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

REPORTS OF THE PANEL

*Addendum*

This *addendum* contains Annexes A to C to the Reports of the Panel to be found in documents WT/DS431/R, WT/DS432/R and WT/DS433/R.

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**LIST OF ANNEXES****ANNEX A****WORKING PROCEDURES OF THE PANEL**

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures of the Panel	A-2

**ANNEX B****ARGUMENTS OF THE PARTIES**

<b>Contents</b>		<b>Page</b>
Annex B-1	Integrated executive summary of the arguments of the United States	B-2
Annex B-2	Integrated executive summary of the arguments of the European Union	B-24
Annex B-3	Integrated executive summary of the arguments of Japan	B-47
Annex B-4	Integrated executive summary of the arguments of China	B-68

**ANNEX C****ARGUMENTS OF THIRD PARTIES**

<b>Contents</b>		<b>Page</b>
Annex C-1	Integrated executive summary of the arguments of Argentina	C-2
Annex C-2	Integrated executive summary of the arguments of Australia	C-4
Annex C-3	Integrated executive summary of the arguments of Brazil	C-7
Annex C-4	Integrated executive summary of the arguments of Canada	C-8
Annex C-5	Integrated executive summary of the arguments of Colombia	C-11
Annex C-6	Integrated executive summary of the arguments of the Republic of Korea	C-13
Annex C-7	Integrated executive summary of the arguments of Norway	C-15
Annex C-8	Integrated executive summary of the arguments of Peru	C-16
Annex C-9	Integrated executive summary of the arguments of the Russian Federation	C-18
Annex C-10	Integrated executive summary of the arguments of the Kingdom of Saudi Arabia	C-20
Annex C-11	Integrated executive summary of the arguments of Turkey	C-23

**ANNEX A**

WORKING PROCEDURES OF THE PANEL

<b>Contents</b>		<b>Page</b>
Annex A-1	Working Procedures of the Panel	A-2

## **ANNEX A-1**

### **WORKING PROCEDURES OF THE PANEL**

*Adopted on 18 October 2012*

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

#### **General**

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. In case a party to the dispute designates information as "Business Confidential Information" ("BCI"), the Panel shall adopt additional working procedures concerning business confidential information.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the disputes to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

#### **Submissions**

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the complainants request such a ruling, the respondent shall submit its response to the request in its first written submission. If the respondent requests such a ruling, the complainants shall submit their response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

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

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the

same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised in writing as promptly as possible. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the disputes and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the disputes. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

### **Questions**

11. The Panel may at any time during this panel process pose questions to the parties and ask them for explanations in writing or orally. The Panel may pose questions to third parties pursuant to paragraph 17(d) below.

### **Substantive meetings**

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

- (a) The Panel shall invite the complainants to make opening statements to present their case first. Subsequently, the Panel shall invite the respondent to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters. Each party shall make available to the Panel and the other parties the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.
- (b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party will have an opportunity to and should answer orally these questions and react to the comments. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party(ies) to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.
- (c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- (d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the complainants presenting their statements first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

- (a) The Panel shall ask the respondent if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the respondent to present its opening statement, followed by the complainants. If the respondent chooses not to avail

itself of that right, the Panel shall invite the complainants to present their opening statements first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters. Each party shall make available to the Panel and the other parties the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

- (b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party will have an opportunity to and should answer orally these questions and react to the comments. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party(ies) to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.
- (c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- (d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party(ies) that presented its opening statement first, presenting its closing statement first.

### **Third parties**

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of the first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

- (a) All third parties may be present during the entirety of this session.
- (b) The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies for the interpreters. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.
- (c) After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each third party will have an opportunity to and should answer orally these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.

- (d) The Panel may subsequently pose questions either orally or in writing to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

### **Descriptive part**

18. Each party shall submit an integrated executive summary of its arguments as presented in its written submissions, statements and responses and comments to questions in two parts. The parties shall submit the first part of the integrated executive summary following the first substantive meeting at the latest on the date provided for in the timetable. The parties shall submit the second part of the integrated executive summary at the latest on the date provided for in the timetable. The total number of pages of the integrated executive summary, both parts combined, shall not exceed 32 pages. Parties can request permission to file longer summaries upon a showing of good cause.

19. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement at the latest 7 calendar days after the date of the third party session, or in the event that the Panel addresses questions to the third parties, 7 calendar days after the deadline for submission of responses to these questions. The integrated summary to be provided by each third party shall not exceed 3 pages.

20. The executive summaries referred to above shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of these executive summaries, which shall be annexed as addenda to the report.

### **Interim review**

21. Following issuance of the interim reports, each party may submit a written request to review precise aspects of the interim reports and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim reports as well as the final reports before translation shall be kept strictly confidential and shall not be disclosed.

### **Service of documents**

24. The following procedures regarding service of documents shall apply:

- (a) Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).
- (b) Each party and third party shall file 10 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. Unless otherwise agreed, the paper version shall constitute the official version for the purposes of the record of the dispute.
- (c) Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to

\*\*\*\*\*.\*\*\*\*\*@wto.org, and cc'd to \*\*\*\*\*.\*\*\*\*\*@wto.org, \*\*\*\*\*.\*\*\*\*\*@wto.org and \*\*\*\*\*.\*\*\*\*\*@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

- (d) Each party shall serve any document submitted to the Panel directly on the other party at the time that it transmits such document to the Panel. Each party shall, in addition, serve directly on all third parties its written submissions in advance of the first substantive meeting with the Panel at the time that it transmits such document to the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties at the time that it transmits such document to the Panel. A party or third party may always submit its documents electronically to another party or third party subject to the recipient party or third party's prior written approval and provided that the Secretariat is notified. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.
  - (e) Each party and third party shall file its documents with the DS Registry and serve copies on the other parties (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
  - (f) The Panel shall provide the parties with an electronic version of the descriptive part, the interim reports and the final reports, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the disputes.
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**ANNEX B**

ARGUMENTS OF THE PARTIES

<b>Contents</b>		<b>Page</b>
Annex B-1	Integrated executive summary of the arguments of the United States	B-2
Annex B-2	Integrated executive summary of the arguments of the European Union	B-24
Annex B-3	Integrated executive summary of the arguments of Japan	B-47
Annex B-4	Integrated executive summary of the arguments of China	B-68

**ANNEX B-1****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES***First Part of the Integrated Executive Summary of the United States***I. INTRODUCTION**

1. During the negotiations between Members and China on its WTO accession, there was no dispute that China maintained various restrictions on exportation, including on some of the products at issue in this dispute. Likewise, there was no misunderstanding that Members sought to have China lift these restrictions as part of its accession commitments, and that China committed to do so. Yet China, in pursuit of industrial policy goals, has decided to maintain or even strengthen these restrictions.

2. During the accession negotiations, China stated that since 1992 it had reduced its use of export restrictions, though it acknowledged that as of 1999 it still subjected 58 categories of products covering 73 items to non-automatic export licensing and export restrictions. Members of the Working Party were concerned with China's export restrictions, and some "expressed particular concern about export restrictions on raw materials or intermediate products that could be subject to further processing, such as tungsten ore concentrates, rare earths and other metals." In response, China committed that "it would abide by WTO rules in respect of non-automatic export licensing and export restrictions" and that, upon its accession to the WTO, "remaining non-automatic restrictions on exports ... would be eliminated unless they could be justified."

3. Members of the Working Party also expressed concerns regarding taxes and additional charges that China applied exclusively to exports. With respect to export duties, China committed in its Protocol of Accession to the WTO that it would "eliminate all taxes and charges applied to exports unless ... specifically provided for in Annex 6 of this Protocol," which lists the products on which China retained the right to impose export duties, "or applied in conformity with the provisions of Article VIII" of the GATT 1994.

4. In 2009, the United States, EU and Mexico initiated a challenge to the export restrictions that China imposes on nine categories of industrial raw materials in *China – Raw Materials I*. Earlier this year, the DSB adopted its recommendations and rulings in that dispute, concluding that the restrictions at issue there – the very same types of restrictions (applied to different materials) addressed in the present dispute – were inconsistent with China's WTO obligations. Moreover, the DSB unequivocally concluded that China does not have recourse to the exceptions set forth in GATT Article XX to justify deviation from its commitment, in paragraph 11.3 of the Accession Protocol, not to impose export duties on products other than those listed in Annex 6.

5. The DSB also rejected China's attempts to invoke various exceptions set forth in, for example, GATT Article XX to justify China's use of export quotas to meet alleged environmental and conservation goals. These are the same justifications that China has cited for its export restrictions covering the products at issue here. In rejecting China's use of export quotas, the DSB found that "[f]or the purpose of conservation of a resource, it is not relevant whether the resource is consumed domestically or abroad; what matters is its pace of extraction." The DSB also found that "export restrictions are not an efficient policy to address environmental externalities when these derive from domestic production rather than exports or imports."

6. The products subject to the export restrictions at issue in this dispute are various forms of rare earths, tungsten and molybdenum ("Raw Materials"). China is the leading producer of each of the Raw Materials, which are vital inputs for fundamental industries of Members' economies, including the manufacture of electronics, automobiles, steel, petroleum products, and a variety of chemicals that are used to produce both everyday items and highly sophisticated, technologically advanced products, such as hybrid vehicle batteries, wind turbines and energy efficient lighting.

7. China's export restrictions have distorted the playing field on which Members compete. These export restrictions not only distort domestic and world markets in these critical Raw Materials, but they also impact entire manufacturing chains and have broad implications for competition and trade in a wide variety of products. For example, because China is the world's leading producer of the Raw Materials, the distortions created by the export restrictions can drive up the prices that U.S. and other non-Chinese producers must pay for these inputs on the world market. Concurrently, the export restrictions can increase supplies in China's domestic market, driving down the prices that Chinese producers would otherwise pay for these same inputs.

8. Over time, China has tightened its export restrictions on rare earths, tungsten and molybdenum; export quota amounts have decreased steadily while export duty rates have increased steadily since 2001. Indeed, in the case of rare earths, during the pendency of *China – Raw Materials I*, China not only expanded the scope of products covered by the export quota by adding rare earth alloys to the oxides, concentrates, metals and compounds already subject to the export quota, but China also drastically reduced the volume of the export quota from approximately 50,000 metric tons ("MTs") in 2009 to around 30,000 MTs in 2010.

9. This dispute focuses on two types of restrictions that China imposes on the exportation of the Raw Materials: export duties and export quotas (including certain quota administration measures). It is important to note that the United States does not disagree with policies aimed at addressing environmental externalities stemming from the domestic production of raw materials.

10. China's export duties are inconsistent with China's obligations under its Accession Protocol. China's export quotas, in themselves and in the manner they are administered, are inconsistent with China's obligations under the GATT and China's Accession Protocol, which incorporates commitments made by China in the Report of the Working Party. To summarize:

11. **Export Duties:** China's obligations under paragraph 11.3 of Part I of the Accession Protocol require that China not impose export duties on products that are not listed in Annex 6. However, China imposes export duties on over 80 forms of rare earths, tungsten and molybdenum that are not listed in Annex 6.

12. **Export Quotas – Maintenance of Export Quotas:** GATT Article XI:1 and the Protocol, through its incorporation of paragraphs 162 and 165 of the Working Party Report, obligate China not to maintain prohibitions or restrictions on exportation. Despite this, China imposes quotas on the exportation of various forms of rare earths, tungsten and molybdenum, including ores, concentrates, and further processed products such as metals and alloys.

13. **Export Quotas – Administration and Allocation of the Export Quotas:** China's commitments under paragraph 5.1 of Part I of the Accession Protocol, as well as paragraph 1.2 of the Accession Protocol to the extent it incorporates paragraphs 83 and 84 of the Working Party Report (commonly referred to as China's "trading rights" commitments), require China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export products except for goods listed in Annex 2A of the Accession Protocol. China explicitly committed to eliminate certain eligibility criteria for obtaining the right to export. In its administration of the quotas for rare earths and molybdenum, China breaches these commitments by impermissibly requiring exporters to satisfy certain criteria – *i.e.*, (i) prior export experience and export performance and (ii) minimum capital requirements – to be eligible to participate in the process required to receive an allocation of the quotas (and in turn be able to export).

## II. EXPORT DUTIES

14. China imposes "temporary" export duties on various forms of rare earths, tungsten and molybdenum. These export duties are inconsistent with China's obligations under the Accession Protocol, specifically those found in paragraph 11.3, because they are not listed in Annex 6 of China's Accession Protocol or applied in conformity with GATT Article VIII.

**A. China's Obligations under the Accession Protocol**

15. China committed in its Accession Protocol 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." Annex 6 of the Accession Protocol, titled "Products Subject to Export Duty," sets forth a list of 84 discrete products by individual harmonized system (HS) numbers accompanied by a short description of each product.

16. The products listed in Annex 6 are the only ones for which China retains the right to continue imposing export duties. Annex 6 also indicates an export duty rate expressed as an *ad valorem* percentage for each. These listed export duty rates are the upper limit of rates which China retained the right to impose on the export of these products. The note to Annex 6 states:

China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.

17. With one exception, the various forms of the Raw Materials do not appear in Annex 6. Accordingly, China must not impose export duties on the Raw Materials. Nevertheless, China restrains the exportation of various forms of rare earths, tungsten and molybdenum through the imposition of export duties.

**B. "Temporary" Export Duties**

18. On December 9, 2011, the Tariff Commission issued the *2012 Tariff Implementation Program*, which took effect on January 1, 2012. Section E of the *2012 Tariff Implementation Program* outlines adjustments to export duties, providing that in 2012 the "regular" export duty rates in effect for 2011 will remain unchanged, and certain goods will be subject to "temporary" duty rates as set out in detail in the Export Tax Rate Table.

19. On December 23, 2011, Customs issued the *2012 Tariff Implementation Program (Customs)* (Exhibit JE-47), which implemented the *2012 Tariff Implementation Program* issued by the Tariff Commission. For rare earths, tungsten and molybdenum, the export duties in the *2012 Tariff Implementation Program (Customs)* are the same as those set forth in the *2012 Tariff Implementation Program*.

20. With respect to the products at issue in this dispute, the Export Commodities Duty Rate List sets out "temporary" duty rates, which can be found in Exhibit JE-6. Accordingly, China's measures impose export duties on over 80 different forms of the Raw Materials (counted by tariff number) subject to this dispute.

21. Annex 6 of China's Protocol does not include any of the products listed in Exhibit JE-6.

**C. China's Export Duties on Raw Materials Are Inconsistent with China's Obligations under Part I, Paragraph 11.3, of the Accession Protocol**

22. Paragraph 11.3 of the Accession Protocol obligates China not to impose taxes and charges on exports unless they are provided for in Annex 6 or applied in conformity with GATT Article VIII. Because the "temporary" export duties on the Raw Materials do not fulfill either criteria, their imposition breaches China's obligations under the Protocol.

**1. Paragraph 11.3 of the Accession Protocol**

23. The second sentence of paragraph 1.2 of the Accession Protocol states, "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." As an integral part of the WTO Agreement, the provisions of the Protocol are part of a covered agreement for purposes of DSU Article 1.1.

24. Part I, Section 11, of the Accession Protocol contains China's commitments on taxes and charges levied on imports and exports. In particular, Part I, paragraph 11.3, 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 of the GATT 1994.

25. Annex 6 of the Protocol lists 84 products sequentially by HS number and accompanied by a description of the product and an export duty rate listed as an *ad valorem* percentage.

## 2. China's "Temporary" Export Duties Are Inconsistent with China's Obligations under Paragraph 11.3 of the Accession Protocol

26. China imposes "temporary" export duties at *ad valorem* rates ranging from 5 to 25 percent on various forms of rare earths, tungsten and molybdenum. These duties are charges applied to exports that China itself terms as "export tariffs" in China's measures.

27. The export duties resulting from the application of these duty rates are not applied "in conformity with the provisions of GATT Article VIII" because export duties do not fall within the scope of that Article. Article VIII:1(a) applies to "[a]ll fees and charges of whatever character (other than ... export duties ...) imposed by contracting parties on or in connection with ... exportation ... ." None of the other provisions of Article VIII applies to export duties either.

28. None of the products on which these export duties are imposed are listed in Annex 6. Therefore, neither of the two exceptions in paragraph 11.3 of the Protocol applies to these duties.

29. In addition, as the panel and the Appellate Body each found in *Raw Materials I*, the exceptions found in GATT Article XX are not available in the context of China's commitments in paragraph 11.3 of the Accession Protocol. According to the Appellate Body:

In the light of China's explicit commitment contained in Paragraph 11.3 to eliminate export duties and the lack of any textual reference to Article XX of the GATT 1994 in that provision, we see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3 ... . [A] proper interpretation of Paragraph 11.3 of China's Accession Protocol does not make available to China the exceptions under Article XX of the GATT 1994. Consequently, we find that the Panel did not err, in paragraph 7.159 of the Panel Reports, in finding that "there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of the Accession Protocol."

30. Accordingly, China's maintenance of the temporary export duties applied to the exportation of rare earths, tungsten and molybdenum is inconsistent with China's commitment under paragraph 11.3 of the Protocol to eliminate all taxes and charges applied to exports. Indeed, the panel in *Raw Materials I* found that the very same series of measures, consisting of, *inter alia*, the *Customs Law, Regulations on Import and Export Duties* and the *Tariff Implementation Program* in force at that time, resulted in the imposition of export duties inconsistent with paragraph 11.3 of the Protocol.

### III. EXPORT QUOTAS

31. China imposes export quotas on various forms of rare earths, tungsten and molybdenum. These export quotas are inconsistent with China's obligations under GATT Article XI:1, which explicitly prohibits restrictions made effective through a quota on the exportation of any product. Likewise, these export quotas are also inconsistent with China's obligations in paragraphs 162 and 165 of the Working Party Report, as incorporated by paragraph 1.2 of the Protocol.

#### A. Overview of Export Quotas

32. China restricts the exportation of various forms of rare earths, tungsten and molybdenum by subjecting the exportation of these materials to export quotas.

33. China's *Foreign Trade Law* subjects goods whose exportation is subject to export quotas to an export quota administration. Under the *Foreign Trade Law*, MOFCOM is the government agency responsible for the centralized administration of all quotas. Specifically, MOFCOM is responsible for setting the total amount of export quotas for the following year no later than October 31 of each year, distributing export quotas, evaluating applications for export quotas, and determining whether to grant quotas.

34. MOFCOM must approve the exportation of the goods listed in the catalog as subject to quota before they can be exported. Entities that are approved to export under the quotas are issued a certificate of quota after meeting certain standards, which are discussed below.

#### **B. Goods Subject to Export Quotas**

35. MOFCOM, in collaboration with other relevant departments of the State Council, is required to publish the catalog of goods subject to restricted exportation, including export quotas, within 21 days of the catalog taking effect. The catalog effective for the year 2012, the *2012 Export Licensing Management Commodities List*, includes the Raw Materials listed in Exhibit JE-7 as subject to export quotas.

#### **C. China's Export Quotas on Rare Earths, Tungsten and Molybdenum Are Inconsistent with China's Obligations under Article XI:1 of the GATT 1994**

36. Article XI:1 of the GATT 1994 is titled "General Elimination of Quantitative Restrictions" and states, in relevant part:

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

37. The obligation in GATT Article XI:1 applies to a spectrum of different types of measures. In particular, one of the types of measures that Article XI:1 explicitly prohibits Members from instituting or maintaining is a restriction made effective through a quota.

38. China subjects the exportation of various forms of rare earths, tungsten and molybdenum to quotas. These quotas prohibit exportation of these materials above certain quantities and, accordingly, restrict the exportation of these materials.

39. China maintains numerous general measures that establish an export quota regime. First, Article 19 of the *Foreign Trade Law* provides in relevant part that the "state applies quota and licensing system to the management of goods subject to ... export restrictions ... ." Second, Article 36 of the *Import and Export Regulations* provides that "[g]oods restricted from exportation that are subject to quantitative restrictions by the state are subject to the administration of quotas." Third, the *Export Quota Measures* provide that MOFCOM "conducts an export quota administration of some commodities restricted from export by the State."

40. As the government agency responsible for administering the export quotas, MOFCOM, in collaboration with Customs, identifies the goods subject to export quotas on a list published annually. For the export quotas taking effect on January 1, 2012, MOFCOM and Customs published the *2012 Export Licensing List Notice*, which identifies rare earths, tungsten and molybdenum as products subject to export quotas.

41. The export quotas China applies to certain forms of rare earths, tungsten and molybdenum are measures that make effective a restriction on the exportation of these products. They do so by limiting the quantity of each product that may be exported. These export quotas are therefore in breach of China's obligations under Article XI:1 of the GATT 1994.

42. The *China – Raw Materials I* panel found that China imposed export quotas on a number of raw materials through a series of measures, including the *Foreign Trade Law* and *Import and Export Regulations* and that this series of measures resulted in WTO-inconsistent export quotas.

#### IV. QUOTA ADMINISTRATION

43. China imposes prior export experience and export performance and minimum capital requirements as criteria for applicants to be eligible to receive an allocation of the quotas on rare earths and molybdenum. These requirements are inconsistent with China's obligations contained in Part I, paragraph 5.1 of the Protocol and paragraphs 83 and 84 of the Working Party Report, as incorporated via paragraph 1.2 of China's Protocol, whereby China agreed not to condition the right to trade on prior export experience and export performance or minimum capital requirements.

##### A. Rare Earths

44. China requires enterprises to apply to receive an allocation of the rare earths export quota for a given year in November of the previous year. As part of that application process, China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation under the quota. Applicant enterprises that do not satisfy the requisite criteria are not permitted to export rare earths. In addition, MOFCOM administers different application processes and criteria for manufacturing enterprises and trading enterprises.

##### 1. Manufacturing Enterprises

45. MOFCOM issued procedures governing the rare earth quota application process in 2012 for manufacturing enterprises. That measure – the *2012 Rare Earth Export Quota Application Procedures* – provides the requirements that manufacturing enterprises must satisfy in order to be eligible to receive an allocation under the quota. With respect to manufacturing enterprises, the applicants are required to, *inter alia*:

(iii) meet prior export experience and export performance from 2008-2010 (for enterprises whose export quotas were acquired after 2008, the export performance is based on all years from the year in which the quota was acquired up to 2010).

##### 2. Trading Enterprises

46. With respect to Chinese trading companies, China requires that such enterprises also satisfy the requirements set out above in respect of manufacturing enterprises. However, China imposes a number of additional criteria on trading enterprises. Specifically, trading enterprise applicants are required to have a minimum registered capital of RMB 50 million.

47. In addition, the MOFCOM measure promulgating the first batch of the rare earths export quota further demonstrates that MOFCOM uses prior export experience and export performance as an eligibility requirement and a criterion for calculating the amount of quota rights for applying enterprises.

48. Specifically, Annex 1 to the *2012 First Batch Rare Earth Export Quota* provides that the rare earth quotas for both manufacturing and trading enterprises are to be allocated based on the following formula:

Assigned quota = Total quota \* (A1 + A2), where

A1 = (Enterprise's export quantity in past three years / total national export quantity in past three years) \* 0.5

A2 = (Enterprise's export value in past three years / total national export value in past three years) \* 0.5

## B. Molybdenum

49. For the export quotas on molybdenum, MOFCOM is directed by the *Export Quota Measures* to determine the total amount of the quota for each year and, in doing so, is directed to take into account certain factors. These factors are: (i) the needs of guaranteeing the safety of the national economy; (ii) the needs of protecting limited domestic resources; (iii) development planning, objectives and policies of the State on the relevant industries; and (iv) demands on the international and domestic markets, and the production and sales status.

50. In addition, MOFCOM is directed to administer an application process for the export quota on molybdenum. As part of that process, only enterprises that have the "license or qualification for import and export activity in accordance with laws and no record of violations of laws or regulations in economic activities in the last three years" may apply for a quota.

51. Enterprises under local administration are required to submit their applications for export quotas to the relevant local authorities, which review such applications and report to MOFCOM on the applications received. Enterprises under central administration submit their applications for export quota directly to MOFCOM. MOFCOM accepts both the applications filed by enterprises under central administration and the applications that have been preliminarily reviewed and submitted by the local administrative authorities.

52. MOFCOM then distributes the quotas to enterprises under central administration and distributes quotas to local administrative authorities, which further distribute those quotas to the enterprises within their respective areas.

53. To guide the quota allocation process, MOFCOM and the local administrative authorities are directed to take into consideration: (i) the export performance of the particular good; (ii) the utilization rate of the export quota; (iii) the "operation capacity" of the applicant; and (iv) the "production scale and resources status, *etc.*, of the applicant enterprises or regions" during the previous three years.

54. MOFCOM published the 2012 molybdenum quota amount on October 31, 2011 and made the first batch allocation on December 26, 2011. MOFCOM made the second batch allocation on July 19, 2012.

55. China requires enterprises to apply to receive an allocation of molybdenum under the export quota for a given year in November of the previous year. As part of that process, China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation of the quota. Applicant enterprises who do not satisfy the requisite criteria are not permitted to export molybdenum. In addition, MOFCOM administers different application processes and criteria for manufacturing enterprises and trading enterprises.

### 1. Manufacturing Enterprises

56. MOFCOM issued the *2012 Molybdenum Quota Application Procedures* that govern the molybdenum quota application process in 2012 for manufacturing enterprises. That measure provides the specific requirements that manufacturing enterprises must satisfy in order to be eligible to receive a quota allocation. With respect to manufacturing enterprises, the applicants are required to, *inter alia*:

(ii) have actual export performance from 2008 to 2010 if the enterprise had previously acquired export quota or, if a new applicant, successfully met the production requirements from 2008-2010, which were:

(a) a combined production of 6,000 MTs of ferromolybdenum and molybdenum oxide; and

(b) production capacity of molybdenum powder and molybdenum metal of 600 MTs; and



(c) production of molybdate of more than 1,600 MTs; although these requirements can be lowered if the applicant produces certain high-tech products.

## 2. Trading Enterprises

57. With respect to trading companies, China requires such enterprises to satisfy the requirements set out above for production enterprises as well as additional criteria. In particular, trading enterprises are required to have a minimum registered capital of RMB 30 million.

58. The MOFCOM measures promulgating the molybdenum quota further demonstrate that MOFCOM uses prior export experience and export performance both as an eligibility requirement and a criterion for calculating the amount of quota rights for applying enterprises.

59. Specifically, Annex 2 to the *2012 First Batch Tungsten and Molybdenum Export Quota* provides that the molybdenum quota for both manufacturing and trading enterprises are to be allocated based on the following formula:

Assigned quota for a *manufacturing enterprise* = total quota \* (((A1 + A2) \* 0.5) + (A3 \* 0.5)), where

A1 = Enterprise's export quantity from 2009 to October 2011 / total national export quantity in same period \* 0.3

A2 = Enterprise's export value from 2009 to October 2011 / total national export value in same period \* 0.7

A3 = Enterprise's production quantity from 2009 to October 2011 / total national production in past three years

Assigned quota for a *trading enterprise* = total quota \* (A1 + A2), where

A1 = Enterprise's export quantity from 2009 to October 2010 / total national export quantity in same period \* 0.3

A2 = Enterprise's export value from 2009 to October 2010 / total national export value in same period \* 0.7

### C. China's Administration and Allocation of Its Export Quotas on Rare Earths and Molybdenum Are Inconsistent with China's Obligations under the Accession Protocol and the Working Party Report

60. As part of its WTO accession, China committed to provide all enterprises in China and all foreign enterprises and foreign individuals the right to trade in all goods except those listed in Annex 2A or Annex 2B of China's Accession Protocol. As only tungsten is listed in either Annex (*i.e.*, Annex 2A), these commitments extend to rare earths and molybdenum.

61. China's trading rights commitments are expressed in Part I, paragraph 5.1 of the Protocol, as well as in Part I, paragraph 1.2 of the Protocol, to the extent that it incorporates the commitments referred to in paragraphs 83 and 84 of the Working Party Report.

62. In addition to restricting the exportation of rare earths and molybdenum through export quotas, China restricts the right of enterprises to export rare earths and molybdenum by requiring enterprises to satisfy certain criteria – *i.e.*, the prior export experience and export performance and minimum registered capital requirements discussed above – to be eligible to receive a quota allocation. The measures establishing China's current trading rights regime for the forms of rare earths and molybdenum subject to export quotas are inconsistent with China's obligations contained in Part I, paragraphs 5.1 and paragraphs 83 and 84 of the Working Party Report, as incorporated by 1.2 of the Accession Protocol.

## 1. China's Trading Rights Commitments

63. Part I, Section 5 of China's Accession Protocol contains commitments by China with respect to the right to trade. Part I, paragraph 5.1 of the Protocol provides:

Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods ... For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period.

64. Paragraph 1.2 of Part I of the Protocol also states in pertinent part that "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."

65. Paragraph 83 of the Working Party Report, which is referred to in paragraph 342, explains, in relevant part:

(a) The representative of China confirmed that, upon accession, China would eliminate for both Chinese and foreign-invested enterprises any export performance, trade balancing, foreign exchange balancing and prior experience requirements, such as in importing and exporting, as criteria for obtaining or maintaining the right to import and export.

(b) With respect to wholly Chinese-invested enterprises, the representative of China stated that although foreign-invested enterprises obtained limited trading rights based on their approved scope of business, wholly Chinese-invested enterprises were now required to apply for such rights and the relevant authorities applied a threshold in approving such applications. In order to accelerate this approval process and increase the availability of trading rights, the representative of China confirmed that China would reduce the minimum registered capital requirement (which applied only to wholly Chinese-invested enterprises) to obtain trading rights to RMB 5,000,000 for year one, RMB 3,000,000 for year two, RMB 1,000,000 for year three and would eliminate the examination and approval system at the end of the phase-in period for trading rights.

(d) The representative of China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade. Foreign-invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting nor would new business licence encompassing distribution be required to engage in importing and exporting.

66. Paragraph 84, which is referred to in paragraph 342 of the Working Party Report, states:

(a) The representative of China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China. Such right, however, did not permit importers to distribute goods within China. Providing distribution services would be done in accordance with China's Schedule of Specific Commitments under the GATS.

(b) With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way. He further confirmed that any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade. The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to minimum capital and prior experience would not apply.

67. In sum, China committed to providing all enterprises in China the right to trade in rare earths and molybdenum via paragraph 5.1 of the Protocol and paragraphs 83(d) and 84(a) of the Working Party Report. Paragraph 5.1 states three relevant elements to this obligation. China shall: (1) grant the "right to trade" to "all enterprises in China;" (2) grant the right to trade with respect to "all goods" except for those listed in Annexes 2A and 2B; and (3) "complete all necessary legislative procedures to implement" its trading rights commitments "within three years after accession."

68. With respect to the first element, the "right to trade" is defined in the second sentence of paragraph 5.1 as the "right to import and export goods." Paragraph 5.1 further specifies that the right to trade applies throughout the customs territory of China. Thus, the right to trade includes the right to export goods from the entire customs territory of China.

69. Therefore, except as provided in the first clause of paragraph 5.1, China may not reserve the right to trade to a sub-set of enterprises in China. Likewise, limitations on who may exercise the right to trade, based on prior export experience and export performance or minimum capital requirement, would be inconsistent with China's trading rights commitments.

70. The second element of the obligation provides that the right to trade applies to "all goods" except those listed in Annexes 2A and 2B. Annex 2A consists of two parts – Annex 2A1 entitled "Products Subject to State Trading (Import)" and Annex 2A2 entitled "Products Subject to State Trading (Export)." As the U.S. claim of inconsistency regarding China's obligations contained in paragraph 5.1 concerns the right to export, only Annex 2A2 is relevant here. Rare earths and molybdenum are not covered by Annex 2A2.

71. Annex 2B identifies a list of six product headings (natural rubber, timber, plywood, wool, acrylic and steel) that are divided into 245 products according to their eight-digit HS number. Trading rights for all of these products were to be "liberalized within three years" following China's WTO accession – *i.e.*, by December 11, 2004. Annex 2B is not relevant to these proceedings because none of the Raw Materials are covered by Annex 2B and this limitation is no longer applicable to China's trading rights commitments, since it expired in 2004.

72. Thus, all enterprises in China should now have the right to export from China all goods, except those listed in Annex 2A2 of the Accession Protocol. Annex 2A2 does not include rare earths or molybdenum.

73. The third element established that within three years after accession China was required to complete all necessary legislative procedures to implement its obligations with respect to the right to trade. This three-year period expired on December 11, 2004

74. Paragraph 83(d) of the Working Party Report confirms the obligation contained in paragraph 5.1 of the Accession Protocol – *i.e.*, that China committed to provide trading rights to all enterprises in China by December 11, 2004.

75. Paragraph 84(a) of the Working Party Report likewise confirms China's obligations with respect to trading rights, as set forth in paragraph 5.1 of the Protocol. Paragraph 84(a) provides that China's trading rights obligations apply to all enterprises in China, as of December 11, 2004, with regard to all products outside Annex 2A. Paragraph 84(a) also confirms China's commitment to eliminate its "examination and approval" system of trading rights within three years after

accession at which time "China would permit all enterprises in China and foreign enterprises and individuals ... to export and import all goods."

76. Paragraphs 83(a) and 83(b) prohibit China from imposing certain specific restrictions on the right to trade. Specifically, paragraph 83(a) makes clear China's commitment not to impose on Chinese and foreign-invested enterprises any prior export experience and export performance requirements in exporting as criteria for obtaining or maintaining the right to export.

## **2. China's Measures Allocating the Rare Earth and Molybdenum Export Quotas Are Inconsistent with China's Trading Rights Commitments**

77. As part of its administration of the rare earth and molybdenum export quotas, China restricts enterprises' right to export by requiring enterprises to satisfy certain criteria to be eligible to export under the quota.

78. The *Import and Export Regulations* provides that MOFCOM is responsible for the administration of export quotas, that enterprises seeking to export under the quota must apply to do so, and that the relevant administrative authorities must decide whether to grant those applications. The *2012 Rare Earth Export Quota Application Procedures* and *2012 Molybdenum Export Quota Application Procedures*, issued by MOFCOM, govern the application process for the allocation of the rare earths and molybdenum export quotas. These measures prescribe several criteria that applicants must satisfy in order to be eligible to export under the quotas. One of those criteria is that the enterprise have exported the requisite amount of rare earths or molybdenum in the previous three-year period, or have supplied for export the requisite amount of rare earths or molybdenum in the previous three-year period. In addition, trading companies are also required to have a registered capital of at least RMB 50 million to export rare earths and RMB 30 million to export molybdenum.

79. In addition, the allocation equations found in the *2012 First Batch Rare Earth Export Quota* and the *2012 First Batch Tungsten and Molybdenum Export Quota* rely on the prior export experience and export performance of the applicant in allocating the quota.

80. China's restrictions on the right to trade rare earths maintained through the *2012 Rare Earth Export Quota Application Procedures* and the *2012 First Batch Rare Earth Export Quota* and China's restrictions on the right to trade molybdenum maintained through the *2012 Molybdenum Export Quota Application Procedures* and the *2012 First Batch Tungsten and Molybdenum Export Quota* are inconsistent with China's trading rights commitments. Only by having the requisite prior export experience and export performance and minimum registered capital can an enterprise export rare earths and molybdenum under the quota. The relevant commitments in the Working Party Report incorporated via paragraph 1.2 of China's Accession Protocol explicitly call for the elimination of prior export experience and export performance and minimum capital requirements in respect of the grant of trading rights.

81. In fact, the *China – Raw Materials I* panel found that China's prior export experience and export performance and minimum registered capital requirements were inconsistent with China's trading rights commitments.

82. Accordingly, China's measures limiting the right to export rare earths and molybdenum are inconsistent with China's trading rights commitments in Part I, paragraph 5.1 of the Accession Protocol as well as Part I, paragraph 1.2 of the Accession Protocol to the extent it incorporates paragraphs 83 and 84 of the Working Party Report.

## **V. Conclusion**

83. For the reasons set forth, the United States respectfully requests the Panel to find that China's measures, as discussed above, are inconsistent with China's obligations under the GATT 1994 and the Accession Protocol. The United States further requests, pursuant to DSU Article 19.1, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.

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*Second Part of the Integrated Executive Summary of the United States***I. Introduction**

1. Despite commitments made by China when it acceded to the WTO, China maintains a number of restraints on the exportation of important raw materials – various forms of rare earths, tungsten and molybdenum (together the "Raw Materials"). China's policies of imposing export restraints on these Raw Materials are driven by and help to fuel the dramatic expansion of China's downstream industries, to the detriment of the industries and workers of other Members. The export restraints at issue in this dispute are inconsistent with WTO rules.

2. China fails to rebut the complainants' claims that these export restraints are inconsistent with China's commitments in its Accession Protocol, which incorporates commitments made by China in its Working Party Report and its obligations under the GATT 1994. In fact, China concedes the inconsistency of the export restraints with the relevant obligations. While China invokes certain exceptions of the GATT 1994 to justify its measures, China's reliance on these exceptions is unavailing.

3. In particular, China invokes Article XX(b) of the GATT 1994 in an attempt to portray its use of export duties as necessary for the protection of health. But, a review of the law and the facts confirms that the Article XX exceptions are not applicable to these export duties and, even if they were, China's defense does not withstand scrutiny. Similarly, China's invocation of the exception related to conservation in Article XX(g) of the GATT 1994 to justify export quotas also fails because, chief among all the flaws, the export quotas do not relate to the goal of conservation.

4. Lastly, China administers its export quotas in a WTO-inconsistent manner through the use of prior export performance and minimum capital requirements. China has also failed to rebut these claims.

**II. China's Export Duties Are Inconsistent with China's obligations under Paragraph 11.3 of the Accession Protocol**

5. China imposes export duties on over 80 forms of rare earths, tungsten and molybdenum. Those export duties range from 5 to 25 percent.

6. Paragraph 11.3 of China's Accession Protocol provides, in relevant part, that China "shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 ... ." Annex 6 of the Accession Protocol sets forth a list of 84 products by Harmonized System ("HS") code for which China reserved the right not to eliminate export duties. The Annex 6 list also indicates, for each product, the maximum export duty rate that China may impose.

7. The rare earths, tungsten and molybdenum products at issue in this dispute on which China imposes export duties are not included in the Annex 6 list of reserved products. The export duties China imposes on rare earths, tungsten and molybdenum are therefore inconsistent with China's obligations under Paragraph 11.3 of the Accession Protocol.

8. China does not contest that these export duties are inconsistent with Paragraph 11.3 of the Accession Protocol. Instead China focuses its efforts on arguing that the exceptions under Article XX of the GATT 1994 are applicable to its Paragraph 11.3 commitment in this dispute, even though both the panel and the Appellate Body found in *China – Raw Materials*, a previous, very similar dispute, that Article XX is not applicable. Albeit belatedly, China also attempts to justify its export duties under the exception provided for in Article XX(b) of the GATT 1994.

9. However, as discussed in previous U.S. submissions in this dispute, and as the panel and the Appellate Body concluded in the *China – Raw Materials* dispute, the GATT 1994 Article XX exceptions are not available as justifications for breaches of the commitment in Paragraph 11.3 of the Accession Protocol. But even aside from the fact that GATT 1994 Article XX exceptions are not applicable to Paragraph 11.3, China would fail to meet the requirements of Article XX(b) with respect to the export duties on rare earths, tungsten and molybdenum.

10. First, the export duties at issue are not designed to protect human, animal or plant life or health. Second, China does not even argue that the export duties are currently making a material contribution to China's stated objective to protect human, animal, or plant life or health. And contrary to China's arguments, the duties are not apt to do so in the future. Third, there are a number of reasonably available alternatives that would more directly address China's stated objectives, and not raise the same issues of WTO inconsistency as China's export duties. Finally, China fails to show that the export duties at issue satisfy the conditions of the Article XX chapeau.

11. China's Article XX(b) defense relies on the assertion that China's export duties are part of a comprehensive policy to protect the environment. None of the cited elements of China's comprehensive environmental policy shows a link between export duties and a pollution reduction objective. In attempting to defend certain export duties and quotas in the *China – Raw Materials* dispute, China also claimed that it had a comprehensive environmental framework with respect to the products at issue in that dispute, and offered a number of measures that purported to relate to pollution resulting from the production of the products. However, the panel found that it "still need[ed] persuasive evidence of a connection between environmental protection standards and export restrictions."

12. China fails to establish any such connection with respect to the export duties on rare earths, tungsten and molybdenum. None of the various documents cited by China as elements of a comprehensive environmental policy with respect to rare earths, tungsten and molybdenum sheds light on how export duties on those products serve the ends of such a policy, let alone how they are necessary to protect human, animal, or plant life or health.

13. China also fails to demonstrate that its export duties on rare earths, tungsten and molybdenum are apt to make a material contribution to the supposed goal of reducing pollution caused by the mining and production of those products. In order to show that a measure is apt to make a material contribution, in circumstances where it is "difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy" and "the results obtained from certain actions ... may manifest themselves only after a certain period of time . . .", the responding Member must provide evidence of the relationship between the policy tool and the objective.

14. However, in arguing that export duties on rare earths, tungsten and molybdenum are apt to make a material contribution toward an environmental or health objective, China offers no evidence. Instead, it only makes conclusory statements. China simply asserts that export duties increase prices "in a synergetic relationship with" other measures. But China does not explain this supposed "synergetic relationship." In addition, while China appears to recognize that export duties only increase prices for exports, China does not attempt to show why or how increasing prices only for exports is apt to make any contribution, much less a material one, to China's supposed goal of reducing pollution that is caused not by exportation, but by the mining and production of rare earths, tungsten and molybdenum.

15. Similarly, in asserting that export duties are apt to make a material contribution to an environmental objective, China provides no analysis of the impact that export duties have on domestic prices and consumption. China states that its export duties are imposed "in order to reduce consumption by these foreign consumers and thus to reduce production of the rare earth, tungsten and molybdenum resources." However, China ignores the fact that export duties decrease prices of the raw materials for domestic consumers, thereby increasing domestic consumption and encouraging the production and sale of the materials in the form of downstream products.

16. China cannot present any environmental justification for discriminating against industrial consumers outside of China in favor of industrial consumers within China. However, this discrimination does serve an economic goal: to ensure that domestic consumers have access to the raw materials at issue at lower prices than their foreign counterparts, and in turn to encourage the expansion of China's downstream industries that produce more sophisticated, higher value-added products. If China were interested in reducing the health effects associated with mining and production of rare earths, tungsten or molybdenum, China could impose volume restrictions on mining and production or establish effective pollution controls on how mining or production takes place. Instead, China's production continues to expand.

17. China contends that it maintains "a comprehensive policy to protect the environment in connection with the production of rare earths, tungsten and molybdenum," including various environmental regulations related to production, such as pollution controls on production, a resource tax, and a mining deposit. This demonstrates that China considers such measures – that is, measures that impose direct restrictions on mining or production, the causes of pollution – feasible.

18. Unlike any of those measures, which apply equally to both domestically-consumed and exported products, export duties on rare earths, tungsten and molybdenum are targeted specifically at foreign consumers of those products. While China claims that its export duties operate "in a synergetic relationship" and "function together" with environmental regulations, the mere inclusion of export duties in a list with such regulations is not sufficient to establish the complementarity or interaction between the export duties and the environmental regulations that China identifies.

19. Lastly, China has made almost no attempt to meet its burden to demonstrate that its export duties on rare earths, tungsten and molybdenum satisfy the requirements of the chapeau of Article XX. This is not surprising, given that those export duties plainly fail to meet those requirements.

20. For the foregoing reasons, the breaches of Paragraph 11.3 of the Accession Protocol by China's export duties on rare earths, tungsten and molybdenum are not justified under Article XX(b).

**III. China's Export Quotas Are Inconsistent with China's Obligations Under Article XI:1 of the GATT 1994, Paragraph 1.2 of the accession protocol, and Paragraphs 162 and 165 of the Working Party Report and Not Justified Under Article XX(g)**

21. As the United States set forth in its first written submission, China subjects the exportation of various forms of rare earths, tungsten and molybdenum to quotas. These export quotas are inconsistent with Article XI:1 of the GATT 1994.

22. China attempts to justify the export quotas it imposes on rare earths, tungsten and molybdenum under the exception provided for conservation measures in Article XX(g) of the GATT 1994. However, for the reasons discussed below, China has failed to establish that its export quotas meet the requirements of that exception.

