FOCUS

CONFLICT AND BALANCE BETWEEN ENVIRONMENTAL PROTECTION AND TRADE LIBERALIZATION

THE APPLICABILITY OF ENVIRONMENTAL EXCEPTIONS OF THE GATT TO CHINA’S WTO-PLUS OBLIGATIONS — WTO PANEL AND APPELLATE BODY RULINGS ON THE CHINESE EXPORT RESTRICTIONS OF RARE EARTHS, TUNGSTEN AND MOLYBDENUM

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On March 26, 2014, a panel, established by the WTO Dispute Settlement Body, circulated its final report regarding the China — Rare Earths case to WTO Members. This dispute concerns China’s export restrictions on rare earths, tungsten, and molybdenum. In its report, the panel agreed with the findings of another dispute, the China — Raw Materials case. It concluded that the environmental exceptions under Article XX GATT 1994 cannot be applied to China’s actions. This conclusion is reconfirmed in the latest appellate body’s report of China — Rare Earths on August 7, 2014. Therefore, China was not able to justify the violation of their WTO-plus obligation to eliminate all export duties, contained in paragraph 11.3 of China’s Accession Protocol. As a consequence of the panel’s decision, it seems impossible for China to justify trade barriers with environmental interests and to invoke any exceptions. Such findings are subject to a fundamental controversy within the WTO multilateral trade system, trying to solve the tensions between environmental protection and trade liberalization.

This essay examines the general applicability of environmental exceptions by analyzing the panel’s and appellate body’s approaches to the China — Rare Earths case and their findings, in connection with the purpose of sustainable development as prescribed by the preamble of the WTO Agreement. It has to be examined whether the non-application of the WTO environmental exceptions complies with Article 31 Vienna Convention on the Law of Treaties and is consistent with the balance between the different values pursued by the WTO. This article argues that Article XX GATT 1994

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should be applicable to China’s WTO-plus obligation specified in paragraph 11.3 of its Accession Protocol as far as environmental interests are concerned.

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INTRODUCTION

Rare earth, tungsten and molybdenum are all essential natural resources, especially for industrial development. Rare earth elements are widely used in agriculture, information technologies, military technologies, and clean energy technologies. They are, for example, components of batteries used in electronic cars. They are also critical for the production of laptops and smartphones as well as vital components for aircraft and satellites. Therefore, rare earth metals are regarded as “industrial vitamins.” China owns the biggest resources of rare earth in the world (which is equivalent to about 36% of the world’s known reserves as at 2009), and all of the 17 known rare earth elements can be found on Chinese territory. Since the late 1980’s, China has exported rare earth in order to build up its economy. The rare earth industry developed so rapidly that soon China became the world’s largest rare earth supplier. Today China supplies approximately 95% of the global demand. The US, Japan and the EU as well as other industry countries and regions all depend on China’s rare earth export. However, the resources are limited. In the 1980’s, almost 90% of the world’s rare earth reserves were located in China. Today there are only 36% left. Chinese experts indicate that the remaining reserves could be exhausted in about 20 years, if the Chinese government does not control the extraction and export. Furthermore, the extraction and processing of rare earth causes severe environmental damage and harms the Chinese population, as the mining and processing procedures are both highly energy consuming and polluting. In view of these facts, the Chinese government has taken notice of the necessity of environmental protection and resources conservation that lead to a shift in their rare earth policy. Ever since the last decade, China has introduced a series of measures in order to conserve resources and protect the environment. Export restrictions on rare earth are part of the main implementation. The maximum export has been massively reduced and the export duty was raised from 10% in 2006 to 25% in 2008, which lead to an increase in rare earth prices and worldwide concerns regarding the security of global supplies. Based on these circumstances, the US, Japan, and the EU brought the Chinese export restrictions of rare

2 Id.
3 Id. at 15.
5 See WANG, fn. 1 at 29.
8 Id.
earths, tungsten and molybdenum to the WTO’s attention on March 13, 2012.9 The panel refused to accept China’s argument that its export restrictions were justified by Article XX(b) or (g) GATT 1994 and were therefore not a breach of the WTO-plus obligation prescribed in paragraph 11.3 of the Protocol on the Accession of the People’s Republic of China (hereafter China’s Accession Protocol or the Protocol). In the subsequent appellate body’s report,10 the opinion of China relating to the applicability of paragraph 11.3 is also not supported. These decisions made it impossible for China to justify any measures relating to rare earth export duties and to invoke environmental provisions, although the panel acknowledged that the mining and processing of rare earths, tungsten, and molybdenum is severely harmful to the environment.

This case reflects the conflict between free trade and environmental protection. China’s restrictions on the export of mineral resources is accused by import members of the WTO to be trade-distorting and inconsistent with the WTO regulations, while China as the export member of the WTO expects to justify its measures on the basis of environmental protection and the conservation of exhaustible natural resources. In view of this, this article will devote its attention to the environmental protection within the WTO framework.

This essay has five parts. The first part provides an overview of environmental exception regulations in the GATT 1994. The second part briefly describes China’s WTO-plus obligations under paragraph 11.3 of the Protocol. The third part focuses on the findings of the panel report and appellate body report in the China — Rare Earths case with respect to the applicability of Article XX GATT to China’s WTO-plus obligation to eliminate export duties. This part introduces the basic background of this dispute and the main findings of the panel report and the appellate body report regarding the applicability of Article XX GATT. The fourth part comments on the findings from the perspective of inappropriateness of the applied interpretative approach and the inconsistency with the WTO objective of environmental protection. The fifth and last part then approach an alternative holistic interpretation of the matter, which requires all relevant elements to be considered.

I. ENVIRONMENTAL REGULATIONS UNDER THE GATT 199411

The WTO allows its members to adopt trade-restrictive measures aimed at protecting the environment when its members fulfil specific conditions. In the preamble of the WTO Agreement,12 members recognize that part of the WTO is to 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

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11 General Agreement on Tariffs and Trade (GATT).
This excerpt shows that environmental protection and sustainable development are both basic aims of the WTO. Furthermore, there are some regulations that directly indicate environmental protection such as Article XX(b) and (g) GATT 1994, Article 2.2 TBT, Article 2.2 SPS and Article XIV GATS. However, this essay solely discusses the regulations under the GATT 1994 with its main focus on Article XX, which is the one regulation that is the most concerned with environmental protection.

The basic principles of the GATT 1994 are non-discrimination and free trade. However, in order to balance the interests between free trade and other values, such as sustainable development and national security, the GATT allows WTO members to make some exceptions. In some circumstances the members can use Article XX GATT to justify measures, which would otherwise be inconsistent with their GATT obligations. These exceptions help to balance the international free trade and interests of national sovereignty.

The GATT regulations relating to environmental protection are Article XX(b) and (g) GATT, which deal with two aspects of environmental interests — one is the protection of human, animal and plant life or health and the other is the conservation of exhaustible natural resources.

A. Article XX(b) GATT 1994

Article XX(b) GATT allows WTO members to take necessary measures in order to protect the life or health of humans, animals, and plants. In most cases relating to environmental protection, such as US — Gasoline, EC — Asbestos, Brazil — Retreaded Tyres, those actions were generally accepted by the Dispute Settlement Body of the WTO.

This provision was created due to a proposal submitted by the US in 1945 during a conference with the purpose to draft a Charter for an International Trade Organization. Following this, at a conference in Lake Success in 1947, the delegate of Belgium-

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13 WTO Agreement 1994, first recital in the preamble.
14 Anke Thiedemann, WTO und Umwelt — Die Auslegung des Article XX GATT in der Praxis der GATT/WTO-Streitbeilegungsergane (WTO and the Environment — The Interpretation of Article XX GATT in Practice, the GATT/WTO Dispute Settlement Organs), LIT VERLAG Münster (Berlin), at 8 (2005).
Luxembourg tried to introduce the condition, corresponding domestic safeguards under similar conditions exist in the importing countries and regions, which illustrates the drafter’s concerns over the abuse of sanitary regulations by importing countries and regions. However, this condition was cancelled at the conference in Geneva because of its redundancy. In the early stages of the draft, during the ITO negotiations, the purpose of Article XX(b) was limited to sanitary restrictions. However, in light of the historic backgrounds of the 1927 Convention, and other bilateral treaties in which similar exceptions had been extended to environmental measures, all parties agreed that existing environmental treaties and national laws should be covered by those regulations. As a result, the exceptions are applied to the sanitary as well as environmental measures.

In order to justify an action under Article XX(b) GATT, the action has to be examined in two steps. First the requirements of the specific section of Article XX GATT 1994 must be analysed, and then the actions in question need to be assessed in accordance with the requirements of the Chapeau of Article XX GATT 1994. Therefore, to justify an action under Article XX(b) GATT, the member has to argue that: (1) the measures at issue are designed to protect human, animal, or plant life or health; (2) the GATT inconsistency is necessary for the realization of this policy objective. To assess the necessity of the actions two points must be taken into consideration: that the actions can achieve the desired level of protection and that there are no alternative actions which would be consistent or less inconsistent with the GATT 1994; and (3) the GATT inconsistent actions must be applied in conformity with the requirements of the chapeau of Article XX.

