

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

(DS431, DS432, DS433)

**SECOND WRITTEN SUBMISSION
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TABLE OF REPORTS CITED

Short Form	Full Citation
<i>Brazil – Tyres (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>Brazil – Tyres (Panel)</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS332/AB/R
<i>Canada – Herring and Salmon</i>	GATT Panel Report, <i>Canada – Measures Affecting Exports of Unprocessed Herring and Salmon</i> , L/6268, adopted 22 March 1988, BISD 35S/98
<i>China – Audiovisual Products (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>China – Audiovisual Products (Panel)</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R, adopted 19 January 2010 as modified by the Appellate Body Report, WT/DS363/AB/R
<i>China – Raw Materials (AB)</i>	Appellate Body Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012
<i>China – Raw Materials (Panel)</i>	Panel Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R, WT/DS395/R, WT/DS398/R, adopted 22 February 2012, as modified by the Appellate Body Report, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R
<i>EC – Asbestos (Panel)</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R
<i>EC – Tariff Preferences (Panel)</i>	Panel Report, <i>European Communities – Conditions for Granting Tariff Preferences to Developing Countries</i> , WT/DS246/R, adopted 20 April 2004, as modified by the Appellate Body Report, WT/DS246/AB/R

<i>EU – Footwear (Panel)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R, adopted 22 February 2012
<i>Korea – Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, adopted 10 January 2001
<i>U.S. – COOL (AB)</i>	Appellate Body Report, <i>United States – Certain Country of Origin Labeling (COOL) Requirements</i> , WT/DS384/AB/R, adopted 23 July 2012
<i>U.S. – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Better Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>U.S. – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>U.S. – Shrimp (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998
<i>U.S. – Tuna (Panel)</i>	GATT Panel Report, <i>United States – Prohibition of Imports of Tuna and Tuna Products from Canada</i> , L/5198 - 29S/91, adopted 22 February 1982

TABLE OF EXHIBITS

Joint Exhibit No.	Description
JE-129	Roderick G. Eggert: Rare Earth Elements, 25 April 2013 (Rare Earth Report)
JE-130	PWC: Tungsten Study, September 2012 (Tungsten Report)
JE-131	Roderick G. Eggert: Molybdenum, 25 April 2013 (Molybdenum Report)
JE-132	Notice relating to the publishing on the internet of the list of industries which preliminary meet the 2011 rare earth and coke export quota reporting requirements, PRC Ministry of Commerce, Foreign Trade Department, 14 December 2010
JE-133	Announcement No. 79, 2010 of the Ministry of Commerce Promulgating Qualification Standards for State Trade Export Enterprises and Export Supplying Enterprises of Tungsten Products, Antimony Products and Silver and Annual Examination Declaration Procedures of 2011, PRC Ministry of Commerce, 10 November 2010
JE-134	Announcement No 80, 2010 of the Ministry of Commerce concerning the 2011 indium, molybdenum export enterprises annual examination standards and procedures, PRC Ministry of Commerce, 10 November 2010
JE-135	China Expands Resource Tax to Nation, The Wall Street Journal, 10 October 2011
JE-136	Professor Gene M. Grossman: Export Duties as a Means to Address Environmental Externalities
JE-137	2012 Tungsten Price Data
JE-138	The rare earth capital city: In the grasslands popped up a new city dedicated to science and technology, China Tax News, 12 October 2012
JE-139	Ganzhou City, preferential tax corporate income tax policy for enterprise development, Tax Rate, 22 January 2013
JE-140	China to impose rare earth resource tax, Xinhua report, 24 March 2010 (http://news.xinhuanet.com/english2010/china/2011-03/24/c_13796465.htm)

JE-141	Professor L Alan Winters: Under-filled export quotas do not indicate that the quotas impose no costs on non-Chinese users, 25 April 2013
JE-142	Website of the Baotou National Rare Earth Hi-Tech Industrial Development Zone: http://www.rev.cn/en/int.htm (visited on 24 April 2013)
JE-143	Rare Earth Invoices Are Said to Be Saving Illegal Companies and Intensifying Market Confusion, Xinhua Energy, 24 October 2012
JE-144	State Regulation Exists in Name Only and Shut-Down Rare Earth Companies Reopen Successively in Other Areas, Xinhua Finance, 15 October 2012
JE-145	Establishment of Subsidiary, company release by HOYA Corporation, 16 June 2011
JE-146	Shin-Etsu Chemical to set up a base in China to manufacture magnet alloys for rare earth magnets, company release by Shin-Etsu Chemical Co., Ltd, 2012
JE-147	On addition of capital to Chinese joint venture for increased optical glass production capacity, company release by Ohara Inc, 20 October 2011
JE-148	China Cuts 2012 Rare Earth Export Quota, AP Asia, 27 December 2011
JE-149	U.S. Called Vulnerable Report Says, International Herald Tribune, 16 December 2010
JE-150	Drastic increase in prices due to Chinese speculation International market prices, Nikkan Sangyo Newspaper, 13 May 2011
JE-151	Rare earth prices on the rise since the end of May, Asahi Newspaper, 4 July 2011
JE-152	Regarding Printing and Distribution of Notice on Preferential Policies of Fujian (Longyan) Rare Earth Industrial Park to Encourage Investments of Businessmen, Longzhengzo [2010] No. 388, 27 September 2010
JE-153	Jiangxi Province Twelfth Five-Year Rare Earth Plan
JE-154	Notice Concerning Printing and Issuing “Export Catalogue of China High and New Technology Products” 2006 Version, Guo Ke Fa Ji Zi “2006” No. [6]
JE-155	Notice Concerning Issuing “China High and New Technology Product Catalogue” from the Ministry of Science and Technology, Ministry of Finance, and State Administration of Taxation, Guo Ke Fa Ji Zi [2000] No. 328

JE-156	Customs Import and Export Tariff of the People's Republic of China (2012), Economic Daily Press
JE-157	Price Data Ce Oxide, Asian Metal
JE-158	Price Data La Oxide, Asian Metal
JE-159	Price Data Ne Metal, Asian Metal
JE-160	Price Data Dy Metal, Asian Metal
JE-161	Price Data La(99%) and La(99.999%), Asian Metal
JE-162	Monthly Average Exchange Rate 2010-2012

I. INTRODUCTION

1. Despite commitments made by China when it acceded to the World Trade Organization (“WTO”), China maintains a number of restraints on the exportation of important raw materials – various forms of rare earths, tungsten and molybdenum (together the “Raw Materials”).¹ China’s policies of imposing export restraints on these Raw Materials are driven by and help to fuel the dramatic expansion of China’s downstream industries, to the detriment of the industries and workers of other Members. The export restraints at issue in this dispute are inconsistent with WTO rules. Those rules provide a firm foundation for international trade and development; contrary to China’s argumentation, China’s pursuit of its economic objectives neither justifies China’s breach of those rules nor provides a basis for reading the WTO Agreement so as to weaken or nullify those rules.

2. In addition to their inconsistency with WTO rules, China’s export restraints distort the playing field on which Members compete. Specifically, the export restraints operate to make the raw material inputs at issue available to Chinese producers at lower prices. At the same time, the export restraints drive up world prices and limit access to these Raw Materials for producers outside China, thereby creating a competitive disadvantage on them and ultimately putting pressure on them to move their operations, technologies, and jobs to China.

3. 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.²

4. At the heart of the dispute are the export duties and export quotas that China maintains on these products. China fails to rebut the complainants’ claims that these export restraints are inconsistent with China’s commitments in its Protocol of Accession to the WTO (“Accession Protocol”), which incorporates commitments made by China in the Report of the Working Party on China’s Accession to the WTO (“Working Party Report”), and its obligations under the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”). In fact, China concedes the inconsistency of the export restraints with the relevant obligations.³ While China invokes certain exceptions of the GATT 1994 to justify its measures, China’s reliance on these exceptions is unavailing.

¹ See Chart of Raw Materials Names (Exhibit JE-4), 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.

² 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 (which in turn are used to produce 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.

³ See China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras 30-33.

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

6. China’s statements in the course of this dispute and the design and operation of the measures have confirmed that the export restraints – both duties and quotas – serve the objective of ensuring China’s continued economic growth. Specifically, China wants to restrain the export of these raw materials “to promote [its] own development into the production of more sophisticated goods and services.”⁴ This, and other statements and evidence that we will discuss in this submission, belie China’s arguments in support of its defenses.

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

II. CHINA’S EXPORT DUTIES ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL

A. The Prima Facie Case

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

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

10. The rare earths, tungsten⁶ and molybdenum products at issue in this dispute on which China imposes export duties are not included in the Annex 6 list of reserved products. The

⁴ China’s First Written Submission, para. 58.

⁵ See Exhibit JE-6; Exhibit JE-45.

⁶ 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.

export duties China imposes on rare earths, tungsten and molybdenum are therefore inconsistent with China’s obligations under Paragraph 11.3 of the Accession Protocol.

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

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

B. Article XX Is Not Applicable to China’s Export Duty Commitments in Paragraph 11.3 of the Accession Protocol

13. For the reasons set forth in the U.S. first written submission, submissions regarding China’s request for a “preliminary ruling,” and first oral statement, the exceptions in Article XX are not available as a defense to a breach of the export duty commitments in Paragraph 11.3 of China’s Accession Protocol.⁷ Therefore, China’s reliance on the exception contained in Article XX(b) of the GATT 1994 to justify its export duties on rare earths, tungsten and molybdenum is unavailing.

14. The United States will not repeat in this submission the arguments that it has already presented on this issue. Rather, the United States would emphasize that the conclusion that the Article XX exceptions are not available to justify breaches of the export duty commitments in Paragraph 11.3 of the Accession Protocol is firmly grounded in the customary rules of treaty interpretation. China’s arguments to the contrary have no basis in those rules, and instead rely upon an “intrinsic relationship” test that not only lacks any basis in the Vienna Convention on the Law of Treaties, but also would yield inconsistent and unpredictable results.

⁷ U.S. First Written Submission, para. 75; U.S. Response to the Request of China for a “Preliminary Ruling,” paras. 15-36; U.S. Response to China’s Rebuttal Submission Regarding its Request for a “Preliminary Ruling,” paras. 7-21; U.S. Oral Statement at the First Substantive Meeting with the Panel, paras. 9-11.

1. Application of the customary rules of treaty interpretation yields the conclusion that Article XX of the GATT 1994 is not available to justify breaches of Paragraph 11.3, and China’s proposed “intrinsic relationship” approach should be rejected

15. An analysis of both the text and context of Paragraph 11.3 makes clear that the exceptions of Article XX of the GATT 1994 are not applicable to Paragraph 11.3 of the Accession Protocol. Paragraph 11.3 contains its own exceptions to the commitment to “eliminate all taxes and charges applied to exports. . . .”⁸ The first exception is Annex 6, which provides a list of products for which China reserved the right to impose export duties and a maximum rate which the export duties on those products may not exceed. The second exception is for “taxes and charges . . . applied in conformity with the provisions of Article VIII of the GATT 1994.” There is no textual basis in Paragraph 11.3 for applying the exceptions in Article XX to the export duty commitment in Paragraph 11.3. In contrast, other commitments in China’s Accession Protocol and Working Party Report do include language that captures the exceptions of the GATT 1994.⁹

16. Both the panel and the Appellate Body in *China – Raw Materials* concluded that Article XX of the GATT 1994 is not available to justify breaches of Paragraph 11.3. As the United States has explained, their conclusion is consistent not only with a thorough application of the customary rules of treaty interpretation,¹⁰ but also with the reasoning in *China – Audiovisual Products*, in which the Appellate Body found that the explicit reservation of a “right to regulate trade in a manner consistent with the WTO Agreement” provided a basis for finding that the exceptions in Article XX were available as a defense for a breach of the trading rights commitment.¹¹

17. China would have the Panel eschew the customary rules of treaty interpretation and instead apply the “intrinsic relationship” test that China devised in order to conclude that Article XX of the GATT 1994 is available to justify its breach of its export duties commitments in Paragraph 11.3. However, as the United States has explained, China’s “intrinsic relationship” test has no basis in the customary rules of treaty interpretation, is in no way supported by the text of the covered agreements, and is flatly inconsistent with the well-reasoned approach taken by the panel and the Appellate Body in *China – Raw Materials*.¹²

⁸ U.S. Response to the Request of China for a “Preliminary Ruling,” paras. 20-21.

⁹ U.S. Response to the Request of China for a “Preliminary Ruling,” para. 22; U.S. Comments on China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel, paras. 4-10.

¹⁰ U.S. Response to the Request of China for a “Preliminary Ruling,” paras. 25-28.

¹¹ *China – Audiovisual Products (AB)*, paras. 218-23.

¹² U.S. Response to Request of China for a “Preliminary Ruling,” paras. 31-36; U.S. Response to China’s Rebuttal Submission Regarding its Request for a “Preliminary Ruling,” paras. 7-15; U.S. Answers to the Panel’s Questions Following the First Substantive Meeting of the Panel, paras. 75-77; U.S. Comments on China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 8-

18. Multiple provisions of China’s accession documents – including Paragraphs 11.1 and 11.2 of the Accession Protocol, which provide immediate context for Paragraph 11.3, as well as Paragraph 5.1 of the Accession Protocol and Paragraphs 160 and 162 of the Working Party Report – make clear that the negotiators of China’s accession commitments knew how to incorporate references to the GATT 1994 when they intended to do so. Indeed, Paragraph 11.3 itself refers to Article VIII of the GATT 1994 in delineating one of the two exceptions that are available for breaches of that commitment. China’s tortured reading of those many other provisions of China’s accession documents cannot change the fact that Paragraph 11.3 includes no such referential language, and completely fails to address the fact that Paragraph 11.3 provides for its own exceptions.

19. In advocating its proposed “intrinsic relationship” approach to the interpretation of Paragraph 11.3, China in effect suggests that the Panel does not need to bother reading Paragraph 11.3 itself, or Article XX of the GATT 1994. Under China’s proposed approach, interpretation of Paragraph 11.3 is a mix-and-match exercise: some provisions of China’s accession commitments are an integral part of one or potentially more agreements, while others are not. According to China, the way to conduct this exercise is for a panel to ask and answer the hypothetical question, “[I]f the WTO membership as a whole were subject to the ‘WTO-plus’ obligation at hand, in which covered agreement would the drafters have logically included such an obligation.”¹³

20. Aside from the fact this proposed approach has no basis in the customary rules of treaty interpretation, China’s proposed method for determining of which agreement(s) Paragraph 11.3 is an integral part, is internally inconsistent. For example, according to China, Paragraph 11.3 is an integral part of the GATT 1994, but apparently neither Paragraph 11.1, Paragraph 11.2, nor Paragraph 5.1 is – even though each of them may also discipline trade in goods.¹⁴ Similarly, China argues that it must be assumed that China retained the right to impose export duties that satisfy the conditions of Article XX of the GATT 1994, in the absence of express language to the contrary, but at the same time China acknowledges that explicit language was required in order for China to retain the right to apply fees and charges in conformity with Article VIII of the GATT 1994.¹⁵

9, 13-19.

¹³ China’s First Written Submission, para. 429; U.S. Response to Request of China for a “Preliminary Ruling,” para. 34.

¹⁴ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 5-16; U.S. Comments on China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 4-10.

¹⁵ China’s Answers to the Panel’s Written Question Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 20; U.S. Comments on China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 11-12.

21. As noted above, and in earlier U.S. submissions, the text of Paragraph 11.3 itself, read with Article XX of the GATT 1994, does not make express that the latter does not apply. The interpretation of Paragraph 11.3 by both the panel and the Appellate Body in *China – Raw Materials* and the interpretation of Paragraph 5.1 in *China – Audiovisual Products* confirm that Article XX cannot simply be assumed to apply. In each dispute, the findings of the panels and of the Appellate Body were grounded in the text of the provision of the Accession Protocol at issue.

2. Neither Article XII of the Marrakesh Agreement nor Paragraph 1.2 of the Accession Protocol support China’s proposed “intrinsic relationship” test, much less the conclusion that Article XX of the GATT 1994 applies to breaches of Paragraph 11.3

22. China also attempts to rely on Article XII:1 of the Marrakesh Agreement and Paragraph 1.2 of the Accession Protocol to support its position that Paragraph 11.3 is an integral part of the GATT 1994. However, this reliance is not consistent with either the text of Article XII or of China’s Accession Protocol.

23. Neither Article XII of the Marrakesh Agreement nor Paragraph 1.2 of the Accession Protocol lends support for China’s “intrinsic relationship” test, much less implies that there is such a relationship between Paragraph 11.3 and the GATT 1994 such that the exceptions of Article XX must somehow be mapped onto Paragraph 11.3. As the United States has explained, Paragraph 1.2 of the Accession Protocol clearly provides that the Accession Protocol is “an integral part of the WTO Agreement,” and the first recital of the preamble of the Protocol defines the “WTO Agreement” to be the “Marrakesh Agreement Establishing the World Trade Organization.”¹⁶ This is entirely consistent with Article XII of the Marrakesh Agreement, which contemplates that accession of a Member “shall apply to this Agreement and to the multilateral agreements annexed thereto.”¹⁷ Article XII by its terms distinguishes between the Marrakesh Agreement and the multilateral agreements annexed thereto.

24. Under Article XII, an acceding Member takes up the obligations of all of the multilateral agreements. Contrary to China’s suggestion, this does not require the Panel to examine to which of these agreement or agreements provisions of its Accession Protocol “intrinsically relate.”¹⁸ Various provisions of the multilateral agreements might overlap in subject matter (for example, by imposing disciplines with respect to trade in goods), but that does not mean that those different agreements all have an “intrinsic relationship” to one another such that the exceptions of one agreement should be assumed to apply to another.

¹⁶ U.S. Comments on China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 18; *see also* U.S. Answers to Panel Question 64.

¹⁷ U.S. Response to China’s Request for a “Preliminary Ruling,” para. 12; U.S. Answers to the Panel’s Questions Following the First Substantive Meeting of the Panel, para. 77.

¹⁸ China’s Rebuttal Submission Regarding its Request for a Preliminary Ruling, paras. 16-18.

25. In contrast, unlike Paragraph 11.3 of China’s Accession Protocol, none of the multilateral agreements imposes an obligation to eliminate export duties. As noted above, the drafters of China’s accession commitments made clear when they intended to incorporate a provision of the multilateral agreements. As such, there is no basis for assuming that the exceptions available for one or more of the multilateral agreements are also available to justify breaches of Paragraph 11.3.¹⁹ Returning to the hypothetical question that China advocates as the proper approach to interpreting its accession commitments, under such an approach – regardless of the textual commitments provided in the Accession Protocol, and regardless of how long Members spent negotiating those commitments – Members would apparently never know what those commitments actually meant unless and until a panel engaged in the speculative exercise of attempting to determine into which covered agreement or agreements the drafters would have included such commitments. Not only does such an approach lack a basis in the customary rules of treaty interpretation, but it could also render the carefully-negotiated language of accession commitments meaningless.

3. Conclusion

26. In short, as explained above, the text of Paragraph 11.3 does make expressly clear that Article XX of the GATT 1994 is not available to justify breaches of China’s export duties commitment. This conclusion is further consistent with the fact that, in acceding to the WTO, China agreed to undertake the disciplines set forth in its Accession Protocol *in addition to* the disciplines set forth in the multilateral trade agreements. In response to specific concerns about China’s use of export duties, reflected in Paragraphs 155 and 156 of the Working Party Report, China agreed to eliminate them. It is not unfair to hold China to this express commitment.

27. The conclusion that Article XX of the GATT 1994 is not applicable to justify breaches of China’s export duties commitment does not mean that China cannot achieve non-trade objectives, such as the reduction of pollution. As the United States has noted, all WTO Members may pursue such objectives, provided that they “fulfill their obligations and respect the rights of other Members.”²⁰ Although Paragraph 11.3 obligates China not to use export duties, China has a range of other tools to address legitimate non-trade concerns should it wish to do so. China’s belated and flawed attempt to portray its export duties on rare earths, tungsten and molybdenum as environmental measures (much like its unsuccessful attempt to defend certain export duties under Article XX in *China – Raw Materials* dispute) calls into question China’s suggestion that without export duties China will somehow be required to promote “trade liberalization . . . at whatever cost – including . . . environmental degradation and the exhaustion

¹⁹ As the Appellate Body noted in *China – Raw Materials*, China’s commitment to eliminate export duties “arises exclusively from China’s Accession Protocol, and not from the GATT 1994.” See also *China – Raw Materials* (Panel), para. 7.151.

²⁰ U.S. Response to China’s Request for a “Preliminary Ruling,” para. 24 (quoting *US – Shrimp* (AB), para. 186).

of [its] scarce natural resources.”²¹ Over the course of two disputes, China has never explained why it needs to use export duties to achieve non-trade objectives such as the reduction of pollution. In fact, China elsewhere appears to acknowledge that tools other than export duties are available to achieve non-trade objectives.²²

28. For the foregoing reasons, and as the United States has previously explained, Article XX of the GATT 1994 is not applicable to China’s export duty commitment in Paragraph 11.3 of the Accession Protocol. Accordingly, China’s attempt to justify under Article XX(b) the export duties on rare earths, tungsten and molybdenum, which contravene the commitment in Paragraph 11.3, fails.

