

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

(DS431, DS432, DS433)

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Short Form	Full Citation
<i>China – Audiovisual Products (Panel)</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products</i> , WT/DS363/R, adopted 19 January 2010, as modified by the Appellate Body Report, WT/DS363/AB/R
<i>China – Raw Materials I (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>China – Raw Materials I (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>EU – Footwear</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R, adopted 22 February 2012

TABLE OF EXHIBITS

Joint Exhibit No.	Description	Abbreviated Title
JE-1	World Trade Organization, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, circulated 1 October 2001 (excerpts)	Working Party Report
JE-2	World Trade Organization, Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432, circulated 23 November 2001 (excerpts)	Accession Protocol
JE-3	Chart of Raw Material Names	
JE-4	Notice on Addition of RE Alloy into RE Export Quota License (Ministry of Commerce, General Administration of Customs, 2011)	
JE-5	2009-2011 Chinese Rare Earth Industry Export Quota Situation	
JE-6	Chart of Raw Materials Subject to Export Duties	
JE-7	Chart of Raw Materials Subject to Quotas	
JE-8	World Bank Data	
JE-9	Blueprint for the Adjustment and Revitalization of the Steel Industry (State Council, March 20, 2009)	Adjustment and Revitalization Plan for the Steel Industry
JE-10	Outline of the Eleventh Five-Year Plan for the National Economic and Social Development of the People's Republic of China (2006)	Eleventh Five-Year Plan
JE-11	National Mineral Resources Plan (Ministry of Land and Resources, April 11, 2001)	National Mineral Resources Plan
JE-12	Guidance for Enhancing the Management of Raw Materials Industries (Ministry of Industry and Information Technology (2009) No. 294)	Guidelines for Industrial Management of Raw Materials
JE-13	Development Policies for the Iron and Steel Industry (National Development and Reform Commission, July 8, 2005)	Development Policies for the Iron and Steel Industry
JE-14	Adjustment and Revitalization Plan for the Non-Ferrous Industry (State Council 2009)	Adjustment and Revitalization Plan for Non-Ferrous Industries

JE-15	Outline of the Twelfth Five-Year Plan for the National Economic and Social Development of the People's Republic of China (2011)	Twelfth Five-Year Plan
JE-16	Catalogue for the Guidance of Foreign Investment Industries (the State Development and Reform Commission, the Ministry of Commerce, 31 October 2007)	Catalogue of Industries for Guiding Foreign Investment
JE-17	Yajun Zhang, "China Dangles Rare-Earth Resources to Lure Investment" Wall Street Journal, August 16, 2010	
JE-18	Guiding Opinions of Jiangxi Province on the Development of the Rare Earth Industry (2007)	
JE-19	Marianne Lavelle, "Higher Prices? Thank China: China's insatiable hunger for raw goods is starting to sting U.S. consumers" U.S. News and World Report, April 4, 2004	
JE-20	Peter S. Goodman, "Booming China Devouring Raw Materials: Producers and Suppliers Struggle to Feed a Voracious Appetite" Washington Post, May 21, 2004	
JE-21	Assif Shameen, "Material Impact" The Edge Singapore, September 28, 2009	
JE-22	Yao Yang, "Chinese investment: a new form of colonialism?" EastAsiaForum, July 24, 2012	
JE-23	U.S. Geological Survey Mineral Commodity Summaries (2012): Rare Earths	USGS, Rare Earths
JE-24	"Chinese rare earth major plans hiatus," UPI Energy (October 19, 2011).	
JE-25	Rebecca Coons, "Molycorp Buys Rare Earth Processor for \$1.3 Billion" Chemical Week (March 12, 2012)	
JE-26	Yaron Vorona, "The State of the Union? It depends." The Hill (February 10, 2011)	
JE-27	China's Policy on Mineral Resources (State Council, 2003)	
JE-28	Twelfth Five-Year Development Plan for New Materials Industry (Ministry of Industry and Information Technology, January 4, 2012)	12th Five-Year Development Plan for New Materials Industry
JE-29	Inner Mongolia Autonomous Region "Twelfth Five Year" High-Tech Industries Development Plan (13 December 2011)	

JE-30	Jane Spooner, “Rare earths: China dominates” The Mining Journal, October 7, 2005	
JE-31	Molycorp, The Many Uses of Rare Earths	
JE-32	International Tungsten Industry Association: Tungsten Properties	
JE-33	International Tungsten Industry Association: Tungsten Mining & Beneficiation	
JE-34	International Tungsten Industry Association: Tungsten Processing	
JE-35	International Tungsten Industry Association: Intermediates	
JE-36	International Tungsten Industry Association: Primary Uses of Tungsten	
JE-37	U.S. Geological Survey Mineral Commodity Summaries (2012): Tungsten	USGS, Tungsten
JE-38	International Molybdenum Association: Molybdenum Properties	
JE-39	International Molybdenum Association: Mining	
JE-40	International Molybdenum Association: Processing	
JE-41	International Molybdenum Association: Meltstock Mo Products	
JE-42	International Molybdenum Association: Chemical Mo Products	
JE-43	Roskill Consulting Group, Ltd., “Study of the market for molybdenum” November 2011	Roskill: Study of the market for molybdenum
JE-44	Notice Regarding the 2002 Tariff Implementation Program (State Council Customs Tariff Commission , shuiweihui (2001) No. 14, January 1, 2002)	2002 Tariff Implementation Program
JE-45	Announcement No. 27 Issuing the “2012 Tariff Implementation Program,” (State Council Customs Tariff Commission, shuiweihui, No. 27, issued December 9, 2011, effective January 1, 2012)	2012 Tariff Implementation Program
JE-46	Regulations of the People’s Republic of China on Import and Export Duties (Order of the State Council No. 392, adopted at the 26th executive meeting of the State Council on October 29, 2003, effective January 1, 2004)	Regulations on Import and Export Duties

JE-47	Announcement No. 79 Regarding the “2012 Tariff Implementation Program,” (General Administration of Customs, No. 79, issued December 22, 2011, effective January 1, 2012)	2012 Tariff Implementation Program (Customs)
JE-48	Notice on Issuing the “2012 Export Licensing Management Commodities List,” (Ministry of Commerce and General Administration of Customs, No. 98, issued December 30, 2011, effective January 1, 2012)	2012 Export Licensing Management Commodities List
JE-49	Foreign Trade Law of the People’s Republic of China (adopted as amended at the 8th Session of the Standing Committee of the Tenth National People’s Congress on April 6, 2004, effective July 1, 2004)	Foreign Trade Law
JE-50	Regulation of the People’s Republic of China on the Administration of the Import and Export of Goods (Order of the State Council No. 332, adopted at the 46th executive meeting of the State Council on October 31, 2001, effective January 1, 2002)	Import and Export Regulations
JE-51	Measures for the Administration of Licensing for the Export of Goods (Order of the Ministry of Commerce No. 11, adopted May 7, 2008, effective July 1, 2008)	Export Licensing Measures
JE-52	Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, issued December 20, 2001, effective January 1, 2002)	Export Quota Measures
JE-53	Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeiguanhanzi, No. 68, September 21, 1999, amended September 12, 2010)	Measures for Administration of Licensing Entities
JE-54	Customs Law of the People’s Republic of China (adopted at the 19th Meeting of the Standing Committee of the Sixth National People’s Congress on January 22, 1987, amended July 8, 2000)	Customs Law
JE-55	Circular on the 2012 List of Rare Earth Export Enterprises and First Batch of Rare Earth Export Quotas, (Ministry of Commerce, shangmaohan, No. 1133, December 26, 2011)	2012 First Batch Rare Earth Export Quota

JE-56	Notice Regarding the Supplement Issued for the 2012 First Batch of Rare Earth Export Quota (Ministry of Commerce No. 618, May 16, 2012)	2012 First Batch Rare Earth Export Quota Supplement
JE-57	Notice Concerning the 2012 Second Batch of Rare Earth Export Quotas (Ministry of Commerce, No. 627, August 16, 2012)	2012 Second Batch Rare Earth Export Quota
JE-58	2012 Notice on the Total Export Quota Quantity for Agricultural and Industrial Products in 2012, (Ministry of Commerce, No. 71, issued October 31, 2011, effective January 1, 2012)	2012 Export Quantity for Agricultural and Industrial Products
JE-59	2012 Notice on the List of Export (or Supplier) Enterprises and First Batch Export Quotas of Tungsten, Antimony and Other Nonferrous Metals, (Ministry of Commerce, shangmaohan, No. 1131, December 26, 2011)	2012 First Batch Tungsten and Molybdenum Export Quota
JE-60	Notice of the Ministry of Commerce Concerning the 2012 Second Batch Export Quotas for Tungsten, Antimony, Silver, Tin, Indium, and Molybdenum, (Ministry of Commerce, No. 513, July 19, 2012)	2012 Second Batch Tungsten and Molybdenum Export Quota
JE-61	Announcement on 2012 Application Conditions and Procedures for Qualification for 2012 Rare Earth Export Quota, (Ministry of Commerce, No. 77, November 11, 2011)	2012 Rare Earth Export Quota Application Procedures
JE-62	Announcement Regarding the Qualification Standards of State Owned Tungsten, Antimony and Silver Trade and Export Enterprises, Tungsten and Antimony Export and Supply Enterprises and Declaration Procedures in 2012, (Ministry of Commerce, No. 80, November 11, 2011)	2012 Tungsten Export Quota Application Procedures
JE-63	Announcement on Application Conditions and Procedures for 2012 Indium, Molybdenum and Tin Export Quotas, (Ministry of Commerce, No. 79, November 11, 2011)	2012 Molybdenum Export Quota Application Procedures
JE-64	Announcement Issuing the “2012 Graded License-Issuing List of Commodities Subject to Export License Administration,” (Ministry of Commerce, No. 103, December 31, 2011, effective January 1, 2012)	2012 Export Licensing List Notice

JE-65	Notice Publishing the List of the State Trading Export Enterprises of Tungsten, Antimony and Silver, the Enterprises Exporting and Supplying Tungsten and Antimony, and the Enterprises of Applying for the Export Quotas for Indium and Molybdenum in 2012, (Ministry of Commerce, December 14, 2011)	
JE-66	Notice Publishing the List of Enterprise Applying for the Export Quota for Rare Earths and Coke in 2012 (Ministry of Commerce, December 14, 2011)	
JE-67	The State Council's Notification on the Issuance of Industrial Transformation and Upgrading Plan(2011-2015) (State Council, guofa, No. 47, December 30, 2011)	
JE-68	Overall Plan for Mineral Resources of Jiangxi Province (2008-2015)	
JE-69	Inner Mongolia Autonomous Region's Eleventh Five-Year Plan on the Rare Earth Industry (2006-2010)	
JE-70	Announcement of MOFTEC issuing Export Quota Tendering to 13 Type of Commodities in 1999 (Ministry of Foreign Trade and Economic Cooperation, 1999)	
JE-71	Notice of MOFTEC on Suspension of Tender for Rare Earth Export Quotas (Ministry of Foreign Trade and Economic Cooperation, February 14, 1999)	
JE-72	Notice of the State Council on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as National Specified Minerals under Protective Mining (State Council, 15 January 1991)	
JE-73	1999 Notice Concerning the Rare Earth Products Export Quota (Ministry of Foreign Trade and Economic Cooperation, 14 February 1999)	
JE-74	Statement on Relevant Matters Regarding the Issuance of Export License (Ministry of Commerce Quota and License Administrative Bureau, July 20, 2010)	

JE-75	Notice of the Ministry of Finance, National Development and Reform Commission, Ministry of Commerce, General Administration of Customs, State Administration of Taxation on Adjusting the Tax Refund Rates of Certain Commodities and Supplementing the Catalogue of Prohibited Commodities in Processing Trade (2006) No.139	
JE-76	World Trade Organization, Trade Policy Review, WT/TPR/S/230, circulated 26 April 2010 (excerpts)	
JE-77	Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa No. 398, October 9, 2008)	
JE-78	Rules on the Management of Import and Export License Certificates (Ministry of Commerce, shangwubuling, No. 1, issued February 4, 2012, effective March 5, 2012)	
JE-79	U.S. Geological Survey Minerals Yearbook (2010): Rare Earths	USGS Yearbook, Rare Earths
JE-80	U.S. Geological Survey Minerals Yearbook (2010): Tungsten	USGS Yearbook, Tungsten
JE-81	U.S. Geological Survey Minerals Yearbook (2010): Molybdenum	USGS Yearbook, Molybdenum
JE-82	U.S. Geological Survey, Global Rare Earth Oxide Production Trends (2010)	
JE-83	Notice by the Department of Finance and the State Administration of Taxation on Adjusting the VAT Rebates of Certain Products (29 April 2005)	
JE-84	International Tungsten Association, About Tungsten, Resources, Minerals & Deposits	
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JE-86	International Tungsten Industry Association, Applications, Cemented Carbides	
JE-87	International Tungsten Industry Association, Applications, Cemented Carbides, Tungsten Carbide and Cobalt	
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JE-97	International Molybdenum Association, Molybdenum, Molybdenum Market Information, Molybdenum Global Production & Use	

I. INTRODUCTION

1. During the negotiations between Members and China on its accession to the WTO, there was no dispute among the parties that China maintained various restrictions on exportation, including on some of the very products at issue in this dispute. Likewise, there was no misunderstanding that Members sought to have China lift these restrictions as part of its accession commitments, and that China in fact committed to do so. Yet China, in pursuit of industrial policy goals, has decided to maintain or even strengthen these restrictions. The United States, along with co-complainants the European Union (“EU”) and Japan, is asking the Panel to confirm that China’s export restrictions are inconsistent with its WTO obligations and to recommend that China bring these measures into compliance.

