such border checks and controls "relate to" conservation, since they prevent illegally extracted and/or produced rare earth goods from leaving China, and thus reduce incentives for illegal extraction, production, and export. But, as we have explained above, the Panel struggles to understand how *quantitative restrictions* on the amount of *legally produced* goods that can be exported play a role in such policing. China has argued that its border controls and checks "are tied to and dependent on the existence of the export quotas."[657] In the Panel's opinion, China has failed to explain why this is so. As the Panel sees it, policing and checking are distinct from the export quota, which simply limits the amount that can be exported from the already limited pool of legally extracted and produced rare earths. The amount of legally produced rare earth products that China allows to be exported is not connected to the goal of checking the legality of a particular shipment. Even if there were no quota, China would still need to inspect and police exports of rare earths. This suggests to the Panel that the export quota itself has nothing to do with policing and checking, even if in practice quota compliance checks and legal sourcing checks are performed by the same customs authority. To the contrary, the quantitative restriction on the volume of exports seems to the Panel to be an independent mechanism whose purpose is to control *how much* of the legally extracted and produced rare earths leave China. However, as the panel in *China – Raw Materials* recognized, the place where a resource is consumed is not relevant to the conservation of that resource.[658] In the Panel's opinion, China has not demonstrated how a quantitative limit on exports, above and beyond documentary and physical inspection and other methods of border control, prevents smuggling or limits illegal extraction or production of rare earths.

[656] United States' second written submission, para. 127; European Union's second written submission, para. 125; Japan's second written submission, para. 96.
[657] China's second written submission, para. 137.
[658] Panel Reports, *China – Raw Materials*, para. 7.428.

7.426. In sum, there seems to the Panel to be no reason why border checks and controls, which clearly do "relate to" the suppression of smuggling, could not operate in the absence of the export quota. In sum, the Panel believes that to deal with smuggling, China does not need a quota but enhanced border controls.

7.427. As explained above, the Panel agrees with China that policing actions and customs checks are capable of detecting consignments of illegally produced rare earth products that are exported through regular channels. As noted above, China has explained that "the export quota system enables the Chinese authorities to trace the sources of the exported rare earth products and thus to identify illegally produced rare earth products when they are exported". It does this by requiring all exporters to "provide information on the mining enterprises that are the sources of supply, the quantities purchased and VAT invoices".[659] However, the Panel considers that some smuggling activity takes place outside the regulated chain of commerce, avoiding customs and other border controls altogether. In such circumstances, it is difficult to see how China's export quota system will be able to intercept and prevent illegal exports or smuggling. Where a quantitative restriction involves border controls to limit the amount of *legally exported* rare earth products, it will not be capable of counteracting the risk that rare earth products will be exported outside of the regulated export quota system.

7.428. The Panel notes additionally the complainants' argument that, far from preventing smuggling, export quotas have the tendency to *increase* it. The United States argues that "the export quotas themselves create an incentive for Chinese enterprises to produce illegally and sell to foreign consumers".[660] Japan concurs that "because China's export quotas yield a divergence in the Chinese domestic prices and export prices for the raw materials, China's export quotas actually create incentives for Chinese producers to produce the raw materials illegally and subsequently to smuggle them out of China".[661] Similarly, the European Union argues that "it is those very export quotas … that create the incentive for smuggling".[662] China strongly disagrees with this suggestion, and asks the Panel to give "no weight" to the complainants' allegations.[663]

7.429. The Panel considers that any restriction on access to rare earth products, including extraction and production quotas on their own, could, to a greater or lesser extent, provide incentives for illegal production to satisfy unmet demand. In the Panel's opinion, the problem with China's export quota measures is not that they may, as an almost inevitable side-effect, produce some incentives for illegal extraction, production, or exports. The problem is rather, as the Panel has suggested above, that limiting the amount or volume of legally extracted and produced rare earth products that can be exported for consumption overseas – which is the very essence of an export quota – is not related to the prevention of illegal extraction, production, or export. In fact, it is not export quotas that police illegal extraction, production, and smuggling, but rather enforcement, policing checks, and border controls.

7.430. Finally, the Panel recalls the Appellate Body's direction in *US – Shrimp* that a conservation measure must not be "disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation".[664] In this respect, we agree with the complainants that, at least insofar as China's concern is to prevent smuggling of illegally produced rare earth products, the measures are overbroad[665] since they prevent the export of *legally produced* rare earth products (above a certain absolute numerical limit), rather than just illegally produced products.[666]

[659] China's second written submission, para. 46.
[660] United States' second written submission, para. 126. See also European Union's second written submission, para. 125.
[661] Japan's response to Panel question No. 26; See also European Union's response to Panel question No. 26.
[662] European Union's second written submission, para. 125.
[663] China's second written submission, para. 45.
[664] Appellate Body Report, *US – Shrimp*, para. 141.
[665] Japan's response to the Panel's question No. 123; United States' response to the Panel's question No. 123.
[666] Japan's second written submission, para. 75.

7.6.2.1.3.4 Does China's export quota control or limit illegal extraction or production destined for the *domestic* market?

7.431. China also argues that its export restrictions work to prevent illegal mining for sale to the *domestic market*. In its answer to one of the Panel's questions, China explained that[667]:

> China's export quotas support on-going enforcement efforts by further reducing incentives for illegal mining and production by removing an outlet for selling such illegal products. Indeed, by means of the quantitative export restrictions, China ensures that this export volume will be met by legal producers.[668] Without an export quota in place, there is the potential that a significant part of all legally produced rare earth products could be exported. This could occur because of a speculative demand surge or because of governmentally-promoted foreign stockpiling. This could leave the domestic Chinese market in a supply squeeze. Because the legitimate Chinese producers cannot produce more than the assigned production quota – and there are no other rare earth supplies of any significance outside China – there would be great incentives for illegal producers to meet domestic Chinese demand. The presence of an export quota removes this additional incentive for conservation-frustrating illegal production and selling to the domestic market.[669] Therefore, China relies on quantitative export restrictions as part of its comprehensive conservation policy.

7.432. In other words, China argues that the export quota polices the rare earth product flow to domestic down-stream industries. By ensuring that domestic consumers receive a sufficient share of the limited rare earths supply to meet their demand, the export quota prevents a domestic "supply squeeze" that would create domestic demand for illegally produced rare earth products, and thus limits incentives for illegal production as well as over-production by legal mining and separating and smelting companies.

7.433. The Panel has difficulty agreeing with China's argument for a number of reasons.

7.434. First, the relationship between "quantitative limits" on exports that are controlled at the border and domestic extraction and production quotas is far from clear. The export quota at issue does not contain any provision regarding any form of direct or indirect control over the amount extracted or produced legally or illegally, or over the amount of rare earth products consumed domestically. While an export quota might operate to check the source of rare earth products destined for *export*, the Panel fails to see how such export quota could effectively operate to check or "trace"[670] the source of rare earth products being consumed *domestically*. Nor is the Panel convinced that export quotas can discourage illegal extraction and production intended for the domestic market. For the Panel, there is no connection between export quotas, which operate as a border check on goods destined for export, and domestic consumption, which takes place inside China's own borders, far away from the border points at which the rare earth export quota is controlled. In other words, demand from the domestic market for illegal extraction or production cannot be controlled by export quotas controlled at the border.

7.435. Moreover, it seems to us that if the export quota were to operate as China claims, i.e. by ensuring that domestic consumers have access to a sufficient supply of rare earth products, incentives for illegal extraction and production might still exist if China maintains extraction or production restrictions. This concern is based upon what appears to us to be a tension inherent in China's "comprehensive conservation policy", and which we explain in the following paragraphs.

7.436. China argues that through its extraction and production quotas, China "intend[s] to restrict domestic consumption of newly produced rare earth products".[671] China has also made clear that it attempts to set the levels of its extraction and production quotas below the expected level of

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[667] China's response to the Panel's question No. 124. See also China's executive summary (part II), para. 15.

[668] China's first written submission, para. 135; China's second written submission, para. 47.

[669] China's opening statement at the second meeting of the Panel, para. 20; China's comments on the complainants' responses to the Panel question No. 26.

[670] Japan's executive summary (part II), para. 70.

[671] China's second written submission, para. 95.

domestic demand.[672] Finally, China argues that "China's rare earth consumers cannot purchase more newly produced rare earths than the volume obtained after deducting the export quota from the production quota", and that the export quota therefore operates to *restrict the amount of rare earth products* available to domestic users.[673] In sum, China argues in a variety of ways that its "comprehensive conservation policy" works to restrict the access of domestic consumers to rare earth products. In the Panel's view, so long as the legal domestic supply is lower than domestic demand, the demand for illegally produced rare earth products would likely exist. It appears to us, then, that China's explanation of its export quota as necessary to prevent a "supply squeeze" sits uncomfortably with its claim that a key purpose of its extraction and production caps is precisely to restrict domestic consumption. We find it difficult to reconcile China's claims that, on the one hand, it sets its extraction and production quotas *below* expected domestic demand, but that on the other hand, the export quota is necessary precisely to avoid a "domestic supply squeeze". Without deciding at this point whether China has demonstrated that its measures do in fact restrict domestic production or consumption, we simply note that the stated goals of China's export restriction (to prevent a domestic "supply squeeze") and its extraction and production caps (to restrict domestic consumption) seem difficult to reconcile.

7.437. The Panel considers that not only foreign but also domestic consumers might seek to secure low-cost rare earth products. Indeed, China itself has recognized that there is also demand within China for illegally mined or produced products. As the Panel sees it, it is likely that there will always be some demand for illegally produced goods, which are often cheaper than goods produced by legal enterprises. But, as noted earlier, domestic demand for illegally produced rare earth products cannot be properly addressed through the imposition of an export quota. An export quota is not capable of responding to or tackling the conditions that incentivize illegal extraction and production in these cases because an export quota is simply a quantitative limit on the amount of (legally extracted and produced) rare earth products that can be exported.[674] The amount that can be exported and the policing system that China needs to maintain in light of its conservation policy are two distinct considerations. China could maintain its reporting, checking, and policing mechanisms for rare earth products even if it did not limit the maximum amount of exports.

7.438. Recalling the Appellate Body's statement that measures justified under Article XX(g) must bear a "substantial", "close", and "real" relationship to the conservation objective[675], the Panel is not convinced that China has demonstrated that its use of an export quota is an appropriate means of preventing illegal consumption *domestically*. Moreover, the use of a measure that burdens *foreigners* in order to achieve a *domestic* goal (i.e. reducing domestic consumption of illegally produced rare earth products) in the present case seems to us to lack the requisite degree of "rational"[676] connection demanded by the Appellate Body.

7.439. In sum, there are a number of problems and inconsistencies in China's arguments that its export quota works to reduce domestic demand for illegally produced goods, and thus that they "relate to" conservation by enforcing China's extraction and production quotas. Considered together, these problems and inconsistencies cast doubt on China's claims that the export quota has a substantial, close, and real relationship with the conservation objective.

7.6.2.1.3.5 Signalling

7.440. China argues that the export quota system contributes to the effectiveness of its overall conservation policy by signalling to foreign users of rare earths the need to explore other sources of supply, including substitutes and recycling. According to China, "without the export quotas, the risk exists that foreign users, investors, and financial institutions – knowing there is unlimited export from China – would not likely proceed with rare earth exports outside China and the burden of the conservation policy would be solely on China".[677] In addition, China explains that the export quota, working in conjunction with domestic Chinese restrictions, creates a disincentive for domestic Chinese producers to expand production, while simultaneously creating an incentive for

[672] China's first written submission, para. 130.
[673] See, e.g. China's second written submission, para. 86.
[674] European Union's second written submission, para. 124.
[675] Appellate Body Report, *US – Shrimp*, para. 141.
[676] Appellate Body Report, *US – Shrimp*, para. 141.
[677] China's second written submission, paras. 51-52.

foreign producers to initiate and expand production abroad. Referring to several new foreign mines and recent technological innovations that create substitutes for existing rare earth sources, and noting also the existence of recycling initiatives in different countries, China submits that these developments reflect the signalling effect of its export quota.[678] In its second written submission, (in response to the complainants' question about how the export quota, as opposed to domestic production restrictions, creates an incentive to increase foreign production) China further argues that its export quota ensures that the burden of its conservation policy is balanced between domestic and foreign users of rare earths.[679]

7.441. The complainants take issue with China's position and explanations. The United States and the European Union argue that, by raising international prices while reducing domestic prices, the export quota creates two markets, resulting in a "two-tiered" pricing structure and a corresponding incentive for foreign users of rare earths to relocate to China to obtain rare earths at a cheaper price.[680] They argue 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.[681] The United States and the European Union provide 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.[682] The European Union stresses that the price volatility caused by Chinese export restrictions on rare earths may decisively keep companies from setting up other mining operations outside China.[683] With respect to China's assertion that the signalling effect is evidenced by the development of rare earth recycling efforts, Japan argues that the practical difficulties and costs relating to rare earth recycling make it unfeasible at commercial levels capable of satisfying global demand for rare earths.[684] The complainants argue that strict enforcement of a domestic production quota would be sufficient to signal to foreign and domestic rare earth producers that supply needs to be found elsewhere than China and to limit production.[685]

7.442. The Panel agrees with China that, "[l]ike any commodity market, the rare earths market functions on information and market participants react to signals received from major suppliers and consumers".[686] More specifically, the Panel notes that markets respond to signals which are "broadcast", as it were, through the price which a commodity commands in a given market. It is precisely through price that signals can be sent to and through a market.

7.443. The Panel accepts China's argument that encouraging foreign users and investors to explore alternative sources of supply could relate to the goal of conserving China's exhaustible natural resources, since the development of alternative supply sources would "relieve the pressure on" China's own rare earth supplies.[687] To the extent that the export quota communicates to foreign rare earth consumers that China will no longer supply all the rare earth products needed, it is logical to assume that it will provide a stimulus to consumers, investors, and innovators to explore and develop alternative sources of supply and thus reduce demand for limited Chinese rare earth reserves.

7.444. Having said that, the Panel considers that export quotas 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

[678] China's first written submission, paras. 139-145.
[679] China's second written submission, para. 52.
[680] See, e.g. United States' second written submission, para. 127.
[681] United States' second written submission, paras. 129-130; European Union's second written submission, paras. 128-129.
[682] United States' second written submission, para. 129, (referring to "Xinhua Insight: China tightens regulation of rare earth industry", Xinhua General News Service, June 15, 2011, (Exhibit JE-118)); European Union's second written submission, para. 130, (referring to *Preferential Policies Encouraging Investments for Fujian (Longyan) Rare Earth Industrial Zone*, (Exhibit JE-152)).
[683] European Union's second written submission, paras. 131-132.
[684] Japan's second written submission, para. 100.
[685] United States' second written submission, para. 132; European Union's second written submission, para. 127; Japan's second written submission, para. 101.
[686] China's executive summary (part II), para. 14.
[687] China's first written submission, para. 140.

effectively reserving a supply of low-price raw materials for use by domestic downstream industries.[688] They may also encourage relocation of rare earth-consuming industries to China.

7.445. China responds that other measures in its comprehensive conservation plan counteract or counterbalance the perverse signal sent to domestic consumers by the export quota.[689] According to China, the export quota is a "balancing tool", since without it the extraction and production quotas would only provide a signal to domestic users, while foreign consumers would have no incentive to explore and develop alternative sources of supply.[690]

7.446. The Panel has difficulty accepting this argument. While it may be true that extraction and/or production quotas *could*, in theory, counteract the perverse signals sent by export quotas to domestic consumers, it seems to us that whether or not a production quota coupled with an export quota cuts domestic consumption depends entirely on the level at which the production quota is set and the way in which the export and production quotas interact. According to Exhibit JE-183, if the production quota is very tight[691], it will reduce domestic consumption. At more generous levels, however, it may not reduce consumption at all, or it may reduce it while still leaving it above the level it would be in the absence of export restrictions.[692]

7.447. In the Panel's opinion, China has not demonstrated that, in the design of its export quota and its conservation programme more generally, there is 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. As such, the Panel considers that the risk of perverse signals is real, and this casts doubt on China's claim that the export quota "relates to" conservation.

7.448. The Panel takes note of China's indication that various rare earth recycling projects, efforts to modify industrial designs of downstream products so that they use less rare earths, and developments of rare earth substitutes are under way.[693] The Panel acknowledges that these efforts may go a long way towards furthering what all involved in this dispute recognize is China's *bona fide* conservation policy. Nevertheless, our consideration of the design and architecture of China's export quota on rare earths does not convince us that the export quota is designed in such a way as to ensure that domestic demand is not stimulated by low prices. There does not appear to be any mechanism to ensure that the export quota is set at such a level that, in combination with the extraction and/or production caps, no perverse incentives will be sent to domestic consumers.

7.6.2.1.3.6 Safeguards

7.449. China argues that the export quota enhances its rare earths conservation policy by providing a safeguard against uncertainty in the market and preventing sudden speculative and pre-emptive demand surges. According to China, such speculative surges, which are liable to be caused as a result of China's decision to implement measures to conserve its rare earths resources, "would threaten the sustainable development of rare-earths using industries"[694] by cutting off their access to the limited rare earth supplies.[695] Indeed, China submits expert evidence arguing that it was speculative behaviour by consumers, traders, and investors, rather than actual supply shortages caused by the export quotas, which distorted the rare earths market and caused exaggerated price movements in 2010-2012. China refers to *2011 Several Opinions of the State Council* and submits that the State sets a reasonable quota for annual rare earth exports that basically satisfies the normal demand of the international market, thus reducing the risk of market-distorting panic-buying and stockpiling. In China's view, export quotas "help manag[e] the limited supply [of rare earths] and provide reasonable certainty on the quantities that will be supplied to the domestic and foreign users", thus "moderating speculative demand surges that

[688] Panel Reports, *China – Raw Materials*, para. 7.586.
[689] See, e.g. China's comments on the complainants' responses to Panel question Nos. 71 and 123; China's second written submission, para. 52 ("export quotas are a balancing tool").
[690] China's second written submission, paras. 51-52.
[691] In economics, this means an amount set significantly below demand.
[692] Prof. L. Alan Winters, "*Response to Professor de Melo*", (Exhibit JE-183), p. 5.
[693] See, e.g. China's first written submission, para. 143.
[694] China's second written submission, para. 53.
[695] China's second written submission, paras. 53-61.

could upset market balance and certainty sought by China".[696] They thus contribute to sustainable development.

7.450. The complainants contend that China's argument that export quotas function as a "safeguard tool" reflects China's intent to protect its domestic downstream industry, and that such pursuit cannot be seen as genuinely "relating to conservation".[697] The United States argues that an export safeguard does not keep rare earths from harm, loss, or waste through protective oversight, but rather only protects Chinese downstream consumers from the impact of market forces. In the European Union's view, "speculative demand surges" are themselves caused by the Chinese export restrictions on rare earths.[698] Japan stresses that if China is concerned about the impact of export surges on its domestic industries, the relevant GATT provisions are Articles XI.2(a), XX(i), XX(j), and XXVIII.[699]

7.451. It is not clear to the Panel how protecting the domestic industry from speculative surges in foreign demand relates to "conservation". As the Panel noted in its discussion of the legal test under Article XX(g), "conservation" is essentially about protecting exhaustible natural resources. Therefore, in the Panel's opinion, the fact that the export quota might "contribute to stability in the market and thus to sustainable economic development"[700] does not mean that it "relates to the conservation of exhaustible natural resources". Although, as the Panel has explained, a Member's sustainable economic development needs are a legitimate consideration that may be taken into account when deciding whether and how to design and administer a conservation policy, they are not a standalone justification for the imposition of measures otherwise WTO-inconsistent. In this dispute, China has invoked Article XX(g) to justify its export quota and this subparagraph protects measures which contribute to the "conservation of exhaustible natural resources". As the Panel noted in its discussion above, the panel in *China – Raw Materials* did not suggest that "sustainable economic development" is itself a goal that can be pursued under Article XX(g), but simply indicated that resource-endowed Members may take their sustainable economic development needs into account in designing a conservation policy that "manages the supply and use"[701] of exhaustible resources in a way that "take[s] into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development".[702]

7.452. As such, the Panel considers that China's desire to "moderat[e] speculative demand surges that could upset the market balance and certainty sought by China"[703] is not a conservation-related objective, but an aspect of China's industrial policy. The Panel considers that China is entitled to be concerned about "speculative surges" and other kinds of market "manipulation"[704] that "disrupt the supply of rare earths to both domestic and foreign consumers".[705] Indeed, Members are perfectly entitled to pursue their own industrial policies. But they must do so in a way that is either consistent with their WTO obligations or justified by one of the relevant provisions that explicitly provides exceptions for measures pursuing industrial policy.

7.453. Both the GATT 1994 and other WTO covered agreements generally allow Members to adopt measures in pursuit of their industrial policy needs, and even recognize that, in certain circumstances, Members' industrial policy needs, and especially the imperative to protect vulnerable domestic industries, can override GATT obligations. The Panel considers that China's concerns about the risks posed by sudden "speculative surges" could be addressed, for example, by measures adopted under Article XI.2(a) of the GATT 1994, which allows for "[e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party". As the Appellate Body in *China –*

[696] China's second written submission, para. 61.
[697] United States' second written submission, para. 27; European Union's second written submission, para. 134; Japan's second written submission, para. 103.
[698] European Union's second written submission, para. 135.
[699] Japan's second written submission, para. 103; Japan's comments on China's response to Panel question No. 141.
[700] China's second written submission, para. 61.
[701] Panel Reports, *China – Raw Materials*, para. 7.404.
[702] Panel Reports, *China – Raw Materials*, para. 7.375.
[703] China's second written submission, para. 61.
[704] China's second written submission, para. 56.
[705] China's second written submission, para. 53.

Raw Materials explained[706] Article XI:2(a) permits the application of restrictions or prohibitions on a limited basis to prevent and/or address "critical shortages" of "essential products". An "essential" product is one that is "important," "necessary," or "indispensable" to a particular Member. This may include a product that is an "input" to an important product or industry. The term "critical shortage" in Article XI:2(a) refers to those situations or events that may be relieved or prevented through the application of measures on a temporary, and not indefinite or permanent, basis. Members are entitled to take anticipatory measures within the bounds of Article XI:2(a) to "prevent" a "critical shortage" before it occurs.[707] Moreover, as the Appellate Body clarified, measures applied for a limited duration, adopted in order to bridge a passing need, need not have their temporal scope fixed in advance. In other words, Members may adopt measures under Article XI:2 without having determined in advance precisely how long the measure will remain operative, although they must remain temporary.

7.454. The Panel believes that Article XI:2(a) is sufficient to allow China to adopt measures as needed to protect its domestic industry in times of special vulnerability. In holding that the prevention of "speculative surges" is not a conservation goal, the Panel is not denying China the right to act promptly and effectively to protect its domestic industry, but simply requiring China to act in a manner that is consistent with its WTO obligations. Measures that intend to pursue an industrial purpose cannot be justified as measures that "relate to" conservation, although they may be supported by alternative provisions of the GATT 1994 or other WTO covered agreements.

7.6.2.1.3.7 Does the allocation of limited rare earth resources "relate to" conservation?

7.455. Throughout this dispute, China has argued that the sovereignty it exercises over its own natural resources allows it to allocate rare earth products produced using Chinese rare earth ores between foreign and domestic consumers. While the Panel considers that this argument underpins all of the three alleged justifications discussed above, it also appears to be somewhat distinct, especially when in the second part of its integrated summary, China explains that through its export quota, it manages what is effectively the world supply of rare earths. China adds that it does so in order to "ensur[e] an appropriate supply for foreign and domestic commercial users today".[708]

7.456. China argues that its export quota seeks to "distribute trade of rare earth products in a manner that approaches the expected domestic and foreign demand".[709] Additionally, China has explained that one purpose of its export quota is to prevent foreign consumers from "purchas[ing] … all of the limited volume of rare earths supply according to the extraction quota".[710] According to China, supply management and allocation "in a manner that meets as much as possible the relative commercial needs of foreign and domestic users" is a "responsibility that comes with [China's] role as currently supplying more than 90% of all rare earth supply".[711]

7.457. China argues that its right to "manage the supply" of exhaustible natural resources is inherent to its sovereignty over exhaustible natural resources, which, in China's opinion, allows resource-endowed Members to "freely use and exploit their natural wealth and resources … for their own progress and economic development".[712] According to China, a finding by this Panel that China is not entitled to allocate the supply of rare earth products between foreign and domestic users would be anathema, since "it is simply not credible that resource-endowed countries would, by acceding to the WTO, have relinquished this fundamental norm".[713] China also refers to a statement made by the panel in *China – Raw Materials* that it interprets as allowing measures that address "the challenge of using and managing resources in a sustainable manner … while promoting economic development".[714] On the basis of this statement, China argues that "a conservation policy is not limited to *preserving* exhaustible natural resources in their current state, but also covers *use and management* of these resources in line with a Member's sustainable

[706] Appellate Body Reports, *China – Raw Materials*, paras. 308-344.
[707] Panel Reports, *China – Raw Materials*, para. 7.305.
[708] China's executive summary (part II), para. 8.
[709] China's second written submission, para. 52.
[710] China's response to Panel question No. 123.
[711] China's response to Panel question No. 66.
[712] China's response to Panel question No. 66, (quoting United Nations General Assembly Resolution 626 (VII), Right to Exploit Freely Natural Wealth and Resources (21 December 1952) (Exhibit CHN-49)).
[713] China's response to the Panel's question No. 66.
[714] China's second written submission, para. 54.

economic development".[715] China makes clear that, in its opinion, the "conservation" objective allows Members to adopt measures, including export quotas, "that foster the sustainable development of their domestic economies consistently with general international law and WTO law".[716]

7.458. The complainants have at various points in their submissions argued that China misunderstands "conservation" by "reading economic goals into Article XX(g)".[717] The European Union argues that "the concept of conservation does not cover *allocation* of where the product is consumed", and explains that "[f]or the purpose of conservation the place of consumption is irrelevant".[718] The United States adds that "the negotiating history does not support China's argument that Article XX(g) of the GATT includes a right of supply-management to promote a Member's domestic industry".[719] Japan urges that "it would be anomalous if Article XX(g) were to be interpreted in such a way as indirectly to permit WTO Members to promote industrial policy while the limited scope of paragraphs (i), (j), and other GATT exceptions would prevent them from doing so directly".[720]

7.459. The Panel set out its understanding of the relationship between "conservation", "sustainable development", and "permanent sovereignty over natural resources" above. It explained that the conservation objective embodied in Article XX(g) of the GATT 1994 allows Members to take their sustainable development needs into account in deciding whether to adopt a conservation policy, how to design that policy, and what instruments will be used to implement that policy. It clarified that, in the context of Article XX(g), resource-endowed Members exercise their sovereignty over natural resources precisely by designing and implementing conservation policies based on their own assessment of various, sometimes competing, policy considerations, and in a way that responds to their own concerns and priorities.

7.460. China appears to misconstrue what the panel said in *China – Raw Materials*.[721] As we have already explained, that panel did not say that "sustainable economic development" was, in itself, a goal that could be pursued under the rubric of "conservation". As we have further explained, the need for "sustainable development" may impact a Member's decision whether or not and how to implement a conservation policy. It may also affect the final form of any conservation policy eventually adopted, as well as the form or manner of any conservation actions taken. But measures adopted for the purpose of economic development are not automatically measures "relating to the conservation of exhaustible natural resources". Indeed, the Panel considers that measures the objective of which is to promote economic development are not "measures relating to conservation" but measures relating to industrial policy.

7.461. China maintains that its "supply management is not intended to protect or promote the domestic industry, but to ensure that the limited supply (specified in the production quota) is allocated in a manner that meets as much as possible the relative commercial needs of foreign and domestic users". China argues that it "undertakes this supply management given the particular responsibility that comes with its role as currently supplying more than 90% of all rare earth supply".[722]

7.462. In the Panel's opinion, once resources are extracted and have entered the market, it is neither China's nor any other Member's "responsibility" or right to allocate the available stock between different users; once extracted and in commerce, rare earths trade is subject to WTO law. Therefore, *a priori*, trade in natural resources should not be restricted without justification. The

[715] China's second written submission, para. 18.
[716] China's second written submission, para. 18, citing Panel Reports, *China – Raw Materials*, para. 7.404.
[717] European Union's response to Panel question No. 66; Japan's response to Panel question No. 66.
[718] European Union's response to Panel question No. 66.
[719] United States' comments on China's response to Panel question No. 66.
[720] Japan's response to Panel question No. 66.
[721] It does this by leaving out certain crucial words in its citations. What the *Raw Materials* panel said at paragraph 7.375 of its report was that "a proper reading of Article XX(g) in the context of the GATT 1994 should take into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development". See China's second written submission, paras. 17 and 54.
[722] China's response to the Panel's question No. 66.

Panel fails to see how, in this case at least, China's allocation of quantities between foreign and domestic users can be justified as enhancing conservation.[723]

7.463. At any rate, while it may be considered generous of China to want to protect the "relative commercial needs of foreign and domestic users", the Panel believes that *a priori* determinations of what volume of rare earth products foreigners need or are entitled to are not directly linked to conservation. While the Panel acknowledges that there is nothing objectionable about Members accounting for their own and other countries' development needs when adopting, designing, and implementing a conservation policy, the Panel does not believe that export quotas that delimit a maximum amount of products available for export from the already limited rare earth product supply are "closely" or "substantially" related to conservation. This conclusion follows naturally from our earlier finding that "manag[ing] what is effectively the world supply of the volume of rare earth products"[724] is not a conservation-related objective.

7.464. Moreover, China's fear that foreign consumers will purchase all of China's limited rare earth resources seems to be founded on the unlikely premise that Chinese consumers would not compete with foreign consumers for rare earth products. Given the heavy reliance of many Chinese industries on rare earth inputs – the Panel recalls that up to 80% of Chinese rare earth products are consumed domestically – there is little reason to believe that such industries would simply "lie back", as it were, and allow the entire resource on which their businesses depend to be exported. Of course, the Panel understands that markets, including the rare earths market, are subject to failures, and that it may at times be necessary for Members to intervene in the market to ensure stability and protect potentially vulnerable rare earths consumers. The Panel accepts China's evidence that "commodities markets are particularly susceptible to speculative and pre-emptive buying".[725] But, as the Panel has explained above, the appropriate way for China to deal with such situations is through other provisions of the WTO Agreement, for example the imposition of temporary safeguard measures under Article XI.2 of the GATT, which addresses situations like the one China seeks to prevent.

7.6.2.1.3.8 Do the manner and circumstances of setting the export quota show that China's export quota "relates to" conservation?

7.465. China also argues that the way in which its 2012 export quota was set demonstrates that it "relates to" conservation.

7.466. China explains in its first written submission[726] that the 2012 export quota was set as part of the coordinated establishment of the diverse volume restrictions for 2012, involving the NDRC, MIIT, MLR and MOFCOM. According to China, such a coordinated and cooperative approach to achieving the objective of conserving China's rare earth resources is legally required by the *2012 Provisional Measures on the Administration of the Directive Production Plan of Rare Earths*, which provides that the MIIT "will discuss with other Ministries and propose a plan of rare earth mining, producing and exporting for the next year to the State Council".[727] China urges that the 2012 export restrictions are thus an integral part of China's coordinated effort to manage the use of its exhaustible rare earth resources.

7.467. According to China, the State Council's *2011 Several Opinions* also mandated the coordinated imposition of production and export quotas to carry out China's rare earths conservation objective. The *Several Opinions* provides that mining, production, and consumption as well as export of rare earths must be restricted "simultaneously".[728] The State Council directed

[723] As the Panel has noted above, export quotas may be capable of sending signals to foreign rare earths producers and consumers that they need to locate and develop new sources of rare earths. However, as the Panel explained, export quotas can also have perverse effects on *domestic* consumption and production. These perverse effects would need to be addressed by the regulating Member.

[724] China's executive summary (part II), para. 8.

[725] Exhibit CHN-153, Dr David Humphreys, *Rare Earths – Demand and Speculation*, April 2013 (Exhibit CHN-153), pp. 3 and 5; China's second written submission, para. 55.

[726] China's first written submission, paras. 114-116.

[727] *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21), Article 4.

[728] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13), Paragraph II(7).

the Ministries to establish the 2012 rare earth export quota by taking into account the "situations concerning domestic resources, production and consumption, and the international markets".[729]

7.468. China explains that, in line with these directives, and as set forth in a statement by Zhang Chenyang, the Director of the Division of Foreign Trade Law of the Department of Treaty and Law of MOFCOM who was involved in the quota-setting process of 2012, the Ministries took into account three categories of factors when setting the level of the export quota for 2012:

- the situation concerning domestic resources in China;
- domestic and foreign demand for rare earths; and
- domestic and foreign production of rare earths.

7.469. China elaborates on these three factors in its first written submission. With respect to "the situation concerning domestic resources in China", China explains that the Ministries examined "the extent and rate of depletion of rare earth resources within China" and concluded that "there was a need to conserve both light and heavy rare earths".[730] With respect to "domestic and foreign demand for rare earth", China explains that it considered the "expected level of consumption of rare earths in China and abroad".[731] Finally, with respect to "domestic and foreign production of rare earths", China explains that the "Ministries determined the level of the 2012 export quotas [] taking into account the total production quota set by MIIT"… [and] "also considered the expected *foreign production of rare earths*".[732]

7.470. In its second written submission, China reiterates that, when it set the 2012 export quota volumes, it took into account "situations concerning domestic resources, production and consumption, and the international markets".[733] China explains that, after considering these factors, it determined how much of its rare earth resources would be preserved for future use, and how much would be consumed during 2012 by users in China and abroad.[734]

7.471. In the Panel's opinion, the three factors listed by China could potentially be said to "relate to" conservation, although in the Panel's opinion domestic and foreign demand for rare earths and domestic and foreign production of rare earths also seem to "relate to" China's industrial policies. In particular, and as the Panel has explained above, the Panel thinks that managing "uncertainty and volatility in the market"[735] is an industrial rather than a conservation policy.

7.472. At any rate, as the Panel sees it, the key difficulty with China's argument is that simply stating what factors are taken into account when setting the export quota does not explain *how* the export quota relates to conservation. Rather, China needs to demonstrate that the export quota as it is designed, and regardless of the subjective thoughts or intentions of those who set it, is "substantially" connected to the goal of conservation. China stated that regulators had conservation concerns in mind when setting export quota.[736] However, the Panel is not concerned with the subjective intention of legislators or regulators. Instead, the Panel's task is to determine, on the basis of an objective examination of the facts, whether the design and architecture of China's export quota measures "relate to" conservation. The Panel considers that China cannot simply list factors that can be relevant without any demonstration of how they were used to design a conservation-related quota in 2012.

7.473. Additionally, for the reasons given below in section 7.6.2.2.2.1, the Panel does not understand how China can argue that the levels for the extraction, production, and export quotas were set simultaneously. To the contrary, it appears to the Panel that the various quota levels

[729] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13), Paragraph II(7).
[730] China's first written submission, para. 117.
[731] China's second written submission, para. 118.
[732] China's first written submission, paras. 123 and 126.
[733] China's second written submission, para. 110, (referring to *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13)).
[734] China's second written submission, para. 110.
[735] China's first written submission, para. 121.
[736] China's first written submission, paras. 116-130.

were determined in batches at various times between December 2011 and August 2012. At any rate, even if China has set the volumes simultaneously, the Panel considers that China has failed to explain how, in this specific case, this simultaneity indicates that the export quota relates to conservation. The Panel accepts that, in principle, simultaneous setting of foreign and domestic restrictions could be an indication that those measures "work together". However, in this case China has failed to explain the *significance* of the establishment procedures or their connection to the conservation objective. China has only posited but not explained why the fact that the quotas were set "as part of the coordinated establishment of the diverse volume restrictions for 2012, involving the NDRC, MIIT, MLR and MOFCOM" means that those agencies were acting with a view to "achieving the objective of conserving China's rare earth resources".

7.474. The Panel has additional difficulties accepting that the manner in which China sets its export quota shows that the quota "relates to" conservation.

7.475. First, the Panel considers that China's allocation of the quota on the basis of light and heavy/medium rare earths tends to treat each category of rare earths as a single commodity, whereas in fact different rare earths have different levels of scarcity. The Panel understands that, as China explains, "China could not make in its extraction quota a further division for each of the 17 elements because different rare earths elements are normally found together in the same ores and indeed in the same minerals".[737] The Panel also understands that "the processing steps will inevitably produce several different rare earth elements at the same time".[738] The Panel does not object to China's conclusion that "China can only practically control the total volume of ores mined and the total volume of smelted and separated products processed from these ores".[739]

7.476. Nevertheless, the Panel finds it difficult to understand why an export quota purportedly for conservation does not distinguish between the products on the basis of their abundance or scarcity. In our view, the fact that individual rare earth ores are released into the market without distinction on the basis of scarcity undermines China's claim that the manner in which the export quota is set "relates to" conservation.

7.477. The Panel also fails to understand why China does not impose restrictions on the sale and/or further processing of individual rare earth ores once they have been separated on the basis of their relative abundance or scarcity. While it is true that rare earths are often found together in the same ores, they are eventually separated into individual rare earths, and thus the Panel sees no reason why the export quota could not be denominated on the basis of individual rare earth elements.

7.478. The Panel notes that, in its first written submission, China argues that its 2012 export quota was set, inter alia, on the basis of evidence regarding the increasing scarcity of both light and heavy/medium rare earths.[740] According to China, the need to conserve China's limited rare earth resources "was particularly acute for medium/heavy rare earths, because those reserves were estimated to last for only 15 years. Therefore, in 2012, China decided to regulate their use by setting separate export quota volumes for light and medium/heavy rare earths".[741] However, the Panel does not see the logical connection between, on the one hand, the need to conserve exhaustible natural resources and, on the other hand, China's decision to administer its export quota in two separate categories. The Panel understands and accepts China's desire to conserve its exhaustible natural resources, and certainly accepts that different categories of rare earth may need to be subject to different levels or degrees of control depending on their scarcity. But China has not explained why, instead of treating each rare earth separately, it has decided to group the 17 rare earth elements into two broad categories. China has not argued that all rare earths in the light and all rare earths in the medium/heavy categories have the same level of scarcity.[742] In fact, China appears to negate this possibility in its response to Panel question No. 21, in which it acknowledges that, "within the group of rare earth elements produced together from the same tonne of ore, the price for any single rare earth element can be very different than the price for another element. It is market demand that decides the price. *The price reflects the scarcity or the*

[737] China's response to Panel question No. 21.
[738] China's response to Panel question No. 21.
[739] China's response to Panel question No. 21.
[740] China's first written submission, para. 117.
[741] China's first written submission, para. 117 (internal citations omitted).
[742] China's response to Panel question No. 21.

abundance of a particular type of rare earth product".[743] In this connection, the Panel recalls that it asked China for details about the reserve levels of its various rare earth materials, but that China has not availed itself of the opportunity to assist the Panel in this regard.[744]

7.479. China has explained that the extraction quota makes a distinction between ores rich in light rare earth elements and ores rich in medium/heavy rare earth elements. [745] The geographical allocation of each type of ores is concentrated in particular regions of China. Ores (rock-type) rich in light rare earth elements are mainly located in the Northern part of China, while the iron-type rare earth ore, which is rich in heavy rare earth elements, is mainly located in the Southern part. The allocation of extraction quota follows this natural geographically distinct distribution pattern.[746] Thus, explains China, the extraction quota is distributed on a light and medium/heavy basis to each province based on the particular reserve(s)of that province.[747]

7.480. The Panel notes that the European Union has questioned the logic of China's extraction quota allocation, since, as it argues, ores mined in different regions of China are "not only constituted of either light or heavy rare earths but … [are] a mix, with some rare earths being only predominant".[748]

7.481. Ultimately, whether certain kinds of rare earths are or are not found in different parts of China is irrelevant to the Panel's primary concern, which is that the allocation of the *export* quota is administered on the basis of light and medium/heavy, but that China has not explained sufficiently how this division relates to conservation. While it may make sense for China to allocate its *extraction* quota along these lines – and the Panel makes no finding on this point, since the extraction quota has not been challenged – the Panel cannot see any conservation-related reason for China to set the *export* quota on the basis of the geographical origin of the elements. As the Panel has explained, an export quota that groups different kinds of resources together for the purpose of sale into the market seems inconsistent with the goal of conserving natural resources, since it does not account for the different levels of scarcity or abundance of each individual element. China has explained that medium/heavy rare earths are, as a general matter, scarcer than light rare earths;[749] but China has also acknowledged that different rare earth resources *within the light and medium/heavy categories* have different levels of scarcity. As such, it appears to the Panel that the allocation of the export quota on the basis of two broad categories will tend to treat different elements in the same way. This seems to undermine, rather than support, the goal of conserving exhaustible natural resources.

7.482. The Panel notes that in its answer to Panel question No. 21, China argued that applying a single export quota on all rare earth elements could enable exporters "to use the quota completely for either light or medium/heavy rare earths. Such decision by exporters, which may be fuelled by speculative demand, would distort the market for the group of rare earth elements that the exporters decided not to export". In the first place, this seems to the Panel to be an industrial policy justification. As the Panel has explained, managing an international resources market cannot be considered to fall within the meaning of "conservation". Moreover, the Panel emphasizes that it is not suggesting a *single* export quota would "relate to" conservation any more than China's current structure.[750] To the contrary, the Panel's concern is that it is difficult to understand how any quota system that treats products with different scarcity levels in the same way could "relate to" conservation.

7.483. In sum, the Panel has difficulty accepting that China's allocation of the export quota on the basis of light and medium/heavy rare earths "relates to" the conservation of exhaustible rare earth ores.

[743] Emphasis added.
[744] China's response to Panel question No. 20.
[745] See also China's response to Panel question No. 21.
[746] China's response to Panel question No. 105.
[747] China's response to Panel question No. 105.
[748] European Union's comments on China's response to Panel question No. 105.
[749] China's first written submission, p. 5.
[750] The Panel makes no finding on this point.

7.484. Finally, the Panel notes that China has explained that its export quota is allocated on the following basis[751]:

> Allocation receivable = allocation of the type of rare earth* (A1+A2)
> (A1 = export quantity of a certain company for the last 3 years / total export quantity of China) *0.5
> (A2 = export value of a certain company for the last 3 years / total export value of China) *0.5

7.485. The Panel does not understand the relationship between the formula used for setting the annual export quota shares and China's conservation programme, and China did not argue that these variables individually and collectively relate to conservation. Indeed, according to China this formula is designed to manage the supply of rare earth resources and encourage export quota utilization. While recognizing that not every aspect of a government's policy must relate directly to conservation, the Panel is concerned that this formula might undermine China's conservation goals. In particular, the Panel notes that the relative abundance or scarcity of a given rare earth material is not an element taken into account when calculating how much an enterprise will be allowed to export in any given year. Instead, the formula seems to focus on industrial policy concerns, including prior export performance and overall value of exports from China.

7.6.2.1.3.9 The possibility that unused export quota volumes will be sold to domestic consumers

7.486. Finally, the Panel notes the European Union's argument that "if China were serious about conserving its resources, it would conserve the material that has not been used up by exports, instead of making it available to domestic producers".[752] In response, China argues that the domestic availability of unused export quota volumes does not undermine the "substantial relationship" between the export quota system and the goal of conserving rare earth ores since "the conservation levels … determined in the extraction and production quota for any given year … constitutes the level of extraction that China considered appropriate for that year". Thus, according to China, there is no harm, from a conservation perspective, in allowing domestic rare earth consumers to use whatever quantity of export-designated rare earths has not been used by foreign consumers. According to China, "once extracted, China cannot put these extracted materials back in the ground".[753] China argues that if, "at the end of the year, there are unsold stocks, due to lack of foreign and/or domestic demand, the existence of these unsold stocks is an important factor considered in setting the extraction, production and export quotas for the *following year*".[754] Thus, in China's view, there is no need for China to "adopt a new measure to prohibit the sale of the material that has not been used up by exports".[755]

7.487. The Panel agrees with China on this point. In the Panel's opinion, the mere fact that unused volumes are allowed to be sold into the domestic market does not in itself mean that the export quota system does not "relate to" conservation. Assuming that the extraction and/or production caps were "real" restrictions, i.e. were set below the level of expected demand for the relevant period (i.e. for 2012), then we believe the fact that China does not require unused export quotas to be preserved for use in future years does not necessarily cast doubt on its conservation objectives, since China is still pursuing conservation through the imposition, on an annual basis, of limits on extraction and production. Within these limits, there is nothing illegal or even contradictory about China pursuing its own industrial or other goals (so long as these are pursued in a WTO-consistent manner).

7.488. While taking into account the unused share of the export quota in the determination of extraction/production and export quotas for the following year(s) may result in a higher degree of conservation, we believe that the Panel cannot find that China's measures as they stand do not "relate" to conservation merely because China has designed its export quota system in such a way

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[751] *2012 First Batch Rare Earth Export Quotas*, (Exhibits CHN-56, JE-55). See also China's second written submission, para 90.

[752] European Union's opening statement at the first meeting of the Panel, para. 49.

[753] China's response to Panel question No. 36.

[754] China's response to Panel question No. 36; *Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products*, (Exhibit CHN-63), para. 14.

[755] China's response to Panel question No. 36.

as to prohibit the stockpiling or exchange of unused export quota shares among exporters while allowing unused export quota volumes to be sold into the domestic market. In our view, this is so even though taking into account such unused export quota's shares for future years' determinations could result in a higher degree of conservation. China is entitled to identify and pursue its own level of conservation, and once such level of extraction/conservation is determined, where products are eventually consumed (abroad or domestically) does not affect the relationship between the challenged measures and the goal of conserving exhaustible natural resources.

7.6.2.2 Second part: whether China's export quota on rare earths is made effective in conjunction with restrictions on domestic production or consumption

7.489. The Panel now turns to examine whether China's export quota on rare earths is "made effective in conjunction with restrictions on domestic production or consumption".

7.490. China submits that its 2012 comprehensive conservation policy includes both *export* and *domestic* restrictions. Specifically, China argues that its conservation plan includes five categories of domestic restriction: access conditions; resource taxes; quotas on extraction, production and export; environmental requirements; and enforcement actions.[756] China argues also that its restrictions on domestic production and consumption of rare earths are "substantial".[757] China argues that it meets the even-handedness requirement in Article XX(g) so long as it ensures that the impact of its conservation policy is imposed on domestic as well as foreign users.[758]

7.491. The complainants rebut the five parts of China's argument, and maintain that China's conservation measures do not constitute "restrictions on domestic production or consumption" within the meaning of Article XX(g) of the GATT 1994. According to the complainants, the export quota, together with the production restrictions, ensures favourable access to domestic consumers at the expense of foreign consumers, fundamentally contradicting the "even-handedness" requirement.[759]

7.492. The Panel now proceeds to determine whether (i) China imposes "restrictions on domestic production or consumption" of rare earths; and (ii) China's export quota is "made effective in conjunction with" such restrictions on domestic production or consumption.

7.6.2.2.1 Whether China has imposed restrictions on domestic production or consumption of rare earths

7.493. China identifies five categories of measures that it claims restrict the production or consumption of rare earth resources in China.[760] As the Panel noted above, these are (a) access conditions; (b) resource taxes; (c) volume restrictions; (d) environmental requirements; and (e) enforcement actions.

7.494. We will assess the first four categories of domestic measures individually. The Panel considers that "enforcement measures", listed by China as a fifth category, are part of the design, structure, and architecture of each of the alleged restrictions, i.e. access conditions, resource taxes, volume restrictions, and environmental requirements, and should be assessed together with each of those four categories of measures invoked by China. The Panel will evaluate each legal instrument invoked by China as an alleged restriction on domestic production or consumption, and assess whether that alleged restriction is capable of restricting domestic production or consumption. As discussed under the legal test of Article XX(g), a domestic instrument will be considered a "restriction" for the purposes of Article XX(g) where it is capable of having a limiting effect. For that purpose, the Panel will consider not only whether there are restrictions in the text of Chinese law, but also whether China has adopted measures to enforce its alleged restrictions. Moreover, the Panel recalls that the question whether there are restrictions on domestic production or consumption of rare earths does not entail an "effects test" of such alleged restrictions, but, rather, an assessment of whether China maintains real restrictions backed up with actual

[756] China's first written submission, para. 164.
[757] China's first written submission, para. 228.
[758] China's first written submission, paras. 226-228.
[759] United States' second written submission, paras. 194 and 197; European Union's second written submission, paras. 179 and 181; Japan's second written submission, section III.A.3.
[760] China's first written submission, para. 165.

enforcement that work together with the export quota for the goal of conserving exhaustible rare earths.

7.6.2.2.1.1 Whether the access conditions are capable of restricting domestic production or consumption of rare earths

7.495. According to China, enterprises wishing to mine rare earths in China are required to obtain a mining licence.[761] Mining companies and smelting and separating enterprises must comply with certain access conditions before they can engage in and have access to the rare earth industry.[762] These access conditions set a minimum production scale for mining, smelting, and separating, and impose a minimum recovery rate for mines[763] and separating enterprises.[764] China explains that these requirements are designed to eliminate small, inefficient producers. In addition, China argues that the State Council in its *Several* Opinions decided to continue the suspension of the processing of applications for new rare earth mining as well as for rare earths smelting and separating projects lodged during 2012. Moreover, the State Council has refused to grant requests for the expansion of mining by existing mines and the expansion of the scope of existing smelting and separating projects during 2012.[765] According to China, these access restrictions are intended to accelerate rare earth industry consolidation and to streamline the industry structure in order to limit the number of miners and producers. China contends that it is much easier to control a smaller number of well-organized and professionally managed mines and production facilities than a very large number of small and more informal mining and production operations. China explains that the consolidation of licences for a much more limited number of mining and rare earth producers helps to restrict domestic production.[766] Indeed, argues China, these 2011-2012 mandated restrictions resulted in a significant reduction in the number of rare earth mining and producing enterprises, and shut down inefficient and uncontrolled mining and production.[767]

7.496. The measures invoked by China as access conditions to the rare earth industry are:

a. *Administration of Registration of Mining of Mineral Resources*[768] of 1998;

b. *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*[769] of 2011;

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[761] China's first written submission, para. 167, (referring to *Administration of Registration of Mining of Mineral Resources*, (Exhibit CHN-15)).

[762] China's first written submission, para. 167, (referring to *2012 Circular on Admission to Rare Earth Industry*, (Exhibit CHN-16) and *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21)).

[763] *2012 Circular on Admission to Rare Earth Industry*, (Exhibit CHN-16), Article IV ("Mixed type rare earth mines and hamartite mines shall have a mining loss rate and a dilution rate not exceeding 10%, the recovery rate of separation shall be no less than 72%, and the recycling rate of separation wastewater shall be no less than 85%. For ion-absorption-type rare earth mines, the mining recovery rate shall be no less than 75%, the recycling rate of separation wastewater shall be no less than 90%, and the vegetation restoration rate shall be no less than 90%. For smelting and separation projects processing rare earth ore of mixed type or hamartite ore, the total recovery rate shall be above 90% from rare earth concentrate to mixed rare earth or above 95% from mixed rare earth to single or concentrated rare earth compounds; for smelting and separation projects processing south ion-absorption-type rare earth ore, the total recovery rate shall be above 92% from mixed rare earth to single or concentrated rare earth compounds. The direct recovery rate of rare earth metals shall be above 92%").

[764] China's first written submission, para. 168, (referring to *2012 Circular on Admission to Rare Earth Industry*, (Exhibit CHN-16)).

[765] China's first written submission, paras. 169-170, referring to *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13), *2012 Circular on Admission to Rare Earth Industry*, (Exhibit CHN-16), and *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20).

[766] China's first written submission, para. 172.

[767] China's first written submission, paras. 171-172, referring to Information Office of the State Council, "*Situation and Policies of China's Rare Earth Industry*", Beijing, June 2012, (Exhibits CHN-1), Roskill, *Rare Earths & Yttrium: Market Outlook to 2015*, 14th Edition, November 2011, (Exhibit CHN-9), *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13), and "*MLR Revokes Raft of Rare Earths Mining Licences*", *Interfax China*, 14 September 2012, (Exhibit CHN-74).

[768] *Administration of Registration of Mining of Mineral Resources*, (Exhibit CHN-15).

[769] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13).

c. *Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012*[770];

d. *Administration of Directive Production Plan of Rare Earths*[771] of 2012;

e. *2012 Circular on Admission to Rare Earth Industry*.[772]

7.497. The Panel has difficulty seeing how these "access conditions" work to restrict the domestic production of rare earths. Although the Panel accepts that these access conditions make it harder for new enterprises to enter the rare earths industry, they do not control the amount of rare earths that enterprises already in the industry may extract or produce.

7.498. The *Administration of Registration of Mining of Mineral Resources*[773] sets out licensing requirements for rare earth mining enterprises, but it does not refer to restrictions on extraction or production of rare earths.

7.499. The *2012 Circular on Admission to Rare Earth Industry*[774]specifies access conditions for mining and separating enterprises seeking entry into the rare earth industries. The *Circular* addresses (i) the establishment and layout of the mining and smelting/separating projects; (ii) production scale, technology, and equipment (including the minimum production scale requirement); (iii) energy consumption; (iv) comprehensive utilization of resources (including a minimum recovery rate requirement); (v) environmental protection; (vi) production quality; (vii) production safety and social responsibility; and (viii) supervision and administration. The *Administration of Directive Production Plan of Rare Earths*[775] provides that, in order to apply for a share of China's extraction and production plan for rare earths, mining and smelting and separating enterprises must satisfy the access conditions.

