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Accession

1. Any 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. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.
2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.
3. Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement.

1.2 Article XII:1

1.2.1 Nature of commitments in accession protocols

1. In *China – Raw Materials*, in a finding not appealed by any party to the dispute, the Panel explained that the terms of accession protocols are integral parts of the WTO Agreement and are enforceable in dispute settlement:

"Accession to the WTO is achieved through negotiation with other WTO Members. Pursuant to Article XII of the Marrakesh Agreement, accessions take place 'on terms to be agreed' between the acceding Member and the WTO membership. Most accession processes take several years to complete and lead to detailed negotiated provisions. The terms of each WTO Member's accession are set out in its Accession Protocol and accompanying Working Party Report. The negotiated agreement between the WTO membership and the acceding Member results in a delicate balance of rights and obligations, which are reflected in the specific wording of each commitment set out in these documents. Ultimately, the acceding Member and the WTO membership recognize that the intensively negotiated content of an accession package is the 'entry fee' to the WTO system.

WTO Members' accession protocols are considered to form integral parts of the WTO Agreement. For example, Paragraph 1.2 of Part I of China's Accession Protocol provides:

'The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in

paragraph 342 of the Working Party Report, *shall be an integral part of the WTO Agreement.*' (italics added)"¹

2. The Panel in *China – Raw Materials* then noted that in the dispute at hand, parties agreed that China's Accession Protocol formed an integral part of the WTO Agreement, and proceeded to the interpretation of that Protocol in accordance with the customary rules of interpretation of public international law:

"In this dispute, as with previous disputes concerned with China's Accession Protocol, all parties agree that China's Accession Protocol forms an integral part of the WTO Agreement. Moreover, all parties agree that WTO Members can initiate WTO dispute settlement proceedings on the basis of a claim of violation of China's Accession Protocol.² Finally, all parties agree that commitments included in the related Working Party Report, and incorporated into the Accession Protocol by cross-reference, are binding and enforceable through WTO dispute settlement proceedings.

Accordingly, the Panel will interpret the provisions of China's Accession Protocol – like those of the WTO covered agreements – in accordance with the customary rules of interpretation of public international law, including those codified in Articles 31, 32 and 33 of the *Vienna Convention*."³

3. In *China – Rare Earths*, the Panel followed the Appellate Body's prior ruling, in *China – Raw Materials*, that the obligation in Paragraph 11.3 of China's Accession Protocol is not subject to the general exceptions in Article XX of the GATT.⁴ However, the Panel did agree with China that the so-called "trading rights" commitments in Paragraphs 83 and 84 of China's Working Party Report are subject to the general exceptions in Article XX of the GATT.⁵ China appealed certain elements of the Panel's reasoning regarding the relationship between Paragraph 11.3 of the Accession Protocol and Article XX of the GATT 1994, including the Panel's rejection of China's argument that, by virtue of Article XII:1 of the WTO Agreement (and Paragraph 1.2 of China's Accession Protocol), Paragraph 11.3 and certain other provisions relating to trade in goods in China's Accession Protocol have been made an integral part of the GATT 1994, and are therefore subject to the general exceptions in Article XX of the GATT. The Appellate Body, like the Panel, did not consider that Article XII:1 of the WTO Agreement (and/or Paragraph 1.2 of China's Accession Protocol) made Paragraph 11.3 of China's Accession Protocol an integral part of the GATT 1994, and did not consider that Article XII:1 offered any specific guidance on whether the obligation in Paragraph 11.3 is subject to the general exceptions in Article XX of the GATT.⁶ The Appellate Body explained that:

"Article XII:1 of the Marrakesh Agreement provides the general rule for acceding to the WTO. Its first sentence stipulates that accession is to be accomplished on 'terms' to be agreed between the acceding Member and the WTO, and its second sentence makes clear that such accession applies to the entire package of WTO rights and obligations, consisting of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto. Pursuant to Article XII:1, while the substantive content of the 'terms' of accession is to be determined in individual accessions, acquiring Membership in the WTO cannot be accomplished where an applicant accepts to be bound by only some, but not all, of the Multilateral Trade Agreements in the WTO framework. Article XII:1, however, does not define the nature of the substantive relationship between the 'terms' of accession, on the one hand, and the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto, on the other hand. Rather, beyond the general rule governing accession set out in its two sentences, Article XII:1 itself does not speak to the question of the specific relationship between individual provisions of an accession protocol and individual provisions of the Marrakesh Agreement and the Multilateral Trade Agreements. In

¹ Panel Report, *China – Raw Materials*, paras. 7.112-7.113.

² (footnote original) This was recognized in *China – Auto Parts*, adopted on 15 December 2008 and in *China – Publications and Audiovisual Products*, adopted on 19 January 2010 when both panels and Appellate Body assessed claims based on China's Accession Protocol.

³ Panel Report, *China – Raw Materials*, paras. 7.114-7.115.

⁴ Panel Reports, *China – Rare Earths*, paras. 7.49-7.138.

⁵ Panel Reports, *China – Rare Earths*, paras. 1.1016-7.1033.

⁶ Appellate Body Reports, *China – Rare Earths*, paras. 5.22-5.34.

particular, Article XII:1, alone, does not create a substantive relationship, 'intrinsic' or otherwise, between provisions of China's Accession Protocol (such as Paragraph 11.3) and provisions of the covered agreements (such as Article II or XI of the GATT 1994). In this regard, we note that the Marrakesh Agreement is the overarching institutional agreement of the WTO, and Article XII thereof does not directly address the question of the substantive relationship between individual provisions of a protocol of accession, on the one hand, and the provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand."⁷

Current as of: December 2024

⁷ Appellate Body Reports, *China – Rare Earths*, para. 5.34.