2. During the accession negotiations, China stated that since 1992 it had reduced its use of export restrictions, though it acknowledged that as of 1999 it still subjected 58 categories of products covering a total of 73 items to non-automatic export licensing and export restrictions.¹ Members of the Working Party were concerned with China’s export restrictions, and some members “expressed particular concern about export restrictions on raw materials or intermediate products that could be subject to further processing, such as tungsten ore concentrates, rare earths and other metals.”² In response to these concerns, China committed that “it would abide by WTO rules in respect of non-automatic export licensing and export restrictions” and that, upon its accession to the WTO, “remaining non-automatic restrictions on exports ... would be eliminated unless they could be justified.”³

3. Members of the Working Party also expressed concerns regarding taxes and additional charges that China applied exclusively to exports. China noted that while the majority of products were exported from China free of export duty, China continued to subject 84 items to export duties.⁴ With respect to export duties, China committed in its Protocol of Accession to the WTO (“Protocol” or “Accession Protocol”) that it would “eliminate all taxes and charges applied to exports unless ... specifically provided for in Annex 6 of this Protocol,” which lists the products on which China retained the right to impose export duties, “or applied in conformity with the provisions of Article VIII” of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).⁵

¹ Working Party Report, para. 158 (Exhibit JE-1).

² Id., paras. 160-161 (Exhibit JE-1).

³ Id., para. 161 (Exhibit JE-1).

⁴ Id., paras. 155-156 (Exhibit JE-1).

⁵ Accession Protocol, para. 11.3 (Exhibit JE-2).

4. In 2009, the United States, EU and Mexico initiated a challenge to the export restrictions that China imposes on nine categories of industrial raw materials in *China – Measures Relating to the Exportation of Various Raw Materials* (DS394/395/398) (*China – Raw Materials I*). Earlier this year, the Dispute Settlement Body (“DSB”) adopted its recommendations and rulings in *China – Raw Materials I*, concluding that the restrictions at issue there – the very same types of restrictions (applied to different materials) addressed in the present dispute – were inconsistent with China’s WTO obligations. Moreover, the DSB in *China – Raw Materials I* unequivocally concluded that China does not have recourse to the exceptions set forth in Article XX of the GATT 1994 to justify deviation from its commitment, in paragraph 11.3 of the Accession Protocol, not to impose export duties on products other than those listed in Annex 6.

5. The DSB in *China – Raw Materials I* also rejected China’s attempts to invoke various exceptions set forth in, for example, Article XX of the GATT 1994 to justify China’s use of export quotas to meet alleged environmental and conservation goals.⁶ Of note, these are the same justifications that China has cited for its export restrictions covering the products at issue in this dispute.⁷ In rejecting China’s use of export quotas, the DSB found that “[f]or the purpose of conservation of a resource, it is not relevant whether the resource is consumed domestically or abroad; what matters is its pace of extraction.”⁸ The DSB further found that “export restrictions are not an efficient policy to address environmental externalities when these derive from domestic production rather than exports or imports.”⁹

6. Contrary to the important commitments that China made during its accession negotiations over ten years ago, and despite the clear findings of the DSB in *China – Raw Materials I*, China has not eliminated its use of export duties and export restrictions. Since China acceded to the WTO, China’s export restrictions have continued to multiply in number and kind, driven by industrial policies adopted in Five-Year Plans and other blueprints for economic growth formulated and approved by China’s government. China continues today to subject over 670 items to non-automatic export licensing, 26 categories of products to export quotas, and over 360 items to export duties, including the three categories of industrial raw materials at issue in the present dispute, which cover 82 items.

7. The products subject to the export restrictions at issue in this dispute are various forms of

⁶ *China – Raw Materials I* (Panel), paras. 7.613, 7.615.

⁷ Statement of China at DSB Meeting, WT/DSB/M/319, 10 July 2012.

⁸ *China – Raw Materials I* (Panel), para. 7.428.

⁹ *Id.*, at para. 7.586.

rare earths, tungsten and molybdenum (together the “Raw Materials”).¹⁰ China is the leading producer of each of the Raw Materials. These Raw Materials are vital inputs for fundamental industries of Members’ economies, including the manufacture of electronics, automobiles, steel, petroleum products, and a variety of chemicals that are used to produce both everyday items and highly sophisticated, technologically advanced products, such as hybrid vehicle batteries, wind turbines and energy efficient lighting.¹¹

8. China’s export restrictions have distorted the playing field on which Members compete. These export restrictions not only distort domestic and world markets in these critical Raw Materials, but they also impact entire manufacturing chains and have broad implications for competition and trade in a wide variety of products. For example, because China is the world’s leading producer of the Raw Materials, the distortions created by the export restrictions can drive up the prices that U.S. and other non-Chinese producers must pay for these raw material inputs on the world market. Concurrently, the export restrictions can increase supplies in China’s domestic market, driving down the prices that Chinese producers would otherwise pay for these same inputs. Not only does this dynamic create tremendous advantages for Chinese producers vis-à-vis non-Chinese producers, but it also places strong pressure on non-Chinese producers to move their operations, technologies and jobs to China.

9. Over time, China has tightened its export restrictions on rare earths, tungsten and molybdenum; export quota amounts have decreased steadily while export duty rates have increased steadily since 2001. Indeed, in the case of rare earths, during the pendency of *China – Raw Materials I*, China not only expanded the scope of products covered by the export quota by adding rare earth alloys to the oxides, concentrates, metals and compounds already subject to the export quota,¹² but China also drastically reduced the volume of the export quota from approximately 50,000 metric tons (“MTs”) in 2009 to around 30,000 MTs in 2010.¹³

¹⁰ See Section III.B below for detailed descriptions of the Raw Materials and their applications. See also Chart of Raw Materials Names (Exhibit JE-3), which sets out short form names and reference codes for the specific products constituting the various forms of the Raw Materials at issue in this dispute.

¹¹ For instance, rare earths are used to produce high-powered magnets in wind turbines and luminescent materials, to polish glass in high-tech products and to refine gasoline. Tungsten is used to produce cemented carbides (e.g., cutting tools), steel, super alloys and mill products (e.g., parts for lamps). Molybdenum is used to create alloys in steel that harden and stabilize high-strength and stainless steel. Molybdenum is also used as a catalyst to slow down or speed up chemical reactions in the production of polymers and plastics.

¹² Notice on Addition of RE Alloy into RE Export Quota License (Ministry of Commerce, General Administration of Customs, 2011) (Exhibit JE-4)

¹³ 2009-2011 Chinese Rare Earth Industry Export Quota Situation (Exhibit JE-5).

10. This dispute focuses on two types of restrictions that China imposes on the exportation of the Raw Materials: export duties and export quotas (including certain quota administration measures). It is important to note that the United States does not disagree with policies aimed at addressing environmental externalities stemming from the domestic production of raw materials. The United States does insist, however, that China act consistently with its WTO obligations and not in a way to advantage its own domestic industries over those of other Members.

11. As detailed below, China’s export duties are inconsistent with China’s obligations under its Protocol of Accession. China’s export quotas, in themselves and also in the manner in which they are administered, are inconsistent with China’s obligations under the GATT 1994 and China’s Protocol of Accession, which incorporates commitments made by China in the Report of the Working Party on China’s Accession to the WTO (“Working Party Report”). The following paragraphs briefly outline the U.S. claims regarding each of these export restrictions.

12. **Export Duties:** China’s obligations under paragraph 11.3 of Part I of the Accession Protocol require that China not impose export duties on products that are not listed in Annex 6 of the Accession Protocol. However, China imposes export duties on over 80 forms of rare earths, tungsten and molybdenum that are not listed in Annex 6 of the Protocol.¹⁴

13. **Export Quotas – Maintenance of Export Quotas:** Article XI:1 of the GATT 1994 and the Accession Protocol, through its incorporation of paragraphs 162 and 165 of the Working Party Report, obligate China not to maintain prohibitions or restrictions on exportation. Despite these obligations, China imposes quotas on the exportation of various forms of rare earths, tungsten and molybdenum, including not only ores and concentrates, but also further processed products such as metals and alloys.¹⁵

14. **Export Quotas – Administration and Allocation of the Export Quotas:** China’s commitments under paragraph 5.1 of Part I of the Accession Protocol, as well as paragraph 1.2 of the Accession Protocol to the extent it incorporates paragraphs 83 and 84 of the Working Party Report (commonly referred to as China’s “trading rights” commitments), require China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export products except for goods listed in Annex 2A of the Accession Protocol. Furthermore, China

¹⁴ See Chart of Raw Materials Subject to Export Duties (Exhibit JE-6) for specific products subject to export duties.

¹⁵ See Chart of Raw Materials Subject to Quotas (Exhibit JE-7) for specific products subject to export quotas.

explicitly committed to eliminate its examination and approval system and to eliminate certain eligibility criteria for obtaining the right to export. In its administration of the quotas for rare earths and molybdenum, China breaches these commitments by impermissibly requiring exporters to satisfy certain criteria – i.e., (i) prior export experience and export performance and (ii) minimum capital requirements – in order to be eligible to participate in the process required to receive an allocation of the quotas (and in turn be able to export).

15. The aforementioned export restraints on the Raw Materials are, just as they are in *China – Raw Materials I*, significant trade barriers that contravene core obligations of the multilateral trading system. As discussed above, the United States and other WTO Members raised their concerns regarding such restraints during the course of China’s accession discussions. Members have continued to raise their concerns through dialogue and through formal dispute settlement, to no avail.¹⁶ As a result, the United States has now been forced, for the second time, to bring its concerns regarding China’s restrictive export policies to the WTO dispute settlement system.¹⁷

* * * * *

16. This submission will set forth the details of the U.S. legal claims, as well as the underlying facts, regarding China’s measures restraining the exportation of these key industrial Raw Materials. Section II sets out the procedural history of this dispute. Section III provides factual background regarding China’s industrial policies and the Raw Materials. Sections IV, V and VI discuss China’s export duties, export quotas and export quota administration, respectively.