C. Even Aside from the Fact that the GATT Article XX Exceptions Do Not Apply to Paragraph 11.3, China Would Not Satisfy the Requirements of the Article XX(b) Exception With Respect to the Export Duties on Rare Earths, Tungsten and Molybdenum

29. China asserts that its export duties on rare earths, tungsten and molybdenum are justified pursuant to Article XX(b) of the GATT 1994. However, notwithstanding its claim that, without recourse to Article XX for breaches of Paragraph 11.3, China would somehow be deprived of the ability to address environmental concerns, China’s proffered defense of its export duties falls far short. Even aside from the fact that Article XX of the GATT 1994 is not available as a justification for breaches of the commitment in Paragraph 11.3 of the Accession Protocol, China’s export duties would not meet the requirements of Article XX(b).

1. Analysis under Article XX of the GATT 1994

30. Article XX is an affirmative defense that provides for certain limited and conditional exceptions to the substantive obligations set forth in the GATT 1994.²³ Because it is an affirmative defense, the burden of establishing that an otherwise GATT-inconsistent measure satisfies the requirements of one of the exceptions in Article XX lies with the party invoking the defense.²⁴

31. Article XX sets forth requirements both in its chapeau and in its 10 delineated subparagraphs. The chapeau of Article XX applies to all Article XX exceptions, and requires that any measure that is otherwise inconsistent with the GATT 1994 must not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between

²¹ China’s First Written Submission, para. 455.

²² U.S. Comments on China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel, paras. 20-21; China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel, para. 18.

²³ *U.S. – Shrimp (AB)*, para. 157.

²⁴ *U.S. – Gasoline (AB)*, pp. 22-23.

countries where the same conditions prevail, or a disguised restriction on international trade.” The Article XX sub-paragraphs each set forth a different basis for excepting otherwise non-conforming measures.

32. As noted in the U.S. first oral statement,²⁵ the Appellate Body reasoned in *U.S. – Gasoline* that the analysis under Article XX is “two-tiered: first, provisional justification by reason of characterization of the measure under [the sub-paragraph]; second, further appraisal of the same measure under the introductory clauses of Article XX.”²⁶

33. China does not contest that the export duties on rare earths, tungsten and molybdenum are inconsistent with Paragraph 11.3 of the Accession Protocol. Instead, China argues that those duties are justified under Article XX(b) of the GATT 1994. Even putting aside for the moment the fact that Article XX of the GATT 1994 is not available to justify a breach of Paragraph 11.3 of the Accession Protocol, in order to justify these inconsistent duties, China would need to demonstrate that the duties satisfy the specific conditions set out in sub-paragraph (b) of Article XX, as well as the requirements of Article XX’s chapeau. China has not done so, nor can it do so.

2. China’s export duties on rare earths, tungsten and molybdenum are not justified by Article XX(b) of the GATT 1994

a. Introduction

34. According to China, its export duties increase prices for foreign consumers and therefore reduce consumption by foreign consumers, and in turn reduce production of rare earths, tungsten and molybdenum, and the pollution caused by their mining and production.²⁷

35. As we will discuss in this section of the submission, China fails to satisfy the requirements of a defense under Article XX(b) for a number of reasons. Before turning to these arguments in more detail, it is important to note a few fundamental flaws with China’s line of argument as it relates to Article XX(b).

36. First, contrary to China’s arguments, the Chinese export duties on rare earths, tungsten and molybdenum are not designed to address the health risks associated with environmental pollution.²⁸ Rather, China’s export duties are designed to promote increased production of

²⁵ U.S. Oral Statement at the First Substantive Meeting with the Panel, para. 19.

²⁶ *U.S. – Gasoline (AB)*, p. 22; see also *Brazil – Tyres (AB)*, para. 139.

²⁷ China’s Answers to Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 206-207; China’s Substantive Defense of Export Duties, para. 36.

²⁸ For purposes of this discussion, the United States is putting aside the question of whether China has met its burden of showing that the environmental impacts identified by China demonstrate a sufficient relationship to the protection of human, animal or plant life or health.

higher value-added downstream products that use rare earths, tungsten and molybdenum as inputs. The export duties serve to lower the price for these inputs in China and thereby facilitate the production of downstream products.

37. As the United States noted in its first oral statement, China’s argument regarding the protection of life or health as it relates to the export duties at issue is illogical and untenable. This is because the export of the products at issue is completely unrelated to environmental pollution. Even according to China, it is the production of these products, not their export, that causes pollution.²⁹ The environmental effect of producing a unit of rare earths, tungsten or molybdenum is exactly the same whether or not that unit is used domestically or exported to other Members. If China wishes to reduce the pollution associated with production of rare earths, tungsten and molybdenum, China can achieve that objective by adopting and implementing production restrictions or pollution controls on primary production, which would affect both domestic and foreign consumers equally. China cannot present any environmental justification for discriminating against industrial consumers located outside of China in favor of industrial consumers within China.

38. This discrimination against foreign consumers does serve an economic goal, however. China’s export duties ensure that domestic consumers have access to the raw materials at issue at lower prices than their foreign counterparts. Numerous statements by China’s government confirm that China’s export restraints on rare earths, tungsten and molybdenum, including export duties, have an economic motive.³⁰

39. In addition to the flaws in China’s assertion of an environmental justification, China’s arguments under Article XX(b) raise serious systemic concerns. As explained above, China’s argument under Article XX(b) with respect to the export duties is that the export duties increase export prices for rare earths, tungsten and molybdenum and lead to reduced production of those products. Reduced production, in turn, leads to reduced pollution associated with that production, according to China. However, if this argument were accepted, it would allow export restraints on any product whose production causes pollution. This approach to Article XX(b) is illogical and should not be sustained.

b. Meaning of Article XX(b)

40. In order to establish a defense under Article XX(b), China must demonstrate that the export duties at issue are “necessary to protect human, animal or plant life or health.” To show that a measure is “to protect” life or health, the responding party must show that (i) there is a risk to human, animal, or plant life or health; and (ii) the underlying objective of the measure is to

²⁹ China’s Substantive Defense of Export Duties, paras. 3, 36.

³⁰ See U.S. First Written Submission, paras. 29-31; U.S. Oral Statement at the First Substantive Meeting with the Panel, para. 34 (citing Explanation for the Compilation of Emission Standards of Pollutants from Rare Earths Industry (JE-99), pp. 17-18).

reduce the risk. If so, then it is possible to conclude that the measure falls within the range of policies designed to protect human, animal, or plant life or health.³¹ As the panel in *China – Raw Materials* explained, in analyzing whether a measure falls within the range of policies designed to protect human, animal, or plant life or health, “panels and the Appellate Body have examined both the design and structure of a challenged measure to decide whether its objective is the protection of life and health”³²

41. In addition, China must show that the export duties at issue are “necessary” to protect life or health. In analyzing the meaning of “necessary” in Article XX, the Appellate Body has stated that “an assessment of ‘necessity’ involves ‘weighing and balancing’ a number of distinct factors relating both to the measure sought to be justified as ‘necessary’ and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective.”³³

42. The Appellate Body has explained further that the factors to be weighed and balanced in the necessity analysis include the contribution of the measure to the realization of the ends pursued by it.³⁴ In *Korea – Beef*, the Appellate Body stated that in order for a measure to be “necessary,” it must be “located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’.”³⁵ In turn, in *China – Audiovisual Products*, the Appellate Body reasoned, “[T]he greater the contribution a measure makes to the objective pursued, the more likely it is to be characterized as ‘necessary’.”³⁶

43. The Appellate Body has also recognized that a measure may be considered “necessary” under Article XX(b) if the measure is “apt to produce a material contribution to the achievement of its objective.”³⁷ In circumstances where it is “difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy” and “the results obtained from certain actions . . . may manifest themselves only after a certain period of time”³⁸, the Appellate Body noted that “the demonstration [of a material contribution] could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.”³⁹ Thus, in order to satisfy the meaning of necessary by

³¹ *Brazil – Tyres (Panel)*, para. 7.43; see also *EC – Tariff Preferences (Panel)*, para. 7.199.

³² *China – Raw Materials (Panel)*, para. 7.479; see also *EC – Asbestos (Panel)*, paras. 8.184, 8.194.

³³ *China – Audiovisual Products (AB)*, para. 239 (citing *Korea – Beef (AB)*; *US – Gambling (AB)*; *Brazil – Tyres (AB)*).

³⁴ *China – Audiovisual Products (AB)*, para. 240.

³⁵ *Korea – Beef (AB)*, para. 161.

³⁶ *China – Audiovisual Products (AB)*, para. 251.

³⁷ *Brazil – Tyres (AB)*, para. 151.

³⁸ *Brazil – Tyres (AB)*, para. 151.

³⁹ *Brazil – Tyres (AB)*, para. 151.

showing that a measure is “apt to produce a material contribution to the achievement of its objective,” the responding Member must provide evidence of the relationship between the policy tool and the objective. It is not sufficient to simply assert that the measure at issue is apt to make a material contribution to the Member’s stated objective. There must be evidence that the measure can bring about a material contribution to the objective.

44. Even if Article XX(b) were applicable to Paragraph 11.3 of China’s Accession Protocol, China’s export duties on rare earths, tungsten and molybdenum would not be justified by Article XX(b). China has failed to substantiate an Article XX(b) defense with respect to its export duties on rare earths, tungsten or molybdenum, as discussed in detail below.

c. China’s export duties on rare earths, tungsten and molybdenum are not justified by Article XX(b)

i. Introduction

45. As discussed above and in more detail below, China’s argument under Article XX(b) is fundamentally flawed. It completely ignores the effects that export duties have on domestic consumption of the products at issue, which can also produce pollution. As the panel in *China – Raw Materials* explained,

An export restriction on an exhaustible natural resource, by reducing the domestic price of the materials, works in effect as a subsidy to the downstream sector, with the likely result that the downstream sector will demand over time more of these resources than it would have absent the restriction.⁴⁰

The expansion of consumption in the domestic market is not a desirable consequence for a policy that purports to achieve environmental goals.⁴¹

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

⁴⁰ *China – Raw Materials (Panel)*, para. 7.430 (internal citations omitted).

⁴¹ Exhibit JE-136.

ii. The export duties on rare earths, tungsten and molybdenum do not fall within the range of policies designed to protect human, animal or plant life or health

47. China's defense under Article XX(b) relies in part on the assertion that the export duties on rare earths, tungsten and molybdenum are part of a comprehensive policy to protect the environment. However, it should be noted that a number of the elements that China cites as elements of this comprehensive policy do not appear to apply to tungsten and molybdenum. Neither the *Emission Standards of Pollutants from Rare Earths Industry* (Exhibit CHN-31), the *Opinions on Enhancing the Ecological Protections of Mines* (Exhibit CHN-32), the *Provisional Measures on the Administration of the Directive Production Plan of Rare Earth* (Exhibit CHN-21), nor the *Circular on Environmental Protection Inspection of Rare Earth Industry* (Exhibit CHN-33) mentions tungsten or molybdenum. Thus, it is not clear that companies mining or producing tungsten and molybdenum are subject to specific emission standards, or to inspection and subsequent publication on a list of companies complying with applicable environmental requirements.⁴²

48. Moreover, none of the cited elements of China's comprehensive environmental policy shows a link between export duties and a pollution reduction objective. In attempting to defend certain export duties and quotas in the *China – Raw Materials* dispute, China also claimed that it had a comprehensive environmental framework with respect to the products at issue in that dispute, and offered a number of measures that purported to relate to pollution resulting from the production of the products. However, the panel found that it "still need[ed] persuasive evidence of a connection between environmental protection standards and export restrictions."⁴³

49. China fails to establish any such connection with respect to the export duties on rare earths, tungsten and molybdenum. None of the various documents cited by China as elements of a comprehensive environmental policy with respect to rare earths, tungsten and molybdenum sheds light on how export duties on those products serve the ends of such a policy, let alone how they are necessary to protect human, animal, or plant life or health. Most of them do not mention export duties at all.⁴⁴ The framework documents (the *Several Opinions*⁴⁵ and the *Situation and Policies of China's Rare Earth Industry* ("White Paper")⁴⁶) that China cites as identifying a discrepancy between the price of rare earths, tungsten and molybdenum and their environmental costs do not address tungsten and molybdenum at all. And with regard to rare earths, those

⁴² China's Substantive Defense of Export Duties, para. 22. A number of the individual environmental requirements identified by China as under the first bullet in paragraph 22 appear to apply only to rare earths as well.

⁴³ *China – Raw Materials (Panel)*, para. 7.507.

⁴⁴ The documents provided as Exhibits CHN-16, CHN-21, CHN-27, CHN-31, CHN-32, CHN-33, CHN-38, CHN-93, CHN-94, CHN-95, CHN-100, CHN-107, CHN-108 and CHN-117 do not refer to export duties.

⁴⁵ Exhibit CHN-13.

⁴⁶ Exhibit CHN-1.

documents do not explain why the price of exports of rare earths must reflect environmental costs that the price of products consumed domestically need not, much less how the specific duty rates reflect such costs and protect health.

50. Regardless of what other measures might be considered part of a comprehensive policy with respect to rare earths, tungsten and molybdenum, China’s export duties do not form part of that policy. China asserts that its comprehensive policy “includes measures that seek to ensure that the prices for rare earth, tungsten and molybdenum reflect the costs of mining and production to the environment” and that “export duties ensure that the price of exported products reflects the environmental costs.”⁴⁷ This assertion is fundamentally flawed because it is mining and production – not exportation – that can give rise to environmental damage and pollution, yet the duties at issue are imposed only on exports.

51. The measures imposing export duties on rare earths, tungsten and molybdenum confirm that they do not have the objective to protect human, animal, or plant life or health. As noted above, in analyzing whether a measure falls within the range of policies designed to protect human, animal, or plant life or health, the panel should consider both the design and structure of the challenged measure to decide whether its objective is the protection of life and health.⁴⁸ In *China – Raw Materials*, in rejecting China’s contention that certain duties (and quotas) were part of a comprehensive program to reduce pollution resulting from production, the panel noted that “the measures imposing the export restrictions at issue in this dispute do not make any mention of environmental or health concerns.”⁴⁹

52. Similarly, the design and structure of the measures imposing export duties on rare earths, tungsten and molybdenum indicate no link between the duties and any environmental or health objective. In its substantive defense of export duties, China asserts that “[t]he intention to use export duties to protect the environment has been consistently expressed . . . each time the new list of export duties was adopted.” However, neither the *2012 Tariff Implementation Program*⁵⁰ issued by the Tariff Commission, nor the *2012 Tariff Implementation Program (Customs)*⁵¹ issued by Customs, identify any supposed objective to protect life and health. Similarly, the *Regulations on Import and Export Duties* say nothing to the effect that duties serve health or environmental purposes.⁵²

53. Up until late December 2011, China’s press releases regarding the imposition of export duties also failed to mention environmental or health concerns. They simply stated that exports

⁴⁷ China’s Substantive Defense of Export Duties, paras. 23, 25.

⁴⁸ *China – Raw Materials (Panel)*, para. 7.479; see also *EC – Asbestos (Panel)*, paras. 8.184, 8.194.

⁴⁹ *China – Raw Materials (Panel)*, para. 7.501.

⁵⁰ Exhibit JE-45.

⁵¹ Exhibit JE-47.

⁵² Exhibit JE-46.

of “high energy-consumption commodities, high-pollution commodities and resource-based commodities” would be taxed.⁵³ The fact that the export of such products would be taxed shows no link between such taxes and the goal of reducing pollution.⁵⁴ In late December 2011, China added the language “to promote sustainable development and to contribute to the efforts of building a resource-conserving and environment-friendly society” in its statement announcing the 2012 export tariffs. Given that this statement was issued after the panel report in *China – Raw Materials* rejected China’s Article XX defense with respect to the export duties at issue in that dispute, this additional language appears to be strategically self-serving and of limited value in assessing the objectives that the export duties have been and are designed to serve. At any rate, the additional language does not support China’s contention that the 2012 export duties on rare earths, tungsten and molybdenum are part of a comprehensive environmental policy. The language in no way explains how duties can achieve the purported goals of “promot[ing] sustainable development and . . . contribut[ing] to the efforts of building a resource-conserving and environment-friendly society.”

iii. The export duties on rare earths, tungsten and molybdenum are not “necessary;” they are not apt to make a material contribution to China’s purported environmental or health objective

54. China also fails to demonstrate that its export duties on rare earths, tungsten and molybdenum are apt to make a material contribution to the supposed goal of reducing pollution caused by the mining and production of those products. As noted above, in order to show that a measure is apt to make a material contribution, in circumstances where it is “difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy” and “the results obtained from certain actions . . . may manifest themselves only after a certain period of time . . .”⁵⁵, the responding Member must provide evidence of the relationship between the policy tool and the objective.

55. However, in arguing that export duties on rare earths, tungsten and molybdenum are apt to make a material contribution toward an environmental or health objective, China offers no evidence. Instead, it only makes conclusory statements. China simply asserts that export duties

⁵³ Exhibits JE-45, JE-47.

⁵⁴ As the United States explained in its comments on China’s response to question 54, the panel in *China – Raw Materials* considered statements made in the 2006, 2007, and 2008 announcements of China’s export duties. In its conclusions, which China did not appeal, the panel noted that “[i]n these announcements, China clarifies that these export duties ‘are targeted at high energy-consumption commodities, high-pollution commodities and resource-based commodities’.” However, the panel also correctly observed that “the link between applying export restrictions and achieving environmental objections is far from explicit.” *China – Raw Materials (Panel)*, para. 7.506.

⁵⁵ *Brazil – Tyres (AB)*, para. 151.

increase prices “in a synergetic relationship with” other measures.⁵⁶ But China does not explain this supposed “synergetic relationship.” In addition, while China appears to recognize that export duties only increase prices for exports,⁵⁷ China does not attempt to show why or how increasing prices only for exports is apt to make any contribution, much less a material one, to China’s supposed goal of reducing pollution that is caused not by exportation, but by the mining and production of rare earths, tungsten and molybdenum.

56. Similarly, in asserting that export duties are apt to make a material contribution to an environmental objective, China provides no analysis of the impact that export duties have on domestic prices and consumption. China states that its export duties are imposed “in order to reduce consumption by these foreign consumers and thus to reduce production of the rare earth, tungsten and molybdenum resources.”⁵⁸ However, China ignores the fact that export duties decrease prices of the raw materials for domestic consumers, thereby increasing domestic consumption and encouraging the production and sale of the materials in the form of downstream products. As the panel in *China – Raw Materials* explained in rejecting China’s claims that certain export duties on raw materials at issue in that dispute made a “material” contribution to the objective of reducing pollution,

China’s analysis does not account for important upstream-downstream interactions. . . . One would expect that China’s analysis of the effects of export restrictions on pollution would account for the pollution that may be generated by additional production in the downstream sector (following the imposition of the export duties and quotas) It is the understanding of the Panel that economic analysis indicates that, under normal conditions, an export restriction imposed upstream acts as an incentive to downstream production. In the case at issue, therefore, an export duty (or quota) on raw materials reduces the price of key inputs, and therefore should be expected to provide an incentive to production by the downstream sector. China’s evidence does not take this into account.⁵⁹

57. As noted above, if China wishes to reduce the environmental impact associated with production of rare earths, tungsten and molybdenum, China can achieve that objective by adopting and implementing production restrictions or pollution controls on primary production, which would affect both domestic and foreign consumers equally. China cannot present any environmental justification for discriminating against industrial consumers located outside of China in favor of industrial consumers within China.

⁵⁶ China’s Substantive Defense of Export Duties, para. 36.

⁵⁷ China’s Answers to Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 206-207.

⁵⁸ China’s Answers to Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 206.

⁵⁹ *China – Raw Materials (Panel)*, para. 7.533.

58. However, this discrimination against foreign consumers does serve an economic goal: to ensure that domestic consumers have access to the raw materials at issue at lower prices than their foreign counterparts, and in turn to encourage the expansion of China's downstream industries that produce more sophisticated, higher value-added products. As noted above, numerous statements by China's government confirm that China's export restraints on rare earths, tungsten and molybdenum, including export duties, have an economic motive.⁶⁰ Indeed, China admits that its export duties drive up prices for exports.⁶¹ However, China fails to tell the whole story. In fact, China's export duties also decrease prices for rare earths, tungsten and molybdenum when those products are consumed domestically, thereby encouraging their consumption (and associated pollution) by downstream industries in China.

59. China's own documents demonstrate that China's consumption of rare earths, tungsten and molybdenum has continued to grow in significant amounts. Specifically, according to China's data, China's consumption of rare earths exploded by more than 419 percent from 1999 to 2011;⁶² China's consumption of tungsten increased more than 175 percent from 2003, the earliest year for which China has provided tungsten data, to 2011;⁶³ and, China's consumption of molybdenum increased more than 73 percent from 2007 to 2011.⁶⁴ Similarly, as noted above, China's production of downstream products containing rare earths, tungsten and molybdenum has continued to expand.

60. In light of the effect that export duties have on domestic prices and domestic consumption, they are generally not considered effective policy tools to address environmental externalities. This is because, as explained in a statement by Dr. Gene Grossman (submitted as Exhibit JE-136), the discouragement of production that might result from an export duty is offset by an encouragement of domestic sales, as decreased prices in the domestic market promote increased domestic consumption.⁶⁵ As Dr. Grossman explains further, such an expansion of domestic sales is an "undesirable consequence" for a policy intended to promote environmental goals.⁶⁶

61. As such, it is not surprising that none of the measures that China cites as elements of a comprehensive environmental policy with respect to rare earths, tungsten or molybdenum demonstrates a link between export duties and the reduction of pollution. The measures

⁶⁰ See U.S. First Written Submission, paras. 29-31; U.S. Oral Statement at the First Substantive Meeting with the Panel, para. 34 (citing Explanation for the Compilation of Emission Standards of Pollutants from Rare Earths Industry (JE-99), pp. 17-18).

