

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

**(WT/DS431)**

**Comments of the United States of America on China’s  
“Answers to the Panel’s Written Questions Subsequent to  
the First Substantive Meeting of the Panel with the Parties”**

**March 25, 2013**

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<i>China – Audiovisual Products (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>China – Raw Materials (AB)</i>	Appellate Body Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012
<i>China – Raw Materials (Panel)</i>	Panel Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R, WT/DS395/R, WT/DS398/R, adopted 22 February 2012, as modified by the Appellate Body Report, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R
<i>India – Autos (Panel)</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS145/R, WT/DS176/R, adopted 5 April 2002
<i>Japan – Alcohol (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
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1. The United States takes this opportunity to provide comments on a number of the points raised in China's March 14, 2013 "Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties." The U.S. second written submission will include further responses to the facts, data, and arguments that China has presented in its Answers. Accordingly, the absence of a U.S. comment on any particular answer by China does not indicate that the United States agrees with China's answer.

**2. To China: Why did you raise your request for a preliminary ruling (only) in your first submission? In other words, why did you not make this request earlier, especially in the light of paragraph 6 of the Working Procedures wherein parties are required to make such requests at the earliest available opportunity?**

2. The United States observes that China's explanation – namely, that its decision to request a preliminary ruling only in its first written submission was due to its "extensive" internal discussions and consideration of the merits of re-arguing the Appellate Body's (and panel's) legal interpretation in *China – Raw Materials* on applicability of Article XX of the GATT 1994 to Paragraph 11.3 of China's Accession Protocol – underscores the fact (as previously noted by the United States in its Response to China's Request for a "Preliminary Ruling")<sup>1</sup> that this matter of substantive law is not appropriate to a request for a "preliminary ruling."

3. Additionally, the United States notes that even if, according to China's answer, China could not decide whether to challenge the Appellate Body's (and panel's) legal interpretation in *China – Raw Materials* on this matter until the time that its first written submission was due, China's answer still does not address why China chose to frame its challenge as a "preliminary ruling" request and why China initially decided it would not present a substantive defense for the imposition of its export duties until February 15, 2013.

**3. To China: Please explain why you think there was no need to include an explicit reference to "WTO Agreement", "in conformity with the GATT 1994" or "Article XX of the GATT 1994" in the text of Paragraph 11.3 of China's Accession Protocol in order for the general exceptions in GATT Article XX to be applicable to the obligation in Paragraph 11.3. More precisely:**

**(a) What implications if any result from the fact that in the immediate legal context of Paragraph 11.3 of China's Accession Protocol, i.e. in Paragraphs 11.1 and 11.2, there are explicit references to "in conformity with the GATT 1994", but there is no such reference in Paragraph 11.3?**

4. China's attempt to explain the differences between the language of Paragraphs 11.1 and 11.2 and Paragraph 11.3 misses the relevance of the former paragraphs.

5. Paragraphs 11.1 and 11.2 of China's Accession Protocol provide immediate context for

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<sup>1</sup> U.S. Response to the Request of China for a "Preliminary Ruling," paras. 4-5.

Paragraph 11.3, showing an ability to incorporate GATT 1994 exceptions when Members intended to do so. The relevance of Paragraphs 11.1 and 11.2 as context does not depend on whether the exact same language used in those provisions might have been appropriate for Paragraph 11.3.<sup>2</sup> The point is that Members knew when and how to include a reference to the GATT 1994 when they wanted to do so. The United States notes that other provisions – including those identified by the Panel in parts (b) and (c) of this Question, as well as in Question 15 – also provide examples of language that encompasses the Article XX exceptions. And language with respect to export duties in the accession protocols of other Members (although not at issue in this dispute) likewise stands in contrast to the language of Paragraph 11.3.<sup>3</sup> Contrary to China's suggestion, the language of Paragraphs 11.1 and 11.2 (and of other provisions that include specific references to the GATT 1994) supports the conclusion that Article XX of the GATT 1994 is not available to justify breaches of Paragraph 11.3.<sup>4</sup>

**(b) What implications if any result from the fact that in other provisions of China's Accession Protocol, for instance in Paragraph 5.1, there is an explicit reference to "in a manner consistent with the WTO Agreement", but there is no such reference in Paragraph 11.3?**

6. China's arguments in response to this question are also contradictory. In response to part (a) of this Question, China suggests that it would have made no sense to include in Paragraph 11.3 language referencing the GATT 1994 because Paragraph 11.3 "adds to" the substance of the GATT 1994.<sup>5</sup> Yet in response to part (b), China argues that such language was required in Paragraph 5.1, which likewise is not governed by the GATT 1994.<sup>6</sup>

7. China claims this is the case because there is an "intrinsic relationship" between Paragraph 11.3 and Articles I and II:1(a) of the GATT 1994, but not between Paragraph 5.1 and any provision of the GATT 1994.<sup>7</sup> According to China, in light of this "intrinsic relationship" it would have been contrary to some supposed "fundamental rule of effective treaty construction"

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<sup>2</sup> See Report of the Working Party of the Accession of Viet Nam, WT/ACC/VNM/48, para. 260 ("The representative of Viet Nam confirmed that Viet Nam would apply export duties, export fees and charges, as well as internal regulations and taxes applied on or in connection with exportation in conformity with the GATT 1994.").

<sup>3</sup> See Report of the Working Party on the Accession of Ukraine, WT/ACC/UKR/152, paras. 512, 240 ("The representative of Ukraine confirmed that at present export duties were applied only to the goods listed in Table 20(a). He further confirmed that Ukraine would reduce export duties in accordance with the binding schedule contained in Table 20(b). He also confirmed that as regards these products, Ukraine would not increase export duties, nor apply other measures having an equivalent effect, unless justified under the exceptions of the GATT 1994.").

<sup>4</sup> See *China – Raw Materials (AB)*, para. 293; *China – Raw Materials (Panel)*, paras. 7.138, 7.146.

<sup>5</sup> China's Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para.7.

<sup>6</sup> *Id.*, para. 9.

<sup>7</sup> *Id.*, paras. 11-15.

to include in Paragraph 11.3 language incorporating the Article XX exceptions, such as that found in Paragraph 5.1.<sup>8</sup> But then China proceeds immediately to contradict itself – if the GATT 1994 is not relevant to the obligations in Paragraph 5.1, as China claims, then there would have been no need to provide for language to make the Article XX exceptions of the GATT 1994 available to justify breaches of Paragraph 5.1. Indeed, China proceeds to indicate that the relationship between Paragraph 5.1 and the GATT 1994 is so close that “the introductory clause of Paragraph 5.1 ensures that China’s ‘WTO-plus’ commitment to grant the right to trade does not undermine China’s rights and obligations under the GATT 1994.”<sup>9</sup>

8. Aside from being internally inconsistent, China’s argument further evidences the flaws with its proposed “intrinsic relationship” test, which the complainants have repeatedly identified. Again, this test has no basis in the customary rules of treaty interpretation, and the Appellate Body did not rely upon any “intrinsic relationship” or absence thereof in analyzing the introductory language of Paragraph 5.1 in the *China – Audiovisual Products* dispute.

9. Moreover, China’s insistence that there is an “intrinsic relationship” between Paragraph 11.3 and the GATT 1994 but not between Paragraph 5.1 and the GATT 1994 appears to boil down to the fact that export duties apply to goods while Paragraph 5.1 relates to the “treatment of traders.”<sup>10</sup> However, China concedes there are provisions of the GATT 1994 that could be implicated by the “treatment of traders,” as the Appellate Body has found.<sup>11</sup> And while China’s argument appears to rest on a fundamental assumption that the GATT 1994 is the only covered agreement relevant to trade in goods, that assumption is not correct. There are provisions of agreements other than the GATT 1994 that discipline trade in goods. As such, China’s argument that there is an “intrinsic relationship” between Paragraph 11.3 of China’s Accession Protocol and the GATT 1994 should be rejected.

**(c) What implications if any result from the fact that in some provisions of China’s Working Party Report, for instance in Paragraph 160, there is an explicit reference to “Article XX of the GATT 1994”, but there is no such reference in Paragraph 11.3?**

10. China’s attempt to explain why Paragraph 11.3 does not include any language suggesting that Article XX applies, while other paragraphs within China’s accession documents do, fails for the same reasons discussed above with respect to China’s attempt to explain away Paragraphs 11.1 and 11.2. The fact that Paragraph 160 refers specifically to Article XX of the GATT 1994 again confirms that the negotiators of China’s accession commitments were able to refer to those

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<sup>8</sup> *Id.*, para. 16.

<sup>9</sup> *Id.*, para. 13.

<sup>10</sup> *Id.*, para. 9.

<sup>11</sup> See *China – Audiovisual Products (AB)*, para. 227 (“[M]easures that restrict the rights of traders may violate GATT obligations with respect to trade in goods.”).

defenses when relevant. The fact that in Paragraph 11.3 they chose not to do so demonstrates that negotiators did not intend the Article XX exceptions to be available. Negotiators instead provided for other, specific exceptions to China’s obligation to eliminate export duties. And China’s reference to paragraph 162 of the Working Party Report, which is incorporated into the Protocol, misses the point.<sup>12</sup> Paragraph 162 of the Working Party Report once again explicitly references the provisions of the GATT 1994. Paragraph 11.3 of the Protocol does not, and so Paragraph 162 provides additional context contradicting China’s interpretation.

**(d) Why would there be a need to refer to GATT Article VIII in Paragraph 11.3, if, as you suggest, all GATT provisions were (presumed to be) applicable to situations covered by Paragraph 11.3?**

11. China’s position that Paragraph 11.3 of its Accession Protocol is an “integral part” of the GATT 1994 such that the Article XX exceptions apply, and that such a conclusion can be assumed even in the absence of any treaty text indicating as much, cannot be reconciled with the fact that Paragraph 11.3 includes a reference to Article VIII of the GATT 1994.

12. “Fees and charges imposed on or in connection with exportation” are – like export duties – subject to certain obligations in the GATT 1994, such as Article I. However, the drafters nonetheless included in Paragraph 11.3 a reference to charges applied to exports being “applied in conformity with the provisions of Article VIII of the GATT 1994.” In other words, Article VIII is an exception to China’s Paragraph 11.3 commitments, provided for by the text of Paragraph 11.3 itself – and not by the existence of any supposed “intrinsic relationship.” Both the Appellate Body and the panel in *China – Raw Materials* found significant the fact that Paragraph 11.3 expressly refers to Article VIII of the GATT 1994, but not to any other GATT provisions.<sup>13</sup>

**4. To China: In its first written submission, China presents three arguments in support of its contention that the obligation in Paragraph 11.3 of its Accession Protocol is subject to the general exceptions in Article XX of the GATT 1994. China’s first argument is that Paragraph 11.3 of its Accession Protocol “has to be treated as an integral part of the GATT 1994”, because it has an “intrinsic relationship” to the GATT 1994, and the general exceptions in Article XX of the GATT 1994 are therefore applicable to Paragraph 11.3. China’s second argument is that “the terms ‘nothing in this Agreement’ in Article XX of the GATT 1994 have to be read broadly to incorporate provisions in post-1994 accession protocols for which an intrinsic relationship to the GATT 1994 can be shown” (emphasis added). With respect to this second argument, China reiterates that “the terms ‘this**

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<sup>12</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 18.

<sup>13</sup> *China – Raw Materials (AB)*, para. 303; *China – Raw Materials (Panel)*, para. 7.129.