7.500. As an initial matter, the Panel notes that both the *2012 Circular on Admission to Rare Earth Industry*[776] and the *Administration of Directive Production Plan of Rare Earths*[777] were made effective *only after* mining and separating and smelting enterprises received their allocation of the 2012 extraction and production quotas. The Panel will address the issue of extraction and production quotas in the following sections. Second, the Panel has doubts how the access conditions described above, which apply to newcomers seeking entry to the rare earths industry, could restrict the activity of rare earth miners and producers who had already entered the rare earths industry and been granted a share of the 2012 extraction and production quotas. In the Panel's opinion, the existence of access conditions confirms the existence of governmental regulation and control over extraction and production of rare earths. However, while access conditions make it harder for new enterprises to enter the rare earths industry, they do not control the amount of rare earths that enterprises already in the industry (i.e. those satisfying the access conditions) extract or produce. The Panel therefore is unable to conclude that access conditions such as a minimum production scale – which is designed to promote the efficiency of resource extraction and production – are restrictions on domestic production.

7.501. The *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*[778], as well as Section IV of the *Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012*, impose a suspension of processing of applications for new or expanded rare earth mines during 2012. According to these documents, however, while such suspension is maintained "in principle"[779], "[k]ey projects approved by the

[770] *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20).
[771] *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21).
[772] *2012 Circular on Admission to Rare Earth Industry*, (Exhibit CHN-16).
[773] *Administration of Registration of Mining of Mineral Resources*, (Exhibit CHN-15).
[774] *2012 Circular on Admission to Rare Earth Industry*, (Exhibit CHN-16).
[775] *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21).
[776] *2012 Circular on Admission to Rare Earth Industry*, (Exhibit CHN-16), (made effective 26 July 2012).
[777] *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21), (made effective 13 June 2012).
[778] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13).
[779] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13), para. IV(14).

State Council," "survey projects," mine integration projects, and "[c]onstruction projects to be supported under [agreements] signed between [the central government] and the government of relevant province (region or municipality) in the context of regional economy support policies of the central government"[780] are still permitted. In the Panel's view, the suspension of processing of applications for *new or expanded* rare earth mines during 2012 – with certain exceptions – also confirms the existence of governmental control over extraction and production of rare earths. However, China has failed to explain how these suspensions restrict the production or extraction of rare earths either by existing rare earth miners and producers or in the context of existing mining/production projects.

7.6.2.2.1.2 Whether the volume restrictions are capable of restricting domestic production or consumption of rare earths

7.502. China argues that its 2012 comprehensive conservation policy for rare earths includes volume restrictions on domestic production in the form of quotas on the volume of rare earths that can be extracted and smelted and separated.[781] China also posits that the combined effect of its export and production quotas for rare earths is to impose a volume restriction on domestic Chinese consumption of rare earth products.[782]

7.503. First, the Panel recalls its conclusion, explained above, that it rejects the notion that measures are capable of restricting domestic production or consumption of rare earths solely on the basis of the existence in law of a volume cap on extraction, production, or consumption of rare earths. In our view, China must also demonstrate that it has measures to effectively enforce these caps. The Panel will therefore examine both the legal framework of the domestic restrictions and whether the caps have been legally implemented and are being enforced in the context of its analysis and application of the second phrase of Article XX(g).

The extraction quota system applicable to rare earths

7.504. According to China, China's extraction quota determines how much rare earth concentrates can be legally produced each year.[783] China invokes the following legal instruments in support of its claim that it has imposed a restriction on the extraction of rare earths in 2012[784]:

a. *Administration of Exploration and Mining of the Specified Minerals*[785];

b. *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*[786]; and

c. *Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012*.[787]

7.505. The Panel notes first that China does not explain the relationship between these three legal instruments in its submissions. The Panel has examined the exhibits and finds that the *Administration of Exploration and Mining of the Specified Minerals*[788], which was "formulated in accordance with "the *Mineral Resources Law*[789], governs the imposition of quantity control over the extraction of the so-called "specified minerals for which protective mining is prescribed". As China explains, "specified minerals" are those minerals "which are subject to the State administration of planned exploration and mining in accordance with pertinent regulations". The *Administration of Exploration and Mining of the Specified Minerals*, however, does not refer explicitly to rare earths.

[780] *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20), Section IV.
[781] China's first written submission, para. 175.
[782] China's first written submission, para. 184.
[783] China's second written submission, para. 36.
[784] China's first written submission, paras. 24 and 175.
[785] *Administration of Exploration and Mining of the Specified Minerals*, (Exhibit CHN-18).
[786] *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, (Exhibit CHN-19).
[787] *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20).
[788] *Administration of Exploration and Mining of the Specified Minerals*, (Exhibit CHN-18).
[789] *Administration of Exploration and Mining of the Specified Minerals*, (Exhibit CHN-18), Article 1.

Nonetheless, the Panel notes that Paragraph 5 of the *Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012* (described below) and the *Monthly Reporting of the Implementation of the Rare Earths Extraction Controlling Quota* do refer to the *Administration of Exploration and Mining of the Specified Minerals*. The Panel considers therefore that the *Administration of Exploration and Mining of the Specified Minerals* is applicable to rare earths, and governs the setting of requirements to control the amount of mining in general.

7.506. In 2011, the Ministry of Land and Resources issued the *Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012*. This document specifies the first batch (46900 rare earth ore (REO) tonnes) of the extraction quota, which is to be allocated among the provinces.[790]Article I of the *Circular* announces that an additional batch of extraction quotas for tungsten, antimony, and rare earth ores will be released at a "proper time" in the second quarter according to national policies and market changes.[791] The Panel therefore understands that the total amount of the 2012 extraction quota was not known until the second quarter of 2012. The Panel recalls that the 2012 extraction quota distinguishes between light and medium/heavy rare earths, and sets separate quota volumes for both of these categories.[792]

7.507. On 19 April 2012, the Ministry of Land and Resources issued the *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, which specifies the total extraction quota for rare earths (93,800 REO tonnes[793]) and allocates the quota between the provinces for 2012. The introductory paragraph of the *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores* states that the amount of the total extraction quota includes the amount of the first batch of 2012 extraction quota issued in 2011.[794] Thus it appears that China does not decide at the beginning of 2012 the total amount of rare earths that Chinese miners are permitted to extract for that year, which means that mining enterprises must prepare business plans prior to being informed of their total share for the year. Instead, China issued through the *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores* a second batch of the extraction quota on rare earths in April 2012, a few months after the issuance of the first batch of the extraction quota for 2012. The Panel understands that the volume of these two batches together represent the maximum amount of rare earths that can legally be extracted through the end of 2012.

7.508. Where a mineral subject to the extraction quota (such as rare earth minerals) co-exists with other minerals in the same ore, the *Administration of Exploration and Mining of the Specified Minerals* provides for two scenarios. Article 15 states that if rare earths constitute more than 20% of all minerals in the mine, the extraction of other minerals shall be "subject to the extraction quota set for" rare earths.[795] If the rare earth does not reach the level prescribed under Article 15, the production of the "major mined mineral" will be limited to the volume that can be produced without exceeding the extraction quota for rare earths. However, if there is a need to expand the production of the "major mined mineral", for instance in case of shortage of the particular type of mineral extracted from the mine, and this expansion would lead to the over-quota extraction of rare earths, official approval must be obtained in advance. In this special case, the miner is required to keep the over-extracted amount of rare earth in stock and not to sell it into the market.[796]

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[790] China's first written submission, paras. 24, and 175, footnote 32, (referring to *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, (Exhibit CHN-19) and *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20)).

[791] *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20).

[792] China's first written submission, para. 175 and China's responses to Panel question No. 105 (referring to *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, (Exhibit CHN-19), Annex).

[793] *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, (Exhibit CHN-19).

[794] The Panel notes that the English version of the *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20) does not provide the effective date for the first batch of extraction quota, while the Chinese version indicates that document was promulgated in 2011.

[795] China's responses to Panel question No. 139.

[796] *Administration of Exploration and Mining of the Specified Minerals*, (Exhibit CHN-18), Article 16; *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control* (Exhibit CHN-43) Article 11; China's responses to the Panel's question No. 139.

7.509. The Panel notes that, based on Exhibit CHN-191, the level of extraction set by China for 2012 (93,800 REO tonnes) was higher than the actual extraction amount in 2011 (84,943 REO tonnes), but identical to the level of the 2011 extraction plan (93,800 REO tonnes). It is not clear whether China knew about the actual level of extraction in 2011 when it set its 2012 extraction level, but the Panel presumes that China must have been aware (at least approximately, through the reports it should have received through its mandatory reporting requirement[797]) that the extraction quota was not being entirely filled. The Panel accepts that an extraction quota set at a level that is equal to or higher than the previous year's level of actual extraction could still be restrictive, if, for example, in deciding the level of extraction quota for the following year, those responsible for setting the quota predicted an increase in domestic demand on the basis of reliable information. However, China has not explained in sufficient detail the rationale for setting an extraction quota for 2012 above the actual extraction level for 2011. In the Panel's view, 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).

7.510. The Panel notes that, in its explanation regarding the extraction quota setting process[798], China refers to Exhibit CHN-63 and CHN-64, arguing that forecasts in 2011 indicated an expectation of increase in Chinese demand in 2012. The Panel examined the two exhibits and found that Exhibit CHN-64, an article from the *China Rare Earths Information Journal* published in December 2011, predicts an increase in Chinese demand in rare earths in *2011-2015*, but no specific information is provided for the year 2012.[799] Exhibit CHN-63, the *Declaration on the Setting of 2012 Export Quotas on Rare Earth Products*, does indicate that, in setting the 2012 quota, the relevant Ministries predicted an increase of Chinese demand for rare earths in 2012, and took this into account. However, China has not provided any evidence or data about the information taken into account by the concerned Ministries and decision-makers in reaching this prediction.[800] Without explaining the basis on which China claims to have predicted an increase in domestic demand in 2012, the Panel feels unable to determine whether the level set in 2012 really was lower than that expected demand. For instance, paragraph 13 of Exhibit CHN-63 states that China based its expectation in part on "industry forecasts", but China has not provided such forecasts to the Panel. Such evidence is even more important because China's own data suggests that domestic consumption of rare earths *decreased* between 2010 and 2011.[801] A rise in domestic demand would therefore seem to go against trend.[802] China has argued that it predicted an increase in domestic demand on the basis of dropping prices.[803] However logical this may be in theory, it is has not been supported with sufficient factual demonstration showing the foundation of China's claim. The Panel is certainly not suggesting that an increase in domestic demand was not possible; it is simply emphasizing that China has failed to provide evidence sufficient to establish that its quota was set at a level that was restrictive, i.e. below predicted domestic demand. Therefore, it is not clear to the Panel whether China's 2012 extraction quota was capable of having a limiting effect. As such, the Panel has difficulty concluding that the extraction quota was a real restriction within the meaning of Article XX(g).[804] Nevertheless, we will continue our analysis of the extraction and production quotas in order to examine the extent to which the 2012 extraction quota was effectively enforced.

7.511. The complainants allege that China does not effectively enforce its extraction and production quotas, that these have not been respected since 2006, and that in 2012 the actual level of extraction was much higher than the level set forth in China's quota measures.[805] China claims that the actual level of extraction of rare earths in 2012 was 76,029 REO tonnes, an

[797] *Monthly Reporting of the Implementation of the Rare Earths Extraction Controlling Quota*, (Exhibit CHN-44) (indicating that, prior to the monthly reporting requirement that came into force in September 2011, reporting was required on a quarterly basis).

[798] China's first written submission, para. 119.

[799] "*Current situation of China rare earth industry and outlook for '2011-2015' period*", China Rare Earths Information Journal, Vol. 17, No. 12, December 2011 and Vol. 18, No. 1, January 2012, (Exhibit CHN-64), p. 4.

[800] *Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products*, (Exhibit CHN-63), p.12.

[801] *Updated Rare Earths Data (1999-2012)*, (Exhibit CHN-191).

[802] In fact, China's data shows that domestic consumption fell quite dramatically in 2012, from 83,110 REO tonnes in 2011 to 64,797 tonnes in 2012: see *Updated Rare Earths Data (1999-2012)*, (Exhibit CHN-191).

[803] *Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products*, (Exhibit CHN-63), para. 24.

[804] *Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products*, (Exhibit CHN-63), p.12.

[805] United States' second written submission, para. 163; European Union's second written submission, paras. 149-150.

amount lower than the 2012 extraction quota of 93,800 REO tonnes. The complainants maintain that the actual extraction level in 2012 was 95,000 REO tonnes, which exceeds the 2012 quota.[806]

7.512. The complainants rely for their data on the *Rare Earth Elements* report prepared by Roderick G. Eggert.[807] China, however, challenges the data source relied on by Eggert, namely the US Geological Survey, and argues that the US Geological Survey data "higher estimated" the level of actual extraction in China. According to China, the source of its own data is official NDRC data, collected either by the authorities directly supervising the industries or by relevant industry associations, as required by Chinese law.[808] China acknowledges that the illegal extraction by miners without a licence and over-quota production by legal miners fall outside of its extraction statistics; therefore, the actual extraction data provided by China only covers in-quota production by legal miners. In the Panel's view, it is unclear whether the difference between China's data and the complainants' data is due to the inclusion of amounts extracted by illegal miners. Nevertheless, for the purpose of assessing whether the extraction quota in 2012 was a real and actual restriction on domestic production, the Panel will use the data provided by China regarding the actual extraction of legal miners in 2012.

7.513. As noted above, China claims that the actual level of extraction of rare earths in 2012 was 76,029 REO tonnes, an amount lower than the 2012 extraction quota of 93,800 REO tonnes. According to China, the 2012 extraction quota was set to impose a real restriction. The complainants argue that China does not fully and sufficiently enforce its domestic restrictions and, therefore, that China's alleged domestic restrictions are not real and actual. The Panel must determine whether the design and structure of the relevant enforcement measures were capable of effectively capturing and punishing over-quota extraction of rare earths and illegal extraction.

7.514. China invokes the following instruments to support its argument that it has imposed enforcement mechanisms to ensure that rare earth mining enterprises comply with the extraction quota[809], including reporting requirements, supervision by the MLR, and deduction of share for over-extraction:

a. *Administration of Exploration and Mining of the Specified Minerals*[810];

b. *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control*[811];

c. *Monthly Reporting of the Implementation of the Rare Earths Extraction Controlling Quota*[812];

d. *Circular Establishing Mining Zone Assistant Administrators Team*[813]; *and*

e. *Inclusion of VAT Invoices Issued by Rare Earth Enterprises into "VAT Anti-Fake System"*.

7.515. The Panel notes that the *Administration of Exploration and Mining of the Specified Minerals* and the *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control* do not refer to rare earths. China has not explained whether or not rare earths fall within the scope of the term "minerals" as that term is used in these two instruments. Nonetheless, the Panel notes that the *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012*[814] and the *Monthly Reporting of the Implementation of the Rare Earths Extraction Controlling*

[806] See, e.g., United States' comments to China's responses to Panel question No. 75 (referring to the Roderick G. Eggert, *Rare Earth Elements*, 25 April 2013, (Exhibit JE-129), p. 8).
[807] Roderick G. Eggert, *Rare Earth Elements*, 25 April 2013, Exhibit JE-129).
[808] China's comments on the complainants' response to Panel question No. 70.
[809] China's first written submission, para. 218.
[810] *Administration of Exploration and Mining of the Specified Minerals*, (Exhibit CHN-18).
[811] *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control*, (Exhibit CHN-43).
[812] *Monthly Reporting of the Implementation of the Rare Earths Extraction Controlling Quota*, (Exhibit CHN-44).
[813] *Circular on Establishing Team of Mining Zone Assistant Administrators for Ore Districts of Rare Earths and Other Materials*, (Exhibit CHN-85).
[814] *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20).

Quota confirm the application of the *Administration of Exploration and Mining of the Specified Minerals* to the extraction of rare earths. Moreover, the *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*[815] refers to the *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control* as the basis for the 2012 extraction quota and the quota allocation. Therefore, as the Panel understands it, the enforcement measures embodied in the *Administration of Exploration and Mining of the Specified Minerals and the Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control* are applicable to the extraction of rare earths.

7.516. The *Administration of Exploration and Mining of the Specified Minerals* and the *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control* direct the local departments of the MLR to allocate the extraction quota to mining enterprises, and each mining enterprise is required to sign a liability letter with the local MLR to confirm their obligation of compliance and their liability in case of breach.[816] Mining enterprises must establish a booking system to record the quantity of rare earth concentrates they produce and sell[817], and must report this to the local departments of the MLR on a monthly basis.[818] Local departments of the MLR are subject to the supervision of the central MLR[819], to which they are required to report monthly or quarterly on the implementation of the total extraction quota. *Monthly Reporting of the Implementation of the Rare Earths Extraction Controlling Quota* modifies the quarterly reporting system by making it into a monthly reporting system for the enforcement of the extraction quota on rare earths.[820]

7.517. With respect to the supervision of the MLR, the *Circular Establishing Mining Zone Assistant Administrators Team* refers to additional specialized human resources to supervise whether mines adhere to their extraction quota.[821]Article 18 of the *Administration of Exploration and Mining of the Specified Minerals* also provides for local MLR officials to assign a technical expert to visit the mines to conduct inspections without prior notice.[822] Moreover, according to China, in June 2012 a new VAT system was put in place to enable identification of production over the extraction caps.[823]

7.518. Regarding punishment for over-quota extraction, the *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores* refers to the *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control* as the basis for the enforcement of the 2012 annual extraction quota. The *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control* provides that over-extraction is grounds for reducing a province's or an individual enterprise's share of the extraction quota.[824]

7.519. In our view, China has made efforts to combat illegal extraction, including in October and November of 2012, when the MIIT in coordination with MLR and other government agencies

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[815] *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, (Exhibit CHN-19). The Panel believes that in its introductory paragraph, the English version of this exhibit mistakenly translates "开采总量控制矿种指标管理暂行办法" (see *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control*, (Exhibit CHN-43)) as "*Provisional Measures for the Administration of Exploration and Mining of the Specified Minerals subject to Protective Mining*".

[816] *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control*, (Exhibit CHN-43), Article 9; *Administration of Exploration and Mining of the Specified Minerals*, (Exhibit CHN-18), Article 11; China's first written submission, para. 218, and China's response to Panel question No. 77.

[817] *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control*, (Exhibit CHN-43), Articles 10 and 12; *Administration of Exploration and Mining of the Specified Minerals*, (Exhibit CHN-18), Article 12; China's first written submission, para. 218; and China's responses to Panel question No. 77.

[818] Ibid.

[819] *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control*, (Exhibit CHN-43), Article 14; China's response to Panel question No. 77.

[820] *Monthly Reporting of the Implementation of the Rare Earths Extraction Controlling Quota*, (Exhibit CHN-44).

[821] China's first written submission, para. 217 (referring to *Circular on Establishing Team of Mining Zone Assistant Administrators for Ore Districts of Rare Earths and Other Materials*, (Exhibit CHN-85)).

[822] China's responses to Panel question No. 77 (referring to *Administration of Exploration and Mining of the Specified Minerals*, (Exhibit CHN-18)).

[823] China's second written submission, para. 22.

[824] *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control Articles*, (Exhibit CHN-43), Articles 5, 13 and 14.

initiated a campaign to combat the illegal extraction and production of rare earths.[825] In the annex to its first written submission, China provides a summary of "on-going enforcement efforts by local governments", listing cases where companies were fined or shut down and where individuals were prosecuted and punished for engaging in illegal mining.[826]

7.520. However, as the Panel has explained, it is not clear whether the 2012 extraction quota was capable of having a limiting effect. China has not convinced the Panel that, although the level was the same as 2011 (but above the 2011 level of actual extraction), it was designed to have a limiting effect. This is so because China has not explained the basis on which it predicted the evolution in demand.

The production quota system applicable to rare earths

7.521. China also claims that its production quota is a domestic restriction imposed in conjunction with its export quotas and hence that its measures conform to the requirements of Article XX(g). With respect to the relationship between the production quota and the extraction quota, China explains that the production quota volume corresponds to the extraction quota volume, but that the former is slightly adjusted because some rare earth concentrates (about 4%) are lost during further processing. Accordingly, in 2012 the production quota was set at 90,400 REO tonnes, while the extraction quota was set at 93,800 REO tonnes.[827]According to China, the production quota is an additional control necessary to avoid circumvention of the extraction quota.[828]

7.522. China explains further that its production quota determines how much smelted and separated products (mainly rare earth oxides and salts) separating and smelting companies can process each year from rare earth concentrates.[829] China invokes the following legal instruments to support its claim that it has imposed a restriction on the production of rare earths in 2012[830]:

a. *Administration of Directive Production Plan of Rare Earths*[831];

b. *2012 First Batch of the Directive Production Plan of Rare Earths*[832]; and

c. *2012 Second Batch of the Directive Production Plan of Rare Earths*.[833]

7.523. The *Administration of Directive Production Plan of Rare Earth*s, which was formulated in accordance with the *Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, and the *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*[834], establish a maximum amount of rare earth oxides and salts that can be produced – i.e. a production quota. The *Administration of Directive Production Plan of Rare Earths* was promulgated and made effective on 13 June 2012. China explains that Article 11 of the *Administration of Directive Production Plan of Rare Earths*[835] requires the MIIT to publish the directive production plan on an

[825] *Verification and Rectification of Illegal Conducts in Rare Earth Industry* (Exhibit CHN-42).
The Panel notes that, in paras. 205-215, China has presented evidence regarding other short-term "campaigns" against illegal mining and production in 2010 and 2011. The Panel considers that those campaigns were not enforcement measures for 2012 extraction quotas or production quotas.

[826] Annex of China's first written submission, (referring to *Guangdong Province Combats Illegal Rare Earths Mining Cases Summary*, (Exhibit CHN-83), *Jiangxi Province Combats Illegal Rare Earths Mining Cases Summary*, (Exhibit CHN-90), "*Rare Earth Special Rectification Campaign Has Achieved Initial Success*", Rare Earth Information, No. 12, December 2011, (Exhibit CHN-91), and *Notices Ordering Enterprises Producing Over Quota to Cease Production*, (Exhibit CHN-113)).

[827] China's responses to Panel question No. 141.

[828] China's second written submission, para. 37.

[829] China's first written submission, para. 24, footnote 33, (referring to *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21), *2012 First Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-22), and *2012 Second Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-23)); China's responses to Panel question No. 141.

[830] China's first written submission, paras. 24 and 177.

[831] *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21).

[832] *2012 First Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-22).

[833] *2012 Second Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-23).

[834] *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21).

[835] *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21), was promulgated and effective on 13 June 2012.

annual basis in a *Circular*. Starting with the directive production plan for 2013, the quota included in the plan will be issued in two separate batches.[836] According to China, "this codifies a practice that was already applied for the 2012 Directive Production Plan".[837] As the Panel understands it, the *Administration of Directive Production Plan of Rare Earths* provides guidance for the imposition of production quotas after 13 June 2012.

7.524. The Panel understands that the MIIT issued the *2012 First Batch of the Directive Production Plan of Rare Earths* on 13 January 2012 on the basis of the *Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry* and the *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*.[838] This document set the first batch of the production quota of rare earths at 45,200 REO tonnes.[839] On 11 June 2012, the MIIT issued the *2012 Second Batch of the Directive Production Plan of Rare Earths*. This document set the second batch of the production quota of rare earths at 45,200 REO tonnes.[840] Taken together, the total production quota for 2012 was 90,400 REO tonnes.[841] The annexes to these two instruments specify the allocation of the production quota at both the central enterprises level and the regional level.[842] The Panel considers that the two batches of the production quota together indicate the maximum amount of rare earth oxides, salts, and other compounds that smelting and separating enterprises could legally produce through the end of 2012. Having examined Exhibit CHN-191, the Panel understands that the total 2012 production quota (90,400 REO tonnes) was set at the same level as in 2011. The Panel recognizes that this level is lower than the actual amount of production of smelted and separated products (96,934 REO tonnes) in 2011.

7.525. However, as the Panel explained above in its discussion of the legal test under Article XX(g), the fact that a quantitative restriction on domestic production or consumption (here, the production plan) is, in a given year, set at a level lower than the level of consumption in a previous year does not necessarily mean that it constitutes a "restriction" within the meaning of Article XX(g), just as the fact that a quantitative restriction is set above or at the same level as in a previous year does not necessarily deprive it of its character as a real restriction. What matters, in the Panel's view, is that the quantitative restriction is set below the expected level of demand for the period in which the alleged restriction is intended to apply. Since expected demand may fluctuate from year to year, the mere fact that China's production was set lower in 2012 than the level of actual consumption in 2011 does not of itself establish that the production quota constituted a "restriction". Instead, the Panel needs to determine whether the 2012 production quota was set at a level below the expected demand for 2012.

7.526. Paragraph 24 of the *Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products* states that in setting the production quota, the relevant Ministries "considered that the overall domestic and foreign demand for the rare earths would continue to be significant", in particular because "prices for rare earths were falling from the levels that they had rapidly achieved in late 2010 and early 2011". The Panel recognizes the logic of this argument, but considers that China has failed to place before it evidence or other demonstration sufficient to support it. As the Panel has explained above, it is very difficult to assess whether a measure such as China's constitutes a "restriction" without evidence showing how China's reasoning, which appears to run contrary to the trend towards reduced domestic demand, is justified. Accordingly, the Panel's view is that China has not provided sufficient evidence as to the expected level of demand for 2012 on the basis of which the Panel would be able to assess whether the 2012

[836] China's first written submission, para. 177 (referring to *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21)).

[837] China's first written submission, para. 177.

[838] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13); see also *2012 First Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-22).

[839] *2012 First Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-22).

[840] China's first written submission, para. 178 (referring to *2012 First Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-22) and *2012 Second Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-23)); China's second written submission, para. 37; China's response to Panel question No. 141. The *2012 First Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-22) was promulgated on 13 January 2012, and the *2012 Second Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-23) was promulgated on 8 June 2012.

[841] Updated Rare Earths Data (1999-2012), (Exhibit CHN-191).

[842] *2012 First Batch of the Directive Production Plan of Rare Earths*, Annex, (Exhibit CHN-22); *2012 Second Batch of the Directive Production Plan of Rare Earths*, Annex, (Exhibit CHN-23).

production plan constituted a "restriction" for the purposes of Article XX(g). In this dispute such evidence is especially important, since in 2012 all consumption levels (both domestic and foreign) for ores and smelted and separated products declined significantly from the 2010 and 2011 levels. This suggests to the Panel that *demand* for such products was especially low in 2012 independently of China's restrictions.

7.527. This means that the fact that the 2012 production restriction was set at a level lower than the 2010 and 2011 restrictions does not suffice, at least in this dispute, to establish that it was capable of having a limiting effect in the sense of restricting domestic production or consumption below the level of expected demand. The low level set in the production plan may still have been higher than the level of expected demand, given that the data suggests an unusually low level of demand throughout the domestic and foreign rare earth markets.

7.528. Indeed, the fact that the extraction and production plans were not filled in 2012 suggests that they were set at levels *above* demand. To the Panel, this seems to indicate that China's extraction and production plans were *targets* to be achieved, and not "restrictions" as required by Article XX(g).

7.529. Despite its concerns about whether the 2012 production cap was set at a level capable of restricting domestic production, the Panel now turns to examine the parties' arguments with respect to the enforcement of such production cap.

7.530. China has invoked a number of Articles[843] of the *Administration of Directive Production Plan of Rare Earths* to describe how it enforces its 2012 production quota. China refers to Articles 13-18 of the *Administration* and argues that rare earth smelting and separating enterprises cannot operate legally without having received a share of the production quota.[844] Further, producing enterprises must establish a ledger reflecting the "real picture of the production and operation" and report monthly on their production and sales to the provincial authorities.[845] For enterprises that produce above the quota, the provincial authorities will impose a suspension of production and may reduce the quota for the next year.[846] Enforcement actions by local authorities are scrutinized by central government officials.[847]

7.531. As mentioned earlier, the Panel understands that the *Administration of Directive Production Plan of Rare Earths* provides guidance for the imposition of a production quota after 13 June 2012. Under the circumstances, the Panel has difficulty understanding how the MIIT could have enforced the 2012 production quota on the basis of the *Administration of Directive Production Plan of Rare Earths*. For instance, Article 14 of the *Administration of Directive Production Plan of Rare Earths* requires producing enterprises to establish a ledger reflecting the "real picture of the production and operation" and report monthly on their production and sales to the provincial authorities. Considering that the *Administration of Directive Production Plan of Rare Earths* was made effective in June 2012, it would not have been possible for enterprises to comply with these requirements from January to June 2012.

7.532. The texts of the two batches of *2012 Directive Production Plan of Rare Earths* provide for reporting mechanisms that support the implementation of the production quota on rare earth oxides and salts. The persons in charge of implementing the production plan at the regional level, and the enterprises subject to the central government's specific plan, are required to report relevant figures and information to the superior administrative departments on a monthly basis.[848] According to China, in June 2012, a new VAT system was put in place to provide a reliable way to identify production above the capped levels.[849]

7.533. The texts of the two batches of *2012 Directive Production Plan of Rare Earths* also provide punishment mechanisms for over-quota production. Enterprises that "produce[] beyond the plan",

[843] See, e.g. Articles 13–18, (Exhibit CHN-21); China's first written submission, para. 219.
[844] *Administration of the Directive Production Plan of Rare Earths*, (Exhibit CHN-21), Article 15.
[845] *Administration of the Directive Production Plan of Rare Earths*, (Exhibit CHN-21), Articles 13-14.
[846] *Administration of the Directive Production Plan of Rare Earths*, (Exhibit CHN-21), Article 16.
[847] *Administration of the Directive Production Plan of Rare Earths*, (Exhibit CHN-21), Article 18.
[848] *2012 First Batch of the Directive Production Plan of Rare Earths*, Articles III-IV, (Exhibit CHN-22); 2012 *Second Batch of the Directive Production Plan of Rare Earths*, Articles III-IV, (Exhibit CHN-23).
[849] China's first written submission, para. 220.

and/or produce "with environmental pollution and safety risk", will have their share of the production quota reduced or even cancelled. Enterprises that "follow[] the plan, pass[] the environmental protection verification, and meet the requirement of safe production" may have their quota share increased.[850]The Panel considers that these instruments demonstrate that China's legislation contains some mechanisms to enforce the 2012 production quota on rare earth oxides and salts.

7.534. The core of the complainants' argument is that, notwithstanding China's legal measures, China's alleged production quota is not actually enforced. They point to significant overproduction, leading them to conclude that China's production plan is not a restriction.

7.535. To this end, the complainants have submitted the Eggert Report, which estimates the actual level of rare earths production in 2012 to have been 95,000 REO tonnes. China, however, claims that the actual level of legal production[851] was 82,000 REO tonnes.

7.536. The Panel recalls that it is for the complainant challenging the existence of domestic restrictions on the basis of non-enforcement to prove that such non-enforcement is so important as to be considered systemic.

7.537. In the Panel's opinion, the complainants have not established to the Panel's satisfaction that there was important or systemic overproduction in 2012, although the Panel recognizes that there appears to have been in previous years. The Eggert Report consists of estimates rather than real statistics, and the Panel therefore feels that it is not entitled to rely on the report to conclude that there was overproduction in 2012.[852]

7.538. The complainants argue additionally that China's argument about the enforcement of its production quota is undermined by China's multiple actions at different levels of government to incentivize the production of rare earths, thereby directly causing production above the target.[853] The complainants refer to media sources suggesting that local governments encourage rare earth producers to expand production beyond the central government's production targets[854], and allege that "a lot of illegally produced rare earth products could 'openly' use special invoices" through a process that "allow[s] some of the illegal companies that were 'shut down' due to reasons such as environmental protection noncompliance to come back to life".[855] Moreover, according to the complainants, actual rare earth extraction and production in China have traditionally exceeded the quotas, sometimes by more than 50%.[856] The European Union argues that the fact that extraction quotas were introduced after the export quotas had been in place for many years, and the fact that the extraction quotas have steadily increased since 2006, demonstrate that China's domestic production controls are not restrictive.[857]

7.539. China rejects these accusations. It argues that China does not undertake or sanction any activity designed to stimulate or promote domestic consumption of rare earths above the extraction and production quotas. China explains the complainants misunderstand China's evidence, which shows that it is only *within the limits of China's conservation policy* (in particular within the quota limits imposed) that China re-focuses demand for rare earths, prioritizing rare earths use to higher value-added industries and making more efficient use of the limited supply.

[850] *2012 First Batch of the Directive Production Plan of Rare Earths*, Articles III-IV, (Exhibit CHN-22); *2012 Second Batch of the Directive Production Plan of Rare Earths*, Articles III-IV, (Exhibit CHN-23).

[851] China has emphasized that its statistics reflect only legal extraction and production.

[852] Roderick G. Eggert, *Rare Earth Elements*, April 25 2013, (Exhibit JE-129).

[853] United States' second written submission, para.174 (referring to *Twelfth Five-Year Development Plan for New Materials Industry*, (Exhibit JE-28), *Inner Mongolia Autonomous Region "Twelfth Five Year" High-Tech Industries Development Plan*, (Exhibit JE-29), *Guiding Opinions of Jiangxi Province on the Development of the Rare Earth Industry*, (Exhibit JE-18)); Japan's second written submission, paras.120-121; United Sates' response to Panel question No. 70.

[854] United States' second written submission, para.175.

[855] Japan's second written submission, para.119.

[856] United States' second written submission, para. 163; European Union's second written submission, paras. 149-150.

[857] European Union's second written submission, paras.148 and 151.

According to China, such internal prioritization is perfectly consistent with the goal of preserving natural resources by limiting the volume that can be extracted and produced each year.[858]

7.540. The Panel agrees with China that, within the limits of China's extraction and production quotas, a policy prioritizing rare earths use by higher value-added industries does not necessarily mean that China is not enforcing its restrictions on domestic production.[859] Moreover, the Panel has concerns about the probative value of the evidence cited by the complainants in support of their contention that Chinese local governments do not respect the extraction and/or production quotas. The exhibits cited by the complainants consist mainly of short media reports[860] and the Panel has not been provided with any direct evidence on which it may rely with confidence. We appreciate that it may be difficult to obtain better evidence of these matters; however, we are unable to found a conclusion of China's failure to enforce its production quota on this evidence alone.

7.541. 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[861], 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 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]".[862]

7.542. 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.

7.543. The Panel further observes that China provides a VAT refund on all exported downstream rare earth products.[863] To the Panel, this would also seem to stimulate the production and consumption of rare earths. Again, China has not shown that its production plan in any way counteracts or negates this incentive. All of this suggests to the Panel that the production plan was not a "real restriction" or accompanied by effective enforcement.

7.544. In sum, the Panel has difficulty concluding that the domestic restrictions referred to by China were capable of restricting the production of rare earth oxides, salts, and compounds in 2012. China has not demonstrated that the production quota was set at a level below expected demand. Additionally, the Panel is concerned that the export quota itself and China's VAT rebate

[858] China's response to Panel question No. 70.
[859] China's response to Panel question No. 70.
[860] See, e.g. United States' second written submission, para. 175; Japan's second written submission, para. 119.
[861] United States' second written submission, para. 129.
[862] Panel Reports, *China – Raw Materials*, para. 7.434.
[863] *Explanation for the Compilation of Emission Standards of Pollutants from Rare Earths Industry (Draft for Comments)* (Exhibit JE-99). This document explains that "[s]ince 1985, China has been exercising export tax rebate policy. Through the implementation of this policy, value-added tax or consumption tax imposed by the state on exports is refunded indirectly to the enterprise, which reduces the cost of exported products and promotes exports": p. 19. As the Panel understands it, exporters are eligible for VAT rebates by default unless such rebates are expressly terminated. *Explanation for the Compilation of Emission Standards of Pollutants from Rare Earths Industry (Draft for Comments)* (Exhibit JE-99) shows, at p. 18, that VAT rebate were expressly terminated for upstream rare earth products, including rare earth metals, rare earth oxides, and rare earth salts. Similarly, *Notice on Adjusting the VAT Refund of Certain Products (2005)* (Exhibit JE-83) shows that VAT rebates on rare earths metals, oxides, and salts were expressly terminated, while the tax rebate on tungsten and tungsten products was reduced to 8%. *Notice on Adjusting the Tax Refund Rates (2006)* (Exhibit JE-75) shows that VAT refunds on various upstream forms of tungsten have also been terminated. However, China has not provided any evidence showing that VAT rebates on downstream rare earths, tungsten, and/or molybdenum have been terminated. Japan raised this point in its second written submission, para. 294, but China has not responded to this claim. The Panel also notes that *Notice on Adjusting the VAT Refund of Certain Products (2005)* (Exhibit JE-83) and *Notice on Adjusting the Tax Refund Rates (2006)* (Exhibit JE-75) show that VAT refunds on various forms of upstream molybdenum have also been terminated.

incentivize domestic production, and that the production quota has not been designed in a way that counteracts these incentives.

Whether there are volume restrictions on domestic consumption

7.545. China submits that the collective effect of China's export and production quotas on rare earths is to impose a volume restriction on domestic Chinese *consumption* of rare earths, within the meaning of Article XX(g).[864] China explains that it controls what it is physically able to control, i.e. production and consumption of newly produced rare earths. China argues that domestic rare earth consumers cannot purchase more newly produced rare earths than the volume obtained after deducting the export quota from the production quota, in the assumption that the export quota is filled. China contends further that even where the export quota is not filled, China's domestic consumers can never legally exceed the production quota minus the actual exports. China asserts that by deducting the export quota from the production quota, the amount of newly produced rare earth products available for domestic consumption in 2012 was significantly lower than in previous years, and "would likely also be below expected demand for the same year".[865]

7.546. The complainants take issue with several aspects of China's argument. According to the complainants, under the combined effect of both a production quota and an export quota, domestic consumers are provided a consumption assurance.[866] The United Sates argues that establishing an export performance requirement as one of the quota allocation criteria does not necessarily provide an export incentive, since an individual company's export quota could remain the same if, in the previous year, its exports followed the general market trend.[867] The European Union stresses that the fact that unused export quota volumes remain available for domestic sale is an incentive to increase domestic consumption in China.[868] Regarding China's argument that the use of stockpiling and recycling account for the data on over-consumption, the European Union and Japan point out that rare earth recycling is not practically or economically feasible at commercial levels, and yield from such activities is generally quite low.[869]

7.547. For several reasons, the Panel is not in agreement with China that it has imposed volume restrictions on domestic consumption. First, China has not provided any evidence to demonstrate that it imposes domestic consumption quotas or other forms of regulatory control over the level of domestic consumption. In fact, 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. If the export quota for a given year is not filled, the un-exported rare earth products will not be reserved for export in the following year. China explains that it sends such unexported rare earth products to its domestic market because "[e]xporters might then attempt to sell the remaining rare earth products in the domestic market either late in a given year or even in the following year. The rare earth products that were not sold by the end of a given year will remain in the stocks of the rare earth producers."[870] In other words, the unused quota volume will remain in the domestic market, and will ultimately be consumed by domestic users. Therefore, the Panel considers that the alleged "consumption cap", i.e. the combined effect of a production and export quota, is rather a kind of consumption assurance or guarantee to domestic consumers[871], since it provides a *minimum* amount of rare earths available for domestic consumption. In 2012, the level of domestic consumption, which was initially assessed at 64,797 REO tonnes, was in fact liable to reach 74,797 REO tonnes, since domestic consumers had access to the non-used part of the export quota. In the Panel's opinion, the fact that unused export quota volumes remain available for domestic sale is an incentive to increase domestic consumption in China.[872] In this connection, the

[864] China's first written submission, para. 184.
[865] China's second written submission, para. 87; China's response to Panel question No. 71.
[866] United States' second written submission, para. 182; European Union's second written submission, para. 156.
[867] United States' second written submission, paras. 183, 184.
[868] European Union's second written submission, para. 156.
[869] European Union's second written submission, para. 156; Japan's second written submission, para. 118.
[870] China's response to Panel question No. 36.
[871] United States' second written submission, para.182; European Union's second written submission, para. 156.
[872] European Union's second written submission, para. 156.

Panel also notes that China does not appear to have any mechanism in place to prevent the illegal selling to domestic users of quantities allocated for export.

7.548. Second, China has not provided any evidence to demonstrate that it imposes enforcement measures on the domestic downstream rare earth industry to ensure that domestic users do not consume more than the alleged "consumption cap". For instance, China has not provided evidence showing that, under Chinese law, there is any punishment on domestic upstream or downstream rare earths users for consuming illegally produced rare earth products.

7.549. Third, the Panel also notes that China has established measures, *inter alia* VAT refunds for downstream users of rare earths, which could stimulate domestic consumption of rare earths by downstream industries that export value-added processed goods.[873] The Panel fails to see how such measures contribute to domestic restrictions whose purpose is to enhance the conservation of rare earths.

7.550. Lastly, the Panel notes that, according to China's data in Exhibit CHN-191, the 2012 levels of extraction and production (93,800 REO tonnes) were well above the levels of actual extraction of 2011 (84,943) but below the level of actual consumption for 2011 (96,934 REO tonnes). The Panel notes also that the 2012 actual domestic consumption level of rare earths was 64,797 REO tonnes, slightly lower than the available amount (66,400 REO tonnes, calculated from the 2012 production quota minus the export quota, i.e. 90,400-24,000 REO tonnes) set by China. This raises doubt about whether, as China's argues, the amount of "newly produced rare earth products available for domestic consumption" in 2012 would likely also be "below the expected demand" for the same year.[874] Indeed in 2012 the total amount of rare earths available was above the actual demand level for the same year. The Panel recognizes that circumstances may change after China's extraction and production quotas were set, so that what was initially designed as a restriction may not, due to intervening circumstances, actually restrict consumption during the relevant period. In such circumstances, a Member may nevertheless be able to demonstrate that the concerned domestic measure may have been designed at a level intended to be restrictive at the time it was set. However, here, China has not provided sufficient explanation as to why its domestic measure should be considered restrictive. Throughout its submissions China has argued in various ways that "the competent Ministries consulted all information reasonably available in late 2011" in setting the domestic restrictions.[875] However, as the Panel has explained, such assertions cannot substitute for detailed evidence showing what level of demand China predicted and how it arrived at that prediction. Without such detailed evidence, the Panel cannot conclude that the domestic quotas were set at levels below domestic demand. As such, in the Panel's opinion China has not demonstrated that it imposed volume restrictions on domestic consumption of rare earths in 2012.

7.6.2.2.1.3 Whether the resource tax is a restriction on domestic production or consumption of rare earths

7.551. China cites its *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*[876] of 2011 to explain that its resource tax aims at "bringing rare earths price … close to its cost".[877] China refers the Panel to the *Implementation Rules for the Provisional Regulations on Resource Tax*[878], and submits that in 2012, light rare earths were subject to a tax rate of 60 RMB per tonne of undressed ore mined. For medium/heavy rare earths, the tax was set at 30 RMB per tonne of undressed ore mined.[879]

7.552. According to China, the resource tax seeks to conserve Chinese rare earth resources by reducing consumption; and the effect of a resource tax is filtered through the entire rare earth supply chain. Higher mining costs increase the costs of inputs for smelting and separating

[873] On the VAT rebate, see discussion in footnote 863 above; on other measures that could stimulate domestic rare earth consumption, see e.g. United States' second written submission, para. 130. See also *Twelfth Five-Year Development Plan for New Materials Industry* (Exhibit JE-28), p. 40.
[874] China's second written submission, para. 25.
[875] China's response to Panel question No. 92.
[876] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13).
[877] China's first written submission, para. 191.
[878] *Implementation Rules for the Provisional Regulations on Resource Tax*, (Exhibit CHN-27).
[879] China's first written submission, para. 192.

enterprises. The higher costs of smelted and separated rare earth products increase the costs of inputs for producers of downstream rare earth-using products, such as magnets and phosphors. The parties disagree on the effects that the resource tax could have on rare earth production in China. In particular, the complainants submit that a tax can have a restricting effect only if it is sufficiently high.

7.553. China supports its position by indicating[880] that, before the tax increase in 2011, rare earths were subject to a tax of 0.4 - 3 RMB per tonne, and that in 2012, rare earths were subject to 60 RMB per tonne of undressed light rare earth ores and 30 RMB per tonne of undressed heavy rare earth ores. China uses the resource tax paid by Baotou Rare Earth as an example to show that the increase in the resource tax in 2011 has led to a very significant increase in the financial burden borne by that company. The complainants, however, note that according to data provided by China regarding the costs imposed on Inner Mongolia Baotou Steel by the increased resource tax, it is that company's enlargement of production, and not the resource tax, which caused an 850% increase in the company's costs.[881] China explains in its second written submission that Baotou Rare Earth paid 762,089 RMB in resource taxes for the ores mined by its own mining projects, a figure that does not include the undressed ores purchased from Mongolia Baotou Steel. However, in 2011 – when the tax was increased – Baotou Rare Earth agreed with Mongolia Baotou Steel to pay the resource tax. To this end, Baotou Rare Earth transferred 650 million RMB to Mongolia Baotou Steel.[882]

7.554. Nevertheless, the Panel acknowledges that increased costs caused by the tax could, in the long run, lead to a reduction in demand and therefore limit production of rare earth ores. Thus, resources taxes could work to reduce extraction of rare earths. However, in the Panel's opinion, China has not adduced sufficient evidence to persuade the Panel that the tax at issue here would be capable of having a limiting effect. Specifically, China's example 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. As the Panel understands it, China's example suggests that the increase in the resources taxes in 2011 has lead the rare earth ore producer (i.e. Mongolia Baotou Steel) to pass on the cost to a rare earth ore consumer (i.e. Baotou Rare Earth) during that year. However, the Panel considers that, in order to assess the cost increase caused by the increase in the resource tax[883], it is not sufficient to provide only the total amount of resources tax that Baotou Rare Earth paid in 2011. As noted by the complainants, the increase in cost might also have been caused by enlargement of production. In order to properly support its argument, China would have had to provide information about the percentage of the tax or the quantities of rare earth ores sold by Mongolia Baotou Steel to Baotou Rare Earth in 2010 and 2011, and the resources taxes charged to Mongolia Baotou Steel for the transactions of rare earth ores with Baotou Rare Earth in 2010. In Exhibits CHN-148 and 149, China indicates that the price of undressed iron ores is 105 RMB per tonne and the resources tax on Baiyun Obo ores is 60 RMB per tonne.

7.555. The Panel emphasizes that it is not assessing here the *impact* of China's resource tax. As mentioned in our discussion of the legal test, when performing our analysis under paragraph Article XX(g), the Panel must assess, on the basis of the legal instruments at issue and the design, structure, and architecture of the alleged restrictions, whether such restrictions are capable of having a limiting effect on domestic consumption or production. China has failed to convince the Panel that its resource tax imposes a real and actual restriction on domestic production.

7.6.2.2.1.4 Whether environmental requirements are restrictions on domestic production or consumption

7.556. China lists a series of measures imposing environmental protection requirements in support of its defence under Article XX(g). These are:

[880] China's first written submission, footnote 290.
[881] United States' second written submission, para. 187; European Union's second written submission, para.161; Japan's comments on China's answers to the Panel's written questions, paras. 27-28.
[882] China's first written submission, footnote 294; China's second written submission, para. 32.
[883] The Panel notes that, at footnote 290 of China's first written submission, China indicates that before the increase, rare earths were subject to a tax of 0.4-3 RMB per tonne. However, China does not specify the tax rate for the rare earth ores in the example of Baotou Rare Earth in 2010.

a. *Emission Standards of Pollutants from Rare Earths Industry*[884];

b. *Deposit for ecological recovery requirements in Opinions on Enhancing the Ecological Protection and Restoration of Mines*[885] and *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*[886] ;

c. *Circular on Environmental Protection Inspection of Rare Earth Industry*[887]; and

d. Environmental requirements as qualification requirements for the application of the production quota in the *Administration of Directive Production Plan of Rare Earths*[888]or the export quota in the *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*.[889]

7.557. The *Emission Standards of Pollutants from Rare Earths Industry* provides for control of wastewater and waste gas produced by the rare earth industry. However, it does not refer to restricting extraction, production, or consumption of rare earths.

7.558. The requirement that mining companies make a deposit for ecological recovery to insure against the risk that they will fail to clean up their mining sites after ceasing operations similarly does not refer to restricting extraction, production, or consumption of rare earths.

7.559. The *Circular on Environmental Protection Inspection of Rare Earth Industry* provides for the inspection of rare earth companies' compliance with applicable environmental requirements and for the publication of a list of complying companies. However, this measure too does not refer to restricting extraction, production, or consumption of rare earths.

7.560. According to the *Administration of Directive Production Plan of Rare Earths* and the *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, only enterprises on the list of enterprises that meet the environmental protection requirements published by the Ministry of Environmental Protection are eligible to apply for a share of the extraction, production, or export quotas. The Panel fails to see how this environmental requirement, which is effectively a qualification requirement for entry into the rare earths industry, could restrict the amount of rare earths extracted or produced by enterprises that have already obtained a share of the extraction, production, and/or export quotas, or that will do so in the future.

7.561. China explains that rare earth enterprises in China face significant costs in complying with the listed environmental requirements. According to China, these higher costs restrict production, first by eliminating a number of small and inefficient producers, and second, by causing a price pass-through effect from producers to consumers.[890]

7.562. As discussed in the section on "access conditions", the Panel has difficulty understanding how measures that promote the efficiency of resource extraction and production necessarily work as restrictions on domestic production as such. While such measures might increase efficiency, they do not on their own impose any restrictions on the volume or pace of rare earth extraction or production.

7.563. The Panel acknowledges that regulatory requirements will impose some compliance costs on concerned enterprises. The issue before the Panel is whether those regulatory requirements contribute to the conservation of rare earths. In the Panel's view, environmental costs are ordinary costs imposed on enterprises to address the market externalities caused by rare earth extraction and production.

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[884] *Emission Standards of Pollutants from Rare Earths Industry*, (Exhibit CHN-31).

[885] *Opinions on Enhancing the Ecological Protection and Restoration of Mines Exhibit*, Section IV, (Exhibit CHN-32).

[886] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, Paragraph II(8), (Exhibit CHN-13).

[887] *Circular on Environmental Protection Inspection of Rare Earth Industry*, (Exhibit CHN-33).

[888] *Administration of Directive Production Plan of Rare Earths*, (Exhibit CHN-21).

[889] *Chart of raw materials subject to export duties*, (Exhibit JE-6); *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, (Exhibits CHN-38, JE-61).

[890] China's first written submission, paras. 197-203.

7.564. The Panel notes that China provides financial rewards to rare earths mining and smelting companies that have passed the national environmental audit.[891] Article 8 of the *Notice on Issuing "Management of Special Fund for Rare Earth Industry Adjustment and Improvement"* provides that "rare earth mining and smelting companies that have passed the national environmental audit, in accordance with the rare earth companies' production capacity verified and published by the MIIT, may receive a one-shot reward". The criteria applicable to this reward are as follows: mining and selection – 1000 RMB per REO tonnes; smelting and separating – 1500 RMB per REO tonne; metal smelting 500 RMB per REO tonne. According to China, the reward amounts to a one-third rebate of an enterprise's total environmental costs.[892] The Panel accepts that such award measures could provide an incentive for enterprises to comply with environmental requirements; however, the Panel considers that such rewards could counteract or offset the costs which China claims are "restricting" domestic production.

7.565. Finally, the Panel turns to China's argument that the five categories of measures (i.e. access conditions; resource taxes; volume restrictions; environmental requirements; and enforcement actions) restrict, individually or collectively, and directly or indirectly, the production or consumption of rare earth resources in China.[893] However, China does not explain how these measures collectively are capable of restricting domestic production or consumption of rare earths beyond the ways in which each individual category of measure might be capable of doing so. In other words, China has not explained how these measures operate together to restrict domestic production or consumption in a way that exceeds what the measures might do individually. The Panel also notes that the State Council documents such as *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*[894] provide general instructions on various aspects of the management of China's rare earth industry. Each of the restrictions referred to by China reviewed above is mentioned in this document. However, in the Panel's opinion, these documents do not explain how China's various measures collectively have additional capacity to restrict China's domestic production or consumption of rare earths than each of the measures do individually.

7.566. In sum, and for the reasons given above, the Panel has difficulty agreeing that China's environmental measures constitute "restrictions on domestic production or consumption" within the meaning of Article XX(g). While China's environmental measures are, of course, to be welcomed, China has not established to the Panel's satisfaction that they are capable of having a limiting effect on domestic production or consumption, as is required if China is to rely on Article XX(g).

7.567. The Panel now turns to consider whether, assuming the above-mentioned measures were "restrictions", China's 2012 rare earths quota was "made effective in conjunction with" these restrictions on domestic production or consumption.