⁶¹ China's Answers to Panel's Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 206, 207.

⁶² Exhibit CHN-137.

⁶³ Exhibit CHN-138.

⁶⁴ Exhibit CHN-139.

⁶⁵ See Exhibit JE-136, p. 3.

⁶⁶ See Exhibit JE-136, p. 3.

imposing the export duties at issue in particular do not mention an environmental or health concern in connection with the imposition of the export restraints. None of the other measures that China cites as elements of a comprehensive policy identifies how export duties contribute to China's supposed goal; most of those documents do not mention export duties at all. In contrast, a number of Chinese measures do reflect China's interest in producing and exporting rare earths, tungsten and molybdenum in the form of higher-value downstream products. Thus, contrary to China's assertions, the export duties on rare earths, tungsten and molybdenum do not bear a direct relationship to the protection of life or health. They do, however, bear a direct relationship to the economic goal of moving China's exports up the value chain.

62. Statements in Chinese documents confirm China's goal of encouraging the production and export of higher value-added downstream products containing rare earths, tungsten and molybdenum. With respect to rare earths, for example, the *Several Opinions* document from the State Council states as one of China's development targets, "The development of new products and the application of new technology shall be accelerated. Rare earth new materials shall increasingly support and secure the downstream industries."⁶⁷ Likewise, the *White Paper*, which is also from the State Council, notes that China "aims to . . . encourage the growth of high-tech rare earths application industries with high added value" and expresses concern that "low-end products overflow while high-end products are in short supply."⁶⁸ In addition, China's Ministry of Industry and Information Technology ("MIIT") 2009 Guidance on Enhancing the Management of Raw Material Industries calls for MIIT to: "actively research and propose tariff adjustment policies, 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."⁶⁹

63. With respect to tungsten and molybdenum, China allows producers of "high-tech" products identified in the *Export Catalogue of High-tech and New-tech Products of China* to avoid being subject to the prior export performance requirements that generally apply in order to obtain a share of the export quota.⁷⁰ The 2006 *Notice Concerning Printing and Issuing "Export Catalogue of China High and New Technology Products"* and 2000 *Notice Concerning Issuing "China High and New Technology Product Catalogue"* show that the catalogue was designed to promote the export of value-added products and the development of high-technology industries, not environmental goals.⁷¹

⁶⁷ Exhibit CHN-13, p.3.

⁶⁸ Exhibit CHN-1, pp. 24, 7.

⁶⁹ *Eleventh Five Year Plan Outline for Social and Economic Development*, Part 9, Chapter 35, Section 1, Exhibit JE-8, p. 17.

⁷⁰ Exhibits CHN-107-B, CHN-100-B; see also U.S. Answers to the Panel's Questions Following the First Substantive Meeting with the Panel, paras. 83-86.

⁷¹ See Exhibit JE-154; Exhibit JE-155. The 2006 Version provides, "In order to adapt to the rapid development of high and new technologies and products; promote the export of high and new technology products; and optimize China's structure for the exportation of goods, the Ministry of Science and Technology, the Ministry of

64. Based on the trade data, it appears that China has been achieving its economic objectives, as confirmed by the dramatic growth in China’s production of higher value-added downstream products:

- for rare earths, there has been dramatic growth in rare earth (NdFeB) magnets (1025 percent between 1999 and 2011), tri-color phosphors (2627 percent between 1999 and 2009) and hydrogen storage alloys (660 percent between 2000 and 2009);⁷²
- for tungsten, the production of tool and high-speed steel, and cemented carbides, all significant consumers of tungsten, nearly doubled from early 2000 to 2010;⁷³
- for molybdenum, the production of stainless steel grew 878 percent from 2002 to 2010.⁷⁴

65. Of course, many, if not all, Members desire to encourage the growth of their domestic industries producing more sophisticated products. However, they have agreed to do so in ways that are consistent with their obligations as Members. This includes, where an exception to those obligations is invoked, demonstrating that the measure at issue satisfies the conditions of the exception. As explained above, China has failed to show that its export duties on rare earths, tungsten and molybdenum are necessary to achieve its purported goal of protecting human, animal, or plant life or health.

iv. WTO-consistent reasonably-available alternatives exist that would more effectively address China’s objectives

66. China makes clear the discriminatory nature of the export duties at issue, as noted above, stating that it imposes those duties “in order to reduce consumption by these foreign consumers”⁷⁵ However, also as noted above, export duties exert downward pressure on domestic prices, thereby stimulating domestic consumption. This stimulative effect of the export duties on domestic consumption of rare earths, tungsten and molybdenum is consistent with China’s

Finance, the State Administration of Taxation, and the General Administration of Customs jointly organized the revision and adjustment of the 2003 edition of the *China High and New Technology Products Export Catalogue* (hereinafter the *Export Catalogue*) to create the 2006 edition of the *Export Catalogue*, which is now formally issued. . . . [T]he products listed in the 2006 edition of the *Export Catalogue* are eligible to benefit from the preferential policies for the export of high and new technology products” See Exhibit JE-154; see also Exhibit JE-155 (2000 *Notice Concerning Issuing “China High and New Technology Product Catalogue” from the Ministry of Science and Technology, Ministry of Finance, and State Administration of Taxation*).

⁷² Rare Earth Report, pp. 16-20 (Exhibit JE-129).

⁷³ Tungsten Report, pp. 39-42 (Exhibit JE-130).

⁷⁴ Molybdenum Report, p. 20 (Exhibit JE-131).

⁷⁵ China’s Answers to Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 206.

efforts to encourage the production of higher value-added products that incorporate those materials, as well as with the fact that Chinese production of both such downstream products and of rare earths, tungsten and molybdenum themselves has continued to increase.

67. While the discrimination that export duties make between domestic and foreign consumers serves an economic purpose, it does not serve an environmental or health one. If China were interested in reducing the health effects associated with mining and production of rare earths, tungsten or molybdenum, China could impose volume restrictions on mining and production or establish effective pollution controls on how mining or production takes place. Instead, China's production continues to expand.

68. China contends that it maintains “a comprehensive policy to protect the environment in connection with the production of rare earths, tungsten and molybdenum,” including various environmental regulations related to production, such as pollution controls on production, a resource tax, and a mining deposit.⁷⁶ This demonstrates that China considers such measures – that is, measures that impose direct restrictions on mining or production, the causes of pollution – feasible.

69. Unlike any of those measures, which apply equally to both domestically-consumed and exported products, export duties on rare earths, tungsten and molybdenum are targeted specifically at foreign consumers of those products. While China claims that its export duties operate “in a synergetic relationship” and “function together” with environmental regulations,⁷⁷ the mere inclusion of export duties in a list with such regulations is not sufficient to establish the complementarity or interaction between the export duties and the environmental regulations that China identifies.

70. Moreover, even if China can claim that environmental regulations are already in place with respect to rare earths, tungsten and molybdenum, yet pollution continues, that does not support China's position that export duties are also necessary to address pollution. Instead, it might be that China needs to impose other types of measures that directly address the causes of pollution, or that China needs to adjust its existing measures to make them more effective. For example, as the United States explained in its opening oral statement at the first meeting with the Panel, the resource taxes on rare earths, tungsten and molybdenum appear low when compared to the price, and to the export duty.⁷⁸ It is unclear why China could not rely upon the resource tax to help ensure that the price of rare earths, tungsten and molybdenum reflects environmental costs, rather than insisting that only products intended for foreign consumers be subject to export duties (that, as the United States noted, are significantly higher than the existing resource tax).⁷⁹

⁷⁶ China's Substantive Defense of Export Duties, para. 22.

⁷⁷ China's Substantive Defense of Export Duties, para. 36.

⁷⁸ U.S. Oral Statement at the First Substantive Meeting with the Panel, para. 55.

⁷⁹ China claims that the increase in the resource tax amounted to a significant increase in the operating costs of the Inner Mongolia Baotou Steel Rare-Earth (Group) Hi-Tech Co. As previously noted by Japan, China's

71. The alternatives discussed above, which do not present the same issues of consistency with WTO obligations as export duties, could be employed to more directly address China’s supposed environmental objectives. Adopting or strengthening measures to control the environmental harms associated with mining and production of rare earths, tungsten and molybdenum would more directly target China’s stated environmental objective without discriminating against other Members. By virtue of its WTO-inconsistent export duties, China is simply controlling who may have access to rare earths, tungsten and molybdenum and on what terms, to the disadvantage of China’s trading partners.

v. China has failed to satisfy the requirements of the Article XX chapeau with respect to export duties on rare earths, tungsten and molybdenum

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

73. First, China’s only attempt to demonstrate that export duties on rare earths, tungsten and molybdenum do not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail is a statement that those duties do not discriminate between the country of destination.⁸⁰ However, as the United States explained in its oral statement at the first meeting with the Panel, the Appellate Body found in *U.S. – Gasoline* that the responding party must also demonstrate that there is no discrimination between the respondent (here, China) and other countries in order to meet its burden under the chapeau.⁸¹

74. Indeed, in its response to Question 47 from the Panel, China appears to agree that “arbitrary discrimination” for purposes of the chapeau covers discrimination between domestic and foreign consumers.⁸² In effect, then, China has presented no explanation or evidence to demonstrate that export duties imposed only on foreign consumers of rare earths, tungsten and

argument in this regard fails because while the resource tax increased 20 times (from 3 RMB per ton to 60 RMB per ton), the amount of resource tax actually paid by Inner Mongolia Baotou Steel Rare-Earth (Group) Hi-Tech Co. increased by more than 850 times. Accordingly, the fact that the company paid so much more in resource taxes in 2011 is not explained by the increase in the resource tax, which can only explain around 2 percent of the change, but rather by grossly increased production, which explains approximately 98 percent of the change. This is also consistent with reports that the increase in the resource taxes on rare earths “are unlikely to add significantly to the price of rare-earth ores, which can fetch tens of thousands of dollars per ton.” China Expands Resource Tax to Nation, *The Wall Street Journal* (October 10, 2011) (Exhibit JE-135).

⁸⁰ China’s Substantive Defense of Export Duties, para. 42.

⁸¹ U.S. Oral Statement at the First Substantive Meeting with the Panel, para. 78 (citing *U.S. – Gasoline* (AB), p. 21).

⁸² China’s Answers to Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 208.

molybdenum satisfy the first prong of the chapeau.⁸³ This is not surprising, given that a unit of these products yields the same pollution whether it is exported or consumed domestically; the discrimination between China and other Members resulting from China’s export duties is both arbitrary and unjustified.⁸⁴

75. Similarly, with respect to the second prong of the chapeau, China states only that the export duties on rare earths, tungsten and molybdenum are not a disguised restriction on international trade because they are “an intrinsic part of China’s policy aimed at protecting the environment against the harms following from excessive mining and production of rare earth, tungsten and molybdenum products.” As explained above, China has failed to demonstrate that the export duties on rare earths, tungsten and molybdenum are part of any environmental policy. China’s export duties raise prices for those products for consumers outside of China, while providing a price advantage for Chinese users. In other words, China’s export duties serve economic (that is, protectionist) goals, not health ones. China’s attempt to disguise its export duties as a health measure presents precisely the problem that the second prong of the Article XX chapeau was intended to address – to prevent abuse of the Article XX exceptions.⁸⁵

d. Conclusion

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

III. CHINA’S EXPORT QUOTAS ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994, PARAGRAPH 1.2 OF THE ACCESSION PROTOCOL, AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT AND NOT JUSTIFIED UNDER ARTICLE XX(G)

A. The Prima Facie Case

76. As the United States set forth in its first written submission, China subjects the exportation of various forms of rare earths, tungsten and molybdenum to quotas.⁸⁶ These export quotas are inconsistent with Article XI:1 of the GATT 1994.⁸⁷

⁸³ China cannot show that this discrimination is not “arbitrary” or “unjustified” in any event. As already noted, pollution occurs as a result of mining or production, not as a result of exportation. As such, there is no relationship between export duties and purported environmental costs.

⁸⁴ In *Brazil – Tyres*, the Appellate Body observed, “[D]iscrimination can result from a rational decision or behaviour, and still be ‘arbitrary and unjustified’ because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.” *Brazil – Tyres (AB)*, para. 232 (emphasis added); see also *id.*, para. 228.

⁸⁵ *Brazil – Tyres (AB)*, para. 227.

⁸⁶ See U.S. First Written Submission, paras. 77-91; Exhibit JE-7.

⁸⁷ U.S. First Written Submission, paras. 92-103.

77. Article XI:1 of the GATT 1994 provides in pertinent part: “[n]o prohibitions or restrictions . . . made effective through quotas . . . shall be instituted or maintained by any Member . . . on the exportation or sale for export of any product destined for the territory of another Member.” China does not contest that the export quotas at issue are inconsistent with Article XI:1.⁸⁸

78. Instead, China attempts to justify the export quotas it imposes on rare earths, tungsten and molybdenum under the exception provided for conservation measures in Article XX(g) of the GATT 1994. However, for the reasons discussed in the following sections, China has failed to establish that its export quotas meet the requirements of that exception. Specifically, China’s export quotas on rare earths, tungsten and molybdenum fail to satisfy any of the required elements of Article XX(g), and therefore the breaches of Article XI:1 are not justified pursuant to that provision.

79. China’s export quotas are also inconsistent with paragraph 1.2 of China’s Accession Protocol to the extent it incorporates paragraphs 162 and 165 of the Working Party Report.⁸⁹ Paragraph 162 of the Working Party Report provides in pertinent part: “[t]he 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.”⁹⁰ Additionally, paragraph 165 of the Working Party Report provides: “[t]he 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.”⁹¹

80. However, as set forth in the U.S. first written submission, China did not eliminate its export restrictions upon accession. Instead, China continues to maintain export restrictions including export quotas on rare earths, tungsten and molybdenum that are not in conformity with WTO rules including Article XI of the GATT 1994.

81. In the following sections, the United States responds to China’s defenses in relation to the export quotas at issue. We will begin by addressing the requirements of Article XX(g) and identify errors in China’s interpretation of that provision. Then we will show that China has failed to establish that its export quotas satisfy any of the elements required by Article XX(g) with respect to each set of quotas – first on rare earths, second for tungsten and third for molybdenum.

⁸⁸ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 32.

⁸⁹ See U.S. First Written Submission, paras. 99-103.

⁹⁰ Exhibit JE-1.

⁹¹ Exhibit JE-1.

B. Article XX(g) of the GATT 1994 Sets Strict Requirements for Measures That Can Be Excused for Conservation Purposes

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

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

83. In order to justify under Article XX(g) of the GATT 1994 the breaches of Article XI:1 by the export quotas on rare earths, tungsten and molybdenum, China must demonstrate that these export quotas: (1) relate to the conservation of exhaustible natural resources and (2) are made effective in conjunction with restrictions on domestic production or consumption. As with Article XX(b), the Member invoking Article XX(g) bears the burden of proof.⁹²

1. “Relating to” conservation of an exhaustible natural resource

84. For a measure to “relate to” conservation, it must bear a relationship to the goal of conservation. The Appellate Body has interpreted this phrase as requiring a “substantial relationship”⁹³ and not “merely incidentally or inadvertently aimed at” conservation.⁹⁴ The Appellate Body has also described this relationship as “a close and genuine relationship of ends and means”⁹⁵ which requires an examination of the relationship between the general structure and design of a measure and the policy goal it purports to serve.⁹⁶ Here, such an examination will require understanding the relationship between the export quotas on rare earths, tungsten and molybdenum and the goal China has purported that it serves – the conservation of these resources.

85. As articulated by the Appellate Body in *China – Raw Materials*, “conservation,” specifically in terms of natural resources, is defined as “[t]he preservation of the environment, esp. of natural resources.”⁹⁷ More generally, “conservation” is defined as “[t]he action of keeping from harm, decay, loss, or waste; careful preservation.”⁹⁸ The New Shorter Oxford English Dictionary defines the verb “conserve” as: “[k]eep from harm, decay, loss, or waste,

⁹² *U.S. – Gasoline (AB)*, pp. 22-23.

⁹³ *U.S. – Gasoline (AB)*, p. 18.

⁹⁴ *U.S. – Gasoline (AB)*, p. 18.

⁹⁵ *U.S. – Shrimp (AB)*, para. 135

⁹⁶ *U.S. – Gasoline (AB)*, para. 136.

⁹⁷ *China – Raw Materials (AB)*, para. 355; New Shorter Oxford English Dictionary (1993), vol. 1, p. 485; see also *China – Raw Materials (Panel)*, para 7.372.

⁹⁸ New Shorter Oxford English Dictionary (1993), vol. 1, p. 485.

esp. with a view to later use; preserve with care.”⁹⁹ The New Shorter Oxford English Dictionary defines “preservation” as “[t]he action of preserving or protecting something; the fact of being preserved”¹⁰⁰ and defines the verb to “preserve” as “keep safe from harm, injury, take care of, protect.”¹⁰¹

86. The term “care,” central to both “conservation” and “preservation,” is defined as “[c]harge, protective oversight, guardianship.”¹⁰² Accordingly, “conservation of exhaustible natural resources,” as it is used in Article XX(g), means keeping exhaustible natural resources from harm, loss, or waste¹⁰³ through protective oversight.

87. Based on this definition, China is incorrect to argue (as it does solely in the context of its attempt to defend the rare earth export quotas) that the term “conservation” means that a Member may take measures to create an export safeguard to protect domestic Chinese consumers from surges in foreign demand.¹⁰⁴ According to China,

if the only tool that [China] had at [its] disposal in 2012 were production and extraction quotas for rare earths – not export quotas – then China ran the risk that unexpected surges in foreign demand could have negatively impacted China’s users In effect, the export quotas function as a “safeguard” mechanism to guard against unanticipated surging exports. This is analogous to the safeguard procedures for surges of unanticipated imports under the Agreement on Safeguards in the WTO.¹⁰⁵

88. China’s argument fails, however, because an export safeguard is not encompassed within the definition of conservation. An export safeguard does not keep rare earths from harm, loss, or waste through protective oversight, but rather only protects Chinese downstream consumers from the impact of market forces.¹⁰⁶ Simply put, this has nothing to do with conservation.

⁹⁹ New Shorter Oxford English Dictionary (1993), vol. 1, p. 485; *China – Raw Materials (Panel)*, para 7.372.

¹⁰⁰ New Shorter Oxford English Dictionary (1993), vol. 2, p. 2341; *China – Raw Materials (Panel)*, para 7.372.

¹⁰¹ New Shorter Oxford English Dictionary (1993), vol. 2, p. 2342.

¹⁰² New Shorter Oxford English Dictionary (1993), vol. 1, p. 338.

¹⁰³ “Waste” is defined as “[u]seless expenditure or consumption; extravagant or ineffectual use (of money, goods, time, effort, etc.).” New Shorter Oxford English Dictionary (1993), vol. 2, p. 3631.

¹⁰⁴ China’s First Written Submission, para. 151.

¹⁰⁵ See China’s First Written Submission, para. 151.

¹⁰⁶ Beyond the fact that an export safeguard is inconsistent with the plain meaning of conservation, such a mechanism has no basis elsewhere in the covered agreements. The GATT 1994 contains no provision that allows Members to suspend obligations, such as those found in Article XI:1, to effect an export safeguard to protect domestic consumers from a surge in foreign demand. In contrast, when Members wanted to create an exception to WTO obligations, they made their intention clear – such as by providing an explicit mechanism (accompanied by procedural safeguards) to suspend obligations under the GATT 1994 in the case of an unanticipated import surge. It

89. In addition, in its interpretation of what “conservation” means for purposes of its defense of the export quotas it imposes on rare earths, tungsten and molybdenum, China invokes the concept of “use and management” over natural resources in its attempt to tie its desire to engage in self-interested economic behaviors to the concept of “conservation of exhaustible natural resources.”¹⁰⁷ In support of this argument, China relies heavily on paragraph 7.375 of the panel report in *China – Raw Materials*:

a proper reading of Article XX(g) in the context of the GATT 1994 should take into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development. As the Appellate Body explained, to do so may require “a comprehensive policy comprising a multiplicity of interacting measures.”¹⁰⁸

90. China’s attempt to incorporate into “conservation” the notion of promoting its own economic development¹⁰⁹ appears to be in hopes of reshaping Article XX(g) into an exception based on a Member’s desire to protect and to create opportunities for growth for its downstream processing industries. To the extent that the interests of a Member’s downstream industry might form the basis for an exception to the GATT 1994 prohibition on export restraints imposed on industrial raw materials, it is already explicitly provided in Article XX(i). And, as the panel noted in *China – Raw Materials*, the context provided by Article XX(i) is important in the interpretation of Article XX(g) of the GATT 1994.¹¹⁰

91. Article XX(i) provides an exception for measures:

involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination.¹¹¹

should also be noted that China has provided no evidence whatsoever that there has ever been an unexpected surge in foreign demand or that such a surge has harmed Chinese consumers. See U.S. Response to Panel Question 61(a).

¹⁰⁷ China’s First Written Submission, para. 53

¹⁰⁸ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 87.

¹⁰⁹ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 87.

¹¹⁰ *China – Raw Materials (Panel)*, paras. 7.384-7.386.

