If they do not—if, for example, an uncooperative state remains unwilling to compel its citizens to testify—the weaknesses of the ICC regime will be exposed. The judges themselves have no meaningful way of forcing a state party to fulfill a request for cooperation beyond reporting it to the Assembly of States Parties or (in situations arising from Security Council referrals) to the United Nations. The council's practice to date (regarding other complaints from the prosecutor of noncooperation) does not give much reason for confidence. One can only hope that the overwhelming majority of states parties will choose to bolster their cooperation with the ICC by abiding by its future subpoena requests, and thus enhance the effectiveness of the Court as it seeks to carry out its mandate to contribute productively to the global fight against impunity for serious atrocity crimes.

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*World Trade Organization—China's accession protocol—General Agreement on Tariffs and Trade—export duties—quotas—restrictions—rare earths—tungsten and molybdenum*

CHINA—MEASURES RELATED TO THE EXPORTATION OF RARE EARTHS, TUNGSTEN, AND MOLYBDENUM. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R. *At* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.
World Trade Organization Appellate Body, August 7, 2014 (adopted August 29, 2014).

In a proceeding brought against the People's Republic of China by the United States (in which Japan and the European Union joined), the Appellate Body of the World Trade Organization (WTO) ruled that China violated its obligations under the General Agreement on Tariffs and Trade 1994 (GATT)[1] by imposing export restrictions on "rare earths," minerals used in mobile phones, hybrid cars, and other high-tech products.[2] In upholding the earlier decision of a WTO dispute settlement panel,[3] the Appellate Body rejected China's argument that export duties, quotas, and other restrictions could be justified by health and environmental concerns.

Even though the Appellate Body's determination was largely consistent with an earlier ruling on similar issues,[4] it reinforced the relevance of GATT standards relating to the health and environmental aspects of natural resource extraction, particularly with respect to the mining of raw materials in a developing country. Because China supplies more than 90 percent of the

[1] General Agreement on Tariffs and Trade 1994 [GATT], Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 154 [hereinafter Marrakesh Agreement], Annex 1A, 1867 UNTS 190, *reprinted in* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 3, 17 (1999) [hereinafter LEGAL TEXTS].

[2] Appellate Body Report, China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014) (*adopted* Aug. 29, 2014) [hereinafter AB Report]. Reports and other documents of the World Trade Organization cited herein are available at its website, http://www.wto.org.

[3] Panel Report, China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, WT/DS431/R, WT/DS432/R, WT/DS433/R (Mar. 26, 2014) (*adopted* Aug. 29, 2014) [hereinafter Panel Report].

[4] Appellate Body Report, China—Measures Related to the Exportation of Various Raw Materials, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012) (*adopted* Feb. 22, 2012) [hereinafter *China—Raw Materials*).

world's rare earth metals (even though its reserves amount to only about one-third of the world's total), the decision promises to have a profound practical impact. More significantly, its repudiation of China's use of trade barriers in an effort to keep those minerals for domestic use helps to clarify the scope and content of Article XX(b) and (g) of the GATT, especially as these provisions relate to "WTO-plus" commitments (commitments exceeding the requirements under the Multilateral Trade Agreements) under China's protocol of accession to the WTO (accession protocol).[5]

The proceeding began in 2012 when the United States (joined by the European Union, Japan, and Canada) challenged China's decision to impose export duties, quotas, and other requirements on the export of raw materials known generally as "rare earths" (part of the "lanthanide group"),[6] which are "either naturally occurring minerals or materials that have undergone some initial processing."[7] The challenge was based on GATT Articles VII, VIII, X, and XI, as well as various provisions of the accession protocol. In March 2014, the panel found the actions of China inconsistent with its obligations under the accession protocol and rejected China's argument that, because those actions were necessary to reduce pollution caused by illegal mining and to protect human, animal, and plant life and health, they could be justified under the "general exceptions" in Article XX(b) and (g) relating to the protection of human, animal, or plant life or health and conservation of exhaustible natural resources.[8]

China appealed that decision on two grounds: first, on the basis of the "systemic" relationship between specific provisions of the Marrakesh Agreement Establishing the World Trade Organization and WTO-covered agreements,[9] on the one hand, and China's accession protocol, on the other hand; and, second, with regard to the panel's interpretation and application of GATT Article XX(g). It also raised claims under Article 11 of the Dispute Settlement Understanding (DSU).

[5] WTO Decision, Accession of the People's Republic of China, para. 1.2, WT/L432 (Nov. 23, 2001) [hereinafter Accession Protocol].