23. Sub-paragraph (g) of Article XX provides an exception from the requirements of the GATT 1994 for measures:

relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

24. In order to justify under Article XX(g) of the GATT 1994 the breaches of Article XI:1 by the export quotas on rare earths, tungsten and molybdenum, China must demonstrate that these export quotas: (1) relate to the conservation of exhaustible natural resources; and (2) are made effective in conjunction with restrictions on domestic production or consumption.

25. Regarding the first criteria, China is incorrect to argue that the term "conservation" means that a Member may take measures to create an export safeguard to protect domestic Chinese consumers from surges in foreign demand. According to China:

if the only tool that [China] had at [its] disposal in 2012 were production and extraction quotas for rare earths – not export quotas – then China ran the risk that unexpected surges in foreign demand could have negatively impacted China's users ... . In effect, the export quotas function as a "safeguard" mechanism to guard against unanticipated surging exports.

26. China's argument fails, however, because an export safeguard is not encompassed within the definition of conservation. An export safeguard does not keep rare earths from harm, loss, or waste through protective oversight, but rather only protects Chinese downstream consumers from the impact of market forces. Simply put, this has nothing to do with conservation.

27. The Appellate Body has interpreted the second clause of Article XX(g) to be a "requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources." The Appellate Body in *U.S. – Gasoline* noted that, while there is "no textual basis for requiring identical treatment of domestic and imported products ... if *no* restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals."

**A. China's Export Quotas on Rare Earths Are Not Justified by Article XX(g) of the GATT 1994**

28. In examining whether China's export quotas on rare earths relate to the conservation of an exhaustible natural resource, the operative question is whether there is a close and genuine relationship of ends and means between the goal of rare earth conservation and the means presented by the application of the export quotas to exports of various rare earth products. As shown below, the answer to this question is no.

29. The measures imposing and administering the export quotas on rare earths do not speak to the relationship between the export quotas and the goal of conservation. This is an important omission, as it shows that the design and architecture of the export quotas are not oriented towards the goal of conservation. Indeed, the panel in *China – Raw Materials* found that it is relevant in determining whether an export restriction relates to conservation how the measure characterizes the relationship between the restriction and the goal of conservation. In other words, beyond just a mention of conservation, how does the measure explain its material contribution to that goal. For rare earths, China has not cited a single explanation in the measures that articulates this relationship.

30. China raises two hypothetical ways in which the export quotas may serve a conservation purpose – by serving as an enforcement tool for China's production targets and by signaling users of rare earths to secure alternative supplies of rare earths from non-Chinese sources. These two contentions are hypothetical in that neither are reflected in Chinese government measures setting forth the rare earth export quotas or, for that matter, any known Chinese government documents. Beyond their lack of support in China's own measures, both of these arguments are without merit.

31. Regarding export quotas as an enforcement tool, China has failed to show how the export quotas – *i.e.*, the numerical limits on rare earth exports – further China's stated objective of curtailing the export of illegally produced materials. China contends that "various elements of China's 2012 export quota system" that police against the export of rare earth products produced above domestic targets – *i.e.*, sourcing and documentation requirements – are "tied to and dependent on the existence of the export quotas." However, China has failed to explain why it cannot have the sourcing and documentation requirements, which have not been challenged by the complainants, without the export quota.

32. The use of an export quota as an enforcement mechanism for China's production restrictions also fails due to its over-breadth. In particular, the export quotas apply not just to illegally extracted rare earths but also equally to legally extracted rare earths, which were produced in a manner consistent with China's alleged domestic production targets. The over-breadth of the export quotas, specifically the impact on legally extracted rare earths, underscores the lack of any real or credible relationship between these quotas and the objective of conservation.

33. As to China's signaling argument, China contends that the export quotas relate to the conservation of rare earths by signaling to non-Chinese consumers the need to develop and locate other sources of supply or develop substitutes. This argument fails for a number of reasons.

34. First, the export quotas are part of a regime that purposefully creates two markets – an internal and an external one – for these materials. The bifurcated markets result in a "two-tiered"



pricing structure – i.e., lower prices in China, significantly higher prices abroad – and a corresponding incentive for foreign users of rare earths to relocate their manufacturing operations, technologies and jobs to China, so as to avoid being subject to the export quotas. This relocation increased demand for Chinese rare earths. The results of this policy were confirmed, for example, by Chen Guiyuan, the deputy director of the Hohhot customs bureau in the Inner Mongolian Autonomous Region, who observes that "[t]o get past government regulations, some foreign companies are investing in their own rare earth metal processing centers in China, aiming to obtain more of the metals at a cheaper price."

35. Second, China does not explain how export quotas, as opposed to domestic production restrictions that actually limit production, create an incentive for foreign rare earth producers to increase production. China can readily send such a signal through domestic production restrictions and need not relate to discriminatory, trade-distorting export quotas.

36. As shown above, China has not met its burden of establishing the relationship between the export quota, as it applies to rare earths, and the goal of conservation of rare earths, *i.e.*, keeping rare earths from harm, loss or waste through protective oversight.

37. Instead, taking into account the absence of restraints on the exportation of downstream products made from rare earths, the existence of policies that actively promote and encourage certain downstream products, and the substantial growth in these industries reflected in production statistics, the picture that emerges demonstrates a complete lack of any relationship between the export quotas on rare earths and the goal of rare earth conservation. In fact, the record shows a close and genuine relationship between the export quotas and China's trade protectionist goals.

38. China has also failed to demonstrate that its export quotas for rare earths are "made effective in conjunction with restrictions on domestic production or consumption." China asserts that it has a "comprehensive conservation policy" consisting of a number of measures that impose "restrictions on domestic production or consumption of rare earths in China." These measures do not constitute restrictions on domestic production or consumption under Article XX(g) of the GATT 1994. Moreover, the export quotas on rare earths are not "made effective in conjunction with" such domestic restrictions on rare earths and therefore are not imposed "even-handedly" as the Appellate Body has interpreted is required by Article XX(g).

39. Specifically, China contends that it has established volume restrictions on rare earths in the form of both extraction and production targets. However, China's argument lacks credibility because, as Colombia also noted in its third party submission, actual rare earth extraction and production have traditionally exceeded the targets, sometimes by more than 50 percent.

40. Beyond the gross amounts of overproduction, China's production targets do not meet the requirements of Article XX(g) of the GATT 1994 because China's system fails to ensure that it controls the production of individual rare earth elements. This fact, combined with China's acknowledgment to the Panel that "[w]e cannot treat rare earths as a single commodity," shows that China does not have production restraints for purposes of Article XX(g).

41. Even if one or some of the measures China has put forward could be considered as limiting the amount of rare earths produced, China would still not have demonstrated that the export quotas on rare earths were "made effective in conjunction with" such restrictions because the impact on domestic and foreign users of rare earths would still not be "even-handed."

42. To the extent any measure China has proffered as evidence of restrictions on domestic production or consumption is relevant at all to the production or consumption of rare earths, it would be relevant only to the mining or "production" of rare earths. If such a measure were considered to "restrict" rare earth production, a restriction on production would affect both domestic and foreign users. As China observes in its own description of the domestic restrictions, such restrictions impose costs on both domestic and foreign consumers. However, foreign users of rare earths are also subjected to the export quotas on rare earths, while domestic users are not. In order for its export quotas measures to be "even-handed," China would need to counter-balance the impact of the export quotas on foreign users with some measure that similarly affects domestic users of rare earths, but it has not done so.

43. Indeed, the panel in *China – Raw Materials* addressed the same scenario – *i.e.*, where foreign consumers would be affected by both China's domestic production restrictions as well as the export quotas' restrictions on their consumption while domestic consumers would be affected only by domestic production restrictions – and found that even-handedness was non-existent.

**B. China's Export Quota on Tungsten Is Not Justified by Article XX(g) of the GATT 1994**

44. As with rare earths, China contends that the export quota on tungsten relates to conservation because the measures establishing and implementing the quota refer to the goal of conservation, either directly or by citing to other measures that reference conservation. As previously discussed, China's reliance on such passing references to the goal of conservation, which fail to explain how the export quota makes a material contribution to that goal, is insufficient to meet China's burden under GATT Article XX(g).

45. In its first written submission, China proffers a hypothetical way in which the export quota on tungsten may serve a conservation purpose – by signaling foreign users of tungsten to secure alternative supplies of tungsten from non-Chinese sources and, at the same time, creating a disincentive to domestic Chinese producers to expand production to supply foreign consumers. China's argument is hypothetical in that it is not reflected in Chinese government measures setting forth the tungsten export quota.

46. Moreover, the export quotas are part of the same general industrial policy regime that, as with rare earths, creates two markets – an internal and an external one – for tungsten. The two markets result in the two-tiered pricing structure – *i.e.*, lower prices in China, higher prices in other Members – and a corresponding incentive for foreign users of tungsten to relocate to China, so as to avoid being subject to the export quota.

47. In addition, China does not explain how the export quota, as opposed to domestic production restrictions that actually limit production, create an incentive for foreign tungsten producers to increase production. China can readily send such a signal through domestic production restrictions and need not relate to discriminatory, trade-distorting export quotas.

48. China has also failed to demonstrate that the export quota on tungsten is "made effective in conjunction with restrictions on domestic production or consumption." China asserts that it has a "comprehensive set of domestic restrictions" consisting of a number of measures that "restrict the production or consumption of tungsten in China." However, these measures do not constitute "restrictions on domestic production or consumption" under Article XX(g) of the GATT 1994. The export quota on tungsten is also not "made effective in conjunction with" such restrictions on tungsten and therefore is not imposed "even-handedly" as the Appellate Body has interpreted is required by Article XX(g).

49. China contends that it has established volume restrictions on tungsten in the form of both extraction and production targets. And as was the case with rare earths, China's argument lacks credibility because actual tungsten extraction and production has consistently exceeded the extraction target, sometimes by almost 50 percent of the target.

50. Even if one or some of the measures China has put forward could be considered as limiting the amount of tungsten produced, China would still not have demonstrated that the export quota on tungsten was "made effective in conjunction with" such restrictions because the relative impact on domestic and foreign users of tungsten would still not be "even-handed."

51. To the extent any measure China has proffered as evidence of restrictions on domestic production or consumption is relevant at all to the production or consumption of tungsten, it would be relevant only to the mining or "production" of tungsten. If such a measure were considered to "restrict" tungsten production, the restrictions on production would affect both domestic and foreign users of tungsten. As China observes in its own general description of its domestic restriction regime, such restrictions would impose costs on both domestic and foreign consumers. However, foreign users of tungsten are also subjected to the export quota on tungsten, while domestic users are not. In order for its measure to be "even-handed," China would need to

counter-balance the impact of the export quota on foreign users with some measure that similarly affects domestic users of tungsten, but it has not done so.

52. Here, any plausible "restriction" on domestic production would equally affect both domestic and foreign users. When juxtaposed with an export quota that restricts supply only to foreign users, it becomes clear that there is no counter-balance to the export quotas and therefore no even-handedness.

**C. China's Export Quota on Molybdenum Is Not Justified by Article XX(g) of the GATT 1994**

53. China's only argument in the course of this dispute that the export quota on molybdenum relates to conservation is that the measures establishing and implementing the quota refer to the goal of conservation, either directly or by citing to other measures that reference conservation. China's reliance on such incantations is insufficient to meet its burden under Article XX(g) of the GATT 1994.

54. China has imposed an export quota on various molybdenum raw materials and products since 2007. In the time that China has imposed an export quota on molybdenum, China's measures implementing the export quota have only made passing reference to the goal of conservation beginning in 2012.

55. Taking into account the absence of restraints on the exportation of downstream products made from molybdenum, such as finished stainless steel, the existence of policies that actively promote and encourage certain downstream products, and the substantial growth reflected in production statistics of such finished products, the picture that emerges demonstrates a complete lack of any relationship between the export quota on molybdenum and the goal of molybdenum conservation. Instead, the record shows a close and genuine relationship between the export quota and China's trade protectionist goals.

56. China has also failed to demonstrate that the export quota on molybdenum is "made effective in conjunction with restrictions on domestic production or consumption." China asserts that it has a "comprehensive set of domestic restrictions" consisting of a number of measures that restrict the production of molybdenum in China. However, these measures do not constitute "restrictions on domestic production" under Article XX(g) of the GATT 1994. Moreover, the export quota on molybdenum is not "made effective in conjunction with" such restrictions on molybdenum and therefore is not imposed "even-handedly" as the Appellate Body has interpreted is required by Article XX(g).

57. China asserts that it has established a volume restriction on molybdenum in the form of an extraction target. However, similar to rare earths and tungsten, actual molybdenum extraction has exceeded the extraction target for the two years in which China provided data.

58. Even if one or some of the measures China has put forward could be considered as limiting the amount of molybdenum produced, China would still not have demonstrated that the export quota on molybdenum was "made effective in conjunction with" such restrictions because the relative impact on domestic and foreign users of molybdenum would still not be "even-handed."

59. To the extent any measure China has proffered as evidence of restrictions on domestic production is relevant at all to the production of molybdenum it would be relevant only to the mining or "production" of molybdenum. If such a measure were considered to "restrict" molybdenum production, a restriction on production would affect both domestic and foreign users of molybdenum. As China observes in its own description of the domestic restrictions, such restrictions impose costs on both domestic and foreign consumers. However, foreign users of molybdenum are also subjected to the export quotas on molybdenum, while domestic users are not. In order for its measure to be "even-handed," China would need to counter-balance the impact of the export quota on foreign users with some measure that similarly affects domestic users of molybdenum, but it has not done so.

60. Here, any plausible "restriction" on domestic production would affect both domestic and foreign users. When juxtaposed with an export quota that restricts supply only to foreign users, it

becomes clear that there is no counter-balance to the export quotas and therefore no even-handedness.

**D. Even if China's Export Quotas Were Justified by GATT Article XX(g), the Export Quotas Fail to Satisfy the Requirements of the Chapeau**

61. An otherwise GATT-inconsistent measure for which a Member seeks an exception under Article XX must satisfy both the requirements of subparagraph of Article XX that the Member invokes and the separate requirements of the chapeau of Article XX. In other words, in addition to meeting the paragraph-specific criteria of Article XX(g), the measure must also "not be applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade."

62. With respect to the export quotas that China maintains on rare earths, tungsten and molybdenum that are inconsistent with Article XI:1 of the GATT 1994, China contends that the breaches of Article XI:1 by the quotas are justified pursuant to GATT Article XX(g). However, even in the highly unlikely event that China were able to demonstrate successfully that its export quotas "relate to conservation" and were "made effective in conjunction with restrictions on domestic production or consumption," China would still fail to satisfy the requirements of the Article XX chapeau.

63. In China's first written submission and oral statement, China made no serious attempt to satisfy its burden of establishing that the export quotas satisfy the chapeau. Instead, in its first written submission, China cursorily argues that the export quotas are not applied in a manner that constitutes arbitrary or unjustifiable discrimination because they "make no distinction in respect of the destination of the products that are exported." However, as later acknowledged by China, this reflects a misstatement of the applicable standard as articulated by the Appellate Body.

64. Specifically, the requirement that a measure not be "applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail" is a requirement that the measure not discriminate between other Members or between other Members and the Member maintaining the measure. The Appellate Body's statements in *U.S. – Gasoline* confirm this interpretation. Moreover, in China's Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting with the Parties, China notes that "the requirement not to apply an export quota system in a manner that would constitute 'arbitrary discrimination' also covers arbitrary discrimination between domestic and foreign consumers."

65. Accordingly, China has articulated the incorrect legal standard under the chapeau. This renders China's cursory statement that the export quotas at issue do not discriminate between export destinations insufficient to satisfy its burden.

66. In its Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting with the Parties, China finally makes an argument that the export quotas on one group of products (rare earths) do not constitute "arbitrary discrimination" under the chapeau. According to China, the fact that the export quotas on rare earths were not filled in 2012 and the fact that Chinese domestic prices for rare earths have recently increased show that the export quotas on rare earths do not constitute discrimination under the chapeau. As shown below, China's argument is based on a flawed understanding of the Article XX chapeau's requirements.

67. The fact that the export quotas on rare earths were not filled in 2012 does not support China's assertion that the export quotas do not result in arbitrary or unjustifiable discrimination between domestic and foreign users. First, some foreign companies were reducing inventories in 2012, and thus not filling the quota, following panic-induced buying and uncertainty in the market that began in the middle of 2010, following China's decision to cut the rare earth export quota nearly in half. Another factor that appears to have affected rare earth sales to foreign companies in 2012 in various ways is disincentives provided by the export duties on rare earths, which for some rare earth products were and continue to be as high as 25 percent ad valorem. Finally, according to a report in the China Daily, smuggling was considered one of the "main cause[s]" for the quota not being filled.

68. Thus, the fact that the export quotas on rare earths were not filled is not a result of their non-discriminatory application, but rather the fact that, in 2012, foreign consumers were reacting to and dealing with the long-term distortive impact of the rare earth export quotas (*i.e.*, panic-induced buying in 2010 following the cut in the export quota), WTO-inconsistent export duties (which apply exclusively to foreign consumers) and the fact that rare earths are often smuggled from China – a problem that is caused by the export quotas themselves. Consequently, the lack of quota-fill in 2012 is not evidence of non-discrimination; rather, it is a significant example of the discriminatory application of the rare earth export quotas.

69. Furthermore, China's contention that domestic prices for rare earths have been increasing completely ignores the fact, key for the Panel's chapeau analysis, that the application of the rare earth export quotas have resulted in discrimination between foreign and domestic users illustrated by drastically higher prices paid by foreign consumers for the very same products. Moreover, this discrimination, which serves no purpose in regards to the goal of conservation, is arbitrary and unjustifiable. As such, the significantly higher prices paid by foreign consumers of rare earths is further evidence of the discriminatory application of the rare earth export quotas to Members.

70. China also asserts that the export quotas do not constitute a disguised restriction on international trade because they are "not applied in a manner that would constitute a *concealed* or *unannounced* restriction." It should be noted up-front that, as the Appellate Body stated in *U.S. – Gasoline*, "[i]t is ... clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of 'disguised restriction.'" Thus, the mere assertion that a measure does not constitute a "concealed or unannounced restriction" falls short of the showing required under this element of the chapeau.

71. For rare earths and molybdenum, China argues that the export quotas are not disguised restrictions on international trade because the export quotas were not filled and because the allocation of the export quotas creates incentives for Chinese companies to supply foreign consumers through prior export performance requirements. China further contends that the export quotas on rare earths are not disguised restrictions on international trade because foreign consumers can use the export quota for different rare earths, depending on demand. For tungsten, China asserts that the export quota does not constitute a disguised restriction because, oddly, China imports significant quantities of tungsten.

72. For rare earths, the United States has already addressed China's claims relating to quota fill. For molybdenum, the United States notes that, like rare earths, molybdenum exports are subject to duties between 5 and 20 percent. And regarding the use of prior export performance requirements, such requirements are inconsistent with China's obligations under the Accession Protocol. China should not be allowed to use such WTO-inconsistent allocation measures to establish that its export quotas are, in fact, WTO-consistent.

73. As to China's argument that foreign consumers can use the export quotas for different rare earth products, depending on demand, China argues that:

within each of the two categories of 2012 [rare earth export] quotas, the manner in which the quota is filled is not pre-determined. For example, if a number of foreign consumers in 2012 needed one specific medium/heavy rare earth element (e.g. Samarium) more than another medium/heavy rare earth element (e.g. Terbium), the quota could be used mainly, or even solely, for the rare earth element (Samarium) that is in the greatest demand.

China's argument acknowledges that consumers of rare earths (*e.g.*, terbium) may not be able to get desired quantities of the specific rare earth product that they need in a given year if, for example, other foreign consumers use the export quota to obtain a wholly different rare earth (*e.g.*, samarium). It is completely unclear how this fact supports China's claim that the export quotas on rare earths are not disguised restrictions on international trade, especially in the view of consumers of particular rare earths whose ability to source needed raw materials is dependent on sourcing decisions for wholly different products. Rather, this element of China's regime, which makes it impossible to predict how much of the export quota is available for exports of any given rare earth product, serves as further evidence that the export quotas on rare earths are, in fact, a disguised restriction on international trade.

74. Regarding tungsten, China's argument that the tungsten export quota is not a disguised restriction on international trade because China imported tungsten in 2012 is illogical on its face. China's ability to import tungsten, consistent with its "two resources, two markets" philosophy, is wholly irrelevant to the Panel's disguised restriction analysis. Rather, China's successful importation of important raw materials such as tungsten shows that China has a policy of taking advantage of the commitments by other Members not to engage in WTO-inconsistent conduct by using export restrictions on raw materials for purposes of industrial policy.

75. While China has failed to meet its burden under the chapeau, evidence provided by the complainants shows that China's export quotas are applied in a manner that is arbitrary, unjustified and a disguised restriction on trade. In particular, the denomination of the export quotas on rare earths is inconsistent with the chapeau. China denominates the export quotas on rare earths in gross weight, while it designates the production targets in rare earth oxide equivalents (REO) tons, which captures the amount of rare earths in a given product. According to China, "rare earth elements are most frequently separated and sold in their oxide form. Therefore, it is customary to present rare earth data in terms of rare earth oxide (REO) equivalents."

76. Beyond just deviating from customary market practice, and China's practice before 2005, China's use of gross weight distorts the application of the rare earth export quotas. Because the export quota is in gross weight, a 100 MT ferroalloy that contains 10 MT of rare earths (*i.e.*, ferroalloy containing at least 10 percent rare earths under HS 7102.9991) would count just as much against the quota as a 100 MT of lanthanum oxide of 99.99 percent purity that contains 99.99 MT of rare earths – both would count 100 MT against the quota.

77. For these foregoing reasons, China has failed to establish that the export quotas for which it asserts a defense under Article XX satisfy the requirements of the chapeau.

#### **IV. China's Prior Export Performance and Minimum Capital Requirements on Rare Earths and Molybdenum Are Inconsistent with China's Trading Rights Commitments and Not Justified Under Article XX(g) of the GATT 1994**

78. As the United States explained in its first written submission, in addition to subjecting exports of rare earths and molybdenum to export duties and quotas, China further restricts the ability of companies to export those products by requiring companies to satisfy certain criteria in order to be able to export under the quota. In particular, China requires companies to satisfy certain prior export performance and minimum capital requirements.

79. Paragraphs 83 and 84 of the Working Party Report impose a clear requirement on China not to impose prior export performance and minimum capital requirements. Similarly, Paragraph 5.1 requires China not to limit the right to trade rare earths and molybdenum to a subset of enterprises based on such requirements. China's restriction on the right to trade rare earths and molybdenum to those enterprises that meet prior export performance and prior minimum capital requirements is inconsistent with the obligations set forth in Paragraph 5.1 and in Paragraphs 83 and 84.

80. In response, China first asserts that it has amended the *Foreign Trade Law* to eliminate requirements that a foreign trade operator meet certain conditions in order to import or export. These cited amendments to the *Foreign Trade Law* are irrelevant to the issue before the Panel, in light of the fact that China does not dispute that it imposes prior export performance and minimum capital requirements on rare earths and molybdenum.

81. China also insists that it is entitled to impose prior export performance and minimum capital requirements on rare earths and molybdenum because it imposes a quota on those products that, in China's view, is justified under Article XX(g) of the GATT 1994. China maintains that those prior export performance and minimum capital requirements are justified under Article XX(g) but that it is not required to make any showing that those requirements meet the conditions of Article XX(g).

82. China's invocation of Article XX(g) with respect to the prior export performance and minimum capital requirements that it imposes on rare earths and molybdenum should be rejected. First, Article XX of the GATT 1994 is not available to justify the imposition of such requirements,

which are plainly inconsistent with Paragraphs 83 and 84 of the Working Party Report. Second, even if Article XX(g) were available as a defense, China would have to show that the prior export performance and minimum capital requirements meet the conditions of Article XX(g). China has not done so.

**V. Conclusion**

83. For these reasons, the United States respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and the Accession Protocol. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.

## ANNEX B-2

## INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

*First Part of the Integrated Executive Summary of the European Union***1 EXPORT DUTIES****1.1 China's Export Duties are inconsistent with its obligations under its Accession Protocol**

1. First of all, the provisions of the Accession Protocol are an integral part of the WTO Agreement, and thus, are enforceable in WTO dispute settlement proceedings pursuant to Article 1.1. of the DSU.
2. The applicability of the DSU in the current dispute is made clear by the second sentence of Para. 1.2. of China's WTO Accession Protocol.
3. This was also held by the panel in *China-Auto Parts*, and confirmed by the Appellate Body in the same dispute. Moreover, in *China-Raw Materials* the panel held that:
 

The second sentence of Paragraph 1.2. of China's Accession Protocol states that provisions of the Protocol are "an integral part of the WTO Agreement." Thus, the provisions of the Accession Protocol are enforceable in WTO dispute settlement proceedings pursuant to Article 1.1 of the DSU. This is consistent with the approach taken by panels and the Appellate Body.
4. The European Union confirmed its position as to the applicability of DSU in its reply to panel's **Question 7**. The European Union stated that, as reflected in the very wording of paragraph 1.2 of the Accession Protocol, the Protocol shall be "an integral part of the WTO Agreement."
5. China's Accession Protocol provides in paragraph 11.3 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.
6. Annex 6 of China's Accession Protocol, entitled "Products Subject to Export Duty" lists 84 different products, each identified by an 8-digit HS number, and by a product description. Article VIII of the GATT 1994 applies to "all fees and charges of whatever character (other than import and export duties and other taxes within the purview of Article III) imposed by contracting parties on or in connection with...exportation [...]"
7. The export duties imposed by China on the exportation of the rare earths, tungsten and molybdenum cannot be justified by either of these exceptions. Firstly, the relevant raw materials are not included in the list of products contained Annex 6 of China's Accession Protocol. Secondly, these export duties are duties and not "fees and charges" within the meaning of Article VIII of the GATT 1994. As a result, they do not fall within the scope of Article of VIII of the GATT.
8. In *China-Raw Materials*, the Panel recalled that Article VIII allows WTO Members to impose, at the border, a variety of fees or charges provided that they are limited in amount to the approximate costs of services rendered and that they are imposed on or in connection with importation or exportation. The Panel found no general exception in the language of Paragraph 11.3 that would authorize China to maintain export duties other than in circumstances described in Annex 6 or in Article VIII of the GATT 1994.<sup>1</sup> This part of the panel's report was not appealed by China.
9. Accordingly, China's imposition and maintenance of temporary export duties applied to the exportation of rare earths, tungsten and molybdenum is inconsistent with China's

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<sup>1</sup> Emphasis added.



commitment under paragraph 11.3 of its WTO Accession Protocol to eliminate all taxes and charges applied to exports.

## **1.2 China's Export Duties cannot be justified by Article XX(b) of the GATT 1994**

### **1.2.1 Article XX is not applicable to justify violations of paragraph 11.3 of China's Accession Protocol**

10. China appears to concede that it violated paragraph 11.3 of its Accession Protocol, However, China invokes the defence provided by Article XX of the GATT 1994, in order to justify this violation.
11. First of all, the EU claims that Paragraph 11.3 of China's Accession Protocol is an integral part of the WTO Agreement and not of the GATT Agreement. China's Accession Protocol reflects rights and obligations that were "tailor-made" for China. That is precisely why they are commonly referred to as "WTO-plus" obligations. China's Accession Protocol and Working Party Report were carefully negotiated and crafted, the result of some 15 years of negotiations. If the drafters of China's Accession Protocol would have wanted the general exceptions of Article XX of the GATT 1994 to apply to Paragraph 11.3, they would have stated it specifically.
12. Moreover, the EU fully agrees with the conclusions reached by both the panel and the Appellate Body in *China-Raw Materials*. In *China-Raw Materials* the Appellate Body had issued a clear and definitive ruling on the question of applicability of Article XX GATT 1994 defences to justify violations of Paragraph 11.3 of China's Accession Protocol. More specifically, the Appellate Body adjudicated that neither the objectives listed in the Preamble of the WTO Agreement, nor the balance struck between them provides specific guidance on the question of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol. It further stated that in the light of China's explicit commitment contained in Paragraph 11.3 to eliminate export duties, and the lack of any textual reference to Article XX of the GATT 1994 in that provision, it can see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3. It is important to note that, as the Appellate Body stated in *US-Stainless Steel (Mexico)*, absent *cogent reasons*, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.<sup>2</sup> This would ensure the security and predictability enshrined in Article 3.2 of the DSU
13. The EU further clarified its position as to the applicability of Article XX to China's export duty commitments in its reply to Question 15. There, the EU submitted that the phrase "nothing in this Agreement" refers only to the GATT 1994, and not to any other Agreement. The fact that some of the other multilateral trade agreements contain their own, similar exceptions (e.g. the GATS and TRIMS Agreements), while others do not, or else contain different exceptions (such as the SPS and TBT Agreements), indicates that *each* obligation has to be analysed in the framework of the *specific* exceptions available to it. Consequently, this supports the interpretation that the phrase "nothing in this Agreement" in Article XX GATT refers only to the GATT 1994 and that Article XX does not *as such* apply to other obligations outside the GATT 1994. This interpretation was also adopted by the panel in the *China-Raw Materials* dispute.
14. The panel found that "a priori, the reference to this "Agreement" suggests that the exceptions [...] relate only to the GATT 1994, and not to other Agreements. On occasion, WTO Members have *incorporated by cross-reference* the provisions of Article XX of the GATT 1994 into other covered agreements. This was done, for example, with the TRIMS Agreement, which *explicitly incorporates* the right to invoke the justifications of Article XX of the GATT 1994. In the Panel's view, the *legal basis* for applying Article XX exceptions to TRIMS obligations is *the text of the incorporation* of the TRIMS Agreement, *and not the text of the Article XX of the GATT 1994*."<sup>3</sup>
15. The Appellate Body in *China-Raw Materials* confirmed the panel's interpretation and went on to state that:

In the present case, we attach significance to the fact that Paragraph 11.3.of China's Accession Protocol expressly refers to

<sup>2</sup> See Appellate Body report, *US-Stainless Steel (Mexico)*, paras 157-162

<sup>3</sup> Panel report, *China-Raw Materials*, para. 7.153. Emphasis added.

Article VIII of the GATT 1994, but does not contain any reference to other provisions of the GATT 1994, including Article XX.<sup>4</sup>

16. The EU further submitted in its reply to **Question 48** that the second sentence of Article XII:1 GATT 1994 should be interpreted as a statement of fact, which certainly does not provide any guidance on the *manner* in which panels dealing with future Accession Protocols should examine *all the diverse* provisions in these Protocols and find an "intrinsic" link with any of the WTO covered agreements. The "WTO-plus" commitments contained in the various post-1994 Accession Protocols are self-standing and independent commitments, which, by their very nature, impose *specific* obligations that add to the obligations included in the WTO covered Agreements. Thus, the EU repeats its view that paragraph 11.3 of China's Accession Protocol does not form part of the GATT 1994 Agreement.
17. Lastly, the issue of the applicability of the general exceptions of the GATT 1994 to commitments contained in post-1994 Protocols of Accession was addressed in **Question 49**, regarding Russia's position on the applicability of the GATT 1994. In its response the EU pointed out that Russia's reference to its own accession negotiations is of little, if any, relevance for the interpretation of China's Accession Protocol, and the EU is not able to accede to Russia's description of the negotiating history. The question of Russia's right to invoke general exceptions of the GATT 1994 to justify violations of commitments contained in its Protocol of Accession was repeatedly discussed in the course of Russia's accession to the WTO. Moreover, the EU explicitly made known to Russia its view that and why these exceptions should *not* apply to *all* accession commitments. In any case, Russia's Protocol postdates China's by more than a decade and it is obvious that each accession protocol has to be judged on its own merits. This was clearly expressed by both the Panel and the Appellate Body in *China-Raw Materials*, which have both repeatedly pointed out that Article XX of the GATT could have been made applicable to paragraph 11.3 of China's Accession Protocol, if the negotiating parties had chosen to adopt a different approach in the Accession Protocol.

**1.2.2 Even if *arguendo* Article XX were considered to be applicable, China fails to make a prima facie case under Article XX(b)**

18. To defend its export duties China invokes the general exception for measures necessary to protect "human, animal or plant life or health" contained in Article XX(b) and claims that the export duties at issue are part of a "*comprehensive policy to protect the environment.*" This policy, according to China, includes a number of measures besides export duties.
19. The EU does not contest that the mining and processing of the materials at issue can cause environmental damage and does not challenge Chinese measures on stricter environmental protection. However, export duties do not provide a solution to environmental problems related to mining.
20. In order to be justified under Article XX (b), a measure must be necessary to protect human, animal, or plant life or health. Placing "necessary" in a continuum of "degrees of necessity", the Appellate Body, in *Korea-Beef*<sup>5</sup>, interpreted the term as being significantly closer to the pole "indispensable", than to the opposite pole "making a contribution to". In a later dispute, *Brazil-Tyres*<sup>6</sup>, the Appellate Body explained that a measure does not have to be "indispensable" in order to be "necessary". However, its contribution to the achievement of the objective must be *material*, not merely marginal or insignificant.
21. In defending its export duties under Article XX(b) of the GATT, China engages in selective quoting from the report in *Brazil-Tyres*. However, it does not demonstrate "quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence, as required by the Appellate Body.<sup>7</sup> Thus, it *fails to meet its burden of proof* in order to support its defence.
22. China alleges that its export duties "materially contribute" to the objective of health protection, because "by increasing the price of the domestic and foreign-bound products,

<sup>4</sup> Appellate Body Report, *China-Raw Materials*, para. 306

<sup>5</sup> Appellate Body Report, *Korea-Beef*, para. 161

<sup>6</sup> Appellate Body Report, *Brazil-Tyres*, para. 210

<sup>7</sup> Appellate Body Report, *Brazil-Tyres*, para. 151. Emphasis added.

demand for those products will decrease, and therefore production [...] will be reduced, resulting in less pollution connected with both mining and production."<sup>8</sup>

23. This assertion is intrinsically erroneous and misleading. While the costs incurred by measures applicable to the *production and consumption* of the products at issue, *export duties additionally* increase the price *only for the non-Chinese* consumers. The EU observes that any decrease in foreign demand results in the diversion of those products to the domestic Chinese market. This leads to a downward pressure in the price of these materials in the Chinese domestic market, and accordingly to potential incentives for their more intensive use in China's downstream industries, and thus to more production of these materials. Moreover, China does not provide any evidence or data on how the specific duty level that it imposes might have resulted in a decrease in demand, production and consumption of these products, and on how this had an alleged beneficial effect on health protection in China.<sup>9</sup>
24. After recalling the legal standards, China merely asserts that the export duties do not make a distinction according to the destination of the products being exported, and that they are an "*intrinsic part*" of China's policy of environmental protection. In the view of the EU this is not sufficient to justify China's measures under the chapeau and also not sufficient to shift the burden of proof to the complainants. In sum, the EU submits that China failed to meet its burden to prove that the export duties it imposes on rare earths, tungsten and molybdenum are "*necessary to protect human, animal or plant life or health*" as defined in Article XX (b) or compliant with the *chapeau* of Article XX, even if the Panel were to conclude – *quod non* – that it was applicable.

## 2 EXPORT QUOTAS

### **2.1 China's Export Quotas are inconsistent with Article XI:1 of the GATT 1994 and cannot be justified by Article XX(g) of the GATT 1994**

25. A measure falls under the prohibition of Article XI:I of the GATT 1994 when, first, it is a *governmental measure*<sup>10</sup> or there is *sufficient governmental involvement*<sup>11</sup> with it, and, second, it is a *quantitative restriction*<sup>12</sup>, i.e. it "prohibits or restricts the exportation or sale for exports of products." China's export quotas on rare earths, tungsten and molybdenum satisfy both these conditions, as they are undoubtedly governmental measures, introduced through various Chinese laws, regulations and notices, and they impose quantitative restrictions, as they prohibit or restrict the exportation of goods, within the meaning of Article XI:I of the GATT 1994. They do so, by expressly limiting the export of rare earths, tungsten and molybdenum to a certain maximum volume. Consequently China's export quotas on these products are inconsistent with Article XI:I of the GATT 1994.

#### **2.1.1 China's export quotas are not "*relating to the conservation of exhaustible natural resources*"**

26. According to WTO jurisprudence, in order for a measure under Article XX (g) of the GATT 1994 to *relate to* the conservation of exhaustible natural resources, it "must be "*primarily*<sup>13</sup> *aimed at*" this conservation.<sup>14</sup> More specifically, the relationship between the measure and the conservation objective must be a "*close and genuine relationship of ends and means*."<sup>15</sup> Following this interpretation, the panel concluded in *China-Raw Materials* that there was no "*clear link*" between the way the duties and quotas were set and "*any conservation objective*", since measures that *increase the costs* [of the raw materials at issue] *to foreign consumers but decrease their costs to domestic consumers* are difficult to reconcile with the goal of conserving [...].<sup>16</sup>

<sup>8</sup> China's Defence on Export Duties Submission of the 15 February 2013, para. 36

<sup>9</sup> Given the fact that China has imposed export duties for a number of years, the data on the production and consumption of these products over these last years should exist, but China has chosen not to present it.

<sup>10</sup> Panel report, *Argentina-Hides and Leather*, para. 11.18

<sup>11</sup> Id. citing the panel report in *Japan-Film*, para. 10.56

<sup>12</sup> Panel report, *India-Quantitative Restrictions*, para. 5.128. (upheld by the Appellate Body). Also, GATT panel report *Japan-Semiconductors*, para. 104.

<sup>13</sup> And not *merely incidentally and inadvertently*. See panel report, *China-Raw Materials*, para. 7.370, referring to the Appellate Body report in *US-Gasoline*.

<sup>14</sup> Appellate Body report, *US-Gasoline*, page 18. Emphasis added.

<sup>15</sup> Appellate Body report, *US-Shrimp*, paras 136 and 137

<sup>16</sup> Panel report, *China-Raw Material*, para. 7.434

27. China invoked the principle of sovereignty over its natural resources as part of its defence strategy. However, as the panel in *China-Raw Materials* pointed out, Members must exercise their sovereignty over natural resources consistently with their WTO obligations, and Article XX (g) has been interpreted and applied in a manner that respects WTO Members' sovereignty rights over their own natural resources.<sup>17</sup>
28. It is important to read this approach to the definition of conservation by the panel in *China-Raw Materials* as a whole, and not by mixing references to various international environmental declarations with the selective quoting of a phrase contained in the panel's report, as China did in paragraph 60 of its first written submission. The EU clarified this position in its reply to Question 56 of the panel in the current dispute. The EU made it clear in its reply to Question 56 that it disagrees with China's *definition of conservation* as including not only "*preservation*", but also measures that govern where a natural resource, *once extracted*, is being *consumed*.
29. The EU followed the same line of argumentation in its response to Question 57 of the panel in the current dispute. More specifically, the EU clarified that measures that limit the *extraction or production* of the products at issue are not regulated by Article XI:1 of the GATT 1994. China is free to dictate and control the pace of mining or extraction of all its natural resources. However, *once* these resources are *extracted*, they become a "*good*" or a "*commodity*", subject to the WTO rules and obligations, which China accepted by joining the WTO in full exercise of its sovereignty. Thus, in order to justify its export quotas on these products, China bears the burden of proving that these export restrictions comply with both Article XX (g) and the *chapeau* of the same article.<sup>18</sup> This view of the role of export restrictions in conservation was also supported by the panel in *China-Raw Materials*:
- It seems to us that a policy of restricting *extraction* would be more in line with a policy with a policy to achieve *conservation* than one confined to restricting exports. For the purpose of conservation of a resource it is not relevant whether the resource is *consumed* domestically or abroad; *what matters is the pace of extraction*.<sup>19</sup>
30. Despite scattered, formal textual links between the export quotas at issue and the goal of conservation, China fails to provide any evidence<sup>20</sup> of a "close and genuine relationship of ends and means" between its export restrictions and the conservation objective. Conservation could be pursued through clear and WTO-consistent (and not unilateral and highly trade-distorting) *extraction and production* controls. Consequently, the EU disagrees with China's statement that the combined effect of export quotas and production quotas could result in limitations on domestic consumption. As the EU made clear in its response to panel's Question 31, it is only the production quotas and more particularly the level at which they are set, which can have a "limiting effect" on domestic consumption. The effect of the export quotas is only to divert production—that would have otherwise been consumed abroad—to the Chinese domestic market, thus imposing a burden solely on foreign consumers.

### 2.1.2 China's export quotas are not made effective in conjunction with restrictions on domestic production or consumption

31. China also fails to pass the test of even-handedness, first clarified by the Appellate Body in *US-Gasoline*. The Appellate Body noted that if all limitations are placed upon imported products alone, the measure cannot be accepted as one that implements conservationist goals. Any such measure is naked discrimination for protecting locally-produced goods. Moreover, in *China-Raw Materials*, the panel explained that Article XX(g) cannot justify

<sup>17</sup> Id., para. 7.381. Emphasis added.

<sup>18</sup> China was aware of the terms of Article XX, as interpreted by the Appellate Body in its *Gasoline* and *Shrimp* reports, in particular with respect to the requirement that restrictions for which Article XX (g) is invoked could be justified only if they are made in conjunction with restrictions on domestic production or consumption.

<sup>19</sup> Panel report, *China-Raw Materials*, paras 7.427 and 7.428. Footnotes omitted. Emphasis added.

<sup>20</sup> Or provides entirely unverifiable evidence. For example, China alleged in its first written submission that its territory is estimated to hold only 23% of the world's rare earth reserves, and that this percentage is based on data on world reserves of the United States Geological Survey, "adjusted" on the basis of Chinese reserve data, available from the Ministry of Land and Resources. However, China did not present any more information about the method of this adjustment or the data it relied upon.

- GATT-inconsistent measures "whose goal or effect is to insulate domestic producers from foreign competition in the name of conservation".<sup>21</sup> It also adds that a certain *quantitative balance* of the restrictive effects imposed on the domestic side and on the export side has to be respected.<sup>22</sup>
32. The EU agrees with the panel's test of "even-handedness" in *China-Raw Materials*, as stated in its reply to the **Question 34** of the Panel in the current dispute. Moreover, the EU agrees with Canada and Australia that limitations on production affect both foreign and domestic users, while export restrictions have an *additional* restrictive effect *only on foreign* users. In the opinion of the EU, China has not provided any evidence regarding any measure affecting the Chinese domestic consumers, which could potentially act as this required "balance" to the *additional* restrictive effects on foreign consumers. On the contrary, the incomplete and incoherent data it provided seem to portray an increase in both the actual production and actual and potential consumption of the materials at issue in China.
  33. In assessing even-handedness, the EU considers, in principle, price differences between foreign and domestic prices to be relevant. However, as expressed in the reply to **Question 35** of the panel, although higher export prices are a clear sign of discrimination against foreign consumers resulting from stricter limitations on foreign supply, export restrictions may also exacerbate price instability in markets outside China. Thus, even if domestic and foreign prices for some *specific* rare earths products, in *specific* time periods, converge,<sup>23</sup> export restrictions have long-term distorting effects, leading to *unusual foreign pricing patterns*, which are in themselves a good indicator of uneven-handedness.
  34. The EU further commented on these long-term distorting effects in its response in Panel's **Question 33**, where the EU pointed out that the tightening of China's export restrictions triggered a huge price hike in 2011, followed by a decline in prices and demand in 2012, as companies outside China eventually started to adjust by running down stocks, modifying production plans and/or resorting to using inferior substitutes or pull out from certain segments of business altogether.
  35. Similarly, in the reply to **Question 38** of the Panel, the EU commented on the relevance of the utilization of export quotas in assessing even-handedness. The EU pointed out that an infringement of Article XI:I of the GATT 1994 is *presumed* to nullify or impair the benefits of another Member.<sup>24</sup> Moreover, Article XI:I protects against *all* trade distorting effects of quotas, and not only of effects on trade-flow volumes.<sup>25</sup> Thus, China and not the complainants *bears the burden* of showing that its export quotas, including *all* their trade distortive effects prohibited by Article XI:I, can be justified under Article XX (g) of the GATT 1994.
  36. Moreover, as the EU remarked in its response to **Question 33**, the quota utilization rates fail to reflect the demand satisfied through unofficial channels. In 2011 more rare earths have been smuggled out of China, which means that demand has been well present but satisfied through unlawful means. This also undermines the validity of China's statement that "in the absence of the export quota system for rare earths, with unsatisfied foreign demand for these high value products Chinese enterprises have an incentive to produce illegally and sell to foreign consumers".<sup>26</sup> As the EU pointed out in its reply to Panel's **Question 26**, the price premium of the products in dispute when traded in foreign markets provides greater incentives for illegal mining and exporting of these products. However, this price premium is the very result of China's export quota system.