¹¹¹ GATT 1994, Art. XX(i) (emphasis in original).

Article XX(i) permits export restrictions on domestic materials imposed to guarantee supplies to a domestic processing industry but only during a period of time when a governmental stabilization plan is in place holding down the price of such materials. Furthermore, Article XX(i) subjects the permissibility of measures involving export restrictions on “domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry” to a very strict proviso. That proviso explicitly emphasizes that any export restrictions on domestic materials that might be excepted under Article XX(i) are still unequivocally subject to the core GATT principles of a level playing field (“restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry”) and non-discrimination (“shall not depart from the provisions of this Agreement relating to non-discrimination”).¹¹²

92. Article XX(i) thus provides important context for Article XX(g): it helps to make clear why Article XX(g) cannot be used to justify China’s export quotas as a measure that limits the availability of rare earths, tungsten and molybdenum to foreign users in order to provide guaranteed availability of those materials to China’s domestic users, such as through an “export safeguard.” (Notably, China only makes this argument with respect to the rare earth export quotas.) Article XX(g) does not, on its face, provide for an exception to GATT rules on a basis other than “conservation.” In particular, as discussed above, “conservation” does not mean what China wants it to mean – *i.e.*, use and management of resources to ensure that downstream domestic processors have a guaranteed source of supply. If it did, Article XX(i) would be rendered superfluous, as the situation contemplated in it would be subsumed by China’s (incorrect) reading of Article XX(g).

93. However, invoking Article XX(i) as an exception would require a respondent to demonstrate a number of matters, including that: (1) the export restrictions are “necessary to” ensure “essential quantities” of such materials to a domestic processing industry; (2) there exists a governmental stabilization plan holding the price of the materials below the world price; (3) the restrictions are “not operat[ing] to increase the exports of or the protection afforded to such domestic industry;” and (4) the restrictions do not discriminate. These comprehensive requirements in Article XX(i) argue strongly against an interpretation of Article XX(g) that would authorize the same kind of restrictions but with a different (and less stringent) set of prerequisites.

94. Indeed, as noted by the panel in *China – Raw Materials*, Article XX(g) of the GATT 1994 cannot be interpreted in a manner so as to contradict the provisions found in Article XX(i) because Members should not be allowed to do indirectly through Article XX(g) what is directly prohibited by Article XX(i) – specifically, use of export restrictions on raw materials in aid of economic development that operate to increase exports, or protection, of the domestic industry.¹¹³

¹¹² China does not invoke Article XX(i) as a justification for the export quota on rare earths, or for any other export restraint on any raw material in this dispute.

¹¹³ *China – Raw Materials (Panel)*, paras. 7.384-7.386.

95. In the course of this dispute, China has objected to the use of Article XX(i) to provide context vis-à-vis the interpretation of Article XX(g) of the GATT 1994.¹¹⁴ However, the Appellate Body has consistently used other subparagraphs of Article XX to impart context as to the particular subparagraph being invoked, specifically in *U.S. – Gasoline* and *Korea – Beef*.¹¹⁵

96. Rather than defending its export quotas pursuant to the “relating to” standard set forth above, which panels and the Appellate Body have consistently used in interpreting Article XX(g) defenses, China attempts to set forth a different, less rigorous standard. China frames the question regarding whether the quotas “relate to conservation” as whether China maintains “a comprehensive conservation policy.”¹¹⁶ Instead of trying to demonstrate that the export quotas have a close and genuine relationship of ends and means with respect to the goal of natural resource conservation, China has created a low threshold test for itself which it attempts to pass by showing only that it has in place a “comprehensive conservation policy.”

97. This appears to be a strategic attempt to dilute the standard under Article XX(g) by importing the “comprehensive policy” language used by the Appellate Body in interpreting the requirements of Article XX(b) in *Brazil – Tyres*.¹¹⁷ This is inappropriate for a number of reasons. The first is that the exception under Article XX(g) for conservation measures is distinct from the exception provided for under Article XX(b) for measures to protect human, animal or plant life or health. Accordingly, the language and standard set forth and the requirements that a responding party must satisfy to be afforded an exception for its measure under Article XX(g) are also distinct from those of Article XX(b). In fact, the Appellate Body has never looked for the existence of a “comprehensive conservation policy” in conducting its analysis under Article XX(g).

98. Second, in interpreting the requirements of Article XX(b) in *Brazil – Tyres*, the Appellate Body required the responding party to meet stringent standards to show, either quantitatively or qualitatively, how the measure in question (which might form part of a “comprehensive policy” comprising a multiplicity of interacting measures) nevertheless makes a “material contribution”

¹¹⁴ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 91.

¹¹⁵ *U.S. – Gasoline (AB)*, pp. 16-17; *Korea – Beef (AB)*, para. 161. In this regard, the Appellate Body’s application of context in *Korea – Beef* is especially informative. In *Korea – Beef*, the Appellate Body used Article XX(g) to inform the conceptual limits of what measures may be considered to be “necessary” under Article XX(d) of the GATT 1994. The Appellate Body observed that “necessary” measures must be “located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to.’” *Korea – Beef (AB)*, para. 161. The Appellate Body reasoned that “making a contribution to” is closer to the test of “relating to” found at Article XX(g), and that particular requirement “is more flexible textually than the ‘necessary’ requirement found in Article XX(d).” *Id.*, fn. 104. Accordingly, measures that just “make a contribution to” may not be considered to be “necessary” for purposes of Article XX(d) based, in part, on the context provided by Article XX(g) of the GATT 1994.

¹¹⁶ See, e.g., China’s First Written Submission, para. 45.

¹¹⁷ *Brazil – Tyres (AB)*, para. 151.

to the achievement of the objective of protection of human, animal or plant life or health.¹¹⁸ It is simply not the case that a Member invoking Article XX(b) can merely state that there is a comprehensive policy and that there is also a trade restriction. Rather, the assertion that the trade restriction brings about a “material contribution” to the goal in question must be tested and supported by sufficient evidence.¹¹⁹ By arguing that all it needs to show to satisfy the “relating to” requirement of Article XX(g) is the existence of a comprehensive conservation policy, China has imported familiar Article XX(b) interpretative language into an Article XX(g) analysis and then distorted it further beyond recognition.

99. Most importantly, China’s attempt to articulate a new test for “relating to” under Article XX(g) is inappropriate and must be rejected because it is more than a matter of semantics – it would effectively alter and lower the standard that a measure must meet in order to be considered a conservation measure that can be excepted under Article XX(g).

2. “Made effective in conjunction with restrictions on domestic production or consumption:” the requirement of even-handedness

100. In addition to “relating to the conservation of exhaustible natural resources,” in order for breaches to be justified under Article XX(g), a measure must also be “made effective in conjunction with restrictions on domestic production or consumption.” This second clause of Article XX(g) requires that “restrictions on domestic production or consumption” actually restrict consumption and that the non-conforming measure at issue be “made effective in conjunction with” such restrictions.

a. Restrictions on domestic production or consumption

101. The term “restriction” is defined as: “[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation” and as “[t]he action or fact of limiting or restricting someone or something,” specifically “[d]eliberate limitation of industrial output.”¹²⁰ The verb to “restrict” is defined as “[l]imit, bound, confine.”¹²¹ In turn, the verb to “limit” is defined as: “appoint, fix definitely, specify,” and “[c]onfine within limits, set bounds to; restrict.” “Limit” is defined as a noun as: “a boundary or terminal point considered as confining or restricting,” and “[a]ny of the fixed points between which the possible or permitted extent, amount, duration, etc., of something is confined; a bound which may not be passed or beyond which something ceases to be possible or allowable.”¹²²

¹¹⁸ *Brazil – Tyres (AB)*, para. 151.

¹¹⁹ *Brazil – Tyres (AB)*, para. 151.

¹²⁰ New Shorter Oxford English Dictionary (1993), vol. 2 at 2569.

¹²¹ *Id.*

¹²² New Shorter Oxford English Dictionary (1993), vol. 1 at 1591.

102. “Restrictions” on domestic production or consumption are, therefore, actions confining or fixing definitely the extent, amount, duration, etc. of domestic production or consumption that is permitted. Moreover, the panel in *China – Raw Materials* noted that the restrictions must “actually restrict or limit domestic production or consumption.”¹²³

b. Made effective in conjunction with

103. The phrase “made effective in conjunction with” was interpreted by the Appellate Body in *China – Raw Materials* to mean that the non-conforming measure must “work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.”¹²⁴

c. “Even-handedness”

104. Taking the two phrases of the second clause of Article XX(g) together, “made effective in conjunction with restrictions on domestic production or consumption” requires that the non-conforming measure at issue: be operative, in force or effective in combination with operative, in force, or effective measures that confine or fix definitely the permitted extent, amount, duration, etc. of domestic production or consumption. In justifying the breaches by the export quotas on rare earths under Article XX(g), China must demonstrate that the export quotas are effective in combination with deliberate actions confining or fixing definitely the permitted extent, amount, etc. of China’s domestic production or consumption of rare earths.

105. The Appellate Body has interpreted the second clause of Article XX(g) to be a “requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”¹²⁵ The Appellate Body in *U.S. – Gasoline* noted that, while there is “no textual basis for requiring identical treatment of domestic and imported products . . . if *no* restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals.”¹²⁶

106. China argues that the Appellate Body’s observation that this clause does not require “identical” treatment of domestic and foreign interests leads to the conclusion that the clause permits severely lopsided treatment of domestic and foreign interests.¹²⁷ The logic underpinning this argument is flawed and the result of this argument is, accordingly, untenable and incorrect.

¹²³ *China – Raw Materials (Panel)*, para 7.437.

¹²⁴ *China – Raw Materials (AB)*, para. 356.

¹²⁵ *U.S. – Gasoline (AB)*, pp. 20-21 (emphasis in original).

¹²⁶ *U.S. – Gasoline (AB)*, p. 21.

¹²⁷ China’s First Written Submission, paras. 67, 69, 162, 226.

107. In *U.S. – Gasoline*, the measure at issue affected imports of gasoline and was challenged as being inconsistent with the national treatment obligation in Article III:4 of the GATT 1994. The Appellate Body’s observation regarding identical treatment was made in the context of identifying the boundaries of the “even-handedness” requirement. The Appellate Body considered that the situation at one end of the spectrum, i.e., where domestic and foreign interests were being treated strictly identically, presented a simple analysis where parties would likely not find themselves disputing the consistency of a measure because, “where there is identity of treatment – constituting real, not merely formal, equality of treatment – it is difficult to see how inconsistency with Article III:4 would have arisen in the first place.”¹²⁸

108. The Appellate Body then considered the situation at the other end of the spectrum, i.e., where only foreign interests were being negatively affected and domestic interests suffered no negative impact. The Appellate Body found that this situation also presented a simple analysis under Article XX(g) of the GATT 1994 because in such a circumstance, the responding party would not have even a colorable argument that the measure at issue would meet the “even-handedness” requirement. As the Appellate Body concluded, in a situation where no restrictions are imposed on domestic interests and restrictions are only being imposed on foreign interests, the measure at issue “cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.”¹²⁹

109. The Appellate Body’s discussion of the even-handedness requirement in *U.S. – Gasoline* only identifies the logical boundaries of the requirement. The Appellate Body did not address what relative treatment of domestic and foreign interests, within those logical boundaries, was required in order to qualify as “even-handed.”

110. The Appellate Body’s reasoning in *U.S. – Gasoline* certainly does not stand for the proposition that China argues it stands for, i.e., that Article XX(g) permits a Member to impose measures that advantage their own domestic interests at the expense of the interests of other Members as long as it imposes some level of restriction on domestic supply that is greater than nothing.¹³⁰ Indeed, China’s contention in this regard was wholly rejected by the panel in *China – Raw Materials* when it observed that “the mere existence of a production restriction does not automatically imply even-handedness between the export restriction and the domestic restriction.”¹³¹

111. As will be shown in the following subsections, China does not treat domestic and foreign interests even-handedly and therefore has not made its export restrictions “effective in conjunction with” domestic restrictions.

¹²⁸ *U.S. – Gasoline* (AB), p. 21.

¹²⁹ *U.S. – Gasoline* (AB), p. 21.

¹³⁰ China’s First Written Submission, paras. 67, 69, 162, 226.

¹³¹ *China – Raw Materials* (Panel), para. 7.464.

3. The goal of conserving an “exhaustible natural resource”

112. Finally, in taking a step back and viewing Article XX(g) as a whole, we recall that to qualify for the exception found at Article XX(g) of the GATT 1994, China must show that its non-conforming measures relate not just to conservation in the abstract, but to the conservation of a particular exhaustible natural resource. In previous disputes, various panels and the Appellate Body have found that the following are exhaustible natural resources under Article XX(g): clean air,¹³² sea turtles,¹³³ fish and other marine life,¹³⁴ bauxite (a type of clay) and fluorspar (a type of mineral).¹³⁵

113. In reviewing the purpose of both the first and the second elements under Article XX(g) – i.e., that the non-conforming measures be “made effective in conjunction with restrictions on domestic production or consumption” – the United States notes that in all previous disputes, panels and the Appellate Body have considered non-conforming trade measures and “restrictions on domestic production or consumption” that have as their objective the conservation of the same exhaustible natural resource. This has been an essential part of the inquiry under Article XX(g) regarding whether “trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.”¹³⁶

114. As noted in more detail below, throughout China’s arguments in support of its defense of its export quotas on rare earths, tungsten and molybdenum, it is not clear precisely which “exhaustible natural resources” China’s quotas are seeking to conserve and whether those are the same “exhaustible natural resources” that its purported restrictions on domestic production or consumption are seeking to conserve. As a result, it is unsurprising that China’s attempts to demonstrate that the export quotas and purported domestic production or consumption restrictions are “working together” and “operating so as to conserve an exhaustible natural resource” fall short of what the GATT 1994 requires.

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

115. Throughout China’s arguments seeking to justify its export quotas on rare earths, tungsten and molybdenum covering nearly 100 tariff lines of products, it appears that China is engaged in the very difficult – if not impossible – task of retrofitting export quotas that have existed for a very long time into the guise of something they were never designed to be – i.e., measures aimed at conserving exhaustible natural resources. When viewed in the context of the origins and background of these export quotas and in the context of the role these export quotas

¹³² *U.S. – Gasoline (AB)*, p. 10.

¹³³ *U.S. – Shrimp (AB)*, para. 131.

¹³⁴ *U.S. – Tuna (Panel)*, para. 4.9; *Canada – Herring and Salmon*, para. 4.4.

¹³⁵ *China – Raw Materials (Panel)*, para. 7.369.

¹³⁶ *China – Raw Materials (AB)*, para. 360.

play in the larger framework of China’s policies relating to its upstream and downstream production, processing, manufacturing and trade – it becomes clear and easy to understand why these measures fail to meet any of the requirements of Article XX(g) of the GATT 1994. We begin here by addressing China’s Article XX(g) defense for the export quotas on rare earths.

1. China’s export quotas on rare earths do not relate to conservation

116. In examining whether China’s export quotas on rare earths relate to the conservation of an exhaustible natural resource, the operative question is whether there is a close and genuine relationship of ends and means between the goal of rare earth conservation and the means presented by the application of the export quotas to exports of various rare earth products.¹³⁷ As shown below, the answer to this question is no.

a. The measures do not demonstrate a close and genuine relationship of ends and means

117. As noted in the U.S. oral statement at the first panel meeting,¹³⁸ the measures imposing and administering the export quotas on rare earths do not speak to the relationship between the export quotas and the goal of conservation.¹³⁹ This is an important omission, as it shows that the design and architecture of the export quotas are not oriented towards the goal of conservation. Indeed, the panel in *China – Raw Materials* found that it is relevant in determining whether an export restriction relates to conservation how the measure characterizes the relationship between the restriction and the goal of conservation.¹⁴⁰ In other words, beyond just a mention of conservation, how does the measure explain its material contribution to that goal. For rare earths, China has not cited a single explanation in the measures that articulates this relationship.

118. China has imposed an export quota on various rare earth raw materials and products since 1999.¹⁴¹ Over time, the volume of the export quota has contracted (most severely in a 40 percent drop in 2010)¹⁴² while the scope of products subject to the quota has expanded (most recently in 2011 when ferroalloys containing at least 10 percent rare earths were added).¹⁴³ In the time that China has imposed an export quota on rare earths – now over a decade – China’s measures implementing the export quota have only made passing reference to the goal of conservation

¹³⁷ *U.S. – Shrimp (AB)*, para. 135.

¹³⁸ U.S. Oral Statement at the First Substantive Meeting with the Panel, para. 35.

¹³⁹ See Exhibits JE-22 and JE-79.

¹⁴⁰ *China – Raw Materials (Panel)*, para. 7.418.

¹⁴¹ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 86.

¹⁴² See Exhibit CHN-137.

¹⁴³ Exhibit JE-4. China did not make an adjustment to the export quota quantity to take into account the fact that additional products were being included in the scope.

beginning in 2012. In particular, the annual measures administering the export quotas on rare earths only began incorporating cursory references to conservation in 2012:

Measure	Conservation Reference in the 2012 Version	Corresponding Reference in the 2011 Version
Public Notice of the Application Standards and Application Procedures for the Rare Earth Export Quota	“In order to protect the resources and the environment, further strengthen the rare earth export administration, and regulate the export operation order, ...” ¹⁴⁴	“To further strengthen export management of rare earth, regulate the order of export operation, ...” ¹⁴⁵
Notice Publishing the List of Enterprises Applying for the Export Quota for Rare Earth	“In order to protect resources and environment, and to further enhance the administration on exports of rare earth and coke, and to regularize the export orientation order, ...” ¹⁴⁶	“In order to strengthen the administration of rare earth and coke exports, and orderly regulate exports according to relevant provisions of the ...” ¹⁴⁷

Unsurprisingly, 2012 happens to be the same year that this Panel was established and the year to which China has taken great pains to point out that the Panel’s terms of reference for making recommendations are limited.¹⁴⁸ (The date of panel establishment, however, does not mean that the Panel is precluded from examining relevant facts and evidence and making findings on the basis of facts pre-dating panel establishment.)

119. China also notes that a number of measures that establish or implement the export quotas on rare earths “cross-reference to the legal bases that identify China’s conservation objective” – i.e., the *Foreign Trade Law* and *Regulations on the Import and Export of Goods*, which both have provisions that allow China to restrict exports for conservation purposes.¹⁴⁹ Such a cross-reference is insufficient to meet China’s burden under Article XX(g) of the GATT 1994. Furthermore, it is important to note that the *Foreign Trade Law* and *Regulations on the Import and Export of Goods* also allow for the restriction of export for a number of other reasons

¹⁴⁴ Exhibit CHN-38.

¹⁴⁵ Exhibit JE-101.

¹⁴⁶ Exhibit CHN-55.

¹⁴⁷ Exhibit JE-132.

¹⁴⁸ See, e.g., China’s First Written Submission, paras. 81-83.

¹⁴⁹ China’s First Written Submission, para. 91; Exhibits CHN-11, 54.

beyond conservation, such as to serve the “public interest” and “export operation order.”¹⁵⁰ Thus, these cross-references to the *Foreign Trade Law* and *Regulations on the Import and Export of Goods* provide no support whatsoever for China’s argument that the export quotas on rare earths relate to conservation.¹⁵¹

120. In attempting to meet its burden of establishing that these export quotas relate to conservation, China places considerable weight on the State Council’s *Several Opinions* white paper, which happened to be issued a month after the WTO concluded that China’s export restrictions on the raw materials at issue in *China – Raw Materials* were inconsistent with its rules.¹⁵² That document, however, also fails to provide any explanation as to how the export quotas relate to the conservation of rare earths. Specifically, the *Several Opinions* white paper is completely silent as to China’s assertion in the context of the present dispute that the rare earth export quotas serve, for example, as an enforcement tool for domestic production restraints or as a signal to non-Chinese consumers that they should seek alternative (i.e., non-Chinese) supplies of rare earths.

121. Rather, the *Several Opinions* outlines the use of China’s rare earth resources in service to China’s industrial policy goals to:

- “vigorously develop rare-earth new materials and industry applications,”¹⁵³ which is in tension with China’s claims that it is limiting domestic production of rare earths;
- “maintain and exert the important role that the rare-earth industry plays as a strategic and basic industry;”¹⁵⁴ and
- “develop[] new products and the application of new technology shall be accelerated. Rare earth new materials shall increasing support and secure the downstream industries,”¹⁵⁵ which, again, is also anathema to China’s conservation claims.

¹⁵⁰ Exhibits CHN-11, Art. 16(1), (6), CHN-54, Art. 35, 49, 57(2)

¹⁵¹ Additionally, it is worth noting that while both the *Foreign Trade Law* (Art. 16(4)) (Exhibit JE-49) and the *Regulations on the Import and Export of Goods* (Art. 35) (Exhibit JE-50) provide for conservation of an exhaustible natural resource as a basis for restricting exports, neither measure requires, as Article XX(g) of the GATT 1994 does, that the conservation-related export restriction be “made effective in conjunction with restrictions on domestic production or consumption.”

¹⁵² China’s First Written Submission, paras. 102 - 112; Exhibit CHN-13.

¹⁵³ Exhibit CHN-13, I(1).

¹⁵⁴ Exhibit CHN-13, I(1).