**Agreement’ under Article XX of the GATT 1994 do not necessarily confine to the text of the GATT 1994 as it entered into force on 1 January 1995. Provisions beyond the GATT 1994 as it entered into force on 1 January 1995 may well be covered, too, if an intrinsic relationship between a given provision and the GATT 1994 can be established as explained in detail in the preceding section of the present comments and in China’s first written submission” (emphasis added). In its rebuttal comments, China clarifies, with respect to its second argument, that it “does not argue that the phrase ‘nothing in this Agreement’ makes the exceptions of Article XX of the GATT 1994 available to violations of provisions contained in (i) other multilateral agreements on trade in goods, (ii) China’s Accession Protocol taken as a whole, or (iii) the WTO Agreement as a whole.”**

**(a) In the light of the foregoing, we understand China’s second argument to be that the terms “this Agreement” in Article XX of the GATT 1994 should be interpreted to apply to the following, and nothing more than the following: (i) the provisions of the GATT 1994; and (ii) the provisions of post-1994 accession protocols that have become an integral part of the GATT 1994. Is our understanding correct?**

**(b) If this understanding is correct, please explain how, if at all, China’s second argument adds to its first argument? That is, if the Panel were to accept China’s first argument and conclude that Paragraph 11.3 has automatically become an integral part of the GATT 1994, would it follow that the words “this Agreement” in the chapeau of Article XX of the GATT 1994 could not exclude, and would actually confirm, the availability of Article XX to defend a violation of Paragraph 11.3? Does China’s second new argument simply amount to the proposition that the terms “this Agreement” in Article XX of the GATT 1994 include all of those provisions in post-1994 accession protocols that have become an integral part of GATT 1994?**

13. It would appear from China’s response to the Panel’s question that China accepts that its second argument does not in fact add anything to the first argument. And neither argument is correct. The phrase “this Agreement” as used in Article XX of the GATT 1994 does not include provisions of post-1994 accession protocols that have (in China’s view) become an “integral part” of the GATT 1994. As the United States has explained, China’s proposed interpretation has no basis in the customary rules of treaty interpretation.<sup>14</sup>

14. In addition, China’s proposed interpretation suffers from multiple practical flaws that render it unworkable. One such problem identified by the United States is that, under China’s “intrinsic relationship” test, the phrase “nothing in this Agreement” would be read to include provisions of other covered agreements that relate to trade in goods and that also could be

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<sup>14</sup> U.S. Response to China’s Request for Preliminary Ruling, paras. 31, 33-34.

considered “intrinsically related” to the GATT 1994.<sup>15</sup>

15. In its response (without precluding that “this Agreement” could apply to covered agreements governing trade in goods other than the GATT 1994), China attempts to limit its position to arguing that “nothing in this Agreement” refers to both the GATT 1994 and to “intrinsically GATT-related provisions” in post-1994 accession protocols.<sup>16</sup> However, China’s argument that Paragraph 11.3 is an integral part of the GATT 1994, based on a supposed “intrinsic relationship,” still fails.

16. Again, there is no textual basis for China’s “intrinsic relationship” test. In turn, there is no basis to determine why such a test would only apply to post-1994 accession protocols and not to other agreements that also include provisions covering trade in goods. Nor is there any basis to determine which provisions have an “intrinsic relationship” to the GATT 1994 and which do not. While China has invited the Panel to answer a hypothetical question to make this determination, the customary rules of treaty interpretation do not contemplate such an approach.<sup>17</sup>

17. Article XII of the WTO Agreement in no way provides textual support for China’s position that Paragraph 11.3 of its Accession Protocol is an “integral part” of the GATT 1994. Again, Article XII makes clear that an acceding Member must agree to the terms of the Marrakesh Agreement and all of the multilateral trade agreements. However, the provisions of all of those agreements are not, along with the provisions of accession protocols, mashed together into a group from which a Member mixes and matches obligations and exceptions.

18. And of course there is no need for all of the complex speculation and uncertainty inherent in China’s approach. The plain language of the Protocol states that: “This Protocol . . . shall be an integral part of the WTO Agreement” and in the very first recital of its preamble the Protocol defines the “WTO Agreement” to be one specific agreement: “the Marrakesh Agreement Establishing the World Trade Organization.” China has not, and cannot, explain why a treaty interpreter should ignore this express declaration by the WTO Members of the agreement that the Protocol is an integral part of and find instead that various unspecified provisions of the Protocol are instead (or perhaps in addition – China does not seem clear on this) an integral part of various other unspecified covered agreements.

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<sup>15</sup> *Id.*, para. 33.

<sup>16</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 21-22.

<sup>17</sup> China’s First Written Submission, para. 429. And of course the question posed by China (“if the WTO membership as a whole were subject to the ‘WTO-plus’ obligation at hand, in which covered agreement would the drafters have logically included such an obligation?”) calls for treaty interpreters to impermissibly speculate as to the intent of hypothetical negotiators, and the outcome, of negotiations that by definition never occurred.

19. In this dispute, the United States has established a *prima facie* breach of the obligation in Paragraph 11.3 to eliminate export duties. The question of whether the exceptions of Article XX of the GATT 1994 are available to justify such a breach depends upon an interpretation of the text of that obligation, following the customary rules of treaty interpretation. As the United States has explained, and as both the Appellate Body and the panel found in *China – Raw Materials*, the answer to that interpretive question is no.

**5. To China: In China’s view, the result of the Appellate Body’s ruling on the non-applicability of Article XX as a defence to a violation of the obligation in Paragraph 11.3 is that “trade liberalization must be promoted at whatever cost – including forcing Members to endure environmental degradation and the exhaustion of their scarce natural resources”. Does this position assume that export duties are, at least in some circumstances, the only type of instrument that can be used to protect the environment and conserve exhaustible natural resources? What is the basis for this assumption? Can it be reconciled with China’s view that “the use of export duties and quotas can produce identical results”?**

20. In its response, China acknowledges that it would be “difficult to conceive that export duties are the *only instrument*” to achieve certain policy goals.<sup>18</sup> China goes on to attempt to justify the export duties on rare earths, tungsten and molybdenum as one of a number of “instruments” that protect human, animal or plant life or health.

21. But China’s initial acknowledgment that other tools are available is both the starting point, and ending point, of any response to Panel Question 5. Simply put, China has never explained – either in its response to the Panel’s question, or in its attempt to substantiate its export duties on rare earths, tungsten or molybdenum under Article XX(b) – why it needs to use export duties as a tool to meet any purported non-trade objectives. Moreover, China has never shown how its export duties have any other purpose than to provide a price advantage to China’s domestic users of the products subject to the export duties.

**9. To China: China submits that the 2012 export duties are justified pursuant to Article XX of the GATT 1994. Is the Panel correct in understanding that China does not dispute either the complainants’ description of how these measures operate, or their claim that these measures are export duties within the meaning of Paragraph 11.3 of China’s Accession Protocol?**

22. The United States notes that China does not dispute that China in fact imposes export duties within the meaning of Paragraph 11.3.

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<sup>18</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 27.

23. China claims that it is inaccurate to state that “the 2012 Tariff Implementation Program does not specify a time limit for the application of the temporary export duty rates.” The record, however, does not support China’s contention. The 2012 Tariff Implementation Program does not contain any end date for the imposition of export duties. Rather, the 2012 Tariff Implementation Program states, “[i]t shall be implemented since January 1, 2012,” and the measure does not provide for a date on which the measure itself will expire or the tariffs provided therein will no longer be effective.<sup>19</sup> Furthermore, even when a “temporary” export duty rate is set out again in a Tariff Implementation Plan for the next year, that export duty rate is once again denominated as a “temporary” export duty rate – without any indication of an expiration date.

**10. To China: China submits that the 2012 export quotas are justified pursuant to Article XX(g). Is the Panel correct in understanding that China does not dispute either the complainants’ description of how the measures operate, or their claim that these measures are restrictions within the meaning of Article XI:1 of the GATT 1994?**

24. As part of its response to Question 10, China contends that the export quotas on rare earths, “in isolation and in view of the competitive conditions prevailing in the rare earths market today and in 2012, had [no] actual restrictive effects.”<sup>20</sup> The United States wholly disagrees with this erroneous statement of fact for the reasons set forth in our response to Question 33 and for the reasons set forth below.<sup>21</sup>

25. First, China’s export restriction regime on rare earths, of which export quotas are an integral part, had “actual restrictive effects” in 2012. For example, the CEO of Philips Lighting North America (“Philips”), in a letter to customers, noted that “shortages” in the supply of rare earth oxides resulted in his company raising prices over 300 percent in 2011.<sup>22</sup> There is no evidence that the supply shortages in rare earth oxides faced by Philips were remediated a few months later, in 2012. Philips also makes it clear that these shortages were caused by “Chinese export decisions.”<sup>23</sup> And lest China argue that “export decisions” does not include export quotas, Philips further notes that “[s]evere supply deficits are expected to occur over the next few years

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<sup>19</sup> Exhibit JE-45.

<sup>20</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 32-33.

<sup>21</sup> U.S. comments on the legal significance of unused quotas for rare earths in 2011 and 2012 can be found at Answers of the United States of America to Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel, paras. 66-69.

<sup>22</sup> Letter from Ed Crawford, CEO Philips Lighting North America, July 2011 (Exhibit JE-110).

<sup>23</sup> Philips Lighting North America, Phosphor – a critical component in fluorescent lamps, p. 9 (Exhibit JE-111).

as China increasingly lowers export quotas.”<sup>24</sup> Clearly, China’s contention that the export quotas on rare earths had no restrictive effects is without merit and should be rejected.

26. Beyond the shortages faced by foreign consumers of rare earths, China’s focus on “actual restrictive effects” ignores the fact that the export quotas, in combination with the export duties, severely distort the terms of competition between domestic (Chinese) and foreign companies that use these raw materials as inputs, specifically through the formation of a two-tiered pricing regime. This is shown, for example, in a presentation by Arnold Magnetic Technologies (AMT), a magnet producer with facilities in both the United States and China. AMT notes that “another problem” that non-Chinese magnet producers face is “the differential in pricing between domestic Chinese material and export material prices.” According to AMT, “[d]ifferential raw material pricing provides a cost advantage to companies located in China, encouraging additional western companies to relocate product manufacturing to China.”<sup>25</sup> The price differential is shown in Exhibit JE-112, page 36, which articulates the difference in domestic Chinese and export materials costs for samarium cobalt and NdFeB magnets.

27. Lastly, China’s argument that the Panel should not consider pre-2012 effects of the rare earth export quotas is entirely unpersuasive. Effects in, for example, 2010 and 2011, illustrate the market distorting results of the types of export restraints that China has adopted. Indeed, in China’s own words, its measures resulted in “massive price increases” “during the very turbulent period” that started in mid-2010.<sup>26</sup> Furthermore, nothing in the record indicates that such market distortions have disappeared in 2012, in 2013, or that they will disappear in the future.

**11. To all parties: Please comment on Canada’s third party submission with respect to the complainants’ trading rights claims.**

28. In its response to Question 11, China repeats its position that, if its export quotas are justified under Article XX of the GATT 1994, it is entitled to use prior export and minimum capital requirements to administer those quotas. According to China, it is not required to show that those requirements themselves are justified under Article XX.

29. China’s response again ignores the fact that its obligation to eliminate prior export and minimum capital requirements, set forth in Paragraphs 83 and 84 of the Working Party Report and Paragraph 5.1 of the Accession Protocol, is in addition to its obligation not to impose quantitative restrictions, set forth in Article XI of the GATT 1994.<sup>27</sup> Even were China’s export

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<sup>24</sup> *Id.*

<sup>25</sup> Arnold Magnetic Technologies, Magnet FAQs, p. 36 (February 7, 2013) (Exhibit JE-112).

<sup>26</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 189.

<sup>27</sup> Answers of the United States of America to Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel, para. 22.

quotas on rare earths, tungsten and molybdenum justified by Article XX (which they are not), such justification would not automatically extend to any means that China chooses to administer those quotas.<sup>28</sup>

30. Contrary to China’s suggestion, the fact that the export quotas and prior export and minimum capital requirements are contained in the same measure does not mean that any justification that applies to the quotas also applies to those requirements.<sup>29</sup> Provisions of the same measure can breach different WTO provisions.<sup>30</sup> Each breach must be justified, if at all, by a demonstration that it satisfies the requirements of an applicable exception.

31. Instead of explaining why the prior export and minimum capital requirements imposed on rare earths and molybdenum are justified under Article XX(g), China again attempts to shift its burden of proof onto the complainants (and onto Canada, a third party).<sup>31</sup> However, even if Article XX were available to justify breaches of Paragraphs 83 and 84, China would bear the burden of establishing this affirmative defense.