[6] Panel Report, paras. 2.3–.7. The lanthanide group includes the following: lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, and lutetium. Other rare earths included in the proceeding were scandium, yttrium, tungsten, and molybdenum.

[7] *Id.*, para. 2.2.

[8] Article XX of the GATT, *supra* note 1, states in subparagraphs (b) and (g):

> Subject to the requirement that such measures are not applied in a matter which would constitute a means of arbitrary and 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;
>
> . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

[9] The "WTO-covered agreements" include the Marrakesh Agreement itself, the Multilateral Trade Agreements in its Annexes 1, 2, and 3, and some of the plurilateral trade agreements in its Annex 4. *See* Marrakesh Agreement, *supra* note 1, Art. II:2, 3; Understanding on Rules and Procedures Governing the Settlement of Disputes, App. 1, Apr. 15, 1994, Marrakesh Agreement, Annex 2, 1869 UNTS 401, *reprinted in* LEGAL TEXTS, *supra* note 1, at 354 [hereinafter DSU].

In addition, the United States, joined by various third-party participants, sought review of the panel's decision, contending that the export duties violated China's commitment in the accession protocol and GATT Article XI:1 to eliminate such charges, as well as other Chinese obligations under the accession protocol (specifically, pt. I, para. 1.2). It also argued that the administration and allocation of those duties violated paragraph 1.2 and paragraph 5.1 (on national treatment) of part I of the accession protocol.[10]

In response, China initially put forward an "environmental protection" defense under GATT Article XX(b) and (g). Specifically, it contended that the mining and production of rare earths, tungsten, and molybdenum was causing environmental harm and jeopardizing the health of humans, animals, and plants in China, and that its export quotas were justified because they "relate[d] to the conservation of exhaustible natural resources."[11]

The Appellate Body first addressed China's claim that the panel had erred in its assessment of the systemic relationship between specific provisions of the accession protocol and the Marrakesh Agreement and annexed Multilateral Trade Agreements. Specifically, it disagreed with the panel's conclusion that the second sentence of paragraph 1.2, which states that the protocol "shall be an integral part of the WTO [Marrakesh] Agreement,"[12] makes China's accession protocol an "integral part" of that agreement but not of individual provisions of the WTO-covered agreements (paras. 5.1–.2). The Appellate Body did not find a "cogent reason" to depart from its prior decision in *China—Raw Materials*, which concluded that China's accession protocol provided no basis for allowing the application of GATT Article XX to paragraph 11.3 of the protocol.[13] But it came to this decision by a different analysis, invoking the rules of interpretation specified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and examining the "systemic relationship" between the WTO-covered agreements and the accession protocol (para. 5.19).

Noting that under WTO law, "the legal act of accession [is] operative with respect to the entire package of WTO rights and obligations as set out in the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto," the Appellate Body determined that, contrary to the apparent meaning of China's argument, this aspect of the law did "not mean . . . that *the legal instrument* embodying the 'terms' of accession, or specific provisions thereof, must 'apply' to, or somehow be directly incorporated into, these Agreements" (para. 5.32). Thus, the Appellate Body held that even though the Marrakesh Agreement sets out the general rules on the terms of accession for accession protocols, it does not address the substantive relationship between individual provisions of the WTO-covered agreements and the terms of the accession protocol (para. 5.34).

The Appellate Body also found that paragraph 1.2 of the accession protocol essentially establishes "a bridge between the package of protocol provisions and the existing package of WTO

[10] In addition, the United States appealed certain issues of law and legal interpretations developed by the panel, but the Appellate Body did not rule on those issues because they were conditioned on the reversal or modification of the panel's decision, which did not occur. *See* AB Report, paras. 5.255–.258.

[11] Panel Report, paras. 7.151–.152 (on Art. XX(b) defense); *id.*, para. 7.236; *see also* GATT Art. XX(g), *supra* note 8.

[12] Accession Protocol, *supra* note 5, para. 1.2.

[13] *See* China—Raw Materials, *supra* note 4, para. 307. Paragraph 11.3 of the Accession Protocol, *supra* note 5, 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."

rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements" (para. 5.50). Because that bridge does not specify how individual provisions in the protocol may be linked to individual provisions of the WTO-covered agreements, the relationship must be determined on a case-by-case basis (paras. 5.52, 5.55). The bridge serves as the starting point for determining whether an "objective link" exists (para. 5.61).

In sum, the Appellate Body found that the panel had been correct in concluding that China did not make clear the "intrinsic relationship" test it wanted to apply and that the second sentence of paragraph 1.2 of the accession protocol does not make individual provisions of the protocol an integral part of those under the WTO-covered agreements (para. 5.68).