¹⁵⁵ Exhibit CHN-13, I(3).

b. The “manner and circumstances” of setting the export quota volumes do not demonstrate a close and genuine relationship of ends and means

122. China further contends that the export quotas on rare earths “relate to” conservation based on “the manner and circumstances” in which the actual numerical limits were set in 2012.¹⁵⁶ In support of this argument, China directs the Panel to the *2012 Provisional Measures on the Administration of the Directive Production Plan of Rare Earths*, the *Declaration on the Setting of 2012 Export Quotas on Rare Earth Products*, which was prepared exclusively for this dispute, and the *Several Opinions*.¹⁵⁷

123. These documents do not, however, show that the export quotas on rare earths relate to conservation. The *2012 Provisional Measures on the Administration of the Directive Production Plan of Rare Earths* discusses a plan for rare earth mining, production and export to be delivered in 2013, not 2012.¹⁵⁸ The *Declaration on the Setting of 2012 Export Quotas on Rare Earth Products* and the *Several Opinions* post-date both the 1999 establishment of the rare earth export quotas (by more than a decade) and the findings by the WTO that China’s export restrictions on the raw materials at issue in *China – Raw Materials* were WTO-inconsistent. There would appear to be limited value in these documents in demonstrating the type of functional relationship between the export quotas and a conservation purpose required by Article XX(g). Rather, these documents seem to serve better the purpose of illustrating the difficulty and effort required in applying to an effective industrial policy tool the veneer of a conservation-related purpose.

c. As enforcement or “signaling” tools, the export quotas on rare earths lack a close and genuine relationship of ends and means

124. Lastly, China raises two hypothetical ways in which the export quotas may serve a conservation purpose – by serving as an enforcement tool for China’s production targets and by signaling users of rare earths to secure alternative supplies of rare earths from non-Chinese sources.¹⁵⁹ These two contentions are hypothetical in that neither are reflected in Chinese government measures setting forth the rare earth export quotas or, for that matter, any known Chinese government documents. Beyond their lack of support in China’s own measures, both of these arguments are without merit for the reasons set forth below.

¹⁵⁶ China’s First Written Submission, para. 113.

¹⁵⁷ China’s First Written Submission, paras. 113-116; China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, paras. 108-115.

¹⁵⁸ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 114.

¹⁵⁹ China’s First Written Submission, para. 132.

125. Regarding export quotas as an enforcement tool, China has failed to show how the export quotas – i.e., the numerical limits on rare earth exports – further China’s stated objective of curtailing the export of illegally produced materials. China contends that “various elements of China’s 2012 export quota system”¹⁶⁰ that police against the export of rare earth products produced above domestic targets – i.e. sourcing and documentation requirements – are “tied to and dependent on the existence of the export quotas.”¹⁶¹ However, China has failed to explain why it cannot have the sourcing and documentation requirements, which have not been challenged by the complainants, without the export quota. From a logical standpoint, there seems to be no reason why such requirements could not be maintained – without the export quota – to serve this purpose.

126. The use of an export quota as an enforcement mechanism for China’s production restrictions also fails due to its over-breadth. In particular, the export quotas apply not just to illegally extracted rare earths but also equally to legally extracted rare earths, which were produced in a manner consistent with China’s alleged domestic production targets. The over-breadth of the export quotas, specifically the impact on legally extracted rare earths, underscores the lack of any real or credible relationship between these quotas and the objective of conservation.¹⁶²

127. In addition, the export quotas themselves create an incentive for Chinese enterprises to produce illegally and sell to foreign consumers – thereby creating the very problem that the quotas are allegedly designed to prevent. In particular, the export quotas (together with the export duties) create two markets, with lower prices inside China and higher prices abroad, thereby incentivizing smugglers to sell abroad where they can realize a higher return. The United States has provided a wealth of information demonstrating this effect.¹⁶³

128. As to China’s signaling argument, China contends that the export quotas relate to the conservation of rare earths by signaling to non-Chinese consumers the need to develop and locate other sources of supply or develop substitutes. According to China, export quotas, working in conjunction with domestic Chinese restrictions, create a dis-incentive to domestic Chinese producers to expand production to service the non-Chinese market, while simultaneously creating an incentive for foreign rare earth producers to increase production.¹⁶⁴ This argument fails for a number of reasons.

¹⁶⁰ China’s First Written Submission, para. 135.

¹⁶¹ China’s First Written Submission, paras. 136-7.

¹⁶² *U.S. – Shrimp (AB)*, para. 141 (examining whether a measure is overbroad in determining if it relates to conservation).

¹⁶³ U.S. Comments on China’s Answers to the Panel’s Written Questions Subsequent to First Substantive Meeting of the Panel, para. 86.

¹⁶⁴ China’s First Written Submission, para. 140.

129. First, as discussed above, the export quotas are part of a regime that purposefully creates two markets – an internal and an external one – for these materials. The bifurcated markets result in a “two-tiered” pricing structure – *i.e.*, lower prices in China, significantly higher prices abroad – and a corresponding incentive for foreign users of rare earths to relocate their manufacturing operations, technologies and jobs to China, so as to avoid being subject to the export quotas.¹⁶⁵ Indeed, China actively encourages such behavior by offering access to resources in exchange for advanced manufacturing technology. This type of encouragement, which is known as the “technology for resource” pillar of China’s industrial policy, was discussed in the U.S. first written submission at paragraph 29. And the results of this policy were confirmed, for example, by Chen Guiyuan, the deputy director of the Hohhot customs bureau in the Inner Mongolian Autonomous Region, who observes that “[t]o get past government regulations, some foreign companies are investing in their own rare earth metal processing centers in China, aiming to obtain more of the metals at a cheaper price.”¹⁶⁶

130. For example, China actively encourages foreign investment in a number of high value-added manufacturing processes that utilize rare earths (for example, rare earth magnets, which are not subject to export restrictions) as inputs.¹⁶⁷ And because foreign users of rare earths have an incentive to relocate to China, the export quotas increase domestic demand for Chinese-produced rare earths, which is contrary to China’s claim that the export quotas relate to conservation of these resources in China.

131. The export quotas have, in fact, caused a number of downstream users of rare earths, such as lighting, optical glass, and magnet manufacturers, to relocate to China or expand their production in China.¹⁶⁸ In relocating to China, such companies note China’s “stable supply of rare earth materials.”¹⁶⁹ Companies that move or expand production save money by manufacturing in China on account of the export restrictions and, consequently, increase domestic demand for rare earths.

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

¹⁶⁵ These price differences are shown in the Rare Earth Report, pp. 29-30 (Table 7.1, Table 7.2) (Exhibit JE-129).

¹⁶⁶ Xinhua Insight, China tightens regulation of rare earth industry (June 15, 2011) (Exhibit JE-118).

¹⁶⁷ See Catalogue of Industries for Guiding Foreign Investment, Catalog of Encouraged Foreign Investment Industries, III,10(26) and 22(2) (Exhibit JE-16).

¹⁶⁸ Cost of ‘greener’ lighting explodes as China dominates rare-earth supply (JE-102); HOYA Announcement (Exhibit JE-145); Shinetsu Announcement (Exhibit JE-146); Ohara Announcement (JE-147).

¹⁶⁹ Ohara Announcement (JE-147).

the course of these proceedings, China has argued that its domestic restrictions impact foreign consumers of rare earths and have the ability to impact behavior outside China.¹⁷⁰

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

d. Viewed in the context of China’s production, processing and trade policies, the export quotas demonstrate a close and genuine relationship to a purpose other than conservation

134. Instead, taking into account the absence of restraints on the exportation of downstream products made from rare earths, such as rare earth magnets and phosphors, the existence of policies that actively promote and encourage certain downstream products,¹⁷¹ and the substantial growth in these industries reflected in production statistics, the picture that emerges demonstrates a complete lack of any relationship between the export quotas on rare earths and the goal of rare earth conservation. Instead, the record shows a close and genuine relationship between the export quotas and China’s trade protectionist goals.

135. Based on data provided by China, rare earth production in China, the world’s largest producer, increased more than 21 percent from 1999, when the export quotas were introduced, to 2011.¹⁷² Other data show that China’s production increased around 36 percent over the same amount of time.¹⁷³ Before the global financial crisis, rare earth production had increased more than 89 percent from 1999 to 2006.¹⁷⁴ In addition, China’s consumption of rare earths exploded by more than 419 percent from 1999 to 2011.¹⁷⁵

136. The explosion in domestic consumption is reflected in the corresponding explosion in the production of downstream products that use rare earths as inputs, such as rare earth (NdFeB) magnets (1025 percent between 1999 and 2011), tri-color phosphors (2627 percent between 1999 and 2009) and hydrogen storage alloys (660 percent between 2000 and 2009).¹⁷⁶ This is

¹⁷⁰ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, paras. 130-131.

¹⁷¹ See Notice Concerning Printing and Issuing “Export Catalogue of China High and New Technology Products” 2006 Version, Guo Ke Fa Ji Zi “2006” No. [16] (Exhibit JE-154) (noting that the export of rare earth magnets, lighting and optical equipment is to be encouraged).

¹⁷² Exhibit CHN-137.

¹⁷³ Rare Earth Report, p. 8 (Table 3.1) (Exhibit JE-129).

¹⁷⁴ Exhibit CHN-137. As shown in the Figure 1 of China’s Opening Oral Statement at the First Panel Meeting, China’s production of rare earth smelted and separated products was growing significantly until being slowed by the financial crisis.

¹⁷⁵ Exhibit CHN-137.

¹⁷⁶ Rare Earth Report, p. 16 (Table 5.1), 19 (Table 5.4), 20 (Table 5.5) (Exhibit JE-129).

wholly consistent with the panel’s observations in *China – Raw Materials* that export quotas work “in effect as a subsidy to the downstream sector . . . [which] will demand over time more of these resources than it would have absent the export restriction.”¹⁷⁷ In the meantime, exports of rare earths from China have steadily decreased under the export restraints imposed.¹⁷⁸

137. The increase in Chinese production of rare earth-containing products is a function of the dramatic price differences between Chinese domestic prices for rare earths and Chinese export prices. As shown in the price data provided in the Rare Earth Report, there are vast differences for nearly all rare earths products – i.e., nearly all individual elements, in both oxide and metal forms – between the domestic and export prices.¹⁷⁹ Indeed, for most products – e.g., cerium oxide, europium oxide, gadolinium oxide, lanthanum oxide, samarium oxide, terbium oxide, yttrium oxide, cerium metal, gadolinium metal, lanthanum metal, samarium metal, and yttrium metal – the Chinese export price is at least double the Chinese domestic price.¹⁸⁰ In the case of samarium oxide, the export price is more than six times the Chinese domestic price.¹⁸¹

138. In the course of this dispute, China has asserted that the substantial differences in Chinese domestic and export prices for rare earths, such as lanthanum, may be caused in part by differences in purity levels between products consumed domestically and exports.¹⁸² China presents no data whatsoever in support of its assertion. Nevertheless, a comparison of prices for high purity lanthanum oxide (sold at 99.999 percent minimum purity) in China versus the exact same product (lanthanum oxide sold at 99.999 percent minimum purity) shows the same drastic price differences discussed above.¹⁸³

139. While they have had a great impact on relative prices, the export quotas on rare earths have had no curtailing impact on the pace of extraction of China’s rare earths resources. And as noted by the panel in *China – Raw Materials* when it rejected China’s use of export quotas, “[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.”¹⁸⁴ Here, the export quotas have only diverted the use of rare earths from other Members into China, thereby fueling the spectacular growth in the downstream rare earth sector.

140. Moreover, the imposition of restraints on the export of rare earths in the absence of similar or similarly extensive restraints on the export of downstream products such as magnets

¹⁷⁷ *China – Raw Materials (Panel)*, para. 7.430.

¹⁷⁸ Exhibit CHN-137.

¹⁷⁹ Rare Earth Report, pp. 29-30 (Table 7.1, Table 7.2) (Exhibit JE-129).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at Table 7.1.

¹⁸² China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, paras. 191-192.

¹⁸³ Asian Metal La(2N) and La(5N) (Exhibit JE-161).

¹⁸⁴ *China – Raw Materials (Panel)*, para. 7.428.

and phosphors – and the active promotion and encouragement of downstream products – demonstrates another close and genuine relationship between the export quotas on rare earths and the goal of fostering the growth and export of value-added, downstream products. As noted in the U.S. first written submission, China’s Ministry of Industry and Information Technology (“MIIT”) 2009 Guidance on Enhancing the Management of Raw Material Industries calls for MIIT to: “actively research and propose tariff adjustment policies, 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.”¹⁸⁵

141. These trends and facts demonstrate the successful realization of economic goals, but have no connection to the goal of conserving China’s rare earth resources. Accordingly, China has failed to demonstrate that its export quotas on rare earths “relate to the conservation of” rare earths.

2. The export quotas do not relate to conservation of an “exhaustible natural resource”

142. China’s Article XX(g) defense for its rare earth export quotas breaks down even further upon closer inspection of the design and scope of the export quotas and the purported production restrictions in trying to determine what, precisely, China is trying to conserve through the use of its export quotas and production measures.

143. In much of the discussion above, the question of what exhaustible natural resource China is trying to conserve has been simplified on the assumption that “rare earths,” in the abstract, is that exhaustible natural resource. However, the facts are not so simple. As China itself has acknowledged, there is no “single” market for rare earths¹⁸⁶ and an examination of China’s measures and arguments demonstrates that there is also very little coherence in China’s purported “conservation” goals with respect to “rare earths.”

144. Colloquially, “rare earths” encompasses 17 different chemical elements. China’s export quotas apply to the light and medium/heavy ores and concentrates of all of them, plus thorium (which is not a rare earth)¹⁸⁷ – which accounts for three tariff codes (2530.9020.10, 2530.9020.90 and 2612.2000.00 respectively). In terms of the rare earths export quotas, “rare earths” also covers around 70 additional tariff codes ranging from:

Separated rare earth products (accounting for around 50 tariff codes encompassing products created when individual rare earth elements are separated

¹⁸⁵ *Eleventh Five Year Plan Outline for Social and Economic Development*, Part 9, Chapter 35, Section 1, Exhibit JE-8 at 17.

¹⁸⁶ Exhibit CHN-4, p.9.

¹⁸⁷ China had thus far not provided an explanation why thorium ores and concentrates are subject to the rare earth export quotas.

from rare earth-containing ores and concentrates – for example, terbium oxide (2846.9016), terbium chloride (2846.9021), and terbium fluoride (2846.9031)) to

Rare earth metals (accounting for around 15 tariff codes encompassing metals further processed (i.e., smelted) from separated oxides, e.g., individual rare earth metals, such as yttrium metal (2805.3017), and rare earth metals that have been intermixed or interalloyed, such as battery quality rare-earth metals, scandium and yttrium, intermixed or interalloyed (2805.3021)) to

Ferro-alloys (Accounting for 3 tariff codes consisting of ferro-alloys containing rare earths with weight of more than 10 percent (2805.3021). Ferro-alloys are rare earths that have been alloyed with iron, nickel, magnesium, copper and other elements, depending on the intended intermediate product and use.¹⁸⁸ These products were added to the export quota regime in May 2011.¹⁸⁹)

145. In the meantime, China’s proffered production measures attempt to regulate the production of “rare earths” – delineated only in two categories: light and heavy rare earths – with respect only to their mining and smelting.

146. The questions raised by these facts are: (1) how do China’s export quotas, which cover a portion of upstream rare earth (and thorium) raw materials and products processed one to three stages from the raw material – but not further downstream products, work together with purported restrictions on production – *i.e.*, the mining and smelting of light and heavy rare earths – to conserve an exhaustible natural resource?; and (2) what “exhaustible natural resource” is being conserved through the operation of these combined measures?

147. China argues in broad brush strokes that, because the panel in *China – Raw Materials* found, and it was un-controverted in that dispute, that bauxite and fluorspar were exhaustible natural resources, the raw materials at issue here are also “exhaustible natural resources” whose conservation China is seeking to protect through the export quotas.¹⁹⁰ However, the bauxite and the fluorspar subject to the challenged export restrictions in *China – Raw Materials* were a clay and a mineral which, like rare earth ores and concentrates, are basically in the form in which they are mined from the earth.¹⁹¹ In the present dispute, China’s export quotas cover not just ores but even further processed products such as rare earth metals and ferro-alloys that contain 10 percent rare earths.

148. Accordingly, China’s arguments here leave these vital Article XX(g) questions unanswered.

¹⁸⁸ See Exhibit JE-3; Rare Earth Report, p. 2 (Exhibit JE-129).

¹⁸⁹ Exhibit JE-4.

¹⁹⁰ See China’s First Written Submission, paras. 85-87.

¹⁹¹ *China – Raw Materials (Panel)*, para. 7.369.

149. In fact, the more closely China's measures are scrutinized, the more questions arise regarding what, if any, relationship they bear to conservation. For instance, why do China's export quotas include rare earth ores, and also a number of products that might not themselves be considered "exhaustible natural resources" because they are intermediately processed products – such as rare earth metals and ferro-alloys – made from the materials that occur naturally? Additionally, why, at the same time, does China not restrain, but rather encourage, the export of further processed products such as rare earth magnets and phosphors, which combined consumed more than a third of China's total rare earth production in 2010?¹⁹² Why, if China is seeking to conserve the supply of rare earths in its raw, exhaustible, naturally occurring form – from which all downstream products derive their rare earth content – would China need anything other than a production restriction? How would export quotas contribute to conservation at all, much less export quotas that extend beyond ores and concentrates but stop part way down the processing stream?

150. China's failure to control the export of these further processed products, while at the same time restricting the export of intermediate products that are not exhaustible natural resources, illustrates that the controls on intermediate products do not relate to the conservation of exhaustible natural resources.

151. It is important to note the various export quotas and export duties that China imposes along the production chain for rare earth products, such as rare earth magnets. In general, China imposes export restrictions on upstream (*i.e.*, input) products, but not on the corresponding, value-added downstream products. In fact, for downstream products, China has policies in place promoting and encouraging their export.¹⁹³

152. For example, the production process for a neodymium-iron-boron (NeFeB) magnet (*i.e.*, a rare earth magnet) consists of four steps: rare earth oxides; metals, alloys and powders; magnet manufacturers; and magnet fabricators.¹⁹⁴ China only subjects materials at the initial stages of processing to export quotas and export duties, while allowing the unrestricted export of further downstream products:

¹⁹² Rare Earth Report, p. 12 (Table 4.4) (Exhibit JE-129).

¹⁹³ See Exhibit JE-154.

¹⁹⁴ Rare Earth Report, pp. 4-5 (Exhibit JE-129).

	Export Quotas ¹⁹⁵	Export Duties ¹⁹⁶
Neodymium oxide	Yes	15%
Neodymium metal	Yes	25%
Other NdFeB alloys	No	20%
NdFeB magnet film	No	20%
Rare earth magnet	No	No

153. As the chart shows, China subjects neodymium oxide and metal to export quotas, allegedly for conservation purposes, and export duties, allegedly for environmental purposes. However, if the neodymium is alloyed or turned into NdFeB magnet film, China no longer imposes an export quota for conservation purposes, but still applies an export duty of 20 percent for environmental purposes. And, if that neodymium is processed even further into a rare earth magnet, China would not impose any export restriction, either a quota or a duty.

154. China’s failure to provide any explanation for how the scope and coverage of the export quotas and purported production restrictions on “rare earths” relate to each other; how, in combination, they relate to “conservation”; and what “exhaustible natural resource” they are seeking to conserve, is fatal to China’s attempts to characterize its export quotas as defensible “conservation” measures.

3. China’s export quotas on rare earths are not made effective in conjunction with restrictions on domestic production or consumption

155. China has also failed to demonstrate that its export quotas for rare earths are “made effective in conjunction with restrictions on domestic production or consumption.” China asserts that it has a “comprehensive conservation policy” consisting of a number of measures that impose “restrictions on domestic production or consumption of rare earths in China.”¹⁹⁷ As discussed below, these measures do not constitute restrictions on domestic production or consumption under Article XX(g) of the GATT 1994. Moreover, the export quotas on rare earths are not “made effective in conjunction with” such domestic restrictions on rare earths and therefore are not imposed “even-handedly” as the Appellate Body has interpreted is required by Article XX(g).

a. The measures China proffers are not “restrictions” on domestic production or consumption

¹⁹⁵ Exhibit JE-3.

¹⁹⁶ Exhibit JE-6.

¹⁹⁷ China’s First Written Submission, para. 165.

156. China lists six types of measures that it contends act as domestic restrictions on the production or consumption of rare earths – *i.e.*, access conditions, volume controls, enforcement actions, consumption controls, taxes and environmental requirements.¹⁹⁸ For the reasons shown below, none of these measures actually restrict either the production or consumption of rare earths in China and, therefore, none meet the requirements set forth for the invocation of GATT Article XX(g).

i. Access conditions are not restrictions on domestic production or consumption

157. China claims that it restricts access to mining rare earth ores by mandating minimum production scale and recovery rates of mining enterprises and suspending the application for new or expanded rare earth mines.¹⁹⁹ As shown below, neither of these sets of measures actually restricts access by Chinese firms to mining rare earth ores.