B. Article XX(g) GATT 1994

Article XX(g) belongs to one of the most important provisions relating to environmental protection under the GATT 1994. It is used to justify actions that are taken

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23 International Convention for the Abolition of Import and Export Prohibitions and Restrictions, Nov. 8, 1927.
24 See Charnovitz, fn. 22 at 11.
25 Id.
27 See fn. 16, paragraph 8.204.
for the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. Article XX(g) is frequently applied by the panel or appellate body when analysing a case dealing with the protection of resources, such as the *US — Gasoline*\(^{29}\) case and the *US — Shrimps*\(^{30}\) case.

This provision was introduced by the US in September, 1946, as part of the “suggested charter for an international trade organization,”\(^{31}\) and prompted by America’s concerns regarding the trade of raw oil.\(^{32}\) The provision was kept unchanged during the Conferences of London and Lake Success. Later, during a conference in Geneva, it was altered due to a request made by the Brazilian delegate. The delegate requested that the original text “taken pursuant to international agreements” should be deleted since the delegation had the intention to adopt conservation measures in chapter VII of the Act of the United Nations Conference on Trade and Employment.\(^{33}\)

During the ITO negotiations, the regulation was discussed in the context of export restrictions rather than import restrictions.\(^{34}\) Raw materials or minerals are typical examples of natural resources that fall under the exceptions of Article XX(g). According to the intentions of the drafters, the provision’s applicability does include living resources such as animals and plants.\(^{35}\) This conclusion can also be drawn from the fact that at the conference of Geneva, the delegation initially agreed to the wording “relate solely to the conservation of fisheries or wildlife or other exhaustible natural resources such as fisheries or wildlife.”\(^{36}\) However, at the end of that conference, the delegation decided that the sentence dealing with “fisheries or wildlife” should be deleted since those issues were already covered by the section on exhaustible natural resources.\(^{37}\)

Like Article XX(b), Article XX(g) is also subject to a multi-level analysis. In order to justify GATT inconsistent actions under Article XX(g), it has to be shown that: (1) the measures at issue are concerned with the conservation of exhaustible natural resources; (2) the measures aid the conservation; (3) the measures are made effective in conjunction

\(^{29}\) See fn. 15.


\(^{31}\) Charnovitz, fn. 22 at 12. The original text is “relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption.”

\(^{32}\) Id. at 11.

\(^{33}\) See fn. 21.

\(^{34}\) See Charnovitz, fn. 22 at 12.

\(^{35}\) Id. at 14.


with restrictions on domestic production or domestic consumption; and (4) the measures are applied in conformity with the requirements of the chapeau of Article XX GATT.

Article XX(b) and (g) GATT are the most important provisions relating to environmental protection. They play an essential role in WTO jurisprudence when faced with conflicts between environmental interests and trade liberalization. In recent WTO cases, China tried to justify its export restrictions on rare earth, tungsten and molybdenum in accordance with these findings by means of the GATT regulations. However, the panel and the appellate body rejected the applicability of these two provisions to China’s WTO-plus obligation under paragraph 11.3 of the Accession Protocol.

II. CHINA’S WTO-PLUS OBLIGATION TO ELIMINATE EXPORT DUTIES PRESCRIBED IN PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL

A. China’s WTO-Plus Obligations in Its Accession Protocol

The WTO-plus obligations are commitments that exceed the already existing requirements of the WTO Agreement. As Article XII:1 Marrakesh Agreement states, “[a]ny State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this agreement and the multilateral trade agreements may accede to this agreement, on terms to be agreed between it and the WTO.”

Therefore, the WTO-plus option provides a legal basis for the WTO and acceding members to agree over terms that are deviant from the existing WTO rules or obligations.

The WTO-plus obligations undertaken by China are extensive, ranging from the administration of China’s trade regime to its economic system and WTO disciplines on investment. These obligations are mainly established in China’s Accession Protocol with cross-reference to the Report of the Working Party on the Accession of China. The Accession Protocol contains a large number of commitments that alter the WTO rules and obligations. Therefore, it is possible that a revised WTO-plus obligation in accordance with China’s Accession Protocol may be applied when China is confronted with international trade disputes.

B. China’s WTO-Plus Obligation to Eliminate Export Duties under Paragraph 11.3 of the Accession Protocol

In general, the WTO multilateral trade agreements do not forbid WTO members from imposing export duties on any products — Article II:1(b) GATT only refers to the import tariffs which shall not be in excess of the rates fixed by each state in its own

38 See Article XII:1 of the Marrakesh Agreement Establishing the World Trade Organization.
40 Id. at 483.
schedule annexed to the GATT, unless the applied export duty is so high that it amounts to a de facto export quota, which is prohibited pursuant to Article XI GATT.\(^{41}\) However, China has accepted the obligation to eliminate all export duties in its Accession Protocol, which is a WTO-plus obligation that exceeds the requirements of the WTO Agreement.

As paragraph 11.3 of China’s Accession Protocol states, “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 GATT.”\(^{42}\) Annex 6 of the Protocol lists eighty-four products—most of which are raw materials—that can be subject to export duties. Each product cannot exceed the maximum export duty rate that China has fixed in its Protocol. Article VIII GATT deals with fees and charges other than import or export duties, which must be limited to the approximate cost of services rendered.

The WTO-plus obligation created by China’s Accession Protocol results in a complex legal problem that is trying to solve the relationship between accession protocols and the WTO Agreement, including the Marrakesh Agreement and its annexed multilateral trade agreements. Although China’s Accession Protocol clearly states that the Protocol is “an integral part of the WTO Agreement,”\(^{43}\) it does not clearly indicate the relationship between a WTO-plus provision and the generally applicable multilateral trade disciplines such as the general exceptions under Article XX GATT.\(^{44}\)

This issue is illustrated in the China—Rare Earths dispute. In China—Rare Earths, China has imposed export duties on rare earth, molybdenum, and tungsten, which violates its obligation under paragraph 11.3 of the Protocol. Since mining and processing of rare earth are greatly harmful to the environment, China intended to invoke environmental exemptions under Article XX GATT to justify its actions. Given that the obligation under paragraph 11.3 of the Accession Protocol is a deviation from the general WTO Agreement that can affect the possibility to justify an inconsistent measure by means of the general exceptions under Article XX GATT,\(^{45}\) the general applicability of Article XX GATT plays a significant role in the China—Rare Earths dispute.

The next section addresses the findings of the panel and the appellate body in China—Rare Earths regarding the applicability of environmental exceptions to China’s WTO-plus obligation under paragraph 11.3 of the Protocol.

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\(^{42}\) Paragraph 11.3 of the Protocol on the Accession of the People’s Republic of China.

\(^{43}\) Paragraph 1.2 of Accession Protocol states: “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.”


III. FINDINGS ON THE APPLICABILITY OF ARTICLE XX IN THE CHINA — RARE EARTHS CASE

A. Brief Description of the WTO Case: China — Rare Earths

In the China — Rare Earths case, the complaining parties were of the opinion that China’s export restrictions of rare earth, tungsten and molybdenum were a breach of China’s WTO obligations. The parties argued that the imposition of export duties violated the Chinese commitments under paragraph 11.3 of the Accession Protocol and that the imposition of export quotas was inconsistent with Article XI:1 GATT 1994.

In view of these accusations, China resorted to the environmental regulations Article XX(b) and (g) GATT — as general exceptions to justify its WTO inconsistent export restrictions. Regarding export quotas, China directly resorted to Article XX(g) GATT to justify its measures. Regarding the export duties, China argued that its commitment under paragraph 11.3 of the Protocol is subject to Article XX GATT and that the disputed export duties on rare earth, tungsten and molybdenum are therefore justifies under Article XX(b) GATT.

However, both of the panel and appellate body rejected the justification by Article XX(b) and (g) GATT and found that China’s actions were against WTO regulations. One reason was that the Chinese government did not prove that its measures met the requirements of Article XX(g) and Article XX(b). The requirements were explained by the panel in accordance with the general rules of interpretation contained in Article 31 Vienna Convention on the Law of Treaties (hereafter Vienna Convention). The second reason was that the applicability of Article XX to paragraph 11.3 of China’s Accession Protocol is rejected by both of the appellate body and the panel.

B. Applicability of Article XX GATT to WTO-Plus Obligations in Panel Report

According to paragraph 11.3 of the Accession Protocol China is obligated to “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.”46 This obligation to eliminate export duties is a typical WTO-plus obligation, because the WTO itself does not prohibit the imposing of export duties.