<sup>21</sup> Panel report, *China-Raw Materials*, para. 7.408

<sup>22</sup> *Id.*, para. 7.465

<sup>23</sup> Which may be due to business uncertainty about supply conditions and unexpected drops in demand for these products in some downstream industries abroad.

<sup>24</sup> See Article 3.8 DSU

<sup>25</sup> Nullification and impairment is presumed even when there is no trade flow between the complaining and defending Member, i.e. where what is protected is an expectation. See eg. Appellate Body report, *EC-Bananas*, para. 249. Moreover, in view of the multifaceted trade-distorting effects of export quotas, nullification and impairment would also be presumed even where, despite the quotas, exports from China to any of the complaining Members/any other WTO Members/WTO Membership as a whole were gradually increasing over time. See panel report, *Turkey-Restrictions on Textile and Clothing*, para. 9.204

<sup>26</sup> China's first written submission, para. 135

37. Last, as noted in response to Question 58, the EU considers the preparatory work of Article XX(g) relevant for its interpretation. The EU believes that the drafters of the GATT evidently did not intend that quantitative restrictions, or export quotas, would be used to promote or protect domestic industries, through advantages in price or supply to the detriment of foreign competitors

### 2.1.3 Chapeau of Article XX of the GATT 1994

38. The prerequisites included in the chapeau of Article XX serve as guarantees that the general exceptions allowed by this Article are not *abused*.<sup>27</sup> In order for these exceptions to be exercised *in good faith*,<sup>28</sup> a measure must *not* constitute, in its design, architecture, structure, and application, arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.
39. China alleges that no discrimination exists, because its export quota measures *de jure* do not discriminate among WTO Members that import the goods in dispute. However, China affords a differential treatment to its *domestic* users compared to all other WTO Members, and fails to make a *prima facie* case that its measures comply with the chapeau of the Article XX.
40. The trade restrictive effects of China's export quotas confirm that China's policies are the very type of disguised protectionism that the chapeau seeks to prevent. Various other policy tools could have been employed, which would have been equally (or more) effective. As the EU argued in its response to Question 53, paragraph II.1.10 of Exhibit CHN-107-b and paragraph 1.5 (second paragraph) of Exhibit CHN-100-B also attest the protectionist character of the export quotas, since they point to the incoherent nature of China's alleged conservation policy, which is fundamentally driven by industrial policy.
41. China argues that its export quotas do not constitute a disguised restriction because first, the quotas for 2011 and 2012 were sufficient to meet foreign demand;<sup>29</sup> second, its quota administration system creates incentives for meeting the demand of foreign users,<sup>30</sup> and third, the system is flexible to meet the needs of foreign consumers.<sup>31</sup>
42. As regards the second argument, the EU considers it to be both legally and factually questionable. Legally questionable, because China relies on features of its quota administration regime that are challenged as incompatible with explicit obligations that China undertook under the Accession Protocol and Working Party Report to justify the very existence of its export quotas. Factually questionable, because the eligibility criteria that China imposes on potential exporters would appear to have at best an incidental effect of ensuring full utilization of allocated quotas.<sup>32</sup>
43. With reference to China's last argument, the EU notes that in order to justify its export quotas under the *chapeau*, China should demonstrate that it has not put in place a rigid and arbitrary quota administration system which is inapt of duly taking into account foreign demand.<sup>33</sup> China failed to do so.
44. As the EU made clear in its response to Panel's Question 19, the EU agrees with the analysis of the panel in *China-Raw Materials*, and more specifically with paragraphs 7.375 and 7.384-7.386. It is indeed important to interpret Article XX (g) in accordance with customary rules of treaty interpretation, which would not lead to interpreting in such a way as to contradict the provisions of Article XX (i), i.e. to allow a Member to do indirectly what paragraph (i) prohibits directly.
45. As stated in EU's response to Question 39 of the Panel, the EU disagrees with China's claim that "export quotas are not a disguised restriction on trade because the export quotas, in isolation, do not cause any significant price difference between adjusted export and domestic rare earths prices."<sup>34</sup> The EU objects to China's highly selective assessment based on an analysis of a few products subject to export quotas, and also contests China's

<sup>27</sup> Appellate Body report, *US-Shrimp*, para. 157

<sup>28</sup> Appellate Body report, *Brazil-Tyres*, para. 215

<sup>29</sup> China's first written submissions, paras 233-235, 378

<sup>30</sup> *Id.*, paras 236-246, 379

<sup>31</sup> *Id.*, paras 247-249

<sup>32</sup> See e.g. European Union's first written submissions, para. 63

<sup>33</sup> See Appellate Body report, *US-Shrimp*, paras 180-183

<sup>34</sup> See China's Oral Statement, first substantive meeting, para. 50

unclear calculations in Figures 4 and 5. The EU also draws the Panel's attention to China's statement in paragraph 51 of its Oral Statement, where China itself acknowledged that price differences between domestic and adjusted export prices can be explained by various factors. The EU notes that such factors can be disrupted foreign demand, speculative behaviours, and the usual discriminatory price-gap effect of the export quota.

## **2.2 China's Export Quotas are inconsistent with its obligations under the Accession Protocol**

46. China's export quotas on rare earths, tungsten and molybdenum are inconsistent with its commitments set forth in paragraphs 162 and 165 of its *Working Party Report*. China has not eliminated its export restrictions upon its accession to the WTO and, moreover, they continue to be in place till today. China's export quotas constitute a violation of Article XI:1 of the GATT 1994, and they are also inconsistent with paragraph 1.2 of China's *Accession Protocol*, which incorporates China's commitments contained in paragraphs 162 and 165 of its *Working Party Report*.

### **3 EXPORT QUOTA ADMINISTRATION AND ALLOCATION**

47. China imposes restrictions on the trading rights of enterprises seeking to export various forms of rare earths and molybdenum contrary to its commitments under the *Accession Protocol* and *Working Party Report*. More specifically, China violates the commitments undertaken in paragraphs 83 and 84 of the Working Party Report, which are incorporated, by virtue of paragraph 342, into paragraph 1.2 of China's Accession Protocol. China also violates paragraph 5.1 of its Accession Protocol, which imposes the obligation that three years after accession "all enterprises in China [...] have the right to trade in all goods throughout the customs territory of China", and clarifies that the "right to trade" includes the "right to export [...] goods."
48. With regard to rare earths, the EU challenges the export performance requirements imposed by the *2012 Rare Earth Export Quota Application Procedures*,<sup>35</sup> as well as MOFCOM's reliance on a company's export performance in calculating the actual quota allocation for rare earth products.<sup>36</sup> The EU also challenges the minimum capital requirements that the Procedures impose on rare earths trading enterprises. With regard to molybdenum, the EU challenges the export performance and prior experience requirements that the Export Quota Measures<sup>37</sup> and the 2012 Molybdenum Export Quota Application Procedures<sup>38</sup> impose. Furthermore, MOFCOM relies on a company's export performance in calculating the actual quota allocation pursuant to the quota allocation formulas for molybdenum.<sup>39</sup>
49. The EU does not agree with China's statement in paragraph 407 of its first written submission that its quota allocation is not discretionary because it is based on a fixed formula. As replied to the Panel's **Question 17**, what the EU challenges under paragraph 84(b) as incompatible with the requirement to grant trading rights in a non-discretionary manner, is not the allocation formula, but the *discretion* that the 2012 Molybdenum Export Quota Application Procedures allows and indeed requires China to exercise *in deciding the eligibility* of potential exporters.
50. As the EU replied to **Question 12** of the Panel, the EU considers the obligations under paragraphs 83 and 84 of China's Working Party Report and the claims under paragraph 5.1 of China's Accession Protocol to be closely related. Paragraphs 83 and 84 elaborate on the obligation to grant the right to trade under paragraph 5.1 of the Accession Protocol, inter alia by creating *specific* commitments with respect to minimum capital and prior experience requirements. Given the specific nature of paragraphs 83 and 84, the EU submits that the analysis should logically begin with these more specific commitments, since their violation also results in a violation of the general obligation of paragraph 5.1. Moreover, the EU replied in **Question 8** that two particular types of restrictions to trading rights, minimum capital requirements and prior experience requirements, are *expressly excluded* from the scope of WTO-consistent regulation.

<sup>35</sup> See *2012 Rare Earths Export Quota Application Procedures* (Exhibit JE-61)

<sup>36</sup> See 2012 First Batch Rare Earth Export Quota, Annex 1 (Exhibit JE-55)

<sup>37</sup> See Export Quota Measures, (Exhibit JE-52)

<sup>38</sup> See 2012 Molybdenum Export Quota Application Procedures, Part II.i.2, (Exhibit JE-63)

<sup>39</sup> See 2012 First Batch Tungsten and Molybdenum Export Quota, Annex 2, p.8, (Exhibit JE-59)

*Second Part of the Integrated Executive Summary of the European Union***1. CHINA'S EXPORT QUOTAS FOR RARE EARTHS ARE IN BREACH OF CHINA'S WTO-OBLIGATIONS****1.1. CHINA'S POLICY CONCERNING RARE EARTHS**

1. While the European Union does not put into question China's objective to conserve exhaustible natural resources, the European Union submits that China's export quotas at issue do not form part of that policy. Rather China only recently tried to "fit" the quotas into its "comprehensive conservation policy for rare earths" for the purposes of the defence of this dispute before this Panel, but has been relying on them for many years in pursuing its industrial policy objectives. China's export quotas are not aimed at conservation at all, but were always, and still are serving to protect and promote China's domestic downstream industry which utilizes these materials.
2. Moreover, while China's dominant position in the supply of rare earths today is undisputable; two things should be borne in mind. First, that China played an active role in creating this "monopoly" situation. China's operators undercut world prices in the 1990s, leading mining operations located in other countries to close, as it was no longer possible for them to compete with China's low prices. Second, China uses the vast majority of the rare earths produced in China itself.

**1.2. LEGAL STANDARD FOR APPLICATION OF SUB-PARAGRAPH (G) AND THE CHAPEAU OF ARTICLE XX OF THE GATT 1994****1.2.1. Sub-paragraph (g) of Article XX of the GATT 1994**

3. In the *US-Gasoline* dispute, the meaning of the phrase "*relating to*" was interpreted by the Appellate Body to mean that a measure "must be "*primarily aimed at*" the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g). The meaning of the phrase "*relating to*" in Article XX(g) was further clarified in the *US-Shrimp* dispute, where the Appellate Body confirmed that Article XX(g) referred to measures "*primarily aimed at*" conservation, and also described the relationship between the measure and the conservation objective pursued as a "*close and genuine relationship of ends and means*".
4. This test of examining whether there was a close relationship between the "*ends*" (i.e. the goal of the conservation of an exhaustible natural resource) and the "*means*" (the export quotas at issue) was also followed by the panel in *China-Raw Materials*. The panel in *China-Raw Materials* noted that there was no "clear link" between the way the duty and quota were set and "any conservation objective". It concluded that China had therefore not met its burden of proving that its export quotas and export duties on the materials at issue in that dispute "related to" conservation.
5. China's interpretation of "conservation" as also encompassing the "use and management" of natural resources is based on a selective reading of the panel report in *China-Raw Materials*, and it does not find support in this report. To the contrary, the panel made it clear also in referring to the exception provided for in GATT Article XX(i) that the exception under Article XX(g) does not leave room to extend the meaning of conservation to cover any economic goals. According to the panel, WTO members cannot rely on XX(g) to "excuse domestic restrictions adopted in aid of economic development if they operate to increase protection of the domestic industry." (see para. 7.386). Moreover, the panel reasoned that for the purposes of the conservation of a natural resource what matters is not in which country or location the resource is consumed, but the rate or pace at which it was extracted or mined. The panel was also very clear in stating that WTO Member States must exercise their sovereignty over natural resources consistently with their WTO obligations. According to the European Union, that means that any restrictive trade measures that China takes *vis-a-vis* other WTO Member States must be in line with the legal obligations that China had undertaken to abide by when it joined the WTO. This is no more than a reflection of the principle of customary international law "*pacta sunt servanda*". In the opinion of the European Union, it is clear that the panel in *China-Raw Materials*, did not intend to extend the scope of the meaning of "conservation" within Article XX(g) to also include the "management and use of these resources", as understood by China. The European Union accepts that conceptually any conservation policy entails an element of management: the very act of restricting production or consumption is an act of management of resources. The



European Union does not, however, agree with China that conservation within the meaning of Article XX(g) could be read as entailing management or use to the advantage of the WTO Member which instituted the conservation policy and the disadvantage of other WTO Members. In other words, conservation is not about allocation of where the product is consumed. The European Union accordingly submits that a measure, the objective of which is to allocate where the product will be consumed, is neither a conservation measure nor a measure related to conservation. Economic objectives are separate and distinct from the non-economic goal of conserving exhaustible natural resources. They cannot and must not be subsumed into the concept of conservation within the meaning of Article XX(g) of the GATT 1994 as to do so would run contrary to customary rules of treaty interpretation and would fundamentally alter the negotiated balance of rights and obligations.

6. The European Union objects to China's interpretation, which reads protectionism into the exception for the otherwise legitimate non-economic objective of conservation. Such an interpretation would make the *chapeau* lose its effect and purpose as a safeguard against abuse of rights and protectionism. This would be manifestly abhorrent to the principles of treaty interpretation. The text should be interpreted holistically; hence the interpretation of the exception should not be such as to reduce the *chapeau* to nullity.
7. Moreover, as reflected in "*The Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment*", the fact that the proposal to delete the text following the phrase "natural resources" was not accepted by the Conference is clear proof that the negotiating parties wanted to keep this exception to a minimum, by requiring that the two conditions are cumulatively met. Obviously, if the second condition (i.e. "made effective in conjunction with restrictions on domestic production or consumption") had been removed, this would have had the effect of significantly extending the scope of the exception. The omission of the words "or other" (resources) is also highly relevant. It is clear that the delegates attending the Conference in 1947, wanted to restrict the scope of this provision to "exhaustible natural resources" and to exclude all "other resources" from its application.
8. The requirement that the measure be "made effective in conjunction with restrictions on domestic production or consumption" has been clarified through WTO jurisprudence as requiring that there be something more than the mere existence of a production restriction in place. A production restriction, which – if having any restrictive effect - impacts both foreign and domestic users is not enough. Instead, a certain limiting effect needs to be felt on the domestic side in order to counter-balance the impact (or limiting effect) of the export restrictions of foreign users and make it provisionally justifiable under Article XX(g). If a WTO Member is not taking steps to restrict the supply of natural resources domestically, it is not entitled to seek the cover of Article XX(g) for the trade restrictive measures it claims are helping to conserve the resource for future generations.
9. In the view of the European Union, the test used by the panel in *China – Raw Materials* requires that a regulatory scheme which was adopted for the purpose of conservation of natural resources establishes a balance between the burdens placed on domestic and foreign consumption of the material protected by the conservation policy. The European Union understands counterbalance in line with its ordinary meaning, that is, something that weighs or balances one thing against another, something that balances or cancels the effect of a thing. This balance is a systemic or structural one and not a balance of effects. The Appellate Body in *US – Gasoline* indicated that even-handedness does not involve an effects test. Thus, the "impact" which the panel referred to in *China – Raw Materials* should not be understood as the actual trade impact or "effects", but would instead be a regulatory or structural impact.
10. Contrary to what China argues, Article XIII is not relevant in the context of this dispute. Unlike Article XIII, the even-handedness test under Article XX(g) does not try to ensure non-discriminatory treatment between third countries affected (MFN-type), but instead compares the restrictiveness of the measures imposed domestically and the measures imposed on other WTO Members (NT-type). WTO jurisprudence concerning paragraph (g) and specifically the even-handedness test confirms that Article XIII principles are not relevant in assessing whether the measure with respect to which the conservation exception has been invoked and domestic restrictions for conservation "are made effective in conjunction" with each other. This conclusion is also supported by the panel report in *China – Raw Materials*, which was faced with legal and factual issues similar to those before this Panel.

Furthermore, the European Union notes that based on the facts in the current dispute, it would be nearly impossible to determine the hypothetical levels of exports that Members might have been expected to obtain in the absence of export quotas. This is particularly so because China has been for a number of years now imposing and gradually tightening its export restrictions, while at the same time constantly increasing domestic production.

11. The European Union also notes that China does not contend that it would be prepared to respect the disciplines of Article XIII. Rather, China casually selects out of Article XIII what fits its line of argument and disregards the rest. China suggests that its quota setting is somehow compatible with Article XIII, because China is trying to approach as closely as possible what the foreign and domestic consumers "might be expected to obtain" under normal market circumstances. Yet, "normal market circumstances" as understood by China are not what Article XIII requires. What Article XIII:2 requires is to allocate quotas based on distribution which existed prior to their introduction; i.e. before trade was restricted and distorted. What China does in actual fact is allocate quotas in a non-transparent process which only takes into account the current and projected needs of its domestic industry and arbitrarily determines the "needs" of non-Chinese consumers.

#### 1.2.2. The *chapeau* of Article XX of the GATT 1994

12. There are three requirements contained in the *chapeau*: (i) *arbitrary discrimination* (between countries where the same conditions prevail); (ii) *unjustifiable discrimination* (with the same qualifier); or (iii) *disguised restriction on international trade*. The measure at issue must comply with all three requirements in its application, whereby the inconsistent application may also be the result of the measure's flawed design, architecture and structure.
13. In order for a measure to comply with the prohibition of "arbitrary or unjustifiable discrimination" pursuant to the *chapeau*, the Member invoking the exception must establish that the application of the measure does not result in *discrimination*. Where discrimination exists, the Member invoking the exception must show that the discriminatory treatment is not *arbitrary* or *unjustifiable* in character. Discrimination within the meaning of the *chapeau* concerns not only discrimination between importing countries (i.e. "most favoured nation" type), but also between the home country and the importing countries (i.e. "national treatment" type).
14. The Appellate Body in *Brazil-Retreated Tyres* noted that the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should be based on the cause of the discrimination and not exclusively on the effects of such discrimination. The Appellate Body then explained that arbitrary or unjustifiable discrimination exists when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. Moreover, it emphasized that the determination of whether a measure is discriminatory in violation of the *chapeau* of Article XX should not depend exclusively on its quantitative impact, without consideration of whether the rationale for the discrimination relates to the legitimate objective of the measure. In addition, according to the Appellate Body, discrimination can also be arbitrary or unjustifiable, in cases where it is avoidable and foreseeable. This will be the case, where alternative measures exist which would have avoided or at least diminished the discriminatory treatment. Last, to comply with the *chapeau* requirements, a measure that conveys – justified – preferences to some WTO Members, but not to others, must in addition be administered on the basis of objective and verifiable criteria and in accordance with the principle of due process.
15. In addition to satisfying the arbitrary and unjustifiable discrimination criterion, a measure with respect to which an exception has been invoked may also not constitute a *disguised restriction on international trade*. The Appellate Body clarified that any restriction which formally meets the requirements of Article XX(g) will constitute an abuse if such compliance is in fact only a *disguise to conceal the pursuit of trade-restrictive objectives*. Disguised discrimination in international trade does not exhaust the meaning of disguised restriction. This was confirmed by the panel in *EC – Asbestos* which noted that the term "disguised" usually implies an intention to conceal something. As a consequence, the focus of the analysis is on the "protectionist object". This object will in most cases not be readily apparent. The panel in *EC – Asbestos* observed in that regard that the protectionist objective of a measure can frequently be discerned from the "design, architecture and revealing structure" of that measure.

1.3. CHINA'S EXPORT QUOTAS ON RARE EARTHS DO NOT MEET THE CONDITIONS OF SUB-PARAGRAPH (G) OF ARTICLE XX OF THE GATT 1994

**1.3.1. China's export quotas are not measures "relating to the conservation of exhaustible natural resources" within the meaning of Article XX(g) of the GATT 1994**

16. The European Union contests China's argument that the export quotas imposed by China (i.e. the measures at issue in this dispute) in violation of Article XI of the GATT 1994, genuinely are "relating to the conservation of exhaustible natural resources" within the meaning of Article XX(g).
17. As China claims that its commitments under paragraphs 162 and 165 of China's Working Party Report on the export quotas on rare earths are also justified under GATT Article XX(g), the arguments made by the European Union rebutting China's claims apply *mutatis mutandis*.
18. The European Union is of the view that "mixed rare earth oxides", "rare earth metals" and "rare earth alloys" are materials which have been derived from "natural resources", but have subsequently undergone several processes that have changed them into processed products, with different uses and applications in industry. The European Union notes that a measure that concerns a product which can no longer be considered as a "natural resource" is not as a result *per se* incapable of being justified under Article XX(g) of the GATT. However, the further one goes from the natural resource, the greater degree of scrutiny is required into whether the relationship between the ends and means (measure and conservation) is indeed genuine. Similarly and perhaps even more importantly, the difference between the scope of the export quota and the scope of the domestic production restrictions puts into question the genuineness of the link of the export quotas with the conservation objective. China's imposition of export quotas on all these kinds of "further-processed" rare earth products lacks the link to conservation and constitutes further proof that the real motivation behind China's export quotas is not conservation but industrial policy.
19. The European Union notes that the only textual references to conservation appear in late 2011, in the notices which implement the export quotas on rare earths for 2012. None of China's measures imposing export quotas in previous years contained this – although only passing – reference or phrasing, despite the fact that China had been imposing export quotas on rare earths since 1999. Moreover, it is important to keep in mind that these notices were published in late 2011, when China had already learnt that it had lost the *China-Raw Materials* dispute before the WTO, an almost identical case to the dispute before this Panel.
20. Given the importance China attaches to the fact that the export quotas are imposed for conservation purposes, and that this seems to be their only alleged objective, it seems questionable to the European Union that there have been no other references to conservation before 2012, and even then, only in two of the relevant measures.
21. In an effort to create further links between the export quotas and the conservation objective, China resorts to citing "cross-references" that the Notices imposing implementing the rare earth quotas for 2012 have with other general laws in China. China does so even whilst admitting that these 2012 Notices "do not explicitly refer to the conservation objective" that it keeps referring to. However, independently of the fact that such "cross-references" appear too remote, there is not even an obvious reference to "conservation" as both basic measures also list other reasons for which the export quotas could have been imposed.
22. Contrary to what China alleges, the *Declaration on the Setting of 2012 Export Quotas on Rare Earth Products*, does not show that the real motivation behind the setting-up and imposition of the export quotas on rare earths is conservation. Rather, the Chinese authorities' main concern seems to be that of ensuring that there is enough production of rare earths available to satisfy the domestic demand of Chinese industry. What is conspicuously absent in Mr Zhang's Declaration is any verifiable information or explanation about how the level of the export quotas on rare earths relates to the objective of conservation.
23. Furthermore, the European Union finds China's assertions about the role of export quotas in relation to smuggling and illegal production to be erroneous and misleading. First of all,

export quotas, in terms of quantitative restrictions, are not needed in order to enforce production levels, and to combat illegal mining or smuggling. China can rely on other means available for the enforcement of its production quotas on rare earths. In addition, China fails to demonstrate that there is a necessary link between illegally mined rare earths and the exporting of rare earth. Illegally mined rare earths can just as well be sold and consumed within China – as China itself concedes- and thus it is difficult to understand how the export quotas imposed by China would be relevant as an instrument against illegal mining. In the view of the European Union, export quotas cannot reasonably be considered as the answer to smuggling (and hence an instrument of conservation) since it is those very export quotas (and export duties) that create the incentive for smuggling, as acknowledged by Chinese officials themselves. Moreover, stopping illegal trade is best done in a plurilateral setting, as both exporters and importers will have an incentive to reduce or eliminate illegal trade if they are subject to a double control, both at origin and destination.

24. The European Union also disagrees with China that export quotas signal to foreign users of rare earths the need to develop and locate other sources of supply or develop substitutes and that these export quotas create a disincentive to domestic Chinese producers to expand production. First of all, the "signalling" that China is claiming to pursue with its export quotas cannot be done in a WTO-incompatible manner, like China is doing. The effects that China claims to pursue could be sufficiently achieved by the strict enforcement of a production quota on these materials. Moreover, and contrary to what China is claiming, sending such a message to foreign users only – by means of a tightened export quota - fails to achieve the conservation aim. Such a signal rather leads to encourage foreign users of rare earths to relocate their manufacturing operations to China in order to secure the necessary supply of rare earths. The European Union therefore contends, that the "signal" China is sending out by imposing export quotas does not contribute to its alleged conservation aim but rather to the relocation of foreign companies to China and the further development of rare earth manufacturing industry in China. Moreover, price volatility due to Chinese export restrictions, and the uncertainty that comes with it, is destructive to business confidence.
25. The European Union also challenges China's arguments that its export quotas on rare earths function as a safeguard mechanism against unanticipated surging exports, which could negatively impact China's domestic users. The pursuit of such an obviously "economic" objective, is not related to "conservation" and cannot be expected as legitimate in the context of Article XX(g) of the GATT. Including economic objectives in the meaning of "conservation" would be against the ordinary meaning and the negotiating history of Article XX of the GATT, as well as contrary to the context – notably Article XX(i) and the *chapeau* – and the purpose of the provision. Accepting China's proposed reading would fundamentally alter the negotiating balance and effectively result in an amendment of the GATT 1994.

**1.3.2. China's export quotas on rare earths are not "made effective in conjunction with domestic restrictions on production or consumption"**

26. In order to justify its measures, China must show that the export quotas it imposes on rare earths "work together with" or "operate jointly with" restrictions on domestic production or consumption. In addition, it must also show that the restrictions on domestic production or consumption operate so as to conserve a natural resource.
27. It is wrong to assume that if there is a decrease in the number of mining licenses granted, this will necessarily result in less mining. Moreover, it also does not follow that a "smaller number of bigger" mining companies, will necessarily mine less than a "bigger number of smaller" ones, even more so as China sets production scales and minimum recovery rates as access criteria. Economies of scale, and better and more efficient technology which are available to the "bigger enterprises," would indicate that these larger, more efficient mining companies could actually have the capacity to produce more, and to produce it more efficiently.
28. With regard to China's volume restrictions, and more specifically restrictions on domestic production, as the data produced by China shows, the first indication of an "extraction plan" appears for the year 2006, even though the export quotas on rare earths had been in place already for a number of years. This sequencing does not reconcile and even directly contradicts China's asserted defence that its export quotas for rare earths are part of its

conservation policy. The export quotas came first, the extraction limits on rare earths came later, and were then regularly and consistently exceeded by Chinese producers.

29. Moreover, it is important to note that the "Extraction Plans" that were set by China were consistently exceeded every year till 2010. According to China's data, it was only in 2011 that China's "Extraction Plan" was not exceeded. Since China introduced its "Extraction Plan" for rare earths in 2006, there has been a steady increase indicating an upward in the amount of rare earths allowed to be extracted. From a conservation point of view, this means nothing else than an increase in the pace of extraction. The European Union thus submits that China's restrictions on domestic production, do not in fact effectively constrain the current levels of production.
30. In its second written submission China concedes that its "comprehensive conservation policy" measures may not have actually restricted domestic consumption or production. It contends, nonetheless, that putting in place a measure which "intends" to restrict domestic production or consumption is sufficient to satisfy the requirements of Article XX(g). To apply Article XX(g) in such a lax manner would go against established jurisprudence and deprive the test of any real meaning. In the view of the European Union an interpretation whereby "made effective" would be limited to the act of "adopting" or entering into force in accordance with municipal law, could open the possibility for WTO Members to avoid the disciplines of Article XX(g), merely by adopting legislation, but without ever enforcing it. Such a reading would also not be supported by the context of the provision and its negotiating history.
31. Evidence on "effectiveness" of a measure is relevant – even critical - in determining whether the system is related to conservation and even-handed. In this respect, the facts on the record justify an even greater degree of scrutiny of China's allegation that it has "made effective" domestic production or consumption restrictions. Let us recall that production caps for rare earths did not exist until 2007 and have certainly not had any effect until 2011. Furthermore, the production caps historically have been set at such high levels that they served as production targets, not limitations, or have never been seriously enforced. Setting a target for boosting production is not a "restriction on domestic production" – in fact, it accelerates the rate of depletion.
32. Even with respect to 2011, the European Union submits that China failed to establish a causal link between the existence of the restriction and the reduction in domestic production or consumption. The latter seems instead to be attributable to the global slowdown and related decrease in demand of downstream products, as well as to strategic reductions in production by Chinese producers, who reduced supply in the hope that the prices which had decreased compared to prior periods would pick up again.
33. The European Union also contests China's allegation that there are restrictions in place with respect to domestic consumption of rare earths. The European Union disagrees with China's assertion that the premise that the material eligible for exports under the quota needs to be subtracted from the production and would therefore lead to a reduced amount of material available for Chinese domestic consumption. China seems to treat the "export quotas" as a kind of allocation mechanism which takes the supply of rare-earths away from the domestic Chinese market, while completely disregarding what the export quotas really are: i.e. restrictions on the foreign consumption of rare-earths.
34. China argues that domestic consumption is limited by the export quota because "the share of the production quota available to domestic consumers is limited to the volume obtained by deducting the export quota from the production quota". The European Union disagrees with China's argument that domestic consumption is restricted by the combined effect of a production quota and the export quota. This assertion is based on two assumptions which do not hold in the case of China. Firstly, that the production quota is set as low as to be capable of restricting domestic consumption. This is not the case, since China's extraction quota and production quotas are set at a level far higher than actual consumption, hence they would not restrict it even if the quantities "earmarked" for exports were not to be made available to domestic consumers. Secondly, China not only allows for unutilised export quotas to be sold domestically, but also has no mechanism in place to prevent the selling out to domestic users of quantities allocated for export quotas. Except the possible desire to keep customers and not to see the future export quota allocations possibly reduced, nothing under the Chinese system actually acts so as to prevent expansion of Chinese domestic consumption at the expense of foreign consumption. While distrusting the market when it comes to risks

that may affect domestic consumption, China essentially relies on market forces as the mechanism which will ensure that quantities "earmarked" for exports will indeed be destined for export and will not instead be used up by domestic downstream production. So while the export quotas demonstrably have the effect of restricting access to rare earths for foreign consumers, the same cannot be said for Chinese consumers who have access to all rare earths produced in a given year.

35. Moreover, as regards the resource tax measure imposed on the extraction of light rare earths (60 RMB per Ton) and medium/heavy rare earths (30 RMB per Ton) China has not nor can it substantiate the link between the resource tax and a decrease in production or consumption. Furthermore, and contrary to what China implies, the additional cost incurred by the rare earth mining enterprises from the resource tax would not be necessarily passed on the consumers of these products, by an increase in the price. In any event, even if the Panel were to consider that price increases can occur as a result of the application of the "resource tax", this does not establish the existence of a domestic restriction, since the additional costs imposed by the "resource tax" would be borne by both domestic and foreign users equally.
36. With reference to the environmental requirements that China imposes on the producers of rare earths the European Union notes that the fact that the mining industry in China is improving its environmental standards, is laudable, but not *per se* linked to conservation. It needs to be borne in mind that China claims that its export quotas on rare earths are "related to conservation" within the meaning (and subject to the disciplines) of Article XX(g) and not measures necessary for the protection of the environment falling under Article XX(b). Moreover, similar to its claims on the imposition of the resource tax, China alleges that through increased environmental costs it is restricting production or consumption of rare earths. However it does not offer any explanation *how* any increased environmental costs for the rare earths producing industry are actually decreasing production or consumption, *let alone evidence that they really are*.
37. Additionally, according to established WTO jurisprudence, the mere existence of a production or consumption restriction is not enough. In order for a measure to pass the "even-handedness" test, there has to be a *balance* in place between the *impact* of the export quotas imposed on foreign users, and the impact of restrictions on the domestic users and consumers. In the opinion of the European Union, China's export quotas on rare-earths do not pass the "even-handedness" test as required by GATT Article XX(g). In order to achieve the balance required by the even-handedness standard as developed in the jurisprudence concerning Article XX(g), there needs to be an equivalent (albeit not identical) impact on the "consumption" of these products in China, in order to act as a "balance" to the burden that the export quotas on rare earths impose on the foreign consumers of these materials.
38. The "even-handedness" test as developed in WTO jurisprudence is essentially also a "fairness" or "impartiality" test. Even if it does not require "identical" treatment of the domestic and foreign consumers of these materials, it definitely does require a "balanced" one. Analysed from that perspective, China's export quotas on rare earths clearly are an additional burden on foreign consumers – beyond the possible limiting effect of production quotas impacting foreign and domestic consumers equally – which is not counter-balanced by any restriction imposed on domestic production or consumption. In this present dispute, the Panel has to assess the "even-handedness" requirement when looking at the "impact" or added burden of the of the export quotas on foreign consumers of rare earths, when compared or balanced with the impact (or lack of thereof) on Chinese consumers of the same materials. China has not proven that its export quotas on rare earths are "made effective in conjunction with domestic restrictions on production or consumption", as required by Article XX(g).

1.4. CHINA'S EXPORT QUOTA MEASURES ON RARE EARTHS ALSO DO NOT SATISFY THE REQUIREMENTS OF THE CHAPEAU OF ARTICLE XX OF THE GATT 1994

39. Even if, *quod non*, the Panel were to consider that the Chinese export quotas on rare earths can be provisionally justified under paragraph (g) of Article XX, these measures fail to satisfy the requirements of the *chapeau*. The European Union has demonstrated that China applied and continues to apply its export quota measures for rare earths in a manner that constitutes arbitrary or unjustifiable discrimination, as well as a disguised restriction on international trade in rare earth products.

**1.4.1. China's reliance on the quota fill rate does not demonstrate that no discrimination or restriction on trade exists**

40. Contrary to what China alleges, the fact that export quotas were not fully utilized in 2011 and 2012, does not demonstrate that non-Chinese consumers of rare earths were not subjected to higher costs resulting from the trade distorting effects of the Chinese export restrictions on rare earths.
41. China's analysis is flawed, since China alleges the lack of restrictive effects of its export quota by looking only at the two most recent years and completely disregards the fact that the quotas have been in place for a number of years. Accepting China's line of defence would allow for conclusions to be made based on the current market demand, despite the fact that this demand had been distorted by the existence of the WTO-inconsistent measure. Furthermore, while quota utilization can be a relevant factor, it is not in itself determinative in establishing the existence of restrictive effects of an export quota. Moreover, the European Union submits that not only did (as a result of the Chinese export quotas on rare earths as well as its export duties) restrictions on international trade continue to exist in 2011 and 2012, but that these restrictions carried costs of substitution and business uncertainty which affected non-Chinese users disproportionately more than Chinese industry, which benefitted from a more stable and sufficient supply than its foreign counterparts.

**1.4.2. Important price differences exist between Chinese domestic prices and foreign prices for rare earths as a result of the Chinese export restrictions**

42. By limiting the quantity exported, an export quota has implications for prices, which in turn affected economic behaviour of operators and welfare distribution. The European Union submitted that export quotas on rare earths protect Chinese downstream industry, because they increase export prices for those inputs above domestic prices. The European Union disputes China's conclusion that based on the following grounds: (i) China's price "adjustment" is not appropriate; (ii) for most of 2012 even adjusted export prices exceeded domestic prices significantly; and (iii) even when export and domestic prices become equal for a brief period, one may not conclude, as China did, that export quotas have no effect.
43. Furthermore and despite having been prompted to do so by the Panel, China put forward no evidence to demonstrate that the excess of transport and trading costs for exporting may amount to 10% of the value of rare earth exports. The European Union therefore disputes the probative value of the conclusions that China draws from its price comparison which was based on China's unsupported estimation on costs. Moreover, China provides no evidence on neither that export sales are of higher quality nor that the relative qualities of export and domestic sales has changed over time in way that explains the growth in the observed export premia over the period 2010-2012.
44. Evidence submitted by the co-complainants shows that Chinese export quotas (and export duties) increase export prices above domestic prices. Export quotas had a dramatic effect on export prices when they were suddenly tightened in July 2010 and that they, in conjunction with export duties, have ever since kept the export prices of most rare earths significantly above domestic prices. The patterns in the ratio of export to domestic prices are strongly consistent, especially when one recognizes the differences between heavy and light rare earths and the demand-side connection of Europium with the heavy rare earths. Moreover, it establishes the existence of a consistent price difference over a broader set of commodities than China exhibited. The inter-temporal pattern, based on China's half-yearly announcement of quota amounts, reflects one event - the sudden extreme tightening of export quotas on rare earths in July 2010, and the panic buying and stock-cycle that it triggered. The quota has not been relaxed since 2010 and it is clear that the stock cycle has not yet been completed. Thus the market for rare earths has not yet achieved equilibrium, especially the equilibrium that will pertain when the world economy fully recovers from the financial crisis. All the evidence suggests that when it does settle down, maintaining export quotas at the 2010 level will result in export prices exceeding domestic prices by a significant amount: the initial shock hit all rare earths and hit far harder in export than domestic markets, and even now towards the end of the de-stocking process, rare earth prices are higher abroad than at home and, for 16 out of 24 of them, to a degree that is statistically significantly greater than the excess that was observed before the export quota was so grievously tightened in July 2010.

45. Restricting exports of natural resources can give downstream producers just the edge they need to stay above the curve in fiercely competitive international markets. In contexts like the one at issue in this dispute, where China has a near-monopoly supplier position of rare earths with respect to which only limited substitution exists, significant and unpredictable restrictions on exports, such as those that China started imposing in 2010, can have a significant effect on downstream industries in competing import-dependent WTO Members. Chinese export quotas (and export duties), notably through their price effects but also due to the uncertainty of supply, also created an incentive for re-location of downstream production from other WTO-Members to China which would have not existed in the absence of those quotas.
46. Contrary to what China alleges, the two restrictions on exports (duties and quotas) cannot be analysed in isolation. The presence of the export duty may at times lead the quota to have no apparent effect on foreign price, if the duty reduces quantity demanded below the quota level. However, it would be erroneous to conclude that this would imply that the export quota would have no effect (in the absence of the duty). The two export restriction measures interact. China argues in its second written submission that the increases in prices required to balance supply and demand can be brought about by either export duties or export quotas. Given the existence of the export duties, China has sought to show that quotas have added no more discrimination against non-Chinese users. In other words, China is "scarifying" export duties to make its case on export quotas appear more credible.
47. The fact that the export quotas and export duties at issue in this dispute have been challenged by the Complainants under different legal claims is a reflection of the fact that they are infringing different WTO obligations, and are also imposed by different legal instruments under Chinese domestic law. However, this does not detract from the fact – which China has not disputed – (i) that both export quotas and export duties are in place and (ii) that both only affect market players outside China. Both also produce similar effects and ultimately distort the market conditions in favour of China. If one were to accept China's premise that the various elements that form part of its conservation policy cannot be analysed in isolation, because they reinforce each other and produce similar and/or complementary effects. The same should hold when analysing effects on foreign users, which are manifestly affected by export quotas and export duties, which produce similar and complementary effects.
48. While we may not have all the data to determine beyond any doubt that the removal of the duties could result in quotas becoming binding again, the effect that export duties certainly do have is that of increasing the price gap between domestic and foreign prices, which in turn creates a competitive advantage for Chinese downstream producers over foreign producers; this advantage would not have existed in the absence of export duties. It is also because of this discriminatory effect on foreign users - which they share with export quotas - that the effects of both export duties and export quotas have to be analysed together - and not because of their relation to conservation or environmental protection the existence of a genuine link with which is in any event highly questionable.

**1.4.3. The amounts of available export quotas for rare earths are not determined in a transparent and predictable manner**

49. China has put in place a system whereby the amounts of export quotas available for any given year are set in a manner which is both arbitrary and non-transparent. China's yearly decisions on the setting of export quotas affect the rights of other WTO Members and their operators to an undisrupted and predictable international trade in rare earths. Any restriction to such trade, even if provisionally justified as related to conservation within the meaning of Article XX(g), must be administered in a transparent and predictable manner. China's failure to do so constitutes arbitrary and unjustifiable discrimination and a disguised restriction to trade within the meaning of the *chapeau*.
50. The European Union submits that China does not base its quota setting decisions on objective and verifiable criteria. Up until 2012 China did not disclose any background as to the criteria that informed its decision on the quantities of rare earths that were made available for export. In 2012 China for the first time published a declaration, which explained in very general terms and *ex post facto* how the quotas were set. Moreover, China discloses no detail about its mid-term or long-term conservation targets and only provides very general criteria that allegedly serve as basis for the decision on the setting of export quotas. It is not clear from the evidence that China presented to this Panel what will be the



relative weight ascribed to each of the criteria in its yearly decisions. Furthermore, past practice in the setting of export quotas for rare earths seems to confirm that actual and projected domestic consumption will not always carry the same weight in the final decision as demand of rare earths for export. While China's lack of transparency makes it difficult to establish this with certainty, it seems that if the same consideration have been relied upon since the introduction of the export quotas, the importance ascribed to each of them for the setting of the export quota and production cap was not the same each year. Nowhere in the documents presented to this Panel does China indicate that any change is to be expected in that respect.

**1.4.4. The rationale for the Chinese export restrictions does not relate to conservation and the discrimination that is inherent to those restriction was entirely avoidable**

51. In accordance with the jurisprudence of the Appellate Body in *Brazil – Retreaded Tyres* to determine whether Chinese export quotas on rare earths are discriminatory in violation of the *chapeau* of Article XX the Panel will need to consider whether the rationale that China provides for the discrimination relates to the alleged conservation objective of the measure.
52. As already noted, China misinterprets the scope of "conservation" under Article XX(g). It is clear - when Article XX(g) is interpreted correctly – that the objective of conservation does not justify measures aimed at protecting and furthering one's own industrial policy goals, as China has done in this case. This also shows that the trade distortive effects inherent to the export restrictions and the manner in which China administered them were by no means accidental. Quite to the contrary, they were the result that China sought to achieve in the context of its industrial policy.
53. Moreover, the discrimination which is inherent to export quotas on rare earths was entirely avoidable. As explained by the Appellate Body, discrimination can be considered as arbitrary or unjustifiable, in cases where it is avoidable and foreseeable. In a case like this where the rationale for the measure at issue is not even related to conservation, the only acceptable alternative is abolishing the measures altogether.
54. However, even if – *quod non* – the Panel were to consider that China was justified to take certain measures to help enforce China's restrictions on production by preventing smuggling; signal the need for exploring other sources of supply; and safeguard China's domestic industry from surges in foreign demand, the European Union submits that this could have been done without distorting trade e.g. through bilateral and multi-later international dialogues or ad hoc action responding to actual needs. The European Union submits that in view of the declared objective, the impact of the Chinese export quotas (on non-Chinese users of the materials specifically and international trade generally) is disproportionately severe. These negative effects on international trade are only accentuated by the lack of transparency and due process in the setting and administration of export quotas and the additional imposition of export duties. For all these reasons, the export quotas constitute arbitrary and unjustifiable discrimination and a disguised obstacle to trade.

**2. CHINA'S EXPORT QUOTAS FOR TUNGSTEN ARE IN BREACH OF CHINA'S WTO-OBLIGATIONS**

**2.1. CHINA'S POLICY CONCERNING TUNGSTEN**

55. The European Union notes at the outset that this overview of China's "*conservation policy for tungsten*", appears to be similar in structure to China's "comprehensive policy for rare earths"; although containing considerably fewer component measures, which China itself seems to acknowledge by not calling it "comprehensive". China's export quota on tungsten does not meet the conditions of sub-paragraph (g) and of the *chapeau* of Article XX of the GATT 1994.

**2.1.1. China's export quotas on tungsten do not meet the conditions of sub-paragraph (g) of Article XX of the GATT 1994**

56. The European Union submits that China's export quotas on tungsten, in violation of Article XI of the GATT 1994, are not measures "relating to the conservation of exhaustible natural resources" within the meaning of Article XX (g) of the GATT 1994. As China claims that its commitments under paragraphs 162 and 165 of China's Working Party Report on the export quotas on tungsten are also justified under GATT Article XX(g), the arguments made by the European Union rebutting China's claims apply *mutatis mutandis*.