7.6.2.2.2 Whether the 2012 export quota on rare earths were "made effective in conjunction with" restriction on domestic production or consumption

7.568. The Panel recalls that subparagraph (g) requires that trade-restrictive measures work in conjunction with domestic restrictions to conserve exhaustible natural resources.[895] The Panel considers that the "made effective in conjunction with" clause requires the simultaneous or perhaps near-simultaneous operation of the relevant foreign and domestic restrictions. As the panel stated in *China – Raw Materials*, "to benefit from the justification permitted under subparagraph (g), a Member cannot seek to rely on a future or potential domestic restriction; nor will measures enacted concurrently but which only have effect or are foreseen to have effect only in the future respect the Article XX(g) criteria, for they must not only exist concurrently; they must operate concurrently." In the Panel's view, the phrase "work in conjunction with" also suggests operative complementarity between the foreign and domestic restrictions.

[891] *Notice on Issuing "Management of Special Fund for Rare Earth Industry Adjustment and Improvement"*, (Exhibits CHN-212, JE-114); see also European Union's second written submission, para. 166; China's responses to Panel question No. 118; United States' comments on China's response to Panel question No. 118; European Union's comments on China's response to Panel question No. 118.

[892] China's response to Panel question No. 118.

[893] China's first written submission, para. 165.

[894] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13).

[895] Appellate Body Reports, *China – Raw* Materials, para. 356.

7.569. As the Panel has noted, China argues that its restrictions on domestic production and consumption of rare earths are *substantial*, and that domestic users, together with foreign consumers of rare earths, *collectively* bear the burden of China's conservation policy. For China, its export quota and its domestic restrictions work together in support of its comprehensive conservation programme.

7.570. As we explain in more detail below, the Panel is not persuaded by China's argument. In our view, China has not explained how the export quota operates and works together with restrictions on domestic production or consumption for the conservation of rare earths. On the contrary, the Panel considers that China's export quota and the restrictions on domestic users or producers of rare earth referred to by China do not seem to work coherently towards the goal of conservation.

7.571. The Panel now proceeds to explain its concerns on the basis of China's and the complainants' arguments.

7.6.2.2.2.1 The levels and timing of the 2012 export, extraction, and production quotas

7.572. China maintains that the Ministries determined the level of the 2012 export quota taking into account the *total* production quota set by the MIIT in consultation with MLR in the *2012 Directive Production Plan*.[896] The production quota volume, in turn, corresponds to the extraction quota volume, but is slightly adjusted because some rare earth concentrates (about 4%) are lost during further processing.[897] According to China, however, the exact amounts of the extraction quota, production quota, and export quota are set at the end of the year preceding or the beginning of the year in which the quota will apply.

7.573. The Panel notes that the legal instrument[898] issuing the first batch of the export quota provides that "the quantity allocated is around 80% of the total quantity to be allocated to enterprises for the whole year". However, the second batch of the export quota[899] allocated to the enterprises amounted to around 31% of the total 2012 total export quota.[900] In the Panel's opinion, the data on the allocation of the export quota in 2012 therefore does not correspond to the statement in the first batch of *2012 Rare Earth Export Quota* that "the quantity allocated is around 80% of the total quantity to be allocated to enterprises for the whole year".[901] The remaining part of the 2012 total export quota was not allocated automatically to eligible enterprises, since such enterprises still needed to go through the quota application procedures for the second batch of export quota shares.[902]

7.574. In light of the above, it seems clear that the total export quota was not set at the end of 2011 or at the beginning of 2012. The evidence suggests that the annual quota level was set late in the year, probably to take into account evolving domestic needs.

7.575. Moreover, the Panel considers that the timing of the overall export quota determination could affect the certainty of the rare earths market and enterprises' capacity to make business plans for 2012. In the following paragraphs, the Panel will explain why this uncertainty is relevant to the question whether China's export quota is a genuine conservation measure, and how it casts doubt on the claim that China's domestic and foreign restrictions "work together".

7.576. The Panel observes first that the three categories of quotas (export, extraction, and production) were set batch by batch at different times. The first batch of the *extraction* quota was

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[896] China's first written submission, para. 123 (citing *Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products*, para. 22, (Exhibit CHN-63)).

[897] China's responses to Panel question No. 141.

[898] *2012 First Batch Rare Earth Export Quotas*, (Exhibits CHN-56, JE-55).

[899] *2012 Second Batch Rare Earth Export Quotas*, (Exhibit CHN-58, JE-57).

[900] On the other hand, for some individual enterprises, the second batch of the export quota was less than 1/4 of the amount of the first batch of export quota, or 20% of the total amount of the two batches of export quota. For instance, the first batch of 2012 rare earth export quota allocated to Sino Steel Corporation was 1,010 tonnes of light rare earth and 145 tonnes of heavy/medium rare earth, while the second batch of export quota allocated to this company was only 96 tonnes of light rare earth and 0 tonnes of heavy/medium rare earth.

[901] *2012 First Batch Rare Earth Export Quotas*, (Exhibits CHN-56, JE-55), para. II, p. 1.

[902] Idem, Annex 2.

announced in 2011[903], and the second batch of the extraction quota was announced on 19 April 2012.[904] The first batch of the *production* quota was announced on 16 January 2012,[905] and contained no indication of when the second batch of the production quota would be announced. The second batch of the production quota was issued on 8 June 2012. The first batch of the *export* quota was announced on 27 December 2011. A supplement to the first batch of the export quota was issued on 16 May 2012, following the second round of environmental protection verification. The second batch of the export quota was issued on 16 August 2012. The following table illustrates the amounts of the extraction, production, and export quotas, and the dates on which they were issued.

Time of issuance / Quota	2011/End of 2011	January 2012	April 2012	May 2012	June 2012	August 2012
Extraction quota	46900 REO tonnes (first batch)		46900 REO tonnes (second batch)			
Production quota		45200 REO tonnes (first batch)			45200 REO tonnes (second batch)	
Export quota	10546 tonnes (first batch)			10680 tonnes (supplement-ary batch)		9770 tonnes (second batch)

7.577. The Panel fails to see any coordination among the three categories of quotas that would suggest they work together, be it for conservation of rare earths or for other reasons. China did not explain how the timing of its announcement of its export quota works together with the overall structure of its measures for the purposes of conservation.

7.578. Indeed, in the Panel's opinion, the uncertainty and unpredictability caused by determining the level of the export quota only late in the year do not help rare earth users to rationally utilize the available amount of rare earths. The insecurity about undetermined limitations may lead to stockpiling, smuggling, second-best alternatives, and sub-optimal investments by consumers. As the panel in *Colombia – Ports of Entry* found[906], such uncertainty can itself be considered a restriction on international trade, and so must be treated seriously. China has not explained how such restrictions work together with other domestic and foreign restrictions for the purpose of conservation. To the contrary, this uncertainty seems only to create instability in the international rare earths market.

7.579. Additionally, the Panel is troubled by the way China determines its quota levels. As we have mentioned, the amount of export of rare earths for 2012 (16,262 tonnes[907]) ended up being even less than the combined amount of the first batch and the supplement to the first batch of the export quota (21,226 tonnes[908]). When China decided to issue the second batch in August 2012, it should have known that foreign users had not used all of their first batch entitlement based on its export control procedures (which are administered at the border); therefore, China would have known that some, if not all, of the second batch could probably end up being consumed domestically. In the result, the second batch of the export quota was unfilled and eventually consumed in China's domestic market. The Panel understands that the total legal supply of rare earths is determined by the extraction quota, which, as we have noted, was determined in April 2012. However, the Panel notes that an important quantity of rare earths that was initially designated for export was redirected to the domestic market (for which it was not destined under

[903] The Panel recalls that *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20) does not specify the date of the issuance of the first batch of the 2012 extraction quota.

[904] *2012 Second Batch Rare Earth Export Quotas*, (Exhibit CHN-58, JE-57).

[905] *2012 First Batch of the Directive Production Plan of Rare Earths*, (Exhibit CHN-22).

[906] Panel Report, *Colombia – Ports of Entry*, para. 7.240.

[907] *Updated Rare Earths Data (1999-2012)*, (Exhibit CHN-191).

[908] *2012 First Batch Rare Earth Export Quotas*, (Exhibit CHN-56, JE-55); *2012 First Batch Rare Earth Export Quotas (Supplement)*, (Exhibit CHN-57, JE-56).

China's original comprehensive conservation plan). To the Panel, this reinforces the fundamental fact that the vast majority of rare earths produced in China is consumed domestically, further raising doubts about the usefulness and effectiveness of export quotas. It also suggests that, if the export and domestic restrictions "work together" at all, they tend to do so to secure the supply of rare earths to downstream domestic users, rather than for the goal of conserving exhaustible natural resources.

7.580. Third, for the Panel, the fact that each batch of the production quota was announced after the export quota was set contributed to the unfilled export quota and the unpredictability of the export market for rare earths.[909] It seems illogical to determine a level for the export quota before the extraction and production quotas are determined. As explained by China, the production quota shares are distributed from MIIT to central enterprises and local MIIT branches, and then to each enterprise at the regional level. The Panel understands that, as a result of such distribution process, Chinese rare earth producers get their share of the first batch of production quota only after the exporters receive their share of the first batch of the export quota. Consequently, most exporters cannot immediately secure the supply of rare earth oxides and salts for export because they must await the allocation of shares of the production quota, with the result that the export quota risks being partly unused. Of course, producers could have a stock of smelted and separated products from the previous year, which they could supply to exporters. However, in the Panel's view, this suggests that the way China releases its quota is not concerned with conservation, but is rather concerned with other considerations including, possibly, a desire to respond to domestic industrial needs.

7.581. In sum, the Panel believes that China has not explained how the timing of its export quota ensures that the quota works in conjunction with domestic restrictions for conservation. The main effect seems to be to cause market instability with no clear conservation justification or connection.

7.6.2.2.2.2 The different product scopes of China's export quota, production quota and extraction quota

7.582. The volume restrictions in China's comprehensive conservation policy on rare earths, i.e. China's extraction, production, and export quotas, are imposed on products at different stages of the rare earth industry value-added chain.

<table>
<tr><td>Mining and concentration</td><td colspan="3">Upstream intermediate products</td><td colspan="2">Downstream products</td></tr>
<tr><td rowspan="2">Rare earth concentrates</td><td rowspan="2">Rare earth oxides and salts</td><td rowspan="2">Rare earth metals</td><td colspan="2">Rare earth alloys</td><td rowspan="2">Rare earth magnets, etc.</td></tr>
<tr><td>Ferroalloy (containing ≥10% rare earths)</td><td>Other rare earth alloys</td></tr>
<tr><td colspan="4">Export quota</td><td colspan="2"></td></tr>
<tr><td>Extraction quota</td><td>Production quota</td><td colspan="4"></td></tr>
</table>

7.583. China submits that the product coverage of the challenged 2012 rare earth export quota reflects China's sovereign right to set its conservation objective at a particular level.[910] According to China, all rare earth metals are produced only from rare earth oxides and salts. The export quota divides the total amount of rare earths at the processing stage into salts and oxides, and allocates shares for foreign and domestic users.[911] Within the limit of their respective shares of the extraction and production quotas, foreign and domestic users decide how much of each type of rare earth product they want to purchase.[912]

[909] The Panel recalls that China claims that the most internationally traded rare earth products are intermediate products, such as oxides, salts and metals. Therefore, the timing of issuing the quotas on the production of rare earth oxides, salts and metals is most relevant to the export quotas. The Panel in this paragraph compares the timing of issuing production quotas and export quotas.

[910] China's second written submission, paras. 63-64.

[911] China's responses to Panel question No. 141.

[912] China's responses to Panel question No. 141.

7.584. As represented in the table above, China imposes volume restrictions on the production of rare earth concentrates, oxides, and salts, while China's export quota covers not only rare earth concentrates, oxides, and salts, but also metals and some high rare-earth content ferroalloys.

7.585. China argues that it must include rare earth metals in its export quota for the purpose of allocating an appropriate share of rare earths resources to domestic and foreign "downstream" rare earth users, who consume not only rare earth oxides and salts, but also metals.[913] Were rare earth metals excluded from the export quota, argues China, foreign users could circumvent the export quota volumes for oxides and salts by purchasing an unlimited amount of metals. Indeed, in extreme cases, *all* oxides and salts produced from legally extracted concentrates in China could be exported in metallic form if metals were not subject to any export control.[914]

7.586. With respect to the situation domestically, China explains that all metals come from oxides and therefore that it does not need to control the production of metals separately. This begs the question why China needs to impose export restrictions on metals if it does not need to control their production – all metals come from oxides, be they exported or not. The Panel does not see any connection between China's differing product coverage and conservation. Rather, this inconsistency seems to highlight China's industrial policy, where metals are inputs in the national production of value-added goods often destined for export. The Panel therefore has difficulty seeing how the product scope of China's 2012 export quota can be considered to "work in conjunction with" the restrictions on domestic production for conservation.

7.587. The Panel also considers that China's argument that foreign users could circumvent the export quota volumes by purchasing an unlimited amount of metals if metals were excluded from the scope of the export quota is flawed, since exporters seeking to export metals would still be subject to the total volume limit imposed by the extraction and production quotas. Therefore, foreign users would not have access to unlimited amounts of metal even if the product scope of the export quota excluded rare earth metals.

7.588. The Panel further notes that China's export quota does not include downstream products, such as rare earth magnets. Following China's logic that "in the extreme case, *all* oxides and salts produced from legally extracted concentrates in China could be used to produce metals that could be exported without controls", it appears to the Panel that even under the export quota's current product scope (i.e. rare earth concentrates, rare earth oxides, salts and metals), all oxides and salts produced from legally extracted concentrates in China could be used to produce metals and then be processed into downstream products, such as rare earth magnets, which could themselves be exported without control. China also explains that the further one moves down the supply chain, the more difficult it becomes to inspect the rare earth content of semi-finished and finished products. According to China, imposing domestic and export restrictions at the downstream stage may well create trade distortions, and would require very burdensome inspections.[915]

7.589. The Panel tends to agree that imposing additional restrictions on finished and semi-finished products that would include small amounts of rare earths likely would be inefficient. Having said this, the Panel recalls that China provides benefits to support exports of those finished products not subject to the export quota such as the VAT rebate. In the Panel's opinion, these benefits operate to stimulate domestic production of downstream products and demand for more rare earths extraction and production, in tension with conservation needs. Additionally, since, as the Panel has explained above, a large amount of Chinese rare earth resources could end up being exported in the form of finished products, the Panel is not persuaded that China's export quota coverage is designed to conserve resources. It seems rather that the point of the coverage is to reserve more raw materials for use by Chinese value-added industries. The Panel recognizes that China, like all WTO Members, needs to balance and implement several policies simultaneously. However, subparagraph (g) offers justification only to conservation-related measures.

7.590. Finally, the Panel recalls that China explains that the inclusion of ferroalloy (containing ≥10% rare earth content) in the export quota is to prevent exporters for circumventing the export quota on rare earths by adding small amounts of other alloy elements into rare earth metals.

[913] China's opening statement at the second meeting of the Panel, para. 32; China's second written submission, paras. 12-13, 70-71.

[914] China's responses to Panel question No. 141.

[915] China's second written submission, paras. 77-78; China's responses to Panel question No. 141.

7.591. The Panel is not convinced that there is a link between exempting metals, ferroalloys, and downstream rare earth products from the production quota while including some of those same products in the export quota (i.e. the metals and ferroalloys), on the one hand, and the goal of conserving exhaustible natural resources on the other. In the Panel's view, the absence of any production quota on metals and ferroalloys is linked to China's industrial policy of promoting its downstream rare earth industry. The fact that China's 2012 export quota on rare earths includes metals and ferroalloys, even though such products are excluded from the production quota, suggests that it is designed to reserve or keep a certain amount of specific rare earth products (i.e. rare earth metals) for use by domestic downstream industries. In the Panel's opinion, this is industrial policy, not conservation.

7.592. The Panel appreciates China's argument that the inclusion of ferroalloys in the export quota is necessary to prevent exporters for circumventing the export quota on rare earths by adding small amounts of other alloy elements into rare earth metals. However, the Panel does not understand why China has not imposed any similar measures to prevent *domestic* circumvention of the production quota. The absence of a similar domestic restriction on the consumption of ferroalloys raises doubts that China's export quota system works together with its domestic extraction and production restrictions.

7.593. With respect to its export policy regarding downstream finished products incorporating rare earths, China argues that it is China's sovereign right to design its rare earth conservation policy by limiting its control to the upstream "rare earth industry" stage of the rare earth supply chain. China insists that the different product scopes of the production and export quotas do not affect in any way the allocation of specific rare earth products to domestic and foreign users. China, as a sovereign state, has the fundamental right to decide its conservation and consumption needs, and thus to set its extraction levels in light of its economic and industrial policies. But, as the Panel has said, conservation is not concerned with *where* extracted resources are consumed. As discussed above, Article XX(g) does not give WTO Members the right to "control the allocation" of rare earths resources once those resources have entered the market. Therefore, sharing the production quota between domestic and foreign users is not itself a conservation-related objective.

7.6.2.2.2.3 Policies on domestic consumption and foreign consumption of rare earths and the question of even-handedness

7.594. The Panel recalls that, because unused export quota shares must be returned to Chinese authorities by 31 October[916] and are allowed to be sold into the domestic market,[917] the Panel found that China's alleged "consumption cap", which results from the combined effect of the production and export quotas, is rather a kind of "consumption assurance", guaranteeing the availability of a minimum amount of rare earths for China's domestic consumers. This suggests to the Panel that China has not been even-handed in imposing foreign and domestic restrictions. Although, as the Panel has explained above, the mere fact that unused export quota volumes can be sold into the domestic market does not, of itself, indicate that China's export quota on rare earths does not "relate to" conservation, it nevertheless does seem to favour domestic over foreign users.

7.595. The Panel also believes 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 restrictions. Moreover, the export quota is not the only restriction imposed by China on exports of intermediate rare earth products. China imposes export duties on intermediate rare earths and lower value-added rare earth products, such as rare earth oxides, salts, and metals, but not on higher value-added rare earth products such as rare earth magnets. The Panel considers the existence of export duties on intermediate rare earths and lower value-added rare earth products to be another example of an uneven burden imposed on foreign downstream rare earth consumers without any equivalent, counterbalancing burden being imposed on China's downstream rare earth industry.

[916] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 42.

[917] China's response to Panel question No. 36.

7.6.2.2.2.4 Temporal disconnect between the export quota and the domestic restrictions referred to by China

7.596. Finally, the Panel finds it significant that China has imposed quotas on the export of rare earth products since at least 2002, but has, according to its own arguments, only maintained restrictions on domestic extraction since 2006 and on domestic production since 2007.[918] The Panel recalls that China has argued that one of the goals and purposes of its export quota on rare earths is to enforce its domestic production and consumption quotas. In the Panel's opinion, however, this argument is difficult to reconcile with the fact that, for the years between 2002 and 2007, China did not impose any domestic restrictions. This raises doubts in the Panel's mind about the nature and, indeed, the existence of any coordination and interaction between the export quota and any domestic restrictions between at least 2002 and 2006. The Panel is well aware that the complainants chose to challenge only the 2012 export quota. Having said this, the WTO case law is clear that panels are entitled to look at the functioning of any challenged measure before and after the date of the request for establishment of a panel when this is useful for the Panel to understand the functioning of the challenged measure. The Panel is also aware that, as the Appellate Body clarified in *China – Raw Materials*, the phrase "made effective in conjunction with" does not require that the challenged measures be designed to make domestic restrictions effective or operative.[919] As such, the mere fact that a restriction on foreign trade was enacted prior to domestic restrictions does not, without more, preclude a regulating Member from arguing that such measure began "working together" with domestic restrictions at a later date (in this dispute, in 2012) and so from relying on the exception in Article XX(g) as of that date.

7.597. Nevertheless, the fact that China's export restrictions pre-date its extraction and production restrictions by 4 and 5 years respectively raises doubts as to whether these two sets of restrictions are designed to work together for conservation. These doubts are amplified when it is recalled that, as the Panel has already explained in the context of its discussion of the legal test under Article XX(g), the requirement that foreign and domestic restrictions "work together" generally implies some degree of temporal simultaneity.

7.598. In the Panel's view, the temporal disconnect between China's export restrictions and its restrictions on domestic production and/or consumption does not demonstrate, by itself, that the two sets of restrictions do not in fact "work together" for conservation. However, this temporal disconnection casts doubt on whether the measures were "made effective in conjunction" with one another. When viewed in the context of and together with the Panel's other findings above, the temporal disconnect between China's export quota and its extraction and production restrictions simply reinforces the Panel's conclusion that the former do not seem to have been "made effective in conjunction with" the latter.

7.599. In sum, the Panel does not understand how China's export quota and domestic restrictions can be considered as working together coherently to enhance conservation.

7.6.2.3 Conclusion on subparagraph (g)

7.600. As explained above, the Panel is of the view that all the elements of subparagraph (g) seek to ensure that challenged measures work in conjunction with domestic restrictions for conservation and to ensure that the conservation burden is distributed in an even-handed manner between foreign and domestic users. The Panel has reviewed the design and architecture of China's export quota system, and has considered whether it (a) relates to the conservation of rare earth ores and (b) works jointly with domestic restrictions for conservation, and therefore whether it is justified under Article XX(g).

7.601. In the Panel's opinion, it is difficult to conclude that China's export quota relates to the conservation of rare earths. The Panel is not persuaded that China's domestic consumption is restricted by the combined effect of China's production quota and export quotas. The Panel agrees that China has some restrictions on domestic production in place, but by setting the levels of the export quota significantly below the level of its alleged production cap, as China acknowledged it has done, China has effectively set aside specific quantities of rare earth products for domestic consumption. Rather than "relating to the conservation of exhaustible natural resources", then,

[918] Rare Earths Data (1999-2012), (Exhibit CHN-137).
[919] Appellate Body Reports, *China – Raw Materials*, paras. 360 and 361.

China's export quota on rare earths seems designed to reserve amounts of rare earth products for domestic consumption.

7.602. With respect to the requirement that measures "relate to" conservation, the Panel is not convinced by China's claim that the texts of its export quota measures themselves demonstrate the existence of a "close" and "real" relationship with the goal of conserving exhaustible rare earth resources. As the Panel has explained, many of the references pointed to by China are indirect, referring not to the goal of conservation but to the *Foreign Trade Law*, which lists several grounds justifying the imposition of export quotas. As such, these references do not provide sufficient evidence of the challenged measures' relationship with the goal of conserving China's natural resources. Even those texts that do refer to conservation simply refer to the "goal" of conserving exhaustible resources, but fail to explain *how* that goal is furthered or promoted through the imposition of an export quota. As the Panel has explained, such references to the goal of conservation, without any further explanation or demonstration as to *how* the measure is designed in such a way as to assist, support or enhance China's conservation programme, do not suffice to establish the requisite relationship between the export quota measures and the conservation objective in Article XX(g).

7.603. Moreover, China not only allows for unutilized export quota shares to be sold domestically, but it does not appear to have any mechanism in place to prevent the illegal selling to domestic users of quantities allocated for export. In the Panel's view, nothing under the Chinese system actually acts so as to prevent expansion of Chinese domestic consumption at the expense of foreign consumption. China essentially leaves it to market forces to determine whether quantities permitted for exportation will indeed be exported and will not instead be used by domestic downstream producers. The Panel does not accept China's justification that its export quota enforces its domestic extraction and production quotas – and thus relates to conservation of rare earths – when there is no mechanism in place for tracing such rare earths that are initially destined for exports but which are finally consumed domestically. More fundamentally, the Panel fails to understand the usefulness of an export quota that is applied on less than 20% of rare earths extracted annually in China, to regulate the remaining 80% that is consumed domestically.[920]

7.604. The Panel agrees with China that its export quota may signal to the world its limited resources and its conservation policy, but China has not been able to demonstrate how it manages to tackle the perverse signals that export quotas usually send to domestic consumers. The Panel therefore does not accept China's argument that its export quota relates to conservation by virtue of its signalling function.

7.605. Importantly, the Panel does not agree with China that its sovereign right over its natural resources allows it to control international markets and the domestic and international allocation and distribution of rare earths. China, as a sovereign WTO Member, can control the amount of rare earths it extracts, but once such resources enter the market, they are subject to WTO rules, which prohibit quotas unless justified under one or more of the GATT exceptions. China has not convinced the Panel that the right in Article XX(g) to adopt measures for conservation provides China with the right to control the domestic and international allocation and distribution of rare earths.

7.606. The Panel recognizes that it is vitally important for China to control at its border, via checking and policing exercises, all exports of natural resources, including rare earths. But the Panel fails to understand why such regulatory control is exercised through a quota system that limits the *amount* of legally produced rare earth products that can be exported. As the Panel has explained, there is no reason why China's legitimate customs controls and checks could not be carried out in the absence of an export quota. China could easily maintain the same legislative apparatus for policing exports even if it were not applying any export quota. Border controls and policing can be WTO-consistent even when imposed on products traded without quantitative restrictions.

7.607. Moreover, the Panel fails to see how an export quota administered at the border could in any way work to control or prevent smuggling that occurs outside of the regulated chain of

[920] According to Updated Rare Earth Data, (Exhibit CHN-191), the actual level of exports of smelted and separated products in 2012 was 14,000 tonnes, whereas the actual level of production was 82,000 tonnes.

commerce. As such, the Panel cannot accept China's argument that the export quota relates to conservation by assisting China to detect and prevent smuggling or illegal extraction and production, since, inter alia, the vast majority of what is extracted and produced is destined to China's domestic market.

7.608. The Panel notes also that China characterized its production quota, access regulations, resource tax, and environmental regulations as even-handed domestic counterparts to the challenged export quota.

7.609. In the first place, the Panel recalls that it has been unable, on the basis of the evidence presented, to find that China's extraction and production caps constitute "restrictions" within the meaning of Article XX(g). China has not provided the Panel with sufficient evidence of expected demand for rare earths during 2012, and as such the Panel cannot determine whether China's extraction and production cap were set at levels lower than the expected demand for the period of time over which the restriction was intended to apply (here, 2012).

7.610. The Panel recalls further that China's access regulations, production quota, environmental regulations, and resource tax affect domestic and foreign users equally, whereas China's export quota applies exclusively to foreign users. Since China does not impose any limits on domestic consumption or a tax that applies exclusively to domestic users, the Panel does not accept that China's export quota has any domestic counterpart. In consequence, the Panel finds that given the structure, design, and architecture of China's export quota system, it is not balanced or "even-handed".

7.611. Additionally, in light of our analysis above, the Panel does not understand how China's export quota could be said to work together with China's domestic restrictions when the extraction, production, and export quotas are applied at different dates, on different products, and denominated in different values[921] without any apparent coordination among them.

7.612. In the Panel's view, China's export quota seems to be designed to guarantee a minimum amount of rare earths for its domestic downstream industries, which are themselves encouraged to export their final products. This is also confirmed by the existence of stimuli for exportation of higher value-added products. The Panel notes in particular that, in contrast to its export restrictions on lower value-added products, China provides export incentives through, for example, refunds of the value-added tax (VAT) upon the exportation of higher value-added products that use rare earths such as rare earth magnets.[922]

7.613. The Panel acknowledges that WTO Members have legitimate rights to pursue industrial policies, and that not all aspects of China's export quota must be about conservation. However, the design and architecture of the export quota must operate so as to assist, support or enhance conservation if China wishes to justify the export quota pursuant to Article XX(g).

7.614. Having examined the design, structure, and architecture of China's export quota and the related domestic restrictions, it is clear to the Panel that China maintains a comprehensive conservation programme. Nevertheless, the Panel finds that China has failed to justify its rare earths export quota, which is the measure challenged by the complainants, under Article XX(g) of the GATT 1994.

7.615. Nonetheless the Panel continues its examination of the matter at issue with the parties' arguments relating to China's statement that its export quota complies with the chapeau of Article XX.

[921] On the issue of denomination in different values, see para. 7.650 below.

[922] Japan's second written submission, paras. 261 and 294; United States' comments on China's response to Panel question, No. 103.

7.6.3 Application of the chapeau of Article XX to China's export quota on rare earths

7.6.3.1 Whether China has demonstrated that its export quota on rare earths was not applied in a manner that constituted arbitrary or unjustifiable discrimination or a disguised restriction on international trade

7.616. China argues that its export quota system is not applied in a manner that arbitrarily or unjustifiably discriminates against users of rare earths in the United States, the European Union, or Japan. It argues further that its export quota system does not constitute a disguised restriction on international trade. In particular, China argues that its export quota system allocates the limited supply of rare earths in a manner sufficient to meet foreign demand, and submits that the export quota is not a genuine and substantial cause of differences between domestic and foreign prices of rare earth products.[923] China points out that its 2012 export quota on rare earths makes no distinction in respect of the destination of exported rare earth products. Therefore, argues China, the quota is not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".[924]

7.617. In response to a question from the Panel, China acknowledged that "the requirement not to apply an export quota system in a manner that would constitute 'arbitrary discrimination' covers arbitrary discrimination between domestic and foreign consumers".[925]

7.618. The complainants argue that China's rare earth export quota, as such and as administered, discriminates against other WTO Members and their industries by creating an advantage for rare earth-consuming Chinese industries that would not have existed in the absence of such quota.[926] They submit therefore that China's position that the export quota is not applied in a manner that constitutes arbitrary or unjustifiable discrimination because it "make[s] no distinction in respect of the destination of the products that are exported" is insufficient to satisfy its burden under the chapeau.[927] Moreover, the complainants argue that the application of the rare earth export quota has resulted in discrimination between foreign and domestic users, as illustrated by the drastically higher prices paid by foreign consumers for the very same products. According to the complainants, this discrimination, which serves no conservation-related purpose, is arbitrary and unjustifiable.[928]

7.619. China explains the process of determining export quota volumes and argues that the 2012 and 2013 export quota volumes were determined in a manner that was not "arbitrary or unjustifiable" and did not result in any restriction on international trade.[929] According to China, when it set the volume of its 2012 export quota, it took into account "situations concerning domestic resources, production and consumption, and the international markets".[930] China explains that, after considering these factors, it determined how much of its rare earth resources would be preserved for future use and how much would be consumed during 2012 by users in China and abroad.[931] China points out that, when China's consumption of rare earths is compared with consumption by the rest of the world, it becomes clear that the export quota allocates the limited supply of rare earth products between foreign and domestic users in shares that closely approximate relative foreign and domestic demand.[932] Moreover, according to China, the 2012

[923] China's second written submission, paras. 101 and 110.
[924] China's first written submission, para. 336.
[925] Panel question No. 47. Specifically, the Panel put the following question to China: "Complainants argue that discrimination between 'countries' within the chapeau of Article XX of the GATT 1994 includes not only MFN-type discrimination, but also NT-type discrimination (see, e.g. paragraph 54 of the European Union's oral statement at the first substantive meeting). Does China agree?"
[926] United States' second written submission, paras. 307-308; European Union's second written submission, para. 225.
[927] United States' second written submission, paras. 293-295; Japan's second written submission, para. 168.
[928] United States' second written submission, para. 299; Japan's second written submission, paras. 167-175.
[929] China's second written submission, para. 115.
[930] China's second written submission, para. 110 (referring to *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13)).
[931] China's second written submission, para. 110.
[932] China's second written submission, para. 111. See also S. Shaw and J. Chegwidden, "Global Drivers for Rare Earth Demand", *Roskill Information Services*, August 2012, p. 32, (Exhibit CHN-4), (reporting that

export quota volume was set at the same level as the quota volume in 2011 despite the fact that the 2011 rare earth export quota was not filled. In China's view, by keeping the export quota volume for 2012 at the 2011 level, China allocated a significant amount of rare earth products for priority consumption by foreign users. China notes that, in 2012, the export quotas for light and medium/heavy rare earths were more than sufficient to meet foreign demand, as evidenced by the fact that the 2012 quota was not filled.[933] With respect to the complainants' argument that stockpiling during 2010 is one reason for the quotas not being filled in 2011 and 2012, China argues that the fact that foreign buyers were able to stockpile prior to 2011 demonstrates that the export quotas were set at an appropriate level, thereby ensuring that supply was more than sufficient to meet foreign needs.[934]

7.620. China submits that its export quota system, rather than being applied in a manner that constitutes a disguised restriction on international trade, is genuinely designed to contribute to the effectiveness of China's overall conservation policy. In particular, China argues that the lack of any "disguised restriction on international trade" in its export quota system is demonstrated by the following facts: (a) the export quota volumes for 2011 and 2012 were sufficient to meet foreign demand; (b) the 2012 export quota system creates incentives for exporters to meet the demand of foreign rare earth users, most notably through the eligibility criteria for enterprises applying for a share in the quota and the formula used as the basis for calculating enterprises' export quota shares; and (c) the fact that there is no distinction between specific rare earth products in the export quota system beyond division into two general categories: light and medium/heavy rare earths.[935]

7.621. The Panel recalls that it is for China, as the party who invoked Article XX of the GATT 1994, to demonstrate that its rare earths export quota is not applied in a manner that constitutes unjustified or arbitrary discrimination, either among foreign users or between domestic and foreign producers and consumers. As the Panel understands it, China raises two main arguments in support of its position that its export quota system does not impose any discrimination, let alone any unjustified discrimination, against other Members. The first one is that the export quota on rare earths was not filled in 2012.

7.622. The complainants, however, argue that quotas create, even when unfilled, some uncertainty among consumers, as compared to a situation in which there are absolutely no restrictions on access to such resources.[936] Such uncertainty would provide incentives for downstream users of rare earths to relocate to China to ensure a stable supply of rare earth inputs.[937] China responds that its conservation policies create uncertainty both for domestic and foreign consumers, that is, the uncertainty cost does not fall disproportionately on foreign consumers.[938] In addition, China asserts that most industry relocation to China took place *prior* to China's tightening of its export quotas in 2008 and 2010.[939] In China's view, this shows that the principal reasons for companies using rare earths to relocate to China are the need to be located near their customers[940] and to exploit China's competitive advantages in the production of rare earth-containing products[941], and not the export quotas.

7.623. The second (and related to the first) main argument that China puts forward in support of its position that its export quota system does not impose any discrimination, let alone any unjustified discrimination, against other Members, is that there is no price difference between the foreign and domestic rare earth markets. The complainants contest this claim. They argue that (a) China's price data is based on an improper "adjustment" methodology; (b) for most of 2012, even adjusted export prices exceeded domestic prices significantly; (c) there are no substantial quality

"China accounts for nearly 70% of demand in 2012". Therefore, non-Chinese demand is residually estimated as 100-70 = 30% (red bar in the graph on p. 32 of the Exhibit)).

[933] China's second written submission, paras. 112-113.

[934] China's second written submission, para. 114.

[935] China's first written submission, paras. 232- 249.

[936] Prof. L. Alan Winters, *Under-filled export quotas do not indicate that the quotas impose no costs on non-Chinese users*, (Exhibit JE-141).

[937] United States' second written submission, para. 131.

[938] China's response to Panel question No. 87.

[939] Dr David Humphreys, *Developments in rare earth-using industries*, (Exhibit CHN-163).

[940] Dr David Humphreys, *Developments in rare earth-using industries*, (Exhibit CHN-163).

[941] Dr David Humphreys, *A response to expert evidence supplied with their Second Written Submissions by the United States, the European Union and Japan*, (Exhibit CHN-186).

differences between the most commonly consumed domestic and exported rare earth products; and (d) any difference in the Chinese domestic price of rare earths, in comparison with the foreign price, provides a direct competitive advantage to Chinese producers of value-added products containing rare earths.[942] The complainants also point to alternative measures that would contribute to China's conservation goals while reducing the level of discrimination and trade restrictiveness that is caused by the export quota. The Panel will consider first the main arguments of China, i.e. that its export quota was not filled in 2012 and that there is no price difference between rare earths sold domestically and those sold outside China.

7.624. In light of the legal test discussed earlier, the Panel will examine whether China has demonstrated that the application of its export quota on rare earths does not cause arbitrary or unjustified discrimination or a disguised restriction on international trade. The Panel will first determine whether there is discrimination and/or a disguised restriction on international trade. If we make an affirmative finding in this respect, we will then determine whether such discrimination or disguised restriction is based on or explained by a conservation rationale. Finally, we will consider whether WTO-consistent alternative measures exist, before concluding overall on China's compliance with the chapeau of Article XX.

7.625. As noted in the Panel's discussion of the legal test, WTO jurisprudence recognizes that the same facts can be relevant in analysing unjustifiable or arbitrary discrimination and disguised restrictions on trade, and that often these concepts overlap. In the present dispute, China's own argumentation about the non-use of the 2012 export quota and the absence of price differences is threaded between these two overlapping concepts. In the Panel's opinion, a situation of discrimination that is not justified constitutes a disguised restriction on trade, but a disguised restriction on trade may exist even if there is no discrimination. For ease of exposition, the Panel will examine different aspects of China's export quota under both of these concepts together.

7.6.3.1.1 The allocation of the export quota in two broad quotas, while export demand and supply may be product-specific

7.626. The Panel recalls China's claim that the mere fact that the 2012 export quota was unfilled necessarily or automatically means that the export quota cannot have had any discriminatory impact. As we have explained above, China bears the burden of establishing every element of its defence, including, in this case, that the challenged export quota on rare earths was not applied in a manner that constituted arbitrary or unjustifiable discrimination between countries where the same conditions prevail. China has attempted to discharge this burden by arguing that where, as in 2012, an export quota is not fully filled, it cannot have had any discriminatory impact.

7.627. The Panel queries whether the fact that the quota was not filled necessarily means that there was no restriction on foreign consumers accessing certain rare earth elements, leading to instances of discrimination. This is so because, as the Panel understands it, exporting firms may decide to export only one or a few rare earth elements, depending *inter alia* on expected demand as well as on their own corporate structure and capacity and business plans and priorities (including industrial specialization, if any).[943] Therefore, even if within their light and/or medium/heavy export quota shares exporters can choose which particular rare earth element(s) to export[944], and even if exporters were able to purchase individual rare earth elements on the

[942] European Union's second written submission, paras. 197-209; Japan's second written submission, paras. 189-195.

[943] China's first written submission, para. 26, notes that "rare earth elements are sold and traded in many different forms." Similarly, China's response to Panel question No. 21 indicates that there are different markets for different rare earths products. According to China's own expert evidence, "the 'rare earths market' does not exist. We cannot treat rare earths as a single commodity": see Exhibit CHN-4, p. 7, cited in United States Opening State at the First Meeting, para. 51. In the Panel's view, the parties' description of the rare earths market could support an inference that export specialization is possible.. The possibility of specialization is also suggested by China's explanation that light rare earths are produced in the Northern part of China while heavy/medium rare earths are mainly found in the southern part of the country: see China's first written submission, para. 85; China's response to Panel question No. 105. In the Panel's opinion, the vertical integration of rare earths production in China could very well lead some enterprises to specialise in the exportation of only some rare earth elements, rather than every element in both the light and the medium/heavy categories: see European Union's comments on China's requests to review precise aspects of the Panel's interim reports, para. 9.

[944] China's first written submission, para. 249; China's response to Panel question No. 21 (indicating that exporters decide what products to export within their export quota shares); Japan's first written

market[945], it is possible that some exporters may not have the technical capacity or be in the commercial situation to export all rare earth elements within the light and/or medium/heavy categories. Where an exporting enterprise has not fully used its quota by 31 October, it must return any unused volume to Chinese authorities. Moreover, exporting firms are prevented by law from exchanging export quota licences *inter se*.[946] In this situation, it would be possible that the overall export quota volume may be unused, and thus partly available for domestic consumption, while foreign demand may still be unsatisfied for one or more specific rare earth products.

7.628. In its comments on the Panel's Interim Reports, China claimed that the Panel's analysis on this point was not supported by the evidence on the record, and alleged, apparently for the first time, that "exporting firms, even if not allowed to sell export quota shares among themselves, can always purchase individual rare earths elements that are in demand on the market and export until their quota share is filled".[947] According to China, "[i]f exporters consider that a particular type of rare earth is needed more than another element by their clients, it is undisputed that they can buy this rare earth element on the market and export it to clients".[948] This new argument was not supported by any footnote reference or other evidence. As we have explained in our Interim Review section, in order to properly assess the implications of the fact that exporters may be able to purchase individual products on the domestic market, the Panel would need to re-open its investigation and ask further questions to the parties. The Panel still believes that, even if exporting enterprises are able to purchase any product on the market, it remains the case that an unfilled quota may still be discriminatory for the reasons given hereafter, and this whether or not exporters may, in practice, export only a few products and/or may be able to purchase individual rare earths products on the domestic market. Nevertheless, we take note of China's point, and we have adjusted our reasoning in the following paragraphs so that it will be clear that our findings that unfilled quotas can still be discriminatory are not based on an understanding that some exporters may not export all products.

7.629. Before proceeding, the Panel also notes the United States' argument that the division of the export quota into two categories raises the problem that consumers of some rare earth elements may be unable to obtain a sufficient or even any supply of a specific rare earth element if exporters use the full volume of the export quota to export a different rare earth element.[949] The Panel need not deal with this argument here, since China's 2012 export quota on rare earths was not filled.

7.6.3.1.2 Unfilled quota shares

7.630. As we have noted, China argues that the unfilled 2011 and 2012 export quotas demonstrate that there was no discriminatory treatment of foreign consumers as a consequence of the 2012 export quota.

7.631. The Panel agrees with China that, in general, quota utilization can be a relevant factor in establishing the existence and nature of a quota's restrictive effects. However, for a number of reasons, the Panel is not persuaded that such evidence is sufficient to establish non-discrimination here.

7.632. First, the Panel is not persuaded that the unfilled export quota is evidence of non-discrimination in this case because China has applied export restrictions (quota and duties) on rare earths for over a decade, and therefore the international rare earths market has adjusted to long-term distortions. China has not successfully rebutted the complainants' arguments that business uncertainty caused by the long-term imposition of export quotas could lead to reduced foreign demand of the product under quota, which could explain, at least in part, why the 2012 quota was not filled. Business uncertainty may lead foreign enterprises to opt for second- or third-best business choices, including relocation of downstream users to China to ensure a stable supply of

submission, para. 78 (indicating that exporters freely choose what particular elements to export from within the light and medium/heavy categories). See *2012 List of Enterprises for the Export of Rare Earths*, (Exhibit CHN-55, JE-66) (announcing enterprises- shares of the rare earths quota in light and medium/heavy rare earths).

[945] China's comments on the interim reports of the Panel, paras. 49-50.
[946] China's responses to Panel question Nos. 143 and 144.
[947] China's comments on the Interim Reports of the Panel, para. 50.
[948] China's comments on the Interim Reports of the Panel, para. 50.
[949] United States' second written submission, para. 303.

rare earth inputs[950], thus representing a disproportionate cost for foreign enterprises even when the quota remains unfilled.

7.633. In particular, the Panel 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.[951] As China itself acknowledges, if foreign demand shifts inward, the export quota can cease to be "binding"[952], that is, it can remain unfilled, but this is not necessarily an indication that the export quota does not have any discriminatory effect on foreign users. Rather, this could be an indication that the export restriction, which China has applied for over a decade, has distorted international trade and investment. In other words, the effects of the export quota are not being compared to the appropriate counterfactual (China's exports had the quota not been in place).

7.634. Indeed, Paragraph 7 of the Ad Note to Article XXVIII of the GATT 1994 recognises that when determining the market share of an export in the context of a Member's renegotiation of a schedule, the situation of the affected Member should be assessed as if there had not been discrimination in place. It is difficult to determine in the case before us precisely the degree to which the lack of quota fill 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.

7.635. Second, the Panel is not persuaded that the unfilled export quota is evidence of non-discrimination because this argument ignores the fact that, as acknowledged by all parties including China, a large proportion of demand for exports of rare earths is satisfied illegally, i.e. through smuggling.[953] While the Panel agrees with China that smugglers seek "to get past governments regulations"[954] (including China's production restrictions), the Panel considers that, according to the evidence put forward by the parties[955], smuggling may also be due to the export quotas (beyond production restrictions) themselves. To the extent that an unfilled quota may be a consequence of the quota itself, i.e. because the quota's existence encourages smuggling that satisfies some foreign demand, the Panel considers that the unfilled quota in this case cannot be taken as evidence of non-discrimination.

7.6.3.1.3 Price differences

7.636. A second pillar of China's defence of its 2012 export quota system is that the export quota has had no "effects" on the foreign price of rare earth products. In support of this position, China provides estimates of differences between foreign and domestic prices for 15 products (namely europium, dysprosium, terbium, neodymium, praseodymium, cerium, lanthanum, in their oxide and metal forms respectively, and for yttrium in metal form only).[956] China excludes samarium and

[950] European Union's second written submission, para. 159; *Magnet FAQs*, (Exhibit JE-112); Roderick G. Eggert, *Rare Earth Elements*, (Exhibit JE-129).

[951] The Panel accepts, as China argues, that relocations to China may not necessarily be wholly attributable to the imposition of export quotas: see Dr David Humphreys, *Developments in rare earth-using industries*, (Exhibit CHN-163).

[952] Prof. Jaime de Melo, *Selected Economic Issues Regarding Export Quotas and Production Quotas*, (Exhibit CHN-157).

[953] United States' second written submission, para. 297, *Rare earth exports to be below quota*, chinadaily.com.cn, 4 March 2013, (Exhibit JE-109); *Smuggling blights rare earth industry*, chinadaily.com.cn, December 14 2012, (Exhibit JE-104); *Rare earth smuggling from China exceeds official exports*, WantChinaTimes, 10 August 2012, (Exhibit CHN-151); SinoCast, *Rare Earths Exporters Facing Shifting Risk*, Exhibit (JE-117), *The Rare Earth Industry is Still in the Downturn*, (Exhibit CHN-152)

[954] China's Second Written Submission, para. 45.

[955] See, e.g. United States' second written submission, para. 127; European Union's second written submission, para. 125; United States' response to Panel question No. 33; and China's second written submission, para. 45.

[956] This evidence is presented in Annex 1 of China's second written submission.

gadolinium from the analysis because, it argues, there is only sporadic trade for these two products.[957] China also excludes yttrium oxide from its price analysis on the ground that the domestic and exported yttrium oxides are of different purity.[958]

7.637. China's defence with regard to pricing data relies on two main arguments. First, China argues that the price data analysis demonstrates that "the differences between domestic and foreign prices for the same rare earth products collapsed dramatically by the end of 2012" and that the *narrowing* and, in many cases, *elimination* of the price gap through the year demonstrate that the 2012 export quota could not be imposed in order to maintain or create a price difference to advantage China's domestic rare earths users.[959] Second, China argues that any difference between foreign and domestic prices was not *caused* by the export quota in 2012. According to China, it is economically impossible, under the conditions prevailing in the Chinese rare earths market at present (that is, export duties between 10-25%, a largely unfilled quota, and the large number of firms that are allocated export quota shares)[960], that an unfilled export quota could cause any differences between foreign and domestic prices.[961] The Panel will consider each of these arguments in turn.

7.638. As regards the *size* of the price gap, the Panel has difficulty accepting China's argument that an alleged narrowing of the price gap during 2012 demonstrates that the 2012 export quota could not have as its objective that of maintaining or creating a price difference to advantage China's domestic rare earths users.[962] The Panel observes that estimates of the price gap provided by the parties vary significantly across products. Foreign prices are higher than domestic prices for several products. In Annex 1 of its second written submission, for example, China's weighted average price gap analysis shows higher foreign prices in 2012 for the following products: dysprosium metal (foreign prices higher by 24%) and dysprosium oxide (93%), europium oxide (54%), terbium oxide (57%) and terbium metal (64%), yttrium metal (54%), neodymium metal (13%), and praseodymium metal (33%). Furthermore, the Panel notes that at the end of 2012, the foreign price for 9 of the 15 products for which China provided data in Table 2 of its response to the Panel's question No. 78 was still higher than the domestic price. Having said that, the Panel recognizes that the price gap was smaller than at the beginning of 2012. In any case, and importantly, foreign prices still exceeded domestic prices for several products as of 28 May 2013[963], the month China claims best represents a "normal" situation. The Panel also notes that for several products (dysprosium metal, dysprosium oxide, europium oxide, terbium oxide, terbium metal, and yttrium metal), the percentage gap between the foreign price and the domestic price increases over the period 2007-2012 for which the analysis is provided.[964]

7.639. Given the persistence of the price gap between foreign and domestic prices in the cases indicated above, the supposed narrowing of the price gap through 2012 and the alleged elimination of this difference by May 2013 for some products is not, in the Panel's view, evidence that the 2012 export quota was not imposed with a view to providing a competitive advantage to the downstream industry through price discrimination.[965] It is the view of the Panel that the evidence before it does not allow to exclude the possibility that existing price differences (be they large or small) have indeed provided a competitive advantage to Chinese producers of value-added products containing rare earths, since in a competitive market, even small differences may provide an advantage. Even "narrowing" differences in critical raw materials such as those at issue may potentially be "significant" in a market where downstream producers face severe competition, thus providing an advantage to domestic users of rare earths in China. China has not

[957] China's response to Panel question Nos. 40-42.
[958] China's second written submission, footnote 261.
[959] China's response to Panel question No. 78.
[960] Prof. Jaime de Melo, *Response to Prof. Grossman and Prof. Winters' Expert Reports*, (Exhibit CHN-206).
[961] Prof. Jaime de Melo, *Selected Economic Issues Regarding Export Quotas and Production Quotas*, April 2013, (Exhibit CHN-157).
[962] China's response to Panel question No. 78.
[963] As reported in Table 2 of China's response to Panel question No. 78.
[964] Evidence provided by Prof. L. Alan Winters, *The Effect of China's Rare Earth Export Restrictions on Export Prices*, (Exhibit JE-169) supports the view that these price differentials have been caused by export quotas.
[965] As indicated in Roderick G. Eggert, *Rare Earth Elements*, (Exhibit JE-129), other reasons can explain the narrowing of the gap between foreign and domestic prices of rare earths, such as consumers' drawing down inventories that they purchased previously, slow economic growth worldwide, market uncertainty.

demonstrated that the positive gap between foreign and domestic prices – where it existed – did not provide a competitive advantage for its downstream sector.

7.640. More generally the Panel has concerns about the reliability of the data and the methodology used in China's analysis of the price gap.

7.641. In the first place, the Panel is concerned with the fact that the price data on which the analysis is conducted may not reflect actual pricing, and that "this practice could lead to both the over-estimation of the likely foreign price as well as the under-estimating of the foreign price".[966] To the extent that, as stated in China's answer to Panel question 85, this can be one of the factors that explains why domestic prices may appear to be higher than adjusted foreign prices – a result against the basic economic logic - the Panel has concerns about the reliability of the data.

7.642. Second, the Panel has concerns about the methodology that China used to calculate price gaps, considering that it is likely to result in downward estimates of the price difference between foreign and domestic prices of rare earths. For example, China deducted 10% fees from the f.o.b. China price, allegedly because such fees are associated with exportation and they are not included in the compared domestic price.[967] Even accepting, *arguendo*, China's argument that these fees are exclusively associated with exports[968], the Panel notes that the 10% figure is an average between the lower estimate of 0.2% and the upper estimate of 20% in a survey of exporters.[969] The wide difference between these two estimates casts doubt on the reliability of the 10% simple average, without information on the underlying survey's findings. The Panel acknowledges that China also provided some analysis applying a 5% fee to calculate the ratio between the adjusted FOB price and the Chinese domestic price. However, lacking any information on the distribution of costs, the Panel is not in the position to assess whether a 5% fee is a reliable estimate of average costs. Furthermore, this additional analysis is provided only for 8 rare earth elements and only with regard to the situation at a specific point in time (end of May 2013).[970]

7.643. Moreover, China's foreign adjusted prices are calculated by subtracting the export duty from the f.o.b. foreign price. China argues that the Panel is not entitled to assess the joint effects of its export duties and export quota, since it has invoked different justifications (Article XX(b) and Article XX(g)) respectively for its export duties and its export quota. The Panel disagrees with China that, when assessing the effects of China's export quota, it is prohibited from taking into account the effects of China's export duties on the same products. In the present dispute, China itself asked the Panel to look at the effects of its export quota. The Panel recalls that "in certain cases the effects of the discrimination may be a relevant factor, among others, for determining whether the cause or rationale of the discrimination is acceptable or defensible and, ultimately, whether the discrimination is justifiable".[971] This assessment of the effects called for by China cannot, however, be carried out by setting aside and ignoring the effect on the relevant rare earth of the export duties, in addition to the export quota. Independently of whether China can use its suggested effects test to demonstrate the conservation purpose of its export quota, it is clear to the Panel that, if an effects test is used, it must be applied taking into account all the components that characterize the relevant market.

7.644. From an economic perspective, as China itself recognizes, export duties and export quotas may interact, and their price effects may overlap. It can be difficult, therefore, to disentangle the effects of these two restrictions. For example, the presence of the export duty may at times lead the quota to have no apparent effect on foreign price, in the case in which the duty reduces the quantity demanded to below the export quota level. However it would be erroneous to conclude that in this circumstance the export quota has no effect at all. To the contrary, the export quota may still have an effect if it reduces exports to a lower level than their free trade level (that is, their level in the absence of the export duty).[972]

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[966] China's response to Panel question No. 85.
[967] China's first written submission, para. 136.
[968] China's comments on the complainants' response to Panel question No. 82.
[969] China's second written submission, footnote 347.
[970] China's opening oral statement at the second meeting of the Panel, para 53; *Updated rare earth metal prices applying different "other export-associate fees*", (Exhibit CHN-197).
[971] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 230.
[972] Prof. Jaime de Melo, *Response to Expert Report by Prof. Winters*, (Exhibit CHN-195); European Union's second written submission, para. 200.