II. PROCEDURAL HISTORY

17. The United States requested consultations with the Government of the People’s Republic of China (“China”) on March 13, 2012, pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) and Article XXII of the GATT 1994 with respect to China’s restraints on the exportation from China of various forms of rare earths, tungsten and molybdenum. On the same day, the EU and Japan requested

¹⁶ See G/C/W/435 (19 November 2002); G/C/W/473 (17 November 2003); G/MA/W/58 (31 August 2004); G/C/W/499 (11 November 2004); G/MA/W/71 (6 September 2005); G/C/W/530 (12 October 2005); G/MA/W/78 (18 September 2006); G/C/W/560 (6 November 2006); G/MA/W/89 (18 September 2007); G/C/W/587 (5 November 2007); G/MA/W/94 (1 October 2008); G/C/W/603 (24 October 2008); G/MA/M/50 (22 October 2009); G/MA/M/54 (28 October 2011).

¹⁷ See *China – Raw Materials I (Panel)*, and *China – Raw Materials I (AB)*.

consultations with China with respect to the same restrictions. The requests were circulated to Members on March 15, 2012.¹⁸

18. The United States, the EU and Japan (together the “Complainants”) each notified China of its desire to be joined in the consultations of the other complainants pursuant to Article 4.11 of the DSU. Canada notified its desire to be joined in the consultations, pursuant to Article 4.11 of the DSU. China accepted these requests. The parties held joint consultations on April 25-26, 2012. These consultations provided helpful clarification, but failed to resolve the dispute.

19. On June 29, 2012, the Complainants each requested the establishment of a panel pursuant to Article 6 of the DSU.¹⁹ The DSB considered these requests at its meeting on July 10, 2012, at which time China objected to panel establishment.

20. On July 12, 2012, the Complainants renewed their requests for the establishment of a panel. Each complainant requested that a single panel be established to examine the three complaints pursuant to Article 9.1 of the DSU. At the DSB meeting of July 23, 2012, the DSB established a single panel with standard terms of reference to examine the complaints by the United States, the EU and Japan.²⁰

21. The Panel was constituted on September 24, 2012.²¹

III. FACTUAL BACKGROUND

22. In this section, the United States provides factual background relating to China’s policy goals and the Raw Materials at issue.

¹⁸ *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* – Request for Consultations by the United States, WT/DS431/1 (15 March 2012); *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* – Request for Consultations by the European Union, WT/DS432/1 (15 March 2012); *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* – Request for Consultations by Japan, WT/DS433/1 (15 March 2012).

¹⁹ *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* – Request for the Establishment of a Panel by the United States, WT/DS431/6 (9 June 2012); *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* – Request for the Establishment of a Panel by the European Union, WT/DS432/6 (9 June 2012); *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* – Request for the Establishment of a Panel by Japan, WT/DS433/6 (9 June 2012).

²⁰ *Dispute Settlement Body: Minutes of the Meeting Held on July 23, 2012*, WT/DSB/M/320, para. 70.

²¹ Note by the Secretariat: Constitution of the Panel Established at the Requests of the United States, the European Union and Japan, WT/DS431/7, WT/DS432/7, WT/DS433/7, circulated 25 September 2012.

- Section III.A describes the role of export restrictions in China’s industrial policies; and
- Section III.B describes the Raw Materials at issue in this dispute.

A. China’s Policies for Promoting Its Downstream Domestic Industries Rely on Restraining the Exportation of Raw Materials

23. China’s economic policies are guided and directed by various plans and policies promulgated by the central government, including the *Five-Year Plans for National Economic and Social Development*, which China’s central government has issued regularly since 1953.

24. Over the period of the tenth, eleventh and twelfth Five-Year Plans, spanning the years 2001 to the present, China has achieved remarkable progress in its industrial growth. The growth of the Chinese economy following accession to the WTO in 2001 is reflected in data from the World Bank on Gross Domestic Product (“GDP”) and value added by manufacturing.²² As the chart below demonstrates, China’s GDP more than quadrupled between 2001 and 2010. Its manufacturing sector, as measured by value added, also more than quadrupled in the same period. Clearly, China has shown major benefits from its accession to the WTO and resulting access to foreign markets.

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
GDP (current US\$, billions)	1,325	1,454	1,641	1,932	2,257	2,713	3,494	4,522	4,991	5,931
Manufacturing, value added (current US\$, billions)	419	457	539	625	734	893	1,150	1,476	1,612	1,757

25. The United States, of course, strongly welcomes China’s economic growth. At the same time, however, China must not adopt and maintain industrial policies that are inconsistent with its WTO obligations and result in harm to the rest of the world. While China’s exports of industrial raw materials have been restricted, China’s production of industrial raw materials and processed, value-added goods has increased dramatically. China’s exports of processed, value-added goods have also increased significantly.

²² World Bank Data (Exhibit JE-8).

26. These trends are the result of a deliberate strategy that China employs to optimize the conditions for realizing its economic and industrial ambitions. China often invokes the concept referred to by the shorthand “two resources, two markets,”²³ which identifies the distinction between domestic and international resources, and domestic and international markets, as a tool to give the Chinese domestic economy an advantage over the rest of the world.

27. Specifically, China creates, leverages and then exploits the differences in the domestic and international markets for raw materials and downstream, processed products, using restrictions on exports of raw materials as the linchpin. China’s strategy of restricting the exportation of raw materials, in particular those in which China enjoys a comparative advantage,²⁴ as well as intermediate and low value-added products,²⁵ creates an incentive for China’s domestic industries to export the products in the value chain whose exportation is not restricted – i.e., high value-added and further processed products.²⁶

28. These policies tend to result in lower input prices for Chinese downstream producers due to increased access to the materials in China. In addition, the restricted supply to world markets tends to increase input prices for non-Chinese downstream producers. Essentially, China converts what would otherwise have been freely exported, lower profit raw materials into indirect exports of those raw, low-value inputs in the form of higher profit downstream products that incorporate the raw materials.²⁷ This strategy affords China’s domestic industries the opportunity

²³ See, e.g., Adjustment and Revitalization Plan for the Steel Industry, II.5 (Exhibit JE-9); Eleventh Five-Year Plan, Chapter 1, para. 3 (Exhibit JE-10); National Mineral Resources Plan, 4(3) (Exhibit JE-11).

²⁴ National Mineral Resources Plan, 4.3 and 7.4 (noting that China has a comparative advantage in tungsten and rare earths) (Exhibit JE-11).

²⁵ Eleventh Five-Year Plan, Chapter 35, Section I (Exhibit JE-10); Guidelines for Industrial Management of Raw Materials, para. 6 (Exhibit JE-12); Development Policies for the Iron and Steel Industry, Article 30 (Exhibit JE-13); Adjustment and Revitalization Plan for the Steel Industry, IV.1 (Exhibit JE-9); Adjustment and Revitalization Plan for Non-Ferrous Industries, 2.2 para. 5 (Exhibit JE-14);

²⁶ Eleventh Five-Year Plan, Chapter 35, Section I (Exhibit JE-10); Guidelines for Industrial Management of Raw Materials, para. 6 (Exhibit JE-12); Adjustment and Revitalization Plan for the Steel Industry, I, IV.1 (Exhibit JE-9); Adjustment and Revitalization for Non-Ferrous Industries, 2.2 para. 5 (Exhibit JE-14); Twelfth Five-Year Plan, Chapter 51 Section 1 (“There will be perfection of policies and measures ... [to extend] domestic value-added chain”) (Exhibit JE-15). The strategy also includes encouraging Chinese industry to “venture out” to source and exploit foreign sources of the raw materials. National Mineral Resources Plan, 4.3 and 7.4 (Exhibit JE-11); Adjustment and Revitalization Plan for Non-Ferrous Industries, part 1, para. 3; part 2.2, para. 5, part 3.5 (“developing overseas resources and enhancing resource-guaranteeing ability”), part 4.6 (Exhibit JE-14); Adjustment and Revitalization Plan for the Steel Industry, part II.II.5 (Exhibit JE-9); Guidelines for Industrial Management of Raw Materials, para. 13 (Exhibit JE-12); Eleventh Five-Year Plan, Chapter 37, Section 3 (Exhibit JE-10); Twelfth Five-Year Plan, Chapter 51 Section 2 (Exhibit JE-15).

²⁷ See Adjustment and Revitalization Plan for Non-Ferrous Industries, 3.1 (Exhibit JE-14).

to grow worldwide market share of more value-added products from an environment that is sheltered from the competition that would have come from international producers with evenhanded and nondiscriminatory access to the same raw material inputs.

29. The export restrictions on raw materials also place strong pressure on firms around the world that produce high value-added downstream products – such as high-tech magnets produced from rare earths – to relocate their facilities, intellectual property and jobs to China in order to have the same access to the lower-priced raw materials as Chinese domestic producers.²⁸ Chinese officials, including senior officials from China’s Ministry of Industry and Information Technology (“MIIT”), have labeled the strategy of China’s industrial policy to induce the transfer of intellectual property in exchange for access to raw materials as “technology for resources.”²⁹

30. One by-product of China’s strong encouragement of industrial growth and manufacturing of high value-added and processed products has been an ever-rising domestic demand for industrial raw material inputs.³⁰ Consequently, even while China has been restricting other Members’ access to raw materials located in China; China has sought guaranteed access to raw material inputs from abroad.³¹ Specifically, China has encouraged Chinese raw material and resource-consuming industries to “go abroad” and invest in foreign mines and processing facilities to ensure a steady and reliable supply of raw material inputs for domestic industrial

²⁸ For example, China actively encourages foreign investment in a number of high-value added manufacturing processes that utilize rare earths as raw material inputs (e.g., cerium products and rare earth magnets). See Catalogue of Industries for Guiding Foreign Investment, Catalog of Encouraged Foreign Investment Industries, III,10(26) and 22(2) (Exhibit JE-16).

²⁹ Yajun Zhang, “China Dangles Rare-Earth Resources to Lure Investment” *Wall Street Journal*, August 16, 2010 (Exhibit JE-17); Guiding Opinions of Jiangxi Province on the Development of the Rare Earth Industry, part IV(2) (2007) (Exhibit JE-18) (noting that the province should “exchange resources for technologies”).

³⁰ Marianne Lavelle, “Higher Prices? Thank China: China’s insatiable hunger for raw goods is starting to sting U.S. consumers” *U.S. News and World Report*, April 4, 2004 (Exhibit JE-19); Peter S. Goodman, “Booming China Devouring Raw Materials: Producers and Suppliers Struggle to Feed a Voracious Appetite” *Washington Post*, May 21, 2004 (Exhibit JE-20); Assif Shameen, “Material Impact” *The Edge Singapore*, September 28, 2009 (Exhibit JE-21); Yao Ying, “Chinese investment: a new form of colonialism?” *EastAsiaForum*, July 24, 2012 (Exhibit JE-22).

³¹ Adjustment and Revitalization Plan for Non-Ferrous Industries, Section 2.3.6 (“We will further improve our ability to guarantee resources”), Section 3.5 (“developing overseas resources and enhancing resource guaranteeing ability”), and Section 4.6 (“increase our resource guaranteeing ability”) (Exhibit JE-14); Development Policies for the Iron and Steel Industry, Article 30 (Exhibit JE-13); Adjustment and Revitalization Plan for the Steel Industry, II.II.5 (“Prioritization of domestic demand with global allocation. . . . put top priority on meeting domestic demand”) (Exhibit JE-9); Twelfth Five-Year Plan, Chapter 52 Section 2 (“We will deepen international energy resources development”) (Exhibit JE-15).

use.³² In other words, China’s policy takes advantage of the market access that other Members provide to their raw materials pursuant to their WTO commitments.