32. That said, the United States notes that China, while insisting that it need not show its prior export and minimum capital requirements are justified under Article XX(g) of the GATT 1994, nonetheless makes the unsupported assertion that China cannot pursue conservation goals without such criteria.<sup>32</sup> The United States does not agree with this assertion. As China presents these criteria, they serve to identify which exporters China feels are best suited to export.<sup>33</sup> In particular, the requirements simply restrict which exporters have access to the rare earths and molybdenum quota based on China’s supposed evaluation of which exporters are best qualified to enter into commercial relationships with purchasers outside of China. As such, there is no

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<sup>28</sup> Elsewhere in its submissions, China appears to recognize this fact. China claims that it is entitled to use prior export and minimum capital requirements (in breach of its Paragraphs 83 and 84 commitments) provided that those requirements are consistent with Articles X and XIII of the GATT 1994, and faults the complainants for not bringing claims under those provisions. China’s First Written Submission, para. 281; n. 566. However, the United States does not understand China to argue that breaches of GATT Article X or XIII would automatically be justified by Article XX should China impose a quota that is justified by Article XX. China appears to understand that the obligations imposed by GATT Article X and XIII are in addition to the obligations imposed by Article XI. The obligations imposed by Paragraphs 83, 84, and 5.1 are likewise in addition to the obligations imposed by Article XI.

<sup>29</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 52.

<sup>30</sup> See, e.g., *India – Autos (Panel)*, para. 7.296 (referring to the “the well established notion that different aspects of the same measure may be covered by different provisions of the covered Agreements”).

<sup>31</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 53.

<sup>32</sup> *Id.*, para. 45 (“These proposed interpretations of China’s trading rights commitments . . . would prohibit China from regulating trade in exhaustible rare earth resources by means of export quotas for conservation purposes.”); para. 47 (“Any other interpretation would deny China the right to effectively regulate trade in goods, in pursuit of a legitimate policy objective.”).

<sup>33</sup> *Id.*, paras. 48, 50; China’s First Written Submission, para. 241; China’s Opening Statement, para. 53.

apparent relationship to any conservation goal.

**12. To all parties and third parties: With respect to the claims regarding prior export performance and minimum registered capital requirements, the complainants have made claims under Paragraphs 83 and 84 of China’s Working Party Report (incorporated by reference via Paragraph 1.2 of China’s Accession Protocol), as well as Paragraph 5.1 of China’s Accession Protocol. What is the proper order of analysis with respect to the claims under these provisions?**

33. As explained in the U.S. response to this Question and in response to Question 11, Paragraphs 5.1, 83, and 84, “read together,” do not permit China to impose prior export and minimum capital requirements. Although Paragraph 5.1 includes the language, “Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement,” that language is not included in Paragraphs 83 and 84. And China specifically agreed in Paragraphs 83 and 84 not to use prior export and minimum capital requirements.

**13. To China: Please comment on the written submission of Colombia. It states that “China alleges that two types of volume controlling measures have been implemented: (i) restrictions on domestic production and (ii) restrictions on domestic consumption”. In this respect, Colombia highlights that “... the data presented by China is performing the opposite of what it is intended to show”. Colombia observes that “Although measures have been taken to limit the domestic production, they have not had any material effect in the achievement of their goal. The production caps have been ineffective to control domestic production, since actual production surpasses the established quotas for 2010 and 2011.” Colombia also says that with regards to the restrictions on domestic consumption, “the same situation with regards to the restrictions on domestic production is happening in this case”. If the export quota was fully used in 2010 and 2011, this would mean that the available quota for domestic production would be 62,000 and 66,400 respectively, a figure below the actual domestic consumption in those years.**

34. The United States would like to comment on two aspects of China’s response to Question 13. First, China argues that the Panel should ignore Colombia’s observation that actual production has exceeded the production targets for rare earths because, while China has not achieved “perfect compliance” in making the production targets binding, China “has actively and successfully improved compliance with its [production] restrictions.”<sup>34</sup>

35. It should be noted as an initial matter that China has attempted to explain the significant amount of production above target for only one group of materials (rare earths). Moreover,

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<sup>34</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 68.

China’s argument that, in effect, it is doing the best it can to enforce binding production restrictions is belied by the fact that China has taken multiple actions at different levels of government to incentivize and otherwise increase production of rare earths, thereby causing production above the target. In particular, China aims to increase the production of downstream materials that use rare earths as inputs. As set forth in the U.S. first written submission:

the *12th Five-Year Development Plan for New Materials Industry* sets targets for the increased production of downstream rare earth products, including increasing production capacity of permanent magnetic materials by 20 thousand tons per year and polishing powder by 5 thousand tons per year;<sup>35</sup>

the *Inner Mongolia Autonomous Region’s Twelfth Five-Year High Tech Industries Development Plan* sets a 60 percent growth target for the entire provincial rare earth industry;<sup>36</sup> and

the Jiangxi provincial government has established specific quantity targets for downstream products, including 100 million sets of fluorescent lighting devices and 1 million sets of electric motors based on permanent magnets.<sup>37</sup>

36. Provincial level measures aimed at growing the local rare earth industry – e.g., the 60 percent growth targeted in the *Inner Mongolia Autonomous Region’s Twelfth Five-Year High Tech Industries Development Plan* – explain statements like those of Zhang Zhong, the president and general manager of the Inner Mongolia Baotou Steel Rare-Earth (Group) Hi-Tech Co., the largest Chinese producer of rare earths, who noted that local governments encourage rare earth producers to expand production beyond the central government’s production targets.<sup>38</sup>

37. In addition, China has recently instituted a “reward” of RMB 3,000 per ton whereby rare earth mining and smelting companies will receive funds from the government based on the size of their operations, thereby encouraging increased production.<sup>39</sup> The same law also established a capital injection fund for “rare earth applied high-technologies industrialization projects” and an annual support fund for research and development.<sup>40</sup>

38. For these reasons, it is not surprising that China’s National Mineral Resource Plan for

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<sup>35</sup> Exhibit JE-28, V, 5.1; Column II, 03.

<sup>36</sup> Exhibit JE-29, Table 1.

<sup>37</sup> Exhibit JE-18, Section II, (3).

<sup>38</sup> WantChinaTimes.com, Central and local authorities clash over Baotou’s rare earth (February 25, 2013) (Exhibit JE-113).

<sup>39</sup> Communication on the management method applicable to Rare earth industry adjustment and improvement special fund, Art. 8 (Exhibit JE-114).

<sup>40</sup> *Id.*, Art. 9-10.



2008-2015 calls for China to extract 140,000 MTs of rare earths in 2015, which would be a substantial increase from current levels.<sup>41</sup> Clearly, production above target is the logical and inevitable result of China’s wide-spread and multi-level stimulation of the rare earth industry – both in the form of increased downstream production that leads to increased production of rare earths as well as direct payments to rare earth producers. Accordingly, China’s assertion that it “has actively and successfully” sought to make the production targets binding should be rejected given how much it has done to cause overproduction.

39. Second, it bears repeating that, simply put, China does not have restrictions on domestic consumption. The U.S. argument on this topic can be found in its answer to Question 31 from the Panel.<sup>42</sup> Moreover, China’s newly proffered empirical evidence of domestic consumption restrictions lacks merit.

40. Specifically, China notes that the *rate* of the increase in China’s consumption of rare earths has declined since China increased enforcement of domestic production targets in 2011.<sup>43</sup> This argument is unpersuasive on its face, especially in view of the overall stagnation of the global economy in the last few years. And, of course, a decline in the rate of increase means that there is still an increase, which is at odds with China’s claims of a restriction on total consumption.

41. China also claims that domestic prices for many rare earth products have increased by at least 31 percent since January 2011 and that the increase is caused by China’s conservation policy.<sup>44</sup> China’s argument wholly ignores the fact that its largest rare earth producer (the aforementioned Inner Mongolia Baotou Steel Rare-Earth (Group) Hi-Tech Co.) halted production in 2012, not to conserve natural resources, but to stabilize prices.<sup>45</sup>

**14. To China: China states that at the time of submitting its first written submission, China does not have production data and consumption data available for 2012. Can China provide an update now? (p. 60, footnote 267; p. 62, footnote 276; p. 110, footnote. 486) Can China provide the relevant data for the last three years (i.e. 2010, 2011 and 2012).**

42. The United States will comment on China’s data once they are provided.

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<sup>41</sup> Exhibit JE-105.

<sup>42</sup> Answers of the United States of America to Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel, paras. 49-52.

<sup>43</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 75.

<sup>44</sup> *Id.*

<sup>45</sup> China Daily, Baotou Steel Rare-Earth halts production to stabilize prices (October 24, 2012) (Exhibit JE-115)

**15. To all parties and third parties: Could the parties comment on China’s interpretation of the phrase “nothing in this Agreement” in the chapeau of Article XX of the GATT 1994? Could the parties also explain why some WTO agreements on trade in goods incorporate the GATT Article XX exceptions in full (e.g., TRIMS Article 3) and other WTO agreements on trade in goods adapt it (e.g., TBT and SPS)?**

43. China’s response repeats its earlier arguments, which the United States has previously addressed.<sup>46</sup> Of note, however, is China’s “acknowledgment” that “at least at first sight, there seem to be strong indicators that the exceptions enshrined in Article XX of the GATT 1994 are not available in the same manner across all multilateral agreements on trade in goods listed in Annex 1A of the WTO Agreement.”<sup>47</sup> The United States notes that China makes no attempt to explain why some WTO agreements on trade in goods incorporate the GATT Article XX exceptions, notwithstanding China’s position that no such language is necessary with respect to the export duty commitment set forth in Paragraph 11.3 of its Accession Protocol. As the United States explained in its response to this Question, the fact that certain covered agreements other than the GATT 1994 incorporate its exceptions, while others do not, demonstrates that Members understood how to make those exceptions applicable to other covered agreements, when they wanted to do so.<sup>48</sup> In contrast, the negotiators of China’s Accession Protocol did not choose to make breaches of Paragraph 11.3 of China’s Accession Protocol justifiable by the Article XX exceptions.

**16. To all parties and third parties: Is GATT 1994 generally applicable to export duties? If so, why is GATT Article XX not applicable to export duties permitted under Paragraph 11.3?**

44. In its response China repeats its arguments as to why Paragraph 11.3 is an “integral part” of the GATT 1994, which the United States has already addressed.<sup>49</sup>

45. The United States notes further that whether “export and import duties are on the same legal footing” for purposes of the non-discrimination obligation in Article I of the GATT 1994 is not relevant to the question of whether Article XX of the GATT 1994 is available to justify breaches of the commitment to eliminate export duties in Paragraph 11.3 of China’s Accession

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<sup>46</sup> U.S. Response to China’s Request for a Preliminary Ruling, para. 33, U.S. Response to China’s Rebuttal regarding its Request for a Preliminary Ruling, paras. 11-15; Answers of the United States of America to Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel, para. 29.

<sup>47</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 82.

<sup>48</sup> See *China – Raw Materials (AB)*, para. 303; *China – Raw Materials (Panel)*, para. 7.153.

<sup>49</sup> See, e.g., U.S. Response to China’s Request for a Preliminary Ruling, paras. 32, 33; U.S. Response to China’s Rebuttal regarding its Request for a Preliminary Ruling, para. 13.

Protocol.<sup>50</sup> Under the legal provision at issue in this dispute – that is, Paragraph 11.3 of the Accession Protocol – export and import duties are *not* “on the same legal footing;” Paragraph 11.3 obligates China to eliminate export duties. This obligation is a separate undertaking by China that is in addition to, and distinct from, the obligations found in the GATT 1994, and the exceptions available to justify breaches of the Paragraph 11.3 obligation are found in Paragraph 11.3 itself.

**18. To China: When did China start to impose export quotas on rare earths, tungsten and molybdenum; and since then, what level of export quotas has been imposed on those natural resources?**

46. As noted, the United States will have additional comments in its second written submission related to the data provided by China in Exhibits CHN-137, CHN-138 and CHN-139. However, the United States preliminarily observes that, according to China’s data, since the export quotas on rare earths, tungsten and molybdenum were instituted in 1999, 2000 and 2007, respectively, both the actual levels of domestic extraction and domestic consumption of these materials have increased.