57. The European Union does not contest the fact that "tungsten" is a "natural resource". However it is important to note that the export quotas that China imposes on "tungsten" are not only imposed on the "tungsten ores" themselves, which are not even allocated a quota, but are also imposed on various forms of "tungsten" products which have undergone some degree of further processing. Moreover, China's claim for a "close and genuine relationship" between the export quotas that it imposes on tungsten and the objective of conservation is not supported by evidence. As already submitted above, the few explicit textual links referred to by China do not at all explain the relationship between the export quota and the alleged conservation objective.
58. In order to compensate for the missing textual link, China claims *post hoc* that its export quotas on tungsten "enhance the effectiveness of China's conservation policy", by signalling to foreign users of tungsten the need to develop and locate other sources of supply or to develop substitutes. However, the European Union recalls that since China started dominating the world tungsten market from the 1970s, many others operations in other countries simply shut down operations as they could not compete with China's cheaper prices. In addition to the more systemic arguments against the appropriateness and effectiveness of such "signalling" with regard to the conservation objective, the EU would like to point out that such a "message" is also ineffective as, substitutes to tungsten are not easily found.
59. Furthermore, China's export quotas on tungsten are not "made effective in conjunction with domestic restrictions on production or consumption" and do not meet the requirements of the "even-handedness test."
60. With regard to China's conditions for access to the tungsten industry, the European Union submits that, as for rare earths, China does not substantiate why these "access conditions" – are functioning as a "domestic restriction" within the meaning of Article XX (g) of the GATT 1994. The "*Opinions on the Integration and Exploitation of Mineral Resources*" is essentially a plan to create order out of a chaotic situation, and is - if anything - an encouragement to mine more, and not less. With regard to the other measures that China refers to, the European Union submits that, as explained for rare earths, establishing order in the mining sector and consolidating the industry does not necessarily lead to a limitation in production. To the contrary, more efficient industries, which have to proof a certain scale of production and minimum recovery rates, are most likely to mine more than less.
61. With regard to China's alleged volume restrictions on the production of tungsten, the data presented by China does not prove that China has volume controls in place as the established targets seem to have always been exceeded. Moreover, as from 2002 onwards, the amount of the "extraction plan" for tungsten was continuously and consistently increasing. Moreover, the European Union disagrees with China's assertion that the combined effect of the production quota and the export quota is that the available amount of tungsten for domestic consumption in 2012 is decreased comparing to the year 2011. To the contrary, the export quotas have the effect of reserving or diverting production that could otherwise have been consumed abroad to the Chinese market. Furthermore, with reference to the resource tax on the extraction on tungsten ores, like for rare earths, China does not substantiate its arguments on how exactly this resource tax limits production.
62. The European Union therefore submits that China has not demonstrated that it has effective restrictions on domestic production or consumption in place. The "*even-handedness*" test required by GATT Article XX(g) is therefore not satisfied. However, even if *quod non*, the Panel were to accept that China has a restriction on domestic production or consumption in place, the European Union submits that China's export quotas on tungsten still do not pass the "*even-handedness*" test as required by GATT Article XX (g). While "*identical*" treatment of domestic and foreign consumers may not be required, China would "need to show that the impact of the export duty or export quota on foreign users is somehow balanced with some measure imposing restrictions on domestic users and consumers in order for its measures to be "even-handed".
63. China's export quotas on tungsten are an added burden on foreign consumers, and this element in itself is already enough to prove that the export quotas imposed by China do not meet the "even-handedness" requirement of GATT Article XX(g). In China, as from 2002 onwards, the amount of the "extraction plan" for tungsten was continuously and consistently increasing. During the same time frame, export quotas on tungsten had already been in place, and as from 2003 onwards, there is a noticeable, steady and continuous tightening of

the export quotas imposed by China. Additionally, the Panel should also keep in mind that the foreign consumers of tungsten also have the additional burden on the imposition of the export duties on tungsten. Naturally, the export duties on tungsten are not imposed on Chinese domestic consumers.

**2.1.2. China's export quotas on tungsten do not satisfy the requirements of the *chapeau* of Article XX of the GATT 1994**

64. If, *quod non*, the Panel were to consider that the Chinese export quotas on tungsten can be provisionally justified under paragraph (g) of Article XX, the European Union submits that these measures in any event fail to satisfy the requirements of the *chapeau*. The European Union begins by noting that China carries the burden of proof to justify its export restrictions on tungsten under Article XX, including under the *chapeau*. China's submission fails to provide an explanation as to the differential treatment that its export quotas afford to China as compared to all other WTO Members.
65. The export quotas on tungsten impose an additional restriction on exports, which does not exist with respect to trade in tungsten for domestic consumption. Furthermore, data submitted by China confirms that unlike the quantities available for domestic downstream users, which show an increasing trend, export quotas have been tightened every year between 2003 and 2009, increased in 2010, only to then again be reduced abruptly the year after.
66. China's line of defence oversimplifies and underestimates the impact of the Chinese export quotas on tungsten on the world market in tungsten. As China itself notes, China presently produces 83% of the world's tungsten supply. Holding such an important share of the world market necessarily means that any reduction to the quantities available will produce economic effects on the world market for tungsten. In assessing the trade distortive impact of China's measure it is also important to consider that China did not and continues not to disclose the criteria based on which the quotas are set for each year, making its yearly decisions entirely arbitrary and unpredictable and thereby accentuating their negative effects. China's export restrictions on tungsten did not pursue conservation goals, but were rather motivated by protectionist objectives. The objective to provide an advantage to its industry over its competitors in other WTO Members is apparent from the "design, architecture and revealing structure", as well as from its effects.

**3. CHINA'S EXPORT QUOTAS FOR MOLYBDENUM ARE IN BREACH OF CHINA'S WTO-OBLIGATIONS**

**3.1. CHINA'S EXPORT QUOTAS ON MOLYBDENUM DO NOT MEET THE CONDITIONS OF SUB-PARAGRAPH (G) AND OF THE CHAPEAU OF ARTICLE XX OF THE GATT 1994**

67. The European Union contests China's argument that the export quotas imposed by China, in violation of Article XI of the GATT 1994, genuinely are "relating to the conservation of exhaustible natural resources" within the meaning of Article XX(g). As China claims that its commitments under paragraphs 162 and 165 of China's Working Party Report on the export quotas on molybdenum are also justified under GATT Article XX(g), the arguments made by the European Union rebutting China's claims apply *mutatis mutandis*.
68. China's interpretation of the meaning and scope of "conservation" is erroneous. China's export restrictions on molybdenum are not "made effective in conjunction with restrictions on domestic production or consumption", and thus do not meet the requirements of sub-paragraph (g) of Article XX. Moreover, the requirements of the *chapeau* of Article XX are also not satisfied.

**3.1.1. China's export quotas on molybdenum do not meet the conditions of sub-paragraph (g) of Article XX of the GATT 1994**

69. The European Union does not contest the fact that molybdenum is a "natural resource", but notes the fact that the export quotas that China imposes on "molybdenum" are also imposed on various forms of molybdenum products, which have already undergone some further processing. Moreover, the asserted claim that China's export quotas on molybdenum "relate to" conservation rests solely on the fact that the "Public Notice of Application Conditions and Application Procedures for the 2012 Export Quotas of Indium, Molybdenum and Tin" – published in November 2011 - contains the phrase "in order to protect the resources". However, the document that China refers to does nothing more than pay lip service to the general concepts of the protection of resources and the environment. In the opinion of the

European Union China has not proved that the export quotas it imposes on molybdenum are "related to the conservation of exhaustible natural resources" as is required by Article XX (g) of the GATT 1994.

70. China's export quotas on molybdenum are not "made effective in conjunction with domestic restrictions on production or consumption" and do not meet the requirements of the "even-handedness" test. As regards the measures that China claims as those which control the access to the molybdenum industry China simply refers to the document entitled, "Opinions on the Integration of Exploitation of Mineral Resources" which is clearly not a measure aimed at "conservation", and also indicates that the target and mission of this integration is to: "significantly improve the ability of exploiting and utilizing mineral resources." As regards China's "volume restrictions" on molybdenum, the data produced by China indicates that in the years that this "production plan" on molybdenum was introduced (i.e. 2010 and 2011), the actual level of production of molybdenum in China exceeded the level set in the plan by around 30,000 Tons. The data provided by China also indicates a dramatic increase in the volume of molybdenum extracted in the last decade. Moreover, with regard to the resource tax, China does not substantiate how this resource tax would actually limit production.
71. Additionally the European Union submits that China's export quotas on molybdenum do not meet the "even-handedness" test required by GATT Article XX (g). While "identical" treatment of domestic and foreign consumers is not required, China would "need to show that the impact of the export duty or export quota on foreign users is somehow balanced with some measure imposing restrictions on domestic users and consumers in order to prove the even-handedness of its measure." In the opinion of the European Union, China's export quotas on molybdenum are an additional burden only on foreign consumers of molybdenum, and do not therefore meet the "even-handedness" requirement of Article XX(g).

**3.1.2. China's 2012 export quotas on molybdenum do not meet the requirements of the *chapeau* of Article XX of the GATT 1994**

72. If, *quod non*, the Panel were to consider that the Chinese export quotas on molybdenum can be provisionally justified under paragraph (g) of Article XX, the European Union submits that these measures in any event fail to satisfy the requirements of the *chapeau*. The European Union notes that China failed to meet its burden to show that export quotas on molybdenum satisfy the conditions of the *chapeau*, notably with respect to the condition that the measure not be applied in a manner which would constitute arbitrary or unjustifiable discrimination. In assessing the trade distortive impact of China's measure it is also important to consider that China did not and continues not to disclose the criteria based on which the quotas are set for each year, making its yearly decisions entirely arbitrary and unpredictable and thereby accentuating their negative effects.
4. **THE PRIOR EXPORT PERFORMANCE AND MINIMUM REGISTERED CAPITAL REQUIREMENTS ON RARE EARTHS AND MOLYBDENUM ARE INCONSISTENT WITH PARAGRAPH 5.1 OF CHINA'S ACCESSION PROTOCOL AND PARAGRAPHS 83 OR 84 OF THE WORKING PARTY REPORT**
73. China has violated its trading rights commitments by imposing prior export performance and minimum registered capital criteria. Article XX of the GATT 1994 is not available to justify China's violations of commitments to abolish prior export performance and minimum registered capital requirements. However, even if Article XX of the GATT 1994 were considered to be available, *quod non*, China failed to make a *prima facie* case under Article XX of the GATT 1994. The European Union notes that the manner in which China attempts to have this Panel apply the Article XX GATT exception to its violations of the trading rights commitments under the Accession Protocol is both legally and logically incoherent. China's argumentation ignores that the obligations under its Accession Protocol relating to trading rights are distinct from and additional to obligations under the GATT 1994.
74. The European Union is challenging China's imposition of prior export performance, prior export experience, and minimum capital requirements. The European Union considers prior export performance as a subset of prior export experience; that is, by requiring an exporter to satisfy specific prior export performance requirements for rare earths and molybdenum, China also requires exporters to demonstrate prior export experience.

5. **CHINA'S 2012 EXPORT DUTIES FOR RARE EARTHS, MOLYBDENUM AND TUNGSTEN ARE INCONSISTENT WITH CHINA'S WTO OBLIGATIONS**

75. Despite the fact that a previous panel and the Appellate Body have already ruled that China cannot resort to the GATT 1994 Article XX general exceptions in order to defend the export duties it imposes on various products, China still chose to ask this Panel to issue a preliminary ruling on the applicability of Article XX of the GATT 1994 to paragraph 11.3 of its Accession Protocol. The European Union repeats its position that the panel and consequently the Appellate Body in *China-Raw Materials* did not err in ruling that Article XX of the GATT Agreement was not applicable to paragraph 11.3 of China's WTO Accession Protocol and that the Panel should follow established jurisprudence.
76. The term "*WTO-plus provisions*" is not a term which is contained in China's *Accession Protocol*, the *WTO Agreement* or any of the agreements contained in the Annexes to the WTO Agreement. As regards the place of accession protocols in the WTO legal universe, this issue would appear to have been exhaustively addressed in Article 1(2) of China's *Accession Protocol*, which does not refer at all to the Annexes to the WTO Agreement in their entirety, or individually to specific Agreements contained in the Annexes. The interplay between the annexed agreements among themselves and with the numerous Accession Protocols has to be assessed on a case by case basis. As to the relationship between paragraph 11.3 of China's *Accession Protocol* and the provisions of the GATT, (notably the applicability of Article XX), the panel and Appellate Body in *China-Raw Materials* have after an exhaustive analysis denied such applicability. The European Union fully subscribes to this result. It is only logical that accession protocols were considered as integral parts of the GATT 1947, as in fact there was no other agreement to which they could have "been an integral part of" in the pre-WTO era.
77. In order to establish whether a measure can be justified under Article XX(b) of the GATT 1994, the Panel would need to examine: (i) whether the policy reflected in the measure falls within the range of policies designed to achieve the objective of or, put differently, whether the policy objective is for the purpose of, "protect[ing] human ... life or health". In other words, whether the measure is one designed to achieve that health policy objective; (ii) whether the measure is "necessary" to achieve said objective; and (iii) whether the measure is applied in a manner consistent with the *chapeau* of Article XX.
78. According to established WTO case-law, the first step in order to analyse whether a measure can be justified under Article XX(b) of the GATT was to verify that the policy objective of the measure falls within the range of policies designed to protect human, animal or plant life or health. The term "*necessary*" contained in the text of GATT Article XX(b) has also been developed by WTO case-law. In the *Brazil-Retreaded Tyres* dispute, the Appellate Body commented on how a panel might conclude that a measure also "*apt to produce a material contribution*" to its stated objective at some future time. However, according to the panel in the *China-Raw Materials* dispute the burden of proof was on China to provide evidence about the potential future contribution to the desired policy goal, by supporting its claim with sufficient evidence.
79. The European Union submits that China's "*economic theory*", i.e. that the reduction in foreign demand for these materials, (brought about by the increase in export prices a due to the imposition of the export duties) will necessarily result in less production and therefore less pollution in China is at best incomplete. What China does not state is that the decrease in foreign demand would also result in the diversion of production to the Chinese domestic market. This in turn provides an incentive to the more intensive use of such raw materials by China's domestic downstream industries, making the Chinese economy in the long-run even more dependent on the use of such inputs. The European Union adds further that China also does not provide any evidence or data on how the imposition of these export duties on rare earths, tungsten and molybdenum might have already resulted in a decrease in demand, production and consumption of these products, and how this already might have had a beneficial effect on environmental and health protection in China. China also does not provide any explanation on the criteria it has used to set the level of the export duties, and what specific effects on production would be expected from a specific duty level.
80. Moreover, China has remained silent on the relationship between export duties and export quotas which are imposed on the very same products. It also does not at all explain why it has chosen to defend its export quotas by Article XX(g) but not with Article XX (b) of the GATT Agreement, despite being specifically asked to do so by the Panel. Furthermore, China

makes reference to the less-trade restrictive "*alternative measures*" that China could have taken in order to achieve its objective. The European Union notes that China confirms that is already using a "diverse range of complementary measures" in order to achieve its objective of environmental protection. The European Union believes that what is really important and essential for environmental and health protection is that China enforces these measures and if possible, even improve on them.

81. The European Union submits that China did not make a *prima facie* case under the *chapeau* and that it is in any event clear that its export duties could not be justified under the *chapeau* of Article XX. Despite conceding that its export duties discriminate against consumers from other WTO Members, China fails to put forward any fact or argument as to why this discrimination should be considered as justified under the *chapeau*. The European Union recalls that export duties by increasing prices for foreign customers fail to reduce overall consumption and do not therefore contribute to the reduction of production and reduction of environmental impact that would flow from it. In addition, according to the Appellate Body, discrimination is also arbitrary or unjustifiable, in cases where it is avoidable and foreseeable, such as in cases, where alternative measures exist which would have avoided or at least diminished the discriminatory treatment. China failed to put forward evidence that would demonstrate the compliance of its export duties with any of these criteria.

**ANNEX B-3****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN***First Part of the Integrated Executive Summary of Japan***I. Introduction**

1. This dispute challenges China's dominion over global trade in rare earths, tungsten, and molybdenum.<sup>1</sup> China restricts access to these materials through a range of WTO-inconsistent export measures, including export quotas, export duties, and the restrictive administration and allocation of export quotas.

2. China's export measures are inconsistent with the letter and spirit of its obligations under the GATT 1994, WTO Accession Protocol, and China's WTO Working Party Report. Moreover, China has intensified the restrictiveness of its export measures: (1) export quota amounts have shrunk; (2) the range of products covered by export quotas and duties has expanded; and (3) the criteria for obtaining export quotas have become even more stringent.

3. China's restrictive policies have systemic implications for the WTO and its Members. China is the world's leading producer of rare earths, tungsten, and molybdenum - crucial inputs in the industrial production of advanced technologies such as batteries, electric vehicles, wind turbines, lighting, satellites, cell phones, hard drives, cameras, computers, glass, chemicals, and high-temperature steel. China's export measures are designed and structured to transform its leadership in production of these key raw materials into leadership in advanced technologies at the expense of its trading partners and the WTO system. China's export restrictions thus pose a major threat to WTO Members (including both developed and developing countries) with limited resource endowments that depend on imports of certain raw materials or industrial inputs.

**II. Factual Background****A. The Raw Materials**

4. Rare earths are a group of 17 chemical elements in the periodic table – scandium, yttrium, and the fifteen lanthanides (lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium, gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, and lutetium).<sup>2</sup> Because of their special properties of magnetism, luminescence and strength, rare earths are key inputs in high-technology and clean-energy applications, including magnets in motors, generators, and hard disk drives; battery alloys for energy storage in wind turbines or hybrid and electric vehicles; phosphors in fluorescent lighting; fluid catalytic cracking catalysts in petroleum refining; and polishing powders for flat panel displays and hard disk drives.

5. Tungsten is an element with the atomic number 74 that has the highest melting point and lowest vapor pressure of all metals. Tungsten is primarily used to produce cemented carbides, which are primarily consumed by the engineering, metal forming, and construction industries.

6. Molybdenum is a silvery metallic element with an atomic number of 42. Molybdenum is an important alloying agent for steel, super alloys, and chemicals.

**B. China's Export Duty Regime**

7. China's General Administration of Customs ("Customs") has the authority to collect export duties, and China's Tariff Commission is responsible for determining items subject to duties and adjusting duty nomenclature, heading numbers, and duty rates.

8. Since 1 November 2006, China has imposed export duties on rare earths, despite China's express commitment to abolish such duties. In 2012, the export duties on rare earths ranged between 10 and 25% *ad valorem*.

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<sup>1</sup> The Chart of Raw Materials Names (Exhibit JE-3) sets out short form names and reference codes for the specific products constituting the various forms of the raw materials at issue in this dispute.

<sup>2</sup> Consistent with its Panel request, Japan treats thorium as a rare earth in this dispute because China considers it as one of the "medium-heavy rare earths" and restricts its exportation both through export quotas and duties.

9. China has imposed export duties on tungsten and molybdenum since 2008, despite China's express commitment to abolish such duties.<sup>3</sup> In 2012, China's export duties on tungsten and molybdenum ranged from 5 to 20% *ad valorem*.

### **C. China's Export Quota Regime**

10. China's Ministry of Commerce ("MOFCOM") has the authority to impose and administer export quotas. MOFCOM, in conjunction with Customs, is responsible for formulating and publishing an annual list of all goods subject to export quotas and making adjustments to the list. MOFCOM typically issues annual export quotas in two batches, one in December of the preceding year, and the other in July of the quota year.<sup>4</sup> Rare earths, tungsten and molybdenum are subject to annual export quotas.

11. The annual export quota for rare earths is allocated between light rare earths and medium-heavy rare earths. In 2012, China's rare earth export quota was 30,996 MT, including 27,122 MT for light rare earths and 3,874 MT for medium-heavy rare earths.

12. The annual export quota for tungsten is allocated among four categories of tungsten products: (1) tungstic acid and its salts; (2) tungstic trioxide and blue tungsten oxide; and (3) tungsten powder and its products; and (4) ammonium metatungstate and paratungstate. In 2012, the total export quota for tungsten was 18,967 MT.

13. The annual export quota for molybdenum products is allocated among three molybdenum product categories: (1) primary raw molybdenum; (2) chemical molybdenum products; and (3) molybdenum products. In total, China's molybdenum quota for 2012 was 40,862 MT.

### **D. China's Quota Administration and Trading Rights**

14. China required enterprises to meet prior export performance and minimum registered capital requirements in order to obtain rare earth and molybdenum export quota rights in 2012.

### **E. China's Export Regime Supports Its Industrial Policies**

15. China's export measures are neither designed nor structured to address any policy objective other than to advance China's industrial policies with respect to rare earths, tungsten, molybdenum, and other "strategic" raw materials where China's abundant production and resources provide Chinese industries a competitive advantage. China's measures promulgated since 1991, at both the central government and provincial levels, demonstrate that the export measures on rare earths, tungsten, and molybdenum served to promote China's downstream industries and value-added exports.

## **III. Legal Discussion**

16. China committed upon its accession to the WTO to reduce significantly its export restrictions on important resources. China has utterly failed to meet its WTO commitments.

### **A. China's Temporary Export Duties Are Inconsistent with China's Obligations under Part I, Paragraph 11.3 of China's WTO Accession Protocol**

17. China committed in Paragraph 11.3 of its WTO Accession Protocol to "eliminate all taxes and charges applied to exports," except in two specific situations – (1) where the taxes and charges are covered by Article VIII and applied consistently with the requirements of Article VIII, and (2) where the taxes and charges are imposed on product listed in Annex 6.

18. Despite this commitment, China imposes export duties at *ad valorem* rates ranging from 5 to 25 percent on various forms of rare earths, tungsten, and molybdenum. Neither of the two exceptions set forth in Paragraph 11.3 of China's WTO Accession Protocol applies to China's export duties on the raw materials.

19. China's export duties restrict supplies of critical raw materials to other WTO Members and provide a substantial competitive advantage to Chinese users that produce downstream products over foreign competitors. These Chinese producers have benefited from privileged access to key raw material inputs for products ranging from magnets, batteries, windmills, to electric cars. The

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<sup>3</sup> Japan does not contest in this dispute the export duty on tungsten ores and concentrates under HS No. 2611.00, which are included in Annex 6 of China's WTO Accession Protocol.

<sup>4</sup> MOFCOM also has occasionally issued a supplementary batch between the first and second batches.



Chinese downstream industries also benefit from price differentials between Chinese domestic and export prices resulting from China's export duties.

**B. China's Export Quotas Are Inconsistent with China's Obligations under Article XI:1 of the GATT 1994**

20. Article XI:1 of the GATT 1994 prohibits WTO Members from instituting or maintaining restrictions or prohibitions made effective through a quota on the exportation of any product. The negotiating history of Article XI of the GATT shows that the provision was intended to guard against the imposition of quantitative prohibitions and restrictions on raw material exports intended to protect or promote domestic industry.

21. China imposes export quotas on rare earths, tungsten, and molybdenum contrary to the dictates of Article XI:1 of the GATT. These export quotas are similar in structure and design to the export quotas found to be WTO-inconsistent by the panel in *China – Raw Materials*.

22. China's export quotas on rare earths, tungsten, and molybdenum are also inconsistent with Paragraphs 162 and 165 of the Working Party Report, which contain China's specific commitment to eliminate export restrictions.

23. China's export quotas are neither designed nor structured to address any policy objective other than to provide a competitive advantage to downstream users of rare earths, tungsten, and molybdenum. They do not support any policy objective other than China's long-standing goal of utilizing its abundant supplies of certain raw materials to develop and maintain global dominance of key downstream industrial technologies.

**C. China's Administration and Allocation of Its Export Quotas Is Inconsistent with China's Obligations under China's WTO Accession Protocol, China's WTO Working Party Report, and the GATT 1994**

24. In order to address WTO members' concerns on China's unusually broad restrictions on trading rights, China committed during its WTO accession to ensure that all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except those listed in Annex 2A or Annex 2B of China's Accession Protocol.

25. Part I, paragraph 5.1 of China's WTO Accession Protocol, and paragraphs 83 and 84 of China's WTO Working Party Report establish that all enterprises in China, all foreign enterprises, and all foreign individuals shall have the right to export all products from China, except for goods listed in Annex 2A or Annex 2B of China's accession protocol, after December 11, 2004. These commitments extend only to rare earths and molybdenum as tungsten is listed in Annex 2A.

26. China also committed in paragraph 83(a) of China's WTO Working Party Report to eliminate any export performance or prior experience requirements as criteria for obtaining or maintaining the right to export and to phase out completely its minimum registered capital requirements to obtain trading rights after a three-year transition period. Paragraph 83(b) of the Working Party Report reiterates China's commitment in Article 5.1 of its WTO Accession Protocol to eliminate the "examination and approval" system for enterprises to be granted trading rights, and with it any minimum registered capital requirements. Paragraph 84(b) of the Working Party Report states that China's commitment to eliminate its prior experience and minimum registered capital requirements applies to foreign enterprises and individuals in China.

27. Contrary to these commitments, China limits the right of enterprises to export rare earths and molybdenum as part of its administration and allocation of the rare earth and molybdenum export quotas. China applies prior export performance, prior export experience, and minimum registered capital requirements to restrict the enterprises' right to export rare earths and molybdenum. China further relies on enterprises' prior export performance as a criterion to allocate export quota rights.

**IV. Conclusion**

28. For the foregoing reasons, Japan respectfully requests that the Panel find that China's measures are inconsistent with China's obligations under the GATT 1994 and China's WTO Accession Protocol. Japan further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with its obligations.

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*Executive Summary of the Oral Statements of Japan at the First WTO Panel Meeting***I. Introduction**

29. The Government of Japan would like to express its appreciation to the Panel Chairman, Members of the Panel, and Members of the Secretariat on this important matter.

30. China uses export restrictions to limit access by global users to supplies of rare earths, tungsten, and molybdenum through export restrictions in order to secure a competitive advantage for China's domestic industries. China's export restrictions on these raw materials are inconsistent with GATT Article XI:1 and China's commitments in its WTO Accession Protocol.

31. China does not deny that its export measures are *prima facie* inconsistent with Article XI:1 of GATT 1994 and its WTO Accession Protocol. Instead, China seeks to defend the WTO-legality of its export quotas and trading rights measures by arguing they are justified under GATT Article XX(g). China also defends the WTO-consistency of its export duty measures by claiming that they are justified under GATT Article XX(b). China further contends that its export restrictions satisfy the additional requirements of the *Chapeau*.

32. Since China has admitted that its measures are *prima facie* inconsistent with GATT Article XI:1 and its WTO Accession Protocol, the Panel's task is to determine if (i) the export quotas and trading rights measures qualify under the GATT Article XX (g) exception, and (ii) the export duties qualify under the GATT Article XX(b) exception when these measures discriminate against users overseas and are designed and structured to confer privileged access to domestic industries and producers. China bears the burden of showing that its measures are justified under Article XX.

**II. Description of China's Export Measures**

33. China agreed in Paragraph 11.3 of its Accession Protocol to phase out its broad use of export duties. However, in 2012, China applied export duties of 10-25% on rare earths and 5-20% on both tungsten and molybdenum.

34. Quantitative export restrictions are expressly prohibited by GATT Article XI:1 and Paragraphs 162 and 165 of the WTO Working Party Report on China's accession. Nevertheless, China maintains export quotas on rare earths, molybdenum, and tungsten. These export quotas cover rare earth ores, separated and refined rare earths, and certain rare earth metals. China's export quotas confer a competitive advantage on Chinese producers and exporters of value-added products, such as rare earth magnets, wind turbines, and electric vehicles.

35. China agreed in Paragraph 5.1 of its WTO Accession Protocol and Paragraphs 83 and 84 of the Working Party Report to phase out restrictions on trading rights and to extend such rights to all firms regardless of nationality, except for certain products listed in Annex 2A. China also specifically agreed not to apply export performance, prior export experience, and minimum capitalization requirements in determining trading rights. Nevertheless, China still applies export performance, prior export experience, and minimum registered capital requirements as part of its quota application procedures for rare earths and molybdenum.

**III. Distinctive Features of China's Export Quota Regime**

36. China seeks to lump together various trade and conservation measures, as well as measures plainly designed to provide preferences to domestic users, in what China terms a "comprehensive" conservation policy.

37. From an Article XX(g) standpoint, the relevant Chinese conservation measures are those aiming to control the pace of extraction of rare earth, tungsten, and molybdenum *ores*, which represent the relevant "exhaustible natural resource" for purposes of Article XX(g). Accordingly, it is wholly unclear how quantitative export restrictions of the type adopted by China here have any connection to the conservation of rare earths, molybdenum, and tungsten ores. China's export quotas set significantly lower quantitative caps compared with its purported domestic production limits and do not control the pace of extraction. They serve only to restrict foreign access to extracted ores as well as intermediate products derived from such ores.

38. China's export measures on rare earths, tungsten, and molybdenum were adopted to guarantee privileged access to these key raw materials for domestic users and industries. The measures were designed and structured to support China's industrial strategy of promoting its domestic industries by transferring its advantage in extracting ores to the processing and

separation of rare earths, molybdenum, and tungsten, and ultimately, to manufacturing and exporting value-added products containing these intermediate inputs.

#### **IV. Legal Discussion**

39. As the Appellate Body explained in *U.S. – Gasoline*, the application of an Article XX exception requires a "two-tiered" analysis – (1) provisional justification of the measure under the substantive provision of Article XX, and (2) further appraisal under the *Chapeau* to Article XX. The burden of proof rests with China with respect to both tiers.

##### **A. GATT Article XX(g)**

40. As the party invoking GATT Article XX(g), China bears the burden to demonstrate that the measures at issue (i) "relate to conservation of exhaustible natural resource," and (ii) are "made effective in conjunction with restrictions on domestic production or consumption." China has failed to meet both aspects of this burden.

##### **1. "Conservation"**

41. China's defense rests on its expansive reading of the term "conservation" for purposes of Article XX(g). China essentially contends that resource-endowed countries are allowed by the WTO Agreement to use their natural resources to bestow a competitive advantage on domestic, value-added industries for the purpose of promoting these domestic industries, even if at the expense of their trading partners.

42. Nothing in the text of Article XX(g) suggests that "conservation" permits restrictions on imports or exports that relate to the protection or promotion of domestic industries for industrial development. In fact, WTO jurisprudence and the relevant negotiating history firmly establish that GATT Article XX(g) may not be used to justify measures taken for domestic protection.

43. China's reliance on the Preamble of the WTO Agreement to justify its interpretation of the term "conservation" is misplaced. The word "conservation" in Article XX (g) must be read in the context of the balance struck under the WTO Agreement as reflected in text of the Preamble as a whole. As the panel held in *China – Raw Materials*, this means that the right to sustainable development does not override basic GATT rules, principles, and obligations.

##### **2. "Exhaustible natural resource"**

44. The relevant "exhaustible natural resource" for Article XX(g) purposes is rare earth, molybdenum, and tungsten *ores*, as opposed to refined and separated intermediate products. Processed rare earth, molybdenum, and tungsten products are not "natural resources" since they require separation, processing, refining, and manufacturing.

##### **3. "Relating to"**

45. China bears the burden of showing "a close and genuine relationship" between the measure (means) and conservation policy goals (ends). While a panel may take a Member's characterization of a particular measure into account, a panel may also find guidance in the structure and operation of the measure and contrary evidence proffered by complainants. As the panel in *China – Raw Materials* explained, the focus of analysis should be on the "text of the measure itself, its design and architecture, and its context."

##### **a. Design and Operation of Measures**

46. As the panel pointed out in *China – Raw Materials*, it does not matter from a conservation standpoint whether a resource is consumed domestically or exported; instead, the key for conservation is the rate of depletion of the raw ore. In fact, export restrictions such as those adopted by China entail long-term, negative effects on the conservation of ores. Export restrictions without equivalent quantitative restrictions on domestic consumption only increase domestic demand and resource exploitation, leading to faster depletion. This has happened in China – the tightening of its export restrictions led to skyrocketing domestic consumption.

47. Moreover, the design and structure of China's export regime encourage a higher degree of manufacturing and processing in China and confer a production cost advantage on China's value-added industries. For example, Japan understands that China prohibits the export of rare earth ores and concentrates, thereby effectively requiring separation and further processing to take place in China. China also applies export quotas and duties to separated and refined rare earth products, such as rare earth oxide, rare earth metals, and rare earth alloys, which incentivize further downstream industries to relocate to China, but imposes no restrictions on exports of

downstream, value-added products derived from rare earth, molybdenum, or tungsten intermediates, such as, iPads, smartphones, high-temperature steel, or advanced steel tools.

48. A structural contradiction is that China's export quotas and duties apply broadly to not only illegally produced but also legally produced rare earths, molybdenum, and tungsten. This is nonsensical because raw materials produced in accordance with China's alleged production limits on ores do not pose any discernible conservation concern, since they were legally produced in accordance with China's production control scheme and desired rate of depletion. China's claimed goals could be accomplished through narrowly focused, less trade-restrictive means, such as a more robust and effective export licensing system.

49. Contrary to China's claim, China's export quotas do not prevent the smuggling and foreign sale of illegally acquired materials. China's export restrictions increase the price of raw materials outside China and *create* incentives for smuggling and illegal production.

50. China claims that its export restrictions serve as a "signal" to users of the need to diversify their sourcing, invest in overseas rare earths, molybdenum, and tungsten mining projects, and develop substitutes. But the same signal could be sent by setting an effective production limit. In addition, in *U.S. – Shrimp*, the Appellate Body condemned the use of unilateral trade measures whose "intended and coercive effect" is to compel foreign governments to adopt specific policy decisions or to force foreign economic operation outside of its jurisdiction to act in a certain manner. If true, China's use of export quotas as a punitive signaling device is a classic example of a coercive signal.

51. China argues that its export restrictions operate as a "safeguard" for Chinese industries by protecting against export surges. While this is probably the most straight-forward explanation for China's measures, this is beyond the scope of Article XX(g) since it involves the protection of domestic users and has nothing to do with conservation.

#### **b. Text of the Measures**

52. China relies on limited textual references added to its 2012 measures as support for its Article XX(g) defense and asks the Panel to ignore all earlier measures. But, these limited references are merely a belated effort to justify WTO-inconsistent measures. China's export measures before late 2011 were bereft of references to resource conservation or environmental protection. The Panel should examine these measures closely, as they provide contextual evidence of the disconnect between China's export measures and resource conservation.

#### **4. "Made Effective in Conjunction with Restrictions on Domestic Production or Consumption"**

##### **a. "Operate Jointly With" or "Work Together"**

53. The Appellate Body explained in *China – Raw Materials* that the term "made effective in conjunction with domestic production or consumption" means "the trade restriction *must operate jointly with* the restrictions on domestic production or consumption" such as "when such trade measures *work together* with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource" (emphases added). China's export and domestic measures do not satisfy this requirement for a number of reasons.

54. The panel in *China – Raw Materials* explained that the level of conservation is determined by the pace of extraction, which in turn depends on domestic production restrictions. China's export quotas do not add anything to the domestic production restrictions from a conservation standpoint, but merely impose an additional, unjustified burden on foreign users and exports.

55. Moreover, China lacks domestic regulations limiting consumption. China claims that there is an implicit consumption limit (based on the difference between the production quota and the export quota). But China's export quotas set a *maximum* quantity – as opposed to reserving a *minimum* quantity – of rare earths, tungsten, and molybdenum available to foreign users. As such, the export quotas cannot possibly limit domestic consumption.

##### **b. China's Export Restrictions Lack "Even-Handedness"**

56. In *U.S. – Gasoline*, the Appellate Body explained that application of the "in conjunction with" requirement of Article XX(g) incorporates a requirement of "even-handedness." The Appellate Body's approach indicates that where domestic and foreign users do not receive identical treatment, any regulatory disparity must have a rational basis in light of the relevant conservation

purpose. A WTO Member imposing trade restrictions allegedly related to conservation must show that any disparate treatment has a legitimate regulatory rationale.<sup>5</sup>

57. China's export quotas and duties fail to meet this even-handedness test. China does not impose any restriction on domestic users and consumers that corresponds to its export quotas. Furthermore, there is no conservation-related regulatory basis for imposing a different regulatory regime on foreign users in the form of export quotas. While China argues that the export quotas serve to prevent smuggling and sales of illegally produced raw materials to foreign consumers, China has a reasonably available alternative to the imposition of the quota measures: China could use its export licensing program to ensure that no illegally mined ores will be exported.<sup>6</sup>

#### **B. GATT Article XX(b)**

58. The Appellate Body held in *China – Raw Materials* that GATT Article XX defenses are not available to China to justify export duties prohibited under Paragraph 11.3 of China's Accession Protocol. Nevertheless, China asserted in its submission of February 15, 2013 that its export duty measures are "necessary to protect human, animal or plant life or health" in accordance with GATT Article XX(b).

59. China's Article XX(b) defense also does not address the panel's finding in *China – Raw Materials* that one practical impact of imposing export duties on upstream products such as ores, absent measures to curb downstream consumption, is that the Chinese domestic price will decline, contributing to increased downstream production and thus increased demand for ores.

60. Like China's export quotas, China's export duties do not serve to deter the overall consumption of rare earths, molybdenum, and tungsten, but are rather designed to incentivize their domestic use and to protect and promote China's domestic industries.

61. China may increase the rates of resource tax to be imposed on a non-discriminatory basis on ore production or tighten the claimed limits on domestic production, as a less WTO-inconsistent reasonably available alternative measure to the export duties. The export duties are not part of a comprehensive policy to protect the environment, but are instead part of a discriminatory policy to promote China's domestic industries together with the export quotas challenged here.

#### **C. China's Measures Are Inconsistent with *the Chapeau***

62. In *U.S. – Shrimp*, the Appellate Body explained that the *Chapeau* is an expression of the principle of good faith. The Appellate Body has consistently interpreted the *Chapeau* requirement to disfavor both MFN-type discrimination between different WTO Members, as well as national treatment-type discrimination between other WTO Members and the WTO Member maintaining the WTO-inconsistent measure.

63. China's export quotas and duties fail to satisfy the *Chapeau's* requirement of good faith. First, as the Appellate Body noted in *Brazil – Tyres*, a trade measure would not comply with the *Chapeau* if the rationale for discrimination does not relate to the pursuit of an objective that was provisionally found to be basis for Article XX justification. For the reasons previously stated, contrary to China's claim, there is no conservation or environmental justification for China's export measures; rather, they merely subject foreign users to an additional burden. Second, China's export quotas and duties fall squarely within the category of disguised trade restrictions. The design and structure of China's export restrictions show that they serve only to provide a competitive advantage to Chinese domestic downstream industries engaged in manufacturing and exporting products requiring rare earths, molybdenum, and tungsten.

<sup>5</sup> The Panel's "even-handedness" examination should rely on the design, structure and operation of the relevant measures to assess whether there is any disparity in their *regulatory impact*, in light of the claimed conservation purpose, on domestic and foreign parties, as opposed to the actual market effects of the measures. Focusing on the actual market effects of China's WTO-inconsistent export restrictions, *i.e.*, the fulfillment or non-fulfillment of the export quota in a particular year, is inherently problematic because such an approach may enable China to use the medium- and long-term trade distorting effects of its measures to justify their continued application. See Japan's Answer to Panel Questions of First Panel Meeting, paras. 51-54, 60.

<sup>6</sup> China's export quotas also are not structured to prevent raw materials from being illegally produced in order to satisfy foreign demands (*e.g.*, China's export quotas do not apply to downstream products requiring the raw materials as inputs). Accordingly, China's export quotas do not prevent downstream products that have incorporated illegally mined raw materials from being exported. China's export quotas yield a divergence in Chinese domestic and export prices, thereby creating incentives for Chinese producers to produce the raw materials illegally and subsequently to smuggle them out of China. Japan's Answer to Panel Questions, of First Panel Meeting, para. 35.

**D. China's Restrictions on Trading Rights Violate Explicit Commitments in Its WTO Accession Protocol**

64. China contends that that its quota administration measures on rare earths and molybdenum are justified under GATT Article XX by virtue of the introductory clause of Paragraph 5.1 as "an integral part of the export quota system." However, China has failed to show that its export quota systems comply with Article XX(g) of the GATT 1994. Moreover, Paragraph 84 (b) of China's Working Party Report clarifies that minimum capital and prior export performance requirements are not WTO-consistent governmental regulations on trade contemplated in the introductory clause of Paragraph 5.1 of China's Accession Protocol.

65. Even assuming *arguendo* that China could invoke Article XX defenses for its trading rights violations, China's trading rights restrictions may not be justified solely on the basis of China's contention that its export quotas are justified under Article XX(g). China must independently show that the quota administration measures at issue are justified under Article XX of the GATT 1994.

**V. Conclusion**

66. Japan has demonstrated in its opening and closing statements at the First Panel Meeting that the design and structure of China's measures – most importantly, the quantitative export restrictions – contribute solely to the development of China's domestic industries. They are not justified by GATT Article XX(g) or GATT Article XX(b).

*Second Part of the Integrated Executive Summary of Japan***I. Introduction**

1. China's export restrictions have severely disrupted global trade in rare earths, molybdenum and tungsten, injured foreign industrial users outside of China, and forced resource-dependent industries located in other WTO Members to relocate operations to China to gain access to needed rare earth supplies.

2. An objective examination of the structure and design of China's export regime and related measures demonstrates that China's export restrictions shows they are designed to: ensure Chinese industries have a competitive advantage in separation, refining and processing of rare earths, tungsten, and molybdenum; disadvantage foreign users by limiting quantities available to them and making them pay higher prices; and transform China's competitive advantage in producing raw materials, and particularly rare earths, into further advantages in the downstream production of value-added technologies.

**II. Legal Discussion**

3. China does not deny the existence of its restrictive measures, or contest that (1) its export quotas are inconsistent with GATT Article XI:1 and Paragraphs 162 and 165 of the Working Party Report, which are made legally operative by Paragraph 1.2 of China's WTO Accession Protocol; (2) its export duties are inconsistent with Paragraph 11.3 of the Accession Protocol; (3) its restrictions on trading rights are inconsistent with Paragraph 5.1 of its Accession Protocol; and (4) its export performance, prior export experience, and minimum capitalization requirements are inconsistent with Paragraphs 83 and 84 of the Working Party Report. China instead seeks to justify its restrictive export quotas and trading rights violations under GATT Article XX(g), and its WTO-inconsistent export duties under GATT Article XX(b).

**A. China's Efforts to Justify its Export Quotas under Article XX(g) and the Chapeau Are Contradicted by Their Structure and Design**

4. Article XX(g) requires, as the Appellate Body explained in *U.S. – Gasoline*, a "two-tiered" analysis. China must show that its measures (i) "relate to conservation of exhaustible natural resource", and (ii) are "made effective in conjunction with restrictions on domestic production or consumption". China also must demonstrate that its export restrictions do not result in "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade" under the Chapeau. The burden of proof throughout rests with China.

5. The justifications proffered by China for its export quotas under Article XX(g) are flawed, because China's export quotas bear no relationship to conservation, are not applied in conjunction with corresponding domestic restrictions on production or consumption, lack even-handedness, and are inconsistent with the Chapeau.

**1. China's Measures Are Unrelated to "Conservation"**

6. "Conservation" in Article XX(g), according to China, goes beyond preserving exhaustible natural resources and encompasses regulating their use for economic development. Nothing in the text of Article XX(g), the negotiating history of GATT 1947 or the WTO Agreement, or GATT/WTO jurisprudence support China's interpretation. The Appellate Body has explained that the definition of "conservation" excludes economic development and is tied to the preservation of natural resources and the natural environment. The panel in *China – Raw Materials* also stated that although WTO Members may use their natural resource endowments for "sustainable development", such use must be in accordance with the WTO Agreements.

7. Japan's view is that Article XX(g) permits a Member to determine the appropriate level of "conservation" but not to set aside resources for domestic users to promote economic development or to protect or promote domestic industries. This view is supported by the text, the panel's analysis in *China – Raw Materials*, and the Vienna Convention.