31. The motivation and impact of these policies are particularly pronounced in the case of rare earths. By way of background, in the 1980s and 1990s, the global rare earth market was inundated with cheap Chinese exports of these raw materials.³³ At the same time that low-cost rare earths poured into the global market, major non-Chinese producers, such as the Mountain Pass facility in the United States, ceased operations.³⁴ China now dominates the rare earth market with approximately 97 percent of global production.³⁵

32. In this dominant position, China was then able to apply efficiently the “two resources, two markets” concept of economically exploiting differences in China’s domestic market and the international market to its rare earth policy.³⁶ For example, according to the most-recent *12th Five-Year Development Plan for the New Materials Industry*, which covers 2011 through 2015, China intends to “give full play to the advantages of rare-earth resources in China to strengthen the industrial scale of rare earth new materials.”³⁷

33. These advantages have been put into use by key Chinese Ministries. In particular, in 2009, MIIT issued its *Guidance on Enhancing the Management of Raw Material Industries*.³⁸ The Guidance calls for MIIT to: “actively research and propose tariff adjustment policies,

³² National Mineral Resources Plan, 7.4 (Exhibit JE-11); Adjustment and Revitalization Plan for Non-Ferrous Industries, part 1, para. 3; part 2.2 para. 5, part 3.5 (“developing overseas resources and enhancing resource-guaranteeing ability”); part 4.6 (Exhibit JE-14); Adjustment and Revitalization Plan for the Steel Industry, part II.II.5 (Exhibit JE-9); Eleventh Five-Year Plan, Chapter 35 Section 2 (“expand ... resources that are lacking domestically ... and raw materials imports”), Chapter 37 Section 3 (“carry out value-added foreign trade and accelerate the diversification of places of origin for products”) (Exhibit JE-10); Twelfth Five-Year Plan, Chapter 51 Section 2 (Exhibit JE-15).

³³ “Chinese rare earth major plans hiatus,” UPI Energy (October 19, 2011) (Exhibit JE-24).

³⁴ Rebecca Coons, “Molycorp Buys Rare Earth Processor for \$1.3 Billion” *Chemical Week* (March 12, 2012) (Exhibit JE-25).

³⁵ USGS, Rare Earths (Exhibit JE-23).

³⁶ In fact, this plan was put in motion at the highest levels of the Chinese government. In 1987, during a visit to the Inner Mongolia Autonomous Region, which is one of the most significant areas of rare earth production in China, paramount leader Deng Xiaoping is popularly quoted as hailing a strong economic future for Inner Mongolia by virtue of its wealth in rare earth resources by declaring “the Middle East has its oil, China has rare earths.” For Deng, rare earths were “of extremely important strategic significance; [China] must be sure to handle the rare earth issue properly and make the fullest use of our country’s advantage in rare earth resources.” Yaron Vorona, “The State of the Union? It depends.” *The Hill* (February 10, 2011) (Exhibit JE-26).

³⁷ 12th Five-Year Development Plan for New Materials Industry, III, 3.1 (Exhibit JE-28).

³⁸ Guidelines for Industrial Management of Raw Materials (Exhibit JE-12).

encourage the export of high value-added products and deep processing products and at the same time strictly control ... rare metal products involved in national strategic security.”³⁹ Likewise, the State Council’s *China’s Policy on Mineral Resources* states that increasing added value is a primary policy goal with respect to export of raw materials, specifically including rare earths and tungsten.⁴⁰

34. Beyond just encouraging the use of these materials in high-technology downstream sectors, China sets explicit production goals for such downstream products so as to encourage their increased production and, as a result, increased domestic demand for rare earths, tungsten and molybdenum. For example, the *12th Five-Year Development Plan for New Materials Industry* sets quantitative targets for the increased production of downstream rare earth, tungsten and molybdenum high-technology products (referred to as “new functional materials”)⁴¹ to be achieved by 2015, including increasing production capacity of, *inter alia*: permanent magnetic materials by 20 thousand tons per year; polishing powder by 5 thousand tons per year and high performance cemented carbides by 5 thousand tons per year.⁴² These production goals increase the domestic demand for the upstream input – i.e., rare earths, tungsten and molybdenum – and, therefore, create an incentive for increased domestic extraction.

35. These goals permeate all levels of the Chinese government. For example, the *Inner Mongolia Autonomous Region’s Twelfth Five-Year High Tech Industries Development Plan* seeks to upgrade the rare earth industry from one focused on “raw material exports” to one centered on “exports of new rare earth products.”⁴³ The Inner Mongolia five-year plan seeks to establish complete production chains for products requiring rare earths, including electric vehicles and fluorescent lighting.⁴⁴ In addition, the region’s previous plan states that government authorities would “[e]ngage in macroscopic controls through export quotas; give full rein to the role of industrial authorities, rare earth industrial associations and groups in the distribution of export quotas; keep guiding rare earth enterprises to facilitate the process of restructuring through such quota controls.”⁴⁵

³⁹ Id., at para. 6.

⁴⁰ China’s Policy on Mineral Resources, IV, para. 8 (Exhibit JE-27).

⁴¹ 12th Five-Year Development Plan for New Materials Industry, II, 2.1 (Exhibit JE-28).

⁴² Id., at V, 5.1; Column II, 03 (Exhibit JE-28).

⁴³ Inner Mongolia Autonomous Region’s Twelfth Five-Year High-Tech Industries Development Plan, III(II) (Exhibit JE-29). The plan sets a 60% growth target for the entire provincial rare earth industry. Id. at Table 1.

⁴⁴ Id., at IV.

⁴⁵ Inner Mongolia Autonomous Region’s Eleventh Five-Year Plan on the Rare Earth Industry, at V(1) (2006-2010) (Exhibit JE-69).

36. Similarly, the *Guiding Opinions of Jiangxi Province on the Development of the Rare Earth Industry* directs the province’s rare earth industry to upgrade by focusing on manufacturing processes designed to enhance the value of rare earth products.⁴⁶ The government seeks to develop further the province’s production of several high-value products that use rare earths, including, *inter alia*, electric cars and DVD drivers.⁴⁷ The Jiangxi provincial government has also 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.⁴⁸ Regarding international trade and investment, the provincial government has stated that it intends to “exchange resources for technologies” – i.e., the “technology for resource” pillar of China’s industrial policy.⁴⁹

B. The Raw Materials

37. The three industrial Raw Materials subject to the various export restraints imposed by China are either naturally occurring minerals or materials that have undergone some initial processing. China is the leading global producer of all three of these Raw Materials, which renders China’s restraints on their exportation particularly distortive for trade in these Raw Materials and of the products manufactured from them.

1. Rare Earths

38. Rare earths⁵⁰ consist of the group of fifteen lanthanide elements with atomic numbers 57 through 71 that typically are found together geologically and grouped apart from the rest of the elements in the periodic table (atomic numbers in parentheses): lanthanum (57), cerium (58), praseodymium (59), neodymium (60), promethium (61), which does not exist naturally in the earth’s crust, samarium (62), europium (63), gadolinium (64), terbium (65), dysprosium (66), holmium (67), erbium (68), thulium (69), ytterbium (70) and lutetium (71). In addition, scandium (21) and yttrium (39) are designated as rare earths because they often occur together with the lanthanide elements. The rare earths from lanthanum to europium (atomic numbers 57 to 63) are often called light rare earths. The elements from gadolinium to lutetium (atomic

⁴⁶ Guiding Opinions of Jiangxi Province on the Development of the Rare Earth Industry, Section II, 4(1) (Exhibit JE-18).

⁴⁷ *Id.*, at part II(3).

⁴⁸ *Id.*, at Section II, (3).

⁴⁹ *Id.*, at part IV(2).

⁵⁰ A list of the rare earths at issue in this dispute can be found at Exhibit JE-3.

numbers 64 to 71), along with yttrium (39), are often referred to as heavy rare earths.⁵¹

39. It should be noted, however, that China classifies lanthanum (57) through promethium (61) as light rare earths and samarium (62) through lutetium (71) as medium and heavy rare earths for purposes of the export quota (discussed below). China also classifies scandium (21) and yttrium (39) as medium and heavy rare earths.

40. Ores containing one or more types of rare earths are extracted and then concentrated at the mine site to increase the rare earth-containing content. The concentrate is then separated into individual rare earth oxides. Rare earth oxides can be converted into rare earth metals or other compounds such as chlorides and fluorides. The term “smelting” is often used to describe the process of separating and reducing rare earths to rare earth metals. Rare earths can also be alloyed with a variety of other elements, such as iron, depending on the intended end-use.⁵²

41. Rare earths are used both as process-enablers and in final products. Examples of process-enablers are fluid-cracking catalysts in petroleum refining, automotive catalytic converters and polishing media for glass mirrors and other products. As process-enablers, rare earths do not remain in the final product. Examples of rare earth use in final products include magnets in high technology motors, generators, disk drives, and other products; battery alloys for energy storage; phosphors in lighting; and glass additives.⁵³

42. According to the U.S. Geological Survey (“USGS”), in 2011, China was the world’s leading producer of rare earths, producing an estimated 130,000 metric tons (MTs) of rare earth oxide (REO), which accounted for approximately 97 percent of global production.⁵⁴

2. Tungsten

43. Tungsten⁵⁵ is the name given to the element with the atomic number 74. The value of tungsten as a raw material stems from its chemical properties. In particular, tungsten has the highest melting point of all metals and is one of the most dense.⁵⁶

⁵¹ Jane Spooner, “Rare earths: China dominates” *The Mining Journal*, October 7, 2005 (Exhibit JE-30).

⁵² Id. (Exhibit JE-30).

⁵³ Molycorp, *The Many Uses of Rare Earths* (Exhibit JE-31).

⁵⁴ USGS, *Rare Earths* (JE-23). REO is the content of rare earths in a given item.

⁵⁵ A list of the tungsten products at issue in this dispute can be found at Exhibit JE-3.

⁵⁶ International Tungsten Industry Association: *Tungsten Properties* (Exhibit JE-32).

44. Tungsten is primarily found in two ores – wolframite and scheelite. The ore is mined, pre-treated and then concentrated at the mine to increase the tungsten content of the material.⁵⁷ The concentrated form undergoes a chemical process to produce the primary intermediate product – ammonium paratungstate (“APT”).⁵⁸ APT can be further processed into a number of other immediate products, such as tungsten oxide.⁵⁹ In turn, tungsten oxide can be reduced to form tungsten powder and tungsten carbide.⁶⁰

45. Tungsten is used to make cemented carbides, which are used to produce metal cutting tools, drilling and mining tools as well as working tools for wood and plastics. Ferro-tungsten is used as an alloying agent in the production of steel and super-alloys. Tungsten is also used as filaments or electrodes for various types of lamps and as a catalyst in the production of a number of chemicals.⁶¹

46. According to the USGS, China is the world’s leading producer of tungsten; China’s tungsten production was 60,000 MTs in 2011, which constituted approximately 83 percent of total global production.⁶²

3. Molybdenum

47. Molybdenum⁶³ is a silvery metallic element with an atomic number of 42. Molybdenum has one of the highest melting temperatures of all the elements, yet compared to most other metals with a high melting point, such as tungsten, it is relatively less dense.⁶⁴

48. Molybdenum is mined from ore containing molybdenite, which is often recovered as a by-product of copper mining.⁶⁵ The molybdenite is concentrated and roasted to form roasted molybdenite concentrate, also know as tech oxide. Tech oxide can be smelted into ferro-molybdenum or further processed into molybdates and molybdenum powders.⁶⁶

⁵⁷ International Tungsten Industry Association: Tungsten Mining & Beneficiation (Exhibit JE-33).

⁵⁸ International Tungsten Industry Association: Tungsten Processing (Exhibit JE-34).

⁵⁹ International Tungsten Industry Association: Intermediates (Exhibit JE-35).

⁶⁰ Id.

⁶¹ International Tungsten Industry Association: Primary Uses of Tungsten (Exhibit JE-36).

⁶² USGS, Tungsten (Exhibit JE-37).

⁶³ A list of the molybdenum products at issue in this dispute can be found at Exhibit JE-3.

⁶⁴ International Molybdenum Association: Molybdenum Properties (Exhibit JE-38).

⁶⁵ International Molybdenum Association: Mining (Exhibit JE-39).

⁶⁶ International Molybdenum Association: Processing (Exhibit JE-40).