47. Clearly, the export quotas have had no impact on the pace of extraction of these resources, which, according to the panel in *China – Raw Materials*, is crucial in the analysis of whether a measure “relates to” conservation. As noted by the panel in that dispute, “[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.”<sup>51</sup> Here, the only objectives served by the export quotas on rare earths, tungsten and molybdenum are economic in nature. The export quotas divert these raw materials to Chinese consumers at lower prices than are available to foreign consumers, which provides competitive advantages to China’s downstream industries vis-à-vis their foreign counterparts and additionally puts pressure on their foreign counterparts to move their operations, technologies and jobs to China.

**19. To all parties and third parties: In paragraph 88 of its first written submission and paragraph 17 of its oral statement at the first substantive meeting, China refers to paragraph 7.375 of the Panel Report in *China - Raw Materials*. Could the parties comment on paragraphs 7.375 and paragraphs 7.384-7.386 of the Panel Report?**

**Paragraph 7.375 provides that:**

**“Thus, a proper reading of Article XX(g) in the context of the GATT 1994 should take into account the challenge of using and managing resources in a**

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<sup>50</sup> See Answers of the United States of America to Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel, paras. 1-12.

<sup>51</sup> *China – Raw Materials (Panel)*, para. 7.428.

**sustainable manner that ensures the protection and conservation of the environment while promoting economic development. As the Appellate Body explained, to do so may require ‘a comprehensive policy comprising a multiplicity of interacting measures.’” (footnote omitted)**

**Paragraphs 7.384 to 7.386 provide that:**

**“The Panel refers now, as part of the immediate context of Article XX(g), to the provisions of paragraph (i) of Article XX, which deal with situations where the exports of domestic materials can be restricted to assist the affected domestic industry. Even in such a situation where a Member is explicitly protecting its downstream industry, Article XX(i) ensures consideration of the interests of foreign producers.**

...

**Article XX(i) provides explicitly that any export restrictions on domestic materials cannot be imposed to increase the protection of the domestic industry. Hence the restrictions remain subject to the core GATT principles of non-discrimination. In the Panel’s view, Article XX(g), which provides an exception with respect to ‘conservation’, cannot be interpreted in such a way as to contradict the provisions of Article XX(i), i.e., to allow a Member, with respect to raw materials, to do indirectly what paragraph (i) prohibits directly. In other words, WTO Members cannot rely on Article XX(g) to excuse export restrictions adopted in aid of economic development if they operate to increase protection of the domestic industry.”**

48. In its response to Question 19, China claims that the panel in *China – Raw Materials* erred in using Article XX(i) to provide context vis-à-vis the interpretation of Article XX(g) of the GATT 1994.<sup>52</sup> According to China, use of Article XX(i) to contextualize Article XX(g) diminishes Members’ rights and adds obligations in violation of Article 3.2 of the Dispute Settlement Understanding (“DSU”).<sup>53</sup> As shown below, China’s argument fails because the Appellate Body has consistently used other subparagraphs of Article XX to impart context as to the particular subparagraph at issue without contravening Article 3.2 of the DSU.

49. For example, in *US – Gasoline*, the Appellate Body noted that the other Article XX subparagraphs provide context for the interpretation of Article XX(g) of the GATT.<sup>54</sup> Similarly,

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<sup>52</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 91.

<sup>53</sup> *Id.*

<sup>54</sup> *US – Gasoline (AB)*, pp. 16-17.

in *Korea – Beef*, the Appellate Body used subparagraph (g) to provide context for the interpretation of Article XX(d) of the GATT 1994.<sup>55</sup>

50. In this regard, the Appellate Body’s application of context in *Korea – Beef* is especially informative. In *Korea – Beef*, the Appellate Body used Article XX(g) to inform the conceptual limits of what measures may be considered to be “necessary” under Article XX(d) of the GATT 1994. The Appellate Body observed that “necessary” measures must be “located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to.’”<sup>56</sup> The Appellate Body reasoned that “making a contribution to” is closer to the test of “relating to” found at Article XX(g), and that particular requirement “is more flexible textually than the ‘necessary’ requirement found in Article XX(d).”<sup>57</sup> Accordingly, measures that just “make a contribution to” may not be considered to be “necessary” for purposes of Article XX(d) based, in part, on the context provided by Article XX(g) of the GATT 1994.

51. As in *Korea – Beef*, the panel in *China – Raw Materials*, used Article XX(i) to inform the conceptual limits of what measures may be considered to be “relating to” conservation by observing that Members should not be allowed to do indirectly through Article XX(g) what is directly prohibited by Article XX(i) – specifically, use export restrictions on raw materials in aid of economic development that operate to increase protection of the domestic industry. In other words, the panel in *China – Raw Materials* used the context of Article XX(i) to inform the conceptual limits of what is considered conservation for purposes of Article XX(g) by noting that China’s preferred interpretation would run afoul of what is specifically prohibited under subparagraph (i).

52. Moreover, in *US – Gasoline*, *Korea – Beef*, and *China – Raw Materials*, the Appellate Body and panel did not alter the rights and obligations of Members. Rather, they used the context of other provisions in Article XX of the GATT 1994 to make findings as to what the rights and obligations were under a particular subparagraph, and how those rights and obligations applied, in the particular dispute at hand. This is entirely consistent with customary rules of treaty interpretation.

53. Accordingly, the use of Article XX(i) to provide context for the interpretation of Article XX(g) by the panel in *China – Raw Materials* is supported by Appellate Body findings and, moreover, does not constitute a contravention of Article 3.2 of the DSU.

**20. To China: In its first written submission, China estimates that “at current levels of demand, medium/heavy rare earths deposits in Southern China will only last for another 15 years”. (emphasis added) Could China provide information on the**

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<sup>55</sup> *Korea – Beef (AB)*, para. 161.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, fn. 104.

**situation regarding light rare earths deposits?**

54. The United States observes that China did not answer the Panel’s question – *i.e.*, it did not provide an estimate as to how long Chinese deposits of light rare earths are predicted to last at current levels of demand.<sup>58</sup> China’s reluctance in this regard may be explained by reports, such as those in the *China Daily*, that characterize China’s supply of light rare earths as “plentiful.”<sup>59</sup>

**21. To China: What is the rationale for dividing the 17 chemical elements into two groups *i.e.* light and medium/heavy rare earths, instead of imposing trade measures individually on products of each element?**

55. According to China’s responses to Question 21 and Question 43, China does not set production restrictions on individual rare earth elements because “China can only practically control the total volume of ores mined and the total volume of smelted and separated products processed from these ores.”<sup>60</sup> China further argues that multiple rare earth elements are found together in the same ore and, therefore, production of multiple rare earth elements is “inevitable” given the limits of what China can control.<sup>61</sup> As shown below, China’s argument is not credible; according to China’s own facts and arguments, it is fully capable of setting restrictions on individual rare earth elements. The fact that China has not established such restrictions on individual rare earth elements, coupled with its admissions that rare earths should not be treated as a single commodity, means that it has failed to meet its burden of showing that it maintains “restrictions on domestic production” under Article XX(g) of the GATT 1994.

56. While different rare earths are often found together in the same ores, they are eventually separated into individual rare earths for either sale or further processing (e.g., combined with other non-rare earth elements to create a ferro-alloy). This point is acknowledged by China in its response to Question 21.<sup>62</sup> It is entirely unclear from China’s response why it could not impose a restriction on the sale or further processing of individual rare earths once they have been separated and, therefore, have domestic restrictions on an individual rare earth-basis. Indeed, China admits that it is able to regulate the smelting process – *i.e.*, the step of further processing

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<sup>58</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 93.

<sup>59</sup> China Daily, Appeal to boost rare earth imports, (August 22, 2012) (Exhibit JE-116).

<sup>60</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 97.

<sup>61</sup> *Id.*, para. 95.

<sup>62</sup> *Id.* (“The specific and individual rare earth elements are only produced when rare earth ores are processed through a multitude of steps to first concentrate and chemically process the minerals and then separate whatever rare earth elements may be in the ton of ore.”)

individual rare earth oxides into, for example, ferro-alloys.<sup>63</sup>

57. Moreover, limits on a company’s ability to sell or further process raw materials (*e.g.*, separated rare earths) that have already been mined is an alleged current feature of China’s domestic law covering extraction. As noted by China in its first written submission, “the rules governing access to the [extraction target for tungsten] provide that if the enterprise were to expand the mining scale, to the point where output exceeded the allocated [target], the enterprise must ‘keep the extra specified minerals of which the protective mining is prescribed beyond the quota properly from being sold.’”<sup>64</sup> China cannot have its facts both ways. Therefore, China should not be allowed to claim that it cannot control sales of mined materials once they have been extracted in the case of rare earths and then highlight such controls as part of its alleged “comprehensive conservation policy” for tungsten.<sup>65</sup>

58. The lack of controls on individual rare earths is important because, according to materials provided by China, “[w]e cannot treat rare earths as a single commodity.”<sup>66</sup> China also acknowledges that demand for one medium/heavy rare earth (samarium) may be different than the demand for another (terbium).<sup>67</sup> And, China has not shown that it sets the domestic production target for terbium (as one example) in a way that ensure that it is below last year’s terbium production, which is China’s proffered standard for binding production restraints. Instead, China asks the Panel to assume that the production of terbium is limited because the production of “rare earths” is allegedly limited. This assumption wholly contradicts China’s own claim that rare earths is not a single commodity and, therefore, should be rejected.

**22. To China: In its first written submission, China states in paragraph 14 that “[t]he expanding demand for rare earths over the past several years gave rise to considerable pressure on Chinese rare earths resources. The risk of depletion is particularly acute for medium/heavy rare earths.” And in paragraph 28 China states that “[t]oday, light rare earths are subject to a tax rate of 60 RMB per ton of undressed ore mined. For heavy rare earths, the tax rate is set at 30 RMB per ton of undressed ore mined.” Could China please explain why light rate earths are subject to a tax rate of 60 RMB and heavy rare earths are subject to a lower tax rate of 30 RMB per ton of undressed ore mined?**

59. The United States will address China’s response in the U.S. second written submission.

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<sup>63</sup> *Id.*, para. 97.

<sup>64</sup> China’s First Written Submission, para. 319 (quoting Exhibit CHN-18).

<sup>65</sup> *See also* China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para 129 (“Chinese law prohibits illegally produced products from being purchased and sold.”).

<sup>66</sup> CHN-4, p.9

<sup>67</sup> China’s First Written Submission, para. 249.

**24. To China: Other than Exhibit CHN-63 and CHN-13, could China provide evidence of official documents or legal instruments indicating the *process* for setting the amount of export quotas in 2012? How is the goal of conservation taken into account in the process of setting export quotas?**

60. The United States makes the following initial observations regarding China’s response to Question 24. First, China’s response focuses entirely on rare earths and, consequently, does not provide any information on the process for setting the export quota amounts for either tungsten or molybdenum.

61. Second, China did not answer the Panel’s question – *i.e.*, it did not provide additional evidence of official documents or legal instruments indicating the process for setting the amount of export quotas in 2012. In fact, the only document cited by China in its response other than CHN-63 and CHN-13 – *i.e.*, the *Provisional Measures on the Administration of the Directive Production Plan of Rare Earth Administration* – discusses a plan for rare earth mining, production and export to be delivered in 2013, not 2012.<sup>68</sup>

62. Instead, to explain the process for setting the rare earth export quotas, China has elected to rely on a post hoc document prepared solely for the purposes of this dispute – *i.e.*, the *Declaration on the Setting of 2012 Export Quotas on Rare Earth Products* (CHN-63) and a document – *i.e.*, the *Several Opinions* (CHN-13) – that post-dates both the establishment of the export quotas (by more than a decade) and the findings by the WTO that its export restrictions on the raw materials at issue in *China – Raw Materials* were WTO-inconsistent (by a month).

63. The United States would like to note that there is very limited value in these types of documents, which may have a self-serving purpose and appear to be produced in post hoc circumstances.