7.645. China asserts that this scenario is not applicable to the current situation in the rare earths market because the fill rate for China's export quotas on rare earth products is very low (only around 50%) and the demand for rare earth products is inelastic – that is, a decrease in the price of rare earths leads to only relatively small increases in demand. Therefore, the removal of China's export duties (ranging between 10% and 25%) for rare earths would not result in an increase in exports that would be anywhere close to the level required to fill the export quotas.[973]

7.646. The Panel acknowledges that this scenario is possible. However, the Panel points out that, although China claims that the demand for rare earths is inelastic, China does not provide an indication of the magnitude of the demand elasticity for rare earths. Furthermore, the Panel notes that parties agree that in the medium-run such elasticity may be higher than in the short-run. However, China does not explain why the analysis of the effects of the simultaneous application of an export quota and an export duty should relate to the short-run, or whether results would remain unchanged if the analysis were to be conducted over a longer time horizon, especially in light of the long period of time during which China has been using these policy instruments.

7.647. As regards the *causal* relationship between the export quota and its alleged discriminatory price effects, China argues that an unfilled quota cannot be the cause of a price difference between foreign and domestic prices.[974]

7.648. The Panel is not persuaded, because there are circumstances when an unfilled export quota can cause a price gap. Since, as we have explained above, an unfilled quota could be discriminatory, it could also cause price gaps. In addition, for example, export quotas can facilitate the exercise of market power. If one exporter raises its price, rivals cannot increase their sales as much as they might like to take advantage of their competitor's higher prices, as they will not be able to sell above the amount that has been allocated under the quota system. In such a situation, the quota may be under-filled, while at the same time foreign prices are higher than domestic prices.[975]

7.649. The Panel considers that determining causation is always challenging, but it is particularly challenging in the present circumstances because quota and duty restrictions have been in place for over a decade. China itself concedes that "it is impossible to isolate the effect of the export quota from a number of other factors during the time period mid-2010 to mid-2012". Given the above, the Panel is not convinced that the evidence of unfilled quota and decreasing price gap, where it exists, through 2012 is sufficient to conclude that China's export quotas were not applied in a manner that would constitute arbitrary or unjustifiable discrimination or a disguised restriction of international trade.

7.6.3.1.4 The use of REO denominations for domestic consumption only

7.650. The Panel also has difficulty with the fact that the 2012 export quota was denominated in gross weight, while the amount of rare earths destined for domestic consumption was denominated in REO tonnes. Thus, the amount of rare earths that could effectively be exported is determined on the basis of a less concentrated form of rare earths, therefore inflating the amount that appears to be exported. This indirectly reduces the proportion between rare earths that is consumed domestically and rare earths exported, and as such appears to the Panel to operate in a discriminatory manner. In its second written submission, China argues that "it is difficult and would be very costly for customs officials to inspect the exact REO-equivalent weight of each rare earth product is presented". The Panel notes the evidence put forward by the European Union that the same quota amount in REO tonnes was converted in consecutive years with a different factor and consequently the gross weight equivalent for 24,000 REO tonnes was different each year: 30,258 tonnes for 2010, 30,184 tonnes for 2011 and 30,996 tonnes for 2012. The Panel notes also the uncontested evidence put forward by the European Union that China never indicated, prior to these proceedings that the quota amount in these years was set at 24,000 REO tonnes. Each year, China published only gross weight figures. At the same time, the Panel notes that China's export quota includes *rare earths alloys containing >10% of rare earths*, which is a downstream product

[973] Prof. Jaime de Melo, *Response to Expert Report by Prof. Winters*, (Exhibit CHN-195).

[974] China's second written submission, para. 123, referring to Prof. Jaime de Melo, *Selected Economic Issues Regarding Export Quotas and Production Quotas*, (Exhibit CHN-157).

[975] Prof. Gene M. Grossman, "*Export Restrictions: Possible Effects of Under-Filled Quotas on Prices and Consumption*", (Exhibit JE-164).

and which can effectively reduce the amount of allowed exports because its weight is potentially considerable, without taking this inclusion into account when fixing the annual export quota amount (the latter remained virtually at the same level in 2011 and 2012). The Panel has doubts as to whether China really needs to use different denominations in its export quotas and in the amount of rare earths destined to domestic consumption.

7.6.3.1.5 The structure of the quota

7.651. The Panel is also concerned about the uneven and unbalanced structure of China's export quota measures. As the complainants have noted throughout this dispute, the measures that China alleges constitute "restrictions on domestic production on consumption," and especially China's extraction and production quotas and its taxes on extraction, also restrict foreign consumption of Chinese raw materials. In other words, every restriction on domestic consumption of Chinese raw materials applies also to foreign consumption. In contrast, China's export quotas impact only on foreign users: there is no corresponding burden, such as a domestic consumption quota, imposed by China on Chinese consumers. Additionally, as the Panel noted above, the difference in the scope of China's production and export quotas seems to favour domestic users while restricting foreign access to certain rare earths products, such as metals. Regardless of whether such structural imbalance meets the "even-handedness" requirement under subparagraph (g) of Article XX, the Panel believes that these features of the 2012 export quota system, which impose unique and special burdens on foreign consumers, are discriminatory in its application.

7.6.3.1.6 Other considerations concerning the manner in which the export quota is determined

7.652. The Panel notes that in 2012, China disclosed for the first time the criteria that informed its decision on the quantity of rare earths to be made available for export. In December 2012, China for the first time published a declaration[976] explaining – in very general terms and *ex post facto* – how its export quotas were set. China relies on this declaration and on *Several Opinions of the State Council on Promoting Sustainable and Sound Development of the Rare Earth Industry*[977], which was issued in May 2011, in alleging that the volumes that it makes available for export are determined taking into account the "situations concerning domestic resources, production and consumption, and the international markets".[978] China submits that its export quota assists in managing the supply of rare earths to domestic and foreign users, and suggests that its decision-making on annual quota volumes available is based on objective criteria and informed by pre-established conservation targets.

7.653. The Panel notes, however, that China has disclosed no details about its mid-term or long-term conservation targets and expected level of demand, and has only provided very general information about the criteria on the basis of which China allegedly sets its export quotas. It is not clear from the evidence that China presented to this Panel what relative weight is ascribed to each of the criteria taken into account in its yearly decisions. The *2012 Declaration* states that Chinese demand was determined based on "industry forecasts based on discussions with industrial users of rare earths".[979] However, there is no evidence that China consulted foreign producers, and China did not contest the complainants' allegation that it had consulted and taken into account the interests of its domestic producers, consumers, and industries. China seems to argue that foreign demand is sufficiently taken into account by looking at the level of actual exports in the previous year (which, of course, were themselves limited by an export quota). In this respect, the Panel considers that China treats domestic interests more favourably than foreign interests.

7.654. The Panel also finds discrimination in the criteria used for allocating the rare earth quota between domestic and foreign users. The export quota level is based on the level of actual consumption in the preceding year, whereas the domestic level seems to be set on the basis of the demand forecasted in China's Five Year Plan. The Panel is also concerned about the formula that China uses to determine the annual allocation of the export quota. This formula is issued annually,

[976] *Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products*, (Exhibit CHN-63).
[977] *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry*, (Exhibit CHN-13).
[978] China's opening statement at the first meeting of the Panel, para. 23.
[979] *Declaration On the Setting Of 2012 Export Quotas on Rare Earth Products*, pt. 13, (Exhibit CHN-63).

as part of the annual export quota measure. As the Panel understands it, the formula could change each year, and there is no guarantee that the quota allocation formula will remain the same from one year to the next. Moreover, as the allocation formula is liable to change annually, the Panel considers that exporters will always face uncertainty as to the weight or significance to be accorded to their export performance in the current year in the quota allocation formula for the following year. This increases the already considerable uncertainty costs that the export quota imposes on foreign rare earth users.

7.655. In the Panel's view, the above analysis suggests that China's export quota on rare earths is applied in a manner that is discriminatory and that constitutes a disguised restriction on trade.

7.656. Finally, the Panel recalls that the export quota system requires exporters to return unexported quantities of rare earths to Chinese authorities by 31 October,[980] after which point they may be sold into the domestic market,[981] but exporting firms are not entitled to exchange their export quota shares inter se. In the Panel's opinion, this results in discrimination against foreign users, since this functioning of the export quota allows and perhaps even encourages domestic stockpiling of rare earths, while ensuring that exporters are never able to build up their own stocks of Chinese rare earths for export. To the Panel, this is discriminatory, insofar as it restricts the access of foreign consumers far more than that of domestic consumers.

7.657. The Panel recalls that the chapeau of Article XX allows for *justifiable* discrimination, which means that the rationale for such discrimination must relate to the policy invoked – in this case, conservation. Having concluded that several aspects of China's export quota on rare earths, including its structure, design, and operation, disfavour and discriminate against foreign users, the Panel now considers whether the rationale for this discrimination is based on conservation considerations.

7.6.3.2 Whether the rationale for the discrimination or the disguised restriction on trade created by the application of China's export quota on rare earths is concerned with conservation

7.658. In accordance with the Appellate Body Report in *Brazil – Retreaded Tyres*[982], the Panel now proceeds to determine whether the discrimination that results from the application of China's rare earths export quota is nevertheless justified and rationally linked to conservation goals. In *Brazil – Retreaded Tyres*, the Appellate Body explained that arbitrary or unjustifiable discrimination exists when the reason(s) for discrimination bear(s) no rational connection to the Article XX objective on the basis of which a Member claims to be regulating, or else contradicts or undermines that objective. This is why the determination whether a measure is discriminatory in violation of the *chapeau* of Article XX should not depend exclusively on its quantitative impact, but must consider also whether the rationale for the discrimination relates to the legitimate objective of the measure. Therefore, to determine whether China has demonstrated that its rare earths export quota does not impose unjustifiable discrimination in violation of the chapeau of Article XX, the Panel will need to consider whether the rationale that China provides for the discrimination relates to the alleged conservation objective of the export quota.

7.659. China submits that its export quota is an integral part of its comprehensive conservation policy. According to China, export quotas are necessary to allow China to manage its resources in a manner consistent with its economic development objectives. In the Panel's view, China has not demonstrated that the distortion created by the application of its export quota system is incidental to its conservation considerations. Rather the discrimination seems to result from components of its export quota systems that reflect industrial policy considerations. For example, the fact that unused export quota volumes must be returned to Chinese authorities by 31 October[983] and may subsequently be sold into the domestic market[984] seems to point toward industrial policy considerations. Further, the Panel does not understand the link between exempting metals and

[980] *Regulations on the Administration of the Import and Export of Goods*, (Exhibit CHN-54), Article 42.
[981] China's response to Panel question No. 36.
[982] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226.
[983] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 42.
[984] China's response to Panel question No. 36.

downstream rare earth products from the production quota but including those same products in the export quota, and the goal of conserving exhaustible natural resources.

7.660. The Panel recalls that more than 80% of rare earths extracted in China are consumed in China. In our opinion, it is difficult to understand the function of an export quota in a situation where the first threat to conservation is domestic. For the Panel, this suggests that the main effect of the export quota on rare earths is to guarantee that domestic consumption benefits from a minimum amount of the extracted rare earths.

7.661. In the Panel's view, although China maintains and enforces a comprehensive conservation policy, the manner in which it operates its rare earths export quota system seems to indicate that its export quota does not relate to conservation considerations but is aimed rather at controlling the amount of rare earths that leaves the country. Moreover, the level of the two-staged 2012 export quota casts doubt on China's alleged conservation objectives. As the Panel noted above[985], China issued the second batch of the export quota in August of 2012, despite the fact that the first batch plus the supplementary batch were already above export needs, thus leading to a 2012 export quota that was never going to be filled and that was inevitably going to be returned to Chinese authorities and possibly resold into the domestic market. The fact that China announced that its first batch (including the supplementary batch) would constitute 80% of the export quota[986], while the second batch amounted to 31% of the total export quota in 2012[987], is certainly an indication that when China issued the first batch of the export quota, the final or total amount of the export quota for 2012 had not yet been set. Finally, as noted earlier[988], the fact that the total extraction quota was not determined or known before 19 April 2012 and the second batch of the production quota was issued only on 8 June 2012, seems to indicate that China waited to be informed of its domestic demand before fixing its level of production and its export quota (determined on 16 August 2012),and raises questions about whether what was ostensibly for export (when there was no further foreign demand after the first batch of the export quota) was in fact designed for domestic consumption.

7.662. The Panel also has difficulty understanding how China's decision to denominate its export quotas in gross weight rather than REO tonnes relates to conservation. The Panel accepts that all WTO Members have the sovereign right to choose to structure and apply their export quota systems in a manner that advances their own conservation goals, but they must do so consistently with their GATT/WTO obligations. In the present case, we are persuaded that China's decision to denominate the export quota in gross weight while it uses REO for domestic consumption is not based on conservation considerations. China argues that "it is difficult and would be very costly for customs officials to inspect the exact REO-equivalent weight of each rare earth product is presented".[989] This may be true, but it suggests that China's export quotas are set with a view to easing the administrative burden of border enforcement and to facilitating trade, rather to conservation. The Panel does not mean to suggest that denominating in gross tonnes could not, as a matter of principle, relate to conservation, but simply finds that China has not provided sufficient details to explain to the Panel how the denomination system adopted – and the discrimination resulting from that system – relates to conservation.

7.663. In sum, China has not demonstrated that the market distortion or discrimination caused by the operation of its rare earth export quota is based on conservation considerations.

7.6.3.3 WTO-consistent alternatives

7.664. It is well settled that discrimination can also be arbitrary or unjustifiable where alternative measures exist that would have avoided or at least diminished the discriminatory treatment. In the context of conducting an analysis under the chapeau of Article XX of a measure provisionally justified under subparagraph (g), the Appellate Body has examined whether a WTO-consistent or less trade-restrictive alternative would be available and would enable the regulating Member to

[985] See the Panel's discussion at para. 7.579 above.
[986] *2012 First Batch Rare Earth Export Quotas*, (Exhibit CHN-56), para. II, p. 1.
[987] *2012 Second Batch Rare Earth Export Quotas*, (Exhibit CHN-58).
[988] See para. 7.507 above.
[989] China's second written submission, para. 176.

achieve its legitimate policy goals with the same degree of efficiency and efficacy.[990] The Panel will review first the arguments of the complainants in this respect and those of China, and will follow with our own analysis.

7.665. The complainants put forward various alternatives that, in their view, China could use instead of export quotas. According to the complainants, these alternatives would provide China with the same level of conservation effectiveness while avoiding the discriminatory and distorting effects that its export quotas have on foreign rare earth users.

7.666. The complainants submit that, to prevent the smuggling of rare earths produced beyond the production targets, China could impose preconditions on rare earth exports to ensure the legality of the export consignments, such as checking VAT invoices. Unlike the export quotas, such preconditions would not be overly broad in their effect because they would not prohibit the export of legally produced rare earths.[991] According to the European Union, if China wanted to prevent the smuggling of rare earths produced beyond the production targets, China could conduct "on-the-spot-checks" at mines and processing facilities, inspect the records of the industries involved, and/or rely on or strengthen the licensing system that China has already put in place for rare earths. The European Union stresses that, by virtue of their economic effects, export quotas tend to create incentives for illegal trade, and argues that stopping illegal international trade is best done in a plurilateral setting. For example, the European Union suggests that, through a mechanism for peer reviewing compliance with defined norms, an incentive would be created for both importers and exporters to reduce or eliminate illegal trade, since internationally-traded goods would be subject to double control at origin and destination. However, even when plurilateral action is not an (immediate) option, screening of exports and automatic procedures for checking shipments are better ways to fight illegal trade than export quotas. In other words, argues the European Union, China has at its disposal a number of alternative measures that would deal with illegal production by controlling production itself and/or controlling trade flows through existing monitoring instruments (e.g. licensing, VAT declarations[992]) but without the use of quantitative restrictions.

7.667. The complainants also suggest[993] that, if China were interested in having an even-handed conservation regime, it could enforce a domestic consumption restriction, such as a domestic sales quota. Such a regime would prevent the export quota from diverting rare earths from the foreign market into China and, in the process, undermining China's alleged conservation goals.

7.668. To respond to China's need to enforce its resource conservation policy, the complainants suggest that China develop an export licensing system, which, they claim, would be just as effective as an export quota at preventing the exportation of illegally produced or smuggled rare earths. China has actually started to implement a tracing system using VAT invoices. To prevent or reduce incentives for domestic producers to engage in illegal mining or production, China could adopt tougher domestic restrictions and strengthen the enforcement of those domestic restrictions. China could also simply set and enforce a production or consumption limit on rare earth ores. If either of these measures were properly enforced, the pace of depletion of rare earth ores could be brought under control. In this context, Japan notes that China has already adopted a form of consumption limit on rare earth ores by imposing an extraction quota on rare earth concentrates.[994] Japan notes that China's argument fails to explain why China cannot control the pace of rare earth consumption given that, according to China's own assertion, China is regulating the production of concentrates. This restriction on consumption could take the form of a sales quota covering both domestic sales and exports, but without mandating quantitative allocation between domestic and foreign users (i.e. a non-discriminatory sales quotas).

[990] Appellate Body Reports, *US – Gasoline*, pp. 25-29, DSR 1996:I, 3, pp. 23-27, and *US – Shrimp*, para. 171 ("The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609".).

[991] Appellate Body Report, *US – Shrimp*, para. 141 (examining whether a measure is overbroad in determining if it relates to conservation).

[992] United States' opening statement at the second meeting of the Panel, para. 42.

[993] See, e.g. complainants' responses to Panel question No. 123.

[994] Ores becomes concentrates when transformed for consumption.

7.669. With respect to the export quota's alleged signalling function, the complainants argue that China could have sent the relevant conservation-related signals to both domestic and foreign users alike in a non-discriminatory manner by tightening its domestic restrictions on production. The complainants insist that such signalling is clearly feasible, since China can simply enforce existing domestic production limits or adopt consumption limits to convey such signals. Considering that users in China are responsible for a large portion of total global rare earth use, such non-discriminatory signalling would be much more effective at controlling excessive production or consumption of rare earths, tungsten, or molybdenum, and would create an undistorted market and therefore a climate for long-term investments.[995] To the extent that the current system reserves the lion's share of Chinese production for domestic industries, this only reduces the incentive for domestic industrial users to take steps to conserve rare earths or to seek substitutes. The European Union adds that a multilateral agreement on developing new rare earths supplies, research initiatives, and/or cooperation projects at the international level could be reached. In this respect, the European Union argues that even where concerted multilateral action is not (immediately) available, a credible public announcement that China is taking serious measures to cut and control rare earth production would induce trade partners to develop new supplies.

7.670. China did not comment extensively on these various, allegedly non-discriminatory alternatives, except to say that it already uses an export licensing system in addition to its export quota system. China maintains that there is no alternative to export quotas for policing and reducing illegal mining and illegal production. It adds that export quotas also enhance the functioning of China's conservation policy through supply management. According to China, nothing is able to replace quotas because export quotas fulfil a number of additional functions. First, they ensure that not only Chinese users but also foreign users receive a signal that China's rare earth supply is not unlimited and that they should explore alternative sources of supply.[996] China expresses concern that in the absence of an export quota, foreign users may consider that they can purchase any share, or even all, of the limited rare earths supply. Additionally, China argues that export quotas ensure stability in the rare earths market by signalling in a transparent manner the volumes of rare earths that will be available to domestic and foreign users. This provides a safeguard against the risk that a speculative demand surge or foreign government-promoted stockpiling could endanger sustainable economic development. Rare earths users know that no such surges will be permitted, given the existence of the export quota.

7.671. With respect to the argument that, to comply with the even-handedness requirement, China should ensure that the unused export quota volumes are not made available to domestic consumers, China responds that it does respect the even-handedness requirement and so is not obliged to explore available alternatives. China insists that when an export quota is not filled, it cannot be the cause of any difference and discrimination between domestic and foreign prices.[997] Hence, the export quota, which was unfilled in 2012, cannot be causing or imposing any uneven-handed impact on foreign users. In these circumstances, it would not further the achievement of the even-handedness requirement to further restrict domestic consumption below the level obtained by deducting the actual export from the production quota volume. For China, preventing domestic users from having access to unused export quota volumes would impose an additional restriction on domestic users and would not further China's conservation objective.

7.672. With respect to the possible use of a domestic sales quota, China asserts without explanation that it does not consider such sales quota to be an appropriate or necessary measure to achieve even-handedness. China adds that restrictions on domestic consumption by industrial users would involve an "undue burden, such as prohibitive costs or substantial technical difficulties"[998], and argues that implementing such measures would require China to "bear

[995] European Union's closing statement at the second meeting of the Panel, para. 10.

[996] China's first written submission, paras. 139-145; China's second written submission, paras. 50-52 China's opening statement at the first meeting of the Panel, paras. 21-22; China's response to Panel question No. 18; China's comments on the complainants' responses to Panel question No. 26; and China's opening statement at the second meeting of the Panel, para. 21.

[997] Prof. Jaime de Melo, *Selected Economic Issues Regarding Export Quotas and Production Quotas*, April 2013, para. 37, (Exhibit CHN-157).

[998] Appellate Body Report, *US – Gambling*, para. 308.

additional administrative costs".[999] However, China has failed to provide any details or evidence as to the administrative burdens or other costs of imposing a domestic sales quota.

7.673. The Panel notes that China does not discuss the fact that all of the alternatives suggested by the complainants are claimed to be WTO-consistent, whereas the export quota it uses is inconsistent with Article XI:1 of the GATT 1994.

7.674. With respect to the complainants' argument that China could send the necessary conservation signals to foreign and domestic rare earth users in a less trade-distorting way, China insists that its conservation policy works and that it has provided evidence of the impact of China's conservation policy on China's rare earth users, including evidence of reduced domestic consumption[1000], evidence of significantly increased domestic prices for rare earths between January 2011 and January 2013[1001], evidence of significant drops in sales by Chinese producers of downstream rare earths-using products[1002], evidence of substitution by Chinese downstream users[1003], and evidence of rare earths recycling projects being researched, developed, and conducted by Chinese enterprises.[1004]

7.675. The Panel recalls once again that it is not asked to assess the efficiency or effectiveness of China's conservation policy, but only to determine whether the export quota China argues is part of its conservation programme are really about conservation rather than another policy reason, and whether any discrimination caused by that quota is justified on the basis of conservation. This requires the Panel to consider whether China has explored the use of WTO-consistent or less trade-restrictive alternatives that could achieve the same conservation goal. In this regard, China has not satisfied the Panel that it has fully explored and justifiably rejected the alternatives proposed by the complainants. In the Panel's opinion, China needed also to explain why such WTO-consistent or less trade-restrictive alternatives are not available to China. In the Panel's view, China has not done so.

7.676. China argues that the alternatives put forward by the complainants are not able to serve or replicate all the functions of an export quota. But the Panel is not convinced that export quotas serve the functions listed by China, or that all of the functions identified by China relate to conservation. In addition, one of the export quota's functions mentioned by China – the possibility of controlling the supply of rare earths – is, as we have said, not contemplated by Article XX(g); as such, China cannot demand that the complainants come up with an alternative means to perform what is essentially an Article XX(g)-inconsistent function.

7.677. The Panel considers that the alternatives proposed by the complainants are reasonably available and appear to be capable of achieving China's desired level of conservation. In particular, the Panel is not convinced that the discrimination caused by China's export quota is merely incidental to its conservation programme and could not have been avoided with WTO-consistent alternative means of policing and controlling illegal extraction, production, consumption, and export of rare earths. Similarly, the Panel considers that the other goals invoked by China to justify the use of an export quota –signalling and safeguarding, can also be reached with WTO-consistent measures. Therefore, for the Panel, the discrimination and trade distortion engendered by China's export quota measures were not based on conservation considerations and were both foreseeable and avoidable, including through the use of WTO-consistent alternative means. In the Panel's view the complainants have met their burden of proof in putting forward alternatives, and China has not provided arguments to rebut them.

7.678. In the Panel's view, China's has not met its burden of demonstrating that its export quota on rare earths is applied in a manner that does not result in unjustified or arbitrary discrimination or disguised restriction on trade against foreign users.

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[999] China's second written submission, para. 100 and China's opening statement at the second meeting of the Panel, para. 33.

[1000] China's opening statement at the second meeting of the Panel, paras. 38, 39 and Figure 4.

[1001] China's opening statement at the first meeting of the Panel, Table 1.

[1002] "*Three Concerns Behind the Prosperity of Rare Earth Listed Companies*", *21st Century Business Herald*, 2 August 2011, (Exhibit CHN-132), pp. 2-3.

[1003] "*Three Concerns Behind the Prosperity of Rare Earth Listed Companies*", 21st Century Business Herald, 2 August 2011, (Exhibit CHN-132), pp. 2-3.

[1004] China's Answers of 8 July 2013, paras. 107-108 and (Exhibit CHN-214): *Introduction of the Rare Earths Recycling in China*, Association of China Rare Earth Industry, 3 July 2013.

7.6.3.4 Conclusion

7.679. In view of the above, the Panel concludes that China has not demonstrated that its 2012 export quota on rare earths was not applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[1005]

7.6.4 Overall conclusion on China's export quota on rare earths

7.680. For the reasons given above, the Panel concludes that China's export quota on rare earths is inconsistent with Article XI:1 of the GATT 1994 and Paragraphs 162 and 165 of China's Working Party Report. The Panel also concludes that China's export quota on rare earths is not justified under either subparagraph (g) or the chapeau of Article XX of the GATT 1994.

7.7 Application of Article XX(g) to China's export quota on tungsten

7.7.1 Introduction

7.681. The Panel will now apply the legal test discussed above to China's export quota on tungsten. The Panel will first assess whether the export quota complies with subparagraph (g), and will then proceed to consider whether the export quota is justified under the chapeau of Article XX, before reaching an overall conclusion on the quota's WTO-consistency.

7.7.2 Application of subparagraph (g) to China's export quota on tungsten

7.7.2.1 First part: whether China's export quota on tungsten relates to the conservation of exhaustible natural resources

7.682. The Panel now proceeds to consider whether China's export quota on tungsten "relates to the conservation of exhaustible natural resources".

7.683. Before proceeding, the Panel notes that the parties have focused less attention on tungsten than on rare earths. China's second written submission has only three pages on tungsten[1006], and does not include any argumentation on whether the export quota on tungsten "relates to the conservation of exhaustible natural resources".[1007] Japan's second written submission does not address the quotas on tungsten in detail.

7.684. Additionally, many of the parties' arguments on tungsten draw on and incorporate their arguments on rare earths. As such, the Panel's findings on China's export quota on tungsten are shorter than its findings on rare earths, and, where appropriate, incorporate some of the analysis already set forth above.

7.7.2.1.1 "exhaustible natural resources"

7.685. China submits that tungsten is being depleted due to intense exploitation, and thus that tungsten resources are "exhaustible natural resources" within the scope of Article XX(g) of the GATT 1994.[1008] China argues that it holds about 61% of the world's tungsten reserves, but bears a disproportionately high burden of producing 83% of the world's tungsten supply.[1009]

7.686. According to the United States, China's argument is based on a simplified assumption that "tungsten" in the abstract is an exhaustible natural resource; however, in terms of the tungsten export quota, "tungsten" covers 14 tariff codes ranging from tungsten ores and concentrates to

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[1005] In view of the nature of the export quota system described above, the Panel's finding is with respect to the series of measures comprising the relevant framework legislation, the implementing regulations, other applicable laws and the specific annual measures imposing the export quotas existing at the date of the Panel's establishment.

[1006] China's second written submission, paras. 179–190.

[1007] These paragraphs are solely concerned with whether China's export quotas on tungsten result in a price advantage for Chinese consumers.

[1008] China's first written submission, para. 297.

[1009] China's first written submission, para. 285 (referring *to USGS Mineral Commodity Summaries 2012, "Tungsten"*, (Exhibit CHN-92), p. 177.

tungsten recyclables and intermediate tungsten products.[1010] The United States recalls that the forms of bauxite and fluorspar subject to the challenged export restrictions in *China – Raw Materials* were clay and a mineral, which, like tungsten ores and concentrates, are basically in the form in which they are mined from the earth.[1011] The United States notes that, in contrast, in the present dispute China's export quotas cover not just ores but also a number of products that "might not themselves be considered 'exhaustible natural resources' because they are intermediately processed products".[1012]

7.687. The European Union does not dispute that tungsten is a natural resource.[1013] However, the European Union stresses that the export quota that China imposes on tungsten is not imposed on tungsten ores, which are not even allocated a quota, but is rather imposed on various forms of tungsten products which have undergone some degree of further processing.[1014]

7.688. The Panel has explained above, in the context of rare earths, that measures can relate to the conservation of exhaustible natural resources even if they do not act directly upon the resource sought to be conserved. Article XX(g) is not only available for measures that apply directly to the raw form of the resource in question, but to any measure that bears a "close", "real", or "substantial" relationship with the goal of conserving an exhaustible natural resources, regardless of the particular product which is the subject of the challenged measure.

7.689. All the parties seem to agree that tungsten ores are exhaustible natural resources. As such, the Panel does not need to determine whether semi-processed tungsten products are "exhaustible natural resources", but will instead focus its attention on whether China's export quota on semi-processed tungsten products are "closely" or "substantially" related to the conservation of tungsten ores.

7.7.2.1.2 "conservation"

7.690. China points out that it has adopted a coherent policy to manage the use of its finite tungsten resources, and that the 2012 export quota on tungsten, challenged by the complainants, is an integral part of this policy and works together with several restrictions on the domestic production and consumption of tungsten resources.[1015]

7.691. According to China, the *Mineral Resources Law*[1016] and the *Foreign Trade Law*[1017] provide a general legal basis for Chinese measures that manage the use of exhaustible minerals, including tungsten. Article 16 of the *Mineral Resources Law* provides that for certain minerals "protective mining is prescribed by the State".[1018] Additionally, Article 16(4) of the *Foreign Trade Law* provides that the export of goods may be restricted "in order to effectively conserve exhaustible natural resources".

7.692. China explains that on 15 January 1991, the State Council specified in the *1991 Circular*[1019] that tungsten is to be considered as one of the "special minerals under the national protective mining". This *1991 Circular* continues in force today. It specifies the reasons for qualifying tungsten as a "special mineral":

> In order to reasonably develop, utilize and protect the national precious resources and push forward the improvement and rectification of the order of mining industry, the State Council decides, pursuant to Article 15 of Mineral Resources Law, to include tungsten, tin, antimony and ion-absorption-type rare earth minerals into the special

[1010] United States' second written submission, paras. 218-219.
[1011] United States' second written submission, para. 222.
[1012] United States' second written submission, para. 224.
[1013] European Union's second written submission, para. 234.
[1014] European Union's second written submission, para. 235.
[1015] China's first written submission, para. 288.
[1016] *Mineral Resources Law*, (Exhibit CHN-10).
[1017] *Foreign Trade Law*, (Exhibits CHN-11, JE-49).
[1018] *Mineral Resources Law*, (Exhibit CHN-10), Article 16(3).
[1019] *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*, (Exhibit CHN-12, JE-72).

> minerals under the national protective mining, and carry out the planned and unified management of their mining, separation, processing, selling and export, etc.[1020]

7.693. As a result of its designation as a "special mineral", exploration and processing of tungsten is subject to strict planning and management to protect the resources and use tungsten in a reasonable manner. The *1991 Circular* mandates that a total production plan is set up for tungsten[1021], and MOFCOM is responsible for developing any export plans for the resource.[1022] China submits that production control and export restrictions are thus integral parts of its conservation policy for tungsten.

7.694. China explains that at present, China's tungsten conservation policy is implemented through the following categories of measures:

- Measures limiting and controlling *access* to the tungsten industry[1023];
- Measures directly *controlling the volume* of the resources being extracted, produced and exported, consisting of an extraction quota (limiting the amount of tungsten concentrates that can be extracted)[1024], a production quota in a *Directive Production Plan*[1025], and an export quota[1026];
- A *resource tax* on tungsten producers to ensure that the price of the resources reflects their costs[1027]; and
- A measure requiring mines to make a *deposit for ecological recovery*.[1028]

7.695. The complainants do not appear to contest that China has a conservation policy for tungsten. For instance, the European Union accepts that China has a tungsten conservation policy[1029], but argues that the export quota on tungsten does not "relate to" this policy.[1030] It concludes that "China's export quota on tungsten does not meet the conditions of subparagraph (g) and of the chapeau of Article XX of the GATT 1994".[1031] Similarly, while the United States expresses some uncertainty about whether China has a "comprehensive

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[1020] *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*, second introductory paragraph, (Exhibit CHN-12, JE-72). Note that this Circular, which dates from 1991, refers to Article 15 of the *Mineral Resources Law*, (Exhibit CHN-10). Article 15 was the provision in the 1986 version of the *Mineral Resources Law* that introduced the category of "specified minerals of which protective mining is prescribed". After amendment in 1996, the corresponding provision became Article 16 of the Law.

[1021] *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*, section 4, first subparagraph, (Exhibit CHN-12, JE-72).

[1022] *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*, section 5, fourth subparagraph, (Exhibit CHN-12, JE-72).

[1023] Mining enterprises must obtain a license for exploration and exploitation of mineral resources. See *Rules for Implementation of the Mineral Resources Law*, (Exhibit CHN-14) and *Administration of Registration of Mining of Mineral Resources*, (Exhibit CHN-15). The conditions for admission to the tungsten industry are specified in *Conditions for Admission to Tungsten Industry*, (Exhibit CHN-93).

[1024] The procedures for administration of the extraction quotas are provided in *Administration of Exploration and Mining of the Specified Minerals*, (Exhibit CHN-18). The 2012 extraction quotas are specified in *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, (Exhibit CHN-19) and *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20).

[1025] The *2012 Directive Production Plan* for tungsten is issued in two batches, as specified in *First Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-94) and *Second Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-95).

[1026] *2012 Export Licensing Catalogue*, Paragraph I(i), (Exhibits CHN-8, JE-48), indicating that tungsten is subject to an export quota. Export quotas are initiated pursuant to *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50) and *Export Quota Administration Measures*, (Exhibits CHN-96, JE-52).

[1027] *Amendment of the Provisional Regulations on Resource Tax*, (Exhibit CHN-26) and *Implementation Rules for the Provisional Regulations on Resource Tax*, (Exhibit CHN-27).

[1028] *Opinions on Enhancing the Ecological Protection and Restoration of Mines*, Section IV, (Exhibit CHN-32).

[1029] European Union's comments on China's response to Panel question No. 108.

[1030] European Union's second written submission, paras. 234 – 243.

[1031] European Union's executive summary (part II), para. 55.

environmental policy for all three groups of products or whether it has distinct such policies tailored to each industry", it does not argue that China has no policy in place for the conservation of tungsten.[1032]

7.696. The Panel begins by noting that China's conservation policy for tungsten is similar in structure to China's conservation policy for rare earths, except that that there are fewer measures. Despite this difference, the Panel believes that its analysis in the context of rare earths is largely applicable in the context of tungsten as well.

7.697. The Panel accepts that China has a conservation policy for its exhaustible tungsten ore resources. As the Panel observed in the context of rare earths, it is certainly in China's own interest to conserve its tungsten resources, and none of the parties have brought evidence to suggest that China has no conservation policy for tungsten.

7.698. The Panel's task is therefore to objectively assess China's export quota on tungsten for compliance with the requirements of Article XX(g). Where the Panel looks at other measures that are also claimed to form part of China's tungsten conservation policy, it does so only for the light such measures throw on the challenged export quota.

7.699. The Panel now proceeds to consider whether China's export quota on tungsten "relates to" the conservation of tungsten ores.

7.7.2.1.3 "relating to"

7.700. As the Panel has observed, China's arguments about tungsten are significantly less extensive than its arguments with respect to rare earths. Whereas China has advanced a number of interrelated arguments as to why its export quota on rare earths "relates to" the conservation of rare earth ores, it seems only to have advanced two reasons why its export quota on tungsten bears a "close", "real", and "substantial" connection to the goal of conserving exhaustible tungsten ores. First, China argues that the texts of its export quota measures include various references to the conservation objective, demonstrating that these measures "relate to" conservation.[1033] Second, China argues that its export quota on tungsten "relates to" conservation because it "enhances the effectiveness of China's conservation policy", specifically by "signalling to foreign users of tungsten of the need to develop and locate other sources of supply or develop substitutes." According to China," [e]xport quotas create a dis-incentive to domestic Chinese producers to expand production (since the amount that can be sold to foreign consumers is limited), while simultaneously creating an incentive for foreign tungsten producers to initiate and expand production."[1034]

7.701. The Panel now proceeds to examine these arguments.

7.7.2.1.3.1 Text of the export quota measures

7.702. According to China, a number of the measures that together constitute China's tungsten export quota contain direct or indirect references to the goal of conserving exhaustible tungsten ore resources.

7.703. The first evidentiary basis that China puts forward as establishing a "close and genuine"[1035] relationship between the export quota and conservation is the reference to conservation in the text of the P*ublic Notice of the Qualification Standards and Application Procedures of the 2012 Tungsten, Antimony and Silver State Trading Export Enterprises, and Tungsten and Antimony Export Supply Enterprises*.[1036] According to China, this Notice specifies the eligibility criteria for enterprises to participate in the 2012 quota allocation process for tungsten and indicates that these measures are adopted "[i]n order to protect the resources".

[1032] United States' comments on China's response to Panel's question Nos. 100, 108.
[1033] China's first written submission, para. 299.
[1034] China's first written submission, para. 307.
[1035] China's first written submission, para. 298.
[1036] See also *2012 Application Qualifications and Application Procedures of Tungsten Export (or Supply) Enterprises*, (Exhibits CHN-100, JE-62).

7.704. The *Public Notice* also specifies that it is adopted on the basis of the *Provisional Measures on Administration of the Export Operations of Tungsten and Tungsten Products*.[1037] These measures state that their objective is to "strengthen[] the management of the export operations of tungsten and tungsten products," and express the objective of "conserving exhaustible non-renewable resources".[1038] They also indicate that the export quota on tungsten is implemented together with "total quantity control of the extraction, production and sale of tungsten and tungsten products".[1039] In light of these references, China submits that the tungsten export quota aims to conserve exhaustible non-renewable resources and is an integral part of China's conservation policy, which also includes production restrictions on tungsten.

7.705. According to China, the fact that the 2012 tungsten export quota was adopted on the basis of measures that refer to China's conservation objective provides further evidence that the quota "relates to" conservation. The legal basis for using export quotas to conserve tungsten resources is contained in the following provisions:

- Article 16(4) of the *Foreign Trade Law*[1040] provides that the export of goods may be restricted "in order to effectively conserve exhaustible natural resources".

- Article 35 of the *Regulations on the Administration of the Import and Export of Goods* indicates that the export of goods that are considered to be exhaustible natural resources in need of conservation, "shall be restricted".[1041]

- For tungsten, specific *Measures for the Administration of Export Commodities Quotas* apply. These measures specify that export quotas, adopted on the basis of Article 35 of the *Regulations on the Administration of the Import and Export of Goods*, and thus pursuing a conservation objective, are administered.[1042]

7.706. The *2012 Export Licensing Catalogue*, which specifies the goods subject to export quotas[1043], MOFCOM's Announcement publishing the total 2012 export quota volume for tungsten[1044], and the Notices publishing the list of enterprises applying for the export quota[1045], as well as the list of enterprises to which shares of the quota have been granted[1046], all refer to the instruments mentioned above as the legal basis for export quotas to conserve resources.

[1037] *2012 Application Qualifications and Application Procedures of Tungsten Export (or Supply) Enterprises*, (Exhibits CHN-100, JE-62). See also *Administration Measures of the Export Operations of Tungsten and Tungsten Products*, (Exhibit CHN-101).

[1038] *Administration Measures of the Export Operations of Tungsten and Tungsten Prod*ucts, Article 1, (Exhibit CHN-101).

[1039] *Administration Measures of the Export Operations of Tungsten and Tungsten Products*, Article 3, (Exhibits CHN-101, JE-49).

[1040] *Foreign Trade Law*, (Exhibits CHN-11, JE-49) Article 16(4).

[1041] *Regulations on the Administration of the Import and Export of Goods*, Article 35, (Exhibits CHN-54, JE-50). Article 35 of the Regulations refers to Article 16(1), (2), (3) and (7) of the *Foreign Trade Law*, (Exhibits CHN-11, JE-49). Article 16(2) of the *1994 version of the Foreign Trade Law* specifies that export restrictions may be adopted to ensure the "effective protection of exhaustible domestic resources". The *Foreign Trade Law* was last amended in 2004, the corresponding provision dealing with conservation of exhaustible natural resources is Article 16(4).

[1042] *Export Quota Administration Measures*, (Exhibits CHN-96, JE-52), Article 3.

[1043] *2012 Export Licensing Catalogue*, introductory paragraph, (Exhibits CHN-8, JE-48) ("Pursuant to the *Foreign Trade Law of the People's Republic of China* and the *Regulations on the Administration of the Import and Export of Goods of the People's Republic of China*, the *2012 Export Licensing Management Goods List* is hereby promulgated").

[1044] *2012 Export Quota Amounts*, (Exhibit CHN-97) ("Pursuant to the *Regulations of the People's Republic of China on the Administration of the Import and Export of Goods* and the *Measures for the Administration of Export Commodities Quotas*, the 2012 total export quota quantity for Agricultural and industrial products are hereby announced".).

[1045] *2012 List of Enterprises for the Export (or/and Supply) of Tungsten, and List of Enterprises for the Export of Molybdenum*, (Exhibit CHN-98) ("… in accordance with the *Foreign Trade Law of the People's Republic of China* and the *Regulations on the Administration of Import and Export of Goods*, the list publishing online the State-Trading Exporting Enterprises of Tungsten, Antimony and Silver of 2012 … are hereby published.").

[1046] *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-99, JE-59) ("According to the *Regulations on Administration of Import and Export of Goods* and the *Measures for the Administration of Export Commodities Quotas*, the list of export (supply) enterprises … is hereby announced and the first batch of the quota is hereby granted.").

7.707. China argues that additional evidence of a "close and genuine relationship" between the 2012 export quota and the conservation objective can be found in the "context" of these measures, namely in the general policy documents for the tungsten conservation policy. In the *1991 Circular*, tungsten was explicitly identified as being among the "special minerals under the national protective mining". As China explains, in 1991, China subjected certain minerals, including tungsten, to "protective mining" with a view to "reasonably develop, utilize and protect"[1047] these resources. Therefore, tungsten production is subject to a total production plan[1048], and MOFCOM determines export plans for this production[1049] to conserve tungsten resources.

7.708. The complainants dispute the probative value of these references to "conservation" in China's export quota measures for several reasons. The complainants consider the references to the goal of conservation in China's export quota measures to be passing references, and argue that China fails to explain how the export quota makes a material contribution to that goal.[1050] The complainants note moreover that China's export quota measures, which have been imposed for over a decade, have only made passing reference to the goal of conservation since the beginning of 2012.[1051] The complainants also contend that cross-references to legal instruments such as the *Foreign Trade Law* and regulations on the export quota measures are insufficient to meet China's burden under Article XX(g), since those instruments also list reasons other than conservation for which the export quotas could have been imposed.[1052] With respect to the *1991 Circular*, the complainants note that this document contains no explanation of the relationship between the export quota and the alleged conservation objective.[1053]

7.709. The Panel begins by reiterating its finding above in the context of rare earths that, while a mere "passing reference" to conservation goals cannot by itself establish the existence of the required relationship between the challenged measure and the goal of conservation, references to conservation in the text of a challenged measure could in principle help to demonstrate that such measure "relates to" conservation. What matters is the nature of the reference(s) in question. Moreover, the Panel reaffirms that the mere fact that textual references to conservation were included for the first time in 2012 does not necessarily undermine their probative value. Again, what matters is the nature of the actual references themselves. As the Panel has noted, the Appellate Body has made clear that "Members of the WTO should not be assumed, in any way, to have continued previous protection or discrimination through the adoption of a new measure", since this "would be close to a presumption of bad faith".[1054] As such, the Panel cannot make any *a priori* judgments about the value and *bona fides* of such references, but instead must closely examine them in their context.

7.710. The Panel has examined the measures referred to by China. It accepts China's argument that some of the export quota measures make reference to conservation-related objectives. However, the Panel also observes that some of the measures pointed to by China include references to other policies, including industrial policies. For instance, the *Public Notice of the Qualification Standards and Application Procedures of the 2012 Tungsten, Antimony, Silver State Trading Export Enterprises and Tungsten, Antimony, Export Supply Enterprises*[1055] does, as China claims, refer to the objective of "protect[ing] the resources and environment." However, the Panel notes that the full sentence referred to by China reads as follows: "In order to protect resources and environment, *in coordination with industry policies of the nation*, and further strengthen the

[1047] *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*, second introductory paragraph, (Exhibit CHN-12, JE-72).
[1048] *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*, section 4, first subparagraph, (Exhibit CHN-12, JE-72).
[1049] *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*, section 5, fourth subparagraph, (Exhibit CHN-12, JE-72).
[1050] United States' second written submission, para. 201; European Union's second written submission, para. 237.
[1051] United States' second written submission, para. 202; European Union's second written submission, para. 237.
[1052] United States' second written submission, para. 203; European Union's second written submission, para. 238.
[1053] United States' second written submission, para. 204; European Union's second written submission, para. 239.
[1054] Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74.
[1055] *2012 Application Qualifications and Application Procedures of Tungsten Export (or Supply) Enterprises*, (Exhibits CHN-100, JE-62).

export administration of rare metal exports…".[1056] In the Panel's opinion, the emphasized phrase is clearly a reference to industrial rather than conservation policy.

7.711. As the Panel explained above in the context of rare earths, it is true that the *1991 Circular* places certain minerals under "national protective mining". However, as the Panel understands it, the focus of the *Circular* is on preventing illegal mining to ensure that the comparative advantage China enjoys in non-ferrous metals is not undercut and protecting the State from "suffer[ing] significant losses".[1057] Although, as the Panel has said, maintaining a "comparative advantage" is not necessarily an anathema to the goal of conservation, the Panel believes that it is primarily an industrial policy objective.

7.712. Finally, the Panel also recalls that the *Foreign Trade Law*, which China claims is referenced in a number of its tungsten export quota measures, lists a number of policy grounds for the imposition of export quotas, including "national security", "shortage of domestic supply" and "other circumstances" as well as "conservation". As such, these cross-references do not provide strong evidence for China's position.

7.713. The Panel notes additionally that, like the *Foreign Trade Law*, the *Regulations on the Administration of the Import and Export of Goods and the Measures for the Administration of Export Commodities Quotas* establish that export quotas can be imposed for a number of reasons besides conservation.

7.714. For instance, the *Measures for the Administration of Export Commodities Quotas* provides for the imposition of export quotas in connection with "development plans, objectives and policies of the States in the relevant industries".[1058] Likewise, Article 35 of the *Regulations on the Administration of the Import and Export of Goods*, to which China refers in its first written submission, provides that "[t]he export of any goods falling into any of the circumstances set forth in subparagraphs (1), (2), (3), and (7) of Article 16 of the Foreign Trade Law shall be restricted". But the paragraphs referred to by China concern restrictions for the purposes of (1) safeguarding national security, social and public interests, or public morals; (2) protecting human or animal health, or to protect the environment, (3) controlling the import and export of gold and silver; and (7) establishing or accelerating the establishment of specific domestic industries.[1059] Subparagraph 16(4) of the *Foreign Trade Law*, which refers to "effectively conserv[ing] exhaustible natural resources", is not explicitly mentioned in Article 35.

7.715. The Panel therefore has difficulty accepting that the various references in China's measures to the *Foreign Trade Law* and the *Regulations on the Administration of the Import and Export of Goods* and the *Measures for the Administration of Export Commodities Quotas* provide any strong support for China's argument that the texts of the export quota measures demonstrate or manifest a "close" and "substantial" relationship with the objective of conserving exhaustible tungsten resources.

7.716. Assessing the various references in China's measures holistically, the Panel considers that China's tungsten export quota measures reference a range of policies and objectives, including conservation and industrial development. The references thus seem to the Panel to send mixed messages, and are ultimately ambiguous. The Panel therefore cannot find that China's export quota on tungsten "relates to" conservation on the basis of these references alone.

7.717. Additionally, and perhaps more importantly, the Panel believes that the texts of China's tungsten export quotas, including their references to conservation, do not explain *how* export quotas relate to the goal of conserving exhaustible tungsten ores. For instance, while the *Public Notice of the Qualification Standards and Application Procedures of the 2012 Tungsten, Antimony, Silver State Trading Export Enterprises and Tungsten, Antimony, Export Supply Enterprises*[1060] refers to object of "protect[ing] the resources", the document contains no indication or explanation

[1056] Emphasis added.

[1057] *Circular on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as Specified Minerals under National Protective Mining*, second introductory paragraph, (Exhibit CHN-12, JE-72).

[1058] *Export Quota Administration Measures*, (Exhibits CHN-96, JE-52), Article 10(3).

[1059] *Foreign Trade Law* (Exhibit CHN-11, JE-49).

[1060] *2012 Application Qualifications and Application Procedures of Tungsten Export (or Supply) Enterprises*, (Exhibits CHN-100, JE-62).

as to how the stated qualification conditions are closely or substantially related to conservation of exhaustible tungsten ores. The document states that the qualification conditions have been adopted "in order" to conserve exhaustible natural resources, but the actual relationship between those conditions and the conservation objective is nowhere explained.

7.718. Similarly, while Article 1 of the *Provisional Measures* refers to the "purpose of strengthening the management of the export operations of tungsten and tungsten products…maintaining the order of export operations of tungsten and tungsten products … and conserving exhaustible natural resources", the relationship between the export quota and the goal of conservation – and specifically how the export quota (as opposed to the extraction and production controls mentioned in Article 2) supports or furthers the conservation objective – is not discussed

7.719. As the Panel has explained, references to "conservation" simply cannot substitute for a full and proper explanation of how the challenged measures were designed to promote conservation. While the references to conservation that China has pointed to do suggest that the export quota measures were imposed with conservation-related concerns in mind, the Panel's task is to determine whether the design and architecture of the measures "relate to conservation", and the references to which China has pointed do not, in the Panel's opinion, substantially illuminate this inquiry.

7.720. In sum, it is the Panel's opinion that China cannot discharge its burden of proof simply by citing a number of references to conservation in the text of a challenged measure without explaining how the challenged measure "relates to", supports, or furthers the goal of conserving exhaustible tungsten ores. Consequently, the Panel cannot conclude that China's export quota on tungsten "relates to" the conservation of tungsten ores on the basis of these references alone.

7.7.2.1.3.2 Signalling

7.721. As the Panel noted above, China argues that its export quota system enhances the effectiveness of its conservation policy by signalling to foreign tungsten users the need to locate and develop other sources of supply, and/or to develop substitutes. More specifically, according to China export quotas create a disincentive to domestic Chinese tungsten producers to expand production (since the amount that can be sold to foreign consumers is limited), while simultaneously creating an incentive for foreign tungsten producers to initiate and expand production in third countries. Thus, the demand for China's limited tungsten resources will lessen as the availability of foreign tungsten sources increases.[1061]

7.722. According to China, by (i) limiting total domestic production and supplies available to Chinese users (through its restrictions on domestic tungsten production), and (ii) limiting the total volume of tungsten products available to foreign users, China is taking a significant step towards limiting the demand for its tungsten resources. In effect, it is providing clear notice to China-based tungsten operators and potential investors in China that they should curb any inclination to expand their tungsten operations, while at the same time providing a green light signal to investors and tungsten producers outside of China to expand investment and production because China is serious about conserving its dwindling tungsten resources. China concludes this point by submitting that the overall effect of the tungsten export quota measures is to facilitate its conservation objective.[1062]

7.723. According to the United States, China's argument is hypothetical since it is not reflected in the government measures that establish the tungsten export quota. Moreover, the United Sates argues that China's export quotas create a two-tiered pricing structure in the tungsten market, and incentivize foreign users of tungsten to relocate to China. The United States points out that China fails to explain how the export quota, as opposed to domestic production restrictions that actually limit production, creates an incentive for foreign tungsten producers to increase production.[1063]

[1061] China's first written submission, para. 307.
[1062] China's first written submission, para. 308.
[1063] United States' second written submission, paras. 205-208.

7.724. The European Union recalls that it was China's price-depressing competitiveness in the global tungsten market that caused tungsten businesses in other countries to close from the 1970s onwards, and thus finds China's argument that the export quota on tungsten is a signalling tool ironic.[1064] The European Union further argues that an export quota on tungsten is not an effective signalling tool, since substitutes for tungsten are not easily found.[1065]

7.725. The Panel has dealt with the argument that export quotas send a "signal" to foreign users above in its analysis of the export quota on rare earths, and considers that what was said there applies with equal force here. While the Panel accepts that export quotas do or at least can send conservation-related signals to foreign users, the Panel is concerned that such quotas can also send perverse signals to domestic consumers, and can even stimulate domestic demand, contrary to China's stated conservation goals. Moreover, the Panel has explained above why the imposition of an extraction and/or a production quota may not suffice to counteract or offset such perverse incentives. As was the case in the context of rare earths, the Panel is not convinced that the design and architecture of China's export quotas, even taken together with the extraction and production caps, is such as to counteract the perverse signals which are generally sent by export quotas. As such, the Panel has difficulty concluding that the export quota on tungsten, which risks encouraging or stimulating domestic demand[1066] and even leading, in the medium-long-term, to more, rather than less, illegal extraction and production, can be said to "relate to" conservation for the purposes of Article XX(g).