49. Molybdenum is used as an alloying agent to enhance strength, hardenability, weldability and toughness; elevate temperature strength; and provide corrosion resistance to steel and super-alloys.⁶⁷ In many cases, ferro-molybdenum is added directly into the furnace or after the steel is melted.⁶⁸ In addition, molybdenum-based chemicals are used in desulphurisation, pigmentation, flame and smoke suppression, and as a corrosion inhibitor.⁶⁹

50. China is the world’s largest producer of molybdenum. In 2010, China produced 80,000 MTs of molybdenum, which was 36 percent of the world’s supply.⁷⁰

IV. EXPORT DUTIES

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

A. China’s Obligations under the Accession Protocol

52. China committed in its Accession Protocol to “eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.”⁷¹ Annex 6 of the Accession Protocol, titled “Products Subject to Export Duty,” sets forth a list of 84 discrete products by individual harmonized system (HS) numbers accompanied by a short description of each product. In Annex 6 of the Protocol, China reserved the right to impose export duties, up to specified duty rate limits, on those 84 products.⁷² At the time, China only imposed export duties on 36 products.⁷³ In the years since China’s accession, however, the number of products on which China imposed export duties exploded, from 36 in 2002 to 363 in 2012.⁷⁴

⁶⁷ International Molybdenum Association: Molybdenum Properties (Exhibit JE-38).

⁶⁸ International Molybdenum Association: Meltstock Mo Products (Exhibit JE-41).

⁶⁹ International Molybdenum Association: Chemical Mo Products (Exhibit JE-42).

⁷⁰ Roskill: Study of the market for molybdenum, 2 (Exhibit JE-43).

⁷¹ Accession Protocol, para. 11.3 (Exhibit JE-2).

⁷² Working Party Report, para. 156 (Exhibit JE-1); *see also 2002 Tariff Implementation Program* (Exhibit JE-44).

⁷³ *2002 Tariff Implementation Program*, Annex 5 (Exhibit JE-44).

⁷⁴ *2012 Tariff Implementation Program*, Table 6 (Exhibit JE-45).

53. The products listed in Annex 6 are the only products for which China retains the right to continue imposing export duties. The list of products in Annex 6 also indicates, next to each of the 84 products, an export duty rate expressed as an *ad valorem* percentage. These listed export duty rates are the upper limit of rates which China retained the right to impose on the export of these products. As the note to Annex 6 states:

China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.⁷⁵

54. With one exception, the various forms of the Raw Materials do not appear on Annex 6 of the Protocol.⁷⁶ Accordingly, under its Accession Protocol obligations, China must not impose export duties on the Raw Materials.

55. Nevertheless, as described in Sections B and C below, China restrains the exportation of various forms of rare earths, tungsten and molybdenum through the imposition of export duties.⁷⁷

B. China's Export Duties Framework

56. This section lays out the basic framework of China's export duties. Under this framework, the export duties at issue in this dispute are labeled "temporary." These so-called "temporary" export duties, as applied to the Raw Materials, are set forth in Section C below.

57. The *Regulations on Import and Export Duties* provide that all goods permitted to be imported into or exported out of China shall, unless otherwise provided for by the State Council, be subject to the imposition of import and export duties in accordance with the *Regulations on Import and Export Duties*.⁷⁸

⁷⁵ Accession Protocol, Annex 6 (Exhibit JE-2).

⁷⁶ China maintains an export duty on tungsten ore (HS No. 2611.0000) that is listed in Annex 6 of China's Accession Protocol, and the export duty rate does not appear to exceed the maximum level listed in the Annex. Accordingly, the United States does not contest in this dispute China's imposition of an export duty on tungsten ore.

⁷⁷ For purposes of the discussion of China's export duties, the terms "rare earths," "tungsten" and "molybdenum" cover the forms of each of these Raw Materials listed in the Chart of Raw Materials Subject to Export Duties (Exhibit JE-6).

⁷⁸ *Regulations on Import and Export Duties*, Article 2 (Exhibit JE-46).

58. The *Regulations on Import and Export Duties* provide that export duties are established in export duty rates.⁷⁹ There are at least three types of export duty rates: “regular” export duty rates that are established to be generally applicable; “temporary” export duty rates established for a limited period of time;⁸⁰ and “special” export duty rates established under special circumstances.⁸¹

59. Article 9 of the *Regulations on Import and Export Duties* provides that temporary export duty rates can be applied for a defined period of time. Article 11 of the *Regulations on Import and Export Duties* further provides that where a good is subject to both a “regular” export duty rate and a “temporary” duty rate, the “temporary” duty rate prevails.

60. The Customs Tariff Commission (“Tariff Commission”), established by the State Council, is responsible for adjusting and determining items subject to duties, duty nomenclature and heading numbers, and duty rates (i.e., “regular” duty rates). The Tariff Commission also determines the goods subject to “temporary” duty rates, the corresponding rates and the time limits for those duties. In addition, the Tariff Commission is responsible for the application of duty rates in special circumstances, i.e., “special” duty rates.⁸²

61. The General Administration of Customs (“GAC” or “Customs”), which is also established by the State Council, is responsible for supervising and controlling the entry and exit of goods into and from China’s borders. The *Customs Law* and *Regulations on Import and Export Duties* specify that Customs’ responsibilities include collecting customs duties as well as other taxes and charges related to import and export.⁸³

C. “Temporary” Export Duties

62. On December 9, 2011, the Tariff Commission issued the *2012 Tariff Implementation Program*, which took effect on January 1, 2012. Section E of the *2012 Tariff Implementation Program* outlines adjustments to export duties, providing that in 2012 the “regular” export duty rates in effect for 2011 will remain unchanged,⁸⁴ and certain goods will be subject to “temporary”

⁷⁹ Id., at Article 9 (Exhibit JE-46).

⁸⁰ See *Regulations on Import and Export Duties*, Articles 4, 9 and 11 (Exhibit JE-46).

⁸¹ See id., at Articles 4 (Exhibit JE-46).

⁸² Id., at Article 4 (Exhibit JE-46).

⁸³ *Customs Law*, Article 53 (Exhibit JE-54); *Regulations on Import and Export Duties*, Article 2 (Exhibit JE-46).

⁸⁴ *2012 Tariff Implementation Program*, Section E (Exhibit JE-45).

duty rates⁸⁵ as set out in detail in the Export Tax Rate Table. The *2012 Tariff Implementation Program* does not specify a time limit for the application of the temporary export duty rates.

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

64. The Export Tax Rate Table in the *2012 Tariff Implementation Program* identifies, by HS number, 363 goods subject to export duties beginning January 1, 2012.⁸⁶ The Export Tax Rate Table indicates the duty rates applicable to those goods as “regular” export duty rates, “temporary” export duty rates and/or “special” export duty rates.

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

66. Annex 6 of China’s Accession Protocol does not include any of the products listed in Exhibit JE-6. Thus, as described in Section D below, these export duties are inconsistent with China’s WTO obligations.

D. China’s Export Duties on Rare Earths, Tungsten and Molybdenum Are Inconsistent with China’s Obligations under Part I, Paragraph 11.3, of the Accession Protocol

67. As shown below, paragraph 11.3 of the Accession Protocol obligates China not to impose taxes and charges on exports unless they are provided for in Annex 6 of the Protocol or applied in conformity with GATT Article VIII. Because the “temporary” export duties on the Raw Materials do not fulfill either criteria, their imposition violates China’s obligations under paragraph 11.3 of the Accession Protocol.

1. Paragraph 11.3 of the Accession Protocol

⁸⁵ Id., at Table 6 (Exhibit JE-45).

⁸⁶ Id., (Exhibit JE-45).

68. The second sentence of paragraph 1.2 of the Accession Protocol states, “[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.” As an integral part of the WTO Agreement, the provisions of the Accession Protocol are part of a covered agreement for purposes of Article 1.1 of the DSU.⁸⁷

69. Part I, Section 11, of the Accession Protocol contains China’s commitments on taxes and charges levied on imports and exports. In particular, Part I, paragraph 11.3, states:

China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.

70. Annex 6 of the Accession Protocol is a list of 84 products, each listed sequentially by HS number and accompanied by a description of the product and an export duty rate listed as an *ad valorem* percentage. The Note to Annex 6 states:

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

71. Accordingly, paragraph 11.3 contains a commitment by China to “eliminate all taxes and charges applied to exports” except in two specific situations: (1) where the taxes and charges are covered by Article VIII of the GATT 1994 and applied consistently with the requirements of Article VIII; and (2) where the taxes and charges are imposed on products listed in Annex 6 at a rate less than or equal to the *ad valorem* percentage specified for those products in Annex 6.⁸⁸

2. China’s “Temporary” Export Duties Are Inconsistent with China’s Obligations under Paragraph 11.3 of the Accession Protocol

⁸⁷ *China – Raw Materials I (Panel)*, para. 7.64.

⁸⁸ In *China – Raw Materials I*, the Appellate Body confirmed that the Note to Annex 6 permits China, in “exceptional circumstances,” to increase applied tariffs on the 84 products listed up to the maximum levels set forth in the Annex; it provides no basis for China to impose duties on products not listed in Annex 6. *China – Raw Materials I (AB)*, paras. 284-87.

72. As described in Section IV.C above, China imposes “temporary” export duties at *ad valorem* rates ranging from 5 to 25 percent on various forms of rare earths, tungsten and molybdenum.⁸⁹ These duties are charges applied to exports that China itself terms as “export tariffs” in China’s measures.⁹⁰

73. The export duties resulting from the application of these duty rates are not applied “in conformity with the provisions of Article VIII of the GATT 1994” because export duties do not fall within the scope of that Article. Article VIII:1(a) applies to “[a]ll fees and charges of whatever character (other than ... export duties ...) imposed by contracting parties on or in connection with ... exportation” None of the other provisions of Article VIII applies to export duties either.

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

75. In addition, as the panel and the Appellate Body each found in *Raw Materials I*, the exceptions found in Article XX of the GATT 1994 are not available in the context of China’s commitments in paragraph 11.3 of the Accession Protocol. According to the Appellate Body:

In the light of China’s explicit commitment contained in Paragraph 11.3 to eliminate export duties and the lack of any textual reference to Article XX of the GATT 1994 in that provision, we see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3 [A] proper interpretation of Paragraph 11.3 of China’s Accession Protocol does not make available to China the exceptions under Article XX of the GATT 1994. Consequently, we find that the Panel did not err, in paragraph 7.159 of the Panel Reports, in finding that “there is no basis in China’s Accession Protocol to allow the application of Article XX of the GATT 1994 to China’s obligations in Paragraph 11.3 of the Accession Protocol.”⁹¹

76. Accordingly, China’s maintenance of the temporary export duties applied to the exportation of rare earths, tungsten and molybdenum is inconsistent with China’s commitment

⁸⁹ 2012 *Tariff Implementation Program*, Table 6 (Exhibit JE-45). As set forth above, for purposes of the discussion of China’s export duties, the terms “rare earths,” “tungsten” and “molybdenum” cover the forms of each of these Raw Materials listed in the Chart of Raw Materials Subject to Export Duties (Exhibit JE-6).

⁹⁰ See 2012 *Tariff Implementation Program* (Exhibit JE-45).

⁹¹ See *China – Raw Materials I (AB)*, para. 307.

under paragraph 11.3 of the Accession Protocol to eliminate all taxes and charges applied to exports.⁹² Indeed, the panel in *Raw Materials I* found that the very same series of measures, consisting of, *inter alia*, the *Customs Law, Regulations on Import and Export Duties* and the *Tariff Implementation Program* in force at that time, resulted in the imposition of export duties that were inconsistent with paragraph 11.3 of the Accession Protocol.⁹³ This Panel should reach the same result in the instant dispute.

V. EXPORT QUOTAS

77. As discussed in Sections A to D below, China imposes export quotas on various forms of rare earths, tungsten and molybdenum. These export quotas are inconsistent with China's obligations under GATT Article XI:1, which explicitly prohibits restrictions made effective through a quota on the exportation of any product. Likewise, these export quotas are also inconsistent with China's obligations set forth in paragraphs 162 and 165 of the Working Party Report, as incorporated by paragraph 1.2 of the Accession Protocol. Section A sets out China's licensing framework for goods subject to restricted exportation, such as the Raw Materials subject to quotas. Section B provides an overview of China's export quota regime. Section C discussed the Raw Materials subject to export quotas, while Section D provides background as to the actual quota amounts. Lastly, Section E explains why the export quotas on the Raw Materials are inconsistent with China's obligations under GATT Article XI:1 and paragraphs 162 and 165 of the Working Party Report, as incorporated by paragraph 1.2 of the Accession Protocol.