**25. To China: In Exhibits JE 11 and JE 67 presented by the co-complainants, the concept of “two resources and two markets” is mentioned. Could China please explain this concept of “two resources and two markets”?**

64. In its answer to this question, China argues that the United States has “misinterpreted” the “two resources, two markets” concept. However, a close and careful examination of China’s arguments and the support China attempts to draw upon for those arguments, demonstrates that China’s own exhibits support the U.S. interpretation and that it is China’s interpretation of these exhibits that is misleading and inaccurate.

65. The United States addressed China’s “two resources, two markets” concept in the U.S.

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<sup>68</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 114.



first written submission in providing the policy context for China’s use of export restraints.<sup>69</sup> As the United States noted, “two resources, two markets” has become a shorthand reference for the strategy of leveraging China’s comparative advantage in certain resources for China’s economic advantage. With respect to raw materials, such as rare earths, tungsten, and molybdenum, this can be realized through, *inter alia*, using export restraints to create two markets (one domestic and one international) for the supply and demand of the raw materials, resulting in benefits to the development and exports for China’s industries involved in processing and high-value added manufacturing related to these raw materials.

66. The United States agrees with China’s most basic background point that “two resources, two markets” refers to domestic and international resources, and the domestic and international markets for these resources and their downstream products.<sup>70</sup> The United States also agrees that the concept is premised on the notion that the resources are traded internationally.<sup>71</sup> However, the assertion that China makes that is not supported by the facts, including China’s own exhibits, is that the concept stands for the spirit of “cooperation,” “mutual benefit,” or “complementary outcome.”<sup>72</sup> What China omits in its interpretation and presentation of “two resources, two markets” is the strategic foundation of this concept – *i.e.*, that China’s comparative advantages in resource endowment should be translated into economic advantages for China.

67. This self-interested “thumb on the scale” spirit of “two resources, two markets” is apparent in the materials that China has introduced in its answer to Question 25; in the supporting materials the United States referenced in its first written submission; and in other sources as well.

***“Two Resources, Two Markets” in Exhibits CHN-141 and CHN-142***

68. The exhibits provided by China in answering Question 25 actually support the point that “two resources, two markets” is geared towards creating economic advantages for China, rather than towards promoting the mutual benefits of trade. This is evidenced in both exhibits CHN-141 and CHN-142. With respect to the excerpt from the CPC Central Committee Decision in exhibit CHN-142, the United States takes note of a couple discrepancies and problems in the exhibit and China’s answer to question 25 before addressing the main substantive point, .

69. First, the language “quoted” in paragraph 118 of China’s answer does not correspond exactly to the language in the translation provided at CHN-142B:

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<sup>69</sup> U.S. First Written Submission, paras. 26-36.

<sup>70</sup> See China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 116; U.S. First Written Submission, para. 26.

<sup>71</sup> See China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 117.

<sup>72</sup> See *id.*, paras. 120 and 125.

Translation provided at para. 118	Translation provided in CHN-142B
It is decided to firmly <u>carrying out</u> the policy of opening up, to <u>accelerate</u> the process of opening to the outside world, to fully utilize <u>the two markets, domestic and international</u> , as well as two resources from <u>domestic and international origin</u> , to optimize the allocation of resources.	It is decided to firmly <u>stick to</u> the policy of opening up, to <u>speed up</u> the process of opening to the outside world, to fully utilize <u>the two markets and the two resources in the domestic and in the international</u> , to optimize the allocation of resources.
It is decided <u>that China should</u> actively participate in international competition and international economic cooperation, to <u>use</u> China's comparative advantage in economy, and to develop open economy so as to realize <u>mutual supplementary connections</u> between domestic and the international economies.	It is decided <u>to</u> actively participate in international competition and international economic cooperation, to <u>perform</u> China's comparative advantage in economy, and to develop open economy so as to realize <u>a mutually supplement</u> between the domestic and the international economies.
It is decided <u>that China should</u> regulate foreign economic activities, to correctly handle foreign economic relationship in accordance with China's conditions and the common rules of international economic activities so as to continuously promote the competitiveness in the international market.	It is decided <u>to</u> regulate foreign economic activities, to correctly handle foreign economic relationship in accordance with China's conditions and the common rules of international economic activities so as to continuously promote the competitiveness in the international market.

Some of these discrepancies may be the result of time pressures in preparing China’s submission and do not have a particularly substantive impact. For example, the discrepancy in the translation of the “two resources, two markets” reference in the first sentence is similar to the level of imprecision in the translation provided in exhibit JE-10, which China pointed to in its answer.<sup>73</sup> That is, the United States believes, after examining the Chinese version of CHN-142, that should China choose its preferred translation or improve the translation of the clause relating to “two resources, two markets,” there ought to be virtually no substantive impact on the arguments presented.

70. However, some of the discrepancies and issues in the translation(s) for exhibit CHN-142 do have substantive implications that are worth mentioning. For example, in the first sentence, the United States observes that both translations provided by China in para. 118 and exhibit CHN-142B conclude with the clause “to optimize the allocation of resources.” The United States notes the ambiguity in English presented by this translation. This clause could be

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<sup>73</sup> See *id.*, paras. 121-122.

interpreted as the fourth and final resolution listed in the sentence (the first three being: (1) to adhere to the policy of opening up; (2) to accelerate opening up; and (3) to fully utilize two resources, two markets). It could also be interpreted as the purpose for the three tasks listed earlier, i.e., that the decisions to adhere to opening up, accelerate opening up, and utilizing two resources and two markets are made “in order to” optimize the allocation of resources. In examining the language in the original Chinese version of the document, however, it is clear that the last clause is a fourth item in a list of four resolutions, each separated by a comma.

71. Additionally, in the second sentence, the translation provided in exhibit CHN-142B states that China has decided “to perform China’s comparative advantage in economy” while in paragraph 118, the translation states that China has decided “to use China’s comparative advantage in economy.” As between the two translations, the one provided in paragraph 118 appears to make a bit more sense in terms of translating the meaning of the relevant Chinese verb into English. Additionally, the United States would suggest that the clause could in general be better translated as: “to make full use of the comparative advantages in China’s economy.”

72. In fact, the most substantively important part of the document China has introduced in exhibit CHN-142 is this clause in the second sentence of paragraph 36 – which announces China’s intention to be strategic in undertaking its economic reforms and to ensure that China benefits economically from its comparative advantages. As indicated in the last clause in this paragraph, China’s reform is aimed at continuously improving China’s international competitiveness. Contrary to China’s assertion to the contrary, this actually serves to support the U.S. description of “two resources, two concepts” as a concept focused on creating opportunities and advantages for China’s own economy.

73. This is also evidenced in the statements by General Secretary of the CPC Central Committee Hu Yaobang that China introduced in exhibit CHN-141. Once again, the translation China has provided in CHN-141B presents some issues. The penultimate sentence of the translation provided at CHN-141B states: “However, to guard against being forced to undersell, we need to plan the export for beneficial exchange.”<sup>74</sup> In examining the language in the original Chinese version of the document,<sup>75</sup> the United States notes that the relevant portions of that sentence would be more accurately translated as: “Of course, in order to prevent a downward pressure on prices, we need to manage exports in a planned way, we need to obtain advantageous terms for exchange . . . .” China’s translation in CHN-141B that references an intention for planning a “beneficial” exchange (“we need to plan the export for beneficial exchange”) appears to combine the two separate concepts of managing exports pursuant to a plan and obtaining advantageous terms for trade in a manner that is unsupported by the original language. Once again, the proper translation of the relevant passage in CHN-141 supports the interpretation that the focus of China’s strategy is to ensure that China reaps the benefit of its resource advantages.

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<sup>74</sup> See Exhibit CHN-141B, p. 2.

<sup>75</sup> See Exhibit CHN-141A, p. 5.

**“Two Resources, Two Markets” in Exhibits JE-9, JE-10, and JE-11**

74. As presented in the U.S. first written submission, the documents provided in exhibits JE-9, JE-10, and JE-11 support – and continue to support -- the showing that “two resources, two markets” is a strategic and systemic policy for leveraging China’s resource advantages – including its raw material resources and the raw materials at issue in this dispute – including through export measures to stimulate and develop China’s downstream industries and China’s exportation of higher value-added goods produced from those raw materials.

75. In its answer, China observes that exhibits JE-9, JE-10, and JE-11 show that the “two resources, two markets” concept applies broadly to its economy and to “a wide range of sectors in industries,” including its steel industry.<sup>76</sup> The United States agrees. The “two resources, two markets” approach is pervasive and systemic one applied broadly as a policy to China’s resource and export management. This supports the contention that the export restrictions on rare earths, tungsten and molybdenum are tools of China’s industrial policy to leverage its resource endowments into advantages for its processing and high value-added production industries (including China’s steel industry, which is well-known for its phenomenal growth in production, development, and exports over the past decade).

76. The United States appreciates China’s efforts to improve the translation of the relevant portion of the Outline of the Eleventh Five Year Plan for National Economic and Social Development provided in exhibit JE-10.<sup>77</sup> That document also provides, in a separate section relating specifically to China’s goals in optimizing its export structures, that China is guided by a desire to develop its own brands, increase their competitiveness internationally, and to provide support for their exportation of high technology, high value-added products<sup>78</sup> – further support for the notion that China’s export strategy is in service of a larger, far-reaching aspiration to create economic advantages for China’s industries.

**“Two Resources, Two Markets” as Described in Other Sources**

77. Finally, there are many additional sources of support for the understanding that the “two resources, two markets” concept drives the imposition of export restraints on raw materials for which China is a leading producer, which results in providing domestic industries with cheaper inputs to encourage the production and exportation of high-value-added products.

78. Observers of China’s raw materials industry recognize that the concept has been consistently invoked by China to designate its strategy to segment domestic and foreign markets

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<sup>76</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 124.

<sup>77</sup> See *id.*, para. 122.

<sup>78</sup> Eleventh Five-Year Plan, Chapter 35, Section 1 (Exhibit JE-10).

as an artificial means of securing higher positions on industrial value chains. For example, Peter Thomas in der Heiden, an expert on Chinese industrial policy at the University of Duisburg-Essen, describes the connection between “two resources and two markets” and restraining exports:

With regard to foreign trade, government policy heavily emphasizes the concept of ‘two markets and two resources’ [omitted footnote] as a source of advantage... Companies are asked to seize opportunities from leveraging procurement and sales both on the home market and abroad. While this is consistent with China’s long-term objective to promote integration into the world economy, government policies rig the game by limiting exports of raw materials and low value added products while simultaneously promoting exports of high value added products.”<sup>79</sup>

79. This observation is consistent with other Chinese policy documents that discuss “two resources and two markets” and industrial upgrading in the same breath. For examples, China’s Ministry of Industry and Information Technology (“MIIT”) Department of Raw Materials, in a report delineating its goals for 2010, devoted a paragraph “to comprehensively plan for and simultaneously consider both the international and domestic markets,” which included an instruction to “encourage the export of high-end products; restrain the export of general processing products.”<sup>80</sup>

80. MIIT also published similar documents at the end of 2012, one of which advised to “[m]ake an overall plan for the ‘two markets and two resources’ to support the implementation of import and export tax policies.”<sup>81</sup> The document also states that China should “[s]upport the export of products that possess indigenous brands and technologies and push processing trade up toward the high end of the industrial chain.”<sup>82</sup> Another sought to “[m]ake full use of the two markets and two resources ... place more emphasis on expanding strategic technology resource imports and exports of high value-added products.”<sup>83</sup>

81. In conclusion, the United States agrees with China’s basic points: “two resources, two

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<sup>79</sup> Peter Thomas in der Heiden, Chinese Sectoral Industrial Policy Shaping International Trade and Investment Patterns - Evidence from the Iron and Steel Industry, Duisburg Working Papers on East Asian Studies, No. 88 (2011) (Exhibit JE-124).

<sup>80</sup> MIIT, Hastening the Progress of Optimizing and Upgrading the Raw Materials Industry’s Structure (December 18, 2009) (Exhibit JE-125).

<sup>81</sup> MIIT, Actively Push Forward the Deepening of Reform and Openness to the Outside Explore and Put Into Practice a New Era of Large Ministry System (December 28, 2012) (Exhibit JE-126).