158. China contends that the requirements of production scale and recovery rate “are designed to eliminate small, inefficient producers that would not use the rare earth resources efficiently and rationally, harming China’s conservation objective.”²⁰⁰ China has provided no support for this assertion. Moreover, China’s argument that limiting access to mining rare earths only to companies that have the ability to extract large amounts of such raw materials is illogical on its face. Likewise, it is wholly unclear how setting a minimum recovery rate limits access to mining rare earths. Rather, these requirements appear to serve China’s interest in creating national champions in the field of rare earths.²⁰¹

159. Furthermore, none of these measures that mandates minimum production scale and recovery rates “restricts” the production of rare earths in the sense of deliberately confining or binding the production or consumption of rare earths. Assuming that mining enterprises comply with the various standards, these measures do not directly limit the amounts of rare earths that mining enterprises may extract. Such licensing measures were found by the panel in *China – Raw Materials* to not constitute production restrictions because “there are no specific provisions actually setting restrictions on domestic production or consumption.”²⁰²

160. Furthermore, the alleged suspension by China of applications for new or expanded rare earth mines is riddled with substantial loop-holes that render the policy wholly ineffective in actually restricting extraction. Specifically, the *Several Opinions* notes that “[i]n principle, any new application for rare earths exploitation and mining shall continue to be put on hold.”²⁰³ The

¹⁹⁸ China’s First Written Submission, para. 164.

¹⁹⁹ China’s First Written Submission, paras. 166-173.

²⁰⁰ China’s First Written Submission, para. 168.

²⁰¹ Exhibit JE-123. *See also* Exhibit JE-122.

²⁰² *China – Raw Materials (Panel)*, para. 7.440.

²⁰³ Exhibit CHN-13, IV(14) (emphasis added).

Circular on Total Extraction Quotas of Tungsten, Antimony and Rare Earth Ore for 2012 further clarifies that “[k]ey projects approved by the State Council,” “survey projects,” mine integration projects, and “[c]onstruction projects to be supported under [agreements] signed between [the central government] and the government of relevant province (region or municipality) in the context of regional economy support policies of the central government” are still permitted notwithstanding China’s purported ban on new or expanded rare earth mines.²⁰⁴ In sum, new rare earth mines approved by the State Council, regional or municipal government are wholly unaffected by the alleged “suspension” on new rare earth mines.

161. Evidence provided by the complainants shows that large, national champion rare earth companies created by China continue to explore for and build new rare earth mines, notwithstanding China’s contentions to the contrary. For example, China Minmetals Group Corp., one of the three companies that China has designated to control 80 percent of heavy rare earth production, has begun mining exploration for heavy rare earths in Guangdong and light and medium rare earths in Hubei province.²⁰⁵ Such actions are wholly anathema to the goal of conservation.

162. For these reasons, the access conditions in the rare earth industry are not actual restrictions on domestic production.

ii. Purported volume restrictions are not restrictions on domestic production or consumption

163. China contends that it has established volume restrictions on rare earths in the form of both extraction and production targets.²⁰⁶ However, China’s argument lacks credibility because, as Colombia also noted in its third party submission,²⁰⁷ actual rare earth extraction and production have traditionally exceeded the targets, sometimes by more than 50 percent:

	2006	2007	2008	2009	2010	2011	2012
Actual level of extraction	132,506	120,800	124,500	129,405	89,259	84,943	n.a.
Extraction target	86,520	87,020	87,620	82,320	89,200	93,800	93,800

²⁰⁴ Exhibit CHN-20, IV.

²⁰⁵ Exhibit JE-123. *See also* Exhibit JE-122.

²⁰⁶ China’s First Written Submission, paras. 175 - 183.

²⁰⁷ Colombia Third Party Submission, para. 19.

	2006	2007	2008	2009	2010	2011	2012
Amount of overproduction as a percent of the extraction target	53.15%	38.82%	42.09%	57.20%	0.07%	0.00%	n.a.
Actual level of production of smelted and separated products	156,969	125,973	134,644	127,320	118,889	96,934	n.a.
Production target of smelted and separated products	n.a.	118,700	118,900	110,700	86,000	90,400	90,400
Amount of overproduction as a percent of the production target	n.a.	6.13%	13.24%	15.01%	38.24%	7.23%	n.a.

As noted by the panel in *China – Raw Materials*, in order for a restriction to meet the requirements set forth in Article XX(g) of the GATT 1994, such restrictions must “actually restrict or limit domestic production or consumption.”²⁰⁸ Of note, in the only years in which there was not significant over-extraction (2010 and 2011) – but still overproduction of 38.24 and 7.23 percent – the world economy was recovering from the global financial crises, thereby lessening demand. In sum, China’s domestic extraction and production targets have been consistently exceeded. The significant amount of production above the targets shows that China does not have actual restrictions or limitations on domestic production.

164. It should also be noted that China’s extraction data provided in CHN-138 for 2010 and 2011 is significantly lower than other information on China’s rare earth production. According to these data, actual extraction exceeded the extraction target by a significantly higher margin – 37.89 percent and 11.94 percent – in 2010 and 2011, respectively.²⁰⁹

²⁰⁸ *China – Raw Materials (Panel)*, para 7.437 (emphasis added).

²⁰⁹ Rare Earth Report, p. 8 (Table 3.1) (Exhibit JE-129).

	2010	2011
Actual level of extraction	123,000	105,000
Extraction target	89,200	93,800
Amount of overproduction as a percent of the extraction target	37.89%	11.94%

165. Beyond the gross amounts of overproduction, China’s production targets do not meet the requirements of Article XX(g) of the GATT 1994 because China’s system fails to ensure that it controls the production of individual rare earth elements.²¹⁰ This fact, combined with China’s acknowledgment to the Panel that “[w]e cannot treat rare earths as a single commodity,”²¹¹ shows that China does not have production restraints for purposes of Article XX(g).

166. China has argued to the Panel that demand for one medium/heavy rare earth (samarium, used in samarium-cobalt magnets) may be different than the demand for another (terbium, used in phosphors).²¹² Thus, China has acknowledged that rare earths are different elements that should not be regulated in the same way because of the difference in downstream demand, for example. At the same time, China has not shown that it sets the domestic production target for terbium in a way that actually restricts the production of terbium below what the market would otherwise dictate. Instead, China asks this Panel to assume that the production of terbium and, by extension, all other individual rare earths, is limited because the production of “rare earths” is allegedly limited. This assumption wholly contradicts China’s own claim that rare earths is not a single commodity and that demand for individual rare earths varies.

167. For example, assuming a production restriction of 100 metric tons (MTs) of rare earth ore, and that the ore contains 10 percent neodymium, the production restriction on rare earths will only restrict the production of neodymium if overall demand for neodymium is above 10 MTs. Otherwise, the extraction cap is above the level of extraction that would occur absent the cap and, as noted by the panel in *China – Raw Materials*, there would not be a production restriction under Article XX(g) of the GATT 1994.²¹³

²¹⁰ See *China – Raw Materials (Panel)*, para 7.464 (noting that China’s production cap regime failed to ensure that it always limited domestic consumption and, therefore, that China did not meet its burden under GATT Article XX(g)).

²¹¹ Exhibit CHN-4, p.9.

²¹² China’s First Written Submission, para. 249.

²¹³ *China – Raw Materials (Panel)*, paras. 7.452-7.453.

168. In the course of this dispute, China has argued that it simply can not set restrictions on individual rare earth elements because “China can only practically control the total volume of ores mined and the total volume of smelted and separated products processed from these ores.”²¹⁴ China further contends that multiple rare earth elements are found together in the same ore and, therefore, production of multiple rare earth elements is “inevitable” given the limits of what China can control.²¹⁵

169. The record clearly shows, however, that China is fully capable of setting restrictions on individual rare earth elements after they are separated from the ore – i.e., that it can save for future use individual rare earth elements. While China is correct in that different rare earths are often found together in the same ores, such ores are eventually processed into individual rare earths for either sale or further processing (*e.g.*, combined with other non-rare earth elements to create a ferro-alloy).²¹⁶ This point is acknowledged by China in its Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties.²¹⁷ There is no reason why China could not impose a restriction on the sale or further processing of individual rare earths once they have been separated into specific rare earth oxides and, therefore, have domestic restrictions on an individual rare earth-basis. Indeed, China admits that it is able to regulate the smelting process – i.e., the step of further processing individual rare earth oxides into, for example, metals and ferro-alloys.²¹⁸

170. For example, after separation, China could restrict the amount of terbium oxide that could be sold, restrict the amount that could be reduced to metals (*i.e.*, terbium metal) or alloyed (*i.e.*, other terbium compounds) or turned into a ferro-alloy and, in the process, ensure that the amount of terbium metal and other terbium compounds is below what the market would otherwise demand. In so doing, China would have terbium oxide stockpiles that it could use in the future.

171. Furthermore, limits on a China-based company’s ability to sell or further process raw materials (*e.g.*, terbium oxide) that have already been mined is an alleged current feature of China’s domestic law covering extraction. As noted by China in its first written submission, “the rules governing access to the [extraction target for tungsten] provide that if the enterprise were to expand the mining scale, to the point where output exceeded the allocated [target], the enterprise must ‘keep the extra specified minerals of which the protective mining is prescribed beyond the quota properly from being sold.’”²¹⁹ The law that China cites for this proposition –

²¹⁴ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 97.

²¹⁵ *Id.*, para. 95.

²¹⁶ Rare Earth Report, pp. 2-3 (Exhibit JE-129).

²¹⁷ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 95 (“The specific and individual rare earth elements are only produced when rare earth ores are processed through a multitude of steps to first concentrate and chemically process the minerals and then separate whatever rare earth elements may be in the ton of ore.”)

²¹⁸ *Id.*, para. 97.

²¹⁹ China’s First Written Submission, para. 319 (quoting Exhibit CHN-18).

the *Provisional Measures for the Administration of Exploration and Mining of the Specified Minerals of which the Protective Mining is Prescribed* – would appear to apply to rare earths as well as tungsten.²²⁰ In short, China acknowledges the fact that it can control raw materials after they have been extracted and Article XX(g) of the GATT 1994 requires restrictions on domestic production or consumption. To the extent that China argues it cannot fully restrict production, it can impose restrictions on domestic consumption, but has not done so. In essence, then, China concedes it neither restricts domestic production nor consumption of the individual rare earth.

172. For these reasons, China is capable of having a regime that ensures that the domestic production or consumption restrictions on each rare earth actually restricts the production or consumption of that individual rare earth. And, China has argued that each rare earth is a distinct element with a different demand profile. China’s failure to do so means that it cannot successfully invoke the exception found at Article XX(g) of the GATT 1994 because it lacks measures that actually restrict domestic production or consumption of individual rare earths.

iii. “Enforcement actions” are not restrictions on domestic production or consumption

173. In its first written submission, China contends that it restricts rare earth extraction and production through enforcement actions directed at limiting or, within five years, eliminating²²¹ production above the domestic production targets.²²² China has further argued that it should not be held responsible for the significant overproduction in the rare earth sector noted by Colombia and the co-complainants because China “has actively and successfully improved compliance with its [production] restrictions.”²²³

174. China’s argument that, in effect, it is doing the best it can to enforce binding production restrictions is contradicted by the fact that China has taken multiple actions at different levels of government to incentivize and otherwise increase production of rare earths, thereby directly causing production above the target. In other words, China does not have “clean hands” as to the problem of overproduction of rare earths. In particular, China aims to increase the production of downstream materials that use rare earths as inputs; thereby increasing demand for rare earths. As set forth in the U.S. first written submission:

the 12th Five-Year Development Plan for New Materials Industry sets targets for the increased production of downstream rare earth products, including increasing

²²⁰ Exhibit CHN-18.

²²¹ Exhibit CHN-59.

²²² China’s First Written Submission, para. 205.

²²³ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 68.

production capacity of permanent magnetic materials by 20 thousand tons per year and polishing powder by 5 thousand tons per year;²²⁴

the *Inner Mongolia Autonomous Region’s Twelfth Five-Year High Tech Industries Development Plan* sets a 60 percent growth target for the entire provincial rare earth industry;²²⁵ and

the Jiangxi provincial government has established specific quantity targets for downstream products, including 100 million sets of fluorescent lighting devices and 1 million sets of electric motors based on permanent magnets.²²⁶

175. Provincial level measures aimed at growing the local rare earth industry – e.g., the 60 percent growth targeted in the *Inner Mongolia Autonomous Region’s Twelfth Five-Year High Tech Industries Development Plan* – explain statements like those of Zhang Zhong, the president and general manager of the Inner Mongolia Baotou Steel Rare-Earth (Group) Hi-Tech Co., the largest Chinese producer of rare earths, who noted that local governments encourage rare earth producers to expand production beyond the central government’s production targets.²²⁷ In fact, Fujian province openly advertises to companies that relocate into its rare earth industrial park that “[r]are earth raw materials needed for investments in production projects relating to fine and further processing of rare earth application products will be supplied 100% guaranteed by the Longyan City Rare Earth Development Ltd.”²²⁸

176. In addition, China has recently instituted a “reward” of RMB 3,000 per ton whereby rare earth mining and smelting companies will receive funds from the government based on the size of their operations, thereby encouraging increased production.²²⁹ The same law also established a capital injection fund for “rare earth applied high-technologies industrialization projects” and an annual support fund for research and development.²³⁰

177. For these reasons, it is not surprising that China’s National Mineral Resource Plan for 2008-2015 calls for China to extract 140,000 MTs of rare earths in 2015, which would be a

²²⁴ Exhibit JE-28, at V, 5.1; Column II, 03.

²²⁵ Exhibit JE-29, Table 1.

²²⁶ Exhibit JE-18, Section II, (3).

²²⁷ WantChinaTimes.com, Central and local authorities clash over Baotou’s rare earth (February 25, 2013) (Exhibit JE-113); *see also* Xinhua Finance, State Regulation Exists in Name Only and Shut-Down Rare Earth Companies Reopen Successively in Other Areas (October 15, 2012) (Exhibit JE-144) (noting that according to one Chinese rare earth producer, rare earth operations in one province will often relocate to another if closed because “[t]he government always opens one eye and closes the other.”).

²²⁸ Preferential Policies of Fujian (Longyan Rare earth Industrial Park to Encourage Investments of Businessmen, 1 (September 27, 2010) (Exhibit JE-152).

²²⁹ Communication on the management method applicable to Rare earth industry adjustment and improvement special fund, Art. 8 (Exhibit JE-114).

²³⁰ *Id.*, Art. 9-10.

substantial increase from current levels.²³¹ Clearly, production above target is the logical and inevitable result of China’s wide-spread and multi-level stimulation of the rare earth industry – both in the form of increased downstream production that leads to increased production of rare earths as well as direct payments to rare earth producers. Accordingly, China’s assertion that it “has actively and successfully” sought to enforce the production targets should be rejected given how much it has done to cause overproduction.

178. China’s argument also fails because, according to the documents provided by China in the course of this dispute, China will only eliminate overproduction of rare earths in five years.²³² As the panel noted in *China – Raw Materials*, “[t]o benefit from the justification permitted under paragraph (g) [of Article XX], a Member cannot seek to rely on a future or potential domestic restriction.”²³³ Here, China is relying on the future enactment of domestic targets that are actually enforced so as to actually restrict the extraction and production of rare earths. This is insufficient to meet the burden of Article XX(g) of the GATT 1994.

iv. Purported “consumption controls” are not restrictions on domestic production or consumption

179. China contends that the “collective effect of China’s export and production quotas for rare earths constitutes a volume restriction on domestic Chinese consumption, within the meaning of Article XX(g).”²³⁴ Nothing could be further from the truth. Rather, the export quotas encourage increased domestic consumption by creating a set amount of raw materials that can only be consumed by domestic users, thereby decreasing prices in the Chinese market. As noted by the panel in *China – Raw Materials*:

[t]he Panel is also concerned with the possibility that export restrictions may have long-term negative effects on conservation due to the increased demand from the downstream sector. An export restriction on an exhaustible natural resource, by reducing the domestic price of the materials, works in effect as a subsidy to the downstream sector, with the likely result that the downstream sector will demand over time more of these resources than it would have absent the export restriction.²³⁵

180. Indeed, China itself has previously disagreed with its current contention that export quotas result in limitations on domestic consumption. According to China’s submission in the *China – Raw Materials* dispute, “export restraints [such as an export quota] encourage the

²³¹ Exhibit JE-105.

²³² Exhibit JE-59.

²³³ *China – Raw Materials (Panel)*, para. 7.455.

²³⁴ China’s First Written Submission, para. 184.

²³⁵ *China – Raw Materials (Panel)*, para. 7.430.

domestic consumption of [raw materials subject to export restraints] in the domestic economy.”²³⁶ This is wholly contrary to China’s argument in the instant dispute.

181. Additionally, the United States notes that, as a conceptual matter, China’s assertion that export quotas and production quotas could be combined to result in limitations on domestic consumption is fundamentally flawed. In any scenario where the amount of a raw material that is produced (“PQ”) is greater than the amount that can be exported under an export quota (“EQ”), the limitation on foreign consumption is obviously defined by the amount of the export quota, or EQ. Foreign consumption might be further limited by other factors at play in a given year – including the presence of other export restrictions, the structure and administration of the export quota, etc. – such that foreign consumption could always be less than the full EQ (theoretically, as little as 0) but never more. Regardless of how much is produced in a given year, foreign consumers can consume *no more* than the amount of the export quota.

182. The combined effect of production quotas and export quotas, however, has a fundamentally different impact on domestic consumption. Because PQ is greater than EQ, domestic consumers are always guaranteed a supply of the raw material. Domestic consumers are guaranteed the difference between production and what can be exported or $PQ - EQ$; if the export quota is not filled in a year or is 0, the supply available to domestic consumers would be even greater, i.e., the difference between PQ and what is actually exported. If for some reason no raw material is exported in a given year, domestic consumers would have access to the full amount of what is produced. Accordingly, under the combined effect of production quotas and export quotas, domestic consumers have available no less than the difference between what is produced and what is exported. Contrary to China’s assertion, therefore, this situation is the exact opposite of a “limitation” on domestic consumption. Under the combined effect of both a production quota and an export quota, domestic consumers are provided a consumption *assurance*. This not only contradicts China’s assertion that it has in place consumption restrictions, but also demonstrates, as discussed below, that the export quotas are not “even-handed” – that is, they are not “made effective in conjunction with” restrictions on domestic production or consumption.

183. In addition, in the course of this dispute, China has argued that the allocation methodology for the rare earth export quotas, which, as discussed below, are WTO-inconsistent and restrict the number of companies that can export rare earths, serves as a type of domestic consumption restraint because it creates an incentive for exporters to use their allocation in a given year in order to get a greater allocation in future years.²³⁷ China’s argument is based on the fact that the allocation for an applicant in a given year is derived from the ratio of that

²³⁶ *Id.*, para. 7.514

²³⁷ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, fn. 169.

applicant's volume/value for the last three years ("A") divided by the total volume/value of China's exports ("T"), or A/T.²³⁸

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

185. And more generally, China's use of prior export performance is inconsistent with China's commitments under the Working Party Report as incorporated in the Accession Protocol for the reasons set forth in Section IV. China should not be allowed to claim that these measures, which are otherwise WTO-inconsistent and limit the number of entities that can export rare earths, help meet China's burden under GATT Article XX(g).

v. Resource taxes are not restrictions on domestic production or consumption

186. In its first written submission and elsewhere, China contends that the resource taxes of RMB 60 per ton on ore containing light rare earths and RMB 30 per ton on ore containing heavy rare earths constitute a restriction under Article XX(g) of the GATT 1994.²³⁹ Curiously, the only evidence that China has provided that the resource taxes have an actual restrictive effect is that the amount of resource taxes paid by a single rare earth producer – the Inner Mongolia Baotou Steel Rare-Earth (Group) Hi-Tech Co., which is the same company whose owner noted that local governments encourage production above the domestic production targets²⁴⁰ – increased by more than 850 times, from RMB 762,089 in 2010 to RMB 649,786,457 in 2011, when China changed the resource tax from RMB 3 per ton to RMB 60 per ton on the rare earth ores mined by that company.

187. As previously noted by Japan,²⁴¹ China's argument in this regard fails because while the resource tax increased 20 times (from RMB 3 per ton to RMB 60 per ton), the amount of resource tax actually paid by Inner Mongolia Baotou Steel Rare-Earth (Group) Hi-Tech Co. increased by more than 850 times. Accordingly, the fact that the company paid so much more in resource taxes in 2011 is not explained by the increase in the resource tax, which can only explain around 2 percent of the change, but rather grossly increased production, which explains

²³⁸ *Id.*

²³⁹ China's First Written Submission, para. 192; China's Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 105.

²⁴⁰ WantChinaTimes.com, Central and local authorities clash over Baotou's rare earth (February 25, 2013) (Exhibit JE-113).

²⁴¹ Japan's Comments on China's Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting of the Panel With the Parties, paras. 27 - 28.

approximately 98 percent of the change. In sum, the increase in the resource tax did not prevent Inner Mongolia Baotou Steel Rare-Earth (Group) Hi-Tech Co. from drastically increasing its production of rare earths from 2010 to 2011. This is also consistent with reports that the increase in the resource taxes on rare earths “are unlikely to add significantly to the price of rare-earth ores, which can fetch tens of thousands of dollars per ton.”²⁴² For these reasons, China has failed to show that the resource taxes on rare earths served as an actual restriction on domestic production for purposes of GATT Article XX(g).

iv. “Environmental requirements” are not restrictions on domestic production or consumption

188. China also contends that a number of environmental regulations on the mining of rare earths – e.g., the *Emission Standards of Pollutants from Rare Earth Industry* and the *Deposit for Ecological Recovery* – “have the potential to reduce extraction” and, therefore, serve as production restrictions under Article XX(g) of the GATT 1994.²⁴³ According to China, implementation of these environmental requirements will lead to higher costs of production, which will be passed along to consumers in the form of higher prices and, at the end of the day, potentially decrease demand for rare earths.²⁴⁴ China has failed to show, however, that this chain of events has actually happened.