7.726. The Panel notes additionally the European Union's argument that signalling is ineffective since tungsten substitutes are not easily found. The European Union has not made this argument with respect to the rare earths, and so the Panel turns to consider it now.

7.727. The Panel has difficulty with the European Union's argument for a number of reasons.

7.728. In the first place, the Panel notes that while substitutes for tungsten may be difficult to come by, the European Union has not argued that there are no natural reserves of tungsten anywhere outside of China. China states in its first written submission[1067] that China is estimated to hold about 61% of the world's tungsten reserves but bears a disproportionately high burden of producing 83% of the world's tungsten supply. Moreover, as China has noted, a number of western countries used to mine tungsten and other minerals but stopped due to environmental and costs-related issues. This suggests that other countries do have tungsten reserves. China's quota could, therefore, be effective in signalling the need for foreign consumers to start (or re-start) tungsten mining in other countries.

7.729. Additionally, as a matter of principle, the fact that alternatives to tungsten are not easily found does not mean that China's signalling argument is invalid. In the Panel's opinion, the ease or difficulty with which alternative sources can be developed is not a factor that affects the right of a resource-endowed Member to encourage investment and research in alternatives or substitutes in the interests of conservation – provided, of course, that such encouragement is consistent with WTO rules. The state of science and technology is in constant flux, and while alternatives to, or substitutes for, tungsten may be difficult to find today, further research and investment might very well lead to the discovery of just such alternatives or substitutes. Indeed, in the Panel's opinion, the kind of signal China seeks to send to foreign tungsten consumers through its export quota measures may very well be the stimulus needed by consumers, investors, and scientists to conduct further research and exploration.

7.730. At any rate, and more fundamentally, the Panel believes that the absence of substitutes in no way affects China's right to adopt measures for the conservation of exhaustible natural resources. As the Panel has explained in its analysis of the legal test under Article XX(g), the sovereignty of all States over their own natural resources allows them to decide whether and how much of a given resource to extract. While resource-endowed Members may take the needs of other States or the availability of alternative resources into account when deciding how much of an exhaustible natural resource to extract, they are under no obligation to do so, and the absence of

[1064] European Union's second written submission, para. 241.
[1065] European Union's second written submission, para. 242.
[1066] Panel Reports, *China – Raw Materials*, para. 7.586. See the Panel's analysis in the context of rare earths in section 7.6.2.1.3.5 above.
[1067] China's first written submission, para. 285.

an alternative to, or substitute for, a particular resource does not deprive Members of that fundamental right to decide how much, if any, of the resource in question should be extracted for sale into the market. China is under no obligation to extract its tungsten resources simply because alternatives to tungsten are not easily found.

7.731. As such, the Panel believes that the problem with China's export quota on tungsten is not that alternatives to tungsten are difficult to come by, but that the export quota sends a perverse signal to domestic consumers. For this reason, the Panel finds it difficult to accept China's argument that the challenged quota "relates to" the conservation of exhaustible tungsten ores.

7.7.2.1.3.3 The possibility that unused export quota volumes will be sold to domestic consumers

7.732. Finally, the Panel notes the European Union's argument that "if China were serious about conserving its resources, it would conserve the material that has not been used up by exports, instead of making it available to domestic producers".[1068] In the context of rare earths, China has responded to this claim by arguing that the domestic availability of unused export quota volumes does not undermine the existence of a substantial relationship between the export quota system and the goal of conserving tungsten since the conservation levels determined in the extraction and production quota for any given year constitutes the level of conservation that China considered appropriate for that year. According to this argument, there is no harm, from a conservation perspective in allowing domestic tungsten consumers to use whatever quantity of export-designated tungsten has not been used by foreign consumers.

7.733. The Panel disagrees with the European Union on this point. In the Panel's opinion, the mere fact that unused volumes are allowed to be sold into the domestic market does not in itself mean that the export quota system does not "relate to" conservation. Assuming that the extraction and/or production caps were "real" restrictions, i.e. were set below the level of expected demand for the relevant period (i.e. for 2012), then we believe the fact that China does not require unused export quotas to be preserved for use in future years does not necessarily cast doubt on its conservation objectives, since China is still pursuing conservation through the imposition, on an annual basis, of limits on extraction and production. Within these limits, there is nothing illegal or even contradictory about China pursuing its own industrial or other goals (so long as these are pursued in a non-discriminatory manner).

7.734. While taking into account the unused share of the export quota in the determination of extraction/production and export quotas for the following year(s) may result in a higher degree of conservation, we believe that the Panel cannot find that China's measures as they stand do not "relate" to conservation merely because China has designed its export quota' system in such a way as to prohibit the stockpiling[1069] or exchange of unused export quota shares among exporters[1070] while allowing unused quota volumes to be sold into the domestic market. In our view, this is so even though taking into account such unused export quota's shares for future years' determinations would result in a higher level of conservation. China is entitled to identify and pursue its own level of conservation, and once such level of extraction/conservation is determined, where products are eventually consumed (abroad or domestically) does not affect the relationship between the challenged measures and the goal of conservation.

7.7.2.2 Second part: whether China's export quota on tungsten is made effective in conjunction with restrictions on domestic production or consumption

7.735. The Panel now turns to examine whether China's export quota on tungsten is "made effective in conjunction with restrictions on domestic production or consumption."

[1068] European Union's opening statement at the first meeting of the Panel, para. 49.

[1069] Given the unused export quota volumes are required to be handed back to Chinese authorities by October 31, it is evident that exporters are not able to stockpile such unused volumes. See *Regulations on the Administration of the Import and Export of Goods, (*Exhibit CHN-54), Article 42.

[1070] China's responses to Panel's question Nos. 143 and 144 ("China can confirm that it is illegal to sell or transfer the export quota").

7.736. China submits it has a distinct conservation policy[1071] for tungsten that includes both *export* and *domestic* restrictions. Specifically, China argues that its conservation plan consists of four categories of domestic restrictions: access conditions; quotas on extraction, production and export; resource taxes; and a deposit for ecological recovery.[1072] China argues also that its restrictions on domestic production and consumption of tungsten are substantial. China claims that it meets the even-handedness requirement in Article XX(g) as long as it ensures that the burden of its tungsten conservation policy is not solely imposed on foreign consumers, but also on domestic consumers.[1073] The complainants rebut the four parts of China's argument, and maintain that China's conservation measures do not constitute "restrictions on domestic production or consumption" within the meaning of Article XX(g) of the GATT 1994. According to the complainants, China's alleged conservation policy for tungsten does not include any domestic restrictions that counter-balance the export quotas on tungsten products.[1074] The complainants thus argue that China's system is not even-handed.

7.737. The Panel now turns to consider whether: (i) China imposes "restrictions on domestic production or consumption" of tungsten; and (ii) whether the challenged export quota is "made effective in conjunction with" such restrictions on domestic production or consumption.

7.7.2.2.1 Whether China has imposed restrictions on domestic production or consumption of tungsten

7.738. In its first written submission, China identifies four categories of domestic measures that, it argues, restrict domestic production and consumption of tungsten in China.[1075] These are: (a) access conditions; (b) resource taxes; (c) volume restrictions; and (d) a deposit for ecological recovery. The Panel will assess each of these measures individually.

7.739. In the following sections, the Panel will evaluate each legal instrument invoked by China as a restriction on domestic production or consumption, and will assess whether those alleged restrictions are real , i.e. restrictions that are capable of having a limiting effect. The Panel recalls that a measure claimed to be a restriction is capable of having a limiting effect only if it is accompanied by actual enforcement. Therefore, the Panel will consider not only whether there are restrictions in the text of the Chinese law, but also whether China has adopted measures to enforce its alleged restrictions. The Panel notes that, unlike in the context of its arguments on rare earths, China did not argue in its first written submission that it had measures to enforce its conservation policy on tungsten. However, China provided three exhibits in response to a question from the Panel after the second meeting, and claims that it has taken enforcement actions to ensure compliance with the alleged restrictions on domestic production or consumption of tungsten. The Panel considers that "enforcement measures" are part of the design, structure, and architecture of each of the four alleged restrictions, i.e. access conditions, resource taxes, volume restrictions, deposit for ecological recovery, and that they should therefore be assessed together with each of these four categories of measures. The Panel will also examine "enforcement measures" combating mining or production by illegal producers.

7.7.2.2.1.1 Whether the access conditions are real and actual restrictions on domestic production or consumption of tungsten

7.740. China argues that it strictly limits the right to mine and produce tungsten, and that it moreover is seeking to create an industry that is organized in a rational and efficient manner.[1076] According to China, enterprises desiring to explore and exploit mineral resources in China are required to obtain a mining licence.[1077] China argues that the licensing requirements strictly

[1071] China's first written submission, section III. B and China's response to Panel question No. 108.
[1072] China's first written submission, paras. 292 and 311.
[1073] China's first written submission, para. 333.
[1074] United States' second written submission, paras. 247-249; European Union's second written submission, paras. 261-263; Japan does not rebut the "conservation measures" one by one in its second written submission, corresponding to the structure of China's first and second written submission. However, Japan does rebut certain legal instruments included in those three "conservation policies".
[1075] China's first written submission, para. 311.
[1076] China's first written submission, para. 313.
[1077] China's first written submission, para. 314 (referring to *Rules for Implementation of the Mineral Resources Law*, (Exhibit CHN-14) and *Administration of Registration of Mining of Mineral Resources*, (Exhibit CHN-15)).

control access to China's tungsten resources, reduce the number of mines and producers, and thereby facilitate adherence to volume restrictions.[1078]

7.741. The measures invoked by China as access conditions to the tungsten industry are:

a. *Opinions on the Integration of Exploitation of Mineral Resources*[1079] of 2006;

b. *Rules for Implementation of the Mineral Resources Law*[1080] of 1994

c. *Administration of Registration of Mining of Mineral Resources*[1081] of 1998;

d. *Circular on Admission to Tungsten Industry*[1082]of 2006.

7.742. The *Opinions on the Integration of Exploitation of Mineral Resources* is a joint legal instrument of the Ministries of Land and Resources, the National Development and Reform Commission, and several other ministries, which together launched the integration of the mining industries of "key types of minerals" (including tungsten[1083]). The *Opinions on the Integration of Exploitation of Mineral Resources* provides that the integration work is to be carried forward in four stages, namely formulation of the overall plan, formulation of the implementation plan, actual implementation of the plan, and examination and inspection. According to the *Opinions*, the integration work was to be completed prior to the end of 2008. China submits that an integrated exploitation of mineral resources is more efficient and more environmentally friendly.[1084]

7.743. In the Panel's view, the initiation of integration of mining industries confirms the existence of governmental regulation and control over extraction of tungsten. The Panel also acknowledges China's argument that a rational industry structure, which China seeks to implement through the access conditions, facilitates the supervision of the Chinese tungsten enterprises' compliance with the applicable conservation measures for tungsten. However, China has not provided the Panel with further explanation about how integration affects the access of miners to the tungsten industry, nor about the progress of the integration work, in particular regarding the tungsten mining industry. Neither has China demonstrated how an integrated tungsten industry could restrict the mining or production of tungsten, or how an integration project that was supposed to be completed prior to the end of 2008 could be a restriction on the mining or production of tungsten in 2012.

7.744. The *Rules for Implementation of the Mineral Resources Law*[1085] set out licensing requirements for mining enterprises in general. The *Administration of Registration of Mining of Mineral Resources*[1086]sets out the conditions and procedures for obtaining a mining licence. However, these two legal instruments do not refer to restrictions on the extraction or production of tungsten.

7.745. The *Circular on Admission to Tungsten Industry*[1087] specifies access conditions for all tungsten metallurgy and processing projects. The *Circular* addresses: (i) the establishment and composition of manufacturing enterprises, (ii) production scales for tungsten metallurgy, tungsten billet and carbide alloy (iii) resource recycling and energy consumption (including minimum production scale), (iv) environmental protection, (v) product quality, (vi) safe production and occupational disease prevention, and (vii) labour insurance.

[1078] China's first written submission, para. 317.
[1079] *2006 Opinions on the Integration of Exploitation of Mineral Resources*, (Exhibit CHN-17).
[1080] *Rules for Implementation of the Mineral Resources Law*, (Exhibit CHN-14).
[1081] *Administration of Registration of Mining of Mineral Resources*, (Exhibit CHN-15).
[1082] *Conditions for Admission to Tungsten Industry*, (Exhibit CHN-93).
[1083] *2006 Opinions on the Integration of Exploitation of Mineral Resources*, (Exhibit CHN-17), Article IV(a).
[1084] China's first written submission, para. 313.
[1085] *Rules for Implementation of the Mineral Resources Law* (Exhibit CHN-14).
[1086] *Administration of Registration of Mining of Mineral Resources*, (Exhibit CHN-15), Article 3(4) and Appendix.
[1087] *Conditions for Admission to Tungsten Industry*, (Exhibit CHN-93).

7.746. The Panel doubts how these access conditions, which control the entry of "new-comers" into the tungsten industry, could restrict the activity of tungsten producers who have already entered the tungsten industry, especially while there is no volume limit on the production of intermediate and finished tungsten products, such as tungsten metallurgy, tungsten billet and carbide alloy. The Panel notes that China only claims that it imposes a production quota on tungsten concentrates. The Panel will discuss whether or not this alleged production quota is a restriction on domestic production in the following section. Here it suffices to say that, while in the Panel's opinion access conditions make it harder for new enterprises to enter the tungsten industry, they do not control the amount of tungsten metallurgy, tungsten billet, and/or carbide alloy that enterprises already in the industry may produce. As such, they also cannot control the amount of intermediate tungsten products that downstream industries in China will be able to obtain. The Panel therefore has difficulty finding that conditions such as a minimum production scale – which is designed to promote efficient production – are restrictions on domestic production.

7.747. In the Panel's opinion, the *Opinions on the Integration of Exploitation of Mineral Resources*, the *Rules for Implementation of the Mineral Resources Law* and the *Administration of Registration of Mining of Mineral Resources* are relevant to the tungsten mining industry; however, China has failed to explain the access conditions for tungsten mining enterprises. The *Circular on Admission to Tungsten Industry*[1088] is only relevant to tungsten metallurgy and processing. In sum, the Panel believes that China has failed to demonstrate that alleged access condition restrictions, which are designed to promote the efficiency of production, are real and actual restrictions.

7.748. The Panel understands that the access conditions set the qualification miners or producers must meet to enter the tungsten industry. The Panel also understands that the violation of access conditions will lead to a miner or producer losing its qualification to mine or produce, and therefore becoming an illegal miner or producer if they continue to mine or produce. The Panel will address the alleged actions against illegal mining and other violations of China's production requirements in a separate section.

7.7.2.2.1.2 Whether the volume restrictions are capable of restricting domestic production or consumption of tungsten

7.749. China argues that its 2012 conservation policy for tungsten includes volume restrictions on domestic production in the form of quotas on the volume of tungsten products that can be extracted and smelted and separated.[1089] China also posits that the collective effect of China's export and production quotas for tungsten is to limit the available amount for domestic Chinese consumption.[1090]

7.750. First, the Panel recalls that it cannot conclude that measures are capable of restricting the domestic production or consumption of tungsten solely on the basis of the existence of a volume cap on the extraction, production, or consumption of tungsten. In the first place, the level of the volume cap must be capable of having a limiting effect on domestic production or consumption. Additionally, the Panel also needs to determine whether China has imposed measures that are capable of actually enforcing these volume caps. In the context of its analysis under the second phrase of Article XX(g), the Panel will examine the legal framework of the domestic restrictions and whether they have been implemented and are capable of being enforced. Whether the alleged non-enforcement of such restrictions constitutes disguised restrictions on trade or discrimination in the application of China's conservation programme will be discussed in the context of the Panel's analysis under the chapeau of Article XX.

The extraction quota system applicable to tungsten

7.751. According to China, China's extraction quota determines how much tungsten concentrates can be legally produced each year.[1091] China invokes the following legal instruments and claims that it imposed a restriction on the extraction of tungsten in 2012[1092]:

[1088] *Conditions for Admission to Tungsten Industry*, (Exhibit CHN-93).
[1089] China's first written submission, para. 318.
[1090] China's first written submission, para. 326.
[1091] China's second written submission, para. 319; China's response to Panel question 100(c).
[1092] China's first written submission, paras. 292, 319, and 320.

a. *Administration of Exploration and Mining of the Specified Minerals*[1093];

b. *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*[1094];

c. *Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012*.[1095]

7.752. The Panel recalls that these legal instruments have been discussed above in the context of China's alleged volume restriction on rare earths. In the present section of its report, the Panel only addresses the tungsten-related aspects of the three instruments.

7.753. The Panel notes that the *Administration of Exploration and Mining of the Specified Minerals*, referred to in Paragraph 5 of the *Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012* provides for control of the amount of mining in general.

7.754. In 2011, the Ministry of Land and Resources issued the *Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012*. That document sets the first batch of the extraction quota at 42,440 tonnes, "among which major quota accounts for 34,340 tonnes and comprehensive utilization quota accounts for 8,100 tonnes".[1096] Article I of the *Circular* announces that the total extraction quotas for tungsten, antimony, and rare earth ores for the whole year will be issued at a proper time in the second quarter according to national policies and market changes.[1097]

7.755. On 19 April 2012, the Ministry of Land and Resources issued the *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, which sets the total extraction quota of rare earths at 89,000 tonnes[1098] and provides for allocation of the extraction quota at the regional level in 2012. The introductory paragraph of the 2*012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores* states that the amount of the total extraction quota includes the amount of the first batch of the 2012 extraction quota. It appears to the Panel that China did not determine the total amount of material that Chinese miners could extract at the beginning of 2012, before mining enterprises made business plans. The second batch of the tungsten extraction quota, which was embodied in the *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, was issued in April 2012, a few months after the issuance of the first batch of the extraction quota for 2012. The Panel considers that the two batches of the extraction quota indicate the maximum amount that miners of tungsten could extract through the end of 2012.

7.756. The Panel notes that, according to Exhibit CHN-223, the level of extraction set by China in 2012 (89,000 tonnes) was lower than the actual amount of tungsten extracted in 2011 (119,875 tonnes). However, as the Panel explained in its discussion of the legal test under Article XX(g), the fact that a quantitative restriction on domestic production or consumption (here, the tungsten extraction plan) is, in a given year, set at a level lower than that at which it was set in a previous year does not necessarily mean that it constitutes a "restriction" within the meaning of Article XX(g). What matters, in the Panel's view, is that the quantitative restriction be set below the expected level of demand for the period in which the alleged restriction is intended to apply. Since expected demand may fluctuate from year to year, the mere fact that China's tungsten extraction was set in 2012 at a volume lower than the actual level of extraction in 2011 does not of itself establish that the extraction plan constituted a "restriction". Instead, the Panel needs to determine whether the 2012 extraction quota was set at a level below the expected demand for 2012.

[1093] *Administration of Exploration and Mining of the Specified Minerals*, (Exhibit CHN-18).

[1094] *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, (Exhibit CHN-19).

[1095] *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20).

[1096] China's first written submission, paras. 24 and 175, footnote 32 (referring to *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, (Exhibit CHN-19) and *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20)).

[1097] *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20).

[1098] *Tungsten Data (1999-2012)* (Exhibit CHN-138 updated), (Exhibit CHN-223).

7.757. Unfortunately, China has not provided any evidence as to the expected level of demand for 2012 on the basis of which the Panel could assess whether the 2012 tungsten extraction plan constituted a "restriction" for the purposes of Article XX(g). As such, the Panel is unable to conclude that the 2012 tungsten extraction plan, as established by Chinese law, constituted a "restriction" for the purposes of Article XX(g).

7.758. With respect to enforcement, China has not explained in sufficient detail *how* it enforced the 2012 extraction quota of tungsten. In that context the complainants assert, and China does not deny, that the actual extraction level of tungsten is almost 39% above the level set in China's extraction quota.[1099] The Panel has examined the exhibits and observes that the *Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012*, which refers to the *Administration of Exploration and Mining of the Specified Minerals*[1100], provides that mining enterprises are required to sign a liability letter with the local MLR to confirm their obligation of compliance and their liability in case of breach. The *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*[1101], which refers to the *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control*[1102], provides that the local departments of the MLR are subject to the supervision of the central MLR, to which they are required to report quarterly on the implementation of the total extraction quota.

7.759. The Panel doubts how the above-described requirements were capable of actually enforcing the 2012 tungsten extraction quota. First, compared with the monthly reporting system for the 2012 rare earth extraction quota, the 2012 tungsten extraction quota only required enterprises to report quarterly. Second, China has not provided any evidence that it sanctions over-quota extraction. The Panel notes that the *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control*, which is referred to in the *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, provides that over-extraction is a reason for reducing an enterprise's share of extraction quota at the provincial level. However, the text of the 2012 tungsten extraction quota does not appear to reflect the availability of that sanction. In this connection, the Panel notes that although there was over-quota extraction in 2011[1103], the 2012 tungsten extraction quota does not indicate reductions for any enterprise. On the contrary, the first batch of the 2012 tungsten extraction quota only mentions that any amount of the extraction quota that is not utilized cannot be used in the following year. In other words, the document concerns (or addresses situations of) *under-extraction*, but imposes no sanctions for *over-extraction*. In the case of tungsten however there was over-quota extraction in 2011. The Panel acknowledges that its task is to examine the domestic restrictions (if any) existing concurrently with the 2012 tungsten export quota. However, the absence in the 2012 extraction quota of any indication or information about sanctions for over-extraction in 2011 casts doubt on whether China really sanctions over-quota extraction of tungsten. The Panel also notes that actual extraction in 2012 reached 124,706 tonnes, which is 40% higher than the level set by the 2012 tungsten extraction quota. In the Panel's view, such a high level of over-quota extraction in 2012 confirms that China has not imposed any enforcement measure capable of capturing and sanctioning over-quota extraction.

7.760. With respect to measures for combating illegal mining[1104], China points to the following legal instruments and argues that China has measures to combat illegal mining of tungsten:

a. *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law*[1105];

b. *Circular of Hebei Province on Issuing the Program of the Rectification of Metal and Non-Metal Mines according to Law*.[1106]

[1099] *Tungsten Data (1999-2012)*, (Exhibit CHN-223). The extraction quota in 2012 was set at 89,000 tonnes, whereas actual extraction reached 124,706 tonnes.

[1100] *Administration of Exploration and Mining of the Specified Minerals*, Article V, (Exhibit CHN-18).

[1101] *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, (Exhibit CHN-19).

[1102] *Administration of the Quota for the Minerals Subject to the Total Extraction Quantity Control*, (Exhibit CHN-43).

[1103] According to *Tungsten Data* (1999-2012) (Exhibit CHN-138 updated), (Exhibit CHN-223), the 2011 extraction quota was 87,000 tonnes, while the real extraction in 2011 reaches 119, 875 tonnes.

[1104] Panel question No. 109.

[1105] *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law*, (Exhibit CHN-218).

7.761. The *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law* was released by several ministries on 4 November 2012[1107] to organize and launch a mine rectification campaign from 2012 to 2015. The *Opinions* provides that: (i) mines which engage in illegal mining shall be identified and closed[1108]; (ii) mines which do not satisfy the safe production conditions after being granted a time-limited production suspension to enable the rectification of the situation shall be closed according to law[1109]; and (iii) mines with outdated processes, technologies, and devices, and mines which do not comply with industrial development policy, shall be closed within a limited time.[1110]

7.762. The *Circular of Hebei Province on Issuing the Program of the Rectification of Metal and Non-Metal Mines according to Law* (promulgated on 26 December 2012) is adduced by China as an example of a provincial government formulating a rectification plan and launching rectification action according to the *Opinions on the Rectification of Metal Mines and Non-Metal Mines*.[1111]

7.763. The Panel notes that in Exhibit CHN-219, China provides examples of enforcement action taken against illegal mining of tungsten in 2012 and 2013.

7.764. The Panel acknowledges that China has made efforts to combat illegal mining. However, the Panel has difficulty seeing how the two above-mentioned legal instruments promulgated at the end of 2012 could have be enforced to combat illegal mining during 2012. Section I(II) of the *Opinions* sets the goal of combating illegal mining by the end of 2015.[1112] Section III(C) of the *Circular* provides that rectification and clampdown in Hebei province would occur from 1 February 2013 to 31 December 2014.[1113] The Panel considers that these two legal instruments provide for the combating of illegal production in the future, but not in 2012. Recalling that the Panel's task is to examine the domestic restrictions (if any) existing concurrently with the export restriction, the Panel considers that China has failed to demonstrate that the above-mentioned instruments constitute real restrictions on domestic mining of tungsten, at least within the relevant period.

7.765. In the Panel's opinion, in 2012 China imposed a quota on how much tungsten concentrates could be produced. However, it appears to the Panel that China did not have in place any enforcement mechanisms or measures capable of capturing and punishing over-extraction. As such, the Panel believes that the extraction quota did not constitute a real restriction on the extraction of tungsten concentrates.

The production quota system applicable to tungsten

7.766. China also claims that its production quota is a domestic restriction imposed in conjunction with its export quota. China explains that its production quota determines how much tungsten concentrates can be produced each year.[1114] China invokes the following legal instruments in support of the claim that it imposed a restriction on the production of tungsten in 2012[1115]:

a. *2012 First Batch of the Directive Production Plan of Rare Metals*[1116];

b. *2012 Second Batch of the Directive Production Plan of Rare Metals*.[1117]

[1106] *Program of the Rectification of Metal and Non-metal Mines in Hebei Province*, (Exhibit CHN-220).
[1107] The Panel notes that the English version of the exhibit has a translation mistake on the date of promulgation of the document.
[1108] *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law*, (Exhibit CHN-218), Section II(I).
[1109] *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law*, (Exhibit CHN-218), Section II(II).
[1110] *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law*, (Exhibit CHN-218), Section II(III).
[1111] China's response to Panel question No. 109.
[1112] *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law*, (Exhibit CHN-218).
[1113] *Program of the Rectification of Metal and Non-metal Mines in Hebei Province*, (Exhibit CHN-220).
[1114] China's first written submission, para. 321.
[1115] China's first written submission, paras. 292 and 321.
[1116] *First Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-94).
[1117] *Second Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-95).

7.767. The Panel notes that the MIIT issued the *2012 First Batch of the Directive Production Plan of Rare Metals* on 13 January 2012. This document sets the first batch of the tungsten production quota at 42,440 tonnes.[1118] On 6 July 2012, the MIIT issued the *2012 Second Batch of the Directive Production Plan of Rare Metals*, which sets the second batch of the tungsten production quota at 38,880 tonnes.[1119] The annexes to these two instruments provide for the allocation of the production quota at the regional level.[1120] The Panel considers that the two batches of the production quota together indicate the maximum amount of tungsten concentrates that could legally be produced through the end of 2012.

7.768. According to the data in Exhibit CHN-223, the total 2012 production quota (81,320 tonnes) was lower than the actual amount of tungsten concentrates consumed in 2011 (119,875 tonnes). However, as the Panel has explained, the fact that a quantitative restriction on domestic production or consumption (here, the tungsten production plan) is, in a given year, set at a level lower than the level of actual production in a previous year does not necessarily mean that it constitutes a "restriction" within the meaning of Article XX(g). What matters, in the Panel's view, is that the quantitative restriction be set below the expected level of demand for the period in which the alleged restriction is intended to apply. Since expected demand may fluctuate from year to year, the mere fact that China's tungsten production was set in 2012 at a volume lower than the actual level of production in 2011 does not of itself establish that the production plan constituted a "restriction". Instead, the Panel needs to determine whether the 2012 production quota was set at a level below the expected demand for 2012.

7.769. Unfortunately, China has not provided any evidence as to the expected level of demand for 2012 on the basis of which the Panel could assess whether the 2012 tungsten production plan constituted a "restriction" for the purposes of Article XX(g). As such, the Panel is unable to conclude that the 2012 tungsten production plan, as established by Chinese law, constituted a real "restriction" for the purposes of Article XX(g).

7.770. With respect to enforcement, the Panel notes that China refers to the two above-mentioned legal instruments (i.e. the first and second batches of the *2012 Directive Production Plan of Rare Metals*) and describes the compliance requirements in two paragraphs in its first written submission. According to China, enterprises must report their use of and compliance with the production quota to the MIIT on a monthly basis. If an enterprise produces without a share of the production quota or beyond its share, it will be ordered to stop producing immediately and the source(s) of its ores products will be identified. Further enterprises conducting illegal purchases and sales of ore products are subject to punishment.[1121] The two legal instruments also indicate that enterprises that produced beyond their share of the production plan in 2011, or that failed to comply with environmental requirements, will have their share of the 2012 plan reduced or even cancelled. On the other hand, enterprises that strictly complied with the 2011 plan and met the safe production requirements could have their share of the quota increased.[1122]

7.771. In sum, the Panel understands that the texts of the two batches of the *2012 Directive Production Plan of Rare Metals* sets a quota on the production of tungsten concentrates, and provides for sanctions for over-quota production. It also sets out various requirements that enterprises must comply with.

7.772. However, for the following reasons, the Panel doubts whether or not the 2012 tungsten production quota was capable of being enforced.

7.773. First, the Panel notes that, as China has admitted, the 2012 extraction quota and the 2012 production quota were imposed on the same product, i.e. tungsten concentrates.[1123] However, China has not provided a sufficiently detailed explanation as to why the extraction quota is 89,000 tonnes, while the production quota is 81,320 tonnes. The Panel understands that, as a

[1118] *First Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-94).
[1119] *Second Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-95).
[1120] *First Batch of the 2012 Directive Production Plan of Rare Metals*, Annex, (Exhibit CHN-94) and *Second Batch of the 2012 Directive Production Plan of Rare Metals*, Annex, (Exhibit CHN-95).
[1121] China's first written submission, para. 321.
[1122] China's first written submission, para. 322.
[1123] China's response to Panel question No. 100.

general matter, the production plan is less than the extraction plan in order to account for materials lost during processing. But to fully appreciate this point, the Panel would have needed more detailed information about the precise amount of materials lost, and how this loss is translated into the level established by the production quota. As a result of the differences in the two quotas, each enterprise might be allocated two kinds of quotas imposed on the same products, but at different levels. It is unclear to the Panel, for example, how the MIIT would sanction an enterprise that produced over its production quota, but below its share of the extraction quota level set by the MLR.

7.774. Second, the Panel considers that the fact that the actual production of tungsten concentrate reached 124,706 tonnes in 2012, which is about 40% higher than the production quota, confirms that the production quota was not well enforced. Although the Panel does not believe that the assessment under the second phrase of Article XX(g) involves an effects test, the Panel notes that China does not deny the existence of significant overproduction and has not attempted to explain it or to justify it. It is therefore difficult for the Panel to conclude that China's production quota on tungsten was capable of having a limiting effect.

7.775. In the Panel's opinion, the 2012 tungsten production quota cannot be considered a restriction on domestic production.

Whether there are volume restrictions on domestic consumption of tungsten

7.776. China submits that the collective effect of China's export and production quotas on tungsten is to limit the amount of tungsten available for domestic consumption.[1124] China argues that by deducting the export quota from the production quota, the amount of newly produced tungsten products available for domestic consumption in 2012 (26,400 metal content tonnes) was significantly lower than the volume available in 2011 (29,020 metal content tonnes).[1125]

7.777. For several reasons, the Panel disagrees with China that China has imposed volume restrictions on domestic consumption.

7.778. First, China has not provided any evidence to demonstrate that it imposes a domestic consumption quota or any other form of regulatory control on domestic consumption. The Panel considers that domestic consumption of tungsten concentrates in China can easily exceed the level that China claims is set by the combined effect of its production and export quotas through over-quota production of tungsten concentrates. Tungsten concentrates produced over-quota would stay in the domestic market and remain available for China's domestic consumption.[1126] In light of this risk, the Panel considers that there is no limit on domestic consumption of tungsten. This is especially so given that, on the evidence we have before us, China does not appear to criminalize or otherwise punish the *consumption* of illegally produced tungsten concentrates. As such, it seems to us that domestic users can consume any amount of the over-quota production without any risk of penalty.

7.779. Secondly, the Panel also notes that China has established measures, *inter alia* VAT refunds for downstream users of tungsten concentrate, which could stimulate domestic consumption of tungsten by value-added producers who export their finished products.[1127] This sits uncomfortably with China's claim to be restricting domestic consumption.

7.780. In sum, the Panel does not accept that China has imposed volume restrictions on the domestic consumption of tungsten.

[1124] China's first written submission, para. 326.
[1125] China's first written submission, para. 327.
[1126] China's first written submission, para. 337; China's response to Panel question No. 111.
[1127] Japan's second written submission, para. 261; United States' comments on China's response to Panel question No. 103; European Union's comments on China's response to Panel question No. 103; Japan's comments on China's response to Panel question No. 103. See discussion in footnote 863 above.

7.7.2.2.1.3 Whether China's resource tax is a restriction on domestic production or consumption of tungsten

7.781. China refers to the *Decision of the State Council to Amend the Provisional Regulations on Resources Tax*[1128]and the *Implementation of the Provisional Regulations on Resource Tax*[1129], and submits that the resource tax imposed on tungsten miners is 9 RMB per tonne for 3rd class of ore, 8 RMB per tonne for 4th class of ore, and 7 RMB per tonne for 5th class of ore. China claims that it increases the cost of tungsten production by imposing this tax on tungsten producers.

7.782. The Panel acknowledges that increased costs caused by the tax could, in the long run, lead to a reduction in demand and therefore limit production of tungsten ores. However, China has failed to provide price data on the tungsten ores[1130] that would have assisted the Panel in assessing whether or not the resource tax is capable of having a limiting effect. The Panel considers that China's argument on the resource tax, which consists of two sentences in its first written submission[1131], is not sufficient to demonstrate that its resource tax on tungsten is a real restriction on domestic production or consumption.

7.7.2.2.1.4 Whether environmental requirements are restrictions on domestic production or consumption

7.783. China refers to the *Opinions on Enhancing the Ecological Protection and Restoration of Mines*[1132] in its first written submission and argues that this measure increases the costs of tungsten production by requiring miners that have obtained a share of the extraction quota to make an ecological recovery deposit. However, the Panel notes that Exhibit CHN-32 is entitled *Opinion on Strengthening Rare Earth Mine Ecological Protection and Governance and Recovery*, and that this legal instrument does not refer to tungsten.

7.784. In response to Panel question No. 100, China invokes six exhibits and argues that it has legal instruments that impose environmental protection requirements on the tungsten industry. These instruments are:

a. *Conditions for Admission to the Tungsten Industry*[1133];

b. *Circular of State Council Overall Rectification and Standardization of mineral Resources Development Order*[1134];

c. *Guideline Suggestions on Gradual Establishment of Responsibility System for mine Environmental Management and Ecological Recovery*[1135];

d. *Circular on Environmental Protection Inspection of Tungsten and Molybdenum Enterprises*[1136];

e. *2012 First Batch of the Directive Production Plan of Rare Metals*[1137];

f. *2012 Second Batch of the Directive Production Plan of Rare Metals*.[1138]

[1128] Exhibit CHN-26.
[1129] Exhibit CHN-27.
[1130] The Panel notes that in *Tungsten: Price Data*, (Exhibit CHN-167), China provides APT price data. However, there is no data available on tungsten ores.
[1131] China's first written submission, para. 329.
[1132] *Opinions on Enhancing the Ecological Protection and Restoration of Mines*, Section IV, (Exhibit CHN-32).
[1133] *Conditions for Admission to Tungsten Industry*, (Exhibit CHN-93).
[1134] *Circular on Overall Rectification and Standardization of Mineral Resources Development Order*, (Exhibit CHN-215).
[1135] *Guideline on Gradual Establishment of Responsibility System for Mine Environmental Management and Ecological Recovery*, (Exhibit CHN-216).
[1136] *Circular on Environmental Protection Inspection of Tungsten and Molybdenum Enterprises*, General Office (Huan Ban Han [2013] No. 442), Ministry of Environmental Protection, 24 April 2013, (Exhibit CHN-217).
[1137] *First Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-94).
[1138] *Second Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-95).

7.785. The Panel will examine each of those exhibits and assess whether they constitute real restrictions on domestic production or consumption.

7.786. The *Conditions for Admission to the Tungsten Industry*[1139] elaborates *Emissions Standards for Pollutants from the Tungsten Industry*, and establishes compliance with these emission standards as one of the conditions for enterprises accessing the tungsten industry. The Panel notes that it has discussed this legal instrument in the section on "access conditions" and has expressed its doubt about how access conditions, which apply to "newcomers" seeking entry into the tungsten industry, could restrict the activity of tungsten producers that have already entered the tungsten industry, especially given that there is no volume limit on the production of intermediate and finished tungsten products such as tungsten metallurgy, tungsten billet and carbide alloy.

7.787. The *Circular of State Council Overall Rectification and Standardization of Mineral Resources Development Order*[1140] and the *Guideline Suggestions on Gradual Establishment of Responsibility System for Mine Environmental Management and Ecological Recovery*[1141] require enterprises to enhance ecological protection and restoration of mines, including tungsten mines. However, the two legal instruments do not purport to restrict extraction, production, or consumption of tungsten.

7.788. The *Circular on Environmental Protection Inspection of Tungsten and Molybdenum Enterprises*[1142] provides for the inspection of tungsten companies' compliance with applicable environmental requirements and for the publication of a list of complying companies. However, the *Circular* was issued in April 2013. China fails to explain how an environmental protection instrument issued in 2013 could have restricted extraction, production, or consumption of tungsten during 2012.

7.789. According to the two batches of the *Directive Production Plan of Rare Metals*[1143], only enterprises on the list of enterprises that meet the environmental protection requirements published by the Ministry of Environmental Protection are eligible to apply for a share of the production quota. However, the Panel fails to see how this environmental requirement, which is really a qualification requirement for entry into the tungsten industry, could restrict the amount of tungsten produced by enterprises that have already obtained a share of the production quota.

7.790. The Panel agrees with China that regulatory requirements will impose some compliance costs on concerned enterprises. However, the issue before the Panel is whether China's environmental regulatory requirements contribute to the conservation of tungsten. In the Panel's view, environmental costs are ordinary costs imposed on enterprises to address market externalities (e.g. environmental pollutions) caused by the production of tungsten.

7.7.2.2.1.5 The cumulative effect of all domestic restrictions and even-handedness

7.791. China claims that the *net effect* of the four categories of measures (i.e. access conditions, resource taxes, volume restrictions, and environmental requirements) is a lower rate of tungsten production in China than would otherwise have been the case.[1144] In this connection, the Panel recalls that subparagraph (g) does not call for an assessment of the effects of the concerned domestic measures. At any rate, China has not explained in sufficient detail *how* the "net effect" of the four categories of measures work together in the way China claims. As such, the Panel has difficulty accepting China's claim.

[1139] *Conditions for Admission to Tungsten Industry*, Section IV, (Exhibit CHN-93).

[1140] *Circular on Overall Rectification and Standardization of Mineral Resources Development Order*, (Exhibit CHN-215).

[1141] *Guideline on Gradual Establishment of Responsibility System for Mine Environmental Management and Ecological Recovery*, (Exhibit CHN-216).

[1142] *Circular on Environmental Protection Inspection of Tungsten and Molybdenum Enterprises*, General Office (Huan Ban Han [2013] No. 442), Ministry of Environmental Protection, 24 April 2013, (Exhibit CHN-217).

[1143] *First Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-94) and *Second Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-95) Article II.

[1144] China's first written submission, para. 361.

7.7.2.2.2 Whether the 2012 export quotas of tungsten were "made effective in conjunction with" restrictions on domestic production or consumption

7.792. The Panel recalls that subparagraph (g) of Article XX requires that the trade-restrictive measures work together with domestic restrictions to conserve exhaustible natural resources.[1145] The Panel considers that the phrase "made effective in conjunction with" requires the simultaneous, or perhaps near-simultaneous, operation of the relevant foreign and domestic restrictions through regulation by the concerned Member's law-making apparatus. As the panel stated in *China – Raw Materials*, "to benefit from the justification permitted under subparagraph (g), a Member cannot seek to rely on a future or potential domestic restriction; nor will measures enacted concurrently but which only have effect or are foreseen to have effect only in the future respect the Article XX(g) criteria, for they must not only exist concurrently; they must operate concurrently." In the Panel's view, the phrase "work together with" also suggests a degree of substantive operative complementarity between the trade and domestic restrictions.

7.793. China claims that its restrictions on domestic production and consumption of tungsten are substantial, and that domestic users, together with foreign consumers of tungsten, collectively bear the burden of China's conservation policy. However, in the opinion of the Panel, China's argument does not explain *how* the export quotas operate and work together with restrictions on domestic production or consumption for conservation. On the contrary, for the following reasons, the Panel finds that China's export quota and the restrictions on domestic users or producers of tungsten referred to by China do not seem to work together towards the goal of conservation.

7.7.2.2.2.1 The different levels of the 2012 extraction quota and production quota on tungsten

7.794. The Panel recalls that the 2012 tungsten extraction quota and the 2012 tungsten production quota are imposed on the same tungsten product, i.e. tungsten concentrates, by different Ministries (the MLR and the MIIT) and at different levels. The 2012 tungsten extraction quota was 89,000 tonnes, and the 2012 production quota was 81,320 tonnes. Setting different extraction and production quotas in this manner could cause difficulties for producers. For example, if a specific enterprise is allocated an amount of the extraction quota that is more than the amount of the production quota to which that enterprise is entitled, the enterprise might be punished by the MIIT for producing more than its entitled production quota amount, even though it used less than its share of the extraction quota.

7.795. Moreover, the Panel notes that China did not announce the total amount of its extraction or production quota before the beginning of 2012. The first batch of the 2012 extraction quota (42,440 tonnes) was issued at the end of 2011. The second batch of the 2012 extraction quota was issued on 19 April 2012. The first batch of the 2012 production quota (42,440 tonnes) was issued on 13 January 2012. The second batch of the 2012 production quota (38,880 tonnes) was issued on 4 July 2012. As an example, the Panel also notes that the first batch of the extraction quota allocated to Zhejiang province was 150 tonnes[1146] and the second batch of the extraction quota allocated to Zhejiang province was 150 tonnes.[1147] However, the first batch of production quotas allocated to Zhejiang province was 175 tonnes[1148] and there was no second batch of the production quota allocated to Zhejiang province.[1149]

7.796. The following table illustrates the different times at which China announced its extraction and production quotas on tungsten:

7.797. Extraction quota and production quota allocation in 2012 for Zhejiang Province

[1145] Appellate Body Reports, *China – Raw* Materials, para. 356.
[1146] *2012 Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ores for 2012 (First Batch)*, (Exhibit CHN-20).
[1147] *2012 Total Extraction Controlling Quota of Tungsten, Antimony and Rare Earth Ores*, (Exhibit CHN-19).
[1148] *First Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-94).
[1149] *Second Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-95).

	End of 2011	January of 2012	April of 2012	July of 2012
Extraction quota	150 tonnes (first batch)		150 tonnes (second batch)	
Production quota		175 tonnes (first batch)		0 tonnes (second batch)

7.798. From the above table, it seems that the tungsten-producing enterprises in Zhejiang province might have been confused as to the exact amount of tungsten production allowed for 2012. Prior to April 2012, enterprises in Zhejiang Province might have been at risk of being sanctioned by the MLR, if they acted consistently with the first batch of the production quota allocated by the MIIT and produced less than 175 tonnes, but more than 150 tonnes of tungsten concentrates. In April 2012, those enterprises were informed that their share of the extraction quota was 300 tonnes in total for 2012. However, the fact that the MIIT did not allocate any amount from the second batch of the production quota to tungsten concentrate producers in Zhejiang Province in July 2012 would result in those enterprises that had followed the MLR's allocation of extraction quota during May and June 2012 potentially being sanctioned by MIIT for over-quota production.

7.799. As this example suggests, the uncertainty and instability caused by the differences in the amounts of the extraction quota and production quota setting may not be helpful for tungsten users, and might prevent them from rationally utilizing their tungsten resources. To the Panel, the setting of the various quotas at different levels is a structural feature of China's quota system that seems to undermine China's claim that the timing of the 2012 tungsten extraction and production quotas work together with the 2012 export quotas on tungsten intermediate production for conservation. The Panel emphasizes that whether or not enterprises were in fact confused by this feature of the quota system is not material to the Panel's analysis: there is no "effects test" under subparagraph (g) of Article XX. Instead, what matters is whether, on the basis of their architecture and structure, the challenged export quota "works together" with China's extraction and production quotas for the goal of conservation. For the reasons given above, the Panel is not convinced that the export quota and the extraction and production quotas on tungsten cooperate or complement each other's operation.

7.7.2.2.2.2 The different product scopes of export quota, production quota and extraction quota

7.800. The Panel notes that the volume restrictions in China's conservation policy on tungsten, i.e. China's extraction quota, production quota, and export quota, are imposed on products at different stages of the tungsten industry value-added chain.

Mining products (tungsten concentrates)	Upstream intermediate products (such as APT)	Downstream (such as cemented carbides)
Export Quotas		
Production restrictions (extraction quota and production quota)		

7.801. As represented in the above table, China imposes extraction and production quotas on tungsten concentrates, while China's export quota covers not only tungsten concentrate, but also ammonium paratungstate (APT), tungstic acids and its salts, tungsten trioxide and blue tungsten oxide, and tungsten powder.[1150]

7.802. China argues that it must include tungsten intermediaries in its export quota to avoid the possibility of circumvention through exportation of the tungsten products after some basic processing.[1151] China does not provide any further explanation on the rationale of setting the product scope of its 2012 export quota on tungsten.

7.803. In the Panel's opinion, the inconsistent product scopes of the extraction, production, and export quotas seem to highlight China's industrial policy, which encourages tungsten intermediaries being used as inputs in the national production of value-added goods often destined

[1150] China's response to Panel question No. 100.
[1151] China's responses to Panel question No. 132.

for export. The Panel does not see any connection between this inconsistency and the goal of conserving tungsten resources. Indeed, by restricting the export of certain tungsten products (such as APT) that are not included in the domestic production restriction, China seems to be reserving an amount of tungsten products for domestic consumption. This inconsistency therefore seems to encourage domestic use of the products China claims it is trying to conserve. As such, the Panel has difficulty seeing how the 2012 export quota "works together with" the extraction and production quotas on tungsten concentrates for conservation.

7.804. Indeed, in the Panel's view, China's 2012 export quota was designed to reserve a certain amount of specific tungsten intermediaries for use by domestic downstream industries. In the Panel's opinion, this is industrial policy. Although the Panel has recognized that WTO Members have legitimate rights to impose industrial policies, it reiterates that industrial policies cannot be implemented under the guise of conservation. Taking into account the design, structure, and architecture of China's export quota and the extraction and production quotas, the Panel considers that China has failed to explain how the product scope of its export quota works together with its extraction and production quotas on tungsten concentrates for the purpose of conservation. The Panel cannot identify any functional and operational complementarity between China's export quota and the domestic restrictions referred to by China for enhancing conservation.

7.7.2.2.2.3 The different policies on domestic consumption and foreign consumption of tungsten

7.805. As the Panel has noted, China's alleged "consumption cap", which results from the combined effect of the production and export quotas, appears to function not as a consumption cap, but rather as a minimum supply guarantee for domestic consumption.

7.806. The Panel also believes that the restrictions imposed on producers of tungsten concentrates affect both domestic and foreign consumers, while the export quota on tungsten affects only foreign consumers. From a structural perspective, China's extraction and production restrictions therefore do not counterbalance its export restrictions and do not appear therefore to work well together. Moreover, the export quota is not the only restriction imposed by China on exports of intermediate tungsten products. China imposes export duties on intermediate tungsten products. The Panel will discuss the combined effect of the export quota and export duties on tungsten in its analysis under the chapeau of Article XX.

7.807. Moreover, in contrast to its export restrictions on lower value-added products, China provides tax and export incentives through, for example, refunds of the value-added tax (VAT) upon the exportation of higher value-added tungsten products. Such tax incentives can only stimulate production for export and act contrary to conservation goals and restrictions.

7.7.2.3 Even-handedness

7.808. The Panel recalls that subparagraph (g) of Article XX also requires even-handedness in the imposition of domestic restrictions for conservation. The Panel agrees with China that China's domestic regulations are inherent to any conservation programme and may be argued to be capable of imposing concurrent real restriction on consumption or production of tungsten. However, the Panel fails to see how such domestic actions can be said to be capable of imposing a burden even-handed with that resulting from its export quota on tungsten so that its export quota and its related domestic restrictions on tungsten work together for the conservation of tungsten concentrates. The Panel believes that the restrictions imposed on producers of tungsten concentrates affect both domestic and foreign consumers, while the export quota on tungsten affects only foreign consumers. From a structural perspective, China's production restrictions therefore do not counterbalance its export restrictions and do not appear therefore to work well together.

7.809. Additionally, in the Panel's view the fact that any unused export quota volume must be returned to Chinese authorities and is allowed to be consumed domestically, while there are no restrictions on domestic consumers consuming the tungsten products designated for export in the export quota, suggests that China has not imposed even-handed restrictions on domestic and foreign consumption. Although, as the Panel has indicated, the mere fact that unused export quota volumes can be sold into the domestic market does not, of itself, lead to the conclusion that

China's export quota does not "relate to" conservation, it does seem to favour domestic over foreign users. The Panel considers that there is nothing in the design and the structure of the conservation policy imposed on domestic consumers to counter-balance the policy that allows domestic consumption of the unused export quota of tungsten products. Therefore, there is no even-handedness in the imposition of export quota and the domestic restrictions referred to by China.

7.7.2.4 Conclusion

7.810. As explained above, the Panel is of the view that all the elements of subparagraph (g) aim at ensuring that the challenged measure works with domestic restrictions for conservation and ensures that its burden is distributed in an even-handed manner between foreign and domestic users. The Panel has reviewed the design and architecture of China's export quota system on tungsten, and has considered whether it works jointly with domestic restrictions for conservation and is therefore justified under Article XX(g).

7.811. In the Panel's opinion, it is difficult to conclude that China's export quota relates to the conservation of tungsten, or that it is made effective in conjunction with restrictions on domestic production or consumption.

7.812. With respect to the requirement that measures "relate to" conservation, the Panel is not convinced by China's argument that the texts of its export quota measures themselves demonstrate the existence of a "close" and "real" relationship with the goal of conserving exhaustible tungsten resources. As the Panel has explained, many of the references pointed to by China are indirect, referring not to the goal of conservation but to the *Foreign Trade Law*, which lists a number of grounds other than conservation justifying the imposition of export quotas. As such, these references do not provide sufficient evidence of the challenged measures' relationship with the goal of conserving tungsten. Moreover, even those texts that do refer to conservation simply refer to the "goal" of conserving exhaustible resources, but fail to explain *how* that goal is furthered or promoted through the imposition of an export quota. As the Panel has explained, such references to the goal of conservation, without any further explanation as to *how* the measure is designed in such a way as to assist, support or enhance China's conservation programme, do not suffice to establish the requisite relationship between the export quota measures and the conservation objective in Article XX(g).

7.813. The Panel is also not convinced that China's tungsten export quota is made effective in conjunction with restrictions on domestic production or consumption.

7.814. First, the Panel recalls that it has been unable, on the basis of the evidence presented, to find that China's extraction and production caps on tungsten constitute "restrictions" within the meaning of Article XX(g). China has not provided the Panel with evidence of the expected demand for tungsten during 2012, and as such the Panel cannot determine whether China's extraction and production caps were set at levels lower than the expected demand for the period of time over which the restriction was intended to apply (here, 2012).

7.815. Second, the Panel has found that China did not have in place any enforcement mechanisms capable of capturing and punishing over-extraction during the relevant period. In this context, the Panel recalls that actual extraction in 2102 reached 124,706 tons, which is 40% higher than the level set by the 2012 tungsten extraction quota. As such, the Panel believes that the extraction quota did not constitute a real restriction. Moreover, the fact that the actual production of tungsten concentrate reached 124,706 tonnes in 2012, which is about 40% higher than the production quota, confirms for the Panel that the production quota was not well enforced and, importantly, China does not deny the existence of significant over-production or attempt to explain it or to justify it. It is therefore difficult for the Panel to conclude that China's production quota on tungsten was capable of having a limiting effect.

7.816. The Panel considers that some of the domestic measures indicated by China, including the entry conditions, resource tax, and environmental regulations, could have had some limiting effect. Nevertheless, overall the Panel considers that China has not provided sufficient evidence to prove that such measures did have a limiting effect during the relevant period. Also, and importantly, the Panel notes that some of the additional restrictions pointed to by China were not

in force at the same time as the challenged export quota, and as such cannot be said to have "worked together" with such quota.

7.817. As the Panel has discussed in detail, the product scope of China's export quota is broader than the scope of its production quota. China argues that it must include tungsten intermediaries in its export quota to avoid the possibility of circumvention through the exportation of tungsten products after some basic processing.[1152] In the Panel's opinion, this feature of China's export quota on tungsten seems geared towards promoting China's industrial policy, which encourages tungsten intermediaries being used as inputs in the national production of value-added goods often destined for exports. The Panel does not see any connection with the conservation objective. The Panel has difficulty seeing how the 2012 export quota, with the current product scope on tungsten intermediaries "works together with" the extraction and production quotas on tungsten concentrates for conservation.