<sup>82</sup> *Id.*

<sup>83</sup> MIIT, Optimizing the Industrial Structure is the Main Task of Hastening the Transformation of the Economic Development Method (November 26, 2012) (Exhibit JE-127).

markets” connotes domestic and international resources, and domestic and international markets; the concept is premised on trade taking place between China and others; and the concept is a broad one that is applied systemically in China’s industrial policy planning. The critical omission in China’s presentation is that the concept is fundamentally a strategic one that is aimed at leveraging China’s comparative advantages in resources into economic benefits for China’s domestic industrial interests. This is supported not just by the exhibits submitted by the co-complainants but also by the exhibits China has provided.

82. The United States observes that “two resources, two markets” is not itself the subject of this dispute. However, it is an important policy concept that is serviced through the use of the measures that are at issue in this dispute – export restrictions, imposed on rare earths, tungsten and molybdenum, that advance China’s economic interests at the expense of the interests of China’s trading partners.

**27. To China: Could China comment on the assertion of the United States that “according to the deputy director of China’s General Administration of Customs anti-smuggling bureau, China’s export restrictions on rare earths are one of the ‘main reasons’ behind smuggling”?**

83. The United States would like to comment on two aspects of China’s response to Question 19: first, China’s argument that the deputy director’s quote is relevant only to export duties, not quotas; and second, China’s contention that “[t]here is no evidence that export quotas during 2012 and today are contributing to [rare earth smuggling].”<sup>84</sup> For the reasons set forth below, both claims should be rejected.

84. According to China, the United States has incorrectly conflated export duties and export quotas under the rubric of “export restrictions.”<sup>85</sup> However, China’s attempt to draw a distinction between export duties, which the deputy director claims are a “main reason” for smuggling, and export quotas, which China adamantly denies causes smuggling, is unpersuasive. Both export duties and quotas raise prices outside China, thereby creating a gap between domestic and foreign prices that incentivizes cross-border smuggling. This gap was referenced by the panel in *China – Raw Materials* when it found that “[a]n export restriction on an exhaustible natural resource, by reducing the domestic price of the materials, works in effect as a subsidy to the downstream sector.”<sup>86</sup>

85. Ironically, while China accuses the United States of incorrectly conflating various types of “export restrictions,” it is China that confuses actions taken at the border, such as inspecting

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<sup>84</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 126.

<sup>85</sup> *Id.*

<sup>86</sup> *China – Raw Materials (Panel)*, para. 7.430.

VAT invoices,<sup>87</sup> which may police against smuggling with other actions taken at the border, such as export restrictions, which cause smuggling.<sup>88</sup>

86. In addition, China’s claim that there is no evidence that the export quotas are contributing to smuggling lacks merit and should be rejected. Such evidence is plentiful. According to a report in SinoCast, which was based on an interview with executives of China Minmetals Rare Earth Co., Ltd, “the sharply lowered export quota [that started in 2010] in turn causes more people to participate in rare earth smuggling.”<sup>89</sup> Analysts contacted for a report by Xinhua Insight noted that “smuggling is on the rise because of high returns for smugglers, as the Chinese government continues to tighten export regulations for rare earth metals.”<sup>90</sup> Also of note, the same report quotes Chen Guiyuan, the deputy director of the Hohhot customs bureau in the Inner Mongolian Autonomous Region, who observes that, rather than fighting smuggling, “[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.”<sup>91</sup> More generally, market sources have observed that “in certain instances, those taxes and quotas have been ineffective in reducing export volumes, and have instead encouraged various forms of smuggling.”<sup>92</sup>

87. Given their nature, it is not surprising that export quotas on rare earths would cause smuggling, and China’s arguments to the contrary should be rejected.

88. At the same time, from another perspective, the rare earths export quotas can also be viewed as overbroad. That is, setting aside the fact that the quotas cause smuggling, to the extent that the quotas do prevent exports, they prevent the export of rare earths regardless of whether they have been legally extracted or illegally extracted. As a result, the quotas can be viewed as overbroad because they impact rare earths that have been produced in a manner that is consistent with China’s domestic production targets and other laws. Therefore, such quotas are not related to conservation.<sup>93</sup>

89. Lastly, the United States would like to note an important point that is relevant to the even-handedness analysis in China’s response to Question 27. According to China, smuggling is

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<sup>87</sup> China’s First Written Submission, para. 137.

<sup>88</sup> See, e.g., China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, fn. 109.

<sup>89</sup> SinoCast, Rare Earth Exporters Facing Shifting Risk (October 27, 2010) (Exhibit JE-117).

<sup>90</sup> Xinhua Insight, China tightens regulation of rare earth industry (June 15, 2011) (Exhibit JE-118).

<sup>91</sup> *Id.*

<sup>92</sup> MetalBulletin, Tide turns on antimony amid rumours of customs crackdown (July 8, 2011) (Exhibit JE-119).

<sup>93</sup> *US – Shrimp (AB)*, para. 141 (examining whether a measure is overbroad in determining if it relates to conservation).

driven by foreign consumers’ attempts to avoid “other costs recently imposed by China through its conservation policy and described by China as ‘domestic restrictions.’”<sup>94</sup> Even accepting China’s assertion, China acknowledges that its so-called “domestic restrictions” impact foreign consumers. The fact that China’s “domestic restrictions” impact both Chinese and foreign users, and export quotas only impact foreign users, further supports the fact that the export quotas (which are at any rare imposed in combination with other restrictions) are not even-handed as required by Article XX(g) of the GATT 1994.

**28. To China: Could China extend Table 1 and Table 2 in its first written submission by providing data on production levels and quotas; extraction levels and quotas; export levels and quotas; export duties; and actual domestic consumption levels for each of the 17 rare earths at issue, as well as for tungsten and molybdenum, from 1999 to 2012?**

90. Please see the U.S. comment on China’s Answer to Panel Question 18 above.

**29. To China: In paragraph 137 of its first written submission, China claims that export quotas contribute to the effective enforcement of China’s domestic production restrictions including because, inter alia, “manufacturing enterprises that seek to export rare earths products must provide the list of mining enterprises who are sources of supply of rare earth raw materials, the quantity purchased and the relevant VAT invoices”. Is a similar requirement in place for sales into the domestic market?**

**30. To China: Is there any non-border and non-discriminatory measure (such as measures on domestic consumption) that could serve to enforce the production restrictions/quotas?**

91. In China’s response to Questions 29 and 30, China identifies at length a number of measures it takes at its border and within the border, purportedly to determine if exported products were produced above China’s domestic production targets (such as examining VAT invoices and requiring exporters to provide a list of mining enterprises that supplied the rare earths being exported)<sup>95</sup> and to enforce the production targets on domestic sales of rare earths (such as by mandating VAT invoices for such sales).<sup>96</sup> However, China has provided only a few sentences at the end of each answer that provide no credible or reasonable links explaining why the export quotas “contribute to the effective enforcement” of the production restrictions,

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<sup>94</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, paras. 130-131.

<sup>95</sup> *Id.*, para. 136.

<sup>96</sup> *Id.*, para. 140.



especially given the existence of measures such as those requiring VAT invoices.<sup>97</sup>

92. It is important to recall again that China’s export quotas are set below the level of the domestic production targets and impact exports of the materials produced consistently with the domestic production targets. This underscores two points: that the export quotas do not “relate to” conservation, because they are overbroad and apply to products that were produced consistently with China’s domestic production targets, and that the quotas are not maintained “in conjunction with” domestic restrictions, because they serve as an additional, non-even-handed restriction that impacts only foreign consumers.<sup>98</sup>

**32. To China: In paragraph 105 of its first written submission China refers to paragraph II(7) of Several Opinions that provides that domestic conservation actions must be simultaneously combined with export restrictions. In particular, China cites “Restricting measures on mining, production, consumption and exports shall be implemented simultaneously”. Has China adopted any measures that specifically and explicitly limit domestic downstream industries’ consumption of the products subject to the challenged quota?**

93. Please see the U.S. comment on China’s Answer to Panel Question 13 above.

**34. To all parties and third parties: Do the parties agree with the test of “even-handedness” proposed in paragraph 7.465 of the Panel Report in *China – Raw Materials*, i.e. “in 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”.**

94. Please see the Answers of the United States of America to Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel at paras. 58-61.

**35. To China: Could the differences between the foreign and domestic prices of the products at issue be relevant for assessing “even-handedness”?**

95. The United States addresses the majority of China’s points on Question 35 in its comments on China’s Response to Questions 40-42. However, the United States wants to make one observation related to China’s argument that:

foreign and domestic prices must be compared during periods in which the rare

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<sup>97</sup> *Id.*, paras. 141, 147.

<sup>98</sup> *US – Shrimp (AB)*, para. 141 (examining whether a measure is overbroad in determining if it relates to conservation).

earth markets are not significantly distorted due to unprecedented market distortions – such as the period during late 2010 to mid-2012.<sup>99</sup>

96. This argument, in essence, asks the Panel to analyze the economic effects of China’s measures by affirmatively ignoring one of the most egregious results of those measures. The “unprecedented market distortions” is a euphemism for China’s decision in mid-2010 to nearly halve the rare earth export quota. Thus, China is essentially saying that although the rare earths market was distorted by China’s own export quotas, the Panel should find a way to factor those distortions out of its analysis for purposes of the even-handedness analysis. Of course – if accepted – China’s argument itself would result in a distorted analysis of the relevant facts.

**36. To China: Could China explain its policy with respect to the unused export quotas? In particular, could China explain paragraph 245 of its first written submission? Could China also comment on paragraph 49 of the European Union’s oral statement?**

97. As part of its response to Question 36, China contends that the allocation methodology for the rare earth export quotas creates an incentive for exporters to use their allocation in a given year in order to get a greater allocation in future years.<sup>100</sup> China’s argument is based on the fact that the allocation for an applicant in a given year is derived from the ratio of that applicant’s volume/value for the last three years (“A”) divided by the total volume/value of China’s exports (“T”), or  $A/T$ .<sup>101</sup>

98. However, when an individual company (A) follows general market trends (T) and does not make export sales of rare earths, it will have no impact on its future allocations because A and T will both be reduced. For example, if overall export sales are down 10 percent (T), and the individual applicant’s sales follow the general trend and are also down 10 percent (A), it will have no impact on the company’s allocation because A and T will be lessened by an equal amount. Thus, China’s argument vastly overstates the impact of its allocation methodology.

**37. To China: In paragraph 144 of your first written submission you refer to recycling actions generally encouraged by governments including China. Could China provide more details on the recycling actions it is undertaking to reduce environmental damage and increase conservation?**

99. The United States will comment on China’s recycling efforts in the U.S. second written submission. The United States initially notes, however, that China’s response only discusses

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<sup>99</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 167.

<sup>100</sup> *Id.*, fn. 169.

<sup>101</sup> *Id.*

recycling efforts that relate to rare earths – China has provided no evidence as to tungsten and molybdenum recycling.

40. **To China: Please respond to the United States’ assertion, in paragraph 65 of its oral statement at the first substantive meeting, that there are “vast differences in the domestic versus foreign prices of a number of the products”.**
41. **To China: Please provide the rationale for deducting an “export duty of 25% and an estimation of other fees [...] of 10%” from the FOB price for the purpose of Figures 4 and 5?**
42. **To China: Following the approach used in Figures 4 and 5 of its oral statement at the first substantive meeting, could China provide a similar analysis for each one of all 17 rare earths, as well as tungsten and molybdenum? Subject to data availability, could the analysis be extended to a longer period of time, ideally from 1999?**

100. While China has deferred providing full and detailed answers to the Panel’s Questions 40-42 to China’s second written submission, the United States has a number of observations in regards to China’s preliminary response.

101. First, China has not provided the requested data in Question 42 for either tungsten or molybdenum. Rather, China has focused the entirety of its efforts on rare earths.

102. Second, China contends that there are not “vast differences” in domestic versus foreign prices for rare earths.<sup>102</sup> However, even after taking into account China’s unsupported adjustments to the prices reported in *Metal Pages* (discussed below), there still appears (unfortunately, China did not provide the underlying data) to be significantly large differences in the relative prices for the majority of rare earth products, including during 2012.<sup>103</sup>

103. Third, China has provided no support whatsoever for its price adjustments. Specifically, China has provided no backup for the 10 percent adjustment for export commission fees, the cost of domestic transport to the port, and the transport packaging fee, other than to say the information was obtained from a “survey.”<sup>104</sup>

104. Lastly, China claims that purity specifications may explain the price differences in

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<sup>102</sup> *Id.*, para. 183.