189. Rather, China merely notes that such measures have forced rare earth mining entities to make “significant investment in pollution control measures,” “temporarily” idle while they installed new emission controls, or merge with other companies.²⁴⁵ China has not explained, however, how any of these events actually restrict production. For example, China has failed to show that temporarily idling a rare earth production facility has any impact on the pace of extraction, either at that facility (which can increase production once it goes back on-line) or overall (given that other facilities can increase production).

190. China’s argument also presents systemic concerns. It is fair to say that a great number of Members, if not most, have environmental requirements that regulate the mining of raw material resources. To say that it necessarily follows that all these Members, therefore, have domestic production restrictions under GATT Article XX(g) would turn this particular Article XX exception into the rule.

191. For these reasons, China has not demonstrated that it maintains any restrictions on the production or consumption of rare earths as required by GATT Article XX(g).

²⁴² China Expands Resource Tax to Nation, The Wall Street Journal (October 10, 2011) (Exhibit JE-135).

²⁴³ China’s First Written Submission, paras. 196-197.

²⁴⁴ China’s First Written Submission, para. 197.

²⁴⁵ China’s First Written Submission, paras. 198, 202.

b. The export quotas on rare earths are not “made effective in conjunction with”: the absence of even-handedness

192. Based on the requirements of Article XX(g) set out above, China’s export quotas on rare earths are not “made effective in conjunction with” restrictions on domestic production or consumption. To the contrary, China’s export quotas present the situation the Appellate Body alluded to in *U.S. – Gasoline*, where “no restrictions on domestic[] [interests] are imposed at all, and all limitations are placed upon [foreign interests] *alone*.”²⁴⁶ As the Appellate Body concluded, in such a scenario, “the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination”²⁴⁷

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

194. To the extent any measure China has proffered as evidence of restrictions on domestic production or consumption is relevant at all to the production or consumption of rare earths, it would be relevant only to the mining or “production” of rare earths. If such a measure were considered to “restrict” rare earth production, a restriction on production would affect both domestic and foreign users of rare earths. As China observes in its own description of the domestic restrictions, such restrictions impose costs on both domestic and foreign consumers.²⁴⁸ However, foreign users of rare earths are also subjected to the export quotas (and the export duties) on rare earths, while domestic users are not. In order for its export quotas measures to be even-handed, China would need to counter-balance the impact of the export quotas on foreign users with some measure that similarly affects domestic users of rare earths, but it has not done so.

195. Here, any plausible “restriction” on domestic production would equally affect both domestic and foreign users. When juxtaposed with export quotas (and export duties) that restrict supply only to as to foreign users, it becomes clear that there is no counter-balance to the export quotas (and export duties) and therefore no even-handedness.

196. Indeed, the panel in *China – Raw Materials* addressed the very same scenario – *i.e.*, where foreign consumers would be affected by both China’s domestic production restrictions as

²⁴⁶ *U.S. – Gasoline (AB)*, p. 21.

²⁴⁷ *U.S. – Gasoline (AB)*, p. 21.

²⁴⁸ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, paras. 130-131 (“There are great financial incentives for foreign buyers to violate Chinese law by smuggling China’s rare earth products. The most important is the low costs. Not only do the illegal foreign buyers avoid the export duty, their purchases of illegally mined and produced rare earths in China do not reflect any of the much higher regulatory-imposed costs of legally produced rare earth products in China.”).

well as the export quotas’ restrictions on their consumption while domestic consumers would be affected only by domestic production restrictions— and found that even-handedness was non-existent:

[s]ince a domestic restriction on production affects both domestic and foreign users of the resources, the Panel is of the view that China has not demonstrated that its regime for refractory-grade bauxite and fluorspar will not lead to an uneven-handed imposition on foreigners. Although there is no textual basis requiring identical treatment under Article XX(g), it is difficult to see how – if no similar or parallel restrictions are imposed at all on domestic users or on domestic consumption and all limitations are placed upon the foreign consumers alone – the export restrictions can be considered even-handed. Nor would they appear to be primarily aimed at or even substantially designed for implementing conservationist goals; on the contrary “the measure would simply be naked discrimination locally [interests]” [sic]. In order to show even-handedness, China would need to show that the impact of the export duty or export quota on foreign users is somehow balanced with some measure imposing restrictions on domestic users and consumers. In our view China has not met this burden.²⁴⁹

197. In interpreting the “made effective in conjunction with” clause of Article XX(g), the Appellate Body has found that “Article XX(g) permits trade measures relating to the conservation of exhaustible natural resources if such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.”²⁵⁰ As explained above, by nature, an export quota, whenever it is set below the amount of a production quota, “works together” with that production quota to create a consumption restriction for foreign users and a consumption guarantee for domestic users. In other words it does not “work together” towards conservation. The export quota, together with the production restriction, simply ensures favorable access to domestic consumers, at the expense of foreign consumers – which operates not to conserve an exhaustible natural resource but to discriminate against foreign consumers. This fundamentally contradicts the “even-handedness” that Article XX(g) requires for trade measures permissible as relating to conservation.

198. This discrimination in the effect of the export quotas, when conjoined with production restrictions, is exacerbated by the trends in changes to the export quotas as compared to the changes in domestic production targets for rare earths. China reports domestic production targets on rare earth extraction starting in 2006.²⁵¹ Since that time, China’s domestic extraction targets have grown from 86,520 MTs (in rare earth oxide equivalents (“REOs”)) in 2006 to 93,800 MTs (REOs) in 2012. Since then, the export quota has shrunk from 45,000 MTs (REOs)

²⁴⁹ *China – Raw Materials (Panel)*, para. 7.465.

²⁵⁰ *China – Raw Materials (AB)*, para. 360.

²⁵¹ Exhibit CHN-137.

to 24,000 MTs (REOs). In 2006, China restricted foreign consumption to around half of its rare earth production while ensuring domestic consumers around half of its rare earth production. By 2012, China had restricted foreign consumption to a little more than a quarter of production while ensuring domestic consumers at least 3/4 of total production.

199. Accordingly, even if China had demonstrated the existence of restrictions on domestic production or consumption, China would still not have demonstrated the requisite even-handedness to justify its export quotas, as applied to rare earths, under Article XX(g) of the GATT 1994.

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

1. China’s export quota on tungsten does not relate to conservation

200. In examining whether China’s export quota on tungsten relates to the conservation of an exhaustible natural resource, the operative question is whether there is a close and genuine relationship of ends and means between the goal of tungsten conservation and the means presented by the application of the export quota to exports of various tungsten products.²⁵² As shown below, the answer to this question is no.

a. The measures do not demonstrate a close and genuine relationship of ends and means

201. As with rare earths, China contends that the export quota on tungsten relates to conservation because the measures establishing and implementing the quota refer to the goal of conservation, either directly or by citing to other measures that reference conservation.²⁵³ As previously discussed, China’s reliance on such passing references to the goal of conservation, which fail to explain how the export quota makes a material contribution to that goal, is insufficient to meet China’s burden under GATT Article XX(g).

202. China has imposed an export quota on various tungsten raw materials and products since 2000.²⁵⁴ Over time, the volume of the export quota has contracted.²⁵⁵ In the time that China has imposed an export quota on tungsten – now over a decade – China’s measures implementing the export quota have only made passing reference to the goal of conservation beginning in 2012, with one exception (discussed below). In particular, the annual measures administering the export quota on tungsten only began incorporating cursory references to conservation in 2012:

²⁵² *U.S. – Shrimp (AB)*, para. 135.

²⁵³ China’s First Written Submission, paras. 299 - 305.

²⁵⁴ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 86.

²⁵⁵ Exhibit CHN-138.

Measure	Conservation Reference in the 2012 Version	Corresponding Reference in the 2011 Version
Public Notice of the Qualification Standards and Application Procedures of the Tungsten, Antimony and Silver State Trading Export Enterprises, and Tungsten and Antimony Export Supply Enterprises	“In order to protect the resources and environment, in coordination with industry policies of the nation, and further strengthen the export administration of the rare metal exports, ...” ²⁵⁶	“In accordance with relevant regulations of the ...” ²⁵⁷

203. In addition, China notes that a number of the measures that either establish or implement the export quota on tungsten were “adopted on the basis of measures that [themselves] refer to China’s conservation objective” – i.e., the *Foreign Trade Law*, *Regulations on the Import and Export of Goods*, the *Measures for the Administration of Export Commodities Quotas*, and the *Provisional Measures on Administration of the Export Operations of Tungsten and Tungsten Products*.²⁵⁸ The United States has already addressed the indirect citations to conservation objectives in the *Foreign Trade Law* and *Regulations on the Import and Export of Goods* and shown why these citations do not meet the relating to standard.²⁵⁹ As is the case with those two measures, the *Measures for the Administration of Export Commodities Quotas* establishes that export quotas can exist for a number of reasons under Chinese law besides conservation, such as to serve the “development plans, objectives and policies of the States in the relevant industries.”²⁶⁰ And while the *Provisional Measures on Administration of the Export Operations of Tungsten and Tungsten Products* mentions conservation, this measure fails to explain how the export quota on tungsten makes a material contribution to the goal of conservation.

204. China also contends that the export quota has a conservation objective based on the *1991 Circular*, which identified tungsten as a “special mineral under the national protective mining.”²⁶¹ However, the *1991 Circular* contains no reference to the export quota on tungsten.²⁶² The *1991 Circular* notes, rather, that China has a comparative advantage in tungsten and rare earths and forbids disclosing rare earth data or mine technology to foreigners, which is in direct contradiction to China’s alleged policy of signaling to foreign producers that they should produce more rare earths.²⁶³

²⁵⁶ Exhibit CHN-100.

²⁵⁷ Exhibit JE-133.

²⁵⁸ China’s First Written Submission, paras. 301-302; Exhibits CHN-11, 54, 96 and 101.

²⁵⁹ See Section III.B.2.A.

²⁶⁰ Exhibit CHN-96, Art. 10(3).

²⁶¹ China’s First Written Submission, para. 304.

²⁶² Exhibit CHN-12.

²⁶³ Exhibit CHN-12.

b. As a “signaling” tool, the export quota lacks a close and genuine relationship of ends and means

205. In its first written submission, China proffers a hypothetical way in which the export quota on tungsten may serve a conservation purpose – by signaling foreign users of tungsten to secure alternative supplies of tungsten from non-Chinese sources and, at the same time, creating a dis-incentive to domestic Chinese producers to expand production to supply foreign consumers.²⁶⁴ China’s argument is hypothetical in that it is not reflected in Chinese government measures setting forth the tungsten export quota. And beyond its hypothetical nature, China’s signaling argument fails for a number of additional reasons.

206. First, the export quotas are part of the same general industrial policy regime that, as with rare earths, creates two markets – an internal and an external one – for tungsten. The two markets result in the two-tiered pricing structure – *i.e.*, lower prices in China, higher prices in other Members – and a corresponding incentive for foreign users of tungsten to relocate to China, so as to avoid being subject to the export quota.²⁶⁵

207. In particular, China actively encourages foreign investment in a number of high value-added manufacturing processes that utilize tungsten (for example, high temperature bearable tungsten filament, which are not subject to export restrictions) as inputs.²⁶⁶ And because foreign users of tungsten have an incentive to relocate to China, the export quota on this basis as well increases domestic demand for Chinese-produced tungsten, which is contrary to China’s claim that the export quota relates to conservation of tungsten in China. Information provided by the complainants shows that the export quota has, in fact, caused downstream users of tungsten to move their operations to China.²⁶⁷

208. Second, China does not explain how the export quota, as opposed to domestic production restrictions that actually limit production, create an incentive for foreign tungsten producers to increase production. China can readily send such a signal through domestic production restrictions and need not relate to discriminatory, trade-distorting export quotas. In fact, during the course of these proceedings, China has argued that its domestic restrictions have the potential to impact foreign consumers and alter their consumption behavior.²⁶⁸

209. The United States further notes that China has not provided any data whatsoever that foreign tungsten producers have expanded production in light of China’s export policies.

²⁶⁴ China’s First Written Submission, para. 307.

²⁶⁵ These price differences are shown in the Tungsten Report, pp. 58-61 (Exhibit JE-130).

²⁶⁶ See Catalogue of Industries for Guiding Foreign Investment, Catalog of Encouraged Foreign Investment Industries, III,10(26) and 22(2) (Exhibit JE-16).

²⁶⁷ See, *e.g.*, H.C. Starck Press Release (JE-103).

²⁶⁸ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, paras. 130-131.

210. As demonstrated above, China has not met its burden of establishing the relationship between the export quota, as it applies to tungsten, and the goal of conservation of tungsten.

c. Viewed in the context of China’s production, processing and trade policies, the export quota on tungsten demonstrates a close and genuine relationship to a purpose other than conservation

211. Instead, taking into account the absence of restraints on the exportation of downstream products made from tungsten, such as cemented carbides, the existence of policies that actively promote and encourage certain downstream products,²⁶⁹ and the substantial growth reflected in production statistics of those products, the picture that emerges demonstrates a complete lack of any relationship between the export quota on tungsten and the goal of tungsten conservation; instead, the record shows a close and genuine relationship between the export quota and China’s trade protectionist goals.

212. According to the data provided by China, tungsten production in China, the world’s largest producer, increased more than 163 percent from 2000, when China begun imposing an export quota on tungsten, to 2011.²⁷⁰ In addition, China’s consumption of tungsten increased more than 175 percent from 2003, the earliest China has provided such data, to 2011.²⁷¹ China’s share of world tungsten consumption increased from 51 percent in 2005 to 62 percent in 2010.²⁷² The explosion in domestic consumption is reflected in the corresponding explosion in the production of downstream products that use tungsten as inputs, such as the approximate doubling in the production of tool and high-speed steel, and cemented carbides, all significant consumers of tungsten, from early 2000 to 2010.²⁷³ Similarly, a number of the intermediate products subject to the tungsten export quota – tungsten concentrates, APT and tungsten powder – saw significant increases in production levels from 2005 to 2010.²⁷⁴

213. Clearly, the export quotas on tungsten have had no curtailing impact on the pace of extraction of China’s tungsten resources. And as noted by the panel in *China – Raw Materials* when it rejected China’s use of export quotas, “[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

²⁶⁹ See Exhibit JE-154 (noting that China will encourage the export of “Ultra-fine Grain Tungsten Carbide-Cobalt Composite Material”).

²⁷⁰ Exhibit CHN-138. Other data show that China’s production of tungsten grew at a compound annual growth rate of 10 percent from 1998 - 2010, which was the second highest rate of growth in the world. Tungsten Report, p. 28 (Exhibit JE-130).

²⁷¹ Exhibit CHN-138.

²⁷² Tungsten Report, p. 37 (Exhibit JE-130)

²⁷³ Tungsten Report, pp. 39, 42 (Exhibit JE-130).

²⁷⁴ Tungsten Report, p. 30 (Exhibit JE-130).

of extraction.”²⁷⁵ The export quota on tungsten has clearly changed the location of the consumption of tungsten, but not the pace of extraction.

214. The export quota on tungsten helped change the location of consumption through, *inter alia*, its impact on relative pricing. Specifically, the export quota, as part of China’s overall export restriction regime on tungsten, has created gross price differences between Chinese export prices for intermediate tungsten products subject to the export quota and the corresponding domestic price. In particular, APT, ferro-tungsten, tungsten carbide and tungsten oxide had average price difference of 25.7, 58.11, 8.94 and 9.93 percent, respectively, between Chinese export prices and domestic prices from the early 2000s to 2011.²⁷⁶ Similar price differences for the same set of products were seen in 2012.²⁷⁷

215. Moreover, the imposition of restraints on the export of tungsten in the absence of similar or similarly extensive restraints on the export of downstream products (e.g., tool and high-speed steel, cemented carbides) – and the active promotion and encouragement of downstream products – demonstrates the close and genuine relationship between the export quota on tungsten and the goal of fostering the growth and exports of value added, downstream products.

216. These trends and facts demonstrate the successful realization of economic goals, but have no connection to the goal of conserving China’s tungsten resources. Accordingly, China has failed to demonstrate that its export quota on tungsten “relates to the conservation of” tungsten.

2. The export quota does not relate to the conservation of an “exhaustible natural resource”

217. As was the case with rare earths, China’s Article XX(g) defense for its tungsten export quota breaks down even further upon closer inspection of the design and scope of the export quota and the purported production restrictions in trying to determine what, precisely, China is trying to conserve through the use of its export quota and production measures.

218. In much of the discussion above, the question of what exhaustible natural resource China is trying to conserve has been simplified on the assumption that “tungsten,” in the abstract, is that exhaustible natural resource. However, the facts are not so simple.

219. In terms of the tungsten export quota, “tungsten” covers 14 tariff codes ranging from:

Tungsten ores and concentrates (accounting for one tariff code – tungsten ores and concentrates (2611.0000)) to

²⁷⁵ *China – Raw Materials (Panel)*, para. 7.428.

²⁷⁶ Tungsten Report, pp. 58-61 (Exhibit JE-130).

²⁷⁷ 2012 Tungsten Price Data (Exhibit JE-137).

Tungsten recyclables (accounting for two tariff codes – tungsten waste and scrap (8101.9700) and tungsten ash (2620.9910)) to

Intermediate tungsten products (accounting for 11 tariff codes encompassing products that have undergone some initial or intermediate processing. The most widely traded product in this category is ammonium paratungstate (APT) (2841.8010).²⁷⁸)

220. In the meantime, China’s proffered production measures attempt to regulate the production of “tungsten” with respect only to their mining and production.

221. The questions raised by these facts are: (1) how does China’s export quota, which covers a portion of upstream tungsten raw materials and products processed multiple stages from the raw material – but not further downstream products, work together with purported restrictions on production – *i.e.*, the mining and production of tungsten products – to conserve an exhaustible natural resource?; and (2) what “exhaustible natural resource” is being conserved through the operation of these combined measures?

222. China argues in broad brush strokes that, because the panel in *China – Raw Materials* found, and it was un-controverted in that dispute, that bauxite and fluorspar were exhaustible natural resources, the raw materials at issue here are also “exhaustible natural resources” whose conservation China is seeking to protect through the export quotas.²⁷⁹ However, the bauxite and the fluorspar subject to the challenged export restrictions in *China – Raw Materials* were a clay and a mineral which, like tungsten ores and concentrates, are basically in the form in which they are mined from the earth.²⁸⁰ In the present dispute, China’s export quotas cover not just ores but even further processed products such as APT and tungsten carbide powder.

223. Accordingly, China’s arguments here leave these vital Article XX(g) questions unanswered.

224. In fact, the more closely China’s measures are scrutinized, the more questions arise regarding what, if any, relationship they bear to conservation. For instance, why do China’s export quotas include tungsten ores, and also a number of products that might not themselves be considered “exhaustible natural resources” because they are intermediately processed products – such as APT and tungsten carbide powder – made from the materials that occur naturally? Additionally, why, at the same time, does China not restrain, but rather encourage, the export of further processed products such as certain carbides, which combined consumed more than a third of China’s total rare earth production in 2010?²⁸¹ Why, if China is seeking to conserve the

²⁷⁸ See Exhibit JE-3; Tungsten Report, p. 16 (Exhibit JE-130).

²⁷⁹ See China’s First Written Submission, paras. 85 - 87.

²⁸⁰ *China – Raw Materials (Panel)*, para. 7.369.

²⁸¹ Rare Earth Report, p. 12 (Table 4.4) (Exhibit JE-129).

supply of tungsten in its raw, exhaustible, naturally occurring form – from which all downstream products derive their tungsten content – would China need anything other than a production restriction? How would an export quota contribute to conservation at all, much less an export quota that extend beyond ores and concentrates but stop part way down the processing stream?

225. China’s failure to control the export of these further processed products, while at the same time restricting the export of intermediate products that are not exhaustible natural resources, illustrates the fact that the controls on intermediate products do not relate to the conservation of exhaustible natural resources.

226. In the course of this dispute, China has claimed that it does not control downstream products that contain tungsten, such as cemented carbides, because such products only contain “small percentages” of tungsten.²⁸² It should be noted, however, that while it is true that any given unit of a corresponding downstream product may not contain substantial quantities of tungsten viewed in isolation, China’s argument is flawed because, cumulatively, such products contain great amounts of tungsten. Nearly two thirds of the world’s tungsten production goes into cemented carbides.²⁸³ And, China’s failure to control such value-added exports, while maintaining controls on less value-added products, shows that the export quota does not “relate to” conservation pursuant to Article XX(g) of the GATT 1994.

227. Indeed, the importance of the cumulative impact of the use of raw materials in downstream products was recognized by the panel in *China – Raw Materials* when it observed that:

[i]n 2008, although far less fluorspar was exported from China in its raw material form than in 2000, more fluorspar in total was exported from China than in 2000 due to the substantial increase in exports of downstream products containing fluorspar. For the Panel, this evidence does not support China’s claim that it has put in place comprehensive plan to conserve . . . fluorspar.²⁸⁴

228. As was the case with rare earths, it is interesting to note the various export restrictions that China imposes along the production chain for tungsten-containing products, such as metal cutting tools. In general, China imposes export quotas and duties on inputs, but not on value-added downstream products. In fact, for downstream products, China has policies in place promoting and encouraging their export.²⁸⁵

²⁸² China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 243.