7.818. The Panel also notes measures inconsistent with the goal of policies, such as VAT refunds for downstream users of tungsten concentrate, which could stimulate domestic consumption of tungsten by value-added producers who export their finished products. This sits uncomfortably with China's claim to be restricting domestic consumption.

7.819. In sum, the Panel's view is that China's 2012 export quota was designed to reserve a certain amount of specific tungsten intermediaries for use by domestic downstream industries. In the Panel's opinion, this is industrial policy. Although the Panel has recognized that WTO Members have legitimate rights to impose industrial policies, it reiterates that industrial policies cannot be implemented under the guise of conservation. Taking into account the design, structure, and architecture of China's export quota and the extraction and production quotas, the Panel considers that China has failed to explain how its export quota works together with its extraction and production quotas on tungsten concentrates for the purpose of conservation. The Panel cannot identify any functional and operational complementarity between China's export quota and the domestic restrictions referred to by China for enhancing conservation.

7.820. Accordingly, the Panel concludes that China's export quota on tungsten does not relate to the conservation of tungsten, and is not made effective in conjunction with restrictions on domestic production or consumption.

7.821. Nonetheless, in order to fully discharge its responsibility under Article 11 of the DSU, the Panel proceeds to consider whether the application of China's export quota on tungsten complies with the requirements of the chapeau of Article XX.

7.7.3 Application of the chapeau of Article XX to China's export quota on tungsten

7.7.3.1 Whether China has demonstrated that its export quota on tungsten was not applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade

7.822. China argues that its 2012 export quota on tungsten makes no distinction in respect of the destination of the exported tungsten products. Therefore, China argues, the export quota is not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".[1153]

7.823. China adds that the application of the 2012 export quota on tungsten does not constitute a "disguised restriction on international trade" because significant quantities of tungsten products were imported into China during 2011 and 2012. According to China, this suggests that China's conservation policy is effective in restricting production and consumption of tungsten originating in China, as Chinese consumers are importing significant quantities of tungsten from abroad. China adds that these imports of tungsten demonstrate that foreign consumers of tungsten were *also* capable of securing supplies of tungsten *outside* of China. If Chinese users were able to secure tungsten on the world market, then this implies that foreign consumers of tungsten would have

[1152] China's response to Panel question No. 132.
[1153] China's first written submission, para. 336.

been able to do the same. This demonstrates that the export quota does not constitute a disguised restriction on international trade. [1154]

7.824. The European Union argues that if, *quod non*, China's export quota were to satisfy the requirements of subparagraph (g), it nevertheless does not meet the test under the chapeau of Article XX.[1155] The European Union also notes that China's submission fails to provide an explanation for the differential treatment that its export quota accords to China as compared to all other WTO Members.[1156] Specifically, the European Union contends that the export quota on tungsten imposes an additional restriction on foreign consumption of Chinese tungsten which does not exist with respect to domestic consumption.[1157]

7.825. The European Union submits that China's line of defence oversimplifies and underestimates the impact of China's tungsten export quota on the world market.[1158] China presently produces 83% of the world's tungsten supply. Holding such an important share of the world market necessarily means that any reduction in the quantity available will produce economic effects on the world market for tungsten. The European Union adds that, in assessing the trade distortive impact of China's measure, it is also important to consider that China did not and continues not to disclose the criteria on the basis of which the quotas are set for each year, making its yearly decisions entirely arbitrary and unpredictable and thereby accentuating their negative effects.[1159] According to the European Union, China's export restrictions on tungsten do not pursue conservation goals, but are rather motivated by protectionist objectives.[1160] The quota's objective of providing an advantage to Chinese tungsten-consuming industries over their competitors in the territories of other WTO Members is apparent from its "design, architecture and revealing structure", as well as from its effects.

7.826. The Panel recalls that, according to WTO jurisprudence, the same facts can lead to conclusion on unjustifiable or arbitrary discrimination, and/or disguised restrictions on trade, and that often these concepts overlap. In the present dispute, China's own argumentation is intertwined between these two overlapping concepts. The Panel considers that unjustified discrimination can constitute a disguised restriction on trade, but a disguised restriction on trade may exist even if there is no discrimination. For ease of exposition, the Panel will examine China's tungsten export quota under both of these concepts together.

7.827. All parties agree that the requirement that a measure not be "applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail" is a requirement that the measure not discriminate among other Members, or between other Members and the Member maintaining the measure.[1161]

7.828. The Panel now proceeds to examine whether China has demonstrated that the application of its export quota on tungsten does not cause arbitrary or unjustified discrimination or a disguised restriction on international trade. The Panel will first determine whether there is discrimination and/or a disguised restriction on international trade. It will then consider whether such discrimination or disguised restriction is based on, or explained by, a conservation rationale. Finally, the Panel will assess whether one or more WTO-consistent alternative measures exist, and will then reach a conclusion on China's compliance with the chapeau of Article XX.

7.829. China asserts that its export quota on tungsten does not constitute a disguised restriction on international trade because China imported significant quantities of tungsten during 2011 and 2012.[1162] The Panel accepts that China imported a significant amount of tungsten, and notes that this seems to confirm the existence of a strong demand for tungsten among Chinese industries. The Panel does not understand China's argument that, because Chinese domestic users can import

[1154] China's first written submission, para. 337.
[1155] European Union's second written submission, para. 269. See also United States' second written submission, para. 234.
[1156] European Union's second written submission, para. 272.
[1157] European Union's second written submission, para. 274.
[1158] European Union's second written submission, para. 275.
[1159] European Union's second written submission, para. 276.
[1160] European Union's second written submission, para. 277.
[1161] Appellate Body Report, *US – Gasoline*, pp. 23-24, DSR 1996:I, 3, pp 21-22; parties' responses to and comments on Panel question No. 47.
[1162] China's first written submission, para. 337.

tungsten, there is no problem with China's export restrictions on tungsten. In the Panel's view, the fact that China imports tungsten neither excuses nor justifies its export quota on tungsten, unless China argues and demonstrates that the export quota and its imports of tungsten somehow work together for conservation, and unless China explains how its *imports* of tungsten are evidence that its tungsten export quota does not discriminate in favour of its domestic users. The Panel recalls that the chapeau of Article XX is concerned with the way the challenged export quota is applied to other WTO Members. Clearly, if other WTO Members with tungsten reserves do not impose export restrictions, other WTO Members, including China, will be able to import tungsten from them; but this does not justify China's export restrictions on tungsten. In fact, the Panel considers that this situation seems to confirm the complainants' argument that China reserves its tungsten raw materials for Chinese manufacturers of downstream products through, *inter alia*, export restraints that create two markets (one domestic and one international) for the supply and demand of the raw materials, resulting in benefits to the development and export capacity of Chinese industries involved in tungsten processing and higher value-added manufacturing.[1163] In the Panel's view, it seems that China imposes an export quota on tungsten to discourage the export of tungsten. The Panel notes that China is fully entitled to pursue industrial policies that favour the production and export of value-added processed goods and discourage the export of raw materials. However, in doing so it must act consistently with its WTO rights and obligations regarding, *inter alia*, export quotas.

7.830. China also asserts that the relatively small size of the gap between foreign and domestic prices for tungsten in 2012 shows that its export quota was not targeted to provide a competitive advantage to the Chinese downstream sector using tungsten. Price data presented in Figure 5 of China's second written submission[1164] show a gap between foreign and domestic prices ranging approximately between 5% and 20% during 2012. Since even a small price difference in tungsten may provide a significant advantage to the downstream sector using tungsten, the evidence before the Panel does not allow us to exclude that existing price differences have indeed provided a competitive advantage to Chinese producers of value-added products containing tungsten.

7.831. Furthermore, when the Panel asked China for details on its pricing methodology for tungsten, the Panel understood China's response to mean that, for all three products including tungsten, *Metal Pages* (China's source of price data for tungsten)[1165] uses estimated pricing that may well not reflect actual pricing[1166], and that "this practice could lead to both the over-estimation of the likely foreign price as well as the under-estimating of the foreign price."[1167] Thus, the Panel does not consider it appropriate to rely on this price data evidence to establish non-discrimination. In addition, as discussed in the context of rare earths, neither is the Panel persuaded by the methodology used by China to calculate the price gaps. China subtracts the amount of the export duty from the f.o.b. price of tungsten before comparing it to domestic prices. However, export duties and quotas interact, and in the case of tungsten, China has failed to justify the removal of the export duty from the f.o.b. price on the ground that the removal of the export duty would not increase exports to the level necessary to fill the quota on tungsten.

7.832. Given the above, the Panel is not convinced that China's evidence regarding the price gap is sufficient to demonstrate that China's export quota on tungsten was not applied in a manner that would constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

7.833. Moreover, even accepting *quod non* that, as China claims, the 2012 quota had no *actual* discriminatory impact in terms, for example, of price differences or other economic effects, the Panel is still of the view that the very structure of the export quota system, which imposes unique and special burdens on foreign consumers on the basis of their being located outside of China, is

[1163] United States' comments on China's response to Panel question No. 25.
[1164] China's second written submission, figure 5 and para. 188.
[1165] China's responses to Panel question Nos. 40-42 and 85.
[1166] China's Second Written Submission, paragraph 126; China's response to Panel question No. 85.
[1167] China's answer to Panel question No. 85. The Panel recalls that, as explained in para. 6.21 of its Reports, on 17 June 2013, it sent an email to the parties revising its question No. 85 and asking China to provide more pricing information for tungsten and molybdenum as well as for rare earths. Even if China intended not to respond to the Panel's request for further pricing information on tungsten, the Panel is still entitled to raise the same doubts with respect to the reliability of the *Metal Pages* data on tungsten as it raises with respect to the data on rare earths, since *Metal Pages* contains data on all three products at issue, and China has relied on *Metal Pages* data in its arguments on all three products.

discriminatory in violation of the requirements of the chapeau of Article XX. The measures that China alleges constitute "restrictions on domestic production on consumption", and especially China's extraction and production quotas and its taxes on extraction, potentially restrict both domestic and foreign consumption of Chinese raw materials, while the export quota applies only to foreign users: there is no corresponding burden, such as a domestic consumption quota, imposed by China on Chinese consumers. Regardless of whether such a structural imbalance meets the "even-handedness" requirement under subparagraph (g) of Article XX, the Panel believes that it is discriminatory, insofar as it imposes added burdens on foreign consumers simply on the basis of their being located outside China, and with no conservation-related justification.

7.7.3.2 Whether the rationale for the discrimination or the disguised restriction on international trade created by the application of China's export quota on tungsten is concerned with conservation

7.834. In accordance with the Appellate Body report in *Brazil – Retreaded Tyres*[1168], the Panel now proceeds to determine whether the discrimination that results from the application of China's export quota on tungsten is nevertheless justified and rationally linked to conservation goals. In *Brazil – Retreaded Tyres*, the Appellate Body explained that arbitrary or unjustifiable discrimination exists when the reason(s) for discrimination bear(s) no rational connection to the Article XX objective on the basis of which a Member claims to be regulating, or else contradicts or undermines that objective. This is why the determination whether a measure is discriminatory in violation of the chapeau of Article XX should not depend exclusively on its quantitative impact, but must consider also whether the rationale for the discrimination relates to the legitimate objective that the measure allegedly pursues (in this case, conservation of exhaustible tungsten resources). Therefore, to determine whether China has demonstrated that its tungsten export quota is not unjustifiably discriminatory in violation of the chapeau of Article XX, the Panel needs to consider whether the rationale that China provides for the discrimination relates to the alleged conservation objective of the export quota.

7.835. The Panel recalls that more than 60% of tungsten extracted in China is consumed in China.[1169] Moreover, the Panel notes that according to China's own data, the 2012 extraction quota was exceeded by more than 40,000 tonnes. The Panel finds it difficult to understand the function of an export quota in such situation where, as the figures indicate, the main threat to the conservation of Chinese tungsten reserves, is domestic consumption. For the Panel, the export quota's main effect is to guarantee that domestic consumption benefits from a minimum amount of the extracted tungsten. The Panel recalls also that China has not suggested that price discrimination created by its export quota system is based on conservation considerations.

7.836. In the Panel's view, China has not demonstrated that the distortion created by the application of its export quota system is merely incidental to conservation considerations. Indeed, China denies the existence of any discrimination. On the contrary, in the Panel's opinion the discrimination seems to result from aspects of China's export quota system that reflect industrial policy considerations. For example, the fact that the quota system requires unused export quota shares to be returned to Chinese authorities[1170] and allows such returned volumes to be sold in the domestic market[1171] seems to point towards industrial policy considerations, especially when exporting firms can only trade their non-used export quota shares for tungsten products higher in the industrial chain (i.e. further-processed tungsten products). As we have noted previously, Members are free to pursue their own industrial policies, but they must do so consistently with their WTO commitments.

[1168] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226.

[1169] China has not provided data on the level of domestic tungsten consumption in 2012. However, the Panel notes that, according to Exhibit CHN-223, the actual level of tungsten extraction in 2012 was 124,706, whereas only 15,863 (measured in metal content) or 19,916 (measured in gross weight) tonnes were actually exported. The Panel considers that the actual level of domestic consumption can be approximated by subtracting the level of actual exports from the level of actual extraction.

[1170] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 42.

[1171] China's response to Panel question No. 36.

7.7.3.3 WTO-consistent alternatives

7.837. In the context of conducting an analysis under the chapeau of Article XX of a measure provisionally justified under subparagraph (g), the Appellate Body has examined whether a WTO-consistent or less trade-restrictive alternative would be available and would enable the regulating Member to achieve its legitimate policy goals with the same degree of efficiency and efficacy.[1172] According to the Appellate Body, discrimination can be considered arbitrary or unjustifiable where alternative measures exist which would have avoided or at least diminished the discriminatory treatment. For this reason, the Panel now proceeds to examine alternative measures put forward by the complainants.

7.838. The complainants put forward various alternatives that, they claim, China could use instead of export quotas and which, they claim, would provide China with the same level of conservation effectiveness while avoiding the discriminatory and distorting effects that the export quota has on foreign users. The parties expanded on these alternatives in response to a Panel question and the complainants discussed alternative measures for China's rare earths, tungsten, and molybdenum export quotas together. The Panel therefore refers to its discussion and analysis of alternative measures in section 7.6.3.3 above of its findings on the rare earths export quota.

7.839. China has not commented extensively on these various, allegedly non-discriminatory alternatives, except to say that it already uses an export licensing system in addition to its export quota system. As the Panel has noted in its discussion of rare earths, China argues that nothing is able to replace the quota because the export quota also fulfils a number of additional functions. Most importantly, it ensures that not only Chinese users but also foreign users receive a signal that China's tungsten supply is not unlimited and that they should explore alternative sources of supply.

7.840. With respect to the export quota's alleged signalling function, the complainants argue that China could have sent the relevant conservation-related signals to both domestic and foreign users alike in a non-discriminatory manner by tightening its production restrictions. The complainants insist that such signalling is clearly feasible, since China can simply enforce existing domestic production limits or adopt consumption limits to convey such signals. Such non-discriminatory signalling would be much more effective at controlling excessive production or consumption of tungsten, and would create an undistorted market and therefore a climate for long-term investments.[1173] To the extent that the current system reserves the lion's share of Chinese production for domestic industries, the export quota only reduces the incentive for domestic industrial users to take steps to conserve tungsten or to seek substitutes.

7.841. The Panel notes that China does not comment on the complainants' claim that all their suggested alternatives are WTO-consistent, whereas the export quota China uses is inconsistent with Article XI:1 of the GATT 1994. In the Panel's opinion, China needs to explain why such WTO-consistent or less trade-restrictive alternatives are not available to China. In the Panel's view, China has not done so.

7.842. The Panel recalls again that it is not asked to assess the efficiency or effectiveness of China's conservation policy, but only to determine whether the export quotas it argues are part of its conservation programme are really about conservation rather than another policy reason, and whether any discrimination caused is justified on the basis of conservation. This requires the Panel to consider whether China has explored the use of WTO-consistent or less trade-restrictive alternatives that could achieve the same conservation goal with the same efficiency and effectiveness. China has not satisfied the Panel that it has fully explored and justifiably rejected the alternatives proposed by the complainants.

7.843. The Panel therefore concludes that the discrimination and trade distortions engendered by China's export quota measures were both foreseeable and avoidable, including through the use of

[1172] Appellate Body Reports, *US – Gasoline*, pp. 25-29, DSR 1996:I, 3, pp. 23-27 and *US – Shrimp*, para. 171 ("The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609".)

[1173] European Union's closing statement at the second meeting of the Panel, para. 10.

WTO-consistent alternative means such as border controls and policing and/or by imposing domestic taxes and consumption restrictions that would at least reduce the level of discrimination against foreign users.

7.7.3.4 Conclusion

7.844. In light of the above, the Panel concludes that China has not demonstrated that its 2012 export quota on tungsten was not applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[1174]

7.7.4 Overall conclusion on China's export quota on tungsten

7.845. For the reasons given above, the Panel concludes that China's export quota on tungsten is inconsistent with Article XI:1 of the GATT 1994 and Paragraphs 162 and 165 of China's Working Party Report. The Panel also concludes that China's export quota on tungsten is not justified under either subparagraph (g) or the chapeau of Article XX of the GATT 1994.

7.8 Application of Article XX(g) to China's export quota on molybdenum

7.8.1 Application of subparagraph (g) to China's export quota on molybdenum

7.8.1.1 Introduction

7.846. The Panel will now apply the legal test under Article XX(g) to China's export quota on molybdenum. The Panel will first assess whether the export quota complies with subparagraph (g), and will then proceed to consider whether the export quota is justified under the chapeau of Article XX, before reaching an overall conclusion on the quota's WTO-consistency.

7.8.1.2 First part: Whether China's export quota on molybdenum "relates to the conservation of exhaustible natural resources"

7.847. The Panel now turns to consider whether China's export quota on molybdenum "relates to the conservation of exhaustible natural resources". The Panel will begin by considering whether the products subject to China's export quota are "exhaustible natural resources". It will then proceed to consider whether China's measures "relate to" the "conservation" of such exhaustible natural resources.

7.848. Before proceeding, the Panel notes that the parties have focused less attention on molybdenum than on rare earths. China's second written submission has only four pages on molybdenum[1175], and does not include any argumentation on whether the export quota on molybdenum relates to the conservation of exhaustible natural resources.[1176] Japan's second written submission does not specifically address the quota on molybdenum in detail.

7.849. Additionally, many of the parties' arguments on molybdenum draw on and incorporate their arguments on rare earths. As such, the Panel's findings on China's export quota on molybdenum are shorter than its findings on rare earths, and, where appropriate, incorporate some of the analysis already set forth above.

7.8.1.2.1 "exhaustible natural resources"

7.850. China submits that molybdenum is susceptible to depletion by intense exploitation, and thus is an "exhaustible natural resource" within the meaning of Article XX(g) of the GATT 1994.[1177]

[1174] In view of the nature of the export quota system described above, the Panel's finding is with respect to the series of measures comprising the relevant framework legislation, the implementing regulations, other applicable laws and the specific annual measures imposing the export quotas existing at the date of the Panel's establishment.

[1175] China's second written submission, paras. 191-205.

[1176] These paragraphs are solely concerned with whether China's export quotas on molybdenum result in a price advantage for Chinese consumers.

[1177] China's first written submission, para. 352.

According to China, it has 43.9% of the world's known molybdenum reserves, and produces 38% of the world's molybdenum supply.[1178]

7.851. The United States submits that China's argument is based on a simplified assumption that "molybdenum" in the abstract is an exhaustible natural resource; however, China's export quota covers 14 tariff codes ranging from molybdenum ores and concentrates to molybdenum scrap and intermediate molybdenum products.[1179] The United States recalls that the forms of bauxite and fluorspar subject to the challenged export restrictions in *China – Raw Materials* were clay minerals which, like molybdenum ores and concentrates, are basically in the form in which they are mined from the earth.[1180] In contrast to *Raw Materials*, the United States notes that in the present dispute China's export quota covers not just ores but also a number of products that "might not themselves be considered 'exhaustible natural resources' because they are intermediately processed products".[1181]

7.852. The European Union does not contest the fact that "molybdenum" is a "natural resource". However, the European Union stresses that the export quota that China imposes on "molybdenum" is also imposed on various forms of "molybdenum" products which have undergone some degree of further processing.[1182]

7.853. As the Panel has explained above in the context of China's export quotas on rare earths and tungsten, measures can "relate to the conservation of exhaustible natural resources" even if they do not act directly upon the resource sought to be conserved. Article XX(g) is not only available for measures that apply directly to the raw form of the resource in question, but to any measure that bears a "close", "real", or "substantial" relationship with the conservation of an exhaustible natural resource, regardless of the particular product that is the subject of the challenged measure.

7.854. All the parties seem to agree that molybdenum ores are exhaustible natural resources.[1183] As such, the Panel does not need to determine whether semi-processed molybdenum products are themselves "exhaustible natural resources", but will instead focus its attention on whether China's export quota on semi-processed molybdenum products are "closely" or "substantially" related to the conservation of molybdenum ores.

7.8.1.2.2 "conservation"

7.855. China argues that it has adopted a conservation policy for its exhaustible molybdenum resources, and argues that the 2012 export quota on molybdenum challenged by the complainants is both an integral part of this policy and works together with several other restrictions on the domestic production and consumption of molybdenum resources.[1184]

7.856. China explains that the legal basis of its conservation policy for molybdenum is found in the *Mineral Resources Law*[1185], and the *Foreign Trade Law*.[1186] China recalls that Article 16 of the *Mineral Resources Law*[1187] provides that for certain minerals "protective mining is prescribed by the State".[1188] Further, Article 16(4) of the *Foreign Trade Law*[1189] provides that the export of goods may be restricted "in order to effectively conserve exhaustible natural resources".

[1178] China's first written submission, para. 352.
[1179] United States' second written submission, paras. 261-262.
[1180] United States' second written submission, para. 265.
[1181] United States' second written submission, para. 267.
[1182] European Union's second written submission, para. 283.
[1183] United States' second written submission, para. 265; European Union's second written submission, para. 283; China's first written submission, para. 352.
[1184] China's first written submission, para. 342.
[1185] *Mineral Resources Law*, (Exhibit CHN-10).
[1186] *Foreign Trade Law*, (Exhibits CHN-11, JE-49).
[1187] *Mineral Resources Law*, (Exhibit CHN-10).
[1188] *Mineral Resources Law*, Article 16(3), (Exhibit CHN-10).
[1189] *Foreign Trade Law*, (Exhibits CHN-11, JE-49), Article 16(4).

7.857. According to China[1190], China's conservation policy for molybdenum consists of the following categories of measures:

- Measures limiting and controlling *access* to the molybdenum industry[1191];
- Measures directly *controlling the volume* of resources being produced and exported, consisting of a total production quota in a *Directive Production Plan*[1192] and an export quota[1193];
- A *resource tax* on molybdenum producers to ensure that the price of the resources reflects their costs[1194]; and
- A measure requiring mines to make a *deposit for ecological recovery*.[1195]

7.858. In response to questions from the Panel, China conceded that it does not have an extraction quota on molybdenum.[1196] Instead, China's arguments focus on the relationship between the challenged export quota and the goal of conserving exhaustible molybdenum ores.

7.859. The Panel begins by noting that China's conservation policy for molybdenum is similar in structure to China's conservation policy for rare earths, except that it contains fewer measures. Despite this difference, the Panel believes that its analysis in the context of rare earths is largely applicable in the context of molybdenum as well.

7.860. The Panel accepts that China has a conservation policy for its exhaustible molybdenum ore resources. As the Panel observed in the context of rare earths, it is certainly in China's own interests to conserve its molybdenum resources, and none of the parties have argued that China has no conservation policy with respect to such materials.[1197]

7.861. As such, the Panel's sole task is to objectively assess China's export quota on molybdenum for compliance with the requirements of Article XX(g). Where the Panel looks at other measures that are also claimed to form part of China's molybdenum conservation policy, it does so only for the light such measures throw on the challenged export quota.

7.862. The Panel now proceeds to consider whether China's export quota on molybdenum "relates to" the conservation of molybdenum ores.

7.8.1.2.3 Does China's export quota on molybdenum "relate to" the conservation of exhaustible molybdenum resources?

7.8.1.2.3.1 Text of the export quota measures

7.863. China's export quota on molybdenum is embodied in the following measures[1198]:

- *2012 Export Licensing Management Commodities List*[1199];

[1190] China's first written submission, para. 346. The Panel notes that in paras. 342, 343, and 345 and in the title of chapter B (page 115) of China's first written submission, the reference is to "China's conservation policy for molybdenum".

[1191] *Conditions for Admission to the Molybdenum Industry*, (Exhibit CHN-108).

[1192] *First Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-94) and *Second Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-95).

[1193] *2012 Export Licensing Catalogue*, (Exhibits CHN-8, JE-48), Paragraph I(i), indicating that molybdenum is subject to export quotas. The export quotas are administered on the basis of the *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50) and *Export Quota Administration Measures*, (Exhibits CHN-96, JE-52).

[1194] *Amendment of the Provisional Regulations on Resource Tax*, (Exhibit CHN-26) *and Implementation Rules for the Provisional Regulations on Resource Tax*, (Exhibit CHN-27).

[1195] *Opinions on Enhancing the Ecological Protection and Restoration of Mines*, Section IV, (Exhibit CHN-32).

[1196] Panel question Nos. 114 and 141.

[1197] European Union's second written submission, para. 280.

[1198] China's first written submission, para. 347.

- *Announcement of the Ministry of Commerce, No. 71 of 2011 Publishing the Total Export Quantity Quota for Agricultural and Industrial Products in 2012*[1200];

- *Public Notice of Application Conditions and Application Procedures for the 2012 Export Quotas of Indium, Molybdenum and Tin*[1201];

- *Notice Publishing the List of the State Trading Export Enterprises of Tungsten, Antimony and Silver, the Enterprises Exporting and Supplying Tungsten and Antimony, and the Enterprises Applying for the Export Quotas for Indium and Molybdenum in 2012*[1202]; and

- *2012 Notice on List of Export (Supply) Enterprises and First Batch Export Quota of Tungsten, Antimony and Other Non-Ferrous Metals*.[1203]

7.864. China argues that the texts of the measures embodying the 2012 export quota for molybdenum show a "close and genuine relationship of ends and means"[1204] between China's molybdenum export quota and the conservation objective.

7.865. According to China, the first evidentiary basis establishing such relationship is the reference to conservation in the *Public Notice of Application Conditions and Application Procedures for the 2012 Export Quotas of Indium, Molybdenum and Tin*, which specifies the eligibility criteria for enterprises to participate in the quota allocation process. It notes that this *Notice* states that it has been adopted "[i]n order to protect the resources".[1205]

7.866. China argues that further evidence of the "real" and "substantial" relationship between the export quota and the objective of conserving molybdenum is found in the fact that the measures embodying the 2012 molybdenum export quota were adopted on the basis of legal instruments that refer to China's conservation objective. China explains that the legal basis for using an export quota to conserve resources is contained in the following provisions:

- Article 16(4) of the *Foreign Trade Law*[1206] provides that the export of goods may be restricted "in order to effectively conserve exhaustible natural resources".

- Article 35 of the *Regulations on the Administration of the Import and Export of Goods* indicates that the export of goods that are considered to be exhaustible natural resources in need of conservation, "shall be restricted".[1207]

[1199] United States' Panel Request, page 3, third bullet; European Union's Panel Request, page 3, third bullet; Japan's Panel Request, page 3, third bullet. See also *2012 Export Licensing Catalogue*, (Exhibits CHN-8, JE-48).

[1200] United States' Panel Request, page 3, fifth bullet; European Union's Panel Request, page 3, fifth bullet; Japan's Panel Request, page 3, fifth bullet. See also *2012 Export Quota Amounts*, (Exhibits CHN-97, JE-58).

[1201] United States' Panel Request, page 3, twelfth bullet; European Union's Panel Request, page 3, twelfth bullet; Japan's Panel Request, page 3, twelfth bullet. See *also 2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*, (Exhibits CHN-107, JE-63).

[1202] United States' Panel Request, page 3, seventh bullet; European Union's Panel Request, page 3, seventh bullet; Japan's Panel Request, page 3, seventh bullet. See also *2012 List of Enterprises for the Export (or/and Supply) of Tungsten, and List of Enterprises for the Export of Molybdenum*, (Exhibits CHN-98, JE-65).

[1203] United States' Panel Request, page 3, ninth bullet; European Union's Panel Request, page 3, ninth bullet; Japan's Panel Request, page 3, ninth bullet. See also *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-99, JE-59).

[1204] Appellate Body Reports, *China – Raw Materials*, para. 355 (citing Appellate Body Report, *US – Shrimp*, para. 136).

[1205] *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*, Introductory Paragraph, (Exhibits CHN-107, JE-63).

[1206] *Foreign Trade Law*, (Exhibits CHN-11, JE-49), Article 16(4).

[1207] *Regulations on the Administration of the Import and Export of Goods* (Exhibit CHN-54, JE-50), Article 35. Article 35 of the *Regulations* refers to Article 16(1), (2), (3) and (7) of the *Foreign Trade Law*, (Exhibits CHN-11, JE-49). Article 16(2) of the *1994 version of the Foreign Trade Law*, (Exhibit CHN-61) specifies that export restrictions may be adopted to ensure the "effective protection of exhaustible domestic resources". The *Foreign Trade Law* was last amended in 2004, the corresponding provision dealing with conservation of exhaustible natural resources is Article 16(4).

- For molybdenum, specific *Measures for the Administration of Export Commodities Quotas* apply as well. These Measures specify how export quotas, adopted on the basis of Article 35 of the *Regulations on the Administration of the Import and Export of Goods*, and thus pursuing a conservation objective, are to be administered.[1208]

7.867. According to China, the *2012 Export Licensing Catalogue*, which specifies the goods subject to export quotas[1209], MOFCOM's *Announcement* publishing the total export quota volume for molybdenum[1210], the *Public Notice of Application Conditions and Application Procedures for the 2012 Export Quotas of Indium, Molybdenum and Tin*[1211] specifying the eligibility criteria for enterprises to participate in the quota allocation process, the *Notices* publishing the list of enterprises applying for the export quota[1212], and the list of enterprises to which part of the quota is granted[1213] all refer to the instruments above as the legal basis for the imposition of export quotas to conserve resources.

7.868. The complainants dispute the probative value of these references to "conservation" in China's export quota measures for several reasons. The complainants consider them to be passing references.[1214] They note moreover that China's export quota measures, which have been imposed for over a decade, have only made passing reference to the goal of conservation since the beginning of 2012.[1215] The complainants also contend that cross-references to legal instruments such as the *Foreign Trade Law* and *Regulations* in the export quota measures are insufficient to meet China's burden under Article XX(g), since those instruments also list reasons other than conservation for which the export quota could have been imposed.[1216]

7.869. The Panel begins by observing that it has discussed a number of the instruments invoked by China in its discussion above on rare earths and tungsten. Most importantly, the Panel has analysed the *Foreign Trade Law* and the *Regulations on the Administration of the Import and Export of Goods*, and concluded that references to these documents in the texts of China's quota measures are insufficient to establish the required degree of correspondence between the challenged measures and the goal of conserving exhaustible natural resources. The Panel will not repeat what it has written above, but finds that the analysis given in the context of rare earths and tungsten is applicable also in the context of molybdenum.

7.870. It appears to the Panel that the only new exhibit as regards molybdenum is the *Public Notice of Application Conditions and Application Procedures for the 2012 Export Quotas of Indium, Molybdenum and Tin*. The Panel has examined this document and takes note that, as China has argued, it refers in its preamble to the goal of "protect[ing] the resources and environment".

[1208] *Export Quota Administration Measures*, (Exhibits CHN-96, JE-52), Article 3.

[1209] *2012 Export Licensing Catalogue*, Introductory Paragraph, (Exhibits CHN-8, JE-48) ("Pursuant to the *Foreign Trade Law of the People's Republic of China* and the *Regulations on the Administration of the Import and Export of Goods of the People's Republic of China*, the *2012 Export Licensing Management Goods List* is hereby promulgated").

[1210] *2012 Export Quota Amounts*, Introductory Paragraph, (Exhibits CHN-97, JE-58) ("Pursuant to the *Regulations of the People's Republic of China on the Administration of the Import and Export of Goods* and the *Measures for the Administration of Export Commodities Quotas*, the 2012 total export quota quantity for agricultural and industrial products is hereby announced.").

[1211] *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*, Introductory Paragraph, (Exhibits CHN-107, JE-63) ("… according to the relevant provisions of the Foreign Trade Law of the People's Republic of China and The People's Republic of China Regulation on the administration on import and export of goods…").

[1212] *2012 List of Enterprises for the Export (or/and Supply) of Tungsten, and List of Enterprises for the Export of Molybdenum*, (Exhibits CHN-98, JE-65), Introductory Paragraph ("… in accordance with the Foreign Trade Law of the People's Republic of China and the Regulations on the Administration of Import and Export of Goods, … the list publishing online the enterprises applying for the export quota for indium and molybdenum are hereby published.").

[1213] 2012 *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-99, JE-59) ("According to the Regulations on Administration of Import and Export of Goods and the Measures for the Administration of Export Commodities Quotas, the list of export (supply) enterprises … is hereby announced and the first batch of the quota is hereby granted".).

[1214] United States' second written submission, para. 201; European Union's second written submission, para. 237.

[1215] United States' second written submission, paras. 202; European Union's second written submission, para. 237.

[1216] United States' second written submission, para. 203; European Union's second written submission, para. 238.

However, the Panel observes that the full sentence referred to by China reads as follows: "In order to protect the resources and environment, *in coordination with industry policies of the nation*, and further strengthen the export administration of the rare metal exports…".[1217] In the Panel's opinion, the italicized phrase is clearly a reference to industrial rather than conservation policy. Although, as the Panel has noted, conservation and industrial policies are not necessarily incompatible, the Panel considers that the juxtaposition of references to conservation and industrial policies in the *Public Notice* sends mixed messages, and thus the Panel cannot conclude on the basis of this document alone that China's export quota on molybdenum "relates to" conservation.

7.871. Additionally, and perhaps more importantly, the Panel believes that the texts of China's molybdenum export quota measures, including their references to conservation, do not explain *how* the export quota relates to the goal of conserving exhaustible molybdenum. For instance, while the *Public Notice of Application Conditions and Application Procedures for the 2012 Export Quotas of Indium, Molybdenum, and Tin* refers to the object of "protect[ing] the resources"[1218], the document contains no indication or explanation as to *how* the stated qualification conditions are closely or substantially related to the conservation of exhaustible molybdenum. The document states that the qualification conditions have been adopted "in order" to conserve exhaustible natural resources, but the actual relationship between those conditions and the conservation objective is nowhere explained.

7.872. As the Panel has explained in the context of China's export quotas on rare earths and tungsten, references to "conservation" simply cannot substitute for a full and proper explanation of *how* the export quota on molybdenum was designed to promote conservation. While the references to conservation that China has pointed to do suggest that the export quota measures were imposed with conservation-related concerns in mind, the Panel's task is to determine whether the design and architecture of the measures "relate to conservation", and the references to which China has pointed do not, in the Panel's opinion, significantly illuminate this inquiry.

7.873. In sum, it is the Panel's opinion that China cannot discharge its burden of proof simply by citing a number of references to "conservation" in the text of a challenged measure without explaining how the challenged measure "relates to", supports, or furthers the goal of conserving exhaustible molybdenum ores. Consequently, the Panel cannot conclude that China's export quota on molybdenum "relates to" the conservation of molybdenum ores on the basis of these references.

7.874. The Panel notes that, unlike in the context of rare earths and tungsten, China has not provided any further arguments explaining the relationship between its export quota on molybdenum and the goal of conserving exhaustible natural resources. It has not, for instance, argued that the export quota on molybdenum sends a signal to foreign and/or domestic users that China is serious about conserving its exhaustible natural resources.

7.8.1.2.3.2 The possibility that unused export quota volumes will be sold to domestic consumers

7.875. The Panel notes that the European Union's argument that "if China were serious about conserving its resources, it would conserve the material that has not been used up by exports, instead of making it available to domestic producers".[1219] In the context of its arguments on rare earths, China has responded to this claim by arguing that the domestic availability of unused export quota volumes does not undermine the existence of a substantial relationship between the export quota system and the goal of conserving molybdenum, since the conservation levels determined in the production quota for any given year constitutes the level of conservation that China considers appropriate for that year.[1220] On this argument, there is no harm, from a conservation perspective, in allowing domestic molybdenum consumers to use whatever quantity of export-designated molybdenum has not been used by foreign consumers.

[1217] Emphasis added.
[1218] *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*, (Exhibits CHN-107, JE-63).
[1219] European Union's opening statement at the first meeting of the Panel, para. 49.
[1220] China's response to Panel question No. 36.

7.876. The Panel disagrees with the European Union on this point. In the Panel's opinion, the mere fact that unused volumes are allowed to be sold into the domestic market does not in itself mean that the export quota system does not "relate to" conservation. Assuming that the extraction and/or production cap was a "real" restriction, i.e. were set below the level of expected demand for the relevant period (i.e. for 2012), then we believe that the fact that China does not require unused export quotas to be preserved for use in future years does not necessarily cast doubt on its conservation objectives, since China is still pursuing conservation through the imposition, on an annual basis, of limits on production. Within these limits, there is nothing illegal or even contradictory about China pursuing its own industrial or other goals (so long as these are pursued in a non-discriminatory manner).

7.877. While taking into account the unused share of the export quota in the determination of production and export quotas for the following year(s) may result in a higher degree of conservation, we believe that the Panel cannot find that China's measures as they stand do not "relate" to conservation merely because China has designed its export quota system in such a way as to prohibit the stockpiling or exchange of unused export quota shares among exporters while selling unused export quota volumes into the domestic market. In our view, this is so even though taking into account such unused export quota shares for future years' determinations would result in a higher level of conservation. China is entitled to identify and pursue its own level of conservation, and once such level of conservation is determined, where products are eventually consumed (abroad or domestically) does not affect the relationship between the challenged measures and the goal of conserving exhaustible natural resources.

7.8.1.3 Second part: whether China's export quota on molybdenum is made effective in conjunction with restrictions on domestic production or consumption

7.878. The Panel now turns to examine whether China's export quota on molybdenum is "made effective in conjunction with restrictions on domestic production or consumption."

7.879. China submits that it has a distinct conservation policy[1221] for molybdenum, including both *export* and *domestic* restrictions. Specifically, China argues that its conservation plan consists of four categories of domestic restriction: access conditions; quotas on extraction, production and export; resource taxes; and deposit for ecological recovery.[1222] China also argues that its restrictions on domestic production and consumption of molybdenum are substantial. China argues that it meets the even-handedness requirement in Article XX(g) as long as it ensures that the burden of its molybdenum conservation policy is not imposed solely on foreign consumers, but also on domestic consumers.[1223] The complainants rebut the four lines of China's argument, and maintain that China's conservation measures do not constitute "restrictions on domestic production or consumption" within the meaning of Article XX(g) of the GATT 1994. According to the complainants, China's alleged conservation policy for molybdenum contains no domestic measure that counterbalances the export quota on molybdenum products, and is therefore not even-handed.[1224]

7.880. The Panel now has to determine whether (i) China imposes restrictions on domestic production or consumption of molybdenum; (ii) whether China's export quota is "made effective in conjunction with" such restrictions on domestic production or consumption; and (iii) whether China's domestic and foreign restrictions are "even-handed".

7.8.1.3.1 Whether China has imposed restrictions on domestic production or consumption of molybdenum

7.881. In its first written submission, China identifies four categories of measures that it argues restrict the domestic production or consumption of Chinese molybdenum resources.[1225] As noted, these categories are (a) access conditions; (b) resource taxes; (c) volume restrictions; and (d)

[1221] China's first written submission, section IV.B; China's response to Panel question No. 108.
[1222] China's first written submission, paras. 346 and 360.
[1223] China's first written submission, para. 333.
[1224] United States' second written submission, paras. 275-290; European Union's second written submission, paras. 287-306.
[1225] China's first written submission, para. 311.

deposit for ecological recovery. The Panel will assess each of China's domestic measures individually.

7.882. In the following sections, the Panel will evaluate each legal instrument invoked by China as a restriction on domestic production or consumption, and assess whether these alleged restrictions *are capable of having a limiting effect*. The Panel recalls that a measure claimed to be a restriction is capable of having a limiting effect only if it is accompanied by actual enforcement. The Panel will therefore consider not only whether there are restrictions in the text of Chinese law, but also whether there China has adopted measures to enforce these alleged restrictions.

7.883. The Panel notes that, unlike in the context of its arguments on rare earths, China has not argued that it has measures to enforce its conservation policy on molybdenum. In response to a question from the Panel after the second meeting of the Panel with the parties, China provided three exhibits and claimed it has taken enforcement actions to ensure compliance with the alleged restrictions on domestic production or consumption of molybdenum. The Panel will assess these "enforcement actions". The Panel considers that "enforcement measures" are part of the design, structure, and architecture of each of the four alleged categories of restriction, and should be assessed together with each of those four categories. The Panel will also examine "enforcement measures" combating mining or production by illegal producers. The Panel recalls that domestic restrictions must be real and actual, which means that they must be in force, implemented and enforced. Accordingly, the Panel will consider the respective enforcement of each domestic legal instruments invoked by China pursuant to the second phrase of subparagraph (g).

7.8.1.3.1.1 Whether the access conditions are restrictions on domestic production or consumption of molybdenum

7.884. China argues that it strictly limits access to the molybdenum industry, and that, moreover, it is seeking to create a molybdenum industry that is organized in a rational and efficient manner.[1226] According to China, a rational industry structure facilitates supervision of the enterprises' compliance with the applicable conservation measures for molybdenum (including volume restrictions). China explains that strictly controlling access to the molybdenum industry also reduces the number of mines and producers, thus restricting total production.[1227]

7.885. The measures invoked by China as access conditions to the molybdenum industry are:

a. *Opinions on the Integration of Exploitation of Mineral Resources*[1228] of 2006;

b. *Announcement on Admission to Molybdenum Industry*[1229]of 2012.

7.886. The Panel has addressed the *Opinions on the Integration of Exploitation of Mineral Resources* in its discussion of China's conditions on access to the tungsten industry. The same provisions of the legal instrument regarding the integration of the mining industries of "key types of minerals" (including molybdenum[1230]) are also applicable to the molybdenum industry. As we said in the context of tungsten, the Panel acknowledges China's argument that a rational industry structure facilitates the supervision of the enterprises' compliance with the applicable conservation measures for molybdenum (including the production quota). According to China, strictly controlling the access to the industry also reduces the number of mines and producers, and thus restricts total production. However, the Panel considers that China has not provided any explanation about how the integration work would affect the access of miners to the molybdenum industry, or on the progress of the integration work, in particular regarding the molybdenum mining industry. In the Panel's opinion, China has not demonstrated how an integrated molybdenum industry would necessarily restrict the mining or production of molybdenum. While access conditions may prevent new enterprises from entering the molybdenum industry, the Panel is not convinced that they could limit the amount of molybdenum produced by enterprises already in the market. Moreover, access conditions do not appear to control the amount of molybdenum produced by newly

[1226] China's first written submission, para. 362.
[1227] China's first written submission, para. 365.
[1228] *2006 Opinions on the Integration of Exploitation of Mineral Resources*, (Exhibit CHN-17).
[1229] *Conditions for Admission to the Molybdenum Industry*, (Exhibit CHN-108).
[1230] *2006 Opinions on the Integration of Exploitation of Mineral Resources*, (Exhibit CHN-17), Article IV(a).

qualifying enterprises once they have met the conditions. Moreover, the Panel acknowledges that its task is to examine the domestic restriction existing *concurrently* with the 2012 molybdenum export quota. China has failed to explain how an integration project that was supposed to be completed prior to the end of 2008 could be a restriction on the mining or production of molybdenum in 2012.

7.887. The *Announcement on Admission to Molybdenum Industry*[1231] specifies access conditions for mining and production enterprises seeking entry into the molybdenum industry. The *Circular* addresses: (a) the establishment and layout of production enterprises; (b) production scale and equipment; (c) recovery of resources and energy consumption (minimum recovery rate); (d) environmental protection; (e) product quality; (f) safe production and occupational disease prevention and control; and (g) labour insurance.

7.888. The Panel notes that the *Announcement on Admission to Molybdenum Industry* was made effective only in July 2012. The Panel doubts how this legal instrument could contribute to restricting production of molybdenum prior to July 2012 (including in the period January-June 2012).

7.889. The Panel also doubts how the access conditions described above, which restrict the entry of newcomers into the molybdenum industry, could restrict the activity of intermediate molybdenum producers who have already entered the molybdenum industry when there are no volume limits on the production of intermediate molybdenum. The Panel considers that the access conditions make it harder for new enterprises to enter the molybdenum industry, but considers that they do not control the amount of molybdenum that enterprises already in the industry may produce. The Panel therefore has difficulty finding that conditions such as a minimum production scale – which was designed to promote the efficiency of production after July 2012 – really restrict domestic production.

7.890. The Panel understands that China's access conditions set the qualifications for miners and/or producers to enter the molybdenum industry. Violation of the access conditions will lead to a miner or producer losing its licence to produce, and therefore becoming an illegal producer if they continue to mine or produce. The Panel will address the alleged actions against mining without a licence and violations of other production requirements in a separate section of its report.

7.8.1.3.1.2 Whether the volume restriction (production quota) is capable of restricting domestic production of molybdenum

7.891. China argues that its 2012 conservation policy for molybdenum includes volume restrictions on domestic production, in the form of quotas set by the MIIT on the volume of molybdenum concentrates that can be produced from molybdenum ores.[1232] In response to a question from the Panel, China explains that it has not yet imposed an extraction quota on molybdenum as it does for rare earths and tungsten. According to China, this is attributable to the fact that molybdenum was not included in the *1991 "Circular on Including Tungsten, Tin, Antimony Ion-Absorption-Type Rare Earth Minerals into Special Minerals under the National Protective Mining*." As a result, the Ministry of Land and Resources (MLR) does not have the competence to set an extraction quota on molybdenum.[1233]

7.892. China invokes the following legal instruments in support of its claim that it has imposed a restriction on the production of molybdenum concentrates in 2012[1234]:

a. *2012 First Batch of the Directive Production Plan of Rare Metals*[1235]; and

b. *2012 Second Batch of the Directive Production Plan of Rare Metals*[1236]

[1231] *Conditions for Admission to the Molybdenum Industry*, (Exhibit CHN-108).
[1232] China's first written submission, para. 366.
[1233] China's response to Panel question No. 114.
[1234] China's first written submission, paras. 346 and 366.
[1235] *First Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-94).
[1236] *Second Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-95).

7.893. The Panel notes that the MIIT issued the *2012 First Batch of the Directive Production Plan of Rare Metals* on 13 January 2012, which specified the first batch of the production quota of molybdenum (100,000 tonnes).[1237] On 6 July 2012, the MIIT issued the *2012 Second Batch of the Directive Production Plan of Rare Metals*, which specified the second batch of the production quota of molybdenum (94,520 tonnes).[1238] The annexes to these two instruments specify the allocation of the production quota at the regional level.[1239] The Panel considers that these two batches of production quota together indicate the maximum amount of molybdenum concentrates that could be produced by the end of 2012. According to the data in Exhibit CHN-224, the total 2012 production quota (194,520 tonnes) was lower than the actual amount of molybdenum concentrates (229,600 tonnes) produced in 2011.

7.894. However, as the Panel explained above in its discussion of the legal test under Article XX(g), the fact that a quantitative restriction on domestic production or consumption (here, the molybdenum production plan) is, in a given year, set at a level lower than that at which it was set in a previous year does not necessarily mean that it constitutes a "restriction" within the meaning of Article XX(g). What matters, in the Panel's view, is that the quantitative restriction be set below the expected level of demand for the period in which the alleged restriction is intended to apply. Since expected demand may fluctuate from year to year, the mere fact that China's molybdenum production was set in 2012 at a volume lower than the actual level of production in 2011 does not of itself establish that the production quota constituted a "restriction". Instead, the Panel needs to determine whether the 2012 production quota was set at a level below the expected demand for 2012.

7.895. Unfortunately, China has not provided any evidence as to the expected level of demand for 2012 on the basis of which the Panel could assess whether the 2012 molybdenum production plan constituted a "restriction" for the purposes of Article XX(g). As such, the Panel is unable to conclude that the 2012 molybdenum production quota, as established by Chinese law, constituted a real "restriction" for the purposes of Article XX(g).

7.896. With respect to enforcement, the complainants note that China has not argued that the production target actually restricted production of molybdenum in 2012.[1240] Moreover, according to the complainants, the fact that extraction exceeded the production quota in 2012 shows that China does not have restrictions or limitations on domestic production.[1241] Indeed, the complainants refer to the data provided by China, and note that the volume of molybdenum extraction and domestic consumption has increased dramatically in the last decade.[1242]

7.897. China refers to the first and second batches of the *Directive Production Plan of Rare Metals* and describes the compliance requirements in two paragraphs in its first written submission. According to China, utilization of and compliance with the production quota must be reported on a monthly basis to the MIIT. In case an enterprise produces without a share of the export quota or beyond its share of the quota, "it will be ordered to stop producing immediately and the sources of ore products will be traced". Further, "punishments are imposed on enterprises conducting illegal purchases and sales of…ore products".[1243] The two legal instruments also indicate that "[f]or those enterprises that produced beyond the plan in *2011* and that with environmental pollution and safety risk, the plan quota shall be reduced or even cancelled". On the other hand, "for those enterprises that strictly followed the plan, and meet the requirement of safe production, the quota may be properly increased".[1244]

7.898. In the Panel's view, the texts of the two batches of the *2012 Directive Production Plan of Rare Metals* appear to set a quota on the production of molybdenum concentrates, and entail

[1237] *First Batch of the 2012 Directive Production Plan of Rare M*etals, (Exhibit CHN-94).
[1238] *Second Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-95).
[1239] *First Batch of the 2012 Directive Production Plan of Rare Metals*, Annex, (Exhibit CHN-94) and *Second Batch of the 2012 Directive Production Plan of Rare Metals*, Annex, (Exhibit CHN-95).
[1240] United States' second written submission, para. 278; European Union's second written submission, para. 295.
[1241] United States' second written submission, para. 280; European Union's second written submission, para. 293.
[1242] European Union's second written submission, paras. 293-294.
[1243] China's first written submission, para. 369; *First Batch of the 2012 Directive Production Plan of Rare Metals*, paras. III, IV and V, (Exhibit CHN-94).
[1244] China's first written submission, para. 368.

compliance requirements as well as sanctions on over-quota production. However, China has not put forward any evidence regarding enforcement or sanctions against over-quota production of molybdenum concentrates in 2012. The Panel notes that the text of the 2012 production quota measures mention sanctions for over-quota production and for violations of the safe production requirements that occurred in 2011. The Panel considers that China needed to put forward evidence, e.g. the text of 2013 production quota, which might have mentioned sanctions for over-quota production and for violations of the safe production requirements that occurred in 2012. As it stands, the Panel considers that China has not adduced evidence indicating the number of enterprises fined for the over production in 2012, and whether and by how much their share of the production quota was reduced or even cancelled.

7.899. Moreover, the Panel notes that China has not demonstrated how exactly over-quota producers are sanctioned. For instance, at the Panel's second meeting with the parties in June 2013, by which time the 2013 annual production quota for molybdenum should have been issued and allocated to each molybdenum concentrate producer, China had still not indicated whether this quota had actually been implemented and if any sanctions had been imposed on those enterprises that produced over their quota limit.

7.900. The Panel notes that, according to China's own statistics, actual production of molybdenum concentrate reached 267,947 tonnes in 2012, which is approximately 38% higher than the production quota. In the Panel's opinion, this suggests that the quota was not sufficiently enforced. Although the Panel has stated earlier that it does not consider that there is an effects test under the second part of Article XX(g), the Panel notes that China does not deny this over production and has not attempted to explain or justify it.

7.901. In sum, the Panel is not convinced that China imposed enforcement actions capable of effectively capturing and sanctioning any violation of the production quota. As such, the Panel believes that the production quota was not a restriction on domestic production as required under Article XX(g).