<sup>103</sup> *Id.*, paras. 197 - 203.

<sup>104</sup> *Id.*, para. 190.

domestic versus foreign prices for rare earths.<sup>105</sup> In this vein, China cites CHN-144 for the proposition that “Metal Pages itself indicated that China may produce high purity oxides for specific exports – high purity lanthanum oxide for optical applications is one example.”<sup>106</sup> CHN-144 says absolutely nothing about differences in the purity levels of exports versus domestic products. Again, China has provided no data to support its arguments and, as a result, has failed to meet its burden under Article XX(g).

**43. To China: Could China comment on paragraph 51 the United States' oral statement at the first substantive meeting, which refers to paragraph 249 of China's first written submission, asserting that there is no one single market of all rare earths products; therefore, a production cap imposed on all rare earth or on all medium/heavy rare earths may not really limit the production of each specific element of the rare earths.**

105. Please see the U.S. comments on China’s Answer to Panel Question 21 above.

**44. To China: If it is true that a price measure could help to internalize the environment cost, why does China only apply an export duty, which increases the price only for foreign consumers, without any corresponding tax on sales to domestic consumers?**

106. In its answer, China acknowledges that it “uses export duties to increase the price of the products at issue for foreign consumers, in order to reduce consumption by these foreign consumers.” China claims that this “reduce[s] production of the rare earth, tungsten, and molybdenum resources” and, in turn, “pollution following from the mining and production of these resources.”<sup>107</sup>

107. China’s brief response highlights the fundamental flaws in its Article XX(b) defense, which the United States will discuss further in its second written submission. First, China acknowledges that pollution follows from the mining and production of the products at issue, not from their export. As such, pollution would logically be addressed by restrictions on mining and production, not on exports. China’s argument would allow export restraints on any product whose production causes pollution.<sup>108</sup>

108. Second, China’s Article XX(b) defense fails to account for other effects of its export duties, in particular on domestic prices and in turn on downstream industries. As the panel in

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<sup>105</sup> *Id.*, para. 191.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*, para. 206.

<sup>108</sup> *China – Raw Materials (Panel)*, para. 7.515.

*China – Raw Materials* explained, “economic analysis indicates that, under normal conditions, an export restriction imposed upstream acts as an incentive to downstream production. In the case at issue, therefore, an export duty (or quota) reduces the price of key inputs, and therefore should be expected to provide an incentive to production by the downstream sector.”<sup>109</sup> Indeed, in its first written submission, the United States explained how China employs export restrictions as a deliberate strategy to encourage domestic production of higher profit downstream products that incorporate the raw materials whose exportation is restricted.<sup>110</sup>

109. The United States notes that China has failed to explain why it does not impose any corresponding tax on sales of rare earths, tungsten and molybdenum affecting only domestic consumers. Rather, China chooses to impose taxes and restrict access only with respect to products sold to consumers outside of China. While there is no link between such a discriminatory policy and China’s purported pollution objectives, there is a clear link between such restrictions on exports and China’s industrial and economic objectives. Members may, of course, promote such goals, but they must do so in a way that respects their WTO obligations. That is not the case with respect to China’s export duties.

**46. To China: Could China respond to the arguments set forth in paragraph 17 of the United States’ oral statement at the first substantive meeting, paragraph 69 of Japan’s oral statement at the first substantive meeting, and paragraph 78 of the European Union’s oral statement at the first substantive meeting?**

110. In its response, China admits that it “uses export duties to increase the price of the products at issue for foreign consumers.” China faults the complainants for “not demonstrat[ing] that the domestic prices for these products experienced any downward pressure as a consequence of the duties.”

111. In so doing, China again attempts to shift the burden of producing evidence and argument onto the complainants. However, it is China’s burden to demonstrate that its export duties satisfy all of the elements of an Article XX(b) defense. As the United States will discuss in detail in its second written submission, China has not done so. Moreover, while China acknowledges in its response to the Panel’s question that its export duties increase prices for *foreign* consumers, in its Substantive Defense of Export Duties, China glossed over the fact that export duties do not similarly impact domestic consumers.<sup>111</sup>

112. That said, the effect of an export restriction on domestic prices is a matter of standard economic principles. China appeared to accept the point that export restrictions exert downward

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<sup>109</sup> *Id.*, para. 7.533.

<sup>110</sup> U.S. First Written Submission, paras. 26-29.

<sup>111</sup> China’s Substantive Defense of Export Duties, para. 36.

pressure on domestic prices in the previous dispute, as did the panel.<sup>112</sup>

**47. To China: Complainants argue that discrimination between “countries” within the chapeau of Article XX of the GATT 1994 includes not only MFN-type discrimination, but also NT-type discrimination (see e.g. paragraph 54 of the European Union’s oral statement at the first substantive meeting). Does China agree?**

113. Please see the U.S. comments on China’s Answer to Panel Questions 10 and 13 above.

**49. To all parties and third parties: Please comment on the Russian Federation’s oral statement at the third party session with the Panel, and in particular, on paragraphs 4 to 9.**

114. The United States explained in its response to this Question that the issue in this dispute is whether Article XX of the GATT 1994 is available to justify breaches of the commitment to eliminate export duties found in Paragraph 11.3 of China’s Accession Protocol. The United States further repeated that the conclusion that Article XX of the GATT 1994 is not available is based on an interpretation of the text of Paragraph 11.3 under the customary rules of treaty interpretation.

115. In addition, while not relevant for purposes of this dispute, the United States noted that the Russian Federation’s characterization of the negotiating history of its accession, which China finds “highly insightful and alarming,”<sup>113</sup> is not accurate.<sup>114</sup>

116. China considers that the Russian Federation identified important “systemic implications” with respect to the proper interpretation of Paragraph 11.3 of China’s Accession Protocol.<sup>115</sup> However, the questions presented by the Russian Federation’s oral statement do not support the conclusion that China seeks, namely that China was entitled to assume that Article XX of the

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<sup>112</sup> *China – Raw Materials (Panel)*, para. 7.526 (“China’s qualitative argument relies on the standard economic theory of the effects of an export restriction: an export restriction on polluting raw materials, by reducing foreign demand for the good on which it is imposed, shifts supply of the good to the domestic market, thus putting downward pressure on the domestic price of the product.”). In *China – Raw Materials*, the panel also explained, “An export restriction on an exhaustible natural resource, by reducing the domestic price of the materials, works in effect as a subsidy to the downstream sector, with the likely result that the downstream sector will demand over time more of these resources than it would have absent the export restriction.” See *China – Raw Materials (Panel)*, para. 7.430 (internal citations omitted).

<sup>113</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 213.

<sup>114</sup> See also EU’s Response to Question 49, paras. 68-69.

<sup>115</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 212.

GATT 1994 applies to its commitment to eliminate export duties, notwithstanding the plain language of that commitment itself (and the fact that other provisions of China's accession commitments do use language that refers to the GATT 1994).

117. All Members have accepted disciplines with respect to measures they might take. By the act of accepting WTO obligations and becoming a Member, it agrees that it will act in a certain manner – that is, in compliance with the obligations it has assumed. As the Appellate Body recognized in *Japan – Alcohol*:

The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.<sup>116</sup>

In other words, the concept that each WTO Member has accepted limitations on how it exercises its sovereignty is not a novel one.

**50. To China: What do export duties add to export quotas and production quotas in contributing to the policy goals pursued by China?**

118. China's response further clarifies that the export duties imposed on rare earths, tungsten, and molybdenum simply add a barrier to trade, beyond the export quotas and quota allocation requirements also imposed on those products.

119. At the first meeting with the Panel, the United States noted that, over the course of this dispute and the last, China has attempted to justify similar measures – export duties and quotas – on various products under different theories, invoking various WTO exceptions.<sup>117</sup> As in the *China – Raw Materials* dispute, China's inability to establish the justifications asserted for its export duties and quotas on rare earths, tungsten and molybdenum reflects the fact that those duties and quotas are not in fact designed to serve the policy goals that China cites.

120. With respect to export duties in particular, in response to the Panel's question, China

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<sup>116</sup> *Japan – Alcohol (AB)*, p. 15. Similarly, in *China – Raw Materials*, the panel explained, “it is China's sovereign right to regulate trade that enabled it to negotiate and agree with the provisions of Paragraph 11.3 of its Accession Protocol.” *See also US – Tyres (Panel)*, para. 7.10 (stating, with respect to its analysis of provisions of China's Accession Protocol, “[i]t was not for the Panel to seek to recalibrate what the WTO Members had agreed to in the negotiations that led to the accession of China to the WTO in the light of what the Panel might perceive as changing economic circumstances that perhaps had not been considered when the Protocol was negotiated. That remains the prerogative of the WTO Members themselves.”).

<sup>117</sup> U.S. Closing Statement, paras. 3-10.

repeats that it imposes export duties to increase prices for foreign consumers, thereby reducing consumption by those consumers and in turn, according to China, reducing production of rare earths, tungsten and molybdenum and pollution caused by their mining and production.<sup>118</sup> As the United States has already pointed out, China has not established why restrictions on *exportation* accomplish anything that cannot be accomplished through restrictions on mining and production, activities that cause pollution.<sup>119</sup> China claims that “export duties ensure that the price of exported products reflects the environmental costs imposed on China from their production.”<sup>120</sup> But, again, there is no link between exportation and environmental costs. As such, it is not clear why exporters should bear purported environmental costs that domestic users do not.<sup>121</sup>

121. It is telling that China’s attempted defense of its export duties ignores the impact such duties have on domestic consumption of the products at issue. China’s export duties decrease the prices, and thereby encourage consumption, of rare earths, tungsten and molybdenum for Chinese consumers.<sup>122</sup> China makes no account for this in claiming that its export duties reduce pollution.

122. In other words, it is clear that export duties on rare earths, tungsten and molybdenum add costs for, and discriminate against, foreign consumers of those products. China has not shown that those duties add anything to the achievement of environmental or health goals. Rather, the incentives that such duties provide for downstream domestic production, which can also create pollution, detract from such goals.

**51. To China: Please explain why China justifies its export duties exclusively under Article XX(b), and justifies its export quotas exclusively under Article XX(g) for the same products?**

123. See U.S. comments on China’s response to Question 50 above.

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<sup>118</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 219.

<sup>119</sup> U.S. Opening Statement, para. 17; Answers of the United States of America to Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel, para. 74; *see also China – Raw Materials (Panel)*, para. 7.586 (“[E]xport restrictions are not an efficient policy to address environmental externalities when these derive from domestic production rather than exports or imports.”). The United States will elaborate on this point in its second written submission.

<sup>120</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 220.

<sup>121</sup> *See China – Raw Materials (Panel)*, para. 7.515 (“The Panel wishes to note its concern at the systemic implications of China’s arguments under Article XX(b), as this provision could then be interpreted to allow the use of export restrictions on any polluting products on the ground that export restrictions reduce the production of these products and thus pollution.”).

<sup>122</sup> *See* U.S. Comments on China’s Response to Question 46; *see also China – Raw Materials (Panel)*, paras. 7.430, 7.533-7.534, 7.586.