8. The negotiating history of GATT 1947 and report of the *1950 Working Party "D" on Quantitative Restrictions* support Japan's interpretation of Paragraph (g). They evidence that "conservation" in Article XX(g) does not enable a Member to use trade measures to bestow a competitive advantage on domestic industries under the pretext of "conservation" policy tools.

9. China claims that the Preamble to the WTO Agreement supports its use of Paragraph (g) for domestic protection. Such an interpretation is premised on a selective and flawed reading of the WTO Agreement. The common objectives articulated by WTO Members in the Preamble are more multi-faceted than China acknowledges. Moreover, WTO Members agreed that the solution to these objectives was to strengthen WTO rules and disciplines, not to permit WTO Members promote their own economic development at the expense of their trading partners in violation of WTO rules.

10. China's interpretation of Paragraph (g) is overly broad and would enable resource-endowed countries to rely on "sustainable use and development" to justify limits on exports or imports of natural resource-derived products in order to protect or promote its domestic processing and value-added industries. If such practices become widespread, trade restrictions will proliferate, and every WTO Member will lose.

**2. The Design and Structure of China's Measures Show their Lack of a "Substantial Relationship" with Conservation**

**a. The Relevant "Exhaustible Natural Resource"**

11. Japan respectfully submits that the term "exhaustible natural resource" must be given meaning in light of the text of Paragraph (g) and its negotiating history. The negotiating history shows that the drafters of GATT 1947 designed Paragraph (g) to have a specific and limited scope that is strictly limited to natural resource products. The drafters specifically rejected proposals by certain delegates to expand the scope of Paragraph (g) by adding "or other" to Article 32(j) of the draft ITO Charter or to expand the scope of Paragraph (g) to cover "manufactured products".

12. For purposes of Paragraph (g), the relevant "exhaustible natural resources" consist of rare earth, molybdenum, and tungsten *ores*, as opposed to ore derivatives, such as refined and separated intermediate rare earths, molybdenum, and tungsten; rare earth oxides; alloys; metals; or value-added products containing rare earth, molybdenum, and tungsten elements, parts, components, or other inputs. It is the extraction of rare earth ores that determines the rate of depletion for conservation purposes. Intermediates, metals, alloys, and value-added products are not "natural resources", since they require further separation, processing, and manufacturing steps to process the raw ores from their natural state into pure rare earth elements. As a result, refined materials are not "natural", nor are they "resources", but are instead artificial, man-made, manufactured products, which do not qualify for the Paragraph (g) exception.

13. China's export measures are overbroad because they apply to intermediates, metals, and value-added products containing rare earth inputs, not just ores. China has not explained why export quotas for intermediate products, such as rare earth oxides and alloys, are necessary to conserve the exhaustible natural resources at issue, *i.e.*, rare earth ores, while asserting that the extraction quotas on such ores are effective. Similarly, with respect to Paragraph (g)'s "in conjunction with" and "even-handedness" requirements, if as here a WTO Member expands the scope of an export quota to cover downstream processed and value-added products, Japan has explained (in Japan's answer to Panel Question 142) that the Member should bear the burden of demonstrating that domestic consumption restrictions are maintained on such products. This becomes more and more problematic as the degree of downstream processing and manufacturing increases, and the operational and functional connection between the trade-restrictive measures and conservation of an exhaustible natural resource becomes even more attenuated.

14. If, as China contends, any product derived from a natural resource can be subject to quantitative restrictions under Paragraph (g), its interpretation would cover virtually every manufactured product, since most are derived in some form from an exhaustible natural resource. In addition, China's interpretation would permit restrictions on processed and manufactured products even in the absence of restrictions on the domestic consumption of the same products.

15. Accordingly, the expansive scope of China's rare earth restrictions, and in particular their overbroad application to processed rare earths, metals, and alloys, raises serious questions as to (1) whether such measures "relate to" conservation of ores, and (2) are applied "in conjunction with" restrictions on domestic production or consumption of ores.



**b. The Structure and Design of China's Measures**

16. The text of Paragraph (g) requires that measures "relate to" conservation. China's export regime lacks a close, genuine, and substantial relationship to conservation, because it is structured to protect and promote Chinese industries engaged in refining and separating the raw materials and the development and export of industrial, value-added products.

17. First, from a conservation standpoint, the form in which rare earths, molybdenum, and tungsten are exported, or whether they are exported at all, should not matter. Instead, the focus should be on the protection of ores existing within China. Second, China applies export quotas and duties to separated and refined rare earth products without imposing corresponding restrictions on exports of downstream, value-added products. As such, the structure and design of China's export quotas encourage manufacturing and processing in China and undercut China's ostensible conservation goals.

18. Moreover, China applies export quotas to rare earths produced legally under China's production quotas. The overbroad application of China's export restrictions to legal raw materials is inconsistent with the Appellate Body's finding in *U.S. – Shrimp* that conservation-related trade measures should be narrowly targeted to achieve their purpose.

19. Finally, the lack of any connection between the export quotas and conservation is evidenced by China's sharp reduction in its export quota on rare earths from 2005 to 2012, even as domestic consumption and production substantially increased over the same period.

**c. China's Addition of New Textual References**

20. China's justification of its export quotas as conservation measures relies heavily on recently added textual references. China's approach is inconsistent with (1) the Appellate Body's decision in *Japan – Alcoholic Beverages II*, which focuses on the objective structure, design, and architecture of a measure and rejects an "aim and effect" test, and (2) the panel's decision in *China – Raw Materials*, which provides that a mere reference to "conservation" in a measure does not necessarily indicate that the measure is related to a legitimate conservation goal. Moreover, the export measures relied on by China do not contain references to conservation, except for two measures that appeared in late 2011, after the panel's decision in *China – Raw Materials*. Self-serving, last-minute additions of textual references should be given little evidentiary weight, especially because China's earlier measures provide clear contextual evidence of the lack of connection to resource conservation when China's export measures were "made effective".

**d. Relevance of China's Pre-2012 Measures**

21. Contrary to China's claim that the Panel can only examine the measures related to the 2012 export quota systems, China's pre-2012 measures are highly relevant. Under Appellate Body precedents, the Panel has the authority to examine earlier, related measures to ascertain whether they shed light on the structure and design of China's measures. Moreover, China's request that the Panel rely exclusively on current market conditions should not be accepted because current market conditions are often, as here, seriously distorted by the long-standing, WTO-illegal measures at issue.

**e. China's Policy Justifications**

22. China's purported policy rationales behind the export quotas are not persuasive. First, China argues that the export quotas prevent the smuggling and foreign sale of illegally produced raw materials. However, by increasing the price of raw materials outside China, export restrictions create incentives for smuggling and illegal production. Moreover, China has not promulgated or enforced any quota on domestic sales or consumption; indeed, China's downstream domestic purchasers are not punished for purchasing illegally produced materials. If China's goal is really to prevent smuggling and illicit production, this could be accomplished in a much more focused and less WTO-inconsistent matter, *i.e.*, implementing an export licensing system to ensure that any exported raw materials are legitimately produced and enforcing equivalent safeguards to trace the origins of rare earths sold for domestic consumption consistent with GATT Article XX(d). China does not explain why its efforts do not effectuate such enforcement and instead must focus on *exports* irrespective of their legality.

23. China claims that export restrictions serve as a "signal" to foreign users of the need to diversify their sourcing, invest in overseas mining projects, and develop substitutes. The same signal could be sent in a more effective and less WTO-inconsistent manner by setting and

enforcing production limits. China's use of export quotas as "signals" falls into the category of unilateral coercive trade measures condemned by the Appellate Body in *U.S. – Shrimp*.

24. Finally, China argues that its export restrictions operate as a "safeguard" for Chinese users by protecting against export surges. This straight-forward explanation for the Chinese measures is plainly beyond the scope of Article XX(g) since it involves the protection of domestic producers and has nothing to do with "conservation".

### 3. China's Export Quotas Are Not "Made Effective in Conjunction with Restrictions on Domestic Production or Consumption"

25. A WTO Member seeking to invoke GATT Article XX(g) bears the burden of showing that its "measures are made effective in conjunction with restrictions on domestic production or consumption". This means the trade restriction must "operate *jointly with*" and/or "*work together with* restrictions on domestic production or consumption" to conserve the applicable exhaustible natural resource"; this provision is designed to ensure a WTO Member cannot single out imports or foreign users for a disproportionate regulatory burden. The negotiating history of GATT 1947 shows that the drafters repeatedly rejected proposals to eliminate the "in conjunction with" requirement in order to make it easier for contracting parties to promote industrial development. The proposals were rejected because of widespread concerns that such an exception might unduly restrict access to raw materials and invite protectionist abuses.

26. In Japan's view, the terms "operate jointly with" and "work together with" mean that conservation-related trade restrictions must be part of a unified regulatory scheme that involves parallel restrictions on both exports (or imports) and domestic production or consumption. In this case, the relationship between China's domestic restrictions on rare earths and its export quotas does not satisfy this requirement. China does not maintain parallel restrictions on domestic consumption. At best, the relationship is a "vertical" one, where China's export quota restricts trade in downstream products derived from rare earth ores and concentrates.

27. In addition, China's alleged production controls do not appear to have any "limiting effect" – direct or indirect – on domestic production or consumption, and thus are not "made effective". The production caps are at such high levels that they served as production targets, not limitations, or have never been seriously enforced. The purported caps have been widely ignored, as China has both "black mines" conducting illegal mining and production and a "rare earth black industrial chain". That China has set ambitious targets for dramatically increasing the production of downstream rare earth, tungsten and molybdenum products by 2015 further shows the caps are not viewed as having any "limiting effect".

28. China also bears the additional burden of showing that its rare earth export quota is "even-handed" and represents a balancing of the impact of the export quota on foreign users with restrictions on domestic users and consumers. As the Appellate Body made clear in *U.S. – Gasoline*, even-handedness does not involve an "effects test", but instead refers to a regulatory or structural "impact" to be discerned from the design, structure and operation of the conservation scheme. The panel's deliberate use of the word "balanced" in *China – Raw Materials* implies that the impact of export restrictions must be counterbalanced, matched, neutralized, or maintained in equilibrium by equivalent and regulatory structural burdens on domestic users and consumers. While even-handedness does not require identical treatment, any disparities in regulatory impacts must have a rational basis in light of the relevant conservation purpose.

29. As the panel indicated in *China – Raw Materials*, this means that "[i]n order to show even-handedness, China would need to show that the impact of the export duty or export quota on foreign users is somehow balanced with some *measure imposing restrictions on domestic users and consumers*". China claims that there is an implicit consumption limit premised on the volume difference between the production quota and the export quota. However, the export quota scheme leaves domestic users free to purchase rare earths that are otherwise eligible for export. This allows domestic consumption to increase beyond what China claims to represent a *de facto* consumption limit; the main effect of the export quota is thus to reserve specific quantities of rare earths for Chinese industrial users.

30. Far from demonstrating China's high-minded efforts to conserve a natural resource or protect the interests of foreign rare earth consumers, the rare earths export quota scheme underscores China's long-standing goal of transforming its abundant raw material resources into global dominance in value-added production and exports.

**4. As a Factual Matter, China's Export Quotas Lacks Even-handedness and Are Not Applied "In Conjunction with" Restrictions on Domestic Production or Consumption**

31. When the specific, distinctive features of China's export and production regimes are examined in detail, as required under Article XX(g), the lack of even-handedness or any legitimate conservation-related justification for the added burden on foreign users becomes even more apparent. Importantly, the production (volume) restrictions imposed by China on the extraction of ores, which are the key to controlling the rate of depletion, apply regardless of the destination or use of the products, *i.e.*, they apply both to foreign users and domestic users alike. Accordingly, China's export restrictions do not "work together with" production restrictions by providing any additional contribution to the conservation of rare earth ores.

32. By setting the levels of the export quotas significantly below the level of its alleged domestic production caps, as China acknowledged in its First Written Submission, China has effectively set aside specific quantities for domestic value-added producers. While China claims to impose production quotas, production has vastly exceeded these "quotas" even as the export quotas have been sharply reduced.

33. China attempts to characterize its production quotas and resource taxes as the domestic counterparts of export quotas and duties. However, China's production quotas and resource taxes affect domestic and foreign users equally, whereas China's export quotas and duties apply exclusively to foreign users. As a consequence, because China does not impose any limits on domestic sales/consumption or a tax that exclusively applies to domestic users, its export quotas and duties have no domestic counterparts.

34. The design and structure of China's export quotas thus enhance domestic consumption. China's export quotas subject foreign users to an added burden, to which domestic users are not. This cannot be even-handed treatment.

35. In response, China argues that export quotas are required to prevent the smuggling of materials produced in violation of domestic production quotas. Yet China has not promulgated or enforced any quota on the domestic sale or consumption of illegal raw materials.

36. China further argues that, despite their discretionary and non-transparent nature, the export quotas are even-handed because China sets the quota by considering foreign demand. This argument is invalid since adopting China's approach would require the Panel to justify the quotas by their discretionary and non-transparent features themselves.

37. China also contends that the export quotas are even-handed because quotas were not filled in 2011 and 2012 and there were only small price differences. China's position ignores the long-term impact of the export quotas and the fact that the price disparities are significant enough to distort markets and trade flows. China has placed undue emphasis on actual foreign and domestic prices, as WTO precedents show that "even-handedness" does not involve an "effects test".

38. China has imposed its export quotas on rare earths since 1999, and so their medium- and long-term, trade-distorting effects, including their diminishment of foreign demand, are both complicated and difficult to isolate. Accordingly, if the non-fulfillment of China's export quotas in certain years is considered relevant to the Panel's "even-handedness" analysis, the Panel would be effectively enabling China to use the trade-distorting effects of its WTO-inconsistent measures to justify the continued application of such measures.

39. Moreover, the fulfillment or non-fulfillment of export quotas depends on various complex market factors, such as current economic conditions, companies' corporate strategies and behaviors, and the scale of production and consumption of the exporting country. Accordingly, relying on the fulfillment or non-fulfillment of export quotas in the "even-handedness" analysis could lead to bizarre findings, including (1) that the same export quotas are WTO-consistent in the years in which such quotas are not fully used but not WTO-consistent in other years, or (2) that the same export quotas are WTO-consistent for WTO Members with large-scale consumption, but not WTO-consistent for WTO members with small-scale consumption.

**5. China's Export Quotas Fail to Satisfy the Appellate Body's Tests under the Chapeau of Article XX**

40. China has made little effort to justify its arbitrary and unjustifiable discrimination against exports and foreign users. As the panel noted in *China – Raw Materials*, from a conservation

standpoint, what matters is the rate of extraction of the underlying ore, not whether it is exported or consumed domestically.

41. China's export quotas lack a legitimate regulatory objective and represent a disguised restriction on international trade. The applicable standard, contrary to China's assertion, is not whether China's export quotas are "hidden or concealed", but whether they pursue a "legitimate policy objective", on the one hand, or on the other represents a pretext for protectionism, discrimination, or abuse. The design and structure of China's export quotas shows that they do not serve any purpose, aside from benefitting China's downstream, value-added industries.

42. China claims that its export quotas do not disadvantage foreign users because they do not lead to price differences and were not filled in 2011 and 2012. This claim is both legally irrelevant and factually inaccurate. The "effects test" advocated by China was rejected in the Appellate Body's decision in *Brazil – Tyres*. China's export quotas were not filled in 2011 and 2012 due to the combined effects of a variety of economic factors, including the medium- to long-term, trade-distorting impact of China's export quotas and duties. First, the most prominent factor contributing to the lack of full usage of the 2011 export quota was the panic and massive spike in Chinese rare earth prices in 2011 caused by reductions in China's export quotas and increases in China's export duties. Second, the reductions in China's export quota levels and concomitant increases in China's export duties on rare earths forced many global downstream industries relying on rare earths to shift some or all of their production to China. Finally, the continuing weakness of the global economy diminished foreign demand for rare earths in 2011 and 2012. In short, even if "effects" were relevant, which they are not, China's claim that its WTO-illegal export quotas do not lead to adverse effects is simply inaccurate.

**B. China Has Failed to Meet its Burden as to its Article XX(g) Defense for its Restrictions on Trading Rights**

43. China's restrictions on quota access violate China's explicit trading rights commitments pursuant to Paragraph 5.1 of China's WTO Accession Protocol and paragraphs 83 and 84 of China's WTO Working Party Report by sharply restricting access to such rights.

44. China claims that its legislative amendments to the Foreign Trade Law completed its commitment to allow all enterprises the right to trade in all products. This is incorrect and legally irrelevant. This assertion ignores other remaining restrictions and pre-conditions on trading rights through instruments other than the Foreign Trade Law, including the export performance, prior export experience, and minimum registered capital requirements imposed on rare earths.

45. China also contends that its restrictions on trading rights are justified under GATT Article XX by virtue of the introductory clause of Paragraph 5.1 as "an integral part of the export quota system". However, China has failed to show that its export quota systems comply with Article XX(g) of the GATT 1994. In addition, as to China's commitments under Paragraphs 83 and 84 of the Working Party Report, Article XX is not even applicable for the reasons enunciated by the Appellate Body in *China – Publications and Audiovisual Products*. Even if China were somehow entitled to invoke Article XX for trading rights restrictions, China has failed to demonstrate that such restrictions have any relationship to "conservation".

**C. China Has Failed to Meet its Article XX(b) Burden to Defend its Export Duty Measures**

46. China does not contest that its export duties are inconsistent with Paragraph 11.3 of the Accession Protocol. Instead, China's attempts – three months after the due date of its First Written Submission and shortly before the first substantive meeting of the Panel with the parties – to justify its export duties under Article XX(b) of the GATT 1994.

**1. Article XX Is Not Applicable to China's Export Duty Commitments under Paragraph 11.3 of the Accession Protocol**

47. The GATT Article XX exceptions are not available to defend the inconsistency of China's export duties with Paragraph 11.3 of the Accession Protocol. China's proposed "intrinsic relationship" test contradicts basic principles of international treaty interpretation and would lead to absurd results. China's approach would render *inutile* specific provisions of other WTO Agreements that incorporate the GATT Article XX exceptions in part or in full or omit such exceptions entirely. China's approach also would render GATT Article XX exceptions applicable to some post-1995 WTO accessions but not others, depending on the subjective expectations of multiple participants in complex and multi-faceted negotiations.

48. Moreover, contrary to China's claim, Paragraph 11.3 of China's Accession Protocol is an integral part of the Marrakesh Agreement rather than the GATT 1994. Paragraph 1.2 of China's Accession Protocol refers to the WTO Agreement, but not to the GATT 1994, making it clear that China's Accession Protocol is an integral part of the "WTO Agreement". As the references in Articles XI and XII of the Marrakesh Agreement demonstrate, the "WTO Agreement" is distinct from the "Multilateral Trade Agreements", including GATT 1994, which are identified in Annex 1. GATT 1994 by its terms incorporates only Protocols of Accession that predated entry into force of the WTO Agreement.

**2. Even if the GATT Article XX Exceptions Were Applicable to Paragraph 11.3 of the Accession Protocol, China Has Not Met its Burden with Respect to the Requirements of Article XX(b)**

49. China's Article XX(b) defense fails to satisfy either of the two tiers of the Article XX(b) analysis. First, China has failed to demonstrate that the export duties are *necessary* to fulfill its claimed policy objectives. Second, China has not even attempted to justify its export duty measures under the requirements of the Chapeau.

**a. Necessary to Protect Human, Animal, or Plant Life or Health**

50. The Appellate Body has stated that "an assessment of 'necessity' under GATT Article XX(b) involves weighing and balancing a number of distinct factors, including the importance of the interests or values furthered by a challenged measure, its trade-restrictiveness, whether a less WTO-inconsistent measure is reasonably available, and the degree of contribution of the measure to the realization of the ends pursued by it.

51. China's export duties have severely distorted international commerce by restricting exports of raw materials, introducing significant pricing disparities, and pressuring foreign producers and users to relocate to China to ensure access to adequate supplies of rare earths. China's export duties are not part of a comprehensive framework designed and structured to protect human, animal, or plant health. China's policies demonstrate that its export duties are designed to promote increased production and exportation of value-added downstream products that use the raw materials at issue as inputs. This fact is also confirmed by the dramatic growth in China's downstream products manufactured with rare earths, tungsten, and molybdenum.

52. China has not demonstrated that its export duties make a material contribution to environmental protection. On the contrary, while China's export duties increase the differentials between domestic and foreign prices, Chinese producers of rare earths, tungsten, and molybdenum will be inclined to increase sales to domestic consumers.

53. China also has available several less WTO-inconsistent alternative measures to its export duties. Unlike the export duties, an increased resource tax would raise the price of both domestically and foreign consumed ores and processed materials. The imposition of a pollution tax or "Pigouvian tax," whereby producers are made to pay for each unit of pollution they generate that matches the social cost of pollution, likewise would raise the price of both domestically and foreign consumed ores and processed materials.

**b. Requirements of the Chapeau**

54. In addition to failing to meet the provisional burden of its GATT Article XX(b) defense, China's defense also fails on Chapeau grounds. China asserts that its export duties do not distinguish between the destinations of the products being exported. This is both factually irrelevant according to Appellate Body jurisprudence, which has consistently interpreted the Chapeau to cover both MFN-type discrimination between different WTO Members, as well as national treatment-type discrimination between other WTO Members and the WTO Member maintaining the WTO-inconsistent measure, *i.e.*, China.

55. China's export duties constitute arbitrary or unjustifiable discrimination. China's export duties are highly discriminatory because there is no corresponding tax on domestic consumption. Moreover, China's export duties also constitute a disguised restriction on international trade. The design and structure of China's export duties evidence that they do not serve any purpose other than providing a one-sided competitive advantage to China's downstream industries.

**D. China's Export Restrictions Are Designed and Structured to Support China's Industrial Strategy of Protecting and Promoting Value-Added Industries and Exports**

56. China's export quotas and duties are structured and designed to provide a competitive advantage to China's downstream industries that rely on rare earths, tungsten, and molybdenum as production inputs. China included this strategy in both its *11<sup>th</sup> Five Year Plan* and *12<sup>th</sup> Five Year Plan*, which set forth China's overarching economic goals from 2006 to 2015. Numerous Chinese industrial measures promulgated between 2006 and 2012 target increased exportation and production of value-added products while at the same time restraining the exportation of raw and intermediate materials.

57. China's export quotas and duties have been an integral part of this longstanding industrial strategy. China's Ministry of Environmental Protection ("MOEP") has stated that the export quotas are implemented to "limit low level and promote high level, improve the export structure, and increase the export of products with high added value" and that the export duty measure are adopted by the state to "optimize the rare earth industrial structure and promote the sustained, fast, and steady development of the rare earth industry". MOEP's precise description is supported by other Chinese measures that expressly link China's export control mechanisms to the promotion of value-added industries and exports.

58. The text of China's export quota measures further demonstrates their true purpose: to protect value-added industries/exports. Exporters selling value-added products, with high levels of technological content, receive priority in China's export quota application process.

59. The structure and design of China's export restrictions and related measures confirms that they promote value-added industries and exports. China's export quotas and duties place the strongest restrictions on mineral products with less value-added. By contrast, China still provides VAT refunds, and does not impose export duties, on exports of value-added products.

60. In addition, the allocation of China's export quotas based on prior export and/or production performance favors large producers and exporters. China views these enterprises as best positioned to adopt an integrated production structure for value-added products.

61. China's export quotas also were implemented significantly earlier than the domestic production quotas, further demonstrating a discernible connection between these measures. China's industrial strategy has taken precedence over its production controls, as China has set forth ambitious quantitative targets for downstream products and, in some instances, even encouraged over-quota production to promote downstream industries.

62. The actual effects of China's export quotas and duties also demonstrate that these restrictions promoted China's downstream industries. China's export quotas and duties have produced a substantial price gap between domestic and export prices for raw and intermediate materials. While China's export quotas on the raw materials decreased significantly from 2005 to 2012, both China's domestic consumption of the raw materials and China's production of downstream products continuously increased over the same period.

63. In sum, extensive evidence demonstrates that China's export quotas and duties promote its value-added industries and exports. China's export restrictions do not relate to resource conservation and environmental protection when they operate to confer a commercial advantage to China's downstream industries as part of official government policy.

**II. Conclusion**

64. For the foregoing reasons, Japan respectfully submits that the design and structure of China's relevant measures— most importantly, the quantitative export restrictions – together with China's domestic measures, protect and promote the development of China's domestic industries, and thus cannot be justified by GATT Article XX(g), nor GATT Article XX(b).

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*Executive Summary of the Oral Statements of Japan at the Second WTO Panel Meeting***I. Introduction**

65. While China seeks to confuse the legal issues by shifting the Panel's focus to the economic effects of its export quota regime, the Appellate Body and Panel decisions show that the focus of an Article XX(g) inquiry is not on "effects" or a party's aims or intentions, but instead is squarely on the "design, structure, and operation" of China's export quotas.

66. China also accuses Japan of arguing that there are no circumstances in which China's use of export quotas could ever meet the conditions set forth in Article XX(g). This mischaracterizes Japan's position, as Japan does not rule out that such circumstances may exist. The Panel should resolve the legal claims set forth in this dispute with respect to the facts and legal measures presented in this dispute, rather than engaging in an endless series of hypothetical scenarios, which can be left for other panels and for another day.

67. Japan highlights the fundamental deficiencies in China's export quotas when they are viewed as conservation measures and addresses China's arguments. Japan's focus will be on China's rare earth export quota, which is at the heart of this case.

**II. China's Export Quotas and "Conservation"**

68. China's export quotas are, by their structure, design, and operation, fundamentally inconsistent with China's professed intentions of controlling the rate of depletion of its rare earth ores and preserving its rare earth ore supply for future generations.

69. First, China attempts to justify the export quotas on the ground that they facilitate the enforcement of China's resource conservation policy. However, China could simply adopt export licensing requirements, which would be less trade-restrictive yet equally effective. China's export quota takes the form of a simple, blanket quantitative restriction on both legal and illegal rare earths. China has yet to explain how rare earths produced in accordance with China's production limits pose conservation concerns. China's export quotas tend to widen the price differentials between domestic and export prices, and thus, to increase incentives for illegal mining and smuggling. China's most recent tightening of the rare earth export has increased absolute levels of smuggling.

70. Contrary to China's claims, its export quota system cannot serve as a tracing mechanism supporting production regulations. The recipients of China's export quotas can readily sell or transfer their export quotas, and accordingly the export quota system cannot ensure that the rare earths actually exported were legally produced. In its answers and comments after the Second Panel Meeting, China fails to demonstrate that the sale of an export quota is illegal, or that any entity has been penalized for such behavior. Japan addresses this issue in its answer to Panel Question 144 and its comments on China's answers to Panel Questions 143 and 144.

71. China also argues that its export quotas set maximum limits on the amounts that can be exported and thus reduce incentives for illegal production. A more direct and WTO-consistent solution would be for China to adopt and enforce tougher domestic restrictions on illegal mining. Moreover, since the structure and design of China's export quota scheme does not cover value-added products, the overall structure and design simply mean that rare earths will be consumed domestically, and exported in the form of value-added products.

72. China's export restrictions go beyond what traditionally has been defined as an "exhaustible natural resource", *i.e.*, ores. China argues that crude ores are not traded. This fails to explain why China cannot control the pace of ore *consumption*, as China alleges that it regulates the production of concentrates, which is the process of ore consumption.

73. Second, China insists that its export quotas serve as a "signal" of the limited availability of raw materials to foreign users to encourage them to promote substitution and recycling. China could have sent such a signal in a non-discriminatory and non-trade restrictive manner by tightening its production or consumption limits.

74. Third, China argues that its export quotas operate as a "safeguard" to protect Chinese users from a sudden and massive surge in foreign demand. As Japan has emphasized throughout this dispute, the term "conservation" in Article XX(g) does not justify the use of restrictions on imports and exports for industrial development, or for the promotion or protection of domestic industry.

### III. China's Export Quotas and GATT Article XX(g)

#### A. "Relating to"

75. China's export quotas contradict its alleged goal of preserving rare earth ores for future generations and instead accelerate the rate of depletion. China argues that the design and structure of its export quotas on rare earths changed radically between 2011 and 2012, but their structural deficiencies have not changed since their adoption more than 14 years ago.

76. China argues that the Panel should examine the allegedly beneficent intentions of China's regulators and textual references that were added to China's export quota measures following the Panel decision in *China – Raw Materials*. But the Appellate Body has consistently cautioned, since *Japan – Alcoholic Beverages II*, against relying on subjective intentions. The design, structure, and operation test avoids this morass by focusing on the objective features of the challenged measures.

#### B. "In Conjunction with Restrictions on Domestic Production or Consumption"

77. Even though a WTO Member invoking Paragraph (g) bears the burden of showing that its trade restrictions have been imposed "in conjunction with" restrictions on domestic production or consumption, China's Second Written Submission barely discusses how the export quotas and alleged domestic production restrictions "work together".

78. The structure and design of China's export quotas evidence that they do not "work together" with the domestic restrictions as part of a conservation scheme. There is no corresponding limit covering domestic consumption. As observed by the panel in *China – Raw Materials*, this will produce increased domestic consumption resulting from lower domestic prices, thereby offsetting any reductions in foreign consumption. The domestic and export price differences caused by China's export quotas also incentivize illegal mining and smuggling. Since China's export measures do not make any discernible contribution to China's claimed conservation scheme, and in fact actually work against this goal, the relationship between the Chinese export and domestic production measures is fundamentally different from that envisaged by the Appellate Body in *U.S. – Gasoline* and *U.S. – Shrimp*.

#### C. Even-handedness

79. In *China – Raw Materials*, the panel determined that "even-handedness" requires that an export quota be balanced by restrictions on domestic consumption. Again, China can control the pace of depletion of rare earth ores (*i.e.*, exhaustible natural resources) by setting a non-discriminatory and non-trade-distorting production or consumption limit on rare earths. This is further explained in Japan's answers to Panel Questions 123 and 131.

80. Far from reserving specific quantities for export, the export quota scheme allows domestic users to *purchase* rare earths, molybdenum, and tungsten that could otherwise be exported. In other words, the design and structure of the export quota is to increase the amount and proportion of domestic production available to Chinese industrial users at the expense of foreign users.

81. China further argues that suppliers in China prioritize exports because prior export performance is used in the allocation of future export quotas. China's use of prior export performance as one of the criteria for allocating export quota rights is itself a violation of China's WTO obligations and thus should not be relied on to justify China's WTO-inconsistent quotas.

82. China also ignores the ruling by the panel in *China – Raw Materials* that, in order to demonstrate even-handedness, China must show that the impact of the export duty or export quota on foreign users is "somehow balanced" with some measure imposing restrictions on domestic users. China's export quotas and duties impose an added burden on foreign users, beyond China's asserted production restrictions and resource taxes, while their Chinese competitors are subject only to the latter set of measures.

83. In *U.S. – Gasoline*, the Appellate Body made clear that even-handedness does not involve an "effects test", noting in particular the difficulty of determining causation. This observation is particularly apt here, as China's decade-long WTO-inconsistent quotas have seriously distorted prices and demand. As the Appellate Body indicated in *Korea – Alcoholic Beverages*, it would be improper to allow a WTO Member to justify a WTO-illegal barrier for lack of trade effects, when this very lack of trade effects was likely generated by the WTO-illegal measure itself.



84. The Appellate Body's application of the even-handedness test in *U.S. – Gasoline* and *U.S. – Shrimp* focused on whether domestic producers were subject to a comparable restrictive measure. Even the lack of such a measure is not necessarily dispositive if its absence stems from a legitimate regulatory distinction for the over-arching policy goal of "conservation of exhaustible natural resources" explicitly referenced in Article XX(g). China has yet to explain how its different treatment of rare earth exports and foreign users stems from a legitimate regulatory distinction for conservation purposes.

#### **D. Chapeau**

85. China relies on its pricing arguments under Paragraph (g) also to contend that its export quotas satisfy the requirements of the Chapeau. In *Brazil – Tyres*, the Appellate Body specifically rejected an "effects test" in the Chapeau analysis. China's export quotas and export duties have been structured, designed, and operated to favor Chinese domestic users. China's export measures actually work against their ostensible conservation rationale by promoting increased domestic consumption.

86. According to the Appellate Body, where there exists an alternative reasonably available, which "could have avoided any discrimination" or is otherwise less inconsistent with the GATT 1994, discrimination is arbitrary or unjustifiable. The Appellate Body further explained that the imposing Member must explore adequate means of mitigating any administrative problems relied on to justify rejecting the alternative measure.

87. A number of alternative courses of action are reasonably available to China, including the enforcement of a non-discriminatory and non-trade-distorting extraction quota. China failed to engage substantively on these alternatives.

88. Finally, China's continued insistence that export quotas and export duties must be examined separately is misguided. China appears to conflate the jurisdictional issue and the substantive question. The chapeau requires that the export quotas "not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction". As the export duties are imposed concurrently with the export quota on the same products, the combined operation of the export duties and export quotas is directly relevant to the examination of the "manner" in which the export quotas are applied.

#### **E. China's Economic Effects Arguments**

89. China has repeatedly sought throughout this dispute to shift the Panel's focus to the alleged lack of economic effects of its export quotas. China's claims regarding the pricing effects and the trade-restrictive effects of the 2011 and 2012 rare earth export quotas are misplaced as a legal matter, since neither Article XX(g)'s even-handedness requirement, nor the Chapeau, incorporates an "effects test". The market distortions caused by China's 14-year imposition of export quotas on rare earths highlight the aptness of this rule.

##### **1. China Improperly Seeks to Limit the Panel's Factual Inquiry**

90. China initially claimed that the Panel must limit the scope of the evidence to be considered to the actual effects of the export quotas observed in 2012. China's assertion incorrectly conflates the Panel's terms of reference and its corresponding need to address the legal infirmities in China's 2012 measures, with the temporal scope of the factual evidence the Panel is to consider as part of its "objective assessment of the matter before it" pursuant to Article 11 of the DSU. As the Appellate Body emphasized in *EC – Selected Customs Matters*, "[e]vidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel".

##### **2. China's Arguments as to the Effects of the Export Quotas are Invalid**

91. While the Appellate Body has previously rejected effects tests under both Article XX(g) and the Chapeau, if the Panel nevertheless determines to conduct such an analysis, it must consider all of the available economic evidence in its analyses. This evidence demonstrates that (1) the export quotas on rare earths were not fully used in 2011 and 2012 because of complex economic factors, including the medium- and long-term distortions in rare earth supply and demand caused by China's export quotas and export duties; (2) increases in foreign rare earth prices were caused by China's sharp reductions in the export quota amounts; and (3) tectonic market shifts arose from China's manipulation of the export quota, including stockpiling and the relocation of Japanese rare earth consumers to China.

92. China has claimed that if the rare earth quotas are not filled (such as in 2011 and 2012), it is "economically impossible" for the quota to have caused any differences in domestic and foreign prices. The expert reports submitted by Complainants show: (1) there are circumstances under which an unfilled export quota nonetheless affects prices and consumption in the export market; (2) when foreign demand exceeds the volume permitted by an export quota, the foreign price will increase to reduce foreign demand to the quota volume; and (3) statistical analyses demonstrate that China's export quotas have had a major impact on relative export-to-domestic prices for rare earths since mid-2010.

93. The export quotas have played a significant role in the disparity between domestic and foreign prices for rare earths. *Metal Pages* and *Asian Metal* data – which were proffered by China – evidence that Chinese rare earths prices are generally *significantly higher* in foreign markets than in China's domestic market. The only survey suggesting otherwise – in support of which China has supplied no back-up data – is fundamentally distorted by China's illogical deduction of export duties and an unexplained 10-percent fee. First, China improperly deducted from the FOB price the export duty applicable to the rare earth product. For the reasons explained by Complainants' experts, however, the economic effects of China's export duties and export quotas must be evaluated together, not in isolation. Second, China illogically deducted a 10-percent fee from the foreign prices even though the claimed export fees (*e.g.*, transportation and packaging fees) are not unique to foreign users. Subsequently, China admitted the arbitrariness of the 10-percent fee and claimed that a 5-percent fee would be just as suitable. The WTO dispute settlement system cannot satisfy its mandate under DSU Article 3.2 if the types of economic analysis proffered by China are to govern a Panel's assessment of an export quota measure.

94. The evidence before the Panel of the medium- and long-term distortions caused by China's export quotas calls into question the relevance and accuracy of China's position that it properly considers foreign demand when setting the total amount of the export quotas. China's domestic production and consumption increased sharply as the export quotas were substantially decreased during the 2005 to 2010 period. These market distortions, which remained in place in 2011 and 2012, illustrate why the Panel in *Turkey – Textiles* expressed such concerns about the non-transparent, discretionary, and arbitrary nature of quotas, and why the Appellate Body has consistently avoided an "effects test" for WTO violations.

95. Finally, the evidence before the Panel contradicts China's claim that the foreign price increases starting in 2010 should be attributed to "speculations". The drastic July 2010 reduction of the rare earth quota created uncertainty about the future availability of rare earths and a rush to procure rare earth supplies. These developments, including the resulting merry-go-round of price increases, further speculative investments, further price increases, and ultimately a price crash, originated in the non-transparent and arbitrary nature of the China's export quota regime. This destructive, artificial cycle illustrates the need to look skeptically on China's claims that the export quotas have not had an effect on export pricing or on the disparity between China's domestic and foreign prices for rare earths.

#### **IV. Trading Rights**

96. Paragraphs 83-84 of Working Party Report are made legally operative by Paragraph 1.2 of the Accession Protocol, not Paragraph 5.1. The Appellate Body's decisions in *China – Audiovisuals* and *China – Raw Materials* indicate that the applicability of the GATT's general exceptions to a particular Chinese accession commitment hinges on whether there is an explicit textual link between the GATT exceptions and the specific commitment at issue. That textual link does not exist in Article 1.2. Even if China were somehow entitled to invoke Article XX to defend its export performance, prior export experience, and minimum capital requirements, China has yet to explain how they "relate to" conservation and are counter-balanced by equivalent domestic sales performance and minimum capital restrictions on Chinese domestic producers for purposes of "even-handedness". Indeed, these trading rights criteria represent a thinly disguised form of discrimination against foreign firms and foreign invested enterprises.

#### **V. Conclusion**

97. As the party seeking to invoke Article XX(g), China bears the burden of showing that its export quotas satisfy the Article XX(g) and Chapeau requirements. China has failed in every respect. The structure, design, and operation of China's rare earth export quotas are inconsistent with its professed conservation goals. High-level Chinese industrial planning measures show that the export quotas and duties promote its downstream, value-added industries. For the foregoing

reasons, Japan respectfully requests that the Panel find that China's export quota, export duty, and trading rights measures violate its obligations under GATT Article XI:1, China's WTO Accession Protocol, and the WTO Working Party report.

**ANNEX B-4****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA***First Part of the Integrated Executive Summary of China***I. INTRODUCTION**

1. This executive summary of the submissions made to date by the People's Republic of China ("China") before the Panel in *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (WT/DS431, WT/DS432 and WT/DS433) provides an overview of the following arguments by China:

- China's export quota systems for light and medium/heavy rare earths are justified under Article XX(g) of the GATT 1994.
- China's export quota system for tungsten is justified under Article XX(g) of the GATT 1994.
- China's export quota system for molybdenum is justified under Article XX(g) of the GATT 1994.
- China's trading rights commitments in Paragraph 5.1 of China's *Accession Protocol* and Paragraphs 83 and 84 of the *Working Party Report* do not prevent the use of prior export performance and minimum capital criteria to administer the rare earths and molybdenum export quota systems.
- The general exceptions of Article XX of the GATT 1994 are available to China to defend a potential violation of Paragraph 11.3 of China's *Accession Protocol*.
- China's export duties on rare earths, tungsten and molybdenum are justified under Article XX(b) of the GATT 1994.

**II. ARGUMENTS RELATING TO CHINA'S EXPORT QUOTA SYSTEM****A. Scope of the Panel's jurisdiction**

2. Because the Complainants have challenged only China's 2012 export quota systems, the question is not whether the export quota systems that applied *before* 2012 meet the conditions of Article XX(g) of the GATT 1994. Therefore, the Panel should examine whether the design and structure of the 2012 export quota systems, working together with the other elements of China's conservation policy in place in 2012 and today (including the restrictions on domestic production and consumption), meet the different legal criteria of Article XX(g). Further, because Complainants have made separate and distinct claims against China's export quota systems for rare earths apart from China's export *duties* for rare earths, the Panel must examine China's defense for its 2012 export quota system separate and apart from China's defense for its 2012 export *duties*.

**B. China's 2012 export quotas on light and medium/heavy rare earths are justified under Article XX(g) of the GATT 1994****1. The 2012 rare earth export quotas relate to conservation of exhaustible natural resources**

3. Rare earths are non-renewable natural resources. Intense exploitation of China's rare earth resources leads to their depletion in quantity and quality. The exhaustible nature of China's rare earth resources is particularly acute for China because it is at present the only country that supplies the world markets with a significant amount of both light and medium/heavy rare earths.

4. Measures justified under Article XX(g) of the GATT 1994 must relate to the specific policy goal of "*conservation*" of exhaustible natural resources. The panel in *China – Raw Materials* conducted a detailed analysis of the term "conservation" in light of its context – consisting of the text of Article XX(g) and its preamble – and taking into account the international law principle of Permanent Sovereignty over Natural Resources. The panel concluded that the term "conservation" encompasses measures aimed both at *preserving* exhaustible natural resources in their current state, as well as *regulating their use* for economic development *today*. The panel stated that, under a proper interpretation of Article XX(g) of the GATT 1994, resource-endowed WTO Members are "entitled to manage the supply and use of those resources through conservation-related measures that foster the sustainable development of their domestic economies".<sup>1</sup>

5. Through China's export quotas, China reconciles the need to conserve exhaustible rare earth resources for *future* use with the need to use these resources for sustainable economic development *today*. In particular, the export quotas:

- help to enforce China's domestic conservation policy by reducing incentives for the mining or production in violation of the applicable requirements (including access conditions to the industry and environmental requirements) and extraction and production quotas, since they enable the Chinese authorities to trace the sources of the exported rare earth products and send a signal to domestic producers that an unlimited export market does not exist and that it is therefore not financially attractive to invest in new or expanded illegal production;
- ensure that the burden of its conservation policy is not solely on domestic Chinese users of rare earths, providing incentives to both domestic and foreign users to explore the use of alternative sources of supply;
- provide a safeguard against uncertainty in the market in respect of sudden speculative and pre-emptive demand surges that would disrupt the supply of rare earths to both domestic and foreign consumers.

6. China further demonstrated, based on the text and context of the measures embodying the 2012 export quotas, that there is a "close and genuine relationship of ends and means" between the quotas and the conservation objective:

- Certain of the measures embodying the 2012 export quotas, in particular the Notice of the Application Standards and Application Procedures for the 2012 Export Quota and the Notice Publishing the List of Enterprises Applying for the Export Quota for Rare Earth and Coke in 2012, refer explicitly to the objective to "protect resources" and all of the challenged 2012 quota measures refer to Article 16(4) of the Foreign Trade Law and Article 35 of the Regulations on the Administration of the Import and Export of Goods that form the legal basis for the quotas and explicitly link export quotas with China's policy of conserving resources.
- State Council policy documents, in particular the *1991 Circular*,<sup>2</sup> designating rare earths as a "specified mineral subject to protective mining", and the State Council's 2011 *Several Opinions*<sup>3</sup> explicitly state that the export quotas are part of a comprehensive conservation programme.

7. China continued and also demonstrated that the "design and architecture" of the 2012 export quota system is to conserve the exhaustible rare earth resources. The 2012 export quotas were formulated and set in conjunction with a 2012 extraction controlling quota and production

<sup>1</sup> Panel Report, *China – Raw Materials*, para. 7.404. See also, *Ibid.*, para. 7.381.

<sup>2</sup> Exhibit CHN-12: *1991 Circular on Qualifying Tungsten, Tin, Antimony, Ion-Absorption-Type Rare Earth Minerals as Specified Minerals of which the National Protective Mining is Prescribed*, (Guo Fa (1991) No.5, 15 January 1991).

<sup>3</sup> Exhibit CHN-13: *Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry* (Guo Fa [2011] No. 12), 10 May 2011.

quota on domestic production of smelted and separated rare earth products. These quotas are thus "interconnect[ed]"<sup>4</sup> and form an integrated whole that the Panel must consider together.