7.8.1.3.1.3 Whether China's resource tax is a restriction on domestic production or consumption of molybdenum

7.902. China refers to the *Decision of the State Council to Amend the Provisional Regulations on Resources Tax*[1245], *Implementation of the Provisional Regulations on Resource Tax*[1246] and *Circular on Taxation on Adjusting the Applicable Tax Rate of Resource Tax for Tin and Other Ores*[1247], and indicates that it increased the resource tax imposed on molybdenum miners in February 2012. The tax rate after adjustment is 12 RMB per tonne for 1st class of ore, 11 RMB per ton for 2nd class, 10RMB per tonne for 3rd class, 9 RMB per tonne for 4th class and 8 RMB per tonne for 5th class of ore.[1248]

7.903. To support its argument, China provides the following data from a "major molybdenum supplier", Jinmu Group, and argues that, faced with significantly increased costs for operating molybdenum mines, these mines will want to pass on part, it not all, of these costs to downstream consumers. According to China, the increased resource tax will lead to higher molybdenum prices and thus limit domestic consumption.[1249]

Mine	Ore grade	Extraction in 2011	Original resource tax	Adjusted resource tax	Increase in cost (RMB)
Jinduicheng Mine	0.099%	10,000,000	6 RMB/ton	10 RMB/ton	40,000,000
Ruyang Mine	0.12%	1,650,000	8 RMB/ton	12 RMB/ton	6,600,000

7.904. The Panel acknowledges that increased costs caused by the tax could, in the long run, lead to a reduction in demand and therefore limit production of molybdenum ores. However, China did

[1245] *Amendment of the Provisional Regulations on Resource Tax*, (Exhibit CHN-26).
[1246] *Implementation Rules for the Provisional Regulations on Resource Tax*, (Exhibit CHN-27).
[1247] *Circular on Adjusting the Applicable Tax Rate of Resource Tax for Tin and Other Ores*, (Exhibit CHN-112).
[1248] China's first written submission, footnote 547.
[1249] China's first written submission, paras. 372-373 (referring to Zhang Fang, Guo Xiaolu, "An Analysis on Resource Tax Adjustment", *China Securities Research*, 22 February 2012, (Exhibit CHN-109).

not submit any evidence about either the percentage of such tax on producers or the price of molybdenum ores[1250] that could have enabled the Panel to assess whether the resource tax is capable of limiting the production or consumption of molybdenum. In other words, the evidence presented by China does not explain, on a percentage basis, how much of the overall cost of production is attributable to the tax, and how much is due to the companies' scale of production. The Panel considers that evidence from two particular enterprises[1251] is not sufficient to demonstrate that the resource tax on molybdenum is a real and actual restriction on domestic production or consumption.

7.8.1.3.1.4 Whether environmental requirements are restrictions on domestic production or consumption

7.905. China refers to the *Opinions on Enhancing the Ecological Protection and Restoration of Mines*[1252] in its first written submission and argues that this measure increases the costs of molybdenum production by requiring that, once a mining company obtains an extraction right, it must make an ecological recovery deposit. However, the Panel notes that Exhibit CHN-32, entitled *Opinion on Strengthening Rare Earth Mine Ecological Protection and Governance and Recovery*, does not refer to molybdenum.

7.906. In response to a question from the Panel[1253], China submits that it has four relevant legal instruments applicable to the molybdenum industry relating to emission standards, ecological protection, restoration of mines, and inspection of compliance. These are:

a. *Announcement on Admission to Molybdenum Industry of 2012*;

b. *Circular on Environmental Protection Inspection of Tungsten and Molybdenum Enterprises;*

c. *2012 First Batch of the Directive Production Plan of Rare Metals* ;

d. *2012 Second Batch of the Directive Production Plan of Rare Metals*.

7.907. China claims that these legal instruments contain a link to the *Directive Production Plan*. The Panel will examine each instrument and assess whether the environmental requirements contained therein are real restrictions on domestic production or consumption.

7.908. The *Announcement on Admission to Molybdenum Industry*[1254] elaborates emission standards for pollutants from the molybdenum industry, and establishes compliance with the emission standards as one of the conditions for enterprises accessing the molybdenum industry. The Panel notes that it has discussed this legal instrument in the section on "access conditions" and has expressed doubt about how the access conditions, which apply to newcomers seeking access to the industry, could restrict the activity of molybdenum producers who have already entered the molybdenum industry.

7.909. The *Circular on Environmental Protection Inspection of Tungsten and Molybdenum Enterprises*[1255] provides for the inspection of molybdenum companies' compliance with applicable environmental requirements and for the publication of a list of complying companies. However, the *Circular* was issued in April 2013. China has not explained how a legal instrument put in place in 2013 could restrict extraction, production, or consumption of molybdenum in 2012. This measure is not concurrent and is therefore not relevant to the disputed 2012 molybdenum export quota.

[1250] The Panel notes that in *Molybdenum roasted concentrates: Price Data*, (Exhibit CHN-169), China provides molybdenum roasted concentrates price data. However, there is no data available on molybdenum ores.

[1251] China's first written submission, para. 372.

[1252] *Opinions on Enhancing the Ecological Protection and Restoration of Mines*, Section IV, (Exhibit CHN-32).

[1253] Panel question No. 100.

[1254] *Conditions for Admission to the Molybdenum Industry*, (Exhibit CHN-108).

[1255] *Circular on Environmental Protection Inspection of Tungsten and Molybdenum Enterprises* , General Office (Huan Ban Han [2013] No. 442), Ministry of Environmental Protection, 24 April 2013, (Exhibit CHN-217).

7.910. Additionally, according to the two batches of the *Directive Production Plan of Rare Metals*[1256], only enterprises on the list of enterprises that meet the environmental protection requirements published by the Ministry of Environmental Protection are eligible to apply for a share of the production quota. However, the Panel fails to see how this environmental requirement, acting as a qualification requirement, could restrict the amount of molybdenum produced by enterprises that have already obtained a share of the production quota.

7.911. The Panel is aware that any regulatory requirement will impose compliance costs on the concerned enterprises. However, the issue before the Panel is whether China's environmental regulatory requirements restrict domestic production or consumption so as to conserve molybdenum.

7.912. In the Panel's view, China has not adduced detailed evidence to establish that the environmental costs it invokes would have any price pass-through effect on consumers such that production of molybdenum would be restricted. In the Panel's view, environmental costs are ordinary production costs imposed on enterprises to address market externalities (in the present context, environmental pollution caused by the production of molybdenum).

7.8.1.3.1.5 Whether measures for combating illegal mining are restrictions on domestic production or consumption

7.913. In response to a question from the Panel[1257], China referred to the following legal instruments and submitted that China has measures in place to combat the illegal mining of molybdenum:

a. *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law*[1258];

b. *Circular of Hebei Province on Issuing the Program of the Rectification of Metal and Non-Metal Mines according to Law*.[1259]

7.914. The Panel has addressed these legal instruments when considering enforcement action against the illegal mining of tungsten. The same provisions of the legal instruments are applicable to the molybdenum industry. They address illegal mining, violation of safe production conditions, and mines with outdated processes, technologies and devices.[1260]

7.915. The Panel notes that in Exhibit CHN-219, China provides examples of ways in which it has cracked down on illegal molybdenum mining in 2012.

7.916. The Panel acknowledges that China has made efforts to combat illegal mining. However, the Panel has difficulties seeing how the two above-mentioned legal instruments promulgated at the end of 2012 could be used to combat illegal mining during 2012. Section I(II) of the *Opinions* sets the goal of combating illegal mining by the end of 2015.[1261] Section III(C) of the *Circular* provides that the period of rectification and clampdown in Hebei province would be from 1 February 2013 to 31 December 2014.[1262] Therefore, the Panel considers that while the two legal instruments provide for the future combating of illegal production, they do not establish a mechanism applicable or operative in 2012. Recalling that our task is to examine whether domestic restrictions exist concurrently with the challenged export restrictions, the Panel considers that China has failed to demonstrate that the above-mentioned instruments were capable of having a "limiting effect".

[1256] *First Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-94), Article II and *Second Batch of the 2012 Directive Production Plan of Rare Metals*, (Exhibit CHN-95), Article II.

[1257] Panel question No. 109.

[1258] *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law*, (Exhibit CHN-218).

[1259] *Program of the Rectification of Metal and Non-metal Mines in Hebei Province*, (Exhibit CHN-220).

[1260] *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law*, Section II, (Exhibit CHN-218) and *Program of the Rectification of Metal and Non-metal Mines in Hebei Province*, Section II, (Exhibit CHN-220).

[1261] *Opinions on the Rectification of Metal Mines and Non-Metal Mines according to Law*, (Exhibit CHN-218).

[1262] *Program of the Rectification of Metal and Non-metal Mines in Hebei Province*, (Exhibit CHN-220).

7.8.1.3.1.6 The cumulative effect of all domestic restrictions and even-handedness

7.917. China claims that the *net effect* of the four categories of measures (i.e. access conditions, resource taxes, volume restrictions, and environmental requirements) is a lower rate of molybdenum production in China than would otherwise have been the case.[1263] The Panel recalls first that subparagraph (g) does not call for an assessment of the effects of the concerned domestic measures. However, even if the Panel wanted to consider this argument, China has not explained in sufficient detail *how* the net effect of the four categories of measures work together in the way China claims. As such, the Panel has difficulty accepting China's claim.

7.918. In sum, the Panel does not understand how China's production restrictions on molybdenum can be considered as working together coherently for the purpose of conservation.

7.8.1.3.2 Whether the 2012 export quota on molybdenum was "made effective in conjunction with" restrictions on domestic production or consumption

7.919. The Panel recalls that subparagraph (g) requires that GATT-inconsistent trade measures work together with domestic restrictions to conserve exhaustible natural resources.[1264] The Panel considers that the phrase "made effective in conjunction with" requires the simultaneous or perhaps near-simultaneous operation of the relevant foreign and domestic restrictions. As the panel stated in *China – Raw Materials*, "to benefit from the justification permitted under subparagraph (g), a Member cannot seek to rely on a future or potential domestic restriction; nor will measures enacted concurrently but which only have effect or are foreseen to have effect only in the future respect the Article XX(g) criteria, for they must not only exist concurrently; they must operate concurrently.[1265]" In the Panel's view, the phrase "work together with" also suggests a degree of substantive operative complementarity between the trade and domestic restrictions.

7.920. China claims that its restrictions on domestic production and consumption of molybdenum are substantial, and that domestic users, together with foreign consumers of molybdenum, *collectively* bear the burden of China's conservation policy. In the Panel's view, China's argument does not explain how the export quota works together with restrictions on domestic production or consumption for conservation. On the contrary, for the following reasons, the Panel finds that China's export quota and the restrictions on domestic users or producers of molybdenum referred to by China do not appear to always work coherently towards the goal of conservation.

7.8.1.3.2.1 The different product scopes of China's export quota and production quota

7.921. The Panel notes that the volume restrictions in China's conservation policy on molybdenum, i.e. China's production and export quotas, are imposed on products at different stages of the molybdenum industry value-added chain.

Mining products (molybdenum ores and concentrates)	Upstream intermediate products (such as molybdenum oxide)	Downstream (such as finished stainless steel products)
Export quota		
Production restrictions		

7.922. As represented in the above table, China imposes a production quota on molybdenum concentrates, while China's export quota covers not only molybdenum concentrates but also semi-processed molybdenum products such as molybdenum oxides and hydroxides, ammonium molybdates, other molybdates, ferro-molybdenum, molybdenum powders, and unwrought molybdenum, including bars and rods obtained simply by sintering, etc.[1266]

7.923. China argues that it must include molybdenum intermediaries in its export quota to avoid the possibility of circumvention through exportation of molybdenum products after some basic processing.[1267] China does not provide any further explanation of the rationale for setting the

[1263] China's first written submission, para. 361.
[1264] Appellate Body Reports, *China – Raw Materials*, para. 356.
[1265] Panel Reports, *China – Raw Materials*, para. 7.455 (emphasis original).
[1266] China's response to Panel question No. 100.
[1267] China's response to Panel question No. 132.

product scope of its 2012 export quota on molybdenum differently from that of its domestic production restriction.

7.924. The Panel also notes that in announcing the second batch of the export quota for 2012, China indicated that as of 1 August 2012, export companies allocated quota shares for specific molybdenum products would be allowed to adjust their export quota allowances to apply to molybdenum products higher up in the industrial chain, without first seeking authorization from MOFCOM.[1268] These quota shares may be freely allocated to molybdenum products higher in the industrial chain, but may not be reallocated to molybdenum products with a lesser degree of processing.

7.925. In the Panel's opinion, this inconsistency appears to be linked to China's industrial policy, which requires molybdenum intermediaries for use as inputs in the national production of value-added goods often destined for exports. The Panel does not see any connection with conservation considerations. The Panel has difficulty seeing how the 2012 export quota, with the current product scope on molybdenum intermediaries, "work[s] together with" the production quota on molybdenum for conservation.

7.926. In the Panel's view, China's 2012 export quota was designed to reserve a certain amount of specific molybdenum intermediaries for use by domestic downstream industries. In the Panel's opinion, this is industrial policy. Although the Panel recognizes that WTO Members have the right to pursue industrial policies, industrial policies cannot be implemented under the guise of conservation. Taking into account the design, structure, and architecture of China's export quota and the production quota, the Panel considers that China has failed to explain how the product scope of its export quota works together with its production quota on molybdenum concentrates for the purpose of conservation. The Panel cannot identify any functional and operational complementarity between China's export quota and its alleged domestic restrictions for enhancing conservation.

7.8.1.3.2.2 A global quota while demand may be product specific

7.927. The Panel recalls that China imposes a global export quota (in addition to export duties) on exports of molybdenum. The export quota for molybdenum is further allocated among the following three molybdenum product categories: (1) primary raw molybdenum; (2) chemical molybdenum products; and (3) molybdenum products.[1269] One aspect of the operation and application of China's export quota system the Panel finds troubling is the fact that molybdenum export quota shares cannot be exchanged amongst exporters or reallocated to different exporters if unused. Under China's *Regulations on the Administration of the Import and Export of Goods*, the holder of an export quota is required to return any unused quota volume by 31 October of the year for which the export quotas have been issued.[1270] Exporting enterprises may be subject to sanction if they fail to do so and also fail to fully use their quota by the end of the year.[1271] Enterprises may also face sanctions for exporting without permission, exceeding the quantitative limitations, or buying or selling quota certificates or other documents without approval. Thus, unused export quota shares can only be handed back to the Chinese authorities, from which point they may be sold domestically.[1272] However, as noted above, the notice announcing the "second batch" export quota clarified that, as of 1 August 2012, the export companies allocated quota allowances for specific molybdenum products may adjust the export quota allowances to apply to molybdenum products higher in the industrial chain, without first seeking authorization from MOFCOM.[1273]

[1268] The Notice indicates the industrial chain for molybdenum proceeds as follows: molybdenum furnace materials (primary raw molybdenum) → molybdenum chemical products → molybdenum products. See *2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-165, JE-60).

[1269] *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals* (Exhibits CHN-99, JE-59); *2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals* (Exhibits CHN-165, JE-60).

[1270] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 42.

[1271] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 42.

[1272] China's response to Panel question No. 36.

[1273] The Notice indicates the industrial chain for molybdenum proceeds as follows: molybdenum furnace materials (primary raw molybdenum) → molybdenum chemical products → molybdenum products. See *2012 Second Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-165, JE-60).

According to the notice, these quota shares may be freely allocated to molybdenum products higher in the industrial chain, but may not be reallocated to molybdenum products with a lesser degree of processing.

7.928. In the Panel's opinion, this is problematic for two reasons. First, the "first batch" export quota shares for molybdenum, which indicates the specific amount of specific categories of molybdenum allocated to specific enterprises[1274], provides no flexibility for exporters to fulfil the demand for any specific form of molybdenum product other than the amount allocated to specific enterprises.[1275] Second, the "second batch" allows only reallocation of export quota shares to molybdenum products higher in the industrial chain. The result of allocating specific products to specific enterprises is that the overall export quota volume may be unused, and thus partly available for domestic consumption, while foreign demand may still be unsatisfied for one or more specific molybdenum products. It is therefore possible that the export quota for molybdenum might go unfilled even though demand for one or more molybdenum products remains unsatisfied.

7.929. In the Panel's opinion, this inconsistency appears to be linked to China's industrial policy, which requires molybdenum intermediaries for use as inputs in the national production of value-added goods often destined for exports. The Panel does not see any connection with conservation considerations. The Panel has difficulty seeing how the 2012 export quota, with the current product scope on molybdenum intermediaries, work together with" the production quota on molybdenum for the purpose of conservation.

7.930. In the Panel's view, China's 2012 export quota seems rather designed to reserve a certain amount of specific molybdenum intermediaries for use by domestic downstream industries. In the Panel's opinion, this is industrial policy. Although the Panel has recognized that WTO members have the right to pursue industrial policies, industrial policies cannot be implemented under the guise of conservation. Taking into account the design, structure, and architecture of China's export and production quotas, the Panel considers that China has failed to explain how the product scope of its export quota works together with its production quota on molybdenum concentrates for the purpose of conservation. The Panel cannot identify any functional and operational complementarity between China's export quota and the domestic restrictions referred to by China for enhancing conservation.

7.8.1.3.2.3 Policies on domestic consumption and foreign consumption of molybdenum

7.931. In the Panel's view, the fact that unused export quota volumes are allowed to be consumed domestically, while there are no measures restricting domestic consumers from consuming some or even all of the volume of molybdenum products that were designated for export, suggests that China has not been even-handed in imposing foreign and domestic restrictions. Although, as the Panel has explained above, the mere fact that unused export quota volumes can be sold into the domestic market does not, of itself, indicate that China's export quota does not "relate to" conservation, it does seem to favour domestic over foreign users. The Panel considers that there is nothing in the design and structure of the conservation policy imposed on domestic consumers to counterbalance the policy that allows domestic consumption of the unused export quota of molybdenum products. Therefore, there is no even-handedness in the imposition of export quota and the domestic restrictions referred to by China.

7.932. The Panel also observes that there was no limitation on the production of molybdenum concentrates prior to 2010, although there has been an export quota on molybdenum products since 2007. China does not argue that it has imposed any restriction on the domestic consumption of molybdenum. The Panel notes that prior to 2010, China's domestic molybdenum downstream users (such as finished stainless steel producers) could consume an unlimited amount of molybdenum products. After 2010, the available amount of molybdenum was maintained at a level at least twice that of the yearly molybdenum export quota.[1276] In the Panel's view, this makes it is difficult to understand how China's export quota and domestic restrictions work together to enhance conservation.

[1274] Annex 2 of *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals* (Exhibits CHN-99, JE-59).
[1275] Annex 2 of *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals* (Exhibits CHN-99, JE-59).
[1276] *Molybdenum Data (1999-2012)* (Exhibit CHN-139 updated), (Exhibit CHN-224).

7.933. In the Panel's opinion, restrictions imposed on producers of molybdenum concentrates affect both domestic and foreign consumers, while the export quota on molybdenum affects only foreign consumers. From a structural perspective, China's production restrictions therefore do not counterbalance its export restrictions, and so do not appear to work well together for the purpose of conserving exhaustible molybdenum resources. Moreover, export quotas are not the only restrictions imposed by China on exports of intermediate molybdenum products. China also imposes export duties on intermediate molybdenum products. The Panel will discuss the combined effect of export quotas and export duties on molybdenum in its analysis under the chapeau of Article XX. Additionally, in contrast to its export restrictions on lower value-added products, China provides tax and export incentives through, for example, refunds of the VAT upon the exportation of higher value-added molybdenum products.[1277] Such tax incentives can only stimulate production for export, and seem to act contrary to conservation goals and restrictions.

7.8.1.4 Even-handedness

7.934. The Panel recalls that subparagraph (g) of Article XX also requires even-handedness in the imposition of domestic restrictions for conservation. The Panel agrees with China that China's domestic regulations are inherent to any conservation programme and may be argued to be capable of imposing concurrent real restriction on consumption or production of molybdenum. However, the Panel fails to see how such domestic actions can be said to be capable of imposing a burden even-handed with that resulting from its export quotas on molybdenum so that the export quota and its related domestic restrictions on molybdenum work together for conservation. The Panel believes that the restrictions imposed on producers of molybdenum affect both domestic and foreign consumers, while the export quota on molybdenum affects only foreign consumers. From a structural perspective, China's production restrictions therefore do not counterbalance its export restrictions and do not appear therefore to work well together.

7.935. Additionally, in the Panel's view the fact that any unused export quota volume is allowed to be consumed domestically, while there are no restrictions on domestic consumers consuming the molybdenum products designated for export in the export quota, suggests that China has not imposed even-handed restrictions on domestic and foreign consumption. Although, the mere fact that unused export quota volumes can be sold into the domestic market does not, of itself, indicate that China's export quota does not "relate to" conservation, it does seem to favour domestic over foreign users. The Panel considers that there is nothing in the design and the structure of the conservation policy imposed on domestic consumers to counter-balance the policy that allows domestic consumption of the unused export quota of molybdenum products. Therefore, there is no even-handedness in the imposition of export quota and the domestic restrictions referred to by China.

7.8.1.5 Conclusion

7.936. As explained above, the Panel is of the view that all the elements of subparagraph (g) aim at ensuring that the challenged measure works with domestic restrictions for conservation and ensures that its burden is distributed in an even-handed manner between foreign and domestic users. The Panel has reviewed the design and architecture of China's export quota system on molybdenum, and has considered whether the export quota relates to conservation and whether it works jointly with domestic restrictions for conservation, and is therefore justified under Article XX(g).

7.937. In the Panel's opinion, it is difficult to conclude that China's export quota relates to the conservation of molybdenum, or that it is made effective in conjunction with restrictions on domestic production or consumption.

7.938. With respect to the requirement that measures "relate to" conservation, the Panel is not convinced by China's claim that the texts of its export quota measures themselves demonstrate the existence of a "substantial", "close" and "genuine" relationship with the goal of conserving exhaustible molybdenum resources. As the Panel has explained, many of the references pointed to by China are indirect, referring not to the goal of conservation but to the *Foreign Trade Law*, which lists a number of grounds justifying the imposition of an export quota. As such, these references

[1277] Japan's second written submission, paras. 261 and 294; United States' comments on China's response to Panel's question No. 103.

do not provide sufficient evidence of the challenged measures' relationship with the goal of conserving molybdenum. Moreover, even those texts that do refer to conservation simply refer to the "goal" of conserving exhaustible resources, but fail to explain *how* that goal is furthered or promoted through the imposition of an export quota. As the Panel has explained, such references to the goal of conservation, without any further explanation or demonstration as to *how* the export quota is designed in such a way as to assist, support, or enhance China's conservation programme, do not suffice to establish the requisite relationship between the export quota measures and the conservation objective in Article XX(g).

7.939. The Panel is also not convinced that China's molybdenum export quota is made effective in conjunction with restrictions on domestic production or consumption.

7.940. First, the Panel recalls that there was no extraction limit imposed on molybdenum in 2012. Although China did impose a production cap in 2012, the Panel recalls that it has been unable, on the basis of the evidence presented, to find that this cap constituted a "restriction" within the meaning of Article XX(g). China has not provided the Panel with evidence of expected demand for molybdenum during 2012, and as such the Panel cannot determine whether the production restriction China imposed on molybdenum was set at a level lower than the expected demand for the period of time over which the restriction was intended to apply (here, 2012).

7.941. Second, the Panel believes that by setting the level of the export quota significantly below the level of its production cap, China has effectively set aside specific quantities of molybdenum products for domestic consumption. Far from reserving specific quantities for export, the export quota scheme seems to the Panel to allow domestic users to *purchase* molybdenum that might otherwise be exported. Adding to this the fact that unexported molybdenum products are sold into the domestic market, it appears to the Panel that the design and structure of China's molybdenum export quota system tends to *support* and *stimulate* rather than restrict domestic demand and consumption.

7.942. Third, the Panel is not convinced that the various categories of alleged restrictions on domestic consumption, including the entry conditions, resource tax, and environmental regulations, are capable of restricting domestic production or consumption in an even-handed manner. In the first place, some of the measures pointed to by China were not in force at the same time as the challenged export quota, and as such cannot be said to have "worked together" with such quota. Additionally, as the Panel has explained, entry requirements may be effective at controlling the number of participants in the molybdenum industry, but they do not appear to restrict in any way the amount of molybdenum products that enterprises already operating in the molybdenum industry can extract and/or produce. Finally, with respect to China's resource tax, the Panel has explained that regulatory costs are a normal part of doing business. In any case, China has not established the effective level (and thus the potential restrictive impact) of this tax, and has put forward as evidence only one example relating to one company. In the Panel's opinion, such limited evidence is insufficient to meet China's burden of proof. At any rate, as the Panel has explained above, the evidence provided by China does not allow a clear assessment of the tax's restrictive effect. Without details about the price of the tax on a percentage basis, the Panel is unable to determine to what extent the tax increased the costs borne by the Jinmu Group, and to what extent that company's increased costs are attributable to other factors, including expanded production. As such, the Panel has insufficient evidence to conclude that the tax represents a restriction on domestic production or consumption.

7.943. Finally, as the Panel has discussed in detail, the product scope of China's export quota, which is more extensive than the scope of its production quota, and in particular the fact that molybdenum intermediates are not covered by the production quota but are covered by the export quota suggests to the Panel that the real goal of China's molybdenum quota system is to promote Chinese economic development. At the very least, the different product scopes of the export and production quotas prevent the Panel from concluding that the two caps work together well for the purpose of conserving molybdenum. WTO-consistent alternative measures could provide China with equivalent conservation benefits.

7.944. In sum, the Panel concludes that China's export quota on molybdenum does not "relate to" the conservation of molybdenum, and is not made effective in conjunction with restrictions on domestic production or consumption. Nevertheless, in order to fulfil its obligation under Article 11

of the DSU, the Panel will now proceed to consider whether, if China's export quota were justified under Article XX(g), it also satisfies the requirements of the chapeau of Article XX.

7.8.2 Application of the chapeau of Article XX of the GATT 1994 to China's export quota on molybdenum

7.8.2.1 Whether China has demonstrated that its export quota on molybdenum was not applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on international trade

7.945. The Panel begins by noting that China has not developed its arguments on molybdenum to the same extent as those on rare earths. Nevertheless, just as in the context of rare earths, China needs to show that its export quota on molybdenum is not applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

7.946. China argues that in 2011, its molybdenum export quota was not completely used; information from China Customs on actual exports in 2011 shows that actual exports reached only 54.6% of the 2011 quota. According to China, this is evidence that the volume of molybdenum exports set in the 2011 molybdenum export quota was more than sufficient to meet foreign demand, and this demonstrates the absence of any disguised restriction on trade in the application of the 2012 molybdenum export quota.[1278]

7.947. China submits that the absence of a disguised restriction on trade is further evidenced by the fact that enterprises that wanted to obtain a share of the 2012 molybdenum quota had to apply for a share of the quota, and that MOFCOM allocated the quota taking into account the "export performance, the quota utilization rate, the operation capacity, the production scale and the resource status … of that commodity". According to China, by requiring exporters to demonstrate proven export performance, the quota system sought to select exporters in China that were capable of supplying the export quota share allocated to them.[1279]

7.948. In its second written submission[1280], China provides information regarding the price of molybdenum, and argues that domestic molybdenum prices are consistently higher than prices of Chinese and non-Chinese molybdenum available on the European market. China argues that this demonstrates the absence of any causal connection between its molybdenum export quota and any commercial advantage enjoyed by downstream Chinese consumers of molybdenum.[1281]

7.949. The Panel notes also that only the European Union has developed separate arguments under the chapeau of Article XX for China's molybdenum export quota. The United States and Japan rebut China's arguments under the chapeau of Article XX for all three products in the same discussion, although Japan tends to focus its discussion on China's export quota on rare earths.

7.950. The European Union argues that China has failed to meet its burden of showing that the export quota on molybdenum satisfies the conditions of the chapeau, notably with respect to the requirement that GATT-inconsistent measures not be applied in a manner which would constitute arbitrary or unjustifiable discrimination. In assessing the trade-distortive impact of China's molybdenum export quota, the European Union insists that China did not, and continues not to, disclose the criteria on the basis of which the molybdenum quota is set each year, thus making its yearly decisions entirely arbitrary and unpredictable and thereby accentuating their negative effects.

7.951. With respect to the requirement that GATT-inconsistent measures not constitute a disguised restriction on international trade, the complainants note that China relies on the arguments it made with respect to the non-utilization of the rare earths export quota, i.e. that its export quota on molybdenum has not been fully utilized in 2011 and 2012, and hence cannot be considered as a disguised restriction.[1282] The complainants submit that, for the reasons they

[1278] China's first written submission, para. 378.
[1279] China's first written submission, para. 379.
[1280] Response to Panel question No. 42.
[1281] China's second written submission, para. 191.
[1282] European Union's second written submission, para. 310.

advanced in the context of rare earths, China's arguments concerning the relevance of actual quota consumption rate should be rejected.[1283]

7.952. As noted in our discussion on the legal test under Article XX(g) above, WTO jurisprudence recognizes that in a dispute the same facts can lead to a conclusion on both unjustifiable or arbitrary discrimination and/or disguised restrictions on trade, and that often these concepts overlap. In the present dispute, China's own argumentation intertwines these two overlapping concepts. The Panel considers that unjustified discrimination can constitute a disguised restriction on trade, but a disguised restriction on trade may exist even if there is no discrimination. For ease of exposition, the Panel will examine China's molybdenum export quota under both of these concepts together.

7.953. All parties agree that the requirement that a measure not be "applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail" is a requirement that the measure not discriminate among other Members, or between other Members and the Member maintaining the measure.[1284] In light of the legal test discussed earlier, the Panel will examine whether China has demonstrated that the application of its export quota on molybdenum does not cause arbitrary or unjustified discrimination or a disguised restriction on international trade. The Panel will first determine whether there is discrimination and/or a disguised restriction on international trade, then whether such discrimination or disguised restriction is based on, or explained by, a conservation rationale, and finally whether WTO-consistent alternative measures exist, before concluding on China's compliance with the chapeau of Article XX.

7.954. The Panel concluded above, in the context of analysing the export quota on rare earths, that the evidence submitted by China on the non-use of the quota and price differences does not suffice to enable the Panel to conclude that the design and architecture of China's export quota do not lead to discrimination; this is also the case with respect to China's export quota on molybdenum.

7.955. China asserts that its export quota is not a disguised restriction on international trade because it was not filled. According to China, it follows from this fact that the quota cannot have had any effect on access to supplies by foreign purchasers of Chinese molybdenum.[1285] As discussed in the context of the rare earths export quota, the Panel is not convinced that an unfilled quota is sufficient evidence of non-discrimination and/or the absence of trade restrictiveness in the circumstances of this case. Export quotas (and duties) on molybdenum have been in place since 2007. It is highly likely that these measures have altered normal conditions of competition and have imposed a disproportionate cost on foreign consumers of molybdenum over time, including through higher uncertainty costs for foreign consumers than domestic, thereby depressing foreign demand and resulting in the unfilled quota. The circumstances of this case lead the Panel to conclude that, at least in part, China's export quota is unfilled because of the cumulative effects of China's export restrictions.

7.956. In addition, China asserts that, since January 2007, domestic prices of roasted molybdenum concentrate have been "*consistently* higher than prices paid by European purchasers".[1286] The conclusion drawn by China is that "[t]he price comparison … refutes the notion that China's export quota for molybdenum provided Chinese domestic users with any pricing advantage vis-à-vis their European competitors". When the Panel asked China for details on its pricing methodology for molybdenum, the Panel understood China's response to mean that, for all three products including molybdenum, *Metal Pages* (China's source of price data for molybdenum)[1287] uses estimated pricing that may well not reflect actual pricing[1288], and that "this practice could lead to both the over-estimation of the likely foreign price as well as the under-

[1283] European Union's second written submission, para. 312.
[1284] Appellate Body Report, *US – Gasoline*, pp. 23-24, DSR 1996:I, 3, pp. 21-22; parties' responses to and comments on Panel question No. 47.
[1285] China's second written submission, para. 203.
[1286] China's second written submission para. 191.
[1287] China's responses to Panel question No. 85.
[1288] China's Second Written Submission, paragraph 126; China's response to Panel question Nos. 40-42 and 85.

estimating of the foreign price."[1289] Thus, the Panel does not consider it appropriate to rely on this price data evidence to establish non-discrimination.

7.957. The Panel recalls that the export quota system requires exporters to return unexported quantities of molybdenum to Chinese authorities by 31 October,[1290] after which point they may be sold into the domestic market,[1291] but exporting firms are not entitled to exchange their export quota shares with other exporting firms. In the Panel's opinion, this results in discrimination against foreign users, since this functioning of the export quota allows and perhaps even encourages domestic stockpiling of molybdenum, while ensuring that exporters are never able to build up their own stocks of Chinese molybdenum for export. To the Panel, this is clearly discriminatory, insofar as it restricts the access of foreign consumers far more than that of domestic consumers.

7.958. The Panel also observes that China imposed no limitation on the production of molybdenum concentrates prior to 2010, and so prior to 2010 China's domestic molybdenum downstream users (such as finished stainless steel producers) could consume unlimited amounts of molybdenum products. After 2010, the available amount of molybdenum – that is, the amount allowed to be produced under the production plan – measured in metal content – has been maintained at a level approximately four times higher that of the molybdenum export quota.[1292] The Panel notes as well that China has been maintaining an export quota on molybdenum products since 2007. For all of these reasons, it is difficult for the Panel to accept China's argument that the main goal of its export quota is to enforce its production quota. Rather, in the Panel's view, China's export quota system seems designed and operated in such a way that it will always favour domestic producers.

7.959. Finally, the Panel is concerned about the uneven and unbalanced structure of China's export quota measures. As the complainants have noted throughout this dispute, the measures that China alleges constitute "restrictions on domestic production on consumption," and especially China's extraction and production quotas and its taxes on extraction, also restrict foreign consumption of Chinese raw materials. In other words, every restriction on domestic consumption of Chinese raw materials also applies to foreign consumption. On the other hand, China's export quotas impact only on foreign users: there is no corresponding burden, such as a domestic consumption quota, imposed by China on Chinese consumers. Regardless of whether such structural imbalance meets the "even-handedness" requirement under subparagraph (g) of Article XX, the Panel believes that it is clearly discriminatory, insofar as it imposes added burdens on foreign consumers simply on the basis of their being located outside of China. Moreover, even accepting *quod non* that, as China alleges, the quota in 2012 had no actual discriminatory impact, the Panel is still of the view that the very structure of the export quota system, which imposes unique and special burdens on foreign consumers on the basis of their being located outside of China, is discriminatory, in violation of the requirements of the chapeau of Article XX.

7.8.2.2 Whether the rationale for the discrimination or the disguised restriction on trade created by the application of China's export quota on molybdenum is concerned with conservation

7.960. The Panel now proceeds to determine whether the discrimination that results from the application of China's export quota on molybdenum is nevertheless justified and rationally linked to the goal of conserving exhaustible molybdenum resources. In *Brazil – Retreaded Tyres*, the Appellate Body explained that arbitrary or unjustifiable discrimination exists when the reason(s)

[1289] China's answer to Panel question No. 85. The Panel recalls that, as explained in para. 6.21 of its Reports, on 17 June 2013, it sent an email to the parties revising its question No. 85 and asking China to provide more pricing information for tungsten and molybdenum as well as for rare earths. Even if China intended not to respond to the Panel's request for further pricing information on molybdenum, the Panel is still entitled to raise the same doubts with respect to the reliability of the *Metal Pages* data on molybdenum as it raises with respect to the data on rare earths, since *Metal Pages* contains data on all three products at issue, and China has relied on *Metal Pages* data in its arguments on all three products.

[1290] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 42.

[1291] China's response to Panel question No. 36.

[1292] *Molybdenum Data (1999-2012)* (Exhibit CHN-139 updated), (Exhibit CHN-224). When measured by gross weight, the production plan has been maintained at a level a little less than twice that of the export quota.

for discrimination bear(s) no rational connection to the Article XX objective on the basis of which a Member claims to be regulating, or contradicts or undermines that objective.[1293] This is why the determination whether a measure is discriminatory in violation of the chapeau of Article XX should not depend exclusively on its quantitative impact, but must consider also whether the rationale for the discrimination relates to the legitimate objective that the measure allegedly pursues (in this case, the conservation of exhaustible natural resources). To determine whether China has demonstrated that its export quota on molybdenum does not impose unjustifiable discrimination in violation of the chapeau of Article XX, the Panel needs to consider whether the rationale that China provides for the discrimination relates to the alleged conservation objective of the export quota.

7.961. In the Panel's view, China has not demonstrated that the distortion created by the application of its export quota system is merely incidental to its conservation policy considerations. Rather, the discrimination seems to result from aspects of the export quota systems that reflect industrial policy considerations. For example the fact that the quota system requires unused export quotas to be returned to Chinese authorities[1294] and allows such returned volumes to be sold in the domestic market[1295] seems to point towards industrial policy considerations, especially when exporting firms can only trade their unused export quota share in favour of molybdenum products higher in the industrial chain (i.e. further-processed molybdenum products).

7.962. Although China has since 2010 imposed a production quota on molybdenum, China's own data shows that the actual level of extraction, measured in tonnes, has consistently exceeded the production plan. In 2012, the production plan was set at 194,520 tonnes, but the actual level of extraction was 267,947 tonnes.[1296] This raises the question what is being done with extracted molybdenum ores that cannot legally be produced (i.e. further processed). Since they cannot legally be exported, the Panel presumes that they are being stockpiled in China for later use by domestic value-added industries. All of this suggests to the Panel that very significant quantities of molybdenum ores are being extracted and stockpiled in China, and thus that the first threat to the conservation of Chinese molybdenum reserves is domestic. In these circumstances, it is difficult to understand the function of an export quota, since the most serious conservation risk does not come from foreign demand but domestic activity inside China. For the Panel, the main effect of China's export quota is to guarantee a minimum amount for domestic consumption from the limited amount of the extracted molybdenum. The Panel fails to see any conservation considerations in this aspect of China's export quota system.

7.8.2.3 WTO-consistent alternatives

7.963. As noted earlier, in the Panel's view, discrimination can also be arbitrary or unjustifiable where alternative measures exist which would have avoided or at least diminished the discriminatory treatment. In the context of conducting an analysis under the chapeau of Article XX of a measure provisionally justified under subparagraph (g), the Appellate Body has examined whether a WTO-consistent or less trade-restrictive alternative is available that would enable the regulating Member to achieve its legitimate policy goals with the same degree of efficiency and efficacy.[1297]

7.964. The complainants put forward various alternatives that China could use instead of export quotas which, they claim, would provide China with the same level of conservation effectiveness while avoiding the discriminatory and distorting effects that its export quotas have on foreign users. The parties have expanded on these alternatives, which include tracing, export licensing, and the imposition of a domestic consumption limit, in response to a Panel question[1298], and the complainants discussed alternative measures for China's rare earths, tungsten, and molybdenum

[1293] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226.
[1294] *Regulations on the Administration of the Import and Export of Goods*, (Exhibits CHN-54, JE-50), Article 42.
[1295] China's response to Panel question No. 36.
[1296] Molybdenum Data (1999-2012), (Exhibit CHN-224).
[1297] Appellate Body Reports, *US – Gasoline*, pp. 25-29, DSR 1996:I, 3, pp. 23-27 and *US – Shrimp*, para. 171 ("The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609".).
[1298] Panel question No. 123.

export quotas together. The Panel therefore refers to its discussion and analysis of alternative measures in section 7.6.3.3 above of its findings on the rare earths export quotas.

7.965. China did not comment extensively on these various, allegedly non-discriminatory alternatives, except to say that it already uses an export licensing system in addition to its export quota system. China also argues that export quotas enhance the functioning of China's conservation policy through supply management. According to China, nothing is able to replace quotas because export quotas fulfil a number of additional functions.[1299]

7.966. The Panel notes that China has not commented on the complainants' claim that all their suggested alternatives are WTO-consistent, whereas the export quota China uses is inconsistent with Article XI:1 of the GATT 1994. In the Panel's opinion, even if China's export quotas were as effective as the alternatives suggested by the complainants, China would nonetheless need to explain why such WTO-consistent or less trade-restrictive alternatives are not available to China.

7.967. The Panel recalls again that it is not asked to assess the efficiency or effectiveness of China's conservation policy, but only to determine whether the export quotas it argues are part of its conservation programme are really about conservation rather than another policy reason, and whether any discrimination caused is justified on the basis of conservation. This requires the Panel to consider whether China has explored the use of WTO-consistent or less trade-restrictive alternatives that could achieve the same conservation goal with the same efficiency and effectiveness. In the Panel's view, China has not fully explored and justifiably rejected the alternatives proposed by the complainants.

7.968. In the Panel's view, China has not demonstrated that the distortion caused by the operation of its export quota or its discriminatory treatment of foreign users of molybdenum extracted in China is based on conservation considerations. For the Panel, such trade distortion caused by the export quota was both foreseeable and avoidable, including through the use of WTO-consistent alternative means of licensing, borders control, and policing, and/or through the imposition of domestic taxes and consumption restrictions that would at least reduce the level of discrimination against foreign users.

7.8.2.4 Conclusion

7.969. In view of the above, the Panel concludes that China has not demonstrated that its 2012 export quota on molybdenum was not applied in a manner that constituted arbitrary or unjustifiable discrimination or a disguised restriction on international trade.[1300]

7.8.3 Overall conclusion on China's export quota on molybdenum

7.970. For the reasons given above, the Panel concludes that China's export quota on molybdenum is inconsistent with Article XI:1 of the GATT 1994 and Paragraphs 162 and 165 of China's Working Party Report. The Panel also concludes that China's export quota on molybdenum is not justified under either subparagraph (g) or the chapeau of Article XX of the GATT 1994.

7.9 Trading rights

7.9.1 Introduction

7.971. In addition to their claims concerning the imposition of export quotas on rare earths, tungsten, and molybdenum, the complainants claim that particular aspects of China's administration of certain of the export quotas breach China's "trading rights commitments".

7.972. The complainants argue that requirements to demonstrate export performance, to demonstrate prior export experience, and to comply with a minimum capital requirement, so as to

[1299] See the Panel's discussion on the application of the chapeau to China's export quota on rare earths, above section 7.6.3.

[1300] In view of the nature of the export quota system described above, the Panel's finding is with respect to the series of measures comprising the relevant framework legislation, the implementing regulations, other applicable laws and the specific annual measures imposing the export quotas existing at the date of the Panel's establishment.

be eligible to participate in the quota allocation process for rare earths and molybdenum quotas, are inconsistent with Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report, as incorporated into Paragraph 1.2 of China's Accession Protocol. The complainants submit that China expressly undertook in its Accession Protocol and Working Party Report to eliminate these specific requirements, and they maintain that China is obliged to accord to all foreign enterprises and individuals, as well as to all enterprises in China, the right to export goods except those listed in Annex 2A of the Accession Protocol. The complainants' claims are made in respect of rare earths and molybdenum. These products are not listed in Annex 2A. The claims do not extend to tungsten, which is listed in Annex 2A.[1301]

7.973. The European Union makes an additional claim that the prior export performance conditions that China imposes on applicants for the molybdenum export quota violate China's commitments in Paragraph 84(b) of China's Working Party Report. According to the European Union, by virtue of *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*, China fails to "grant trading rights to foreign enterprises in a non-discretionary way".[1302]

7.974. China responds that its trading rights commitments do not mean that China can no longer regulate trade, including by means of export quotas to conserve exhaustible natural resources. China refers to the Appellate Body finding in *China – Publications and Audiovisual Products* that China's obligations in Paragraph 5.1 are qualified by the opening clause of this Paragraph, which specifies that China's trading rights commitments are "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement".[1303]

7.975. The Panel has concluded above that China's export quotas are inconsistent with its obligations under Article XI:1 of the GATT 1994 and Paragraphs 162 and 165 of China's Working Party Report and cannot be justified pursuant to Article XX(g) of the GATT 1994. Thus, the quotas being administered are not "WTO-consistent". Consequently, the Panel must decide whether this leads necessarily to a finding that China has also breached its trading rights commitments by maintaining its export quotas. This question arises because China argues that when China regulates trade in rare earth products using export quotas that are justified under Article XX(g), the prior export performance and minimum registered capital criteria are also justified under Article XX(g) as an integral part of the export quota system. We do not agree with China. In our view, it is possible for the eligibility criteria that quota applicants have to comply with to be consistent with China's trading rights commitments even if Chinas' export quotas are WTO-inconsistent, and vice versa.

7.976. Having determined that our finding under Article XI:1 of the GATT 1994 is not determinative of the issues regarding the eligibility criteria and trading rights, the Panel will turn now to consider whether the measures at issue are inconsistent with Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report. In this context, the Panel will also consider whether it should examine claims made under Paragraphs 83 and 84 of China's Working Party Report before or after those made under Paragraph 5.1 of its Accession Protocol. It will then turn to China's defence under Article XX(g) of the GATT 1994. The Panel will then examine the European Union's separate claim.

7.9.2 Claims under Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report

7.977. The Panel will begin its analysis with a review of the obligations contained in Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report. The Panel will then review the evidence provided by the complainants in support of their claim that China maintains eligibility criteria in violation of these obligations.

[1301] Tungsten is listed in Annex 2A, see, United States' first written submission, para. 127. See also European Union's first written submission, para. 149, and Japan's first written submission, para. 175.
[1302] European Union's first written submission, para. 158.
[1303] China's first written submission, para. 270.

7.9.2.1 The obligations in Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report

7.978. Prior to China's accession to the WTO, only specialized enterprises had the right to import into or export from China. These foreign trade operators had to meet certain conditions and obtain permission to import or export goods. Different requirements applied to foreign-invested enterprises. During China's accession negotiations, some WTO Members expressed concern that the right to import and export goods from China was available only to some Chinese enterprises, and that foreign-invested enterprises could only import or export after meeting certain conditions.[1304]

7.979. In response to these concerns, China made a commitment to "progressively liberalize the availability and scope of the right to trade". China further committed that within three years of its WTO accession, all enterprises would have the right to trade in all goods throughout the customs territory of China. These legal obligations were included in Paragraph 5.1 of China's Accession Protocol.

7.980. Article 5.1 of China's Accession Protocol provides:

> Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods ... For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period

7.981. Paragraph 1.2 of the Accession Protocol 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.

7.982. Paragraph 342 of the Working Party Report provides (underlining added):

> The Working Party took note of the explanations and statements of China concerning its foreign trade regime, as reflected in this Report. The Working Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs … 83-84, … and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol.

7.983. The complainants make claims under Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Working Party Report. These provisions are reproduced below:

> 83(a) The representative of China confirmed that, upon accession, China would eliminate for both Chinese and foreign-invested enterprises any export performance, trade balancing, foreign exchange balancing and prior experience requirements, such as in importing and exporting, as criteria for obtaining or maintaining the right to import and export.
>
> (b) With respect to wholly Chinese-invested enterprises, the representative of China stated that although foreign-invested enterprises obtained limited trading rights based on their approved scope of business, wholly Chinese-invested enterprises were now required to apply for such rights and the relevant authorities applied a threshold in

[1304] China's Working Party Report, para. 82.

approving such applications. In order to accelerate this approval process and increase the availability of trading rights, the representative of China confirmed that China would reduce the minimum registered capital requirement (which applied only to wholly Chinese-invested enterprises) to obtain trading rights to RMB 5,000,000 for year one, RMB 3,000,000 for year two, RMB 1,000,000 for year three and would eliminate the examination and approval system at the end of the phase-in period for trading rights.

(d) The representative of China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade. Foreign-invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting nor would new business licence encompassing distribution be required to engage in importing and exporting.

84(a) The representative of China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China. Such right, however, did not permit importers to distribute goods within China. Providing distribution services would be done in accordance with China's Schedule of Specific Commitments under the GATS.

(b) With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way. He further confirmed that any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade. The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to minimum capital and prior experience would not apply.

7.984. In *China – Publications and Audiovisual Products*[1305], the Appellate Body used the term "trading rights commitments" to refer to the obligations of China in respect of the right to trade that are contained in Paragraph 5.1 of China's Accession Protocol, as well as Paragraphs 83(d) and 84(a) of China's Working Party Report, which confirm China's obligation to grant the right to trade.[1306] Paragraphs 83 and 84 also provide additional restrictions on China's right to regulate trade. In particular, Paragraph 83(a) directs China to eliminate export performance and prior experience requirements for both Chinese and foreign-invested enterprises, while Paragraph 83(b) directs China to eliminate any "examination and approval system", within three years of accession, including the minimum registered capital requirements. Paragraph 84(b) states that "trading rights would be granted in a non-discriminatory way" and, in granting trading rights to foreign enterprises in China, China explicitly committed to eliminate prior experience and minimum registered capital requirements.[1307] We recall that the Appellate Body concluded in *China – Publications and Audiovisual Products* that "the applicability of China's trading rights commitments to a measure is triggered when that measure concerns who may import a good".[1308] In the same vein, we consider that China's trading rights commitments are also triggered when the measure at issue concerns who may export a good. Neither China nor any other party has suggested otherwise.

[1305] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 133.
[1306] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 167. See also Panel Reports, *China – Raw Materials*, para. 7.655.
[1307] Panel Reports, *China – Raw Materials*, para. 7.666.
[1308] Appellate Body Report, *China – Audiovisual Products*, para. 196.

7.9.2.2 The measures at issue

7.985. The complainants submit that there are five measures that contain eligibility criteria with which export quota applicants must comply so as to be eligible to apply for part of the rare earths and molybdenum quota allocation. The Panel provided a description of the eligibility criteria in the challenged measures in section 7.4.1.3 above. The following is thus confined to a brief description of the challenged measures.

7.986. The complainants submit that, under the *Export Quota Administration Measures* which applies to the administration and allocation of, *inter alia*, the molybdenum export quota, MOFCOM is directed to take into account (i) the export performance of the good; (ii) the utilization rate of the export quota; (iii) the "operation capacity" of the applicant; and (iv) the "production scale and resources status, etc., of the applicant enterprises or regions" during the previous three years when distributing quotas.[1309] The *2012 Application Qualifications and Procedures for Rare Earth Export Quotas* requires applicants to have had actual export performance and prior export experience in a given time period and have a minimum registered capital that is above a certain amount, though the precise nature of these requirements may vary depending on the type or nature of enterprise.[1310] The *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* specifies that, to apply for the molybdenum export quota, the enterprise must have exported the requisite amount of molybdenum in the previous three-year period, or have supplied for export the requisite amount of molybdenum in the previous three-year period. In addition, trading companies are also required to have a minimum registered capital that is above a certain amount.[1311] The allocation equations found in the *2012 First Batch Rare Earth Export Quotas (Supplement)* and the *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals* rely on the prior export experience and export performance of the applicant in allocating the quota.[1312]

7.987. As noted above, the complainants argue that requirements to demonstrate export performance and prior export experience and to comply with a minimum capital requirement so as to be eligible to participate in the quota allocation process for rare earths and molybdenum quotas are inconsistent with Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report. The complainants submit that China expressly undertook in its Accession Protocol and Working Party Report to eliminate these specific requirements and to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export goods, other than those listed in Annex 2A of the Accession Protocol.

7.988. China responds that these three criteria are WTO-consistent because they are an integral part of China's export quota system, which, it argues, is itself WTO-consistent because it complies with Article XX(g) of the GATT 1994. Therefore, according to China, the criteria are necessarily WTO-consistent.[1313] The complainants disagree, and argue that the export performance, prior experience, and minimum registered capital criteria must comply with the relevant provisions of China's Protocol of Accession and Working Party Report. The Panel will examine this argument below.

7.989. China also maintains that its trading rights obligations under Paragraph 5.1 of the Accession Protocol are not absolute, but are instead qualified by the opening clause of the first sentence of that provision, which reads as follows: "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement…". Further, this was confirmed by the Appellate Body in *China – Publications and Audiovisual Products*, which stressed that this introductory phrase means that China's trading rights obligations cannot "affect, encroach upon, or impair" China's right to regulate trade in a WTO-consistent manner. China states that this finding

[1309] *Export Quota Administration Measures*, (Exhibits CHN-96, JE-52), Article 19. China confirms that this Article requires exporters to demonstrate proven export performance, see para. 379 of China's first written submission.

[1310] *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, (Exhibits CHN-38, JE-61) Sections 1(1) and 1(2)).

[1311] *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*, (Exhibits CHN-107, JE-63) paras. II(ii)2 and II(ii)3.

[1312] *2012 First Batch Rare Earth Export Quotas (Supplement)* (Exhibits CHN-57, JE-56), Annex 1 and *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, (Exhibits CHN-99, JE-59), Annex 2.

[1313] See, e.g., China's response to Panel question No. 11, para. 24.

confirms that Paragraph 5.1 entitles China to adopt export quotas that are contrary to Article XI:1 of the GATT 1994, provided that they are justified under an exception, e.g. Article XX(g) of the GATT 1994.[1314] In addition, China argues that Paragraph 5.1 entitles China to administer these quotas through an examination and approval system, including through quota allocation criteria that are consistent with China's WTO obligations or, even if individual elements in this quota system were to violate China's WTO obligations, are justified under, e.g. Article XX(g) of the GATT 1994. China submits that, as a consequence, when it regulates trade in rare earth products through WTO-consistent export quotas it can use eligibility criteria, including prior export performance and minimum registered capital requirements, to ensure the effectiveness of these quotas. In this context, China stresses that the Panel should find that the obligations in Paragraphs 83 and 84, as elaborations of the general commitments reflected in Paragraph 5.1 of the Accession Protocol, must be read together.[1315]

7.990. China also adds that in response to concerns by some WTO Members, China made a commitment in Paragraph 5.1 of its Accession Protocol to "progressively liberalize the availability and scope of the right to trade". This commitment was further elaborated in Paragraphs 83 and 84 of the Working Party Report. Today, after amendment of the *Foreign Trade Law*, China no longer applies such pre-conditions to foreign trade operators.[1316] Hence, in 2012, all enterprises in China have the right to trade in all goods. China submits that the *Foreign Trade Law* no longer applies qualification conditions to enterprises that intend to engage in the import and export of goods. Foreign trade operators only have to register with MOFCOM, unless it is provided that no such registration is necessary.