As regards China's claims that the panel had erred in its conclusions concerning Article XX(g), the Appellate Body did not reverse the decision of the panel but noted several errors in its interpretation of that provision (para. 5.141). It disagreed, however, with China's first claim that the panel had mistakenly found that the export quotas did not "relate to" conservation and that Article XX(g) required it to assess only the text, structure, and design of the measure in question. The Appellate Body clarified that Article XX(g) neither required the panel to evaluate the actual effects of the measure nor precluded such an evaluation. Rather, focusing on the design and structure of a measure allowed for an "objective methodology" and avoided the uncertainty of an "empirical effects test" (para. 5.112).

As for China's argument that a measure "relates to" conservation even if it merely "contributes" to that goal, the Appellate Body viewed that argument as conflating the "necessity" test in Article XX(b) and the "relating to" test in Article XX(g). It stressed that the latter requires a holistic assessment of whether the measure bears a close and substantial connection to conservation (paras. 5.115–.117).

In response to China's claim that the panel had erred in finding that the export quotas had not been "made effective in conjunction with" domestic restrictions, the Appellate Body did fault the panel for using the evenhandedness test as a "separate element" of the analysis under Article XX(g), which requires that such measures be "made effective in conjunction with restrictions on domestic production or consumption" (paras. 5.120, 5.127). It explained that an evenhandedness requirement is embodied in Article XX(g) more generally in terms of the ways a measure is applied, rather than as a separate element of analysis (para. 5.124).

Moreover, the Appellate Body disagreed that Article XX(g) requires a showing that the burden of conservation through export quotas is evenly distributed between domestic producers or consumers and foreign ones (para. 5.136). But it warned of the difficulty of justifying trade restrictions under Article XX(g) that place a more severe burden on foreign producers and consumers (para. 5.134). Finally, it found that the panel had not erred in focusing on the design and structure of the measures at issue since, as mentioned, Article XX(g) neither precludes nor requires an examination of the market effects of the measures (paras. 5.137–.141). All told, even though the Appellate Body found that the panel had erred on some points of interpretation concerning Article XX(g), it did not change the panel's conclusion that China's export quotas were not justified under Article XX(g).[14]

[14] Because the panel's decision on the applicability of Article XX(b) had not been appealed, that issue was not addressed by the Appellate Body. The panel concluded that China had failed to show that the measures challenged were "necessary to protect human, animal or plant life or health" and to provide persuasive evidence "*of a connection* between environmental protection standards and export restrictions." Panel Report, para. 7.160 (quoting Panel Report, China—Raw Materials, para. 7.507, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011)

The Appellate Body also addressed China's claims that the panel had violated the requirements of DSU Article 11, which provides that a panel "should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[15] China contended, inter alia, that the panel had failed to examine relevant evidence and to reconcile its findings with contrary evidence, and that it used a "double standard" in its application of Article XX(g) to the facts of the case (paras. 5.181, 5.214).

The Appellate Body disagreed with China's allegations, finding no DSU Article 11 violation (paras. 5.242–.243) It examined the ways that the panel had considered the evidence regarding China's comprehensive domestic conservation policy and the "perverse signals" to domestic consumers resulting from the export restrictions, which encouraged domestic production and consumption of rare earths because of lower domestic prices (though China disagreed with this last point, noting that no such impact had been proven (para. 5.196)). The Appellate Body focused on the need to balance domestic restrictions with those on exports, and highlighted the understanding that environmental conservation is not necessarily in conflict with free trade principles, but it must be pursued in a balanced way that does not benefit domestic production over foreign sales.

* * * *

From the broad perspective of international trade, this dispute is the most recent development in the ongoing clash between industrialized countries and China over raw materials and rare earths, which are vital to the manufacture of several high-tech products such as cell phones, wind turbines, and electric car batteries. At the center is the continued transformation of China from a global supplier of raw materials into their consumer, together with its massive commodities boom and increasing need for energy resources. Despite its recent economic slowdown, China continues to embrace a policy of expansion and global presence, in particular as it invests in Africa and Latin America in exchange for access to their natural resources.

This trend in a developing country reinvigorates the debate as to whether trade rules inhibit or contribute to economic development and whether the WTO should demand stricter rules from some members, through WTO-plus commitments, than from others. In the end, as *China—Rare Earths* reflects, the WTO Dispute Settlement Body (DSB) is concerned with ensuring that government practices are compliant with trade agreements and avoid protectionism, in the spirit of traditional neoliberal principles of market access. It is unclear whether these same principles can address the geopolitical nuances created by the global impact of WTO members like China, which recalibrates the balance of economic power between developed and developing countries.