8. Under the system, the export quota volumes and conditions are set in a rational manner through a coordinated process by all competent Chinese Ministries (NDRC, MOFCOM, MLR and MIIT), simultaneously with extraction controlling and production quotas, with the objective of conserving rare earth resources. In line with the guidance provided by the State Council in its *Several Opinions*, the quota volumes are determined taking into account "situations concerning domestic resources, production and consumption, and the international markets".<sup>5</sup> This ministerial cooperation allows China to use the quotas, together with other domestic restrictions, to "manage the supply and use" of the resources, balancing the need to preserve resources for future generations with the needs of foreign and domestic current users. China has been successful in doing so, as the rare earth export quotas were not filled in 2012, showing that foreign users had access to all light and medium/heavy rare earth products they needed.

## 2. The export quotas are made effective in conjunction with restrictions on domestic production and consumption

9. A conservation-related export restriction will only comply with Article XX(g) of GATT 1994 if it "works together with" restrictions on domestic production or consumption. The Appellate Body found that the phrase "made effective in conjunction with restrictions on domestic production or consumption" in Article XX(g) imposes a requirement of "even-handedness" in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources".<sup>6</sup> This means that the burden of the conservation policy must not be on foreign trade *alone*.<sup>7</sup> China must thus combine the export restrictions with restrictions on *either* domestic production *or* consumption.<sup>8</sup> However, the panel in *China – Raw Materials* found that this "does not oblige" the resource-endowed Member "to ensure that the economic development of other user-countries benefits *identically* from the exploitation of the resources of the endowed countr[y]".<sup>9</sup>

10. China's comprehensive rare earth conservation policy in 2012 includes both *export* and *domestic* restrictions, and includes the following five categories of domestic restrictions:

- measures limiting and controlling the access of Chinese businesses to enter or expand operations in the rare earth industry;<sup>10</sup>
- extraction and production quotas controlling the volume of new rare earth products being mined, produced and consumed;<sup>11</sup>
- a significantly increased resource tax imposed upon rare earth producers;<sup>12</sup>
- compliance with environmental requirements, including *Emission Standards* and a requirement to make a deposit for ecological recovery that impose significant compliance costs upon rare earth producers;<sup>13</sup> and,
- rigorous enforcement actions to ensure compliance with these four categories of domestic restrictions.<sup>14</sup>

<sup>4</sup> Exhibit CHN-13: *Several Opinions*, Paragraph II(5).

<sup>5</sup> Exhibit CHN-13: *Several Opinions*, Paragraph II(7). See also Exhibit CHN-63: *Declaration on the Setting of 2012 Export Quotas on Rare Earth Products*.

<sup>6</sup> Appellate Body Report, *U.S. – Gasoline*, p. 20-21 (original emphasis). See also Panel Report, *China – Raw Materials*, paras. 7.402, 7.462.

<sup>7</sup> Appellate Body Report, *U.S. – Gasoline*, p. 21.

<sup>8</sup> China's Answers of 14 March 2013, paras. 148-149.

<sup>9</sup> Panel Report, *China – Raw Materials*, para. 7.404 (emphasis added).

<sup>10</sup> China's First Written Submission, paras. 166-173.

<sup>11</sup> China's First Written Submission, paras. 174-189.

<sup>12</sup> China's First Written Submission, paras. 190-195.

<sup>13</sup> China's First Written Submission, paras. 196-203.

<sup>14</sup> China's First Written Submission, paras. 204-225 and Annex.

11. China has provided extensive evidence that the effect of the access conditions; extraction, production, and export quotas; resource tax; and environmental requirements was to restrict domestic production and consumption of rare earths.

12. The totality of the evidence presented by China shows that its measures have restricted domestic production of new rare earth products.<sup>15</sup> Production of rare earths has been decreased significantly since the rare earth extraction controlling quota was introduced in 2006.<sup>16</sup> Actual extraction reduced from 120,800 REO tons in 2006 to 84,943 REO tons in 2011 and actual production of smelted and separated rare earth products reduced from 156,969 REO tons in 2006 to 96,934 REO tons in 2011.<sup>17</sup> Moreover, the evidence also showed that China was effective in combating out-of-quota illegal production, especially since it initiated in 2010 intensified enforcement actions.<sup>18</sup>

13. China has also provided argument and evidence that its measures have restricted domestic consumption of newly mined and produced rare earths. The combined effect of the export quotas and production quotas is to limit domestic consumption of newly mined and produced rare earth products. By subtracting the export quota from the production quota and providing incentives to exporters to fill their export quota (*i.e.* by basing the calculation of an exporter's quota share on past export performance), China effectively restricts the share of the total production quota available to Chinese domestic consumers.<sup>19</sup> The burden of the conservation policy is thus both on domestic and foreign users and, therefore, China's quota system meets the requirement of even-handedness in the imposition of restrictions.

14. A consideration of the operation of China's export quota system in conjunction with its domestic restrictions supports this conclusion. China demonstrated that the export quota and production quota volumes for 2012 were set in such manner as to restrict domestic consumption. The volume of newly mined and produced rare earth products that was available to domestic consumers for 2012 was 66,400 REO tons. This was significantly below the actual domestic consumption in 2011, *i.e.* 83,110 REO tons. Further, evidence on the reduction in the growth of domestic consumption,<sup>20</sup> and on the increase of domestic prices<sup>21</sup> and corresponding demand-softening effect on downstream consumers,<sup>22</sup> shows that China made the export restrictions "effective in conjunction with" restrictions on domestic production and consumption.

### 3. The export quota system complies with the Chapeau of Article XX

15. China's 2012 export quota measures for light and medium/heavy rare earths make no distinction in respect of the destination of the products that are exported. Therefore, the application of China's 2012 export quota measures do not treat similarly-situated WTO Members differently. Moreover, during the past two years, the rare earth export quotas were not filled, but the export quotas were still maintained at the same levels. Foreign users could obtain all rare earth products they needed. Hence, no "arbitrary or unjustifiable discrimination" was caused between foreign users from different WTO Members, nor between foreign and domestic Chinese users, as a result of the application of the 2012 rare earth export quota system.

16. China's 2012 export quotas on light and medium/heavy rare earths do not constitute a "disguised restriction on international trade" either. The Complainants did not provide evidence that the 2012 export quota systems had the intention, let alone the effect, of providing benefits to the domestic rare earths-consuming downstream industry. Indeed, the 2012 export quotas for light and medium/heavy rare earths were not filled. The export quota volumes were thus more than sufficient to meet foreign demand for both light as well as medium/heavy rare earths. China

<sup>15</sup> China's First Written Submission, Table 1; China's Oral Statement of 26 February 2013, paras. 31-32 and Figure 1.

<sup>16</sup> Exhibit CHN-137: *Rare Earths Data (1999-2012)*.

<sup>17</sup> *Ibid.*

<sup>18</sup> China's First Written Submission, para. 183; China's Oral Statement of 26 February 2013, para. 32 and Figure 1.

<sup>19</sup> China's First Written Submission, paras. 184-189; China's Oral Statement of 26 February 2013, para. 39; China's Answers of 14 March 2013, paras. 69-72, 150, 156-158; China's Comments of 25 March 2013, paras. 52-58.

<sup>20</sup> See China's Oral Statement of 26 February 2013, paras. 33-34 and Figure 2.

<sup>21</sup> *Ibid.*, paras. 40-41, Figure 3 and Table 1.

<sup>22</sup> *Ibid.*, para. 42.

has also provided evidence that the domestic and export prices of different rare earth metals and oxides follow the same evolution over time (factoring out the effect of the export duty and other export-specific costs).<sup>23</sup> This demonstrates that the export quotas did not cause any disguised restrictions on international trade.

17. Further, China's 2012 export quota system creates incentives for exporters to meet the demand of foreign users of rare earths. These incentives are created through the criteria through which China administers the quota system and the formula on the basis of which the enterprise's export quota share is calculated. The prior export performance and minimum registered capital criteria function to identify those companies that have a serious interest in exporting the products at issue, and that are equipped with the necessary expertise and resources to engage in the trade thereof. China has demonstrated that, rather than denying access to the same producers that supply domestic consumers, China's export quota system ensures that the same efficient and reliable suppliers are selected to supply the export market. Of the 42 major Chinese producers of smelted and separated rare earth products, 37 hold the export quota on their own or have access to the quota through their parent or affiliated enterprises.<sup>24</sup>

18. When determining the size of the share of the export quota allocated to individual export enterprises, a formula is applied that is based on the enterprise's past export performance. The consequence of the use of such formula is that, if an exporter has not completely used the export quota that was allocated for a given calendar year, it will receive a *smaller* allocated volume for the next year. These export quota-related requirements considerably increase the likelihood that foreign consumers will actually receive the amount of rare earth products that China specified in the export quota.

**C. China's 2012 export quotas on tungsten are justified under Article XX(g) of the GATT 1994**

**1. China's 2012 export quota on tungsten relates to the conservation of exhaustible natural resources**

19. Tungsten is a non-renewable natural resource. Intense exploitation of China's tungsten resources leads to their depletion in quantity and quality. Thus, China's tungsten resources are "exhaustible natural resources" within the scope of Article XX(g) of the GATT 1994.

20. China's 2012 export quota for tungsten, in combination with measures restricting domestic production or consumption, "relat[es] to conservation" of China's tungsten resources:

- The measures embodying the 2012 export quota for tungsten show that a "close and genuine relationship of ends and means" exists between the export quota and the conservation objective. In particular, the text of the *Public Notice of the Qualification Standards and Application Procedures of the 2012 Tungsten State Trading Enterprises, and Tungsten Export Supply Enterprises* refers explicitly to the conservation objective. Moreover, the measures embodying the 2012 tungsten export quota are adopted on the basis of Article 16(4) of the *Foreign Trade Law*, Article 35 of the *Regulations on the Administration of the Import and Export of Goods* and the *Measures for the Administration of Export Commodities Quotas* which all refer to China's conservation objective.
- Further, in the *1991 Circular* the State Council designated tungsten as a "special mineral under the national protective mining" and mandates that exploration, processing and export of tungsten is subject to strict planning in order to "reasonably develop, utilize and protect" the tungsten resources.<sup>25</sup>

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<sup>23</sup> China's Oral Statement of 26 February 2013, Figures 4 and 5; China's Answers of 14 March 2013, paras. 196-203.

<sup>24</sup> China's Oral Statement of 26 February 2013, para. 48 and Annex.

<sup>25</sup> Exhibit CHN-12: *1991 Circular*, second introductory paragraph, section 4 (first subparagraph) and section 5 (fourth subparagraph).



**2. The export quotas are made effective in conjunction restrictions on domestic production and consumption**

21. China's tungsten export quotas work together with the following categories of restrictions on domestic production and consumption:

- measures limiting and controlling the access to the tungsten industry;<sup>26</sup>
- measures directly controlling the volume of the resources being extracted, produced and consumed, by means of extraction quotas (limiting the amount of tungsten concentrates that can be extracted) and production quotas;<sup>27</sup>
- a resource tax on tungsten producers to ensure that the price of the resources reflects their costs;<sup>28</sup> and,
- measure requiring mines to make a *Deposit for Ecological Recovery*.<sup>29</sup>

**3. The export quota system complies with the Chapeau of Article XX**

22. China's 2012 export quota on tungsten makes no distinction at all in respect of the destination of the products that are exported. Therefore, it is not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

23. Further, the application of China's 2012 export quota on tungsten does not constitute a "disguised restriction on international trade" either. China demonstrated that significant quantities of tungsten products were imported into China during 2011 and 2012, showing that that foreign consumers of tungsten were *also* capable of securing supplies of tungsten *outside* of China. If China's users were able to secure tungsten on the world market, then this implies that foreign consumers of tungsten would be able to secure the same. This demonstrates that the export quota does not constitute a disguised restriction on international trade.

**D. China's 2012 export quotas on molybdenum are justified under Article XX(g) of the GATT 1994**

**1. China's 2012 export quota on molybdenum relates to the conservation of exhaustible natural resources**

24. Molybdenum is a non-renewable natural resource. Intense exploitation of China's molybdenum resources leads to their depletion in quantity and quality. Thus, China's molybdenum resources are "exhaustible natural resources" within the scope of Article XX(g) of the GATT 1994.

25. China's 2012 export quota for molybdenum, in combination with measures restricting domestic production or consumption, "relat[es] to conservation" of China's molybdenum resources. The measures embodying the 2012 export quota for molybdenum show that a "close and genuine relationship of ends and means" exists between the export quota and the conservation objective. In particular, the text of the *Public Notice of Application Conditions and Application Procedures for the 2012 Export quotas of Molybdenum* explicitly refer to China's conservation goal. Moreover, the measures embodying the 2012 molybdenum export quota are adopted on the basis of Article 16(4) of the *Foreign Trade Law*, Article 35 of the *Regulations on the Administration of the Import and Export of Goods* and the *Measures for the Administration of Export Commodities Quotas* which all refer to the conservation objective.

**2. The export quotas are made effective in conjunction restrictions on domestic production and consumption**

26. China's molybdenum export quotas work together with the following categories of restrictions on domestic production and consumption:

<sup>26</sup> China's First Written Submission, paras. 313-317.

<sup>27</sup> China's First Written Submission, paras. 318-328.

<sup>28</sup> China's First Written Submission, para. 329.

<sup>29</sup> China's First Written Submission, paras. 330-332.

- measures limiting and controlling the access to the molybdenum industry;<sup>30</sup>
- measures directly controlling the volume of the resources being produced and consumed, by means of production quotas;<sup>31</sup>
- a resource tax on molybdenum producers to ensure that the price of the resources reflects their costs;<sup>32</sup> and,
- measure requiring mines to make a *Deposit for Ecological Recovery*.<sup>33</sup>

### 3. The export quota system complies with the Chapeau of Article XX

27. China's 2012 export quota on molybdenum makes no distinction at all in respect of the destination of the products that are exported. Therefore, it is not applied "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

28. Further, the application of China's 2012 export quota on molybdenum does not constitute a "disguised restriction on international trade" either. China provided evidence that the export quotas for molybdenum were not filled in the past two years.<sup>34</sup> Foreign users could thus obtain access to all the molybdenum products they wanted. China also applies prior export performance and minimum capital criteria to administer the molybdenum export quotas in order to select exporters in China that are capable to supply the export quota share allocated to them.

#### E. China's trading rights commitments do not prevent China from using of prior export performance and minimum registered capital requirements to administer the export quotas for rare earths and molybdenum

29. Prior to China's accession to the WTO, only specialized enterprises had the right to import or export. Such "foreign trade operators" were required, on the basis of China's *Foreign Trade Law* to have a certain minimum capital and a required record of import and export. In response to concerns by some WTO Members, China made a commitment in Paragraph 5.1 of its *Accession Protocol* to "progressively liberalize the availability and scope of the right to trade". This commitment was further elaborated in Paragraphs 83 and 84 of the *Working Party Report*. Today, after amendment of the *Foreign Trade Law*, China no longer applies such conditions to foreign trade operators. Hence, in 2012, *all* enterprises in China have the right to trade *in all goods*.

30. However, this does not mean that China can no longer regulate trade, including by means of export quotas to conserve exhaustible natural resources. Indeed, the Appellate Body in *China – Audiovisual Products* has confirmed that China's obligations in Paragraph 5.1 are qualified by the opening clause of this Paragraph, which specifies that China's trading rights commitments are "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement".<sup>35</sup>

31. The commitments in Paragraphs 83 and 84 of the *Working Party Report* are also qualified by China's right to regulate trade, since these Paragraphs deal with the same subject-matter as Paragraph 5.1, have similar titles and are on an equal legal footing. Moreover, the panel in *China – Audiovisual Products* found that the obligations in Paragraph 83(d) "should be interpreted so as to be consistent with those of Paragraph 5.1".<sup>36</sup> In that same dispute, the Appellate Body has confirmed that Paragraph 84(b) "cannot impair China's power to impose ... *regulatory measures in respect of trade in goods that the covered agreements affirmatively recognize that China may take*".<sup>37</sup>

32. Therefore, enterprises that have the right to trade may be subject to "WTO consistent requirements relating to ... exporting", such as export quotas justified under Article XX(g) as well

<sup>30</sup> China's First Written Submission, paras. 362-365.

<sup>31</sup> China's First Written Submission, paras. 366-370.

<sup>32</sup> China's First Written Submission, paras. 371-373.

<sup>33</sup> China's First Written Submission, para. 374.

<sup>34</sup> Exhibit CHN-139: *Molybdenum Data (1999-2012)*.

<sup>35</sup> Appellate Body Report, *China – Audiovisual Products*, para. 219.

<sup>36</sup> Panel Report, *China – Audiovisual Products*, para. 7.310.

<sup>37</sup> Appellate Body Report, *China – Audiovisual Products*, para. 225 (emphasis added).

as criteria to administer these export quotas. Indeed, in the specific and exceptional situation where a WTO Member uses export quotas, the permitted export volume of the products subject to the quota must be allocated to exporting enterprises in some manner.

33. In respect of the export quotas on light and medium/heavy rare earths and molybdenum – which are justified under Article XX(g) – exporting enterprises must apply for obtaining a share of the annual export quotas. The prior export performance and minimum registered capital requirements are among the criteria that China uses to ensure that the export quotas are allocated to enterprises that are able to fulfill their export contracts. Hence, these criteria are criteria relating to the administration of the WTO-consistent export quotas and are *not* limitations on the right to trade.

34. Therefore, China's use of these quota allocation criteria is not prevented by the commitments in Paragraph 5.1 of the *Accession Protocol* or Paragraphs 83 and 84 of the *Working Party Report*, which are indeed qualified by China's right to regulate trade in goods in a manner consistent with the WTO Agreement. If the Complainants wanted to separately challenge China's quota allocation criteria, they should have challenged these measures under the specific WTO obligations applicable to quota allocation rules, including Article X:1, Article X:3(a) and Article XIII of the GATT 1994.

35. China also explained why the European Union's claim that the requirement in Article II.1.2 of the *Application Conditions for the 2012 Export Quotas for Molybdenum* violates China's commitment in Paragraph 84(b) of the *Working Party Report* because it would, allegedly, "allow [Chinese authorities] discretion to select between the applicants based on their own preference by arbitrarily deciding which level of prior export performance is sufficient"<sup>38</sup> must be dismissed. China explained that it was sufficient for manufacturing and trading enterprises that applied for a share of the 2012 export quota for molybdenum, and that had obtained an export quota before, to show *any level* of export performance.

36. It is well-established in the Appellate Body's jurisprudence that, where a term or provision of domestic law may admit of different possible interpretations or meanings, but can, in all cases, be interpreted and applied in a WTO-consistent manner, absent other evidence, a panel must presume that a responding Member will interpret and apply the measure in a WTO-consistent manner.<sup>39</sup> The European Union does not provide any evidence that would support its allegation that the decision on the eligibility of foreign enterprises to obtain a share of the export quotas would be taken in a *discretionary* manner. Therefore, in the absence of such evidence, the Panel must presume that Article II.1.2 of the *Application Conditions for the 2012 Export Quotas for Molybdenum* will be applied in a WTO-consistent manner.

### III. CHINA'S ARGUMENTS RELATING TO CHINA'S EXPORT DUTIES

#### A. Availability of Article XX of the GATT 1994 to defend a violation of Paragraph 11.3 of China's *Accession Protocol*

##### 1. Introduction

37. China argues that the general exceptions of Article XX of the GATT 1994 are available to defend a violation of China's export-duty commitments under Paragraph 11.3 of China's *Accession Protocol*. A careful analysis of the legal nature of China's *Accession Protocol* and of its precise legal relationship with the *WTO Agreement* and the multilateral trade agreements annexed thereto shows that Paragraph 11.3 of China's *Accession Protocol* is an integral part of the GATT 1994. As a consequence, China may have recourse to Article XX of the GATT 1994 to defend a violation of Paragraph 11.3 absent an explicit statement to the contrary in China's *Accession Protocol* or elsewhere in the covered agreements. China explains that the terms "nothing in this Agreement" in the chapeau of Article XX of the GATT 1994 do not exclude but rather confirm the availability of Article XX of the GATT 1994 to defend a violation of China's export-duty commitments. An

<sup>38</sup> European Union's Answers of 14 March 2013, para. 28.

<sup>39</sup> See Appellate Body Report, *U.S. – Oil Country Tubular Goods Sunset Reviews*, para. 173; Appellate Body Report, *U.S. – Section 211 Appropriations Act*, para. 259; Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74. See also Appellate Body Report, *U.S. – Continued Suspension*, para. 314; Appellate Body Report, *EC – Sardines*, para. 278.

appropriate holistic interpretation, taking due account of the object and purpose of the *WTO Agreement*, confirms China's view that it may justify the use of export duties through recourse to Article XX.

## 2. Paragraph 11.3 of China's Accession Protocol is an integral part of the GATT 1994

38. China stresses that post-1994 accession protocols are not covered agreements in and by themselves. Rather, they stipulate the terms under which a new Member accedes to the WTO, more specifically, according to Article XII:1 of the *WTO Agreement*, "to [the *WTO Agreement*] and the Multilateral Trade Agreements annexed thereto". In other words, post-1994 accession protocols serve to specify, including by means of "WTO-plus" commitments, how a WTO Member takes up the obligations in the *WTO Agreement* and the multilateral trade agreements annexed thereto. This overarching intrinsic link between post-1994 accession protocols and the *WTO Agreement* and the multilateral trade agreements annexed thereto is a defining feature of the WTO accession process.<sup>40</sup>

39. The list of covered agreements in Appendix 1 of the *DSU* is exhaustive and post-1994 accession protocols do not figure on that list. The mere fact that Paragraph 1.2 of China's *Accession Protocol* stipulates that China's *Accession Protocol* shall be an integral part of the *WTO Agreement* does not change this fact. China recalls in this context that the Trade Policy Review Mechanism (TPRM), governed by Annex 3 of the *WTO Agreement* is equally an integral part of the latter according to the express terms of Article II:2 of the *WTO Agreement*. However, the TPRM is not a covered agreement since it does not figure in Appendix 1 of the *DSU*. Rather than being covered agreements in and by themselves, post-1994 accession protocols stipulate, including through "WTO-plus" provisions, how the covered agreements will apply as between the newly acceding Member and the incumbent WTO Membership. Thus, *e.g.*, Paragraph 11.3 of China's *Accession Protocol* adds to a specific covered agreement, namely the GATT 1994, as applicable between China and its fellow Members.

40. It follows from Article XII:1 of the *WTO Agreement*, read together with Article 1.2 of China's *Accession Protocol*, that when confronted with a "WTO-plus" provision in China's *Accession Protocol*, the treaty interpreter has to proceed in two distinct steps. *First*, the treaty interpreter has to determine, on a case-by-case basis in light of the subject matter and the underlying rationale of a given accession commitment, to which of the covered agreements listed in Appendix 1 of the *DSU*, that commitment intrinsically relates to. *Second*, once it has been established to which covered agreement a given accession commitment intrinsically relates to, it is indeed of utmost importance to carefully investigate whether the acceding Member may have waived its right to have recourse to the exception provisions contained in the relevant covered agreement to defend a violation of any integral parts of that agreement.<sup>41</sup>

41. In the case of China's export-duty commitments in Paragraph 11.3 of China's *Accession Protocol*, this investigation involves a careful consideration of important contextual provisions, notably Paragraphs 5.1 and 7.3 of China's *Accession Protocol*. This consideration leads to the necessary conclusion that it would have been contrary to the rule of effective treaty construction for the drafters to include an explicit reference to Article XX of the GATT 1994 into Paragraph 11.3 of China's *Accession Protocol*. That provision being an integral part of the GATT 1994, China may have recourse to the exceptions of Article XX of the GATT 1994 absent an express statement to the contrary in Paragraph 11.3 of China's *Accession Protocol* or elsewhere in the covered agreements.<sup>42</sup>

42. China argues that the export-duty commitments undertaken by China in Paragraph 11.3 of China's *Accession Protocol* bear an intrinsic relationship to two specific GATT-provisions, namely Article XI:1 and,<sup>43</sup> most importantly, Article II:1(a) of the GATT 1994.<sup>44</sup> Paragraph 11.3 of China's *Accession Protocol* expands for China upon these two GATT-provisions.

<sup>40</sup> China's Rebuttal Submission Regarding its Request for a Preliminary Ruling, paras. 13-28.

<sup>41</sup> China's Comments of 25 March 2013, paras. 4-13; China's Answers of 14 March 2013, paras. 2-20.

<sup>42</sup> China's Answers of 14 March 2013, paras. 2-20; China's Comments of 25 March 2013, paras. 4-13.

<sup>43</sup> China's First Written Submission, paras. 431-434.

<sup>44</sup> China's Rebuttal Submission Regarding its Request for a Preliminary Ruling, paras. 22-24.

43. Thus, nothing in the text of Article II:1(a) of the GATT 1994 would prevent a WTO Member to make commitments on export duties in its Goods Schedules. Some Members have indeed done so. In principle, Article II:1(a) of the GATT 1994 accommodates both types of bindings – import and export duties. It requires that Members "shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in... the appropriate Schedule". The reference to "commerce of the other contracting parties" can be both import or export commerce; the nature of the obligations under Paragraph 11.3 and Article II:1(a) is thus essentially the same, *i.e.*, a border measure affecting either import or export.

**3. The terms "nothing in this Agreement" in the chapeau of Article XX of the GATT 1994 do not exclude but confirm the availability of Article XX of the GATT 1994 to defend a violation of Paragraph 11.3 of China's Accession Protocol**

44. China argues that a correct interpretation, under the rules of the *Vienna Convention*, of the phrase "nothing in this Agreement" in the chapeau of Article XX of the GATT 1994 does not narrowly limit the availability of the exceptions under Article XX to defending violations of obligations listed in the GATT 1994 as it entered into force on 1 January 1995. Rather, the exceptions under Article XX are also available to excuse violations of intrinsically GATT-related "WTO-plus" provisions contained in post-1994 accession protocols. The latter category thus consists of those provisions that are not part of the text of the GATT 1994 as it entered into force on 1 January 1995 but that nevertheless have to be treated as an integral part of the latter, such as Paragraph 11.3 of China's *Accession Protocol*.<sup>45</sup>

**4. An appropriate holistic interpretation, taking due account of the object and purpose of the WTO Agreement, confirms that China may justify the use of export duties through recourse to Article XX of the GATT 1994**

45. In China's view, interpretation of a specific provision of WTO law, as part of a holistic exercise taking duly into account the object and purpose of the *WTO Agreement*, may not lead to a result that effectively prevents Members from achieving the fundamental objectives enshrined in the Preamble of the *WTO Agreement*. This is due to the fact that it is the objectives stipulated in the Preamble that effectively reflect the object and purpose of the *WTO Agreement* as a whole.

46. Among the most important of the fundamental objectives enshrined in the Preamble of the *WTO Agreement* is the promotion of human welfare, the raising of living standards, the optimal use of resources, and the protection and preservation of the environment. The interpretative value of the WTO's fundamental objectives must be taken into account when deciding whether Article XX is available to justify a potential violation of Paragraph 11.3 of the *Accession Protocol*.

47. In China's view, for provisions contained in the GATT 1994 as it entered into force on 1 January 1995 as well as for intrinsically GATT-related "WTO-plus" provisions in post-1994 accession protocols, it is the availability, absent express language to the contrary, of the exceptions under Article XX of the GATT 1994 that ensures that Members are not deprived of their capacity to effectively contribute to the achievement of the WTO's fundamental objectives.<sup>46</sup>

**B. China's substantive defense of the export duties under Article XX(b) of the GATT 1994**

48. In 2012, China provided more than 90% of all rare earth supply, while its territory was estimated to hold only 23% of the world's rare earth reserves. Hence, while many countries benefit from China's resources, China stands almost alone in bearing the burden of this production. This burden includes the grave harm that the mining and production of rare earth products causes to the environment and, as a consequence, to the health of humans, animals and plants in China. Studies about tungsten and molybdenum mining in China also concluded that their production entailed significant risks to the environment.

<sup>45</sup> China's First Written Submission, paras. 436-444; China's Rebuttal Submission Regarding its Request for a Preliminary Ruling, paras. 35-42; China's Answers of 14 March 2013, paras. 21-25.

<sup>46</sup> China's First Written Submission, paras. 445-458; China's Rebuttal Submission Regarding its Request for a Preliminary Ruling, paras. 43-55.

49. Article XX(b) of the GATT 1994 protects China's sovereign right to adopt a policy to tackle the environmental harm arising from the production and consumption of rare earth, tungsten and molybdenum resources and, therefore, to protect human, animal or plant life or health. China's export duties on rare earths, tungsten and molybdenum products are integral part of an integral part of a comprehensive policy that has the goal to reduce pollution and protect the health of China's population, its animals and plants. China demonstrated this on the basis of documents announcing and describing this policy as well as from other measures that China has adopted as part of this policy.

50. The duties increase the price of exported rare earth, tungsten and molybdenum products, in a synergetic relationship with the resource tax and the *Deposit for Ecological Recovery*, as well as the imposition and enforcement of costly environmental regulations to control pollution created by the production of these products. By increasing the price of the domestic and foreign-bound products, demand for these products will decrease and, therefore, production of rare earth, tungsten and molybdenum products in China will be reduced, resulting in less pollution connected with both mining and production. These price adjusting measures function together with industry access conditions requiring compliance with specific environmental requirements, including *Emission Standards*, and environmental compliance inspection. Accordingly, the export duties are, together with these other measures, "apt to make a material contribution to the achievement of [the] objective" of protecting human, animal or plant life or health.<sup>47</sup>

51. China recalls that the Appellate Body in *Brazil – Retreaded Tyres*, stressed that "[s]ubstituting one element of this comprehensive policy for another would weaken the policy by reducing the synergies between its components, as well as its total effect".<sup>48</sup> Therefore, the export duties, as part of such comprehensive policy, are "necessary" to protect "human, animal or plant life or health".

52. China's export duties do not make a distinction according to the destination of the products being exported. In the absence of any distinction based on origin or destination, there is no cause to consider that the export duty is applied "in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail". Further, the application of China's export duties does not constitute a "disguised restriction on international trade" either. The export duties are tailored to, and are an intrinsic part of, China's policy aimed at protecting the environment against the harms following from excessive mining and production of rare earth, tungsten and molybdenum products

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<sup>47</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

<sup>48</sup> See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

*Second Part of the Integrated Executive Summary of China*

## I. INTRODUCTION

1. This second part of the executive summary of the submissions made by the People's Republic of China ("China") before the Panel in *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (WT/DS431, WT/DS432 and WT/DS433) provides an overview of the following arguments by China:

- China has a comprehensive conservation policy for rare earths.
- Article XX(g) of the GATT 1994 permits WTO Members to balance conservation with the objective of sustainable economic development.
- China's rare earth export quotas relate to the conservation of exhaustible natural resources.
- China's rare earth export quotas are made effective in conjunction with restrictions on domestic production and consumption.
- Complainants failed to rebut China's arguments and evidence showing that China's rare earths export quota system is not applied in a manner that would violate the requirements of the *chapeau* of Article XX of the GATT 1994.
- Complainants failed to rebut China's arguments and evidence showing that there is no causal connection between the export quotas for tungsten and molybdenum and any commercial advantage provided to downstream Chinese users of tungsten and molybdenum.

## II. CHINA HAS A COMPREHENSIVE CONSERVATION POLICY FOR RARE EARTHS

2. China's conservation policy for rare earths had its origin in 1991 when the State Council designated rare earths as "special minerals under national protective mining" which China must "reasonably develop, utilize and protect".<sup>1</sup> In 2005, the State Council specified in another *Circular*, that "[f]or the purpose of *conserving domestic resources* [including rare earths], it is necessary to control the export amount of certain exhaustible resource products while controlling the domestic production and consumption of them".<sup>2</sup> In its 2011 *Several Opinions* – an instrument that is legally binding for all Ministries, Agencies, Commissions, and provincial and local Chinese authorities<sup>3</sup> – the State Council set out a strong and clear rare earth policy requiring "effective protection and a rational utilization"<sup>4</sup> of rare earths from mandated action by all responsible authorities within China.

3. China's rare earths conservation policy consists of: (i) a strict control of the access to the rare earth industry; (ii) taxation and prices as adjusting measures; (iii) tackling harm to the environment caused by rare earth mining and production; (iv) strict quantitative control of the extraction in mines and production of smelted and separated rare earth products as well as export, whereby the interconnection among the extraction quota, production quota and export quota is ensured; and (v) strict enforcement of laws and regulations relating to the rare earth industry.

4. China's strict annual quantitative limits on, first, the extraction of rare earths in mines in China, second, on the processing into smelted and separated products and third, on the export of those products, work as detailed in the following paragraphs.

5. China's conservation policy starts with the rare earths in the ground. The extraction quota controls the annual depletion rate of the rare earth resources.<sup>5</sup> This quota is split up between light

<sup>1</sup> Exhibit CHN-12: *1991 Circular*, second introductory paragraph.

<sup>2</sup> Exhibit CHN-62: *Circular on Measures Limiting the Export of Certain of High-Energy-Consuming, High-Polluting and Resource-Related Products*, (Fa Gai Jing Mao [2005] No.2595), 9 December 2005, Section III (emphasis added).

<sup>3</sup> Exhibit CHN-185: *The Status and Effect of Several Opinions of the State Council on Promoting the Sustainable and Sound Development of the Rare Earth Industry in China's Domestic Law System*, 9 June 2013.

<sup>4</sup> Exhibit CHN-13: *Several Opinions*, Introductory Paragraph.

<sup>5</sup> China's Second Written Submission, para. 36; China's First Written Submission, paras. 24, 175.

and medium/heavy rare earths according to the main types of ores and their geographical location in China. This quota is monitored by the Ministry of Land and Resources (MLR).<sup>6</sup>

6. China also imposes a production quota on smelted and separated rare earth products in addition to the extraction quota. This quota is set and administered by the Ministry of Industry and Information Technology (MIIT). It covers roughly the same total volume as the extraction quota, with a slight adjustment for the rare earth concentrates that get lost during further processing.<sup>7</sup> This second quota – imposed at the smelting and separating stage of the rare earths supply chain – facilitates the enforcement of the extraction quota against illegal mining. Indeed, were there only an extraction quota and given the difficulty of detecting illegal mining, illegal mines could sell their ore products to smelting and separating enterprises, who could process unrestrained quantities of these illegal products without being inspected.<sup>8</sup> Further, the monitoring and enforcement of the production quota by a different Chinese Ministry (MIIT) than the MLR that monitors the extraction quota, doubles up on the enforcement of China's rare earth conservation goal.

7. The production quota also furthers China's conservation policy by effectively placing an annual limit on extraction in cases where smelting and separating enterprises have unused stocks of unprocessed rare earth concentrates due to lack of demand in the previous year. In the absence of a production quota, these enterprises could produce unrestrained amounts of smelted and separated products from (a) these older concentrate stocks, in addition to (b) the full amount of rare earth concentrate that is produced according to the new extraction quota for the running calendar year. Yet, because China imposes a production quota, in the new year the smelting and separating enterprises will only need to use a part of the new ores that can be produced according to the extraction quota for that year. These enterprises will indeed use their stocks first. The result of the production quota is that demand for newly extracted ores will be limited – and keep ores in the ground.

8. Finally, China also imposes export quotas to manage what is effectively the world supply of the volume of rare earth products determined in the extraction and production quotas. Through the enforcement of the quotas, China signals to rare earth users in China and abroad that it is serious about preserving rare earths for future use, while at the same time ensuring an appropriate supply for foreign and domestic commercial users today. China thus relies on the export quotas to balance the conservation objective with the objective of sustainable economic development. The export quotas apply to the rare earth products that are actually internationally traded and thus drive the depletion of the resources: rare earth oxides, metals and salts.<sup>9</sup>

### **III. ARTICLE XX(G) OF THE GATT 1994 PERMITS WTO MEMBERS TO BALANCE CONSERVATION WITH THE OBJECTIVE OF SUSTAINABLE ECONOMIC DEVELOPMENT**

9. China addressed Complainants' interpretation of Article XX(g) that China – and indeed, all resource-endowed WTO Members – can, in the framework of a conservation policy, do nothing to control the international sale and marketing of its rare earth products once extracted from Chinese soil. China explained that their interpretation rejects the *Raw Materials* panel's holding that a WTO Member can rely on export quotas to "us[e] and manag[e] resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development".<sup>10</sup>

10. This interpretation is embedded in the context of the Preamble of the WTO Agreement,<sup>11</sup> which points to the WTO Member's challenge of dealing with the tension between realizing the needs of WTO Members at different levels of economic development through "optimal use"<sup>12</sup> of

<sup>6</sup> China's Answers of 14 March 2013, para. 94; China's Second Written Submission, para. 36.

<sup>7</sup> China's Second Written Submission, para. 37 and footnote 94; China's First Written Submission, paras. 24, 176-183.

<sup>8</sup> China's Second Written Submission, para. 37.

<sup>9</sup> China's Second Written Submission, paras. 12-13, 70-71.

<sup>10</sup> Panel Report, *China – Raw Materials*, para. 7.375.

<sup>11</sup> Panel Report, *China – Raw Materials*, paras. 7.373-7.376.

<sup>12</sup> Panel Report, *China – Raw Materials*, para. 7.374.



resources, on the one hand, and the "protection and conservation" of the resources for future use, on the other hand.<sup>13</sup>

11. This interpretation is also consistent with the international law norm of Permanent Sovereignty over Natural Resources.<sup>14</sup> This norm gives resource-endowed countries the right to "freely use and exploit their natural wealth and resources ... for their own progress and economic development".<sup>15</sup> In light of this fundamental international law norm, it is simply not credible that resource-endowed countries would, by acceding to the WTO, have relinquished this fundamental norm and not be permitted to balance the needs of their own citizens with the rights of foreign users of such resources.<sup>16</sup>

12. The negotiating history of the GATT also supports this interpretation. Brazil proposed to permit the use of export restrictions to preserve scarce natural resources where the resources are so limited that, in case of unlimited export, the supply would be inadequate for domestic needs.<sup>17</sup> In response, the negotiators in the Committee on Quantitative Restrictions "recognized that there might be cases in which such action would be *unobjectionable*",<sup>18</sup> but that it needed to be "subject to sufficient safeguards".<sup>19</sup>

13. China explained that Complainants err that this interpretation would create a loophole in the disciplines of the GATT 1994 and would let protectionism prevail.<sup>20</sup> China does *not* use the challenged export quotas to promote its domestic industry at the expense of foreign users, but in order to reconcile its conservation policy with sustainable economic development needs. It cannot be the case that, once exhaustible natural resources are extracted from the ground, resource-endowed WTO Members would be prevented from managing these resources and from balancing the needs of their own citizens with the rights of foreign users of such resources.<sup>21</sup> Article XX(g) and its chapeau include stringent safeguards to prevent a resource-endowed Member from abusing its right of supply-management under Article XX(g) to promote its domestic industry at the expense of foreign users of the natural resources at stake. The export quotas must indeed be "made effective in conjunction with restrictions on domestic production or consumption", requiring the resource-endowed Member not to compromise the achievement of its conservation objective by permitting unlimited domestic production and consumption. Moreover, as required by the chapeau, the export quotas must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade".

#### **IV. CHINA'S RARE EARTH EXPORT QUOTAS RELATE TO THE CONSERVATION OF EXHAUSTIBLE NATURAL RESOURCES**

##### **A. China provided evidence that it sends the correct conservation signals to the market**

14. China explained in Part I of its executive summary that through the export quotas, China reconciles the need to conserve exhaustible rare earth resources for *future* use with the need to use these resources for sustainable economic development *today*. Like any commodity market, the rare earths market functions on information and market participants react to signals received from major suppliers and consumers. Given China's current unique position as being practically the sole supplier of rare earths in the world, any signals sent through its policies will directly trigger reactions in the market. It is therefore incumbent upon China to send the *right* signals that

<sup>13</sup> Panel Report, *China – Raw Materials*, para. 7.375.

<sup>14</sup> Panel Report, *China – Raw Materials*, paras. 7.377-7.381.

<sup>15</sup> Exhibit CHN-49: U.N. G.A. Resolution 626 (VII), *Right to Exploit Freely Natural Wealth and Resources* (21 December 1952).

<sup>16</sup> China's Oral Statement of 18 June 2013, para. 15.

<sup>17</sup> See Exhibit CHN-187: Verbatim Report of the First Meeting of the Sub-Committee of Committee II on Quantitative Restrictions and Exchange Control, E/PC/T/C.II/QR/PV/1, 11 November 1946, p. 15. See also Exhibit CHN-188: Verbatim Report of the Fifth Meeting of the Sub-Committee of Committee II on Quantitative Restrictions and Exchange Control, E/PC/T/C.II/QR/PV/5, 18 November 1946, p. 79.

<sup>18</sup> Exhibit CHN-189: Preparatory Committee of the International Conference on Trade and Employment, Committee II, Report of the Sub-Committee on Quantitative Restrictions and Exchange Control, E/PC/T/C.II/59, 21 November 1946, p. 5 (emphasis added).

<sup>19</sup> *Ibid.*

<sup>20</sup> See China's Oral Statement of 18 June 2013, para. 13; China's Answers of 8 July 2013, paras. 5-7; China's Comments of 17 July 2013, para. 15.

<sup>21</sup> China's Oral Statement of 18 June 2013, para. 15; China's Answers of 8 July 2013, para. 3.

*contribute to its conservation objective.* China provided evidence that, when China sets the export quota volumes for a given calendar year at the end of the preceding year, "simultaneously"<sup>22</sup> with the production quotas, China effectively sends the following signals to the market for the coming year:

15. *First*, China signals to would-be illegal producers<sup>23</sup> in China that the risk/reward ratio is insufficient to start up illegal activity. Given the already intensified enforcement efforts against illegal production and smuggling, China's export quotas help to further reduce the *economic* incentive to produce illegally. Under a given level of enforcement, without an export quota in place, entities in China will consider the potential that a significant part of all legally produced rare earth products could be exported, leaving the domestic Chinese market in a supply squeeze. This could occur because of a speculative demand surge or because of governmentally-promoted foreign stockpiling.<sup>24</sup> Because the legitimate Chinese producers cannot produce more than the assigned production quota – and there are no other rare earth supplies of any significance outside China – there would be great incentives for illegal producers to meet the shortfall in domestic Chinese demand. The predictable level of supply from legal sources to both domestic and foreign markets, an expectation resulting from the presence of an export quota, removes this incentive for conservation-frustrating illegal production and selling to the domestic market.<sup>25</sup>

16. *Second*, the export quotas – even when not filled in certain years – send the signal that unlimited supplies from China cannot and will not last. Without the export quotas, the risk exists that foreign users, investors, and financing institutions – knowing there is unlimited export from China – would not likely proceed with rare earth projects outside China and the burden of the conservation policy would be solely on China. China provided evidence of a considerable increase in the number of new rare earth mining projects starting up outside China and securing investment since 2010. A report by China's rare earth expert John Goode details these many new investments.<sup>26</sup> Further evidence supporting this effect is the development of substitutes and the initiation of recycling efforts.<sup>27</sup> China also provided evidence of substitution by Chinese downstream users,<sup>28</sup> and the initiation of rare earths recycling projects by Chinese enterprises and the preparation of research and development and recycling projects.<sup>29</sup> This shows that China sent the correct signal to rare earth enterprises, investors, and financing entities, both in China and abroad.

17. *Third*, China signals to the Chinese and foreign users of rare earths what the respective volumes of supply will look like in the coming year. These transparent announcements<sup>30</sup> allow Chinese and foreign users to adjust their behavior. Such announcements will dampen any likelihood of panic, speculative and pre-emptive buying, to which the rare earths market is

<sup>22</sup> Exhibit CHN-13: *Several Opinions*, Paragraphs II(7) and VI(20); Exhibit CHN-21: *Provisional Measures on the Administration of the Directive Production Plan of Rare Earth*, (Gong Xin Bu Yuan [2012] No.285), 13 June 2012, Article 4 and Exhibit CHN-63: *Declaration on the Setting Of 2012 Export Quotas on Rare Earth Products*, paras. 2 and 4.