After the panel confirmed that China’s export duties were inconsistent with its commitments under paragraph 11.3 of the Accession Protocol, China tried to resort to Article XX(b) GATT to justify its actions. However, the applicability of Article XX(b) GATT to China’s WTO-plus obligation was rejected in spite of the recognized environmental damage caused by mining and processing of rare earth, tungsten and molybdenum.47

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46 See fn. 42.
47 See Panel Report, China — Rare Earths, WT/DS431/DS432/DS433/R, paragraph 7.150.
1. The Adopted Panel and Appellate Body Reports in the China — Raw Materials Case.\textsuperscript{48} — The panel in the China — Rare Earths case observed that the panel’s report of the China — Raw Materials case stated that there is no reference to the GATT 1994 in paragraph 11.3 of China’s Accession Protocol. Therefore, the panel and appellate body of China — Raw Materials had concluded that “there is no basis in China’s Accession Protocol to allow the application of Article XX GATT to China’s obligations in paragraph 11.3 of the Accession Protocol.”\textsuperscript{49}

Based on this conclusion made in China — Raw Materials, the panel of China — Rare Earths was of the opinion that in accordance with Article 17.14 DSU the earlier outcomes should be adopted.\textsuperscript{50} In addition to Article 17.14, Article 3.2 DSU\textsuperscript{51} states that security and predictability are very crucial to the multilateral trading system. Therefore it is necessary to obey previous adjudications in order to avoid contradictory decisions in similar cases. As a result the panel acted with great reluctance when asked to re-examination the applicability of Article XX in consideration of China’s arguments.\textsuperscript{52}

However, after considering the following four points: (1) that China had proposed new argument, (2) that no other party rejected to the re-examination, (3) that the parties to this dispute are different from the parties in China — Raw Materials and (4) finally the fundamental systemic importance of the applicability of Article XX in the present case,\textsuperscript{53} the panel decided to re-examine the applicability of Article XX to paragraph 11.3 of the Accession Protocol\textsuperscript{54} but limited the re-examination to the specific arguments that were presented by China instead of a de novo determination.\textsuperscript{55} The panel pointed out that only if China’s arguments could be regarded as “cogent reason” to deviate from the findings in China — Raw Materials it might reverse the previous statements.\textsuperscript{56}

2. China’s Arguments Relating to the Applicability of Article XX. — In order to prove that paragraph 11.3 of the Protocol is subjected to Article XX GATT China brought four arguments to the panel:

(1) Interpretation of omissions in the covered agreements.

In this regard, China argued that although paragraph 11.3 of the Accession Protocol holds no actual reference to Article XX GATT, this in itself does not exclude the


\textsuperscript{50} See fn.47, paragraph 7.55.

\textsuperscript{51} Understanding on Rules and Procedures Governing the Settlement of Disputes.

\textsuperscript{52} See fn. 47, paragraph 7.54.

\textsuperscript{53} Id. paragraph 7.59.

\textsuperscript{54} Id. paragraph 7.60.

\textsuperscript{55} Id.

\textsuperscript{56} Id. paragraph 7.61.
applicability of Article XX GATT. China also quoted the opinion of the appellate body in *US — Carbon Steel*, which stated that “such silence does not exclude the possibility that the requirement was intended to be included by implication.”

In view of this, the panel analysed the appellate body’s findings in *US — Carbon Steel* and came to the conclusion that the appellate body’s opinions in *China — Raw Materials* and *US — Carbon Steel* were comparable. The appellate bodies of both cases were deciding over similar issues. In the *US — Carbon Steel* case, the body had to decide whether the *de minimis* standard in Article 11.9 SCM Agreement was applicable to Article 21.3 SCM Agreement. *China — Raw Materials* dealt with the applicability of Article XX GATT to paragraph 11.3 of China’s Accession Protocol. In both cases, the agreements held no cross references to one another and the appellate body therefore denied the applicability. Also in both cases, the analysis began with a grammatical interpretation of the agreements. During the analysis, the appellate body of both cases drew on the technique of cross-referencing. In *US — Carbon Steel*, the appellate body was of the opinion that the frequent use of cross-references suggested that the negotiator of the SCM Agreement would have expressly cross-referenced a requirement that was to be applied to one provision but regulated in another context. In *China — Raw Materials*, a similar situation existed. Furthermore, both cases referred to the “immediately adjacent paragraphs” within the same article as the paragraph at issue as a basis for interpretation.

Finally, both cases tried to explain why the prioritisation of WTO rights and obligations cannot provide guidance on the interpretation at issue. Based on the above reasoning, the panel concluded that China’s argument regarding omissions in a provision was not persuasive and therefore no cogent reason to reverse the appellate body’s findings regarding the applicability of Article XX GATT to paragraph 11.3 of the Accession Protocol.

(2) Systemic relationship Between the provisions of China’s Accession Protocol and the GATT.

A new argument presented by China was that, due to the textual basis of paragraph 1.2 of the Accession Protocol and Article XII:1 Marrakesh Agreement, paragraph 11.3 of the Accession Protocol is an integral part of the GATT 1994. Accordingly, Article

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57 Id. paragraph 7.63.
58 Id. paragraph 7.65.
59 Id. paragraph 7.67.
60 Id.
61 Id. paragraph 7.68.
62 Id. paragraph 7.69.
63 Id. paragraph 7.71.
64 Id. paragraph 7.72.
65 Id. paragraph 7.75.
XX GATT should be applicable to paragraph 11.3 of the Accession Protocol. However, the panel also rejects this argument for the following reasons:

(i) With respect to paragraph 1.2 of China’s Accession Protocol.

The panel disagreed with China’s argument that the term “WTO Agreement” contained in paragraph 1.2 of the Accession Protocol is meant to include the Marrakesh Agreement and the multilateral trade agreements annexed thereto. The panel took in fact the opposite view that the term “WTO Agreement” only refers to the Marrakesh Agreement itself.66

Based on the literal meaning of the words used in paragraph 1.2, the panel found no implication that “individual provisions of the Accession Protocol are integral parts of different multilateral trade agreements annexed to the Marrakesh Agreement.”67 From the wording the panel could only deduce that China’s Accession Protocol “as a whole” is an integral part of the Marrakesh Agreement.68

According to paragraph 1 of GATT 1994, the constitution of the GATT 1994 provides an exhaustive list. Pursuant to paragraph 1(b) (ii), the protocols of accession that “have entered into force under the GATT 1947 before the date of effectiveness of the WTO Agreement” could be regarded as an integral part of the GATT 1994.69 However, China’s Accession Protocol was not in consistence with the requirements contained in paragraph 1 and should therefore be excluded from the constitution of the GATT 1994.

The panel was of the opinion that from the wording of paragraph 1, Part II of the Accession Protocol in connection with Article II:7 GATT 1994, it could only be inferred that “the schedules annexed to this protocol — not including paragraph 11.3 of the Protocol — are an integral part of the GATT 1994.”70

With reference to past experiences of previous cases, the panel concluded that the function of paragraph 1.2 of the Accession Protocol consists of two aspects: “One is to make sure the obligations under China’s Accession Protocol were enforceable under the DSU and the other is to ensure that the corresponding interpretation complies with the customary rules of the interpretation of public international law.”71

As a consequence, the panel found that seeing the WTO Agreement as a reference to the Marrakesh Agreement already fulfil both functions.72 Accordingly, the panel stated that China’s interpretation of paragraph 1.2 of the Protocol departed from the practice of the earlier panel’s and appellate body’s reports.73

66 Id. paragraph 7.80.
67 Id. paragraph 7.82.
68 Id.
69 Id. paragraph 7.83.
70 Id. paragraph 7.84.
71 Id. paragraph 7.85.
72 Id.
73 Id.
The panel found that it would be redundant to make explicit textual reference to the exceptional application of the GATT, such as paragraph 5.1 of the Accession Protocol, if it agreed with China’s argument that Article XX could be applied to the WTO commitments of the Accession Protocol.\(^{74}\)

Based on the reasoning above, the panel came to the conclusion that only China’s Accession Protocol as a whole is an integral part of the Marrakesh Agreement but not its individual provisions as such.

(ii) With respect to Article XII:1 of the Marrakesh Agreement.

China argued that Article II:1 Marrakesh Agreement showed that the Accession Protocol was an integral part of the GATT 1994 because of its intrinsic relationship and its function to “serve to specify” China’s obligations under the WTO Agreement and the multilateral trade agreements annexed thereto. However, the panel found nothing to support China’s opinion.

In the panel’s opinion, the text of Article XII:1 Marrakesh Agreement contained no information that would support China’s assertion that individual protocol provisions should be considered as an integral part of the WTO Agreement.\(^{75}\) Moreover, the scope of the commitments in the Accession Protocol exceeds the scope of the obligations specified in the WTO Agreement and other multilateral trade agreements annexed thereof.\(^{76}\)

The panel had doubts about China’s arguments. The consequence of following China’s reasoning would have been that many other multilateral agreements, referring to the GATT as “serving to specify” the obligations, would automatically be regarded as an integral part of the WTO Agreement.\(^{77}\) In view of the above reasoning, the panel rejected China’s argument regarding Article XII:1 Marrakesh Agreement.\(^{78}\)

(3) “Nothing in this Agreement” in Article XX GATT 1994.

China argued that the phrase “nothing in this agreement,” contained in the chapeau of Article XX GATT implies that the provision is applicable to paragraph 11.3 of the Accession Protocol. In China’s opinion, the term “this agreement” refers to the GATT 1994 which, based on China’s earlier reasoning, includes the Accession Protocol as an integral part of the GATT 1994. Therefore, Article XX had to be applicable to paragraph 11.3 of the Protocol. However, the panel noted that it had not accepted China’s argument that the Accession Protocol was an integral part of the GATT. As a consequence the panel also rejected this part of China’s reasoning.