7.9.2.2.1 Whether the Panel should consider claims under Paragraphs 83 and 84 prior to claims under Paragraph 5.1

7.991. The Panel, noting that the complainants had made claims under Paragraphs 83 and 84 of the Working Party Report as well as under Paragraph 5.1 of the Accession Protocol, asked the parties for their views regarding the order in which the Panel should analyse these claims. The Panel also asked whether, assuming it examined the complainants' claims under Paragraphs 83 and 84 first, it would also be necessary to make additional findings under Paragraph 5.1.[1317] The complainants responded that the Panel should analyse the more specific obligations first, i.e. those under Paragraphs 83 and 84, and that a violation of these paragraphs would necessarily mean a violation of the more general obligation in Paragraph 5.1.[1318] While China stressed the importance of applying Paragraphs 83 and 84 together with Paragraph 5.1, it also stated that it did not consider it "relevant" whether or not the Panel examines Paragraph 83 and 84 prior to examining Paragraph 5.1, "since the commitments in all these Paragraphs are without prejudice to China's right to regulate trade in goods by means of WTO-consistent export quotas and quota allocation criteria".[1319]

7.992. Taking note that the complainants all agree on the order of analysis and that China does not consider the order of examination "relevant", the Panel has decided to proceed by examining first whether China has breached the commitments it undertook in Paragraphs 83 and 84 of its Working Party Report.

7.9.2.2.2 Whether China's measures are inconsistent with Paragraphs 83 and 84 of China's Working Party Report

7.993. At this point, and before considering the parties' claims regarding Paragraphs 83 and 84, we consider it useful to comment on a discrepancy in how the United States and the European Union referred to the eligibility criteria in their first submissions compared with their second

[1314] China's first written submission, paras. 270-271.
[1315] China's first written submission, paras. 275, 276, 399, and footnote 565; China's response to Panel question No. 12, paras. 55 and 59; China's comments on the complainants' response to Panel question No. 8, para. 18.
[1316] China's first written submission, para. 266; footnote 399 of China's first written submission states: "See the current version of the *Foreign Trade Law*: (Exhibit CHN-11)…".
[1317] Panel question No. 12.
[1318] Responses to Panel question No. 12, United States , para. 26; European Union, para. 13; and Japan, para. 13.
[1319] China's comment on complainants' responses to Panel question No. 12, para. 26.

submissions. There was also a difference in how China referred to these criteria compared with how the complainants referred to them, as the Panel explains below.

7.9.2.2.2.1 Parties' description of the challenged criteria

7.994. In their requests for establishment of a panel, the complainants asserted that "China imposes restrictions on the trading rights of enterprises seeking to export various forms of rare earths and molybdenum, such as prior export performance and minimum registered capital requirements".[1320] In their first submissions, the complainants all described the eligibility criteria as export performance, prior export experience, and minimum registered capital requirements, but in their second submissions, the United States and the European Union no longer referred to the experience criterion.[1321] Throughout these proceedings, China referred to prior export performance and minimum registered capital requirements.

7.995. In response to Panel questions on this, the three complainants confirmed they were challenging the three criteria described in the preceding paragraph.[1322] The complainants submit that export performance is a subset of prior export experience; that is, by requiring an exporter to satisfy specific prior export performance requirements for rare earths and molybdenum and by basing the quota allocation on prior export amounts, China also requires exporters to demonstrate prior export experience.[1323]

7.996. China did not take issue with or in any way challenge the complainants' assertion that prior export performance is a subset of prior export experience. In its comments on this question, China focused on the argument that there was no prescribed level of required prior export performance: "no matter the difference between the terms "prior export performance" and "export experience", any level of prior export performance during the mentioned time period is sufficient to meet the criterion. Indeed, the measures do not specify a minimum level of prior export performance that is required."[1324]

7.997. The Panel agrees with the complainants that the prior export performance and export experience criteria are related. For an entity to comply with the prior export performance criterion implies that that entity has export experience, as export performance would confer experience in exporting activities. Conversely, an entity cannot have acquired export experience if it has never previously exported anything, i.e. if it is unable to comply with the export performance criterion, it cannot comply with the prior export experience criterion either.[1325] Therefore, the Panel agrees with the complainants that satisfying an export performance requirement necessarily requires a demonstration of prior export experience. The Panel therefore concludes that all complainants have challenged and continue to challenge the export performance, prior export experience, and minimum registered capital criteria.

7.9.2.2.2.2 The three challenged eligibility criteria

7.998. China does not deny that it imposes prior export performance and minimum registered capital requirements. To the contrary, it asserts that Paragraphs 1.2 and 5.1 of the Accession Protocol, read in combination with Paragraphs 83 and 84 of the Working Party Report, permit China to regulate export trade through these criteria "in a manner consistent with the WTO Agreement". China also argues that the complainants' challenge to the *Foreign Trade Law* is without merit because that *Law* no longer contains eligibility criteria.[1326]

[1320] WT/DS431/6, WT/DS432/6, and WT/DS433/6.

[1321] See, for example, para.152 of the United States' first written submission, para. 137 of the European Union's first written submission; para. 330 of the United States' second written submission, and heading 5.1.1 of the European Union's second written submission.

[1322] United States' response to Panel question No. 135, para. 78; and the European Union's response to Panel question No. 135, para. 117. See also Japan's response to Panel question No. 138.

[1323] Complainants' responses to Panel question No. 133.

[1324] China's comments on parties' responses to question No. 133.

[1325] The Panel also notes that in their oral responses to this question at the second meeting, the European Union and the United States stated that they had adopted the terminology used by China in its first written submission.

[1326] China's first written submission, para. 266.

7.999. Turning first to China's argument that there are no longer any eligibility criteria in the *Foreign Trade Law*, the Panel acknowledges that China has removed certain pre-conditions for obtaining the right to trade that were found in the 1994 version of the *Foreign Trade Law*. However, these restrictions and pre-conditions on trading rights are still found in instruments other than the *Foreign Trade Law*.[1327]

7.1000. The Panel thus agrees with China's argument that the *Foreign Trade Law* does not contain any pre-conditions that apply in respect of obtaining the right to trade.

7.1001. The Panel turns next to the complainants' challenge of the minimum registered capital, export performance, and prior export experience requirements found in *2012 Application Qualifications and Procedures for Rare Earth Export Quotas Application Procedures*, the *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*, the *2012 First Batch Rare Earth Export Quotas (Supplement)*, and the *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*. The Panel observes that China does not deny that it uses eligibility criteria in determining successful quota applicants. In fact, to the contrary, China asserts that it is entitled to use such eligibility criteria to administer its export quotas.

7.1002. The Panel recalls that in Paragraph 83(a) of its Working Party Report, China undertook to eliminate upon accession any export performance and prior experience requirements for both Chinese and foreign-invested companies. Paragraph 83(b) confirms China's commitment to eliminate the "examination and approval" system for enterprises to be granted trading rights, including by eliminating any minimum registered capital requirements. Paragraph 83(d) of the Working Party Report confirms the obligation contained in Paragraph 5.1 of the Accession Protocol, viz. China's commitment to provide trading rights to all enterprises in China by 11 December 2004. Likewise, Paragraph 84(a) of the Working Party Report confirms China's obligations with respect to trading rights, as set out in Paragraph 5.1 of the Accession Protocol. Paragraph 84(b) confirms that no minimum capital or prior experience related-requirements will be imposed on foreign companies for obtaining trading rights and that "trading rights [will] be granted in a non-discriminatory way".

7.1003. However, as the Panel outlined above and briefly recalls here, the *Export Quota Administration Measures*, relevant for the administration and allocation of the molybdenum (and tungsten) export quotas, specifically require MOFCOM to take into account certain performance indicators when distributing quotas. The *2012 Application Qualifications and Procedures for Rare Earth Export Quotas* and *2012 Molybdenum Export Quota*[1328] prescribes the application process for the allocation of export quotas for rare earths and molybdenum in 2012. These measures detail the requirements applicants must satisfy in order to be eligible to export under the 2012 quotas. Two of these requirements are that, first, an enterprise must have had actual export performance and prior export experience in a given time period, and secondly, a trading enterprise must have registered capital that is above a certain minimum amount.[1329] In addition, the allocation equations found in the *2012 First Batch Rare Earth Export Quotas (Supplement)* and the *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals* rely on the prior export experience and export performance of the applicant in allocating the quota.

7.1004. In our view, requiring an enterprise to have achieved a certain level of export performance to qualify for a share of the export quota, or to have prior experience, are precisely the type of requirements that China explicitly committed to eliminate in Paragraph 83(a) of its Working Party Report. Similarly, China imposes a minimum registered capital requirement; the Panel finds that this is the type of requirement that China committed, pursuant to Paragraph 83(b)

[1327] The *Foreign Trade Law* (Exhibits CHN-11, JE-49) sets out the underlying legal framework for the imposition and administration of export quotas. Article 16 of the *Foreign Trade Law* authorizes the imposition of restrictions on the importation or exportation of goods. Article 18 of the *Foreign Trade Law* authorizes MOFCOM to issue catalogues of goods restricted or prohibited from export or import. *Article 19* authorizes the use of quotas on goods that are subject to export restrictions, and Article 20 gives MOFCOM and other ministries the authority to allocate quota rights.

[1328] *2012 Application Qualifications and Procedures for Rare Earth Export Quotas,* (Exhibits CHN-38, JE-61); *Export Quota Administration Measures,* (Exhibits CHN-96, JE-52), *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* (Exhibits CHN-107, JE-63), *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals* (Exhibits CHN-99, JE-59).

[1329] *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, (Exhibits CHN-38, JE-61).

of the Working Party Report, to abolish completely by 11 December 2004. The Panel also notes that China repeated its commitment not to impose either type of requirement, namely "requirements relating to minimum capital and prior experience," in the third sentence of paragraph 84(b) of its Working Party Report. These eligibility criteria mean that not all enterprises in China have the right to trade rare earths and molybdenum, contrary to commitments China undertook in Paragraphs 83(d) and 84(a) of the Working Party Report.

7.1005. The Panel therefore concludes that the *Export Quota Administration Measures, 2012 Application Qualifications and Procedures for Rare Earth Export Quotas,* the *2012 First Batch Rare Earth Export Quotas (Supplement)*, as well as the *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*, and the *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, contain eligibility criteria. Therefore, these measures breach the commitments that China undertook in Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of its Working Party Report, as incorporated into its Accession Protocol by virtue of Paragraph 1.2.

7.9.2.2.3 Whether China's measures are also inconsistent with Paragraph 5.1 of China's Accession Protocol

7.1006. As requested by the complainants, the Panel will now consider whether China has also violated the obligation it undertook in Paragraph 5.1 of the Accession Protocol.

7.1007. There are three elements in the obligation found in Paragraph 5.1 of China's WTO Accession Protocol: China shall (a) grant the "right to trade" to "all enterprises in China"; (b) grant the right to trade with respect to "all goods," except for those listed in Annexes 2A and 2B; and (c) "complete all necessary legislative procedures to implement" its trading rights commitments "within three years after accession". The Panel will address each of these in turn.

7.1008. The first element, the "right to trade", is defined in the second sentence of Paragraph 5.1 as the "right to import and export goods" into or from the entire customs territory of China. The first element of Paragraph 5.1 also notes that China has committed to grant the right to trade to "all enterprises in China". There are no additional conditions or restrictions on which enterprises shall have the right to trade in this Paragraph.

7.1009. The second element of the obligation contained in paragraph 5.1 provides that the right to trade applies to "all goods" except those listed in Annexes 2A and 2B. Annex 2A consists of two parts – Annex 2A1 entitled "Products Subject to State Trading (Import)" and Annex 2A2 entitled "Products Subject to State Trading (Export)." As the U.S. claim of inconsistency regarding China's obligations contained in paragraph 5.1 concerns the right to export, only Annex 2A2 is relevant here.[1330] Rare earths and molybdenum are not covered by Annex 2A2

7.1010. The third element of Paragraph 5.1 establishes that within three years of its accession, China is required to complete all necessary legislative procedures to implement its obligations with respect to the right to trade. This three-year period expired on 11 December 2004.

7.1011. Accordingly, the Panel finds that by virtue of the three elements of Paragraph 5.1 described above, China is obliged to ensure that all enterprises in China have the right to export rare earths and molybdenum.

7.1012. The Panel concluded in the preceding section, and indeed China does not deny, that China applies eligibility criteria in selecting enterprises to receive a share of the export quota on rare earths and molybdenum. Thus, contrary to the obligation in Paragraph 5.1, there are conditions or restrictions imposed on enterprises in China, meaning that not all enterprises in China have the right to trade rare earths and molybdenum. Consequently, the Panel finds that China is in breach of its obligation in Paragraph 5.1 of its Accession Protocol to grant all enterprises in China the right to trade rare earths and molybdenum.

[1330] Annex 2A comprises two parts: Annex 2A1 entitled "Products Subject to State Trading (Import)" and Annex 2A2 entitled "Products Subject to State Trading (Export)".

7.9.2.3 Conclusion

7.1013. The Panel finds that China is in breach of its trading rights commitments in Paragraph 5.1 of China's Accession Protocol and in Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Working Party Report.

7.1014. The Panel turns now to consider whether China's WTO-inconsistent measures are justifiable under Article XX(g) of the GATT 1994.

7.9.3 Defence under Article XX(g) of the GATT 1994

7.1015. The Panel has found that the eligibility criteria in the *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, the *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*, the *2012 First Batch Rare Earth Export Quotas (Supplement)*, the *2012 First Batch Export Quotas of Tungsten, Antimony and Other Non-Ferrous Metals*, and the *Export Quota Administration Measures* breach China's commitments in Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Working Party Report and Paragraph 5.1 of China's Accession Protocol.

7.9.3.1 Whether China's commitments in Paragraphs 83 and 84 are subject to the general exceptions in Article XX because these commitments like those in Paragraph 5.1 are qualified by China's right to regulate trade

7.1016. China acknowledges that it is required to grant the right to trade to all enterprises, and that it must eliminate minimum registered capital and prior export performance requirements as conditions on the availability of the right to trade generally.[1331] However, China submits that there are situations where it is entitled to maintain an export quota for various forms of rare earths and molybdenum and that, in such situations, it may establish quota allocation rules that restrict the right to trade. China submits that such rules may include minimum registered capital and prior export performance requirements.[1332] China also argues that, in any event, the criteria at issue in this dispute concern the administration of WTO-consistent export quotas and are not limitations on the right to trade. Consequently, argues China, its use of these quota allocation criteria is not prevented by the commitments in Paragraphs 83 and 84. China argues further that the commitments in Paragraphs 83 and 84 are subject to the general exceptions in Article XX because they are qualified by China's right to regulate trade through WTO-consistent measures, including export quotas justified under Article XX(g). China explains that this is so because its obligations in respect of trading rights under Paragraph 5.1 of the Accession Protocol are not absolute and therefore its obligations in Paragraphs 83 and 84 of the Working Party Report are also qualified in light of China's right to regulate trade.[1333] In this regard, China emphasizes that the obligations in Paragraphs 83 and 84, as elaborations of the general commitments reflected in Paragraph 5.1, must be read together with Paragraph 5.1.[1334] China further argues that the prior export performance and minimum registered capital criteria are an integral part of the export quota system, which is itself justified under Article XX(g).[1335]

7.1017. The complainants state that China expressly committed not to use export performance, prior export experience, and minimum registered capital criteria, and that Article XX(g) is not available for these criteria.[1336] Japan asserts that, in the absence of a reference in Paragraph 1.2 of the Accession Protocol or in Paragraphs 83 or 84 of the Working Party Report to the language that appears in Paragraph 5.1, namely, "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement ", Paragraphs 83 and 84 are not qualified by China's right to regulate trade in a WTO-consistent manner.[1337] The United States, noting the absence in Paragraphs 83 and 84 of the language reproduced above, states that although minimum capital

[1331] See, for example, China's first written submission, para. 284.
[1332] China's first written submission, para. 284.
[1333] China's first written submission, para. 270, 398; China's response to Panel question No. 11, para. 47, China's comments on the United States and Japan's responses to Panel question No. 8, para. 16.
[1334] China's first written submission, paras. 275, 399; China's response to Panel question No. 12.
[1335] See, for example, China's first written submission, paras. 11, 261, 280, and 389 and China's response to Panel question No. 11.
[1336] Complainants' responses to Panel question No. 8.
[1337] Japan's response to Panel question No. 8, para. 9.

and prior experience requirements might in principle be WTO-consistent, in the sense of being consistent under, for example, the GATT 1994, China agreed in its Accession Protocol not to use those requirements.[1338] The European Union considers that while Article XX of the GATT 1994 is applicable to the trading rights commitments that China undertook pursuant to Paragraph 5.1 of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report, it is not applicable to minimum capital and prior experience requirements, which China expressly excluded from what can be considered as WTO-consistent regulation of trade.[1339]

7.1018. More particularly, the complainants emphasize that China explicitly confirmed in Paragraph 84(b) that minimum capital and prior export experience criteria would not apply, and therefore, these are excluded from what can be considered as WTO-consistent regulation of trade. It will be recalled that Paragraph 84(b) provides as follows:

> With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way. He further confirmed that any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade. The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to minimum capital and prior experience would not apply.

7.1019. According to the European Union, China is wrong to allege that the Appellate Body confirmed that the subset of governmental regulation that constitutes an exercise of regulatory powers that the covered agreements affirmatively recognize includes minimum capital and prior experience requirements.[1340] The United States points to the use of the disjunctive "but" in the last sentence to distinguish between prior export performance and minimum capital requirements and those types of regulatory activity that might, by virtue of the qualifying language in Paragraph 5.1, be permitted. According to the United States, China relies on the first part of the phrase in the third sentence of Paragraph 84(b) to argue that it is permitted to impose prior export performance and minimum capital requirements, but ignores the disjunctive "but".[1341] Japan makes a similar observation.[1342]

7.1020. The Panel notes that the Appellate Body in *China – Publications and Audiovisual Products*, in its consideration of the phrase "right to regulate trade" in Paragraph 5.1 of China's Accession Protocol, held that when China regulates trade, it must do so "in a manner consistent with the WTO Agreement". The Appellate Body explained that:

> WTO Members' regulatory requirements may be WTO-consistent in one of two ways. First, they may simply not contravene any WTO obligation. Secondly, even if they contravene a WTO obligation, they may be justified under an applicable exception.[1343]

7.1021. The Appellate Body went on to comment that Paragraph 84(b) of China's Working Party Report:

> [I]n particular, seems to us to identify a subset of governmental regulation that constitutes an exercise of regulatory powers that the covered agreements affirmatively recognize as accruing to WTO Members. … We read this as a confirmation that China's obligation to grant the right to trade cannot impair China's power to impose WTO-consistent import licensing, TBT, and SPS measures, [as well as

[1338] United States' response to Panel question No. 8, para. 16.
[1339] European Union's response to Panel question No. 8, para. 11.
[1340] European Union's response to Panel question No. 8.
[1341] United States' second written submission, para. 317.
[1342] Japan's second written submission, para. 212.
[1343] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 223.

other] types of regulatory measures in respect of trade in goods that the covered agreements affirmatively recognize that China may take.[1344]

7.1022. The Panel will now consider whether China specifically committed to exclude prior export performance and minimum capital requirements in Paragraph 84(b) of its Working Party Report from what could be considered as WTO-consistent regulation of trade, as the complainants allege.

7.1023. In our view, the complainants have misconstrued Paragraph 84(b) because they have failed to read the third sentence as a whole. The Panel recalls that the two criteria mentioned in Paragraph 84(b) – minimum capital and prior experience – were not at issue in the *China – Publications and Audiovisual Products* dispute and thus were not referred to by the Appellate Body in its consideration of this paragraph. In the Panel's view, a proper reading of the third sentence entails reading the sentence as a whole and then applying the Appellate Body's findings to the entire sentence. The complainants rather focus on the first part of the sentence and consider the applicability of the Appellate Body's discussion of the term "WTO-consistent" to this part of the sentence only, while excluding the second part of the sentence, which they consequently consider to be an absolute commitment incapable of justification under an applicable exception and hence incapable of being WTO-consistent. In our view, the third sentence cannot be parsed into two separate and unrelated obligations, either legally or grammatically. Accordingly, the Appellate Body's guidance cannot be applied only to part of the sentence. The Panel understands the third sentence of Paragraph 84(b) in the context of this dispute as follows: foreign enterprises and individuals with trading rights have to comply with all WTO-consistent requirements related to exporting, but requirements relating to minimum capital and prior experience cannot be used, even if the export quotas were to be WTO-consistent. The only way China would be able to use minimum capital and prior experience as eligibility criteria for WTO-consistent quota allocation is if these criteria in and of themselves can be justified under an applicable exception. To put it another way, and to borrow the Appellate Body's language cited in paragraph 7.1020 above, if "they" (minimum capital, export performance and prior experience regulatory requirements) "contravene a WTO obligation" (i.e. Paragraphs 83 and 84 of China's Working Party Report), "they may be justified under an applicable exception" (e.g. Article XX(g) of the GATT 1994).

7.1024. In sum, we understand that China's right to regulate trade under Paragraph 5.1 of its Accession Protocol is not impaired by its trading rights commitments as long as the eligibility criteria imposed on such trade can be justified under an applicable exception. The question is whether this qualified obligation regarding trading rights in Paragraph 5.1 of the Accession Protocol can also be found in Paragraphs 83 and 84 of China's Working Party Report, such that China could seek to establish that the breaches of its trading rights commitments found by the Panel are both justifiable and justified under Article XX(g).

7.1025. In deciding this issue, the Panel notes that Paragraphs 83 and 84 do not contain the same introductory language as Paragraph 5.1, i.e. "without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement …", which permits China to rely upon Article XX of the GATT 1994 to seek to justify breaches of its WTO obligations. Consequently, in the absence of this explicit textual link to the GATT 1994, whether China's commitments in Paragraphs 83 and 84 are qualified in the same manner will depend on whether there is some other basis, textual or otherwise, for such qualification. We have found three such bases, which we explain below.

7.1026. First, the Panel observes that Paragraph 5.1 and Paragraphs 83 and 84 deal with the same subject-matter; indeed they fall under sections with similar titles: "Right to Trade" and "Trading Rights". Further, it is accepted by all parties to this dispute, and the Panel agrees, that the trading rights commitments in Paragraphs 83 and 84 are elaborations of the general obligation to grant the right to trade under Paragraph 5.1 of the Accession Protocol. As part of its analysis of the introductory clause of Paragraph 5.1, the Appellate Body noted that certain paragraphs of China's Working Party Report, which elaborate China's trading rights commitments, may "provide context for and inform the scope of the WTO-consistent governmental regulation that may not be impaired by China's obligation to grant the right to trade."[1345] In particular, the Appellate Body noted that "Paragraph 84(b), in particular, seems to us to identify a subset of government

[1344] Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 224-225.
[1345] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 224.

regulation that constitutes an exercise of regulatory power".[1346] Thus, the Appellate Body itself has shed some light on the relationship between Paragraphs 83 and 84 and Paragraph 5.1. The Appellate Body also stated that it "s[aw] the obligations assumed by China in respect of trading rights, which relate to traders, and the obligations imposed on all WTO Members in respect of their regulation of trade in goods [as] closely intertwined," and explained that this "interlinkage was reflected in paragraph 5.1 itself".[1347] The Panel finds that this interlinkage is also reflected in Paragraphs 83 and 84; for example, Paragraph 84(b) refers to WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT, and SPS measures. Further and as already noted above, Paragraphs 83(d) and 84(a) of China's Working Party Report confirm China's obligation to grant the right to trade. The Panel considers that it would be anomalous and legally incoherent if China's obligation to grant the right to trade was qualified under Paragraph 5.1 of China's Accession Protocol but not under Paragraphs 83 and 84.

7.1027. This brings the Panel to its second basis for concluding that China's commitments in Paragraphs 83 and 84 are qualified similarly to the commitments under Paragraph 5.1. The panel in *China – Publications and Audiovisual Products* found that the obligations in Paragraph 83(d) "should be interpreted so as to be consistent with those of paragraph 5.1":

> [W]e note that, unlike paragraph 5.1, paragraph 83(d) does not explicitly state that the obligation to grant the right to trade to all enterprises in China is without prejudice to China's right to regulate trade in a WTO-consistent manner. We do not consider that one can logically infer from this that the commitment set out in paragraph 83(d) is intended to deprive China of the right to regulate trade. We think the purpose of paragraph 83(d) is to "confirm" the obligation to grant the right to trade to enterprises in China. If that is the case, it was not essential to provide specific clarification whether this obligation detrimentally affects China's right to regulate trade. Furthermore, we recall that paragraph 5.1 is part of the context of paragraph 83(d). In view of the close substantive similarity between the first sentence of paragraph 5.1 and paragraph 83(d), we believe the provisions of paragraph 83(d) should be interpreted so as to be consistent with those of paragraph 5.1. For these reasons, we conclude that the obligation stipulated in paragraph 83(d) should be understood as being without prejudice to China's right to regulate trade in a WTO-consistent manner.[1348]

7.1028. The panel in *China – Publications and Audiovisual Products* also made a similar finding in respect of Paragraph 84(a).[1349]

7.1029. The Panel finds this reasoning by the panel in *China – Publications and Audiovisual Products* equally apt here, and considers that it should also interpret the obligations in Paragraphs 83(d) and 84(a) so as to be consistent with Paragraph 5.1. Consequently, the Panel finds that the obligations in those paragraphs to grant the right to trade should be understood as being without prejudice to China's right to regulate trade in a WTO-consistent manner. Paragraphs 83(d) and 84(a) do not explicitly state that the obligation to grant the right to trade to all enterprises in China is "without prejudice to China's right to regulate trade in a WTO-consistent manner". However, in the Panel's opinion, it does not necessarily follow from this that Members intended to deprive China of the right to regulate trade.[1350]

7.1030. The third reason for the Panel's conclusion that China is entitled to seek to justify breaches of its commitments in Paragraphs 83 and 84 is also found in the Appellate Body report in *China – Publications and Audiovisual Products*. In this report, the Appellate Body found that:

> [T]he introductory clause of paragraph 5.1 cannot be interpreted in a way that would allow a complainant to deny China access to a defence merely by asserting a claim under paragraph 5.1 and by refraining from asserting a claim under other provisions

[1346] Ibid.
[1347] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 226.
[1348] Panel Report, *China – Publications and Audiovisual Products*, para. 7.310.
[1349] Panel Report, *China – Publications and Audiovisual Products*, para. 7.315.
[1350] Panel Report, *China – Publications and Audiovisual Products*, paras. 7.310 and 7.315.

> of the covered agreements relating to trade in goods that apply to the same or closely linked measures, and which set out obligations that are closely linked to China's trading rights commitments.[1351]

7.1031. The Panel considers that this finding is particularly relevant in the current proceedings. If the Panel were to find that China could not invoke Article XX(g) under Paragraphs 83 and 84 in order to seek to justify its WTO-inconsistent measures, a complainant could simply assert a claim regarding China's trading rights commitments under those provisions only without making a claim "under other provisions of the covered agreements relating to trade in goods that apply to the same or closely linked measures", in this case Paragraph 5.1 of China's Accession Protocol, thereby denying China access to a defence under the introductory clause of Paragraph 5.1. In this way, a complainant could too easily circumvent the defence offered by Paragraph 5.1 and assert its claims only under Paragraphs 83 and 84 of China's Working Party Report.

7.1032. Having found that China can seek to justify violations of its trading rights commitments, we observe that the Appellate Body has cautioned that not every measure that breaches China's trading rights commitments can be justified under Article XX of the GATT 1994:

> [W]hether China may, in the absence of a specific claim of inconsistency with the GATT 1994, justify its measure under Article XX of the GATT 1994 must in each case depend on the relationship between the measure found to be inconsistent with China's trading rights commitments, on the one hand, and China's regulation of trade in goods, on the other hand.[1352]

7.1033. Thus, to sum up, the Panel concludes that breaches of China's trading rights commitments in Paragraphs 83 and 84 can be justified under an applicable exception of the GATT. However, to establish that its measures are actually justifiable, China has to show, in the words of the Appellate Body, that they have a "clearly discernible, objective link to the regulation of trade" in rare earths and molybdenum.[1353]

7.9.3.2 Whether the breaches of China's trading rights commitments are justified pursuant to Article XX(g) of the GATT 1994

7.1034. The Panel has concluded that the commitments in Paragraphs 83 and 84 are subject to the general exceptions of Article XX of the GATT 1994 insofar as measures regulating trade in goods are concerned. We note that the Appellate Body has held that in certain circumstances, "[a]ny exercise of China's right to regulate trade will be protected under the introductory clause of paragraph 5.1 … and that China may seek to show that, because its measure complies with the conditions of a GATT 1994 exception, the measure represents an exercise of China's power to regulate trade in a manner consistent with the WTO Agreement and, as such, may not be impaired by China's trading rights commitments".[1354] The Appellate Body has also held that "successful justification of these provisions, however, requires China to have demonstrated that they comply with the requirements of Article XX of the GATT 1994".[1355]

7.1035. The complainants have requested the Panel to find, in the event that it concludes that China is entitled to invoke a WTO exception, that China has conflated the issues of whether the export quotas are justified by Article XX(g) and whether the trading rights restrictions are justified by Article XX(g). The complainants assert that these are two separate issues to be addressed independently, and that China has failed to demonstrate that its requirements for prior export performance, prior export experience, and minimum registered capital are justified by Article XX(g).[1356]

[1351] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 229.
[1352] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 229.
[1353] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 230.
[1354] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 230.
[1355] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 233.
[1356] United States' response to Panel question No. 11, para. 22; United States' second written submission, para. 321; European Union's second written submission, para. 321; Japan's response to Panel question No. 11. and Japan's second written submission, para. 217.

7.1036. As noted in the preceding section, according to China, it is not necessary for China to justify separately the prior export performance and minimum capital requirements under Article XX of the GATT 1994. China argues that the criteria at issue are not limitations on trading rights. Rather, the prior export performance and minimum capital requirements are quota allocation criteria that constitute an integral part of China's export quota system. China submits that if the complainants wanted to challenge separately China's quota allocation criteria, they should have challenged these measures under the specific WTO obligations applicable to quota allocation rules, including the following: Article X:1 of the GATT 1994 requiring that quota allocation rules be published; Article X:3(a) imposing disciplines on the manner in which quota administration rules are administered; and Article XIII of the GATT 1994 imposing a series of disciplines specifically on quota administration. As the complainants did not invoke any of these provisions in respect of China's administration of its 2012 export quotas, there is no need for China to justify separately the consistency of these export quota eligibility criteria.[1357]

7.1037. The Panel notes that throughout these proceedings China has emphasized that the criteria at issue relate to the administration of WTO-consistent export quotas and are not limitations on the right to trade.[1358] While the Panel acknowledges that China characterizes its minimum capital, export performance, and prior experience requirements as quota allocation criteria – and at the same time notes that China often refers to them as eligibility criteria[1359] – relating to the administration of its export quotas, it nonetheless has already found that the disputed measures contain exactly the type of restrictions that China expressly committed to eliminate. The Panel has concluded that in Paragraphs 83 and 84 of its Working Party Report, China expressly committed to eliminating export performance or prior experience requirements as criteria for obtaining or maintaining the right to export, and to phase out completely its minimum registered capital requirements.

7.1038. The Panel recognizes that China did seek to provide justification for its eligibility criteria, but only as part as of its export quota system.[1360] For example, in the case of rare earths, China states that requiring an applicant to demonstrate export performance enables the Chinese authorities to ensure that the exporter has the commercial expertise necessary to participate in complex international transactions and that "this application requirement ensures that enterprises to which part of the export quota is allocated are capable of supplying the export volumes that are allocated to them".[1361] China asserts that trading enterprises must also have registered capital over 50 million RMB in the case of rare earths[1362], and submits that imposing minimum registered capital requirements ensures the exporter's financial soundness, the absence of which might hamper its ability to source the materials and comply with international contracts.

7.1039. However, as we observed above, China explains that the export performance and minimum registered capital criteria eligibility requirements are an integral part of China's 2012 export quota system as they serve to ensure the effectiveness of its quota system and as such are also justified under Article XX(g).[1363]

7.1040. The Panel considers that the imposition of export quotas in breach of the commitment set forth in Article XI:1 of the GATT 1994 not to impose quantitative restrictions on the one hand, and the imposition of prior export performance, prior export experience, and minimum capital requirements in breach of the commitments in China's Accession Protocol not to impose prior export performance, export experience, and minimum capital requirements on the other hand, are distinct breaches of distinct commitments. As such, these breaches must be justified separately. Therefore, we must examine each invoked exception individually to determine if the conditions of the exceptions asserted have been met.

[1357] China's comments on the United States' and Japan's responses to Panel question No. 11.

[1358] See, for example, China's comments on the United States' and Japan's responses to Panel question No. 8, para. 15 and question No. 11, para. 23.

[1359] See, for example, China's first written submission, paras. 272, 279, and 280.

[1360] See, for example, China's first written submission, paras. 241, 244, and 280 and China's opening oral statement at the first meeting of the Panel, para. 53.

[1361] China's first written submission, paras. 239 and 385.

[1362] China's first written submission, para. 240 referring to *2012 Application Qualifications and Procedures for Rare Earth Export Quotas*, (Exhibits CHN-38, JE-61), Article I.2.2, and para. 395, referring to *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* (Exhibits CHN-107, JE-63).

[1363] China's first written submission, para. 280.

7.1041. China acknowledges that specific WTO obligations applicable to quota allocation rules are subject to obligations that include Articles X:1, X:3(a) and XIII of the GATT 1994. It is not clear to the Panel, however, why China recognizes that it would have to justify separately the consistency of the eligibility criteria if these provisions had been invoked, but maintains that it is not required to do so for claims made under Paragraph 5.1 of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report. According to China's line of argument, its quota allocation rules could be classified, and accordingly justified, as integral parts of China's export quota system. However, as we explained above, in our view, the justifications must be made separately for each of China's obligations.

7.1042. The Panel now turns to the analysis of the justification itself. As the Panel has already discussed extensively elsewhere what China, as the party invoking the exception, needs to establish to justify its WTO-inconsistent measures pursuant to Article XX(g), we will only make brief reference to those requirements here. Pursuant to the two-tier test established by the Appellate Body in *US – Gasoline*, the application of Article XX(g) requires "first, provisional justification by reason of characterization of the measure under XX(g); and second, further appraisal of the same measure under the introductory clauses of Article XX" i.e. the *chapeau*. Thus, specifically under the first part of the two-tier test, China must demonstrate that its measures (i) "relate to conservation of exhaustible natural resources", and (ii) are "made effective in conjunction with restrictions on domestic production or consumption".

7.1043. The Panel has already found that the imposition of export quotas in breach of the commitment set forth in Article XI:1 of the GATT 1994, and the imposition of prior export performance, export experience, and minimum registered capital requirements in breach of Accession Protocol commitments, are separate and distinct breaches, and must be justified separately. However, contrary to its Article XX(g) defence of export quotas, China has not provided specific arguments explaining why the eligibility criteria contained in the measures at issue relate to "conservation of exhaustible natural resources".

7.1044. Even in its defence of its export quotas, where China makes reference to the eligibility criteria and offers some reasons therefor, the reasons provided are not offered within the framework of the requirements of an Article XX(g) defence as set out in this paragraph. The Panel notes that this is consistent with China's assertion that "as an integral part of the export quota system, the prior export performance and minimum registered capital criteria are also justified under Article XX(g)"[1364], and hence China does not separately justify these criteria.[1365] Specifically, and with reference to the examples noted in paragraph 7.1038 above, China states that requiring an applicant to demonstrate prior export performance enables the Chinese authorities to ensure that the exporter has the commercial expertise necessary to participate in complex international transactions. China also states that it sets minimum capital requirements to "ensure the exporter's financial soundness, the absence of which might hamper its ability to source the materials and comply with international contracts."[1366] In the Panel's opinion, these are not conservation-related concerns.

7.1045. In the light of the foregoing, and bearing in mind that the burden of establishing that the requirements set out in an exception have been met lies with China as the party seeking to rely on it, the Panel concludes that China has not established that its violations of its trading rights commitments can be justified pursuant to Article XX(g).

7.9.3.3 Conclusion

7.1046. The Panel finds that China is entitled to invoke Article XX(g) of the GATT 1994 to seek to defend violations of its trading rights commitments in Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Working Party Report. Furthermore, the Panel finds that these are distinct breaches of distinct commitments and that they must be justified separately to establish that they meet the conditions of the exception asserted. The Panel also finds that China has failed to make a

[1364] China's first written submission, paras. 261 and 280.
[1365] China's comments on the complainants' responses to Panel question No. 11, para. 25.
[1366] China's first written submission, para. 239.

prima facie case that the violations of its trading rights commitments are justified pursuant to Article XX(g).[1367]

7.9.4 The European Union's additional claim under Paragraph 84(b) of China's Working Party Report

7.9.4.1 Introduction

7.1047. The European Union claims that, by virtue of the *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*, China is in breach of its obligation to grant trading rights to foreign enterprises wanting to export molybdenum products in a non-discretionary way.[1368]

7.9.4.2 Obligation under Paragraph 84(b) of China's Working Party Report

7.1048. In Paragraph 84(b) of the Working Party Report, China confirmed that:

> With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way.

7.9.4.3 The measure at issue

7.1049. According to the European Union, the prior export performance requirement applies to all enterprises that have previously acquired export quotas, including foreign enterprises. The *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* does not quantify the export performance required to qualify for a quota – the European Union refers to a benchmark[1369] – thus allowing China freedom to choose, based essentially on its own preference and considerations, how much a company has to have exported in order to meet the export performance criterion and qualify for a quota share. As a result, China does not grant trading rights to foreign enterprises in a non-discretionary way, and for this reason breaches its obligation under paragraph 84(b) of the Working Party Report and thus paragraph 1.2 of the Accession Protocol.[1370]

7.1050. China responds that the European Union does not provide any evidence to support its allegation that trading rights to foreign enterprises would be granted in a discretionary manner. China also states that "[s]howing *any* level of past export performance would satisfy this requirement".[1371]

7.1051. In the course of answering Panel questions on the European Union's additional claim, an issue arose regarding the translation of a certain term in Chinese found in Article II.1.2 of the *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota*. Specifically, the issue is whether the term should be understood as "reached actual export performance", as the European Union argued, or whether it should be understood as "have export performance", as China stated, meaning the existence of prior exports (at any level). China also states that it is irrelevant whether the term is translated as "actual export performance" or just "export performance". For China, the sentence should be read as a whole, and even if one were to add the word "actual" to "export performance", it would not add any additional elements, as all "export performance" after verification is "actual".[1372]

[1367] In view of the nature of the export quota system described above, the Panel's finding is with respect to the series of measures comprising the relevant framework legislation, the implementing regulations, other applicable laws and the specific annual measures imposing the export quotas existing at the date of the Panel's establishment.

[1368] European Union's first written submission, paras. 157-158.

[1369] European Union's response to Panel question No. 17, para. 29.

[1370] European Union's first written submission, para. 158.

[1371] China's first written submission, para. 405.

[1372] China's comments on European Union's response to Panel question No. 136, para. 125.

7.1052. The Panel has taken note of the translation issues raised by China and the European Union. However, we do not consider that the translation of the relevant Chinese characters has any particular bearing in resolving this issue. To recall, the European Union claimed that the *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* does not quantify the export performance required to qualify for a quota, meaning that China does not grant trading rights to foreign enterprises in a non-discretionary way. In the course of these proceedings, China asserted that "showing *any level* of past export performance would satisfy this requirement". The Panel has taken note of this undertaking by China and has no reason to question this statement.[1373]

7.9.4.4 Conclusion

7.1053. Having taken note of China's statement referred to in paragraph 7.1052 above, the Panel concludes that the European Union has not met its burden to prove that the prior export performance criterion in the *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* breaches the commitment in Paragraph 84(b) of China's Working Party Report that trading rights to foreign enterprises will be granted in a non-discriminatory and non-discretionary way.[1374]

[1373] See also Panel Reports, *China – Raw Materials*, para. 7.944.

[1374] In view of the nature of the export quota system described above, the Panel's finding is with respect to the series of measures comprising the relevant framework legislation, the implementing regulations, other applicable laws and the specific annual measures imposing the export quota existing at the date of the Panel's establishment.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1 Complaint by the United States (DS431)

8.1.1 Conclusions

8.1. In respect of claims concerning export duties[1375]:

a. The Panel finds that the export duties that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue[1376] are inconsistent with Paragraph 11.3 of China's Accession Protocol;

b. The Panel finds that China may not seek to justify the export duties it applies to various forms of rare earths, tungsten, and molybdenum pursuant to Article XX(b) of the GATT 1994. Even assuming *arguendo* that China could seek to justify the application of export duties under Article XX(b), the Panel finds that China has not demonstrated that the export duties it applies to various forms of rare earths, tungsten, and molybdenum are justified pursuant to subparagraph (b) of Article XX of the GATT 1994. In addition, the Panel finds that China has not demonstrated that the measures are applied in a manner that satisfies the chapeau of Article XX.

8.2. In respect of claims concerning export quotas[1377]:

a. The Panel finds that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue[1378] are inconsistent with Article XI:1 of the GATT 1994;

b. The Panel finds that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue are inconsistent with Paragraphs 162 and 165 of China's Working Party Report as incorporated into China's Accession Protocol by virtue of Paragraph 1.2;

c. The Panel finds that China has not demonstrated that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum are justified pursuant to subparagraph (g) of Article XX of the GATT 1994. In addition, the Panel finds that China has not demonstrated that the measures are applied in a manner that satisfies the chapeau of Article XX.

8.3. In respect of claims concerning export quota administration and allocation[1379]:

a. The Panel finds that the restrictions on the trading rights of enterprises exporting rare earths and molybdenum (i.e. the prior export experience requirement, the export performance requirement, and the minimum registered capital requirement) that China applies by virtue of the series of measures at issue[1380] are inconsistent with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Working Party Report, as incorporated into China's Accession Protocol by virtue of Paragraph 1.2;

b. The Panel finds that the restrictions on the trading rights of enterprises exporting rare earths and molybdenum (i.e. the prior export experience requirement, the export performance requirement, and the minimum registered capital requirement) that China

[1375] The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-3 and para. 2.16 of these Reports.
[1376] See section 7.3.1.2 above.
[1377] The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-3 and para. 2.16 of these Reports.
[1378] See discussion in sections 7.4.1.2-7.4.1.3 above.
[1379] The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-3 and para. 2.16 of these Reports.
[1380] See discussion in sections 7.4.1.2-7.4.1.3 above.

applies by virtue of the series of measures at issue[1381] are inconsistent with Paragraph 5.1 of China's Accession Protocol;

c. The Panel finds that China is entitled to seek to justify the restrictions on the trading rights of enterprises exporting rare earths and molybdenum referred to in paragraph 8.3 pursuant to Article XX(g) of the GATT 1994;

d. The Panel finds that China has failed to make a *prima facie* case that the violations of its trading rights commitments are justified pursuant to Article XX(g).

8.1.2 Nullification and impairment

8.4. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that where China has acted inconsistently with Article XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83, 84, 162, and 165 of China's Working Party Report as incorporated into its Accession Protocol by virtue of Paragraph 1.2, it has nullified or impaired benefits accruing to the United States under the WTO Agreement.

8.1.3 Recommendations

8.5. Pursuant to Article 19.1 of the DSU, having found that China has acted inconsistently with Article XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83, 84, 162 and 165 of China's Working Party Report, the Panel recommends that the Dispute Settlement Body requests China to bring the existing measures at issue into conformity with its obligations under the GATT 1994, China's Accession Protocol and China's Working Party Report. In respect of findings concerning export duties and export quotas on various forms of rare earths, tungsten, and molybdenum, and restrictions on the trading rights of enterprises exporting rare earths and molybdenum, the Panel has found that the series of measures have operated to impose export duties and export quotas on various forms of rare earths, tungsten, and molybdenum, and restrictions on the trading rights of enterprises exporting rare earths and molybdenum (i.e. the prior export experience requirement, the export performance requirement, and the minimum registered capital requirement), that are inconsistent with China's WTO obligations. The Panel, therefore, recommends that the Dispute Settlement Body requests China to bring its measures into conformity with its WTO obligations such that the series of measures does not operate to bring about a WTO-inconsistent result.

[1381] See discussion in sections 7.4.1.2-7.4.1.3 above.

8.2 Complaint by the European Union (DS432)

8.2.1 Conclusions

8.6. In respect of claims concerning export duties[1382]:

a. The Panel finds that the export duties that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue[1383] are inconsistent with Paragraph 11.3 of China's Accession Protocol;

b. The Panel finds that China may not seek to justify the export duties it applies to various forms of rare earths, tungsten, and molybdenum pursuant to Article XX(b) of the GATT 1994. Even assuming *arguendo* that China could seek to justify the application of export duties under Article XX(b), the Panel finds that China has not demonstrated that the export duties it applies to various forms of rare earths, tungsten, and molybdenum are justified pursuant to subparagraph (b) of Article XX of the GATT 1994. In addition, the Panel finds that China has not demonstrated that the measures are applied in a manner that satisfies the chapeau of Article XX.

8.7. In respect of claims concerning export quotas[1384]:

a. The Panel finds that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue[1385] are inconsistent with Article XI:1 of the GATT 1994;

b. The Panel finds that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue are inconsistent with Paragraphs 162 and 165 of China's Working Party Report as incorporated into China's Accession Protocol by virtue of Paragraph 1.2;

c. The Panel finds that China has not demonstrated that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum are justified pursuant to subparagraph (g) of Article XX of the GATT 1994. In addition, the Panel finds that China has not demonstrated that the measures are applied in a manner that satisfies the chapeau of Article XX.

8.8. In respect of claims concerning export quota administration and allocation[1386]:

a. The Panel finds that the restrictions on the trading rights of enterprises exporting rare earths and molybdenum (i.e. the prior export experience requirement, the export performance requirement, and the minimum registered capital requirement) that China applies by virtue of the series of measures at issue[1387] are inconsistent with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Working Party Report, as incorporated into China's Accession Protocol by virtue of Paragraph 1.2;

b. The Panel finds that the restrictions on the trading rights of enterprises exporting rare earths and molybdenum (i.e. the prior export experience requirement, the export performance requirement, and the minimum registered capital requirement) that China

[1382] The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-3 and para. 2.16 of these Reports.
[1383] See section 7.3.1.2 above.
[1384] The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-3 and para. 2.16 of these Reports.
[1385] See discussion in sections 7.4.1.2-7.4.1.3 above.
[1386] The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-3 and para. 2.16 of these Reports.
[1387] See discussion in sections 7.4.1.2-7.4.1.3 above.

applies by virtue of the series of measures at issue[1388] are inconsistent with Paragraph 5.1 of China's Accession Protocol;

c. The Panel finds that China is entitled to seek to justify the restrictions on the trading rights of enterprises exporting rare earths and molybdenum referred to in paragraph 8.8 pursuant to Article XX(g) of the GATT 1994;

d. The Panel finds that China has failed to make a *prima facie* case that the violations of its trading rights commitments are justified pursuant to Article XX(g); and

e. The Panel finds that the European Union has not established that the prior export performance criterion in the *2012 Application Qualifications and Application Procedures for Molybdenum Export Quota* is inconsistent with the commitment in Paragraph 84(b) of China's Working Party Report as incorporated into China's Accession Protocol by virtue of Paragraph 1.2.

8.2.2 Nullification and impairment

8.9. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that where China has acted inconsistently with Article XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83, 84, 162, and 165 of China's Working Party Report, it has nullified or impaired benefits accruing to the European Union under the WTO Agreement.

8.2.3 Recommendations

8.10. Pursuant to Article 19.1 of the DSU, having found that China has acted inconsistently with Article XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83, 84, 162, and 165 of China's Working Party Report, the Panel recommends that the Dispute Settlement Body requests China to bring the existing measures at issue into conformity with its obligations under the GATT 1994, China's Accession Protocol and China's Working Party Report. In respect of findings concerning export duties and export quotas on various forms of rare earths, tungsten, and molybdenum, and restrictions on the trading rights of enterprises exporting rare earths and molybdenum, the Panel has found that the series of measures have operated to impose export duties, and export quotas on various forms of rare earths, tungsten, and molybdenum, and restrictions on the trading rights of enterprises exporting rare earths and molybdenum (i.e. the prior export experience requirement, the export performance requirement, and the minimum registered capital requirement), that are inconsistent with China's WTO obligations. The Panel, therefore, recommends that the Dispute Settlement Body requests China to bring its measures into conformity with its WTO obligations such that the series of measures does not operate to bring about a WTO-inconsistent result.

[1388] See discussion in sections 7.4.1.2-7.4.1.3 above.

8.3 Complaint by Japan (DS433)

8.3.1 Conclusions

8.11. In respect of claims concerning export duties[1389]:

a. The Panel finds that the export duties that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue[1390] are inconsistent with Paragraph 11.3 of China's Accession Protocol;

b. The Panel finds that China may not seek to justify the export duties it applies to various forms of rare earths, tungsten, and molybdenum pursuant to Article XX(b) of the GATT 1994. Even assuming *arguendo* that China could seek to justify the application of export duties under Article XX(b), the Panel finds that China has not demonstrated that the export duties it applies to various forms of rare earths, tungsten, and molybdenum are justified pursuant to subparagraph (b) of Article XX of the GATT 1994. In addition, the Panel finds that China has not demonstrated that the measures are applied in a manner that satisfies the chapeau of Article XX.

8.12. In respect of claims concerning export quotas[1391]:

a. The Panel finds that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue[1392] are inconsistent with Article XI:1 of the GATT 1994;

b. The Panel finds that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum by virtue of the series of measures at issue are inconsistent with Paragraphs 162 and 165 of China's Working Party Report as incorporated into China's Accession Protocol by virtue of Paragraph 1.2;

c. The Panel finds that China has not demonstrated that the export quotas that China applies to various forms of rare earths, tungsten, and molybdenum are justified pursuant to subparagraph (g) of Article XX of the GATT 1994. In addition, the Panel finds that China has not demonstrated that the measures are applied in a manner that satisfies the chapeau of Article XX.

8.13. In respect of claims concerning export quota administration and allocation[1393]:

a. The Panel finds that the restrictions on the trading rights of enterprises exporting rare earths and molybdenum (i.e. the prior export experience requirement, the export performance requirement, and the minimum registered capital requirement) that China applies by virtue of the series of measures at issue[1394], are inconsistent with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Working Party Report, as incorporated into China's Accession Protocol by virtue of Paragraph 1.2;

b. The Panel finds that the restrictions on the trading rights of enterprises exporting rare earths and molybdenum (i.e. the prior export experience requirement, the export performance requirement, and the minimum registered capital requirement) that China

[1389] The specific forms of the raw materials subject to Japan's claims are identified in Exhibit JE-3 and para. 2.16 of these Reports.
[1390] See section 7.3.1.2 above.
[1391] The specific forms of the raw materials subject to Japan's claims are identified in Exhibit JE-3 and para. 2.16 of these Reports.
[1392] See discussion in sections 7.4.1.2-7.4.1.3 above.
[1393] The specific forms of the raw materials subject to Japan's claims are identified in Exhibit JE-3 and para. 2.16 of these Reports.
[1394] See discussion in sections 7.4.1.2-7.4.1.3 above.

applies by virtue of the series of measures at issue[1395] are inconsistent with Paragraph 5.1 of China's Accession Protocol;

c. The Panel finds that China is entitled to seek to justify the restrictions on the trading rights of enterprises exporting rare earths and molybdenum referred to in paragraph 8.13 pursuant to Article XX(g) of the GATT 1994;

d. The Panel finds that China has failed to make a *prima facie* case that the violations of its trading rights commitments are justified pursuant to Article XX(g).

8.3.2 Nullification and impairment

8.14. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that where China has acted inconsistently with Article XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83, 84, 162, and 165 of China's Working Party Report, it has nullified or impaired benefits accruing to Japan under the WTO Agreement.

8.3.3 Recommendations

8.15. Pursuant to Article 19.1 of the DSU, having found that China has acted inconsistently with Article XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83, 84, 162 and 165 of China's Working Party Report, the Panel recommends that the Dispute Settlement Body requests China to bring the existing measures at issue into conformity with its obligations under the GATT 1994, China's Accession Protocol and China's Working Party Report. In respect of findings concerning export duties and export quotas on various forms of rare earths, tungsten, and molybdenum, and restrictions on the trading rights of enterprises exporting rare earths and molybdenum, the Panel has found that the series of measures have operated to impose export duties and export quotas on various forms of rare earths, tungsten, and molybdenum, and restrictions on the trading rights of enterprises exporting rare earths and molybdenum (i.e. the prior export experience requirement, the export performance requirement, and the minimum registered capital requirement), that are inconsistent with China's WTO obligations. The Panel, therefore, recommends that the Dispute Settlement Body requests China to bring its measures into conformity with its WTO obligations such that the series of measures does not operate to bring about a WTO-inconsistent result.

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[1395] See discussion in sections 7.4.1.2-7.4.1.3 above.