<sup>23</sup> Illegal producers may either be mining or producing without the required license or may be legitimate producers that engage in over-quota mining or production.

<sup>24</sup> Exhibit CHN-153: *Rare earths – demand and speculation. Report Prepared by Dr. David Humphreys*, April 2013, pp. 3-5; Exhibit CHN-190: *Rare Earth Metals*, Parliament Office of Science & Technology, Postnote Number 368 January 2011, p. 4.

<sup>25</sup> China's Comments of 25 March 2013, paras. 49-50.

<sup>26</sup> Exhibit CHN-192: *The impact of Chinese rare earth quotas on non-Chinese exploration, development, demand and production. A review by J.R. Goode*, June 2013.

<sup>27</sup> Exhibit CHN-192: *The impact of Chinese rare earth quotas on non-Chinese exploration, development, demand and production. A review by J.R. Goode*, June 2013.

<sup>28</sup> Exhibit CHN-132: "Three Concerns Behind the Prosperity of Rare Earth Listed Companies", *21<sup>st</sup> Century Business Herald*, 2 August 2011, pp. 2-3.

<sup>29</sup> China's Answers of 8 July 2013, paras. 107-108 and Exhibit CHN-214: *Introduction of the Rare Earths Recycling in China*, Association of China Rare Earth Industry, 3 July 2013.

<sup>30</sup> Specified in the different batches for 2012: Exhibit CHN-57: *Notification of the Ministry of Commerce on the Supplement to the 2012 First Batch of Rare Earth Export Quota* (Shangmaopi [2012] No. 618), 16 May 2012; Exhibit CHN-56: *2012 Notification on List of Rare Earth Export Enterprises and First Batch Rare Earth Export Quota*, (Ministry of Commerce, Shangmaohan, No. 1133, 26 December 2011) and ; Exhibit CHN-58: *Notification of the Ministry of Commerce regarding the Second Batch Rare Earth Export Quota of 2012* (Shang Mao Han [2012] No. 627), 16 August 2012.

particularly sensitive.<sup>31</sup> Further, such announcements signal that China is willingly supplying the actual commercial needs in the market,<sup>32</sup> but not foreign governments' stockpiling programs.<sup>33</sup> Thus, the export quotas serve to prevent speculative surges from happening that would cut-off access to the limited rare earth supplies, threatening sustainable development.<sup>34</sup> China's evidence that the rare earths market had cooled down in 2012 and is now a "normal" market reflects consumers' confidence in China's rare earth policy, of which China's 2012 export quota is an important part.<sup>35</sup>

**B. The text, context, and design and architecture of the 2012 export quotas demonstrate that they relate to conservation**

18. Further evidence that the export quotas "relate[] to conservation" lies in the "text of the [challenged quota] measure[s]", and their "context".<sup>36</sup> China has explained that the very text of the challenged export quota measures, as well as the policy documents to which they are tied, focus on the conservation objective.<sup>37</sup>

19. The connection of the export quotas to China's conservation policy is also found in the "design and architecture"<sup>38</sup> of the 2012 export quota measures.

20. *First*, China recalls that the 2012 export quota volumes are set simultaneously with the extraction and production quotas as part of a coordinated effort by MIIT, MLR, NDRC and MOFCOM.<sup>39</sup> When determining the quota levels in 2012, the Ministries took into account the situations concerning domestic resources, domestic and foreign demand and domestic and foreign consumption.<sup>40</sup> In this manner, they balanced the need to conserve the resources for future use with the need to use these resources for economic development today. The export quota system is thus designed to function together with the extraction and production restrictions, which all conserve resources.

21. *Second*, the export quotas are applied at the level of smelted and separated rare earth products. China thus controls the export of the rare earth products at the upstream "rare earths industry" stage of the rare earths supply chain, where the production quota also applies.<sup>41</sup> This aspect of the architecture of China's export quota system again demonstrates that it is related to conservation. The smelted and separated rare earth products are the products that are actually traded. Hence, these are the products for which the supply can be "managed" effectively.<sup>42</sup> In order to manage the supply of the limited volume of rare earth products, the rare earth export quotas must cover all products produced by the rare earth industry and that form the inputs for the downstream industries using rare earths.<sup>43</sup>

22. *Third*, in reply to Complainants' argument that rare earth salts, oxides and metals are not "exhaustible natural resources", China explained that the clause "relating to conservation of exhaustible natural resources" does not require that the exact marketable product that is the

<sup>31</sup> Exhibit CHN-153: *Rare earths – demand and speculation. Report Prepared by Dr. David Humphreys*, April 2013, pp. 3-5 and Exhibit CHN-1: Information Office of the State Council, "Situation and Policies of China's Rare Earth Industry", Beijing, June 2012, p. 27.

<sup>32</sup> Exhibit CHN-1: Information Office of the State Council, "Situation and Policies of China's Rare Earth Industry", Beijing, June 2012, p. 25.

<sup>33</sup> Exhibit CHN-190: *Rare Earth Metals*, Parliament Office of Science & Technology, Postnote Number 368 January 2011, p. 4.

<sup>34</sup> China's First Written Submission, paras. 146-154; China's Oral Statement of 26 February 2013, paras. 23-25; China's Answers of 14 March 2013, para. 88; China's Second Written Submission, paras. 53-61.

<sup>35</sup> China's Answers of 8 July 2013, paras. 40-44; China's Comments of 17 July 2013, para. 65

<sup>36</sup> See Panel Report, *China – Raw Materials*, para. 7.418.

<sup>37</sup> See China's First Written Submission, paras. 91-112.

<sup>38</sup> See Panel Report, *China – Raw Materials*, para. 7.418.

<sup>39</sup> Exhibit CHN-13: *Several Opinions*, Paragraphs II(7) and VI(20); Exhibit CHN-21: *Provisional Measures on the Administration of the Directive Production Plan of Rare Earth*, (Gong Xin Bu Yuan [2012] No.285), 13 June 2012, Article 4 and Exhibit CHN-63: *Declaration on the Setting Of 2012 Export Quotas on Rare Earth Products*, paras. 2 and 4.

<sup>40</sup> Exhibit CHN-13: *Several Opinions*, Paragraph II(7) and Exhibit CHN-63: *Declaration on the Setting Of 2012 Export Quotas on Rare Earth Products*, paras. 4-5 and 11.

<sup>41</sup> China's Second Written Submission, para. 77.

<sup>42</sup> China's Second Written Submission, paras. 12-13, 70-71.

<sup>43</sup> China's Answers of 8 July 2013, paras. 133-140, 141-147, 293-298, 308-314; China's Oral Statement of 18 June 2013, paras. 10, 32-33 and Figure 1; China's Second Written Submission, paras. 11-12, 62-79.

subject-matter of the measures at issue be only the raw form of exhaustible natural resources themselves. Indeed, in *U.S. – Gasoline*, the measures that were found to relate to conservation of clean air (the baseline establishment rules) applied to the quality standards of different types of gasoline, not the clean air itself.<sup>44</sup> Hence, when designing measures to conserve an exhaustible natural resource, a WTO Member's measure can only control those aspects of trade and markets that it *can* control to achieve the conservation objective. In order to protect the non-renewable rare earth ores from excessive depletion, China's export quotas cover the products it can control and that are traded internationally – rare earth oxides, metals, salts and alloys. These are the products that are traded – not raw, unprocessed rare earth ores.

23. *Fourth*, China does not apply further export quotas to the downstream products using rare earths as inputs. This would have required China to impose a quota for *all* the downstream products that are produced at the same downstream stage of the rare earths supply chain. These downstream products are made from a percentage of rare earths, mixed with other non-rare earth inputs. For instance, a NiMH battery contains 30-50% Nickel, but only 5-10% of the rare earth Lanthanum. Hence, a quota on such batteries would effectively also impose a quota on nickel, which is not intended by China and may create trade-distortions.<sup>45</sup> Moreover, identifying the rare earth content in such end-use products, and setting this off against the export quota volume, requires sophisticated, time-consuming and costly analysis.<sup>46</sup> China already achieves its conservation objective through the current product coverage of the export quotas. It does not need to engage in additional burdensome, trade-distortive and ineffective quota-setting for downstream products.

## **V. CHINA'S RARE EARTH EXPORT QUOTAS MEET THE EVEN-HANDEDNESS CONDITION SINCE THEY ARE MADE EFFECTIVE IN CONJUNCTION WITH RESTRICTIONS ON DOMESTIC PRODUCTION AND CONSUMPTION**

### **A. China has effective restrictions on domestic production**

24. China provided evidence that, since the introduction of the extraction quota in 2006 until today, extraction of rare earths has been reduced by 43%.<sup>47</sup> Further, since the introduction of the production plan in 2007 until today, actual production of smelted and separated rare earth products has fallen by 35%.<sup>48</sup> Moreover, China ensures the effectiveness of the domestic production restrictions by means of effective enforcement, in particular after 2010, when efforts were intensified.<sup>49</sup> In 2011 and 2012, the actual level of extraction was *lower*, not *higher* than the extraction quota. Further, in 2012, the actual level of the rare earth production was *lower*, not *higher*, than the production quota. China also provided detailed evidence of how numerous illegal mines were closed down.

### **B. China has effective restrictions on domestic consumption**

25. China provided evidence on actual consumption of rare earths in China, demonstrating that China's domestic consumption actually declined by 28% from 2010 to 2012 and now rests at levels not seen since 2006. Not surprisingly, this consumption drop coincided with the start of China's intensified enforcement actions in 2010.<sup>50</sup> Moreover, China demonstrated that domestic prices for various rare earth products increased by at least 31 percent and much higher for many products. These higher domestic prices levels reflect, at least in part, the passing-through of additional costs of mining and producing rare earths such as mandated environmental compliance, the resource tax, and the mandatory deposit for ecological recovery; as well as reduced supply arising from the

<sup>44</sup> Appellate Body Report, *U.S. – Gasoline*, p. 19.

<sup>45</sup> China's Second Written Submission, para. 77.

<sup>46</sup> China's Second Written Submission, para. 78.

<sup>47</sup> Exhibit CHN-191: *Updated Rare Earths Data (1999-2012)*.

<sup>48</sup> Exhibit CHN-191: *Updated Rare Earths Data (1999-2012)*.

<sup>49</sup> See China's First Written Submission, paras. 204-220 and Annex; China's Oral Statement of 26 February 2013, para. 28 and China's Oral Statement of 18 June 2013, para. 36.

<sup>50</sup> See China's First Written Submission, para. 209, referring to Exhibit CHN-39: *Circular on Carrying out the Special Nationwide Rectification Campaign on the Exploitation Order of Rare Earth and Other Minerals*, (Ministry of Land and Resources, Guo Tu Zi Fa [2010] No. 68), 10 May 2010 and para. 217, referring to Exhibit CHN-85: *Circular Establishing Mining Zone Assistant Administrators Team of Ore Districts of Rare Earths and Other Materials*, (Guo Ti Zi Ting Fa [2010] No.52), 27 July 2010. The enforcement continues until today, as discussed in China's First Written Submission, paras. 204-220 and Annex; China's Oral Statement of 26 February 2013, para. 28.

rare earth extraction and production quotas.<sup>51</sup> These higher prices had a demand-softening effect on Chinese downstream consumers of rare earth products. China provided evidence how Chinese permanent magnet producers saw their profit and revenue decrease<sup>52</sup> because end-consumers of permanent magnets adjusted their purchasing behaviour, leading to reduced demand.<sup>53</sup> China demonstrated that similar effects could be noticed for Chinese LED fluorescent powder producers.<sup>54</sup>

### C. China's domestic restrictions meet the even-handedness requirement

26. China meets the even-handedness requirement in Article XX(g) as long as it ensures that the impact of the conservation policy is on both *domestic* as well as *foreign users*. The text of Article XX(g) makes clear that China may ensure such impact on domestic users of rare earths *either* through restrictions on domestic production *or* restrictions on domestic consumption.<sup>55</sup> Domestic production and consumption restrictions *produce the same effect*: a production cap on the resources subject to conservation limits the access of domestic consumers to the newly produced resources – just like a consumption cap for such newly produced resources.

27. China provided evidence to demonstrate that its 2012 conservation policy met the even-handedness requirement. China pointed to the structure, design and operation of its quota system to show that its 2012 quota system restricts domestic production and consumption.<sup>56</sup>

28. The *structure and design* of the quota – in particular the manner in which the different quota volumes are determined – show that China meets the even-handedness requirement. To ensure that the impact of the conservation policy would, in 2012, not solely be on foreign users, the Chinese Ministries – when setting the production and export quota volumes for 2012 at the end of 2011 – set these volumes "simultaneously"<sup>57</sup> and made a rational assessment of the expected demand in China and abroad.<sup>58</sup> The export quotas are thus designed to work together with the domestic production quota. The Ministries consulted all available evidence at that time, including customs information and information by the authority responsible for rare earth industry statistics, as well as industry reports, showing the consumption and production of rare earths in previous years as well as the forecasted developments in China and in other countries.<sup>59</sup>

29. The *operation* of the 2012 quota system further demonstrates even-handedness. A "consideration of the predictable effects"<sup>60</sup> of the quotas shows that China meets the even-handedness requirement in respect of the 2012 quotas. The facts indeed support that in 2012 China indeed restricted domestic consumption of newly produced rare earth products and ensured that the impact of the conservation policy was also on domestic users. On the basis of information of actual Chinese domestic consumption levels in 2010 and 2011 and predictions of expected consumption for 2012, Chinese Ministries set the production and export quotas at such levels that the volume of newly produced rare earth products that would be available for domestic consumption in 2012 was *below* the expected domestic consumption. The combination of the export and production quotas for 2012 thus sent a signal to domestic consumers in China that domestic consumption of newly produced rare earths in China would be restricted. This balances any effect of the export quotas on foreign consumers.

30. Of course, these production and export quota volumes for 2012 were set in late 2011. How the different quotas operated in practice can only be examined *ex post* – *i.e.* once the year to which the quotas applied has passed.<sup>61</sup> The actual effects of the quotas in 2012 also support China's argument that it ensured even-handedness during 2012. In 2012, the export quotas were

<sup>51</sup> China's Oral Statement of 26 February 2013, para. 41.

<sup>52</sup> Exhibit CHN-133: *Chengdu Galaxy Magnets Shareholding Co. Ltd, 2012 Provisional Report*.

<sup>53</sup> Exhibit CHN-132: "Three Concerns Behind the Prosperity of Rare Earth Listed Companies", *21<sup>st</sup> Century Business Herald*, 2 August 2011, p. 2.

<sup>54</sup> Exhibit CHN-132: "Three Concerns Behind the Prosperity of Rare Earth Listed Companies", *21<sup>st</sup> Century Business Herald*, 2 August 2011, p. 3.

<sup>55</sup> China's Second Written Submission, para. 84.

<sup>56</sup> China's Answers of 14 March 2013, paras. 61-63.

<sup>57</sup> Exhibit CHN-13: *Several Opinions*, Paragraph II(7).

<sup>58</sup> Exhibit CHN-13: *Several Opinions*, Paragraph II(7). See also Exhibit CHN-63: *Declaration on the Setting of 2012 Export Quotas on Rare Earth Products*.

<sup>59</sup> Exhibit CHN-63: *Declaration on the Setting of 2012 Export Quotas on Rare Earth Products*, para. 5.

<sup>60</sup> Appellate Body Report, *U.S. – Gasoline*, p. 21 (underlining added).

<sup>61</sup> China's Second Written Submission, para. 95.

not filled and thus were more than enough to meet foreign users' needs. China's economic expert Prof. Jaime de Melo has explained that when export quotas are not filled, there cannot be any difference between domestic and foreign prices as a result of the export quotas.<sup>62</sup> Hence, there cannot be any un-evenhanded impact on foreign users. In such a situation, it would not further the achievement of the even-handed requirement nor of China's conservation objective to further restrict domestic consumption below the level obtained by deducting the actual export from the production quota volume. The production quota sets the volume of new production of rare earths that China considered appropriate for 2012.<sup>63</sup>

## **VI. COMPLAINANTS FAILED TO REBUT CHINA'S EVIDENCE THAT CHINA'S RARE EARTHS EXPORT QUOTA SYSTEM IS APPLIED IN A MANNER THAT DOES NOT VIOLATE THE REQUIREMENTS OF THE CHAPEAU OF ARTICLE XX OF THE GATT 1994**

### **A. Legal test under the chapeau of Article XX of the GATT 1994**

31. The key required analysis of the Panel under the chapeau is to assess the actual operation of China's export quota systems. The Appellate Body in *U.S. – Gasoline* indeed stated that "[t]he chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, *but rather the manner in which that measure is applied*".<sup>64</sup> Hence, in contrast to the requirement of even-handedness in Article XX(g) of the GATT 1994 – for which it is sufficient to show that China has imposed restrictions on domestic production or consumption – under the chapeau of Article XX(g) it becomes relevant how China has allocated the limited supply to domestic and foreign users through the export quota system. This requires a consideration of the basis on which the allocation was made and whether the allocated quantities were sufficient to meet demand.

32. Hence, under the chapeau, the challenged 2012 export quota must not be assessed in the abstract, but in the concrete market circumstances in the year in which they operate. Complainants have argued that no effects-tests exists under Article XX(g) or its chapeau. In response, China argued that, *first*, that the Appellate Body found in *U.S. – Gasoline* that the analysis under the chapeau focuses on "the manner in which [a] measure is applied", which essentially requires a consideration of the operation of the challenged measure in practice.<sup>65</sup> *Second*, Complainants' arguments forcefully show that they fabricate a *per se* prohibition on export quotas as part of a conservation policy. They consider it irrelevant to examine whether an export quota meets the separate conditions of Article XX(g) and its chapeau, since, in their view, the quota is *always* illegal. Complainants have never explained where in the GATT 1994 such *per se* prohibition is imposed.

### **B. The export quota system allocated the limited supply in a manner sufficient to meet foreign demand**

33. China allocated the limited supply of rare earth products in 2012 on the basis of past and expected consumption patterns in China and abroad,<sup>66</sup> thereby trying to approach as closely as possible what the foreign and domestic consumers "might be expected to obtain"<sup>67</sup> under normal market circumstances. This is consistent with Appellate Body's finding in *U.S. – Shrimp* that, in respect of the discrimination-concept in the chapeau of Article XX, "discrimination results not only when countries in which the same conditions prevail are differently treated, but *also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries*".<sup>68</sup> Therefore, an export quota system does not "arbitrar[ily] or unjustifiabl[y] discriminate" if it takes into account

<sup>62</sup> Exhibit CHN-157: Jaime de Melo, *Selected Economic Issues Regarding Export Quotas and Production Quotas*, April 2013, para. 37.

<sup>63</sup> China's Answers of 14 March 2013, para. 174

<sup>64</sup> Appellate Body Report, *U.S. – Gasoline*, p. 22 (emphasis added).

<sup>65</sup> Appellate Body Report, *U.S. – Gasoline*, p. 22.

<sup>66</sup> See Exhibit CHN-63: *Declaration on the Setting of 2012 Export Quotas on Rare Earth Products*, paras. 10-20, following the State Council's mandatory criteria specified in Exhibit CHN-13: *Several Opinions*, Paragraph II(7).

<sup>67</sup> Article XIII:2 of the GATT 1994.

<sup>68</sup> Appellate Body Report, *U.S. – Shrimp*, para. 165 (emphasis added). See also Panel Report, *EC – Tariff Preferences*, para. 7.227.

the fact that different conditions prevail in different countries – *i.e.* the different demand patterns in China and abroad. This is indeed the case for China's export quota system.<sup>69</sup>

34. The application of the 2012 rare earth export quotas did not result in any "arbitrary or unjustifiable discrimination", since the lack of quota fill in 2012 shows that foreign users could obtain all the supply of any type of rare earth product they needed. There was thus simply no unequal or discriminatory treatment as a consequence of the application of the 2012 export quotas.

**C. Complainants failed to establish that the challenged 2012 export quotas are the genuine and substantial cause of differences between domestic and foreign prices of rare earth products**

35. The Complainants' basic argument in this dispute is that China uses export quotas to provide a price advantage for China's downstream users of rare earths. However, Complainants have failed to establish a genuine and substantial causal link between China's export quotas and alleged lower prices for domestically sold rare earths compared to the prices paid by foreign users of rare earths.

36. China explained, based on economic expert evidence, that an unfilled export quota cannot be the cause of price differences.<sup>70</sup> Hence, given that that the challenged 2012 rare earth export quotas were unfilled (just as in 2011), any price differences in 2012 cannot be the result of the export quota challenged by the Complainants and defended by China under Article XX(g), but must be due to other factors.

37. Rather than to focus on the effect of the 2012 rare earths export quotas they challenged, the Complainants focused on the 2010 reduction of the export quotas. Complainants fail to recognize that, from March 2010 through 2012, China adopted a number of new conservation measures. China demonstrated that the reduction of the export quota in July 2010 followed major cuts in the extraction and production quotas by, respectively, 25 and 22%<sup>71</sup> as well as a rare earths-specific enforcement campaign.<sup>72</sup> In 2011, the *Emission Standards* entered into force<sup>73</sup> and the resource tax was increased.<sup>74</sup> In May of that year, the State Council set out the conservation policy in great detail in its *Several Opinions*. In light of these facts, there is no basis for Complainants' claim that the export quota was the direct cause of the price effects, given that in 2010 the export quota cut was only one of many new conservation measures; and in 2011 the export quota was not changed and the quota was not filled. Both domestic Chinese users and foreign users saw their prices increase significantly during 2010 and 2011 before collapsing throughout 2012 and finally reaching a new equilibrium in May 2013.

38. China also demonstrated that, during 2012, the difference between domestic and foreign prices for the same rare earth products collapsed dramatically by the end of 2012.<sup>75</sup> The *narrowing*, and, in many cases, *elimination* of the price gap throughout the year<sup>76</sup> demonstrates that the 2012 export quota could not be aimed at maintaining or creating a price difference to advantage China's domestic rare earth users.

39. Furthermore, China established that by the end of May 2013 the pricing data shows very similar foreign and domestic prices for rare earth metals of 8 rare earth elements. These rare

<sup>69</sup> China's Second Written Submission, paras. 102-108; China's Oral Statement of 18 June 2013, paras. 46-47.

<sup>70</sup> Exhibit CHN-157: Jaime de Melo, *Selected Economic Issues Regarding Export Quotas and Production Quotas*, April 2013, para. 37.

<sup>71</sup> See Exhibit CHN-137: *Rare Earths Data (1999-2012)*. The extraction quota in the *Directive Production Plan* reduced from 119,500 REO tons in 2009 to 89,200 REO tons in 2010. The production quota for smelted and separated products reduced from 110,700 REO tons in 2009 to 86,000 REO tons in 2010.

<sup>72</sup> Exhibit CHN-39: *Circular on Carrying out the Special Nationwide Rectification Campaign on the Exploitation Order of Rare Earth and Other Minerals*, (Ministry of Land and Resources, Guo Tu Zi Fa [2010] No. 68), 10 May 2010.

<sup>73</sup> Exhibit CHN-31: *Emission Standards of Pollutants from Rare Earths Industry*, Ministry of Environmental Protection, GB 26451—2011, 24 January 2011).

<sup>74</sup> Exhibit CHN-13: *Several Opinions*, Paragraph II(8). Exhibit CHN-29: *Circular by Ministry of Finance and State Administration of Taxation to Adjust Rare Earth Resource Tax* (Cai Shui [2011] No.22), 15 March 2011.

<sup>75</sup> China's Answers of 8 July 2013, para. 44-45 and Table 2.

<sup>76</sup> China's Answers of 8 July 2013, Table 2.

earth metals constitute the inputs for the most important downstream industries, in particular permanent magnets and NiMH batteries.<sup>77</sup> This evidence cannot be reconciled with Complainants' claims that the *only* purpose of China's 2012 and 2013 export quota systems is to promote China's downstream users of rare earths. Hence, if China's export quotas were really intended to provide a price advantage to the important Chinese users of these rare earth elements, China failed miserably.

**D. Complainants have failed to establish that the challenged 2012 rare earth export quotas are the genuine and substantial cause of relocation of industries using rare earth elements as inputs from outside China to China**

40. Complainants also failed to provide evidence showing that the export quotas were the cause of relocation of rare earth users to China. Were their argument correct, there should have been strong evidence of a significant relocation to China since the reduction of the export quota and overall production quota volumes between 2007 and today. Nonetheless, no such evidence exists. China provided detailed information of Foreign Direct Investment by companies in three important rare earth-using industries in China (NiMH batteries, rare earth catalyst and permanent magnets) and originating from the Complainants. This showed that the number of foreign companies participating in these sectors has been very limited over time, with the bulk of it taking place *before* the reduction of China's export quota volumes since 2007.<sup>78</sup> This directly contradicts Complainants' argument that the export quotas had no other purpose than to promote relocation of downstream rare earths-using industries to China. Complainants failed to rebut any and all of China's evidence in this respect.

**VII. THERE IS NO CAUSAL CONNECTION BETWEEN THE EXPORT QUOTAS FOR TUNGSTEN AND MOLYBDENUM AND ANY COMMERCIAL ADVANTAGE PROVIDED TO DOWNSTREAM CHINESE USERS OF TUNGSTEN AND MOLYBDENUM**

41. China has also provided price data for tungsten and molybdenum in its second written submission.<sup>79</sup> This data as well as the price gap analysis showed the absence of any significant price differences between domestic and foreign tungsten and molybdenum prices. This evidence contradicts Complainants' assertion that the design and operation of China's export quotas for tungsten and molybdenum has been to advantage Chinese downstream users of these products.<sup>80</sup> Complainants failed to rebut this evidence, nor did they provide any evidence to support their assertion.

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<sup>77</sup> China's Oral Statement of 18 June 2013, para. 54.

<sup>78</sup> Exhibit CHN-186: David Humphreys, *A response to expert evidence supplied with their Second Written Submissions by the United States, the European Union and Japan*, 12 June 2013, pp. 4-5.

<sup>79</sup> China's Second Written Submission, Sections VI and VII.

<sup>80</sup> For tungsten, see China's Second Written Submission, paras. 188-190; For molybdenum, see China's Second Written Submission, paras. 199-205.



**ANNEX C****ARGUMENTS OF THIRD PARTIES**

<b>Contents</b>		<b>Page</b>
Annex C-1	Integrated executive summary of the arguments of Argentina	C-2
Annex C-2	Integrated executive summary of the arguments of Australia	C-4
Annex C-3	Integrated executive summary of the arguments of Brazil	C-7
Annex C-4	Integrated executive summary of the arguments of Canada	C-8
Annex C-5	Integrated executive summary of the arguments of Colombia	C-11
Annex C-6	Integrated executive summary of the arguments of the Republic of Korea	C-13
Annex C-7	Integrated executive summary of the arguments of Norway	C-15
Annex C-8	Integrated executive summary of the arguments of Peru	C-16
Annex C-9	Integrated executive summary of the arguments of the Russian Federation	C-18
Annex C-10	Integrated executive summary of the arguments of the Kingdom of Saudi Arabia	C-20
Annex C-11	Integrated executive summary of the arguments of Turkey	C-23

**ANNEX C-1****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA\***

1. Argentina has an interest in submitting comments solely in relation to the question whether the Article XX defences of the GATT 1994 can be used to justify the imposition of export duties by China in the light of the provisions of its Protocol of Accession (PA) to the WTO.
2. One of the most important systemic aspects raised in this dispute concerns the question of whether the accession protocols are "complete and self-sufficient" agreements or whether, on the contrary, they are, as an integral part of the GATT 1994 and the WTO Agreements, a component that interacts and is interpreted as part of a broader legal framework.
3. "Integrity" means something more than mere addition or accumulation. Indeed, inasmuch as the PA is an integral part of a broader whole – the WTO Agreements – it must be interpreted in "conjunction" with the latter, since it has not only been added to the WTO Agreements but, as far as China is concerned, "forms part of the covered agreements", defining the particular and specific scope for China of the rights and obligations they contain.
4. In acceding to the WTO, China accepted a set of general rules within the specific scope defined in its PA. In other words, in the absence of any particular specific rule defining the scope of a given right or obligation, the general rules apply. With regard to export duties, while Article XI:1 of the GATT 1994 contains a general rule providing for the elimination of trade restrictions with an exception for export duties, paragraph 11.3 of the PA contains a specific rule with respect to that instrument (export duties) that does not apply to other WTO Members.
5. It is necessary to keep in mind the rule of interpretation of Article 31 of the Vienna Convention on the Law of Treaties, which provides that the terms of a treaty shall be interpreted "in good faith ... in their context and in the light of its object and purpose". A comprehensive and harmonious interpretation of the Protocol of Accession with the covered agreements is consistent with that rule.
6. Likewise, pursuant to the principle of "effectiveness", as interpreted by the Appellate Body itself, which found that a treaty interpreter is not free to "adopt a reading that would reduce whole clauses or paragraphs of a treaty to redundancy or inutility"<sup>1</sup>, if it were maintained that the provisions of Article XX were applicable only if explicit mention thereof had been made in paragraph 11.3 of the PA, paragraph 1.2 of the PA would become redundant and would not fulfil the principle of "effectiveness".
7. Consequently, to deny the applicability of the exceptions under Article XX merely on the basis of the text of paragraph 11.3 of the PA would be contrary to the object and purpose of paragraph 1.2 of the PA, that is, that the latter should be an "integral part" of the WTO. Moreover, the rule contained in Article XX of the GATT 1994 lays down a general exception which Members may use, in specific circumstances, to justify measures which otherwise would be inconsistent with multilateral rules, and which are aimed at protecting values as important as human health and life and exhaustible natural resources, among other matters.
8. In a similar previous case, where the Appellate Body was required to decide whether the exceptions provided for in Article XX of the GATT 1994 were applicable to China by virtue of the lack of an explicit reference in paragraph 11.3 of the PA, that interpretation appears to have been excessively biased inasmuch as it was based on an exclusively textual interpretation.<sup>2</sup> In addition, the Appellate Body appears to have attached too much importance to two other factors: (a) the interpretation of the term "exceptional circumstances" in the Note to Annex 6 of the Protocol of Accession and (b) the reference in the text of paragraph 11.3 of the PA to Article VIII of the GATT 1994.

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\* Original Spanish.

<sup>1</sup> WT/DS103/AB/R and WT/DS113/AB/R, paragraph 133.

<sup>2</sup> WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R, in particular paragraphs 284, 285 and 303.

9. Neither of these two factors offers a definitive or conclusive interpretation concerning the applicability of Article XX. In short, the term "exceptional circumstances" in the Note to Annex 6 of the PA merely refers to those conditions which might give rise to a change in the rates specified in the schedule of products. No waiver of a general exception of the kind contained in Article XX can be inferred from such restrictive language.

10. Regarding the reference to Article VIII of the GATT, in contrast to the lack of an explicit reference to any other provision of the GATT in the paragraph in question, it too does not appear to be sufficient in itself to support an interpretation involving an implicit waiver of a rule of general application. As was said earlier, the reference to Article VIII would appear to be redundant, since that article would have applied in any case.

11. There is no doubt that China, in its PA, accepted obligations of a scope different from that which emerges from a mere reading of the Agreements regulating each of the respective topics. That is the "WTO plus" dimension in relation to export duties under the PA, but there is nothing to indicate that the acceptance of rules of different scope implies that, unless otherwise specifically stated, there are parts or disciplines of the GATT 1994 that are not applicable to China. If a treaty is an integral part of a set of norms, it does not seem necessary that it should contain explicit references to each of the provisions of which it is, by definition, an integral part.

12. Accordingly, it seems relevant to ask: if the export duties applied by China are not the instrument provided for in Article XI:1 of the GATT 1994, are they then instruments of a different nature? Where is the nature of those instruments defined? And following the same line of reasoning, the following question can also be asked: in the absence of any specific reference that might serve to identify the export duties referred to in China's PA with those referred to in the GATT 1994, could it be inferred that their application is not subject to the most-favoured-nation rule of Article I of that instrument? Or that they are not subject to the security exception under Article XXI? Such interpretations appear to be neither permissible nor reasonable.

Furthermore, are PAs "self-sufficient" or "complete" agreements, or on the contrary, are they to be applied and interpreted in a broader context that gives substance and meaning to each of their provisions?

Do the export duties referred to in paragraph 11.3 of the PA constitute the same fiscal and trade policy instrument as those referred to in Article XI:1 of the GATT, or are we speaking of a different instrument? If so, what is it?

Should the general exceptions in Article XX of the GATT 1994 be invoked explicitly in specific provisions of a PA, or should it be assumed that they apply – in a "general" way unless a Member explicitly waives the right to apply them?

Can a Member's decision to refrain from recourse to provisions of a general nature be implicitly assumed?

13. The key to answering these questions lies in the scope and interpretation given to the expression "shall be an integral part" in paragraph 1.2 of China's PA, taking into account what was said above about an integrated, harmonious interpretation that is not inconsistent with the principle of the "effectiveness" of treaties.

14. The Appellate Body's decisions make a valuable contribution to the "security and foreseeability" of the multilateral trading system. But the contribution of panels to that objective is also valuable. That contribution must be made through an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". Argentina agrees that panels should not deviate from Appellate Body decisions, unless there is good cause. However, it is aware that Members agreed that the recommendations and rulings of panels cannot "add to or diminish the rights and obligations provided in the ... agreements", which means that, if a panel considered that the interpretation given by the Appellate Body in a similar earlier case added to or diminished the rights or obligations of a Member, it should not feel compelled to ratify that interpretation.

**ANNEX C-2****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA****I. THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994**

1. In its third party submission, Australia focuses on the interpretation of Article XX of GATT 1994, particularly with regard to:
  - (a) the meaning of "relating to the conservation of exhaustible natural resources" in paragraph (g);
  - (b) the meaning of "made effective in conjunction with restrictions on domestic production or consumption" in paragraph (g); and
  - (c) the application of the chapeau of Article XX in justifying a measure that is otherwise inconsistent with Article XI.

**A. THE MEANING OF "RELATING TO THE CONSERVATION OF EXHAUSTIBLE NATURAL RESOURCES"**

2. Central to this dispute is whether China has satisfied the first part of Article XX(g) by demonstrating a *close and genuine* relationship between its export restrictions and the goal of conservation.
3. Australia refers to the view expressed by the panel in *China – Raw Materials* that "...a policy of extraction would be more in line with a policy to achieve conservation than one confined to restricting exports. For the purpose of conservation of a resource, it is not relevant whether the resource is consumed domestically or abroad; what matters is its pace of extraction"<sup>1</sup>. Australia finds merit in that panel's view that it would be a limit on production, not an export restriction, which is more prone to conserve a resource. That is to say, it seems difficult for a Member to justify its export restraints by reference to the goal of conservation in circumstances where only a relatively modest fraction of the capped domestic production is permitted to be exported. In making this statement, Australia is mindful that it does not wish to pre-judge the range of measures that Members might choose to use for the purposes of conservation.
4. Australia agrees with China that the term "conservation" encompasses measures aimed both at "preserving exhaustible natural resources in their current state, as well as regulating their use for economic development today"<sup>2</sup>. Nevertheless, Australia queries China's submission that "pursuant to the principle of sovereignty over natural resources, States that possess natural resources may develop policies to husband the use of the resources to promote the production of more sophisticated processed products"<sup>3</sup>. Whilst Australia agrees that States have sovereign rights over their natural resources, Members have also exercised their sovereign rights in becoming party to the WTO Agreements. Members have thus agreed to exercise their sovereign rights in a manner that is consistent with their obligations under the WTO Agreements.<sup>4</sup>

<sup>1</sup> Panel Report, *China – Raw Materials*, para. 7.428.

<sup>2</sup> China's first written submission, para. 48.

<sup>3</sup> China's first written submission, para. 58.

<sup>4</sup> See *S.S. Wimbledon (U.K. v. Japan)*, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17), p. 25; *Exchange of Greek and Turkish Populations*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10 (Feb. 21), p. 21; *Jurisdiction of European Commission of Danube Between Galatz and Braila*, Advisory Opinion, 1927 P.C.I.J. (ser. B) No. 14 (Dec. 8), p. 36, as referred to in Panel Report, *China – Raw Materials*, para. 7.379.

**B. THE MEANING OF "MADE EFFECTIVE IN CONJUNCTION WITH RESTRICTIONS ON DOMESTIC PRODUCTION OR CONSUMPTION"**

5. WTO jurisprudence has established that the second part of Article XX(g) contains an "even-handedness" requirement. That jurisprudence outlines what is not imposed by the even-handedness requirement (as opposed to what is meant by "even-handedness"). That is, the even-handedness requirement does not require domestic and foreign consumers of resources be treated in an identical manner by the resource-endowed Member<sup>5</sup>. It does not require an "empirical effects test"<sup>6</sup>. Nor does it require a "separate showing that the purpose of the challenged measure must be to make effective restrictions on domestic production or consumption"<sup>7</sup>.
6. Australia considers that the Panel has an important opportunity in its consideration of this dispute to further develop Members' understanding of the "even-handedness" requirement. Australia submits that the mere existence of a restriction on domestic production or consumption is not enough to establish even-handedness between the export restriction and the domestic restriction. Rather, Australia submits that Article XX(g)'s even-handedness requirement would require a careful consideration of the design, structure and application of the domestic restrictions, and how those restrictions relate to the export restrictions. Such an approach was taken with respect to import restrictions in *US – Shrimp*<sup>8</sup>.
7. In a matter concerning export restrictions, Australia submits that the consideration of the even-handedness requirement would require a comparison between the export restrictions and the restrictions on domestic consumption. That is, a Member's export restriction in the name of conservation cannot be justified merely because of the existence of restrictions on domestic production.
8. Accordingly, Australia considers pertinent the view expressed by the panel in *China – Raw Materials* that a Member would need "to show that the impact of the export duty or export quota on foreign users is somehow *balanced* with some measure imposing restrictions on domestic users and consumers"<sup>9</sup> in order to satisfy the even-handedness requirement in Article XX(g).
9. Australia, therefore, remains of the view that whilst Article XX(g) does not necessitate *equivalence* in treatment between foreign consumers and domestic consumers, a Member would need to demonstrate that there is a *balance* between its restrictions on foreign consumers and its restrictions on domestic consumers. Otherwise, it would be difficult for the Member to assert that it had applied export restrictions in an even-handed manner.<sup>10</sup>

**C. THE APPLICATION OF THE CHAPEAU OF ARTICLE XX**

10. Australia considers that the reference in the chapeau of Article XX to *discrimination* extends to measures which discriminate between the exporting Member and its importing partners. The Appellate Body's findings in *US – Shrimp* and *United States – Gasoline* would support this submission.<sup>11</sup> That is, discrimination could occur not only between different importing Members, but also between the exporting Member and the importing Members concerned.
11. As noted in China's submission, the chapeau embodies a guarantee against *abus de droit* by a Member invoking the exception.<sup>12</sup> The chapeau, which addresses arbitrary or unjustifiable discrimination and disguised restrictions on international trade, plays an important role in maintaining the delicate balance between the right of a Member to invoke the general exceptions, and the rights of all other Members under the substantive obligations of the GATT 1994.

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<sup>5</sup> See Appellate Body Report, *US – Gasoline*, p. 21.

<sup>6</sup> *Ibid.*

<sup>7</sup> Appellate Body Report, *China - Raw Materials*, para. 361.

<sup>8</sup> Appellate Body Report, *US – Shrimp*, para. 144.

<sup>9</sup> *Ibid.* (emphasis added).

<sup>10</sup> See Appellate Body Report, *US – Gasoline*, pp. 20-21.

<sup>11</sup> Appellate Body Report, *US – Shrimp*, para. 150.

<sup>12</sup> China's first written submission, para. 71 in quoting Appellate Body Report, *US – Shrimp*, para. 158.

12. In considering matters involving export restrictions on natural resources, Australia remains of the view that the chapeau of Article XX requires the Member pursuing conservation goals to restrict domestic consumption and exports in parallel. Where there is a substantial disparity between a domestic production quota and an export quota, it would be difficult for a Member to justify its discriminatory treatment of exports and domestic consumption.

## ANNEX C-3

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

As requested by the Panel, in the present Executive Summary Brazil would like to highlight the points it raised in its Written Submission, Oral Statement and Answers to the questions posed by the Panel on March 1<sup>st</sup>, 2013, that, in its view, are the most relevant to aid the Panel in its decision:

#### **I - Nature of Accession Protocols**

Brazil understands that *Accession Protocols* are a part of the *WTO Agreement* and have links to each of the different covered agreements as they establish the conditions by which a Member accedes both to the WTO as a whole and to each specific agreement thereof. Therefore, on the one hand, they are a covered agreement in their own right, falling within the purview of Article 1.1 of the DSU. On the other, they establish specific obligations that apply in addition to or parallel with obligations set out in one or more of the covered agreements, such as the GATT 1994 and, in this sense, should abide by the same general rules and principles that regulate those agreements.

#### **II - Applicability of the General Exceptions to Accession Protocols**

As argued in its Third Party Submission and in its Oral Statement, Brazil believes that the General Exceptions posited in Article XX of the GATT are a fundamental provision, for they strike a balance between the policy space governments enjoy to pursue legitimate objectives and the obligations under the multilateral trade system. In that sense, the provision provides a predictable and transparent means to accommodate and harmonize conflicting obligations. While Brazil does not take a definite position on the applicability of an Article XX defense in the present case, it believes that restrictions on the Member's right to promote its sustainable development cannot be presumed or inferred: they should only be deemed to exist in light of compelling textual, contextual and systemic evidences.

With regards to omissions in the texts, Brazil is of the view that "omissions in different contexts may have different meanings, and omission, in and of itself, is not necessarily dispositive", as stated by the Appellate Body in *Canada-Autos*<sup>1</sup>. Brazil is of the view that the mere fact that there is no explicit reference in Article 11.3 of China's Accession Protocol should not be automatically assumed to mean that the availability of defenses under such a fundamental provision to the multilateral trading system as Article XX of the GATT 1994 was not implicitly intended by the Members.

#### **III - The Even-handedness requirement under Article XX(g) of the GATT**

As discussed in its Third Party Submission, Brazil believes that the meaning and scope of the requirement of even-handedness remains in need of further clarification. Nevertheless the test, in Brazil's view, requires restrictions on both domestic and international consumption or production, but, as stated in *US-Gasoline*, there is "no textual basis for requiring identical treatment of domestic and imported products". Furthermore, it can be stated that the requirement of even-handedness in Article XX(g) must be read in a manner that allows a country to exploit its resources pursuant to its own environmental and developmental policies and in accordance with its respective level of economic development. It follows, then, that a resource-endowed country is entitled to calibrate its conservational policies in a manner that allows it to benefit from the use of these resources consistently with its developmental needs.

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<sup>1</sup> *Canada – Autos* (Appellate Body Report, paragraph 138).

**ANNEX C-4****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA****I. EXPORT DUTIES AND ARTICLE XX(B) OF GATT 1994**

1. Article XX of GATT 1994 is not available to justify breaches of China's commitment to eliminate export duties under paragraph 11.3 of its Accession Protocol. The ruling in *China – Raw Materials* is clear on this point and is both relevant and applicable in the current dispute. China's export duty obligations arise from its Accession Protocol, and not from GATT. The Appellate Body has found that commitments made in each provision of an Accession Protocol are independent from any related WTO Agreement. Therefore, for the general exceptions in GATT to be available to justify a breach of an obligation in the Accession Protocol, there has to be an express link to the GATT provisions. This conclusion is entirely supported by the ordinary meaning of terms of the treaty and the context provided by related provisions of China's protocol, in which there are several explicit links. Rather than an "overly textualist approach to treaty interpretation", this is the only interpretation that can result from a holistic application of the Vienna Convention on the Law of Treaties.

2. The absence of a reference to Article I of the GATT 1994 in paragraph 11.3 of China's Accession Protocol has no implication for China's MFN obligations when imposing export duties and therefore by extension has no implication for the application of the GATT 1994 exceptions to paragraph 11.3. China committed in paragraph 11.3 *not to impose export duties* on products not listed in Annex 6 of the Protocol, and *not to impose export duties above a maximum amount* on the 84 products listed in that Annex. These commitments are "WTO-plus" that *supplement* China's existing commitments under the GATT 1994; they do not replace them. Therefore, export duties that *do not* fall within one of the two prohibited categories above remain covered by China's obligation under GATT Article I to impose duties only on an MFN basis.