A. Licensing Framework for Goods Subject to Restricted Exportation

78. China imposes licensing requirements on goods subject to quotas, as well as other goods. For products subject to export quotas, including rare earths, tungsten and molybdenum, China's non-automatic export licensing requirements function as one of the mechanisms by which the export quotas are administered and enforced.⁹⁴

⁹² See *China – Raw Materials I (Panel)*, paras. 7.76, 7.80, 7.84, 7.88, 7.92, 7.97 and 7.101 (finding that Chinese export duties were inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol).

⁹³ *Id.*

⁹⁴ The exportation of goods from China is free and not restricted unless otherwise provided for by law or regulation. *Foreign Trade Law*, Article 14 (Exhibit JE-49); *Import and Export Regulations*, Article 4 (Exhibit JE-50). For such non-restricted goods, China may employ a system of automatic export licensing in order to monitor their exportation. *Foreign Trade Law*, Article 15 (Exhibit JE-49).

79. Under the *Foreign Trade Law*, China maintains the authority to restrict or prohibit the exportation of goods.⁹⁵ China administers its export restrictions via the *Export Licensing Measures*.⁹⁶ China’s Ministry of Commerce (“MOFCOM”)⁹⁷ is the department responsible for the centralized administration of export licenses. As such, MOFCOM is responsible for formulating the rules and regulations on the administration of export licenses, supervising and inspecting the implementation of such measures, and punishing violations and violators. Together with Customs, MOFCOM is responsible for formulating, adjusting and publishing a catalog listing all goods subject to export restriction.⁹⁸ Exportation of the goods listed in the catalog requires approval by MOFCOM⁹⁹ and is subject to export licensing.¹⁰⁰ All goods listed in the catalog, whether subject to quotas or not, are subject to a licensing requirement.

80. For products listed in the catalog, an exporter can only seek export clearance from Customs after obtaining an export license and presenting the export license to Customs for declaration and examination.¹⁰¹ For products subject to export quotas, an applicant for an export license must present, *inter alia*, export quota approval certification in order to obtain an export license.¹⁰² Only by successfully applying for a quota can an exporter obtain the necessary export license.

81. Exporting goods subject to restricted exportation without approval or beyond the scope that is approved, e.g., at levels exceeding the quotas, is subject to investigation and can lead to potential criminal and administrative penalties, including the penalties applicable to smuggling, invalidation of any applicable licenses and suspension or revocation of the right to engage in foreign trade.¹⁰³

⁹⁵ *Foreign Trade Law*, Articles 16, 17 (Exhibit JE-49); *Import and Export Regulations*, Article 35 (Exhibit JE-50).

⁹⁶ *Export Licensing Measures*, Article 2 (Exhibit JE-51).

⁹⁷ China’s Ministry of Commerce was previously known as the Ministry of Foreign Economic Relations and Trade (“MOFERT”) and later the Ministry of Foreign Trade and Economic Cooperation (“MOFTEC”). For ease of reference, this ministry is referred to as “MOFCOM” hereinafter.

⁹⁸ *Foreign Trade Law*, Article 18 (Exhibit JE-49); *Import and Export Regulations*, Article 35 (Exhibit JE-50); *Export Licensing Measures*, Article 3 para. 2 (Exhibit JE-51).

⁹⁹ *Foreign Trade Law*, Article 19 (Exhibit JE-49).

¹⁰⁰ *Export Licensing Measures*, Article 2 (Exhibit JE-51).

¹⁰¹ *Import and Export Regulations*, Article 43 (Exhibit JE-50); *Export Licensing Measures*, Article 6 (Exhibit JE-51).

¹⁰² *Export Quota Measures*, Article 25 (Exhibit JE-52).

¹⁰³ *Foreign Trade Law*, Articles 61, 64 (Exhibit JE-49); *Import and Export Regulations*, Articles 64, 65 (Exhibit JE-50). License issuing entities that issue licenses exceeding their authority are subject to penalties including warnings and suspension or termination of their right to issue licenses. *Export Licensing Measures*,

B. Overview of Export Quotas

82. China restricts the exportation of various forms of rare earths, tungsten and molybdenum by subjecting the exportation of these materials to export quotas.¹⁰⁴ As will be discussed in Section VI, China directly allocates quota amounts to applicants who meet the myriad requirements.¹⁰⁵

83. China's *Foreign Trade Law* subjects goods whose exportation is subject to export quotas to an export quota administration.¹⁰⁶ Under the *Foreign Trade Law*, MOFCOM is the government agency responsible for the centralized administration of all quotas. Specifically, MOFCOM is responsible for setting the total amount of export quotas for the following year no later than October 31 of each year, distributing export quotas, evaluating applications for export quotas, and determining whether to grant quotas.¹⁰⁷ Furthermore, MOFCOM, in collaboration with Customs, is responsible for formulating, adjusting and publishing a catalog listing all goods subject to export quota.¹⁰⁸

84. MOFCOM must approve the exportation of the goods listed in the catalog as subject to quota before they can be exported.¹⁰⁹ Entities that are approved to export under the quotas are issued a certificate of quota after meeting certain standards, which are discussed below. As noted above, only after an exporter obtains a certificate of quota can that exporter seek an export

Articles 21, 36, 38 (Exhibit JE-51); *Measures for Administration of Licensing Entities*, Articles 40, 41, 42 (Exhibit JE-53). Any individual working as staff at a license issuing entity that is responsible for issuing licenses outside the scope of approval is also subject to criminal and administrative penalties, including removal from his position, issuance of a warning, demotion, and dismissal, and the managing head of the entity will also be investigated. *Export Licensing Measures*, Article 42 (Exhibit JE-51); *Measures for Administration of Licensing Entities*, Articles 40, 41 (Exhibit JE-53). Forging, altering without approval, buying and selling export licenses are also acts subject to criminal and civil penalties. *Foreign Trade Law*, Articles 34, 63 (Exhibit JE-49); *Import and Export Regulations*, Article 66 (Exhibit JE-50); *Export Licensing Measures*, Article 39 (Exhibit JE-51); *Measures for Administration of Licensing Entities*, Articles 40, 41 (Exhibit JE-53).

¹⁰⁴ For purposes of the discussion of China's export quotas, the terms "rare earths," "tungsten" and "molybdenum" cover the forms of each of these Raw Materials listed in the Chart of Raw Materials Subject to Quotas (Exhibit JE-7).

¹⁰⁵ *Import and Export Regulations*, Article 39 (Exhibit JE-50).

¹⁰⁶ *Import and Export Regulation*, Article 36 (Exhibit JE-50); *Export Quota Measures*, Article 1 (Exhibit JE-52).

¹⁰⁷ *Foreign Trade Law*, Article 18 (Exhibit JE-49); *Import and Export Regulations*, Article 37-39 (Exhibit JE-50).

¹⁰⁸ *Foreign Trade Law*, Article 18 (Exhibit JE-49), *Import and Export Regulations*, Article 37-39 (Exhibit JE-50).

¹⁰⁹ *Foreign Trade Law*, Article 19 (Exhibit JE-49).

license.¹¹⁰ In turn, if an export license is obtained, the exporter must then seek export clearance from Customs by presenting the certificate of quota (along with other required documentation, including an export license) to Customs for declaration and examination.¹¹¹ Exporting goods subject to restricted exportation without approval or beyond the scope that is approved, e.g., where there is an export prohibition or at levels exceeding the designated quotas, is subject to investigation and potential criminal and administrative penalties, including the penalties applicable to smuggling, invalidation of any applicable licenses, and suspension or revocation of the right to engage in foreign trade.¹¹² Quota administering authorities that distribute quotas exceeding their authority are also subject to penalties.¹¹³

C. Goods Subject to Export Quotas

85. As set forth above, MOFCOM, in collaboration with other relevant departments of the State Council, is required to publish the catalog of goods subject to restricted exportation, including export quotas, within 21 days of the catalog taking effect.¹¹⁴ The catalog effective for the year 2012, the *2012 Export Licensing Management Commodities List*, includes the Raw Materials listed in Exhibit JE-7 as subject to export quotas.¹¹⁵ Exhibit JE-7 shows that China subjects around 100 tariff codes that include various forms of the Raw Materials to export quotas.

D. Export Quota Amounts

86. By way of background, with respect to rare earths for 2012, in late 2011 China published a notice, the *2012 First Batch Rare Earth Export Quota*, announcing that MOFCOM was distributing the “first batch” export quota on rare earths to specific enterprises listed therein. According to the notice, the first batch allocation represents approximately 80% of the total amount of the 2012 export quota for rare earths.¹¹⁶

¹¹⁰ *Export Quota Measures*, Article 25 (Exhibit JE-52).

¹¹¹ *Import and Export Regulations*, Article 41 (Exhibit JE-50); *See Export Quota Measures*, Article 25 (providing that enterprises that receive a certificate of quota must then apply for an export license) (Exhibit JE-52).

¹¹² *Foreign Trade Law*, Articles 61, 64 (Exhibit JE-49); *Import and Export Regulations*, Articles 64, 65 (Exhibit JE-50); *Export Quota Measures*, Article 26 (Exhibit JE-52).

¹¹³ *Export Quota Measures*, Article 29 (Exhibit JE-52).

¹¹⁴ *Import and Export Regulations*, Article 35 (Exhibit JE-50); *Export Quota Measures*, Article 7 (Exhibit JE-52).

¹¹⁵ *2012 Export Licensing Management Commodities List*, Annex 1 (Exhibit JE-48).

¹¹⁶ *2012 First Batch Rare Earth Export Quota* (Exhibit JE-55); *2012 First Batch Rare Earth Export Quota Supplement* (Exhibit JE-56).

87. For the first time, China distinguished the allocation of the more than 50 items covered by the rare earths quota between (1) light rare earths and (2) medium and heavy rare earths. Specifically, China allocated 9,095 MTs of light rare earths and 1,451 MTs of medium and heavy rare earths in the first batch. In addition, MOFCOM conditionally allocated an additional 12,605 MTs of light rare earths and 1,753 MTs of medium and heavy rare earths to “pending enterprises.” According to the *2012 First Batch Rare Earth Export Quota*, “Pending Enterprises” would receive quota licenses if they passed environmental reviews conducted by the Ministry of Environmental Protection by July 2012.¹¹⁷

88. On May 15, 2012, China allocated an additional 9,490 MTs of light rare earths and 1,190 MTs of medium and heavy rare earths in the *2012 First Batch Rare Earth Export Quota Supplement*. According to China, this allocation was a supplement to the first batch allocation, but not the second batch allocation. Specifically, the companies that received the supplemental first batch allocation were those companies that had been previously labeled as “Pending Enterprises” and had subsequently passed the environment review by the Ministry of Environmental Protection.¹¹⁸

89. On August 22, 2012, China issued the second batch allocation for rare earths – i.e., the *2012 Second Batch Rare Earth Export Quota*. In the second batch, China allocated 8,537 MTs of light rare earths and 1,233 MTs of medium and heavy rare earths.¹¹⁹ In total, China’s rare earth quota for 2012 was 30,996 MTs (27,122 MTs of light rare earths and 3,874 MTs of medium and heavy rare earths).

90. With regard to tungsten and molybdenum, China’s measures direct MOFCOM to determine the total amount of the annual export quota for each good subject to export quotas and to announce the total amount of the annual export quota for each product by October 31 of the previous year.¹²⁰ Consistent with this directive, on October 31, 2011, MOFCOM published the 2012 export quota amounts for agricultural and industrial products, which included tungsten and molybdenum, in the *2012 Export Quantity for Agricultural and Industrial Products*.¹²¹ The 2012

¹¹⁷ *2012 First Batch Rare Earth Export Quota* (Exhibit JE-55).