\(^{74}\) Id. paragraph 7.86.

\(^{75}\) Id. paragraph 7.91.

\(^{76}\) Id.

\(^{77}\) Id. paragraph 7.92.

\(^{78}\) Id. paragraph 7.93.
(4) Object and purpose of the WTO Agreement.

China argued that from the perspective of the WTO Agreement’s object and purpose, an applicability of Article XX to paragraph 11.3 of the Protocol needed to be confirmed, since a non-applicability of Article XX would imply that the WTO forced member to endure environmental disaster in order to realize trade liberalization.79

This argument was also not accepted. According to the panel, China had made its argument on the false premise that “trade liberalization must be promoted at whatever cost.”80 However, the panel was convinced that paragraph 11.3 of the Accession Protocol in fact only concerned one kind of instrument — export duties.81 This meant that China may take measures other than export duties to protect the environment and human health, unless they could prove that export duties were the only instrument adequate to protect the environment and exhaustible natural resources.82

In sum and based on the above reasoning the panel denied the applicability of Article XX GATT to paragraph 11.3 of China’s Accession Protocol.

C. Findings of Appellate Body about the Systemic Relationship Between the Provisions of China’s Accession Protocol and the GATT

As requested by China, with respect to the question of the applicability of Article XX GATT to paragraph 11.3 of China’s Accession Protocol, the appellate body has only examined the Chinese argument relating to the systemic relationship between the provisions of China’s Protocol and the GATT. Based on its analysis, the Appellate Body concluded that paragraph 1.2 of China’s Accession Protocol and Article XII:1 of Marrakesh Agreement could not prove that a specific provision in China’s Protocol is an integral part of one of the Multilateral Trade Agreements attached to the Marrakesh Agreement.83 The reasons of the Appellate Body are as the following:

1. With Respect to the Article XII:1 of the Marrakesh Agreement. — Before the appellate body, China argued that Article XII:1 of the Marrakesh Agreement served to specify its rights and obligations under the Marrakesh Agreement and the multilateral trade agreements annexed thereto. However, like the panel, the appellate body also rejected this argument.

The appellate body made its analysis starting from the interpretation of Article XII:1 of the Marrakesh Agreement. According to the appellate body, this provision sets out the general rule of an acceding Member joining into the WTO. Its first sentence provides a legal basis that the acceding Member may accede to the Marrakesh Agreement “on terms

79 Id. paragraph 7.105.
80 Id. paragraph 7.105.
81 Id. paragraph 7.112.
82 Id. paragraph 7.113.
83 See fn. 47, paragraph 5.73.
to be agreed” with the WTO. Its second sentence indicates that the acceding Member shall be subject to the rights and obligations in “the entirety of the Marrakesh Agreement and the Multilateral Traded Agreements annexed thereto.”

Based on the interpretation, the appellate body found no textual basis to support China’s argument. Accordingly, the appellate body also saw nothing in this provision that relates to the question of the specific relationship between individual provisions of an accession protocol and the Marrakesh Agreement or any one of the Multilateral Trade Agreements attached thereto.

2. With Respect to Paragraph 1.2 of China’s Accession Protocol. — China also referred to paragraph 1.2 of its Accession Protocol to support its opinion that individual provisions of China’s Accession Protocol is an integral part of the Marrakesh Agreement or one of the Multilateral Trade Agreements to which it intrinsically relates. However, this argument is also not accepted by the appellate body.

First of all, the appellate body made the explanation about the term of “the WTO Agreement.” The analysis was made based on the contexts of this provision — i.e. paragraphs 1.2, 1.1, and 1.3 of China’s Accession Protocol as well as the Decision of the Ministerial Conference of November 10, 2001. The appellate body was of the opinion that the term “the WTO Agreement” may only refer to the Marrakesh Agreement by reading the above contexts of paragraph 1.2 of China’s Accession Protocol; however, the appellate body also indicated that this term does not necessarily preclude the Multilateral Trade Agreements attached to the Marrakesh Agreement if an examination was made based on the whole China’s Accession Protocol. Therefore, in the view of the appellate body, the scope of the term “the WTO Agreement” may vary depending on the different contexts. This conclusion is different from the opinion of the panel in China — Rare Earths, in which the term “the WTO Agreement” only refers to the Marrakesh Agreement.

Although in this respect the appellate body did not support the opinion of the panel, China still has not received support from the appellate body relating to the question of the specific relationship between individual provisions of China’s Accession Protocol and the individual provisions of the Marrakesh Agreement and the attached Multilateral Trade Agreements based on paragraph 1.2 of China’s Accession Protocol. According to the

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84 Id. paragraph 5.27.
85 Id. paragraph 5.28.
86 Id. paragraph 5.34
87 Id.
88 Id. paragraph 5.42.
89 Id. paragraph 5.43.
90 Id. paragraph 5.44.
91 Id. paragraph 5.45.
92 Id. paragraph 5.46.
93 Id.
In fact, according to the appellate body, this provision serves only a bridge function, that is, it indicates that China’s Accession Protocol is integrated into the single package of WTO rights and obligations. Together with Article II:2 of the Marrakesh Agreement, these provisions both show that the Marrakesh Agreement, the Multilateral Trade Agreements attached thereto, and China’s Accession Protocol make up the single package of rights and obligations which China need to abide by in the framework of the WTO. Therefore, the relationship between the individual provisions of the Protocol and the individual provisions of the Marrakesh Agreement and the attached Multilateral Trade Agreements is not revealed by paragraph 1.2 of China’s Accession Protocol.

3. Relationship of China’s Accession Protocol with the Marrakesh Agreement and the Multilateral Trade Agreements Annexed Thereto. — The appellate body held the opinion that the sole paragraph, such as paragraph 1.2 of China’s Accession Protocol or Article XII:1 of the Marrakesh Agreement, cannot resolve the problem of the relationship between each provision of the Protocol, on one hand, and the individual provision of Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other. The resolution shall be made on a case-by-case basis through a thorough analysis in the event of lacking express reference according to the appellate body. That is, the analysis must be made ‘on a basis of the customary rules of treaty interpretation and the circumstances of the dispute, taking into account not only the text of the provision at issue, but also its context and the overall architecture of the WTO system as a single package of rights and obligations and other relevant elements.’

In its analysis, the appellate body has invoked two cases in the framework of the WTO — China — Publications and Audiovisual Products and China — Raw Materials — to prove that a thorough analysis to determine the specific relationship between an individual provision in China’s Accession Protocol, on one hand and provisions of the Marrakesh Agreement and the multilateral Trade Agreements, on the other, has already applied by the WTO practices.

In sum and based on the above reasoning, the appellate body denied that paragraph 1.2 of China’s Accession Protocol and Article XII:1 of the Marrakesh Agreement could

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94 Id. paragraph 5.48.
95 Id. paragraph 5.49.
96 Id. paragraph 5.50.
97 Id. paragraph 5.57.
98 Id. paragraph 5.62, paragraph 5.68, paragraph 5.74.
100 See fn. 48.
101 See fn. 47, paragraph 5.60, paragraph 5.63.
explain the systemic relationship between paragraph 11.3 of the protocol and Article XX of GATT 1994. For the appellate body, the systemic relationship should be made through a thorough analysis on a case-to-case basis. Therefore, the Chinese arguments are rejected and accordingly, the applicability of Article XX GATT to paragraph 11.3 of China’s Accession Protocol is also not supported by the appellate body.

IV. CRITIQUE ON THE FINDINGS IN THE CHINA — RARE EARTHS
DISPUTE ABOUT THE INAPPLICABILITY OF ARTICLE XX
GATT TO WTO-PLUS OBLIGATIONS UNDER
PARAGRAPH 11.3 OF THE PROTOCOL

As stated above, the WTO jurisprudence concluded that the environmental protection exceptions under Article XX GATT could not be applied to justify China’s export duties that violated its commitments under paragraph 11.3 of the Accession Protocol. The question is, whether the findings are accurate.

A. Whether the Interpretation Is Accurate

In the case of China — Rare Earths, the applicability of Article XX to the WTO-plus obligation is the most important issue. By deciding whether Article XX is applicable or not, the applied interpretation approach plays a crucial role. Therefore, it is necessary to analyse whether the applied interpretation approach is accurate. In the present case, both the panel and the appellate body have stated that the analysis of the problem of applicability of Article XX to China’s WTO-plus obligation is resorted to the customary rules of interpretation. 102 Especially the appellate body stressed many time in its report that the interpretation is based on a thorough analysis.

In light of this, in order to analyze whether the applied interpretation is accurate, it needs to cast a glance at the interpretation approach in the practice of the WTO.