3. The Panel should arrive at the same conclusion as that reached in *China – Raw Materials*. The legal basis of the complaints regarding export duties is essentially the same in *China – Rare Earths* as in *China – Raw Materials*. The measures at issue in both disputes are near-identical. The Appellate Body in *US – Stainless Steel (Mexico)* observed that "[e]nsuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" (para. 160) and that a panel's "failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU" (para. 161). The bar is therefore very high for a panel to disregard an Appellate Body finding on a specific legal issue, and all the more so in this dispute, which involves the same party, nearly identical measures and nearly identical products.

4. In the event the Panel finds that GATT Article XX(b) is available to China to justify its export duties, the three legal requirements of that Article are not satisfied. First, the panel in *China – Raw Materials* found that, to justify that the objectives of measures fall within the protection of health and environmental protection, a Member must do more than simply produce a list of measures referring to environmental protection and polluting products. China has not provided compelling evidence that the export duties fulfill this aim. Second, since the export duties have apparently not raised the domestic price, and have not limited domestic production of rare earths, tungsten and molybdenum, they cannot be said to have made a material contribution to the objective of environmental protection. And third, China has not demonstrated that less trade-restrictive and feasible WTO-consistent alternatives available cannot be used in lieu of applying export restrictions.

**II. EXPORT QUOTAS AND ARTICLE XX(G) OF GATT 1994**

5. China has also not demonstrated that its export quotas have met the two requirements to be justified by Article XX(g) of GATT 1994.



6. First, with respect to whether the measures are "related to" the conservation of an exhaustible natural resource, the Appellate Body has explained that a measure must be "primarily aimed at" conservation, and there must be "a close and genuine relationship of ends and means" that requires an examination of the relationship between the general structure and design of a measure and the policy goal it purports to serve. China relies on what it calls a comprehensive set of measures relating to the conservation of strategic raw materials to support its claim. However, if export restrictions are to conserve natural resources, they should be linked to production levels. Since export restrictions have a direct impact on export volumes, in principle, the effectiveness of such measures depends on whether a reduction in exports actually leads to a decrease in production. Were China's export quotas to be *prima facie* defensible under Article XX(g), they would have lowered domestic production or consumption of strategic raw materials. China would therefore have to provide convincing evidence that its export quotas have in fact contributed to a reduction in domestic production and consumption. Without such evidence, China's claim that its export quotas are "related to" conservation would have to fail.

7. Second, China has not demonstrated that its export quotas are made effective "in conjunction with" restrictions on domestic production or consumption that show "even-handed" (although not identical) treatment of domestic industries and foreign trading partners. To satisfy this requirement, there has to be more than minimal restrictions on domestic consumption that may or may not become effective depending upon subsequent events. The panel in *China – Raw Materials* concluded that "it is difficult to see how – if no similar or parallel restrictions are imposed at all on domestic users or on domestic consumption and all limitations are placed upon the foreign consumers alone – the export restrictions can be considered even-handed" (para. 7.465). Evidence submitted by China in this dispute of limitations imposed on domestic production is insufficient to demonstrate that these production limitations serve to *balance* the impact of the export quotas on foreign users. Since they appear to have been imposed well after the export restrictions were put in place, they cannot have been "made in conjunction" with export restrictions. Second, since a limitation on production affects both foreign and domestic users, these limitations are not in themselves evidence of a measure affecting only domestic users that acts to *balance* the effect of the export restrictions that affects only foreign users.

### III. CHAPEAU OF ARTICLE XX OF GATT 1994

8. Should China's export quotas be found to meet the exception for the protection of exhaustible natural resources or should its export duties be found to meet the exception for measures necessary for protecting health and the environment, China has still not demonstrated that the measures satisfy the requirements of the chapeau of Article XX that they not be applied in a manner that constitutes "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and that they are not "a disguised restriction on international trade".

9. The way in which China manages the sales of rare earths, tungsten and molybdenum at home and abroad appears to discriminate between Chinese and foreign markets. China has implemented elaborate rules on applications for export quota licences that are tied to environmental protection, but it is not clear to what extent domestic sales are subject to similar rules. Export quotas are much more trade-restrictive than some viable alternatives, such as environmental guidelines or production quotas. Regulating at source has a direct impact on resource conservation without distinguishing between domestic and foreign consumption. China has implemented legislation setting environmental guidelines and limiting domestic production, which is evidence of its capacity to use these instruments in lieu of export quotas.

### IV. PARAGRAPH 5.1 OF CHINA'S ACCESSION PROTOCOL AND PARAGRAPHS 83 AND 84 OF THE WORKING PARTY REPORT

10. China's restrictions on trading rights, such as the requirements for prior export performance, prior experience and minimum registered capital, are inconsistent with paragraph 5.1 of China's Accession Protocol and paragraphs 83 and 84 of the Working Party Report. China has not demonstrated that recent amendments to the *Foreign Trade Law* mean that all enterprises have the right to trade in all goods. Despite these changes to this law of general application, restrictions remain through other instruments of specific application that apply for obtaining the right to trade in strategic raw materials.

11. China has also not demonstrated that its quota administration requirements are justified under GATT Article XX(g). Paragraphs 83 and 84 of the Working Party Report are incorporated into the Accession Protocol by virtue of paragraph 342 of that same report and paragraph 1.2 of the Protocol itself. Therefore the analysis of applicability of GATT Article XX in *China – Audiovisual Products* and *China – Raw Materials* applies in these circumstances.

12. In relying on this analysis, China incorrectly conflates the issue of whether the export quotas (which govern the products being traded) are justified by Article XX(g) with that of whether the trading rights restrictions (which govern who can trade) are themselves justified by Article XX(g). However, the issue of whether export quotas are justified under Article XX(g) is a separate question from whether restrictions on trading rights – imposed ostensibly as "eligibility requirements" in support of the quotas – are themselves justified by a GATT exception.

13. A review of such restrictions on trading rights would consist of a three-part test: (i) are the restrictions inconsistent with the trading rights commitments in paragraph 5.1; (ii) if they are inconsistent, is there a "clearly discernible, objective link to the regulation of trade in the goods at issue" (in this case strategic raw materials) such that the first part of paragraph 5.1 applies to make them justifiable (this is just a threshold question); and (iii) if they are justifiable, then China would have to demonstrate that they meet the test for Article XX(g) to determine whether it justifies the breach. China has not even attempted to make this defence.

14. On the broader issue of whether paragraphs 83 and 84 of the Working Party Report are subject to the general exceptions of GATT Article XX, to the extent that those paragraphs may be seen to be elaborations of paragraph 5.1 of China's Accession Protocol and that they must be read in conjunction with that paragraph, it is arguable that Article XX would apply to breaches of paragraphs 83 and 84, but only via the intermediary of paragraph 5.1. However, in the absence of an express textual reference to GATT in paragraphs 83 and 84, Article XX would not justify standalone breaches of these provisions, only a breach that simultaneously constitutes a breach of paragraph 5.1.

## ANNEX C-5

## INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA\*

## I. INTRODUCTION

1. Colombia provided its views with respect to the following issues: (a) whether China has fulfilled the conditions necessary to have recourse to GATT Article XX(g); and (b) whether GATT Article XX may be invoked to justify violations of the obligation contained in Paragraph 11.3 of China's Accession Protocol.

**A. Whether China has fulfilled the elements necessary to have recourse to GATT Article XX(g)**

2. Regarding the first issue, in its first written submission, China argues that the 2012 export quota system for rare earths, tungsten and molybdenum is consistent with the requirements set forth in GATT Article XX(g).<sup>1</sup>

3. Colombia will comment solely on the second condition a measure must satisfy in order to be justified under Article XX(g), namely whether the export restrictions in this case are applied in conjunction with restrictions on domestic production or consumption.

4. The legal standard for Article XX(g) that has been consistently applied by WTO adjudicating bodies requires that restrictions on domestic production or consumption impose a "limiting effect" on the domestic consumption or production of the product at issue.

5. In Colombia's view, the *limiting effect* of restrictions on domestic production and consumption can be assessed either by observing the tangible effects of the measure in any given case or by determining if the measure can potentially contribute to produce a *material limiting effect* in the consumption or production of the exhaustible natural resource.

6. The assessment of the limiting effect should be done on both a quantitative and qualitative basis and taking into account all the variables related to the causal link between the measures and the actual limiting effect. Therefore, restrictions on domestic production or consumption should be deemed to have a limiting effect whenever such restrictions produce or have the potential to produce a material limitation.

7. In its first written submission, China identifies a set of measures that it says it has implemented in order to comply with the requisite of restricting domestic production or consumption, among others, the implementation of measures directly *controlling the volume* of production of rare earths<sup>2</sup> and measures imposing *taxes* on rare earth products. At this juncture, Colombia will provide its view of whether these measures comply with the legal standard established by GATT Article XX(g).

*i) Measures controlling the volume*

8. China alleges that two types of volume controlling measures have been implemented: (i) restrictions on domestic production and (ii) restrictions on domestic consumption.

9. With respect to the restrictions on domestic production, China provides in its first written submission rare earth production data.<sup>3</sup> Colombia wants to highlight that the data presented by China illustrates that even though measures have been taken to limit domestic production, actual production surpasses the production caps established for 2010 and 2011.

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\* Colombia requested that its oral statement serve as the integrated executive summary.

<sup>1</sup> China's First Written Submission, para. 4.

<sup>2</sup> China's First Written Submission, para. 164.

<sup>3</sup> China's First Written Submission, Table 1 (footnotes omitted).

10. With regards to the restrictions on domestic consumption, China provides in its first written submission rare earth consumption data.<sup>4</sup> According to this data, the consumption quota is ineffective inasmuch as the actual consumption was far greater than the established quotas for 2010 and 2011.

11. Therefore, such measures cannot be deemed to be restrictions on domestic consumption in the terms of GATT Article XX(g).

12. In addition, China relies on the fact that "*the 2012 production restriction was set below the actual production in 2010 and the expected production in 2011 [...]*"<sup>5</sup> as an argument to support its assertion that its export restrictions do fulfill the conditions of GATT Article XX(g).

13. This assertion is based on an inaccurate interpretation of the panel in *China- Raw Materials*. China interprets that the Panel in *China-Raw Materials* concluded that domestic productions quotas would "restrict" within the meaning of Article XX(g) when the production limitations are set below "the actual production rates." In this regard, Colombia recalls that the Panel expressly clarified that it is not sufficient to impose caps on domestic production; they have to *actually* restrict it in a manner that ensures that the restriction is respected.<sup>6</sup>

14. In this case, it is Colombia's view that the circumstances described in paragraphs 9 and 10 above cast serious doubts on the effectiveness of the 2012 Directive Production Plan and, thus, it is probable that this measure will not be justified under Article XX(g).

ii) *Resource Tax*

15. On the issue of the resource tax, China alleges that the resource tax that it has enacted has the potential to reduce extraction since it is expected to increase prices and, thus, affect demand and likely lessen consumption of rare earths.<sup>7</sup>

16. Colombia understands the rare earth market to be a highly concentrated industry with few suppliers of the goods and where demand can be expected to be highly inelastic. In markets with inelastic demand, especially due to the highly inelastic demand, variations of prices affect the observed demand in a lesser extent than the percentage change in prices. Accordingly, measures that increase prices, such as taxes, may not "restrict" production or consumption in the terms of Article XX(g).

**B. Whether GATT Article XX may be invoked to justify violations of the obligation contained in Paragraph 11.3 of China's Accession Protocol**

17. At the outset Colombia would like to note that it takes no definitive position on the issue of whether Paragraph 11.3 of China's Accession Protocol is subject to Article XX. Nonetheless, Colombia is not persuaded by an interpretation that excludes the application of GATT Article XX to a Member's Protocol of Accession, based solely on a textual approach.

18. Colombia considers that the Panel must determine whether for the application of GATT Article XX to *China's Accession Protocol* an express reference to that provision is required or whether the sole fact that the obligation bears an intrinsic relationship with any GATT obligations is sufficient to conclude that this defense is applicable.

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<sup>4</sup> China's First Written Submission, Table 2.

<sup>5</sup> *Ibidem*, paras.179 and 182.

<sup>6</sup> Panel Report, *China - Raw Materials*, para. 7.464.

<sup>7</sup> *Ibidem*, para. 194.

**ANNEX C-6****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS  
OF THE REPUBLIC OF KOREA\***

1. As with *China-Raw Materials*,<sup>1</sup> this dispute again raises an important issue for all WTO Members: how they can exercise their right to regulate the exportation of natural resources in a WTO consistent manner. In terms of practical impact on international trade, this dispute carries a crucial implication.

2. Although slight variations exist, this dispute raises basically the same issues that were discussed and determined in the companion dispute of *China-Raw Materials*. The panel and the Appellate Body in *China-Raw Materials* ruled that the export restrictions imposed by China on the raw materials subject to the dispute were inconsistent with the rules of the WTO. More importantly, they also ruled that the measures could not be justified by Article XX exceptions of the GATT 1994.

3. Bearing this in mind, Korea raises two issues. One is how a WTO panel should take into account prior panel and Appellate Body reports directly on point, relating to virtually the same measure. The other concerns how the WTO Members should understand obligations under the WTO Agreements in the context of general principles of international law.

**A. IMPLICATION OF THE PRIOR APPELLATE BODY DECISIONS ON VIRTUALLY THE SAME ISSUES**

4. First of all, Korea notes that the challenged measures for rare earths, tungsten, and molybdenum are almost identical with those raised in *China-Raw Materials*. The framework laws and regulations for the measures raised in the two disputes are also basically the same, or quite similar, at least, in all material respects. Accordingly, the analytical framework established by the *China-Raw Materials* panel and the Appellate Body should remain pertinent to the present dispute.

5. In particular, the respondent's argument in its First Written Submission is almost entirely hinged upon the claim of Article XX defense. The respondent's claim on Article XX, however, can be basically summarized as an assertion that it simply disagrees with the prior decisions of the Appellate Body on the issue, and that the present Panel should revisit the issue and possibly overturn the previous Appellate Body decision.

6. With respect to the relevance of the prior Appellate Body reports in subsequent disputes, the Appellate Body offered a succinct view in *U.S.-Continued Zeroing*.<sup>2</sup> As the Appellate Body stated in the dispute, "legitimate expectations of Members" created by the Appellate Body report should be preserved as much as feasible "where they are relevant to any dispute."<sup>3</sup> It seems that the almost identical nature of the measures between this dispute and *China-Raw Materials* sufficiently satisfies the "relevance" standard mentioned in *U.S.-Continued Zeroing*.

7. As the Appellate Body has addressed virtually the same issue just a year ago with extensive discussions, Members would expect that the precedent should guide this Panel in resolving the present dispute, barring any compelling reasons found to exist for this particular dispute.

8. Korea does note that Article XX defense plays an important role in the application of certain covered agreements of the WTO. As China notes, WTO Members do have "the right to promote fundamental societal interests besides trade liberalization," and "the possibility to resort to

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\* Korea requested that its oral statement serve as the integrated executive summary.

<sup>1</sup> Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R/, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012; Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R/ and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports.

<sup>2</sup> Appellate Body Report, *United States - Continued Existence and Application of Zeroing Methodology* (WT/DS350/AB/R) (Feb. 19, 2009), para. 362.

<sup>3</sup> *Id.*

exceptions is of crucial importance"<sup>4</sup> to all Members. This "general" statement of the objective of Article XX, however, does not seem to offer a proper basis to revisit the jurisprudence of the Appellate Body on the "specific" requirements for the application of Article XX. An argument can be raised that it would run against the basic spirit of Article 3.2 of the DSU.

9. In an effort to have the Panel overturn the decisions of the Appellate Body, references to the situations of other Members are also made by the respondent. It is doubtful, however, whether the situations of other Members may carry any meaningful relevance to the determination of WTO consistency of a measure of a respondent before a WTO panel.

#### **B. WTO MEMBERS' OBLIGATION IN THE CONTEXT OF NATIONAL RESOURCES CONSERVATION POLICIES**

10. It is stated by the respondent that "this case is about [its] right to conserve three of its exhaustible natural resources in a manner consistent with its sustainable economic development and the requirements of Article XX(g) of the GATT 1994."<sup>5</sup> In light of this, an argument is put forward by the respondent to the effect that measures falling under natural resources conservation policies should effectively remain unreachable by the WTO Agreements. Sporadic general statements of the panel in *China-Raw Materials*<sup>6</sup> and principles of international law<sup>7</sup> are referred to by the respondent in this respect.

11. In Korea's view, it is important to note that this dispute is brought before a WTO panel in accordance with the DSU, not before any other international tribunal. Established WTO jurisprudence confirms that general statements or principles like these, by themselves, do not prove or disprove violation of a covered agreement by a Member.<sup>8</sup> Nor can they replace or override explicit terms stipulated in the WTO Agreements, including the GATT 1994 and the Accession Protocol, in a dispute pending before a WTO panel.<sup>9</sup> In fact, Article 3.2 of the DSU proscribes a panel from adding or reducing rights and obligations of a Member by deviating from the provisions of the WTO Agreements.

12. This dispute presents important legal and factual implications for all WTO Members: i.e., (i) the Panel's decision will again confirm the outer parameter of a Member's legitimate authority in formulating and administering its policies regarding natural resources in its territory within the context of the GATT 1994; and (ii) the Panel's decision will also carry a significant impact on the global market of the three materials as the respondent is the major sources of the global supply. In that regard, Korea looks forward to a careful analysis and an informed decision of the Panel in this dispute.

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<sup>4</sup> China's First Written Submission, para. 414.

<sup>5</sup> China's First Written Submission, paras. 1, 15.

<sup>6</sup> China's First Written Submission, para. 55.

<sup>7</sup> China's First Written Submission, para. 56.

<sup>8</sup> See Articles 3.2 and 19.2 of the DSU. See also, for example, Appellate Body Report, *Chile - Taxes on Alcoholic Beverages*, WT/DS87,110/AB/R (January 12, 2000), para. 79; Panel Report, *Dominican Republic - Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415, 416, 417, 418/R (February 22, 2012), paras. 7.92-93.

<sup>9</sup> See *id.*

**ANNEX C-7****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY\***

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel, and will therefore briefly set out its views on one legal issue in this oral statement. The issue relates to whether the GATT 1994 Article XX may be invoked in relation to violations of paragraph 11.3 of China's Accession Protocol. This issue was raised by China in a request for a preliminary ruling, and is also among the questions posed by the Panel in advance of the first panel meeting.
2. The chapeau of the GATT 1994 Article XX explicitly refers back to the GATT itself, by underlining that "nothing in this Agreement shall be construed to prevent the adoption or enforcement" of the specific measures listed in the provision. However, in *China – Publications and Audiovisual Products*, the Appellate Body held that GATT Article XX could be invoked in relation to paragraph 5.1 of Part I of China's Accession Protocol.<sup>1</sup>
3. Unlike paragraph 5.1, paragraph 11.3 of China's Accession Protocol does not include similar language as the introductory phrase relied on by the Appellate Body in *China – Publications and Audiovisual Products*. Paragraph 11.3 simply 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 GATT 1994". There is nothing in the wording of this paragraph that points to, or in any way indicates, that the drafters meant to allow for justification under GATT Article XX.
4. Norway notes that the Appellate Body in *China - Raw Materials*, a case dealing with a similar legal issue as the one in question, concluded that China's export duties could not be justified by Article XX. In that case, the Appellate Body looked to Note to Annex 6 of China's Accession Protocol for a possible recourse to the provisions of Article XX to justify imposition of export duties on products not listed in Annex 6. The Appellate Body observed that they saw "nothing in the Note to Annex 6 suggesting that China could invoke Article XX of the GATT 1994 to justify the imposition of export duties that China had committed to eliminate under Paragraph 11.3 of China's Accession Protocol".<sup>2</sup>
5. Norway is of the view that the wording and the structure of the paragraph appears to indicate that the only exceptions from the obligation to eliminate all taxes and charges applied to exports are those expressly provided for in the paragraph itself. This is also in accordance with the customary rules for treaty interpretation as codified in the Vienna Convention on the Law of Treaties Article 31.
6. We believe the drafters could have made it clear in the paragraph if they wanted to include a reference to GATT Article XX or equivalent exceptions. The omission by the drafters to include other exceptions than those expressly mentioned in paragraph 11.3, suggests that they did not intend to include the GATT Article XX exceptions.
7. Finally, Norway acknowledges that Appellate Body Reports as adopted by the Dispute Settlement Body are only binding upon the parties with respect to the particular dispute in question. However, as noted by the Appellate Body in *US – Stainless Steel (Mexico)*, "this does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body Reports that have been adopted by the DSB".<sup>3</sup> Norway sees no reason for this Panel to divert from the Appellate Body's conclusion in *China – Raw Materials* with respect to this question.

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\* Norway requested that its oral statement serve as the integrated executive summary.

<sup>1</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, para 233.

<sup>2</sup> Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R-WT/DS395/AB/R-WT/398/AB/R, para. 285.

<sup>3</sup> Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, para. 158.

**ANNEX C-8****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF PERU\***

1. Peru would like to thank the Panel for the opportunity granted to third parties to comment on the case "China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum".
2. Our country's participation in this dispute is based on a systemic interest relating to the Panel's interpretation of various rights and obligations under the legal system of the WTO, especially those that are little regulated such as export restrictions and the relationship between the Protocols of Accession and the rest of WTO law.
3. With regard to the substance of the case, the delegation of Peru wishes to point out that paragraph 1 of Article XI of the GATT establishes a general prohibition on quantitative restrictions, on both exports and imports. This does not mean that the mere imposition of a condition on imports or exports constitutes an infringement of the provisions of Article XI, since in *China – Raw Materials* the Appellate Body observed that the conditions imposed on the importation of a commodity would need to have a limiting effect, having pointed out that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.
4. Peru also notes that the article in question explicitly prohibits the imposition of import or export licences and quotas. In this connection, and in line with what was said above, it should be pointed out that licences are considered to be trade-restrictive if granted in a discretionary and non-automatic way; therefore, those measures that do not possess these characteristics should be consistent with WTO rules. In *China – Raw Materials*, the Panel noted that in a discretionary and non-automatic licensing system the possibility of denying the licence would be ever present and hence the system, by its very nature, would always have a restrictive or limiting effect.
5. With regard to export quotas, various panels have concluded that these measures are inconsistent with paragraph 1 of Article XI of the GATT 1994, since they have a restrictive or limiting effect. Among the cases in which panels have ruled in this way are: *Japan - Agricultural Products*, *United States – Sugar*, *France – Import Restrictions*, and *China - Raw Materials*.
6. However, those members of the multilateral trading system which have imposed measures of this type have generally cited as justification for applying them the exceptions contained in the second paragraph of Article XI and those specified in Article XX of the GATT 1994, the latter established in view of the need to protect values and vital interests of the State.
7. In this respect, it would be instructive for our delegation to know the balance that this Panel will strike between the objectives of increasing production and trade and the promotion of values and vital interests of the State, such as for example the conservation of exhaustible natural resources and the protection of the environment and human and animal health.
8. The delegation of Peru also notes that the second part of paragraph 1.2 of the Protocol of Accession incorporates the Protocol in the WTO Agreement, including the commitments referred to in paragraph 342 of the Working Party Report. In this connection, paragraphs 162 and 165 of the Report establish that China: (i) would only apply export restrictions and licensing in those cases where this was justified by the provisions of the GATT 1994; and (ii) upon accession to the WTO would eliminate all non-automatic export restrictions, unless they could be justified under WTO rules. It is a matter of interest for Peru that the Panel should establish whether the analysis for determining non-compliance with these provisions should be identical or similar to that carried out in the case of Article XI of the GATT 1994, or whether non-compliance with the latter automatically implies non-compliance with the above-mentioned paragraphs of the Protocol of Accession and the Working Party Report.

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\* Original Spanish. Peru requested that its oral statement serve as the integrated executive summary.



9. Taking into consideration that the violation of Article XI would also signify a violation of the Protocol of Accession, where quantitative restrictions are concerned, Peru would like the Panel to carry out the corresponding analysis in order to determine whether the exceptions contained in Article XX of the GATT 1994 would also justify the obligations contained in the Protocol in question.

10. Peru also attaches special importance to paragraph 11.3 of the Protocol of Accession of the People's Republic of China, which requires China to eliminate all taxes and charges applied to exports. In this respect, Peru would like the Panel to analyse whether there is non-compliance with paragraph 11.3 of the Protocol of Accession and, if so, whether that non-compliance could be justified by the general exceptions of Article XX, before which it would have to assess whether those exceptions are applicable to paragraph 11.3 of the Protocol of Accession, taking account of the findings of the Panel and the Appellate Body in *China – Raw Materials*, where it was concluded that the absence of any reference to the applicability of Article XX of the GATT 1994 in paragraph 11.3 of China's Protocol of Accession would indicate the inapplicability of that general exception. Our country would expect a broad interpretative development of this particular point.

11. We again welcome the opportunity to make this statement and respectfully request the Panel to see fit to take into account the arguments put forward at this meeting, since greater clarity with respect to Articles XI and XX of the GATT 1994, paragraphs 1.2 and 11.3 of the Protocol of Accession and paragraphs 162 and 165 of the Working Party Report would contribute to the appropriate application of these provisions by the Members of the WTO.

**ANNEX C-9****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION\***

Dear Mr. Chairman, members of the Panel, parties to the disputes and staff of the Secretariat: on behalf of the Russian Federation, we would like to thank you for the opportunity to present our views on some of the issues raised in the disputes.

1. We will present our general observations on the issue of applicability of defences available under the WTO Agreement to the commitments contained in Protocols of accession of members to the WTO. This statement is without prejudice to the future findings on whether China's measures in question are otherwise consistent with the provisions of the GATT, including Article XX thereof.

2. In the context of today's discussions we would like to note that we support the position of Brazil, China and Colombia in respect of the issue that we will cover in our Statement.

3. In *China – Raw Materials* the Appellate Body ruled that the provisions of the GATT Article XX are not available where there is no explicit reference to them in the commitment contained in the Protocol, and the absence of such a reference represents 'the Members' common intention not to provide access to such defence.' These findings are a matter of serious concern for the Russian Federation.

4. We would like to recall that the issue of the right of the new members to invoke the WTO Agreement exceptions in respect of the commitments contained in the Protocols of accession was repeatedly discussed in the course of Russia's accession to the WTO. In that context, Russia proposed to include specific language in its Protocol of accession, stating that "nothing in these commitments shall be understood to derogate from the rights of the Russian Federation under the WTO Agreement as applied between the Members of the WTO by the date of accession of the Russian Federation to the WTO". As discussed with Members this language was specifically designed to re-state the right of the Russian Federation, *inter alia*, to use defences provided for in the WTO Agreement, in particular in the GATT Articles XX and XXI and GATS Articles XIV and XIV *bis*, in respect of the commitments undertaken in its Protocol of accession. This language was reflected in the draft Accession Protocol as attached to the draft Working Party report (in the document WT/ACC/SPEC/RUS/25/Rev.3 of 15 October 2004).

5. However, Russia was assured by Members that in accordance with well-established customary practices of the WTO and the understanding shared by the Members, this additional language is redundant as all Members have equal availability of defences under the WTO Agreement in the context of the whole integrity of all parts of the WTO Agreement, in particular Multilateral Trade Agreements and Protocols of accession, with or without specific reference to such defences in the Protocol of accession. Inclusion of such language in their view might have been interpreted as the opposite, thus undermining the rights of those Members whose Protocols of accession became effective before the accession of the Russian Federation and did not contain similar language. Eventually, conforming to this understanding of the Membership Russia agreed to delete the mentioned reference from the draft Protocol of accession and with such an understanding it concluded the Protocol.

6. In this dispute we see that the same WTO Members deviate from their own previous statements and understanding expressed in the course of Russia's accession to the WTO. This is a matter of our systemic concern, as the multilateral trading system has no room for such double standards.

7. Any Multilateral Trade Agreement or Protocol of accession cannot be interpreted apart from the context of the WTO Agreement. This approach directly comes from the provisions of Article 3.2 of the DSU on the customary rules of treaty interpretation. The Vienna Convention on the Law of Treaties states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose".

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\* The Russian Federation requested that its oral statement serve as the integrated executive summary.

8. In Russia's view, this good faith principle dictates that while interpreting the potential scope of the commitments undertaken in the Protocols of accession of a particular Member it shall be taken into account that among others the "General Exceptions" provisions are aimed at protecting the most important values of the Members. It shall be rigorously investigated whether a Member might have waived its right to protect such values as life and health of humans, animals and plants, whether WTO accession might have affected its right to protect public morals. It is obvious that such intention, if any, should be clearly and unambiguously expressed by the acceding Member. Without such express consent no Member shall be deprived of its right to protect the core values. Only such expressly stated waiver might be considered as a deliberate choice and intent of contracting parties. The opposite would be against not only the rule of good faith interpretation but also against the spirit and principles provided for, in particular, in the preamble of the WTO Agreement.

9. By otherwise interpreting the commitments undertaken the Panel will open the box of Pandora. It shall be noted that it would affect not only the right of Members to apply measures under Article XX of the GATT. The similarly worded defence is provided for, in particular, in the GATT Article XXI. Can a Member be deprived of the right to protect its essential security interests without its express consent? Can multilateral trading system be a barrier to international peace and security, can it prevent Members from taking measures required by the UN? These questions are not hypothetical. From the legal point of view defences under the GATT Article XX and Article XXI in this particular case are identical. The decision that would endorse a silent consent would clash the trade commitments of Members with their UN obligations.

10. This concludes our Statement. The Russian Federation hopes that the Panel finds these observations ponderable. Thank you for your time and attention.

**ANNEX C-10****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS  
OF THE KINGDOM OF SAUDI ARABIA****I. INTRODUCTION**

1. The Kingdom of Saudi Arabia participates as a third party in these disputes in order to provide its views on a number of important systemic issues raised by China's measures relating to the exportation of rare earths, tungsten and molybdenum.

**II. THE LIMITED SCOPE OF GATT ARTICLE XI:1 AS CONFIRMED BY THE PANEL AND APPELLATE BODY IN *CHINA – RAW MATERIALS***

2. The panel and Appellate Body in *China – Raw Materials* confirmed the important but limited scope of Article XI:1 of the GATT. An ordinary reading of Article XI:1 makes it clear that WTO Members are generally permitted to maintain export duties<sup>1</sup> and that this provision only prohibits "restrictions" that impose absolute limits on imports or exports, thus permitting non-quantitative restrictions which do not impose absolute limits on exports.<sup>2</sup> Moreover, the wording of Article XI:1 makes it clear that permissible export restrictions may be "made effective through ... export licences." It follows that where an export licensing regime is used to implement a restriction permitted under Article XI:1, that regime will also be consistent with Article XI:1, *provided that* it does not introduce any additional restriction that is unnecessary for its administration. Thus, non-automatic export licenses are not *per se* WTO-inconsistent.<sup>3</sup> Accordingly, if the measure is permitted by the WTO Agreement, for example an export duty, the export licensing regime that implements and administers the export duty is also permissible in principle.

**III. THE IMPORTANT PRINCIPLE OF INTERNATIONAL LAW OF MEMBERS' PERMANENT SOVEREIGNTY OVER THE NATURAL RESOURCES WITHIN THEIR TERRITORIES IS TO BE TAKEN INTO ACCOUNT WHEN INTERPRETING THE WTO AGREEMENTS**

3. The principle of permanent sovereignty over natural resources ("PSNR") forms an essential part of the analysis of whether certain measures are justified or not due to the principle's overarching nature as a fundamental principle of international law that emanates from state sovereignty, the very basis on which the international legal system is built. PSNR is consistent with the commitment of Members to strive for "the optimal use of the world's resources in accordance with the objective of sustainable development", as set out in the Preamble to the WTO Agreement, which must add "colour, texture and shading" to interpretations of WTO provisions.<sup>4</sup> Acceding to the WTO is of course "a quintessential example of the exercise of sovereignty"<sup>5</sup> but when interpreting Members' obligations in respect of measures concerning natural resources, treaty interpreters should genuinely take the principle of PSNR into account, recognizing "the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development."<sup>6</sup>

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<sup>1</sup> Like the present disputes, the claims of the complainants in *China – Raw Materials* were only based on Paragraph 11.3 of China's Accession Protocol. In *China – Raw Materials*, the panel noted China's agreement that it had foregone its general right under the GATT to impose export duties by virtue of the *additional* accession obligation. (Panel Reports, *China – Raw Materials*, para. 7.155) Moreover, the Appellate Body and the panel in *China – Raw Materials* found that there is nothing in either the GATT or any other WTO agreement that prohibits Members from maintaining export duties: See Appellate Body Reports, *China – Raw Materials*, para. 293; and Panel Reports, *China – Raw Materials*, paras. 7.160 and 7.907.

<sup>2</sup> Appellate Body Reports, *China – Raw Materials*, para. 320.

<sup>3</sup> Panel Reports, *China – Raw Materials*, para. 7.917. Saudi Arabia acknowledges that the Appellate Body declared moot and of no legal effect the panel's findings in respect of claims concerning China's export licensing requirements for a procedural reason. (Appellate Body Reports, *China – Raw Materials*, para. 235)

<sup>4</sup> Appellate Body Report, *US – Shrimp*, para. 153.

<sup>5</sup> Panel Reports, *China – Raw Materials*, para. 7.382.

<sup>6</sup> Panel Reports, *China – Raw Materials*, para. 7.375.

4. In order to conclude that the sovereign right over a Member's natural resources is expressly and intentionally limited by the text, the relevant WTO provision must be sufficiently unambiguous.

5. In this respect, Saudi Arabia recalls that the WTO agreements impose on its sovereign Members only those limited, expressly formulated and accepted obligations in respect of policies relating to their natural resources. In fact, it is noteworthy that the WTO agreements do not discipline Members' use or exploitation of their natural resources. Members retain the right to determine whether, when and how to exploit their natural resources. It is only once a resource is harvested or exploited that it can be traded as a product. Saudi Arabia thus agrees with the view of the panel in *China – Raw Materials*, that a policy of restricting extraction is "more in line with a policy to achieve conservation than one confined to restricting exports."<sup>7</sup>

#### **IV. EXPORT MEASURES THAT ARE PRIMARILY AIMED AT CONSERVATION AND ARE IMPOSED IN AN EVEN-HANDED MANNER AND JOINTLY WITH DOMESTIC RESTRICTIONS MAY BE JUSTIFIED UNDER GATT ARTICLE XX(G)**

6. Article XX(g) of the GATT permits measures that (i) relate to the conservation of exhaustible natural resources provided that they are (ii) applied in an even-handed manner and (iii) meet the strict requirements of Article XX's *chapeau*. With respect to the first requirement, an examination of the "general structure and design"<sup>8</sup> of the measure must show that there exists a close and genuine relationship of means and ends between "the measure at stake and the legitimate policy of conserving exhaustible natural resources".<sup>9</sup> Measures that are "primarily aimed at"<sup>10</sup> the conservation of exhaustible natural resources have been found to have a sufficiently "close and genuine relationship of ends and means"<sup>11</sup> to meet this requirement.<sup>12</sup> The second requirement—that conservation-related measures be made effective in conjunction with domestic restrictions—is a test of general even-handedness.<sup>13</sup> Where restrictions imposed on foreign and domestic goods are applied or operate jointly<sup>14</sup>—in other words when they "work together"<sup>15</sup>—they satisfy this requirement.<sup>16</sup>

7. Finally, the important function of Article XX's *chapeau* mandates an examination of the way in which the conservation measure is applied.<sup>17</sup> The important function of the Article XX's *chapeau* is well-established.<sup>18</sup> Where the conservation-related measure is applied in a manner that constitutes "a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade", it will be WTO-inconsistent.

#### **V. A MEMBER'S ACCESSION DOCUMENTS REFLECT A DELICATE BALANCE OF BOTH RIGHTS AND OBLIGATIONS**

8. Matters addressed in the accession documents of a Member must be examined in the light of the specific commitments made in the Working Party Report ("WPR") and the Protocol of Accession.<sup>19</sup> These accession documents are "integral parts of the WTO Agreement"<sup>20</sup> and WTO

<sup>7</sup> Panel Reports, *China – Raw Materials*, para. 7.428.

<sup>8</sup> Appellate Body Report, *US – Shrimp*, para. 137.

<sup>9</sup> Appellate Body Report, *US – Shrimp*, para. 135.

<sup>10</sup> Appellate Body Report, *US – Gasoline*, p. 18.

<sup>11</sup> Appellate Body Report, *US – Shrimp*, para. 136. See also Appellate Body Reports, *China – Raw Materials*, para. 355.

<sup>12</sup> See also Appellate Body Report, *US – Shrimp*, paras. 141-142.

<sup>13</sup> The Appellate Body so found when it reversed that panel's interpretation of the phrase "made effective in conjunction with", which required that "in addition" to being applied jointly with domestic restrictions, "the purpose of [the] export restrictions must be to ensure the effectiveness of [ ] domestic restrictions". (Panel Reports, *China – Raw Materials*, para. 7.397 (referring to GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6)) See Appellate Body Reports, *China – Raw Materials*, paras. 356–358.

<sup>14</sup> Appellate Body Report, *US – Gasoline*, p. 20.

<sup>15</sup> Appellate Body Reports, *China – Raw Materials*, para. 356.

<sup>16</sup> Appellate Body Reports, *China – Raw Materials*, para. 357.

<sup>17</sup> See, e.g., Appellate Body Report, *US – Gasoline*, pp. 22 and 25; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215.

<sup>18</sup> See, e.g., Appellate Body Report, *US – Gasoline*, pp. 22 and 25; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215.

<sup>19</sup> See, e.g., Panel Reports, *China – Raw Materials*, para. 7.144; and Appellate Body Reports, *China – Raw Materials*, paras. 293–299, n. 576.

Members can therefore initiate WTO dispute settlement proceedings on the basis of a claim of violation of a Member's accession documents.<sup>21</sup> The commitments made in these documents create both rights and obligations of the acceding Member in its trade relations with other Members of the WTO and their provisions may base claims at dispute settlement. It is not only an acceding Member that undertakes obligations (sometimes "WTO-plus") in order gain entry to the WTO. The existing membership also accepts to respect an array of rights bestowed upon the acceding Member by virtue of this "accession package" in recognition of the fact that a new Member's accession also benefits the whole membership. It is important that this common intention of the membership is given effect.

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<sup>20</sup> Panel Reports, *China – Raw Materials*, para. 7.113.

<sup>21</sup> Panel Reports, *China – Raw Materials*, para. 7.114, referring to the reports in *China – Auto Parts*, adopted on 15 December 2008 and in *China – Publications and Audiovisual Products*, adopted on 19 January 2010 where both panels and Appellate Body assessed claims based on China's Accession Protocol.

**ANNEX C-11****INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY****Export Duties**

1. In Turkey's view, the key legal question in the present dispute in regard to export duties is whether China is entitled to have recourse to Article XX of the GATT 1994, in the event where the Panel finds that the export duties on rare earths, tungsten and molybdenum are inconsistent with its commitments enclosed in Paragraph 11.3 of China's Accession Protocol.
2. This Paragraph allows China not to "eliminate all taxes and charges applied to exports" on the condition that one of the terms set forth in the same Paragraph is satisfied. Therefore if "such taxes or charges are" specifically provided for in Annex 6 of China's Accession Protocol"; or (ii) such taxes and charges are "applied in conformity with the provisions of Article VIII of the GATT 1994"<sup>1</sup>, then China will be considered to be in conformity with the commitments of the Accession Protocol.
3. Apart from these explicit referrals in Paragraph 11.3 of China's Accession Protocol, Turkey believes that China can not be excused from a potential violation of Paragraph 11.3 of China's Accession Protocol by recourse to other provisions of the GATT 1994, including Article XX.
4. Turkey finally would like to refer to the Appellate Body's statement in "*China - Raw Materials*" that, "as China's obligation to eliminate export duties arises exclusively from China's Accession Protocol and not from GATT 1994, had there been common intention to provide access to GATT Article XX, language to that effect would have been included in Paragraph 11.3 or elsewhere in China's accession Protocol."<sup>2</sup>
5. Turkey's view in regard to the Panels question of what the outcome of there being no reference to GATT Article I is that, Paragraph 11.3 of China's Accession Protocol and GATT Article I impose different kind of obligations. While Paragraph 11.3 of China's Accession Protocol obliges China, 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", GATT Article I obliges all WTO Members (including China) to apply all duties and charges on exports and imports on an MFN basis. However in order to discuss the issue of MFN principle, at first a WTO Member should have a right or at least be permitted to apply the duty or charge. Turkey believes this is a matter that needs to be discussed under Paragraph 11.3 of China's Accession Protocol in the case of export duties applied by China. If such an analysis establishes that China is permitted to apply export duties, than the MFN violation claim (if any) has to be assessed under Article I of the GATT 1994. Therefore, Turkey considers that there is no need to make a specific reference to Article I of the GATT which stipulates a different kind of obligation.

**Export Quotas**

6. From the first written submissions of the Parties, Turkey understands that there is no disagreement between the Parties as to the existence of the export quotas applied by China on rare earths, tungsten and molybdenum.
7. The plain wording of Article XI:1 of the GATT 1994 explicitly prohibits Members from instituting or maintaining restrictions made effective through a quota on the exportation of any product. On the other hand, Paragraphs 162 and 165 of the Working Party Report confirm China's obligations stemming from the WTO Agreements in regard to export restrictions. On the other hand, they also enable China to justify its export restrictions under the provisions of

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<sup>1</sup> Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012 (*China – Raw Materials*, para. 279

<sup>2</sup> Appellate Body Report, *China – Raw Materials*, para. 293

GATT 1994, which Turkey believes to include the general exceptions provided in Article XX of this agreement.

8. In this regard, what establishes the legal question of this dispute in regard to the export quotas is whether Article XX(g) of the GATT 1994 can or cannot be used as an excuse to derogate from the obligations stipulated in the aforementioned provisions and on what conditions this would be possible.
9. Turkey is of the view that the negotiating history of Article XX(g) of the GATT 1994 sheds light on understanding the aim of the negotiators.
10. Regarding the interpretation of Article XX of the GATT 1994, as it is well settled by WTO jurisprudence, a measure can be justified by Article XX; i) if it falls under one or another of the particular exceptions listed from paragraphs (a) to (j) under Article XX; and ii) if it satisfies the requirements imposed by the chapeau of Article XX.<sup>3</sup>
11. In regard to the order of analysis, in *US – Shrimp*, the Appellate Body confirmed the Panel's decision that the determination as to whether the measure is applied in conformity with the chapeau of Article XX should be conducted after the consistency of the measure with paragraph (g) of Article XX is determined.<sup>4</sup>
12. In the present dispute at hand, Turkey believes that the subjects (rare earths, tungsten and molybdenum) of China's export restriction measures are exhaustible natural resources within the scope of Article XX (g) of the GATT 1994. However, in Turkey's view, the Panel should give special attention to examining the relationship between the general structure and design of the measures at issue, and the policy goals sought by China, i.e. the conservation of those resources and identifying whether the export restrictions are made effective in conjunction with restrictions on domestic production or consumption. In this regard, in order to justify a measure under the paragraph (g) the restrictive measures should be applied even-handedly<sup>5</sup>. The even-handedness requirement necessitates a Member taking conservation-related export measures to also restrict domestic production or consumption. In Turkey's view, although this requirement does not seek for identical treatment, it does require the result of the measure to have a non-bias effect.
13. If the Panel finds that the restrictions to the exportations imposed by China fall within Article XX (g) of the GATT 1994, it should continue by analyzing to determine whether those restrictions comply with the chapeau of Article XX of the GATT 1994.
14. The Appellate Body in *US-Shrimp* established three standards to determine compliance to the chapeau of Article XX. These are; seeking whether there is i) an arbitrary discrimination between countries where the same conditions prevail; ii) unjustifiable discrimination between countries where the same conditions prevail; and iii) a disguised restriction on international trade.
15. Turkey asks the Panel to carefully evaluate these three standards in its legal assessment.

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<sup>3</sup> United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, (Appellate Body Report, US – Gasoline), p.22

<sup>4</sup> United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755 (US – Shrimp), Appellate Body Report, para 122.

<sup>5</sup> Appellate Body Report, US-Gasoline, p.20-21