¹¹⁸ *2012 First Batch Rare Earth Export Quota Supplement* (Exhibit JE-56).

¹¹⁹ *2012 Second Batch Rare Earth Export Quota* (Exhibit JE-57). Because the second batch allocation was made after the U.S. panel request, it is outside this panel’s terms of reference.

¹²⁰ *Import and Export Regulations*, Article 38 (Exhibit JE-50); *Export Quota Measures*, Articles 9-11 (Exhibit JE-52).

¹²¹ *2012 Export Quantity for Agricultural and Industrial Products* (Exhibit JE-58).

export quota amounts for these two products was 15,400 MTs of metal content for tungsten and 25,000 MTs of metal content for molybdenum.

91. According to the *2012 First Batch Tungsten and Molybdenum Export Quota*, China allocated 60 percent of the full amount of the quotas for tungsten and molybdenum at the beginning of 2012.¹²² China allocated the remaining 40 percent of these quotas on July 19, 2012 via the *2012 Second Batch Tungsten and Molybdenum Export Quota*.¹²³

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

1. Article XI:1 of the GATT 1994

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

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

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

2. China Uses Quotas to Restrict the Exportation of Certain Raw Materials

94. As set forth in Section V.A above, China maintains an export licensing framework for products subject to export quotas whereby goods subject to quotas cannot be exported without a license. China also maintains a regime to restrict or prohibit the exportation of goods through quotas, which is discussed in Section V.B above. China subjects the exportation of various

¹²² *2012 First Batch Tungsten and Molybdenum Export Quota* (Exhibit JE-59).

¹²³ *2012 Second Batch Tungsten and Molybdenum Export Quota* (Exhibit JE-60). Because the second batch allocation was made after the U.S. panel request, it is outside this panel’s terms of reference.

forms of rare earths, tungsten and molybdenum to quotas, as shown in Section V.C.¹²⁴ These quotas prohibit exportation of these materials above certain quantities, which are set forth in Section V.D, and accordingly restrict the exportation of these materials.

95. China maintains numerous general measures that establish an export quota regime. First, Article 19 of the *Foreign Trade Law* provides in relevant part that the “state applies quota and licensing system to the management of goods subject to ... export restrictions”¹²⁵ Second, Article 36 of the *Import and Export Regulations* provides that “[g]oods restricted from exportation that are subject to quantitative restrictions by the state are subject to the administration of quotas.”¹²⁶ Third, the *Export Quota Measures* provide that MOFCOM “conducts an export quota administration of some commodities restricted from export by the State.”¹²⁷

96. As the government agency responsible for administering the export quotas, MOFCOM, in collaboration with Customs, identifies the goods subject to export quotas on a list published annually.¹²⁸ For the export quotas taking effect on January 1, 2012, MOFCOM and Customs published the *2012 Export Licensing List Notice*, which identifies rare earths, tungsten and molybdenum as products subject to export quotas. The 2012 quota amounts for these materials are set forth in Section V.D above.

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

98. Indeed, the panel in *China – Raw Materials I* found that China imposed export quotas on a number of raw materials through a series of measures, including the *Foreign Trade Law* and *Import and Export Regulations*.¹²⁹ According to the panel, this series of measures resulted in

¹²⁴ For purposes of the discussion of China’s export quotas, the terms “rare earths,” “tungsten” and “molybdenum” cover the forms of each of these Raw Materials listed in the Chart of Raw Materials Subject to Quotas (Exhibit JE-7).

¹²⁵ *Foreign Trade Law*, Article 19 (Exhibit JE-49).

¹²⁶ *Import and Export Regulations*, Article 36 (Exhibit JE-50).

¹²⁷ *Export Quota Measures*, Article 3 (Exhibit JE-52).

¹²⁸ *Foreign Trade Law*, Article 18 (Exhibit JE-49); *Import and Export Regulations*, Article 35 (Exhibit JE-50); *Export Quota Measures*, Article 7 (Exhibit JE-52).

¹²⁹ *China – Raw Materials I (Panel)*, paras. 7.219 - 7.223.

WTO-inconsistent export quotas.¹³⁰

3. China’s Export Quotas Are Also Inconsistent with China’s Obligations under Paragraphs 162 and 165 of the Working Party Report

99. Paragraphs 162 and 165 of the Working Party Report, by way of paragraph 1.2 of China’s Accession Protocol, contain enforceable commitments with respect to the elimination of export restrictions.

100. Paragraph 1.2 of China’s Accession Protocol states in pertinent part: “This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.”¹³¹ Paragraph 342 of the Working Party Report contains a reference to both paragraphs 162 and 165.¹³²

101. Paragraph 162 of the Working Party Report states in pertinent part: “The representative of China confirmed that China would abide by WTO rules in respect of non-automatic export licensing and export restrictions. The *Foreign Trade Law* would also be brought into conformity with GATT requirements. Moreover, export restrictions and licensing would only be applied, after the date of accession, in those cases where this was justified by GATT provisions.”¹³³

102. Additionally, paragraph 165 of the Working Party Report provides: “The representative confirmed that upon accession, remaining non-automatic restrictions on exports would be notified to the WTO annually and would be eliminated unless they could be justified under the WTO Agreement or the Protocol.”¹³⁴

103. However, as set forth above, China did not eliminate its export restrictions upon accession. In addition to non-automatic export licensing, China continues to maintain additional export restrictions including export quotas on rare earths, tungsten and molybdenum. These export quotas are not in conformity with WTO rules including, *inter alia*, Article XI of the GATT 1994, as discussed above. Accordingly, China’s export quotas are inconsistent with paragraphs 162 and 165 of the Working Party Report as incorporated in paragraph 1.2 of China’s

¹³⁰ Id., at para. 7.225.

¹³¹ Exhibit JE-2.

¹³² Exhibit JE-1.

¹³³ Exhibit JE-1.

¹³⁴ Exhibit JE-1.

Accession Protocol.

VI. QUOTA ADMINISTRATION

104. As shown below, China imposes (1) prior export experience and export performance and (2) minimum capital requirements as criteria for applicants to be eligible to receive an allocation of the quotas on rare earths and molybdenum. These two requirements are inconsistent with China’s obligations contained in Part I, paragraph 5.1 of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report, as incorporated via paragraph 1.2 of China’s Accession Protocol, whereby China agreed not to condition the right to trade on prior export experience and export performance or minimum capital requirements.

A. Rare Earths

105. This Section describes China’s quota administration measures for the export quotas on the rare earth materials covered in this dispute.

106. As discussed above, rather than publish the entire rare earths quota amount for a given year in advance, China issues notices during the year announcing that certain “batches” of the rare earth export quota are being allocated to specific enterprises.¹³⁵

107. China requires enterprises to apply to receive an allocation of the rare earths export quota for a given year in November of the previous year. As part of that application process, China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation under the quota. Applicant enterprises that do not satisfy the requisite criteria are not permitted to export rare earths. In addition, MOFCOM administers different application processes and criteria for manufacturing enterprises and trading enterprises.¹³⁶ Subsections 1 and 2 below set out process for these different types of enterprises; Subsection 3 below sets out specific documentary requirements.

1. Manufacturing Enterprises

108. MOFCOM issued procedures governing the rare earth quota application process in 2012 for manufacturing enterprises. That measure – the *2012 Rare Earth Export Quota Application*

¹³⁵ *2012 First Batch Rare Earth Export Quota* (Exhibit JE-55); *2012 Second Batch Rare Earth Export Quota* (Exhibit JE-57).

¹³⁶ *See 2012 Rare Earth Export Quota Application Procedures* (Exhibit JE-61).

Procedures – provides the requirements that manufacturing enterprises must satisfy in order to be eligible to receive an allocation under the quota. With respect to manufacturing enterprises, the applicants are required to, *inter alia*:

- (i) be registered as a foreign trade operator and have independent legal status;
- (ii) observe relevant provisions of rare earth industrial plans, industrial policies and industrial management;
- (iii) meet prior export experience and export performance from 2008-2010 (for enterprises whose export quotas were acquired after 2008, the export performance is based on all years from the year in which the quota was acquired up to 2010);
- (iv) obtain rare earth raw materials from an eligible mining enterprise;
- (v) have environmental treatment facilities suitable to the production scale of the applicant; abide by the emissions standards at the state or local level and according to the certification of the environmental protection departments above the province level; pay pollution fees for 2010 and 2011; be without illegal activities in relation to the environment and have formulated emergency proposals and auxiliary facilities;
- (vi) obtain smelted and separated rare earth materials from a company meeting the environmental requirements set forth by the Ministry of Environmental Protection;
- (vii) observe relevant policies and provisions of the national land administration;
- (vii) observe relevant laws and regulations of the state and relevant local government; buy pension, social, medical, occupational and maternity insurance; pay such charges on-time; and
- (viii) not conduct activities that are noncompliant with relevant laws and regulations of the state.¹³⁷

2. Trading Enterprises

¹³⁷ 2012 Rare Earth Export Quota Application Procedures, Section I(1) (Exhibit JE-61).

109. With respect to Chinese trading companies, China requires that such enterprises also satisfy the requirements set out above in respect of manufacturing enterprises. However, China imposes a number of additional criteria on trading enterprises. Specifically, trading enterprise applicants are required to have a minimum registered capital of RMB 50 million. Trading enterprises are also required to have ISO 9000 quality management certification.¹³⁸

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

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

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

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

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

3. Required Documents

112. China requires enterprises applying to export rare earths under the quota to submit the following documents:

(i) environmental compliance certificates for 2010 and 2011;

(ii) ISO 9000 quality management system certificate;

(iii) supporting documents issued by the labor and social insurance administration confirming the enterprises' participation in certain social programs;

¹³⁸ 2012 Rare Earth Export Quota Application Procedures, Section I(2) (Exhibit JE-61).

(iv) for manufacturing enterprises: tax credit certificates or tax credit application forms; export customs declarations forms and export verification certificates; for smelted products, the name of the mining enterprise, purchasing quantity and corresponding value and invoices and certificates of the mineral suppliers; and

(v) for trading companies: value added invoices and export verification certificates.¹³⁹

B. Molybdenum

113. This Section describes China’s quota administration measures for the molybdenum materials covered in this dispute.

114. For the export quotas on molybdenum, MOFCOM is directed by the *Export Quota Measures* to determine the total amount of the quota for each year and, in doing so, is directed to take into account certain factors. These factors are: (i) the needs of guaranteeing the safety of the national economy; (ii) the needs of protecting limited domestic resources; (iii) development planning, objectives and policies of the State on the relevant industries; and (iv) demands on the international and domestic markets, and the production and sales status.¹⁴⁰

115. In addition, MOFCOM is directed to administer an application process for the export quota on molybdenum. As part of that process, only enterprises that have the “license or qualification for import and export activity in accordance with laws and no record of violations of laws or regulations in economic activities in the last three years” may apply for a quota.¹⁴¹

116. Enterprises under local administration are required to submit their applications for export quotas to the relevant local authorities, which review such applications and report to MOFCOM on the applications received. Enterprises under central administration submit their applications for export quota directly to MOFCOM. MOFCOM accepts both the applications filed by enterprises under central administration and the applications that have been preliminarily reviewed and submitted by the local administrative authorities.¹⁴²

¹³⁹ 2012 Rare Earth Export Quota Application Procedures, Section III (Exhibit JE-61).

¹⁴⁰ *Export Quota Measures*, Article 10 (Exhibit JE-52). MOFCOM may also adjust the annual quota amount by September 30 of the preceding year.

¹⁴¹ *Id.*, Article 13 (Exhibit JE-52).

¹⁴² *Id.*, Article 14 (Exhibit JE-52).