**52. To China: Please comment on the United States’ observation, at paragraph 25 of its oral statement at the first substantive meeting, that “while China limits the export of intermediate forms of tungsten and molybdenum, it does not limit the export of high-end steel products containing these elements.”**

124. As part of China’s response to Question 52, China claims that it does not control downstream products that contain tungsten and molybdenum, such as certain high-end steel, because those products only contain “small percentages” of these raw materials.<sup>123</sup>

125. While it is true that any given unit of a corresponding downstream product may not contain substantial quantities of tungsten or molybdenum viewed in isolation, China’s argument is fatally flawed because, cumulatively, such products contain great amounts of these inputs. And, China’s failure to control such value-added exports, while maintaining controls on less value-added products, shows that the export quotas do not “relate to” conservation pursuant to Article XX(g) of the GATT 1994. In fact, 80 percent of the world’s molybdenum production goes into steel.<sup>124</sup> Similarly, the main use of tungsten is in cemented carbides.<sup>125</sup>

126. The importance of the cumulative impact of downstream use was recognized by the panel in *China – Raw Materials* when it observed that:

[i]n 2008, although far less fluorspar was exported from China in its raw material form than in 2000, more fluorspar in total was exported from China than in 2000 due to the substantial increase in exports of downstream products containing fluorspar. For the Panel, this evidence does not support China's claim that it has put in place comprehensive plan to conserve . . . fluorspar.<sup>126</sup>

127. As was the case in *China – Raw Materials*, China does not control exports of the more value-added, downstream products that incorporate tungsten and molybdenum (as well as rare earths) because the *raison d’etre* of the export quotas is not to conserve exhaustible natural resources, but rather stimulate China’s downstream industries.

**53. To all parties and third parties: Please comment on paragraph II.1.10 of Exhibit CHN-107-B, Public Notice of Application Conditions and Application Procedures for the 2012 Export Quotas of Indium, Molybdenum, Tin. Please also comment on paragraph I.5 (second paragraph) of Exhibit CHN-100-B, Public Notice of the Qualification Standards and Application Procedures of the 2012 Tungsten,**

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<sup>123</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 243.

<sup>124</sup> Dart Mining NL, Molybdenum (Exhibit JE-120).

<sup>125</sup> China Tungsten Online (Xiaman) Manu. & Sales Corp., Cemented Carbides (Exhibit JE-121).

<sup>126</sup> *China – Raw Materials (Panel)*, para. 7.429

**Antimony, Silver State Trading Export Enterprises and Tungsten, Antimony,  
Export Supply Enterprises.**

128. China claims that it lowers the production and supply volume conditions for manufacturing companies applying for export quotas on tungsten and molybdenum if such companies produce high-tech products because such products are “light, sophisticated and delicate,” and, therefore, the corresponding unit weight is lighter than ordinary processed products. According to China, “such companies would be in a disadvantageous position under the application conditions for the export quotas, because the condition of prior production or export supply is assessed on the basis of weight. Therefore, the low weight of the high-tech products must be properly accounted for. By lowering the condition, the Chinese authorities can ensure that all companies are assessed on a fair basis.”<sup>127</sup>

129. China’s argument is illogical because such “light, sophisticated and delicate” products are not subject to the export quotas on tungsten and molybdenum. As shown in Exhibit JE-7, the tungsten and molybdenum products subject to export quotas are not “light, sophisticated and delicate;” rather, they are raw or intermediate products.

130. In reality, as noted in the U.S. answer to this question,<sup>128</sup> China gives preferences to companies that produce high-tech products through the administration of its export quotas on tungsten and molybdenum because that is, in fact, the entire point of such export quotas – *i.e.*, to favor the production of high-tech, value-added products. This particular feature of the tungsten and molybdenum export quotas gives a preference to integrated producers – *i.e.*, ones that use products subject to the export quotas to produce high-tech products.

**54. To China: In paragraphs 26-29 of its substantive defense of its export duties on rare earths, tungsten and molybdenum, China refers to relevant part of press releases by China’s Ministry Finance:**

**(2009) “ ... Meanwhile, to further restrict the exports of ‘high-polluting, high-energy-consuming and resource-dependent’ products, China will continue with the practice of imposing temporary taxes on the exports of coals, crude oil, metallic mineral ores, ferroalloys, steel billets, etc.”**

**(2010) “In 2009, China will continue with the practice of imposing temporary taxes on the exports of petroleum, rare earths, wood pulp, steel billet, etc. ...”**

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<sup>127</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 235.

<sup>128</sup> Answers of the United States of America to Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel, paras. 83-86.

**(2011) “In 2011, China will continue with the practice of imposing temporary taxes on the exports of ‘high-polluting, high-energy-consuming and resource-dependent’ products, including coals, crude oil, fertilizers, non-ferrous metals, etc. In order to discipline rare earth exports ..., export duties for certain rare earth products have been raised.”**

**(2012) “To promote sustainable development and to contribute to the efforts of building a resource-conserving and environment-friendly society, China will continue with the practice of imposing temporary taxes on the exports of ‘high-polluting, high-energy-consuming and resource-dependent’ products, including coals, crude oil, fertilizers, ferroalloys, etc.”**

**Could China explain why, with respect to the continuing export duty measures, it seems that only the press release in Exhibit CHN-121, for export tariffs in 2012, refers to “sustainable development” and “conservation”**

131. As the Panel’s question recognizes, China has imposed export duties on rare earths, tungsten and molybdenum for years. Two points regarding the language used in the press releases related to the imposition of export duties, and China’s response to the question, merit comment at this moment.

132. First, the language referenced in the Ministry of Finance’s press release for the 2012 export tariffs appeared for the first time in December 2011. Given that, at the time, China’s export duties had just been challenged (for the first time) at the WTO, the addition appears to be strategically self-serving. The panel report in *China – Raw Materials*, which was circulated on July 5, 2011, considered statements made in the 2006, 2007 and 2008 announcements of China’s export duties. In its conclusions, which China did not appeal, the panel noted that “[i]n these announcements, China clarifies that these export duties ‘are targeted at high energy-consumption commodities, high-pollution commodities and resource-based commodities’.” However, the panel also correctly observed that “the link between applying export restrictions and achieving environmental objections is far from explicit.”<sup>129</sup> China’s response to the Panel’s question here attempts to obscure the fact that the language in the 2012 press release is different from the press releases in previous years.

133. Second, the language added in the 2012 press release adds little to China’s asserted Article XX(b) defense. Up until late December 2011, China’s press releases simply stated that exports of “high energy-consumption commodities, high-pollution commodities and resource-based commodities” will be taxed.<sup>130</sup> The fact that the export of such products would be taxed

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<sup>129</sup> *China – Raw Materials (Panel)*, para. 7.506.

<sup>130</sup> Exhibits JE-45, JE-47.

shows no link between such taxes and the goal of reducing pollution.<sup>131</sup> Likewise, the language added after the panel report in *China – Raw Materials* simply does not explain how export duties can achieve the goals of “promot[ing] sustainable development and . . . contribut[ing] to the efforts of building a resource-conserving and environment-friendly society,” much less satisfy the requirements of Article XX(b). The United States will address China’s Article XX(b) defense with respect to export duties in detail in its second written submission.

**55. To China: In their oral statements and preliminary oral responses to questions from the Panel, the complainants argued that China arbitrarily denominates the export quotas on rare earths in gross weight, while it designates the production quota in rare earth oxide (REO) equivalents (see e.g. United States’ oral statement at the substantive meeting, para. 79). How does China respond?**

134. As articulated below, China’s response to Question 55 fails to explain why China denominates the rare earth export quotas on a gross weight basis, rather than using a denomination that captures the actual amount of rare earth materials in a given product, such as through the use of REO equivalents.

135. Before addressing the flaws in what China chose to present, the United States notes two key issues that are wholly ignored in China’s response. First, China overlooks the fact that the export quotas for both tungsten and molybdenum are denominated in metal content – *i.e.*, the actual amount of tungsten and molybdenum in a given product – rather than gross weight.<sup>132</sup> China has failed to explain why the rare earths export quota is denominated in gross weight when the tungsten and molybdenum export quotas are not. Most importantly, China neglects to mention the fact that the rare earth quota was actually denominated in REO equivalents, until 2005. This is clearly shown in CHN-5, a document provided by China in its first written submission.<sup>133</sup> According to this document, which lists China’s rare earth export quota amounts through the years, “[e]xport quotas are in gross weight rather than REO content for domestic producers and traders and Sino-foreign producers in 2005 and later years.”<sup>134</sup> The prior use of REO equivalents is also clearly shown in the document that established the 2003 export quota.

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<sup>131</sup> *China – Raw Materials (Panel)*, para. 7.508 (noting, with respect to other measures cited by China in its attempt to justify its duties and quotas under Article XX(b), “This does not shed light on any environmental purpose of the measures in question; rather we learn that exports will be controlled. The reference to serious pollution is descriptive of the products affected by the restrictions, but there is no explanation of how such measures operate together with export restriction policies on raw materials to reduce pollution caused by their production.”).

<sup>132</sup> Exhibit JE-58 (noting “metal content” for the export quotas on tungsten and molybdenum).

<sup>133</sup> Exhibit CHN-5, Table 1, p. 4. The United States notes that this document was created by the U.S. Geological Survey. However, the document was not created for purposes of this dispute and, moreover, is based on data from China’s Ministry of Commerce. *Id.*

<sup>134</sup> *Id.*

That document set the quota for rare earths at 40,000 MTs (on an oxide basis).<sup>135</sup>

136. Regarding the content of China’s response, China argues that *Announcement No. 37 of the General Administration of Customs* (“*Announcement No. 37*”) is designed to determine the purity levels of exports of rare earth oxide products (e.g., 99 percent purity vs. 99.99 percent) so as to prevent customs valuation fraud whereby high purity products are valued as low purity products.<sup>136</sup> China further claims that this document has “nothing to do” with REO equivalents.<sup>137</sup> However, this argument fails to explain the fact that rare earth magnets are also included in the scope of *Announcement No. 37*.<sup>138</sup> Such magnets are not sold on a purity basis – i.e., rare earth magnets are not sold on a 99 or 99.99 percent purity basis. Accordingly, China’s response cannot explain the full scope of the purpose for *Announcement No. 37*.

137. And to the extent that *Announcement No. 37* covers purity, China could readily use such information to administer a regime that is based on REO content, rather than gross weight. With such information, China could, for example, administer a regime whereby 100 metric tons (MTs) of cerium oxide with a purity of 100 percent would count 100 MTs against the rare earth quota, while the same amount of product with 50 percent purity would only count 50 MTs. Clearly, the existence of *Announcement No. 37* shows that China could administer its export quota regime on rare earths in a less arbitrary way should it so choose.

138. Lastly, China’s argument that the denomination of the rare earth export quotas in gross weight actually helps foreign producers is absurd.<sup>139</sup> The sheer fact that a gross weight system captures the non-rare earth part of exported products means that the size of the quota is reduced. The shrinking of the quota clearly does not help foreign consumers.

139. Take, for example, the recent inclusion into the scope of the quota a product wholly ignored by China – “ferro-alloys containing rare earths with weight of more than 10%.”<sup>140</sup> Here, 100 MTs of such product would count 100 MTs against the quota, even though only 11 percent of the product may actually consist of rare earths. Moreover, this product would count the same amount against the quota even if 99 percent of the ferro-alloy consisted of rare earths. Such a result is arbitrary and unjustified and serves as a further restriction on trade.

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<sup>135</sup> People’s Economic and Trade Commission, *Export Quotas, Allocations, and Application Procedures for Important Industrial Items for 2003* (November 1, 2002) (Exhibit JE-128).

<sup>136</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 243.

<sup>137</sup> *Id.*

<sup>138</sup> Exhibit JE-106.

<sup>139</sup> China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 247.

<sup>140</sup> Exhibit JE-3.

**56. To all parties and third parties: In its first written submission, China advances the following definition of “conservation” in Article XX(g): “[i]n sum, ‘conservation’ does not aim solely at preserving, in absolute terms, the limited supply of a natural resource. It aims also at managing that supply over time, with a view to ensuring sustainable use and development of the resource-endowed country”. Is this definition of the term “conservation” consistent with the Appellate Body’s statement, at paragraph 355 of its report in *China - Raw Materials*, that “[t]he word ‘conservation’ ... means ‘the preservation of the environment, especially of natural resources’”?**

140. Please see the Answers of the United States of America to Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel at para. 87.

**58. To all parties and third parties: Please explain whether your respective interpretations of GATT Article XX(g) are supported by the preparatory work (GATT/CP.4/33) of that provision and by the GATT report of the 1950 Working Party “D” on Quantitative Restrictions, in particular, the discussions in paragraphs 8-13.**

141. Please see the Answers of the United States of America to Questions from the Panel to the Parties in Connection with the First Substantive Meeting of the Panel at paras. 92-93.