More technically, the outcome in *China—Rare Earths* reinforces the principle that export restrictions can be found to be trade violations and that WTO-plus commitments in accession

(*adopted* Feb. 22, 2012)). That decision seems justified. The complainants had given convincing evidence that a tax on these exports would cause a rise in prices on the foreign market and a fall in the domestic market, creating incentives for more production of the minerals in question, and they had identified alternative measures to achieve the same objective. China did not adequately respond to these WTO-compliant alternatives, according to the panel. The panel therefore found that China had not met its burden of showing that alternative measures were not reasonably available to meet the environmental objective. *Id.*, paras. 7.185–.187.

[15] DSU, *supra* note 9, Art. 11.

protocols must be explicit about exceptions that may apply. Though the decision takes important steps toward resolving the much-debated question of the relationship between GATT Articles XX and XXI and accession protocols, it does not clarify the DSB's earlier point that the express reference to GATT Article XX in China's protocol does not necessarily lead to a dispositive conclusion of its inapplicability.

The Appellate Body left open several questions regarding this systemic relationship. The DSB did not clarify, for example, whether Articles XX and XXI, the primary provisions allowing members space for social policy, can be applied to other WTO-covered agreements even if not specifically mentioned in those provisions. Many aspects of China's accession protocol are unique and broad. For example, it contains provisions on commitments regarding protection of foreign investment, which seem to exceed the scope of the Agreement on Trade-Related Investment Measures, including market access requirements on investment; the relationship of that agreement to these provisions in the protocol remains unclear.

The separate opinion by one panelist underscores the significance of this issue.[16] Unlike the majority decision, this opinion contended that the WTO is a "single undertaking" and includes commitments considered "'integral parts'" of the Marrakesh Agreement. It pointed out that only provisions of the WTO-covered agreements could be brought before the DSB, and the fact that this dispute was brought before the panel necessarily meant that paragraph 11.3 of China's accession protocol is an integral part of one of the WTO-covered agreements. Unlike Russia's accession protocol, China's accession protocol is silent in paragraph 11.3 as to which WTO-covered agreement should be included within its parameters. Nevertheless, the dissenting panelist concluded that this omission should not be dispositive. Rather, paragraph 11.3 should be read together with GATT Articles II (on most-favored-nation treatment) and XI (eliminating quantitative restrictions), and China could properly invoke the defense under Article XX, unless the protocol explicitly stated otherwise.[17]

The Appellate Body agreed that there is a systemic relationship among the agreements and that China's accession protocol is in fact an integral part of the GATT 1994. But it said the GATT social policy exceptions apply only when explicitly provided for, at least when it comes to WTO-plus commitments in an accession protocol. While concluding that China's accession protocol establishes a "bridge" between its contents and the rights and commitments set forth in the Marrakesh Agreement and WTO-covered agreements (para. 5.50), the Appellate Body gave little indication as to how individual provisions in the protocol may be linked to individual provisions of the WTO-covered agreements, especially when no explicit stipulation is made on this point.

This reasoning seems to suggest that member states with protocols containing WTO-plus commitments will be obligated to *all* WTO-covered agreements (in addition to the more stringent commitments) without any recourse to the exceptions provided for in those agreements, unless they explicitly demand them during their negotiations to become WTO members. This result seems cumbersome for new members, creating a separate class of members as

[16] The author of the separate opinion was not disclosed. The panel members included the chair, Nacer Benjelloun-Touimi (Morocco); Hugo Cayrús (Uruguay); and Darlington Mwape (Zambia). For the separate opinion, see Panel Report, paras. 7.118–.138.

[17] *Id.*, paras. 7.124–.125, 7.136–.138.

to whom WTO obligations are heightened and to whom some provisions of the Marrakesh and related agreements apply but not others.[18]

This lack of consistency may also deter new members from complying with their commitments under their accession protocols. It is not a big leap to conclude that, after *China—Rare Earths*, Articles XX and XXI of the GATT should not specifically apply to WTO-covered agreements (an issue not resolved by the WTO) or to any new plurilateral agreements for that matter, unless they explicitly provide for such application. The panel's decision stated as much in cautioning that the accession protocol's reference to itself as an integral part of the Marrakesh Agreement did not also mean that the Multilateral Trade Agreements (or the WTO-covered agreements), or their individual provisions, were integral parts of one another.[19]

Taken as a whole, the disposition of this dispute leaves much to be desired with respect to the WTO's position on environmental conservation policy as it relates to natural resources. The obvious concern of China about the foreign supply of rare earths, as opposed to domestic production in its downstream markets (especially in light of its competitive wind turbine and rechargeable car battery markets), undermined any legitimate environmental protection concerns. No amicus curiae brief was submitted in this case, but rare earths extraction raises environmental concerns that must be considered.