117. MOFCOM then distributes the quotas to enterprises under central administration and distributes quotas to local administrative authorities, which further distribute those quotas to the enterprises within their respective areas.¹⁴³

118. In order to guide the quota allocation process, MOFCOM and the local administrative authorities are directed to take into consideration the following factors: (i) the export performance of the particular good; (ii) the utilization rate of the export quota; (iii) the “operation capacity” of the applicant; and (iv) the “production scale and resources status, *etc.*,” of the applicant enterprises or regions” during the previous three years.¹⁴⁴

119. The export quotas allocated to enterprises may be adjusted by MOFCOM under the following circumstances: (i) major changes in the international market; (ii) major changes in domestic resources; or (iii) obvious imbalances in the pace of quota-use compared to other regions or centrally administered enterprises.¹⁴⁵ To that end, the *Export Quota Measures* direct the local administrative authorities to inspect the utilization rate of export quotas and, where prescribed utilization rate requirements are not met, to redistribute quota amounts.¹⁴⁶

120. MOFCOM published the 2012 molybdenum quota amount on October 31, 2011 and made the first batch allocation on December 26, 2011.¹⁴⁷ MOFCOM made the second batch allocation on July 19, 2012.¹⁴⁸

121. China requires enterprises to apply to receive an allocation of molybdenum under the export quota for a given year in November of the previous year. As part of that process, China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation of the quota. Applicant enterprises who do not satisfy the requisite criteria are not permitted to export molybdenum. In addition, MOFCOM administers different application processes and criteria for manufacturing enterprises and trading enterprises.¹⁴⁹

¹⁴³ Id., Article 17 (Exhibit JE-52).

¹⁴⁴ Id., Article 19 (Exhibit JE-52) (emphasis added).

¹⁴⁵ Id., Article 20 (Exhibit JE-52).

¹⁴⁶ Id., Article 21 (Exhibit JE-52).

¹⁴⁷ *2012 Export Quantity for Agricultural and Industrial Products* (Exhibit JE-58); *2012 First Batch Tungsten and Molybdenum Export Quota* (Exhibit JE-59).

¹⁴⁸ *2012 Second Batch Tungsten and Molybdenum Export Quota* (Exhibit JE-60). Because the second batch allocation was made after the U.S. panel request, it is outside the panel’s terms of reference.

¹⁴⁹ See *2012 Molybdenum Export Quota Application Procedures* (Exhibit JE-63).

1. Manufacturing Enterprises

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

- (i) have approved production that is in compliance with current industry policies; be qualified to engage in foreign trade operations; have independent legal status;
- (ii) have actual export performance from 2008 to 2010 if the enterprise had previously acquired export quota or, if a new applicant, successfully met the production requirements from 2008-2010, which were:
 - (a) a combined production of 6,000 MTs of ferromolybdenum and molybdenum oxide; and
 - (b) production capacity of molybdenum powder and molybdenum metal of 600 MTs; and
 - (c) production of molybdate of more than 1,600 MTs; although these requirements can be lowered if the applicant produces certain high-tech products;
- (iv) pass ISO 9000 certification;
- (v) meet listed production standards, including recovery rates, energy consumption, possession of specialized laboratory and equipment, and procedures for processing ammonium and sulfur dioxide gas;
- (vi) observe relevant laws and regulations of the state and relevant rules of local governments; and
- (vii) have no activities that are noncompliant with relevant laws and regulations of the state during 2008-2010.

2. Trading Enterprises

123. With respect to trading companies, China requires such enterprises to satisfy not only the requirements set out above for production enterprises, but also a number of additional criteria. In particular, trading enterprises are required to have a minimum registered capital of RMB 30 million. A trading enterprise must also possess ISO 9001 quality management certification.¹⁵⁰

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

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

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

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

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

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

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

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

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

3. Required Documents

¹⁵⁰ 2012 Molybdenum Export Quota Application Procedures (Exhibit JE-63).

126. China further requires Chinese enterprises applying to export molybdenum under the quota to submit the following documents:

- (i) environmental compliance certificates for 2010 and 2011;
- (ii) ISO 9000 quality management system certificate;
- (iii) supporting documents issued by the labor and social insurance administration confirming the enterprises' participation in certain social programs; and
- (iv) for manufacturing enterprises: VAT invoices for related products in previous years.¹⁵¹

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

1. Introduction

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

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

129. In addition to restricting the exportation of rare earths and molybdenum through export quotas, China also restricts the right of enterprises to export rare earths and molybdenum by requiring enterprises to satisfy certain criteria – i.e., the prior export experience and export performance and minimum registered capital requirements underlined and discussed in Sections VI.A and VI.B above – in order to be eligible to receive a quota allocation. For the reasons described below, the measures establishing China's current trading rights regime for the forms of rare earths and molybdenum subject to export quotas are inconsistent with China's obligations

¹⁵¹ 2012 Molybdenum Quota Application Procedures (Exhibit JE-63).

contained in Part I, paragraphs 5.1 and paragraphs 83 and 84 of the Working Party Report, as incorporated by 1.2 of the Accession Protocol.

2. China's Trading Rights Commitments

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

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

131. Paragraph 1.2 of Part I of the Accession Protocol also states in pertinent part:

This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.

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

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

(b) With respect to wholly Chinese-invested enterprises, the representative of China stated that although foreign-invested enterprises obtained limited trading rights based on their approved scope of business, wholly Chinese-invested enterprises were now required to apply for such rights and the relevant authorities applied a threshold in approving such applications. In order to accelerate this approval process and increase the availability of

trading rights, the representative of China confirmed that China would reduce the minimum registered capital requirement (which applied only to wholly Chinese-invested enterprises) to obtain trading rights to RMB 5,000,000 for year one, RMB 3,000,000 for year two, RMB 1,000,000 for year three and would eliminate the examination and approval system at the end of the phase-in period for trading rights.

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

133. Finally, paragraph 84, which likewise is referred to in paragraph 342 of the Working Party Report, states:

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

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

134. In sum, China committed to providing all enterprises in China the right to trade in rare

earths and molybdenum via paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report. Paragraph 5.1 states three relevant elements to this obligation. China shall: (1) grant the “right to trade” to “all enterprises in China;” (2) grant the right to trade with respect to “all goods” except for those listed in Annexes 2A and 2B; and (3) “complete all necessary legislative procedures to implement” its trading rights commitments “within three years after accession.” Each element is addressed in turn below.

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

136. The first element of paragraph 5.1 also identifies the entities to which China has committed to grant the right to trade, i.e., “all enterprises in China.” Every enterprise throughout the entire customs territory of China, without exception, shall have the right to trade. As long as an enterprise is in China, the obligation in paragraph 5.1 contains no additional conditions or restrictions on which enterprises shall have the right to trade.

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

138. The second element of the obligation contained in paragraph 5.1 provides that the right to trade applies to “all goods” except those listed in Annexes 2A and 2B. Annex 2A consists of two parts – Annex 2A1 entitled “Products Subject to State Trading (Import)” and Annex 2A2 entitled “Products Subject to State Trading (Export).” As the U.S. claim of inconsistency regarding China’s obligations contained in paragraph 5.1 concerns the right to export, only Annex 2A2 is relevant here. Rare earths and molybdenum are not covered by Annex 2A2.¹⁵²

139. Annex 2B identifies a list of six product headings – natural rubber, timber, plywood, wool, acrylic and steel – that are divided into 245 products according to their eight-digit HS number. Trading rights for all of these products were to be “liberalized within three years” following China’s accession to the WTO – i.e., by December 11, 2004.¹⁵³ Annex 2B is not

¹⁵² Accession Protocol, Annex 2A2, p. 20 (Exhibit JE-2).

¹⁵³ Accession Protocol, Annex 2B, p. 30 (Exhibit JE-2).

relevant to these proceedings for two reasons. First, none of the Raw Materials is covered by Annex 2B; second, this limitation is no longer applicable to China's trading rights commitments, since it expired in 2004.

140. Thus, all enterprises in China should now have the right to export from China all goods, except those listed in Annex 2A2 of the Accession Protocol. Annex 2A2 does not include rare earths or molybdenum. To limit the right to export any goods not listed in that Annex, including rare earths and molybdenum, would be inconsistent with China's trading rights commitments.

141. The third element of paragraph 5.1 established that within three years after accession China was required to complete all necessary legislative procedures to implement its obligations with respect to the right to trade. This three-year period referred to in the first sentence of paragraph 5.1 expired on December 11, 2004, the third year anniversary of China's accession to the WTO.

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

143. Paragraph 84(a) of the Working Party Report likewise confirms China's obligations with respect to trading rights, as set forth in paragraph 5.1 of the Accession Protocol. Paragraph 84(a) provides that China's trading rights obligations apply to all enterprises in China, as of December 11, 2004, with regard to all products outside Annex 2A. As noted above, rare earths and molybdenum are not listed in Annex 2A and these two raw materials are, therefore, covered by the right to export. Paragraph 84(a) also confirms China's commitment to eliminate its "examination and approval" system of trading rights within three years after accession at which time "China would permit all enterprises in China and foreign enterprises and individuals ... to export and import all goods."

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

145. Furthermore, paragraph 83(b) confirms China's commitment to eliminate the "examination and approval" system for enterprises to be granted trading rights including by eliminating any minimum registered capital requirements. Paragraph 84(b) also confirms that

“trading rights would be granted in a nondiscriminatory way” and that in granting trading rights to foreign enterprises in China, China committed to eliminate prior experience and minimum registered capital requirements.¹⁵⁴

3. China’s Measures Allocating the Rare Earth and Molybdenum Export Quotas Are Inconsistent with China’s Trading Rights Commitments

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

147. The *Import and Export Regulations* provides that MOFCOM is responsible for the administration of export quotas, that enterprises seeking to export under the quota must apply to do so, and that the relevant administrative authorities must decide whether to grant those applications.¹⁵⁵ The *2012 Rare Earth Export Quota Application Procedures* and *2012 Molybdenum Export Quota Application Procedures*, issued by MOFCOM, govern the application process for the allocation of the rare earths and molybdenum export quotas. These measures prescribe several criteria that applicants must satisfy in order to be eligible to export under the quotas. One of those criteria is that the enterprise have exported the requisite amount of rare earths or molybdenum in the previous three-year period, or have supplied for export the requisite amount of rare earths or molybdenum in the previous three-year period.¹⁵⁶ In addition, trading companies are also required to have a registered capital of at least RMB 50 million to export rare earths and RMB 30 million to export molybdenum.¹⁵⁷

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

¹⁵⁴ See *China – Audiovisual Products (Panel)*, paras. 7.249-7.252, 7.260-7.266, 7.285-7.299, 7.313-314, 7.318-324.

¹⁵⁵ *Import and Export Regulations*, Articles 36-40 (Exhibit JE-50); See also *Export Quota Measures*, Articles 13-16 (Exhibit JE-52).

¹⁵⁶ *2012 Rare Earth Export Quota Application Procedures* (Exhibit JE-61); *2012 Molybdenum Export Quota Application Procedures* (Exhibit JE-63).

¹⁵⁷ *2012 Rare Earth Export Quota Application Procedures* (Exhibit JE-61); *2012 Molybdenum Export Quota Application Procedures* (Exhibit JE-63).

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

150. In fact, the panel in *China – Raw Materials I* found that China’s prior export experience and export performance and minimum registered capital requirements were inconsistent with China’s trading rights commitments. Specifically, the panel found that “China’s prior export performance and minimum registered capital requirements are inconsistent with Paragraphs 1.2 and 5.1 of China’s Accession Protocol, read in combination with Paragraphs 83(a), 83(b); and Paragraphs 84(a) and 84(b) of China’s Working Party Report.”¹⁵⁸

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

4. Conclusion

152. China not only subjects the exportation of rare earths and molybdenum to quotas, China also further restricts the exportation of these materials by restricting the right of enterprises to export the materials. These restrictions are inconsistent with important and explicit commitments China made at the time of its accession to eliminate prior export experience and export performance and registered capital as criteria for the right to export.

¹⁵⁸ *China – Raw Materials I (Panel)*, para. 7.677. While this part of the report was not ultimately adopted by the DSB, the Panel may still take it into account in its deliberations and, to the extent the Panel finds its analysis, reasoning, and conclusions persuasive, the Panel may follow it. *EU – Footwear*, para. 7.83. There is no reason to question the panel’s analysis in *China – Raw Materials I* of China’s trading rights commitments.

VII. CONCLUSION

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