1. Customary Rules of Interpretation in the Practice of the WTO. — In the framework of the WTO, the most important provision relating to interpretation is Article 3.2 DSU. Based on this provision, the customary rules of interpretation of public international law is considered as the foundation of the interpretation activities of the WTO jurisprudence. 103 As to the understanding of the customary rules of interpretation of public international law, according to the GATT/WTO practice and the prevailing view in the international community, Articles 31 to 32 Vienna Convention 104 embodies those

102 See fn. 47, paragraph 7.55; Appellate Body Report, China — Rare Earths, WT/DS431/DS432/DS433/AB/R, paragraph 5.57, paragraph 5.62, paragraph 5.68.
rules of interpretation. In the case of *US — Gasoline*, the appellate body expressed its opinion that Article 31(1) of the Vienna Convention has obtained the status of a rule of customary or general international law and therefore, it forms the customary rules of interpretation of public international law. In the sequent case of *Japan — Alcoholic Beverages II*, the appellate body extended the scope of the customary rules of interpretation and emphasized that Article 31 as a whole together with Article 32 were both falling within the customary rules of interpretation of public international law. This interpretation approach is proved by other WTO-cases, and the status of Articles 31 and 32 of the Vienna Convention is fixed in the framework of the WTO that the interpretation rules set forth in Articles 31 and 32 of the Vienna Convention apply to the interpretation of the provisions of the WTO Agreement.

According to the two provisions, the interpretation of the WTO jurisprudence should be done based on the principle of good faith, the original meaning of the text as well as the context and its purpose and object. In the context of the WTO, it is recognized that the text of a provision is the fundamental element for the interpretive process, but Article 31(1) of Vienna Convention also makes clear that the other elements — “context, purpose and object of the treaty” — play a role as equally as the text and between them there exists no hierarchy. Therefore, all of these elements shall be taken into account in accordance with the principle of good faith by determining the meaning of interpreting the provision at issue.

Based on the above analysis, it is clear that customary rule of interpretation is the fundamental interpretative approach in the WTO and this approach considers not only the text and the context, but also the purpose and object of the treaty shall be in accordance with the principle of good faith taken into account.

Now the question is about the applied interpretation approach in *China — Rare*

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106 See fn. 26

107 Id. at 17.

108 See fn. 105, *Japan — Taxes on Alcoholic Beverages*.

109 Id. at 10, 11.


113 See Schollendorf, fn. 103 at 75; id. at 12.
Hearts. This interpretative issue in the present case is reflected mainly in the following aspects as discussed in the next section.


The interpretative approach with respect of thorough analysis in appellate body report.

The appellate body has brought forward an opinion that the question of applicability of Article XX shall be answered through a thorough analysis based on the customary rule of interpretation.114 The alleged interpretative approach based on customary rule of interpretation is actually a right choice, which is consistent with the requirements that all elements, including the text, context as well as the purpose and object of the treaty, shall be taken into account.

However, the alleged approach was not really accomplished in the present case– not all of the elements set out in Articles 31 and 32 of the Vienna Convention are taken into account, although the appellate body has tried to recourse to other elements besides the text115 and gone beyond the narrow text analysis.

With a further observation, it can be found that by proving that the interpretation in the case of China — Raw Materials was made on a basis of thorough analysis, the appellate body of China — Rare Earths has only attached the importance to the context of paragraph 11.3 of China’s Accession Protocol without other elements provided in the Article 31 of the Vienna Convention. If the interpretation had been made on a thorough analysis in accordance with the customary rule of interpretation, it would have reached a total different result:

The appellate body of the China — Rare Earth has neglected the fact that the appellate body of China — Raw Materials never consider the object and purpose of this provision at issue by analysing the applicability of Article XX GATT. Because paragraph 1.2 of the Protocol shows that paragraph 11.3 is meant to be an integral part of the WTO Agreement, the purpose and object of paragraph 11.3116 should be analysed in connection with the purpose and object of the WTO Agreement itself. However, the appellate body in

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114 See fn. 103, paragraph 5.55.
115 In its report the appellate body has emphasized many times that all relevant elements shall be examined by interpreting the applicability of Article XX to paragraph 11.3 of the Protocol; id. paragraph 5.55, paragraph 5.56 and paragraph 5.57.
116 The panel in US — Stainless Steel stated the term “object and purpose” in Article 31(1) is preceded by its whereas the term “context” is preceded by “their.” Thus, we consider that Article 31(1) refers to the object and purpose of the treaty as a whole, rather than specific provisions thereof. See Panel Report, United States — Final Anti-Dumping Measures of on Stainless Steel from Mexico, WT/DS334/R, paragraph 6.16. In addition, the Appellate Body in EC — Chicken Classification highlights that it not would be necessary to divorce a treaty’s object and purpose from the object and purpose of specific treaty provision, or vice versa. See fn. 105, European Communities — Customs Classification of Frozen Boneless Chicken Cuts, paragraph 238. In view of this, the purpose and objective of paragraph 11.3 shall be interpreted in connection with China’s Protocol of Accession. Given that the Protocol of Accession is an integral part of the WTO Agreement, thus, the purpose and objective of the Protocol shall be subject to the purposes and objectives of the WTO Agreement.
China — Raw Materials only focused on whether there were any specific references to the applicability of Article XX GATT 1994 to paragraph 11.3 of the Protocol.\textsuperscript{117} China’s line of argument is being supported if one looks at the purpose and objective of the WTO to analyse the applicability of the GATT. The preamble of the WTO Agreement confirms that the “optimal use of the world’s resources in accordance with the objective of sustainable development” and environmental protection are in the interest of all WTO members\textsuperscript{118} and constitute a fundamental purpose and object of the WTO itself. In view of this, it can be found that trade liberalization may be derogated in order to pursue the non-trade values of the WTO, such as environmental protection.\textsuperscript{119} Therefore the preamble can be regarded as a means to ensure that members are able to make use of their right to regulated trade in a manner that balances interests of environmental protection and trade obligations, including all obligations defined in their accession protocols.\textsuperscript{120}

In light of the above argument, the conclusions made by the appellate body in China — Rare Earths is problematic — the analysis of the appellate body in China — Raw Material is not a thorough analysis and is not consistent with the customary rules of the interpretation. Moreover, the appellate body has delivered a wrong message that the interpretation through a thorough analysis shall follow a fixed examination order. That is, an interpretation shall be started with the wording, then the context. After examining these elements, it then turns to examine other elements. If a result can be already reached based on the context, then there is no need to analyse other elements. In light of this, it may explain why the appellate body alleged that all relevant elements shall be taken into account but actually only the text and the context of paragraph 11.3 of the Protocol has been examined. In the appellate body’s view, the contexts of paragraph 11.3 of the Protocol could provide a conclusion, that is, Article XX GATT is not applicable to paragraph 11.3 of the Protocol. However, the appellate body neglected the fact — without an examination of all elements set out in Article 31(1) of the Vienna Convention the reached conclusion may be not proper and accurate. Moreover, as the elements in Article 31(1) of the Vienna Convention have the same equal role, so the elements relating to the interpretation shall not be examined one by one, but shall be considered as a whole at the same time.

Therefore, it could be found out that there were two defects during its interpretative process: On the one hand, the appellate body still attached its importance only to the context of the provision at issue without considering other elements required by the

\textsuperscript{117} See fn. 48, paragraph 306.

\textsuperscript{118} See Preamble of Marrakesh Agreement Establishing the World Trade Organization.


\textsuperscript{120} LIU Ying, The Applicability of Environmental Protection Exceptions to WTO-Plus Obligations: In View of the China — Raw Materials and China — Rare Earths Cases, 27 Leiden Journal of International Law, 125 (2014).
customary rules of interpretation,\textsuperscript{121} which is not consistent with the requirements provided in Article 31 of the Vienna Convention; On the other hand, the second defect is that the appellate body of \textit{China — Rare Earths} fixed an examination order by applying the thorough analysis, and once a result based on an element is reached, then the remaining elements do not need to be examined more.

(2) The interpretative approach omission in panel report: Omission itself does not mean the inapplicability of Article XX to WTO-plus obligation.

In this dispute, the panel stated that it has resorted to the customary rules of interpretation to analyse the arguments in accordance with Article 3.2 DSU.\textsuperscript{122} However, the fact is that the panel has limited its analysis to a purely textual approach\textsuperscript{123} instead of a full application of the customary rules of interpretation, although it had announced the application of an interpretative approach in accordance with Article 31 to Article 32 Vienna Convention. The conclusion can be proved by the analysis of the meaning of omission in paragraph 11.3 of China’s Accession Protocol.

The interpretation of omission is not challenged in the appellate body report. But it does not affect the fact that the interpretation of omission plays a key role in deciding the applicability of Article XX to WTO-plus obligation, as the lack of an express reference to Article XX GATT under paragraph 11.3 of the Accession Protocol is one of the main reasons why the applicability of the GATT was denied in both cases, \textit{China — Raw Materials} and \textit{China — Rare Earths}.

Before the panel, China argued that an omission by itself did not mean that the authors of the agreement had the intention to deny members the applicability of Article XX GATT.\textsuperscript{124} Facing this Chinese argument, the panel only analysed the case by comparing it to the earlier cases, \textit{China — Raw Materials} and \textit{US — Carbon Steel}. Although it recognized that omissions themselves were not necessarily dispositive, the panel still neglected the facts as discussed below

Previous WTO cases show that omission can be interpreted differently. In \textit{Japan — Alcoholic Beverages II}, a panel first expressed that “omission must have some meaning.”\textsuperscript{125} In the case of \textit{Canada — Autos}, the appellate body stated that “omissions in different contexts may have different meanings and omission is not necessarily dispositive.”\textsuperscript{126} However, in the case of \textit{Canada — Patent Term}, the appellate body

\textsuperscript{121} In the expression by the appellate body it also finds no clue that the object and purpose of the provision shall be stressed during an interpretative process. See fn. 102, \textit{China — Rare Earths}, paragraph 5.63 and paragraph 5.74.