Since other countries have stopped producing rare earths out of environmental concerns, China bears the burden of supplying them to the world market at present. In 1992, Japan's Mitsubishi Chemicals shut down its rare earths plant in Malaysia after contamination apparently contributed to increased birth defects and leukemia cases. The United States originally ceased mining rare earths in 2002, after a spill caused contamination problems regarding the Mountain Pass mine in California, but Molycorp restarted the Mountain Pass mine in 2007, claiming that improved environmental measures were in place. Similarly, the Australian companies Alkane Resources and Lynas are investing in the rare-earths-mining industry in Malaysia, also with new and improved technology. In China, the disposal of radioactive waste resulting from rare earth mining (tailings) in northern Baotou, Mongolia, has contaminated the Yellow River, affecting the clean water supply for nearby villages and causing increased rates of cancer. How China responds to environmental contamination within its borders as a result of rare earths mining could have repercussions well beyond its impact on world trade.

The increase in WTO disputes centered on environmental measures mirrors a shift in markets from traditional manufacturing in goods and services to "green" industries, in part driven by domestic policies incentivizing growth in renewable energy and biofuels. This trend is particularly evident in emerging economies like China, India, and Brazil but also in the United States, Canada, and Europe. The Appellate Body decision in *China—Rare Earths* offers some clarification regarding trade violations resulting from export restrictions used as domestic conservation tools and some guidance on the systemic relationship between the Marrakesh Agreement and WTO-covered agreements, on the one hand, and accession protocols, on the other. Yet the decision has also left unresolved several issues

[18] *See, e.g.*, Julia Ya Qin, *"WTO-Plus" Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol*, 37 J. WORLD TRADE 483, 487–89 (2003).

[19] Panel Report, para. 7.80.

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regarding the applicability of social policy exceptions to trade restrictions in different contexts and the need for increased environmental protection related to natural resource extraction, as demand for natural resources grows with consumer demand and exponential economic growth in the developing world.

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*Geneva Convention Relating to the Status of Refugees—international refugee law—EU refugee qualification directive—conscientious objection—prosecution of deserters as persecution*

SHEPHERD v. GERMANY. Case C-472/13. *At* http://curia.europa.eu.
Court of Justice of the European Union, February 26, 2015.

In *Shepherd v. Germany*, the Court of Justice of the European Union (ECJ) issued a preliminary ruling requested by a German administrative court in an asylum case brought by a United States Army service member. Applying the relevant asylum law of the European Union (EU), the ECJ held that, under certain circumstances, a conscientious objector who has deserted from his military unit may claim international refugee protection. It also clarified the conditions under which the basically legitimate prosecution of military deserters must be qualified as illegitimate persecution under international refugee law.[1]

The applicant in this case was Andre Lawrence Shepherd, a U.S. citizen who had enlisted in the U.S. Army. After basic training, he was schooled in maintenance mechanics for Apache helicopters. These attack helicopters are heavily armed with a devastating thirty millimeter chain gun and various antitank and antipersonnel missiles. In September 2004, Shepherd was assigned to the 412th Aviation Support Battalion, which, though stationed in Germany near Ansbach, had been deployed in Iraq since February 2004. In Iraq, he maintained Apache helicopters in Camp Speicher near Tikrit but did not participate in combat.

In February 2005, Shepherd returned with his battalion to the base in Germany and voluntarily extended his contract. He later asserted that during this period in Germany he began to have doubts about the legality of the Iraq war, as well as the specific military uses to which the helicopters he maintained were put. In April 2007, he was assigned to another military mission in Iraq. He then went absent without leave from the Ansbach camp and hid with a German acquaintance until applying for asylum in August 2008 in the district branch of the German Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge).

Shepherd claimed that he had deserted to avoid being involved in war crimes, since he had found out that military operations in Iraq purportedly entailed the "systematic, indiscriminate and disproportionate use of weapons without regard to the civil population."[2] In particular, the use of Apache helicopters allegedly inflicted great harm on Iraqi civilians. Even though he did not directly engage in combat, he supported combat troops by keeping the helicopters battle ready.

[1] Case C-472/13, Shepherd v. Germany (Eur. Ct. Justice Feb. 26, 2015) [hereinafter Judgment]. Decisions of the Court cited herein are available at its website, http://curia.europa.eu.

[2] Case C-472/13, Shepherd v. Bundesrepublik Deutschland, Opinion of Advocate General Sharpston, para. 3 (Eur. Ct. Justice Nov. 11, 2014).