\textsuperscript{122} See fn. 47, paragraph 7.55.


\textsuperscript{124} See fn. 47, paragraph 7.63.

\textsuperscript{125} See fn. 105, paragraph 111.

made the conclusion that "sometimes the absence of something means simply that it is not there."\textsuperscript{127} In light of this, one must make a clear distinction between different types of omissions. By taking a closer look at previous cases, such distinction can be found and connected to the object and purpose and the context of the provision at issue.\textsuperscript{128} However, the panel in the \textit{China — Rare Earths} case did not make the correct distinctions of the omission in paragraph 11.3 of the Accession Protocol. The panel came to its conclusion purely on the basis of the opinions formed by the appellate body in \textit{China — Raw Materials}.

The panel was of the opinion that the appellate body in \textit{China — Raw Materials} had interpreted the omission in a holistic approach.\textsuperscript{129} However, the alleged “holistic” interpretation was not actually accomplished, as analysed above.\textsuperscript{130} On the contrary, the appellate body of \textit{China — Raw Materials} has actually used a strictly textual approach. According to its opinion, only if there had been an explicit reference to Article XX GATT, it would have been possible to accept China’s arguments.

Therefore, the conclusion made by the panel in \textit{China — Rare Earths} is problematic, given the fact that the panel’s findings are based on the unconvincing opinion of the appellate body in \textit{China — Raw Materials}. Accordingly, the panel also resorted to a pure textual analysis in deciding the meaning of the omission in paragraph 11.3 of China’s Accession Protocol. Therefore, the panel has not accomplished its alleged interpretation in connection with its context as well as its purpose and objective. A correct analysis is as follows:

Taking the original wording of paragraph 11.3 of the Protocol into account, one can only come to the conclusion that there is in fact no explicit reference to GATT 1994. However, this does not necessarily mean that China cannot apply Article XX GATT 1994 to invoke certain environmental exceptions. An omission could have different reasons, as shown by earlier WTO disputes, which would have to be interpreted in connection with its context as well as its purpose and objective.

Judging by the general context of the Protocol, the opinion of the appellate body in \textit{China — Raw Materials} is not convincing. The context provided by paragraph 170 of


\textsuperscript{128} For example, in the case of \textit{Argentina — Textiles and Apparel} the appellate resorted to the object and purpose and context of Article II:1(b) GATT to confirm that although there is no such type of duty was contained in one member’s schedule, it can still be interpreted that an omission included types of duties that are different from the types prescribed in the schedule. It could therefore be subject to Article II:1(b). See Appellate Body Report, \textit{Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and other Items}, paragraph 47.

\textsuperscript{129} See fn. 47, paragraph 7.66.

\textsuperscript{130} The appellate body of China-rare earths has restated that the appellate body of \textit{China — Raw Materials} has taken a thorough analysis based on the customary rule of interpretation. See fn. 102, paragraph 5.63 and paragraph 5.65 (But in author’s opinion this opinion in view of the flawed interpretation applied by the appellate body in China-Rare Earths).
China’s working party report would have supported this assertion if it had been accepted by the appellate body. Unfortunately, the appellate body of China — Raw Materials rejected the use of paragraph 170 as a context for paragraph 11.3 of the Protocol, because in its opinion, paragraph 170 is subjected to Section IV.D “Internal Policies Affecting Foreign Trade in Goods.” As a consequence, paragraph 170 of China’s working party report only concerns internal policies. The appellate body came to the conclusion that the export duties at issue did not fall within the scope of internal policies. Such a conclusion is worth discussing. It is not uncommon that one subject may be classified into two categories. The drafter might choose to classify the subject under any of those categories. This does not necessarily mean that the subject ceases to have any effect on the other category.

Furthermore, if the appellate body took the multilateral environmental agreement as the context for interpretation of paragraph 11.3, in this dispute, United Nations Framework Convention on Climate Change (UNFCCC) can be helpful for the interpretation, since China imposed the export taxes for the sake of reduction of pollution, including reduction of the greenhouse gases produced by the mining and processing of rare earths. In the case of EC — Approval and Marketing of Biotech Products, the panel admitted that international treaties could be understood as the rules of international law under Article 31(3)(c) of the Vienna Convention for the interpretation as a context. In addition, only the international treaties applicable to all the parties in dispute can be used as a context for helping the interpretation. Therefore, with respect to the fact that the US, EU, and Japan as well as China are all the contracting parties of the UNFCCC, and the UNFCCC emphasizes not only the importance of reducing the emissions of greenhouse gases and sustainable development, but also affirms that the needs of developing countries for the achievement of economic growth shall be taken into account, so it could also support that environmental exceptions of GATT shall applied to paragraph 11.3.

From the perspective of the purpose and objective of this provision, based on the analysis above, the objective and purpose of paragraph 11.3 should be connected with the purpose and object of the Marrakesh Agreement. In light of the explicit reference to the environmental protection in the preamble of Marrakesh Agreement the importance of environmental protection shall not be disregarded when confronting with the conflict.

131 See fn. 102, China — Rare Earths, paragraph 298.
134 Id. paragraph 767.
135 Id. paragraph 768 and paragraph 771.
between free trade and environmental protection. Therefore, the omission in paragraph 11.3 of the Protocol shall be interpreted that Article XX is applicable to the WTO-plus obligation under paragraph 11.3 of the Protocol in case of the conflict between environmental protection and trade liberalization.

In light of the arguments above, the conclusion made by the panel in *China — Rare Earths* is problematic and its applied interpretative approach is wrong, since the panel’s findings are based on the unconvincing opinion of the appellate body in *China — Raw Materials* without considering all relevant elements in interpreting the meaning of the omission.

3. The Interpretation of the Systemic Relationship between Paragraph 11.3 of the Accession Protocol and the GATT 1994 in Panel and Appellate Body Reports. — In light of the fact that both of the panel and the appellate body have applied the wrong interpretative approach in their analysis, it is necessary to discuss the correctness of the conclusions about the Chinese argument — the systemic relationship between paragraph 11.3 of the Accession Protocol and the GATT 1994, which were involved in both of panel report and appellate body report.

China tried to argue from a systemic perspective to show that Article XX GATT is in fact applicable to paragraph 11.3 of the Protocol. According to China paragraph 11.3 is an integral part of the GATT 1994. However, both of the panel and the appellate body of the *China — Rare Earths* case rejected that interpretation.

(1) Interpretation of systemic relationship in the appellate body report.

The appellate body was of the opinion that the term “the WTO Agreement” plays no role in deciding the systemic relationship between individual provisions of the China’s Accession Protocol and the Marrakesh Agreement and the Multilateral Trade Agreements attached thereof, because paragraph 1.2 of the Protocol serves a connecting function, which shows, together with Article II:2 of the Marrakesh Agreement, that the Protocol, Marrakesh Agreement, and the Multilateral Trade Agreements attached thereof form up a single package of obligations and rights of China in the framework of the WTO. According to the appellate body, the specific relationship between the individual provision of the protocol and the Marrakesh Agreement and the attached Multilateral Trade Agreements shall be read through a thorough on a case-to-case.

As stated above, the appellate body has not actually conducted a thorough analysis, so it neglected a fact: Although it is recognized that paragraph 1.2 of the Protocol cannot clarify the specific relationship between an individual provision of the protocol and any one of the Multilateral Trade Agreements which attach to the Marrakesh Agreement, but

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137 See fn. 47, paragraph 7.75; fn. 102, *China — Rare Earths*, paragraph 5.63, paragraph 5.65.

138 Id. *China — Rare Earths*, paragraph 5.63, paragraph 5.65.

139 Id. paragraph 5.70.

140 Id. paragraph 5.63, paragraph 5.51 and paragraph 5.68.
paragraph 1.2 has not only a bridge function; in fact, if an interpretation about this provision made in accordance with the customary rules of the interpretation, then it can be found out that this provision can clarify the relationship between an individual provision of the Protocol and the entirety of the annexed Multilateral Trade Agreements.

By analysing the function of paragraph 1.2 of the Protocol, the appellate body did not take paragraph 1.3 of the Protocol into account.141 If the appellate body had focused on paragraph 1.3 of the Protocol, which states that “…in this protocol, those obligations in the multilateral trade agreements annexed to the WTO Agreement…shall be implemented by China,” it would have realised that China has to fulfill obligations not only contained in the Marrakesh Agreement but also in its attached multilateral trade agreements including the GATT 1994.

This article argues that it could be inferred from paragraph 1.3 of the Protocol that China’s Accession Protocol recognizes the binding effect of the multilateral trade agreements annexed to the Marrakesh Agreement.142 The provision only explicitly mentions obligations but still the general principle of good faith in accordance with Article 31(1) Vienna Convention has to be considered. The Vienna Convention indicates that any interpretation shall be made in an “honest and fair” manner.143 Therefore, an interpretation of paragraph 1.3 that only imposes obligations on China without giving it the freedom to exercise its rights would be inconsistent with both, the principle of good faith as well as Article 31(1) Vienna Convention. Therefore, paragraph 1.3 cannot be interpreted in a way that denies China its rights in general or in this case denies its right to invoke general exceptions under Article XX GATT. This also implies that China’s Accession Protocol must be subject to the multilateral trade agreements annexed to the Marrakesh Agreement.

However, based on paragraph 1.2 of the Protocol, it cannot be concluded that China’s Accession Protocol is an integral part of the GATT 1994. The Protocol does not only contain specifications about the trading of goods but also about GATS and other trading. Therefore, it can be said that the Protocol as a whole is an integral part of the annexed multilateral trade agreements. Accordingly, the individual provisions of the Protocol must also be subject to the annexed agreement as a whole.

As to the question whether one individual provision of the Protocol is an integral part of one agreement of the annexed multilateral trade agreements, it can only be made based on the character and nature of the specific provision in question in accordance with the

141 It is noted that the appellate body referred paragraph 1.3 of the China’s Accession Protocol as a context of paragraph 1.2 of the Protocol in deciding the meaning of the term “the WTO Agreement.”


specific case. Therefore, the commitments made in paragraph 11.3 of the Protocol must be subject to the GATT 1994, since their nature and character is closely related to the field of “trade in goods.”

Therefore, the conclusion of the appellate body about the systemic relationship between paragraph 11.3 of the Protocol and Article XX GATT is problematic in light of the application of the flawed interpretative approach. It can be concluded that the individual provisions of the protocol relating to trade in goods are in fact subject to the GATT 1994 based on a right interpretative approach in accordance with the customary rules of the interpretation.

(2) Interpretation of systemic relationship in the panel report.

With respect to this issue, the panel’s interpretation affords a great importance to the wording of the text itself without taking other elements into consideration. It found that unless it was expressly stipulated that paragraph 11.3 of the Protocol is an integral part of one or more of the multilateral trade agreements attached to the Marrakesh Agreement; China’s argument based on paragraph 1.2 of the Accession Protocol could not be accepted. Such a way of interpretation was not inconsistent with the requirements of the customary rules of interpretation.

The panel clearly distorted the meaning of paragraph 1.2 of the Protocol. According to the panel’s interpretation, the Protocol itself is an integral part of the Marrakesh Agreement, but not of its annexed multilateral trade agreements. With respect to this issue, the panel has made the same mistake as the appellate body, which is, it neglected the context of paragraph 1.2 of China’s Accession Protocol; moreover, its analysis was more limited to the wordings of a provision in comparison with the appellate body, which can be shown from the following analysis:

The panel stated that paragraph 1 GATT 1994 only referred to protocols pre-dating the Marrakesh Protocol and the entry into force of the WTO Agreement. Moreover, the panel found that the term “consist of” in paragraph 1 implied that it was an “exhaustive, closed” list. Therefore, China’s Accession Protocol, which entered into force after the establishment of the WTO, should be excluded from the GATT 1994. However, such an interpretation is obviously dependent on the wording itself of a provision, and therefore it is questionable. The panel neither explains the ordinary meaning of “consist of” nor does it elaborate on which basis it concluded that the list of paragraph 1 GATT was exhausted or closed. The panel also ignored questions such as “of what kind of nature are post-1994 protocols of accession if post-1994 protocols have nothing to do with the GATT 1994” and “why are protocols of accession under the GATT 1947 and those under the WTO

144 See fn. 47, paragraph 7.80.
145 See the discussion in the above subsection about the interpretation about the systemic relationship in the appellate body report.
146 See fn. 47, paragraph 7.83.
147 Id.
system treated differently.” Without giving further explanations, the panel’s conclusion based on paragraph 1 GATT 1994, which holds no express reference to an exclusion of post-1994 accession protocols, is not convincing.

It is known that the post-1994 accession protocols, unlike the accession protocols under GATT 1947, are not exclusively devoted to the single subject matter of trade in goods. They are, on the contrary, extended to the whole spectrum of the WTO Agreement, including services issues and other issues not covered by the GATT 1994. Therefore, it is understandable that post-1994 protocols are not expressly prescribed by the GATT 1994 due to their wide coverage. In light of this, in no event this paragraph 1 of GATT 1994 shall become an argument to support the opinion of the exclusion of China’s Accession Protocol from GATT 1994.

Based on the arguments above, it can be concluded that the applied interpretative in fact is not consistent with the customary rules of the interpretation and therefore, both of the panel and the appellate body made flawed conclusions.

B. Whether the Finding of Panel Report Is Consistent with the Environmental Protection Interests Contained in the Preamble of the WTO Agreement

The preamble of the Marrakesh Agreement states: “The relations in the field of trade and economic endeavour should…be allowing for the optimal use of the world’s resources and in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.” Obviously, the preamble recognizes that environmental protection and sustainable development are two main objectives of the WTO multilateral trade system. However, the findings of the case China — Rare Earths about the inapplicability of Article XX GATT appear to ignore these objectives.

Although it is recognized that a sovereign state has the right to take measures to protect the environment as well as human health or life and also confirmed that an interpretation that prevents such a state from taking these measures is inconsistent with the purpose of the WTO Agreement, it ends up coming to a conclusion that is contrary to the panel’s own statement. It seems that, for the sake of the inapplicability of the environmental exceptions in Article XX GATT to paragraph 11.3 of China’s Accession Protocol, the panel has made a result-oriented analysis when interpreting China’s

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148 Id.
149 See Preamble of the Marrakesh Agreement Establishing the World Trade Organization.
151 The environmental protection interest is not discussed in the appellate body report. The objective of environmental protection set out in the preamble of the WTO Agreement is also not mentioned in the analysis made by the appellate body. So with respect to this issue the discussion will around the panel report.
152 See fn. 47, paragraph 7.111.
153 Id. paragraph 7.114.
argument in light of the purpose and object of the WTO Agreement. The panel’s report indicated that unless China could prove export duties were the “only type of instrument” that China could take to protect the environment and human health or life, the assertion based on the objective and purpose of the WTO Agreement could not be supported. Therefore, this analysis is not persuasive. China, as a sovereign state, has the right to decide which instrument it will take to protect its environment as well as human life or health. In the present case, the action China chose was to establish certain export duties.

The questions relating to the “necessity test,” whether export duties make a material contribution or whether export duties are the only instruments that can be used, should be examined under Article XX(b) GATT 1994, rather than being examined with the general applicability of Article XX GATT. Only if Article XX GATT is applicable to paragraph 11.3 of the Protocol the panel has reasons to examine the necessity of the taken actions under Article XX(b) GATT 1994. However, in this dispute, according to the panel’s report, Article XX GATT is not applicable to paragraph 11.3 of the Protocol. Therefore, there should be no need for a necessity test. In its report, however, the panel did examine the necessity of China’s actions, which raises the question why the Panel examines the requirements of necessity in the context of the GATT’s general applicability. After all, the question whether the instrument that China chose is necessary for environmental protection is part of the examination of Article XX. It has nothing to do with the article’s applicability. If a member invokes Article XX(b) or (g) GATT to defend its trade-restrictive measure, then the questions, whether the measures aim at environmental protection or other economic purposes and whether the taken actions are necessary, have to be judged under Article XX GATT and shall not influence the assessment of the applicability of Article XX(b) or (g), as long as the prima facie evidence proves that a relationship between environmental protection and the trade-restrictive measures exist.

The panel’s findings lead towards the inapplicability of Article XX GATT, which sends a powerful message: Trade liberalization appears the most sacred obligation of a WTO member compared to the other non-trade values. It seems like the trade liberalization commitments cannot be derogated, even if they are in conflict with the other non-trade values that member need to pursue.

Such a message is disappointing. Under the WTO multilateral trade system, there should be no hierarchy between trade liberalization and other non-trade values. On the contrary, the WTO devotes itself to balancing the interests between free trade and the non-trade values. The preamble of the WTO Agreement acknowledges the principles of trade liberalization as well as the principle of sustainable development, which shows that

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154 Id. paragraph 7.113.
155 See Qin, fn. 123.
156 See Baroncini, fn. 150.
the WTO multilateral trade system pursues a model of sustainable economic development in association with the environmental and social progress.

Also the WTO jurisprudence has shown the WTO’s endeavour to achieve such balance. The case of \textit{US — Shrimps}\textsuperscript{157} is regarded as a turning point in the field of trade and environmental protection\textsuperscript{158} and the interpretations of the environmental provisions of the GATT. The subsequent case of \textit{EC — Asbestos}\textsuperscript{159} in which the measures were inconsistent with trade liberalization obligations, were found to be justified under the general exceptions of the GATT\textsuperscript{160} for the first time in GATT/WTO history. This implies that since then health and environmental interests of member states belong to the serious concerns of the WTO system. Therefore, it may be concluded that the views of the panel in \textit{China — Rare Earths} represent a step backwards. The panel deemed to consider the trade liberalization commitments as absolute\textsuperscript{161} obligations and neglected the environmental protection interests of member states. The interpretation of paragraph 11.3 should be construed in compliance with the concept of sustainable economic development that is enshrined in the WTO preamble.

In summary, the findings on the non-applicability of the GATT’s environmental exceptions to China’s Accession Protocol are highly questionable. Firstly the applied interpretative approach is in fact not consistent with the requirements of Article 31 Vienna Convention, which requires all the relevant elements, including text, context, purpose, and objective, to be taken into account. Secondly and from an environmental perspective, the findings of the panel appear not to be reconcilable with the concept of sustainable economic development enshrined in the WTO preamble. The concept of sustainable economic development promotes international trade together with the optimal use of world’s resources and environmental protection. In light of this, the WTO judiciary should in the future revise this not-persuasive result.

Article 3.2 DSU\textsuperscript{162} emphasizes that security and predictability are very crucial to the multilateral trading system. Accordingly, panels and appellate bodies often resort to previous reports as a decision-making aid, but the prior practices are not decisive. There is in fact no provision relating to the legal force of prior jurisprudence.\textsuperscript{163} Therefore, the


\textsuperscript{158} Meinhard Hilf, \textit{Freiheit des Welthandels contra Umweltschutz? (Freedom of World Trade Versus Environmental Protection?)}, Neue Zeitschrift für Verwaltungsrecht (New Magazine Administrative Law), at 483 (2000).


\textsuperscript{161} See Barocinini, fn. 150.

\textsuperscript{162} Understanding on Rules and Procedures Governing the Settlement of Disputes.

\textsuperscript{163} See Thiedemann, fn. 14 at 28.
possibility to rely on an earlier decision regarding the non-applicability of the GATT is not compelling. In particular, the interest in environmental protection and a sustainable development is increasing and becoming a highly regarded in the international community.164

V. Recommendation for the Interpretation of the Applicability of Environmental Provisions of the GATT to WTO-Plus Obligations

The disputes of China — Rare Earths and China — Raw Materials are only a starting-point. The general environmental awareness is rising and China’s powerful position as an export country of natural resources will continue for a long time. Moreover, whether the environmental provisions under Article XX GATT are available to those WTO-plus obligations that stipulate the elimination of export duties is not only a concern for China. This matter is likely to affect other acceding members165 that have entered into export duty commitments, which do not contain express reference to any GATT exceptions. Like China, most of these members will be faced with severe environmental degradation but at the same time will be dependent on the export of natural resources. It would contradict any sense of justice if provisions on environmental exceptions are not applied to those WTO-plus members. It is foreseeable that the conflict of environment and trade will continue to play an important role in the future and similar WTO disputes will have to be settled. It is therefore necessary to draw up a road map to resolve this issue, especially since the WTO does not contain general and unequivocal provisions that address this issue.

The procedure of the DSU shows that the WTO judiciary mainly concludes its findings based on express text reference contained in WTO-plus obligations. This resulted in two entirely different and contradictory findings regarding the applicability of Article XX GATT to defend the violation of a specific commitment in China’s Accession Protocol. In China — Publications and Audiovisual Products,166 the appellate body supported the applicability of Article XX to the Chinese WTO-plus obligation under paragraph 5.1 of the Protocol due to the express textual link contained in this provision;167 while the appellate body of China — Raw Materials168 and the panel of China — Rare Earths rejected the applicability because the provision was lacking a similar reference. Such findings lead to uncertainty for acceding members, which make them unsatisfactory.

164 See LIU, fn. 120 at 125.
165 For example Mongolia, Latvia, Saudi Arabia and Montenegro all committed to eliminate export duties on all or specific products and none of them have an express reference to the General Exceptions of GATT in their commitments.
168 See fn. 48.
An interpretative approach depending on the verbatim text of the provision at issue is based on the assumption that “each term of the accession protocol was carefully negotiated and drafted, and that any omission of an explicit reference to another WTO Agreement was a deliberate choice.” However, such assumption cannot be accepted because it disregards the fact that an acceding member may lack “experience, competence of negotiation and decision-making.” Hence, it is not uncommon that an acceding member loosely drafts the terms of its accession protocol. Consequently, a purely textual approach is not acceptable.

An alternative interpretative approach is the holistic interpretation. In fact, the WTO jurisprudence adheres to this interpretative approach that is contained in the Vienna Convention. The panel in the US — Section 301 Trade Act case stated 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.” Therefore, the holistic rule of interpretation is consistent with the customary rule of interpretation, which is embodied in the Articles 31 and 32 of the Vienna Convention. This interpretative approach is also emphasized by the appellate body in the case of China — Rare Earths and was called as a thorough analysis, but it is not actually accomplished in view of its two defects as above analyzed.

A holistic interpretative approach is applied by the examination of “all relevant elements taken as a whole, rather than examining each element in turn until the term at issue is revealed.” Therefore, it is required to not only consider the meaning of the text and the context, but also to consider the purpose and objective of the treaty in accordance with the principle of good faith. Here, the context should be understood according to Article 31(2) and (3). Therefore, it should remember that with respect to the dispute of “environment and trade,” the multilateral environmental agreements may also be considered as the context of the provision at issue; furthermore, regarding this theme from the perspective of good faith, the applicability of Article XX(b) or (g) GATT shall be interpreted not only based on the verbatim text but in full consideration of the real intentions of the signatory. Article XX(b) and (g) GATT were drafted as general exceptions for environmental protection and the conservation of natural resources. From the perspective of good faith, it cannot be inferred that an acceding member who does not expressly exclude the application of environmental exceptions has the intention to give up

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169 See Qin, fn. 123 at 10.
170 Id.
171 Id.
173 Id. paragraph 7.22.
the right to invoke such provisions. Environmental protection is one of the most important issues and does not only concern human health but also the economic development as such. Therefore, it is hard to believe that an acceding state intends to simply waive such an important right.

The purpose and objective of provisions contained in a WTO-plus commitment shall be interpreted in connection with the protocol of accession. A protocol of accession is, according to the opinion of the dispute settling body, an integral part of the WTO Agreement. Therefore, the purposes and objectives of the WTO Agreement can be used to interpret the commitments made in an accession protocol. As stated above, environmental protection is one of the WTO Agreement’s objectives and shall be taken into account as part of the WTO-plus obligation’s interpretation.

The holistic interpretation is of great importance to decide the applicability of environmental provisions of the GATT to WTO-plus obligations. Although the panel and the appellate body in China — Rare Earths claimed to have followed the customary rules of international public law, they only made a purely textual approach and possible context analysis instead of aiming for a holistic interpretation. As a consequence, the values of environmental protection and sustainable development were neglected in comparison to the values of trade liberalization. In future disputes, it must be guaranteed that the holistic interpretative approach is actually applied and not only announced by the panel.

It can be concluded that, in accordance with the holistic interpretation, the environmental provisions under Article XX(b) and (g) GATT should be understood as applicable to WTO-plus obligations of any accession protocol, unless expressly excluded.

**CONCLUSION**

The China — Rare Earths case reflects the conflict between environmental protection and trade liberalization. Both of them are expressly highlighted in the preamble of the WTO Agreement and therefore shall be equally treated and respected. This means that the interests of trade liberalization cannot take priority over environmental interests. A rejection of a WTO member’s right to invoke environmental exceptions to justify trade-restrictive measure that would otherwise be a violation of its accession protocol’s commitments is not in conformity with the environmental interests of states suffering from environmental deterioration. This includes in particular the environmental exceptions under Article XX(b) and (g) GATT, which are essential components of the WTO system.

Nevertheless, the applicability of those exceptions to WTO-plus commitments has been questioned. The WTO Agreement does not clarify the relations between protocols of

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175 See Au, fn. 45 at 112.
176 See LIU, fn. 120.
accession and the GATT. Thus, interpretation becomes the key to the problem. The interpretative approach applied in China — Rare Earths resulted in an exclusion of the environmental exceptions to justify the imposed export duties. Imposing export duties is a violation of China’s Accession Protocol and without any means of justification, the balance between the values of trade liberalization and the values of environmental protection is threatened. An alternative interpretation is the holistic interpretative approach, which requires all relevant elements to be examined. This interpretative approach is already agreed in the appellate body report of China — Rare Earths, so the most important step is to accomplish this approach in the practice. According to this holistic interpretation, omissions in itself do not necessarily mean that states intend to waive rights. By contrast, according to the principal of good faith and based on the objective and purpose of the WTO Agreement, it should be interpreted that environmental protection exceptions is applicable. Such an interpretation also safeguards the environmental interests of WTO members and maintains the balance between trade and the non-trade values of the WTO.

It has to be noted that the problem of applicability only determines whether China has the right to invoke Article XX(b) or (g) GATT 1994 to justify measures that are inconsistent with its WTO-plus obligation prescribed in the Protocol of Accession. This is only the first step towards resolving the conflict between the legal importance of the protection of the environment and the principle of trade liberalization under the GATT. The final key to resolve any conflict between these basic issues within the WTO framework is to adjust trade-restrictive measures to the requirements of Article XX GATT 1994.