²⁸³ Tungsten Report, p. 31 (Exhibit JE-130).

²⁸⁴ *China – Raw Materials (Panel)*, para. 7.429.

²⁸⁵ Exhibit JE-154.

229. For example, the production process for cutting tools consists of five steps: tungsten ores and concentrates; APT; tungsten carbide powder; cemented carbides; and cutting tools.²⁸⁶ China only subjects materials at the initial stages of processing to export quotas and duties, while allowing the unrestricted export of the further downstream products:

	Export Quotas ²⁸⁷	Export Duties ²⁸⁸
Tungsten ores and concentrates	Yes	20%
APT	Yes	5%
Tungsten carbide powder	Yes	5%
Cemented carbides	No	No
Metal cutting tools	No	No

230. As the chart shows, China subjects tungsten ores and concentrates to export quotas allegedly for conservation purposes and a 20 percent duty allegedly for environmental purposes. However, if the tungsten concentrates are chemically processed into APT and tungsten carbide powder, China’s environmental concerns actually diminish, as it imposes a significantly lower (5 percent) duty on the intermediate products – APT and tungsten carbide powder. And, if that tungsten carbide powder is processed even further into cemented carbides or the finished product (i.e., a metal cutting tool), China would not impose any export restriction, either export quota or duty.

231. China’s failure to provide any explanation for how the scope and coverage of the export quota and purported production restrictions on “tungsten” relate to each other; how, in combination, they relate to “conservation”; and what “exhaustible natural resource” they are seeking to conserve, is fatal to China’s attempts to characterize its export quota as a defensible “conservation” measure.

3. China’s export quota on tungsten is not made effective in conjunction with restrictions on domestic production or consumption

232. China has also failed to demonstrate that the export quota on tungsten is “made effective in conjunction with restrictions on domestic production or consumption.” China asserts that it

²⁸⁶ Tungsten Report, pp. 13, 32 (Exhibit JE-130).

²⁸⁷ Exhibit JE-3.

²⁸⁸ Exhibit JE-6.

has a “comprehensive set of domestic restrictions” consisting of a number of measures that “restrict the production or consumption of tungsten in China.”²⁸⁹ However, as discussed below, these measures do not constitute “restrictions on domestic production or consumption” under Article XX(g) of the GATT 1994. The export quota on tungsten is also not “made effective in conjunction with” such restrictions on tungsten and therefore is not imposed “even-handedly” as the Appellate Body has interpreted is required by Article XX(g).

a. The measures China proffers are not “restrictions” on domestic production or consumption

233. China lists five types of measures that it contends act as domestic restrictions on production or consumption of tungsten – i.e., access conditions, volume controls, controls on domestic consumption, taxes and environmental requirements.²⁹⁰ For the reasons shown below, none of these measures actually restrict either the production or consumption of tungsten in China.

i. “Access conditions” are not restrictions on domestic production or consumption

234. China claims that it restricts access to mining and further processing of tungsten through the use of a licensing system that ensures that companies adhere to minimum production requirements, minimum recovery rates and other environmental and labor regulations.²⁹¹ As with rare earths, China has provided no support for its assertion that these requirements actually limit domestic production.

235. According to China, the *Opinions of the Ministry of Land and Resources and other Authorities on the Integration of Exploitation of Mineral Resources* recognizes China’s goal of integrating China’s tungsten mines by closing less efficient operations.²⁹² The *Mineral Resource Law, Rules for Implementation of the Mineral Resources Law of the People’s Republic of China* and the *Measures for the Administration of Registration of Mining of Mineral Resources* provide a licensing system for tungsten with preconditions for companies to obtain the requisite license.²⁹³ Similarly, the *Conditions for Admission to Tungsten Industry* specify conditions of operation for all tungsten metallurgy and processing entities.²⁹⁴ None of these measures, however, “restricts” the production of tungsten in the sense of deliberately confining or binding the production of tungsten. Assuming that the mining or processing enterprises comply with the various standards, these measures do not directly limit the amount of tungsten that mining

²⁸⁹ China’s First Written Submission, paras. 310-311.

²⁹⁰ China’s First Written Submission, para. 164.

²⁹¹ China’s First Written Submission, paras. 315-316.

²⁹² China’s First Written Submission, para. 313; Exhibit CHN-17.

²⁹³ China’s First Written Submission, para. 314; Exhibits CHN-10, 14, 15.

²⁹⁴ China’s First Written Submission, para. 314; Exhibit CHN-93.

enterprises may produce or the amount of tungsten products that metallurgy and processing entities may manufacture.

ii. Purported volume restrictions are not restrictions on domestic production or consumption

236. China contends that it has established volume restrictions on tungsten in the form of both extraction and production targets.²⁹⁵ Regarding China’s claimed production targets, it is entirely unclear from China’s description how the production targets differ from the extraction targets, as both seem to cover tungsten concentrates. Indeed, for two of the three years in which China has had production targets on tungsten, the production target exactly matches the extraction target.²⁹⁶

237. And as was the case with rare earths, China’s argument lacks credibility because, as noted by Colombia in its third party submission,²⁹⁷ actual tungsten extraction and production has consistently exceeded the extraction target, sometimes by almost 50 percent of the target:

	2006	2007	2008	2009	2010	2011	2012
Actual level of extraction	87,277	79,958	97,316	95,850	99,514	119,875	n.a.
Extraction target	59,060	59,270	66,850	68,555	80,000	87,000	89,000
Production target	none	none	none	none	80,000	87,000	81,320
Amount of overproduction as a percent of the extraction target	47.78%	34.90%	45.57%	39.81%	24.39%	37.87%	n.a.

238. As noted by the panel in *China – Raw Materials*, in order for a restriction to meet the requirements set forth in Article XX(g) of the GATT 1994, such restrictions must “actually restrict or limit domestic production or consumption.”²⁹⁸ The significant amount of production above the targets shows that China does not have “actual” restrictions or limitations on domestic production. Moreover, China has provided no justification as to why this Panel should consider

²⁹⁵ China’s First Written Submission, paras. 319-325.

²⁹⁶ See Exhibit CHN-138.

²⁹⁷ Colombia Third Party Submission, para. 19.

²⁹⁸ *China – Raw Materials (Panel)*, para 7.437 (emphasis added).

the extraction and production targets to be restrictions in light of the gross above-target extraction and production of tungsten.

iii. Purported “consumption controls” are not restrictions on domestic production or consumption

239. China argues that the “combined effect of the production quota and the export quota is that the available amount of tungsten for domestic consumption is decreased [in 2012] comparing to the year 2011.”²⁹⁹ Specifically, China contends that the amount of tungsten “available for Chinese consumers can be calculated by deducting the export quota volume from the production quota.”³⁰⁰ China’s argument fails, however, because there is nothing preventing Chinese consumers of tungsten from consuming tungsten that is otherwise available to be exported – *i.e.*, within the export quota. Thus, the entire amount of the production quota is available to Chinese consumers, and China’s arguments to the contrary are without merit.

240. In addition, the United States notes that its arguments related to alleged consumption controls on rare earths are applicable in the context of tungsten and hereby incorporates those arguments by reference.

iv. Resource taxes are not restrictions on domestic production or consumption

241. In a lone paragraph in its first written submission, China claims that it “increases the costs of production [of tungsten] by submitting tungsten producers to a resource tax.”³⁰¹ In a footnote, China notes that the resource tax on tungsten ore is between RMB 7 per ton and RMB 9 per ton. China fails, however, to provide any evidence that this amount of resource tax actually restricts production. It should be noted that this amount would be less than US\$2 per ton.

v. “Environmental requirements” are not restrictions on domestic production or consumption

242. China also contends that the *Deposit for Ecological Recovery* is a domestic restriction under Article XX(g) of the GATT 1994.³⁰² The United States notes that its arguments related to environmental requirements on rare earths are applicable in the context of tungsten and hereby incorporates those arguments by reference.

²⁹⁹ China’s First Written Submission, para. 326.

³⁰⁰ China’s First Written Submission, para. 327.

³⁰¹ China’s First Written Submission, para. 329.

³⁰² China’s First Written Submission, para. 330.

243. For the reasons discussed above, China has not demonstrated that it maintains any restrictions on the domestic production or consumption of tungsten as required to invoke the exception set forth in GATT Article XX(g).

b. The export quota on tungsten is not “made effective in conjunction with”: the absence of even-handedness

244. Based on the requirements of Article XX(g) set out above, China’s export quota on tungsten is not “made effective in conjunction with” restrictions on domestic production or consumption. China’s export quota presents the situation the Appellate Body alluded to in *U.S. – Gasoline*, where “no restrictions on domestic[] [interests] are imposed at all, and all limitations are placed upon [foreign interests] alone.”³⁰³ As the Appellate Body concluded, in such a scenario, “the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination . . .”³⁰⁴

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

246. To the extent any measure China has proffered as evidence of restrictions on domestic production or consumption is relevant at all to the production or consumption of tungsten it would be relevant only to the mining or “production” of tungsten. If such a measure were considered to “restrict” tungsten production, the restrictions on production would affect both domestic and foreign users of tungsten. As China observes in its own general description of its domestic restriction regime, such restrictions would impose costs on both domestic and foreign consumers.³⁰⁵ However, foreign users of tungsten are also subjected to the export quota (and the export duties) on tungsten, while domestic users are not. In order for its measure to be even-handed, China would need to counter-balance the impact of the export quota on foreign users with some measure that similarly affects domestic users of tungsten, but it has not done so.

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

³⁰³ *U.S. – Gasoline (AB)*, p. 21.

³⁰⁴ *U.S. – Gasoline (AB)*, p. 21.

³⁰⁵ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, paras. 130-131 (“There are great financial incentives for foreign buyers to violate Chinese law by smuggling China’s rare earth products. The most important is the low costs. Not only do the illegal foreign buyers avoid the export duty, their purchases of illegally mined and produced rare earths in China do not reflect any of the much higher regulatory-imposed costs of legally produced rare earth products in China.”).

248. And as was the case with rare earths, relative changes in the export quota as compared to the domestic production targets exacerbate the lack of even-handedness. China reports domestic production targets on extraction starting in 2002.³⁰⁶ Since that time, China's domestic extraction targets have more than doubled from 43,740 MTs in 2002 to 89,000 MTs in 2012. Since then, the export quota has shrunk from 23,806 MTs to 18,967 MTs. In 2002, China restricted foreign consumption to around half of its tungsten production while ensuring domestic consumers at least around half of tungsten production. By 2012, China had restricted foreign consumption to no more than a quarter of production while ensuring domestic consumers at least 3/4 of total production.

249. Accordingly, even if China had demonstrated the existence of restrictions on domestic production or consumption, China would still not have demonstrated the requisite even-handedness to justify its export quota, as applied to tungsten, under Article XX(g).

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

1. China's export quota on molybdenum does not relate to conservation

250. In examining whether China's export quota on molybdenum relates to the conservation of an exhaustible natural resource, the operative question is whether there is a close and genuine relationship of ends and means between the goal of molybdenum conservation and the means presented by the application of the export quota to exports of various molybdenum products.³⁰⁷ As shown below, the answer to this question is no.

a. The measures do not demonstrate a close and genuine relationship of ends and means

251. China's only argument in the course of this dispute that the export quota on molybdenum relates to conservation is that the measures establishing and implementing the quota refer to the goal of conservation, either directly or by citing to other measures that reference conservation.³⁰⁸ As discussed above, China's reliance on such incantations is insufficient to meet its burden under Article XX(g) of the GATT 1994.

252. China has imposed an export quota on various molybdenum raw materials and products since 2007.³⁰⁹ In the time that China has imposed an export quota on molybdenum, China's measures implementing the export quota have only made passing reference to the goal of

³⁰⁶ Exhibit CHN-138.

³⁰⁷ *U.S. – Shrimp (AB)*, para. 135.

³⁰⁸ China's First Written Submission, paras. 353-357.

³⁰⁹ China's Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 86.

conservation beginning in 2012. In particular, the annual measures administering the export quota on molybdenum only began incorporating cursory references to conservation in 2012:

Measure	Conservation Reference in the 2012 Version	Corresponding Reference in the 2011 Version
Public Notice of the Application Conditions and Application Procedures for the Export Quotas of Indium, Molybdenum and Tin	“In order to protect the resources and environment, in coordination with industry policies of the nation, and further strengthen the export administration ...” ³¹⁰	“To further strengthen the export management of rare metals, to regulate the export operations, ...” ³¹¹

253. China notes that a number of the other measures that establish or implement the export quota on molybdenum were “adopted on the basis of measures that refer to China’s conservation objective” – i.e., the *Foreign Trade Law* and *Regulations on the Import and Export of Goods*, and the *Measures for the Administration of Export Commodities Quotas*.³¹² The United States has already addressed, and shown the irrelevance of, the indirect citations to conservation objectives in the *Foreign Trade Law* and *Regulations on the Import and Export of Goods*. Similarly, the *Measures for the Administration of Export Commodities Quotas* notes that export quotas can exist for a number of reasons besides conservation, such as to serve the “development plans, objectives and policies of the States in the relevant industries.”³¹³

254. For these reasons, China has not met its burden of establishing the relationship between the export quota, as it applies to molybdenum, and the goal of conservation of molybdenum.

b. Viewed in the context of China’s production, processing and trade policies, the export quota demonstrates a close and genuine relationship to a purpose other than conservation

255. Instead, taking into account the absence of restraints on the exportation of downstream products made from molybdenum, such as finished stainless steel, the existence of policies that actively promote and encourage certain downstream products,³¹⁴ and the substantial growth reflected in production statistics of such finished products, the picture that emerges demonstrates a complete lack of any relationship between the export quota on molybdenum and the goal of

³¹⁰ Exhibit CHN-107.

³¹¹ Exhibit JE-134.

³¹² China’s First Written Submission, para. 355; Exhibits CHN-11, 54 and 96.

³¹³ Exhibit CHN-96, Art. 10(3).

³¹⁴ Exhibit JE-154 (noting that exports of molybdenum high speed tool steel will be encouraged).

molybdenum conservation. Instead, the record shows a close and genuine relationship between the export quota and China’s trade protectionist goals.

256. According to the data provided by China, molybdenum production in that country, which is the world’s largest producer, increased more than 52 percent from 2007, when China began imposing the molybdenum export quota, to 2011.³¹⁵ In addition, China’s consumption of molybdenum increased more than 73 percent over the same period of time.³¹⁶ The explosion in the domestic consumption of molybdenum is reflected in the corresponding explosion in the production of downstream products that use molybdenum as inputs, such as the astonishing 878 percent growth in stainless steel production from 2002 to 2010 and similar levels of growth in tool steel (106 percent) and high-speed steel (112 percent).³¹⁷ Clearly, the export quotas on molybdenum have had no impact on the pace of extraction of China’s molybdenum resources.

257. Moreover, the imposition of restraints on the export of molybdenum in the absence of similar or similarly extensive restraints on the export of downstream products (e.g., stainless steel) demonstrates the close and genuine relationship between the export quota on molybdenum and the goal of fostering the growth and exports of value added, downstream products.

258. China’s export restrictions on intermediate molybdenum products encouraged the growth of the Chinese steel industry by creating differences in the prices paid by Chinese and foreign consumers. For example, Chinese steel producers paid, on average, 20 percent less for ferro-molybdenum in 2012.³¹⁸ And since China began imposing an export quota, its exports of ferro-molybdenum dropped from 21,149 MTs to 475 MTs.³¹⁹ At the same time, China’s exports of alloy and stainless steel have risen.³²⁰

259. These trends and facts demonstrate the successful realization of economic goals, but have no connection to the goal of conserving molybdenum. Accordingly, China has failed to demonstrate that its export quota on molybdenum “relates to the conservation of” molybdenum.

2. The export quota does not relate to the conservation of an “exhaustible natural resource”

260. As was the case with rare earths and tungsten, China’s Article XX(g) defense for its molybdenum export quota breaks down even further upon closer inspection of the design and scope of the export quota and the purported production restrictions in trying to determine what,

³¹⁵ Exhibit CHN-139.

³¹⁶ Exhibit CHN-139.

³¹⁷ Molybdenum Report, pp. 20 - 21 (Table 5.2, Table 5.3, Table 5.4) (Exhibit JE-131).

³¹⁸ Molybdenum Report, p. 29 (Exhibit JE-131).

³¹⁹ Molybdenum Report, p. 26 (Table 6.4) (Exhibit JE-131).

³²⁰ Molybdenum Report, p. 36 (Table 8.2) (Exhibit JE-131).

precisely, China is trying to conserve through the use of its export quota and production measures.

261. In much of the discussion above, the question of what exhaustible natural resource China is trying to conserve has been simplified on the assumption that “molybdenum,” in the abstract, is that exhaustible natural resource. Again, the facts are not so simple.

262. In terms of the molybdenum export quota, “molybdenum” covers 14 tariff codes ranging from:

Molybdenum ores and concentrates (accounting for two tariff codes – molybdenum ores and concentrates (2613.9000) and roasted molybdenum ores and concentrates (2613.1000)) to

Molybdenum scrap (accounting for one tariff code – molybdenum waste and scrap (8102.9700)) to

Intermediate molybdenum products (accounting for the remaining tariff codes encompassing molybdenum products that have undergone some initial processing. One of the most widely traded product in this category is ferro-molybdenum (7202.7000)).³²¹

263. In the meantime, China’s proffered production measures attempt to regulate the production of “molybdenum” with respect only to their mining.

264. The questions raised by these facts are: (1) how does China’s export quota, which covers a portion of upstream molybdenum raw materials and products processed multiple stages from the raw material – but not further downstream products, work together with purported restrictions on production – i.e., the mining of molybdenum ore – to conserve an exhaustible natural resource? and (2) what “exhaustible natural resource” is being conserved through the operation of these combined measures?

265. China argues in broad brush strokes that, because the panel in *China – Raw Materials* found, and it was un-controverted in that dispute, that bauxite and fluorspar were exhaustible natural resources, the raw materials at issue here are also “exhaustible natural resources” whose conservation China is seeking to protect through the export quota.³²² However, the bauxite and the fluorspar subject to the challenged export restrictions in *China – Raw Materials* were a clay and a mineral which, like molybdenum ores and concentrates, are basically in the form in which

³²¹ See Exhibit JE-3; Molybdenum Report, p. 5 (Exhibit JE-131).

³²² See China’s First Written Submission, paras. 85-87.

they are mined from the earth.³²³ In the present dispute, China’s export quota covers not just ores but even further processed products such as molybdenum oxide and ferro-molybdenum .

266. Accordingly, China’s arguments here leave these vital Article XX(g) questions unanswered.

267. In fact, the more closely China’s measures are scrutinized, the more questions arise regarding what, if any, relationship they bear to conservation. For instance, why does China’s export quota include molybdenum ores, and also a number of products that might not themselves be considered “exhaustible natural resources” because they are intermediately processed products – such as molybdenum oxide and ferro-molybdenum – made from the materials that occur naturally? Additionally, why, at the same time, does China not restrain, but rather encourage, the export of further processed products such as stainless, high-speed and tool steels, which combined consumed 71 percent of the world’s molybdenum production?³²⁴ Why, if China is seeking to conserve the supply of molybdenum in its raw, exhaustible, naturally occurring form – from which all downstream products derive their molybdenum content – would China need anything other than a production restriction? How would export quotas contribute to conservation at all, much less export quotas that extend beyond ores and concentrates but stop part way down the processing stream?

268. China’s failure to control the export of these further processed products, while at the same time restricting the export of intermediate products that are not exhaustible natural resources, illustrates the fact that the controls on intermediate products do not relate to the conservation of exhaustible natural resources.

269. In the course of this dispute, China has claimed that it does not control downstream products that are made using molybdenum, such as stainless steel, because such products only contain “small percentages” of molybdenum.³²⁵ China’s argument is flawed because, cumulatively, such products contain substantial amounts of molybdenum. Indeed, 71 percent of the world’s molybdenum production goes into steel products such as stainless, high-speed and tool steels.³²⁶ China’s failure to control such value-added exports, while maintaining controls on less value-added products, shows that the export quotas do not “relate to” conservation pursuant to Article XX(g) of the GATT 1994, but rather “relate to” China’s industrial policy goals.³²⁷

270. As was the case with both rare earths and tungsten, it is instructive to compare the various quotas and duties that China imposes along the production chain for products that use

³²³ *China – Raw Materials (Panel)*, para. 7.369.

³²⁴ Molybdenum Report, p. 14 (Chart 4.1) (Exhibit JE-131).

³²⁵ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 243.

³²⁶ Molybdenum Report, p. 14 (Chart 4.1) (Exhibit JE-131).

³²⁷ *China – Raw Materials (Panel)*, para. 7.429.

molybdenum, such as stainless steel. And again, China imposes quotas and duties on upstream products, but not on downstream products. In fact, for downstream products, China has policies in place promoting and encouraging their export.³²⁸

271. For example, the production process for stainless steel consists of four steps: molybdenum ores and concentrates; molybdenum oxide; ferro-molybdenum; and finished stainless steel products.³²⁹ China only subjects materials at the initial stages of processing to export quotas and duties, while allowing the unrestricted export of finished stainless steel products:

	Export Quotas ³³⁰	Export Duties ³³¹
Molybdenum ores and concentrates	Yes	15%
Molybdenum oxide	Yes	5%
Ferro-molybdenum	Yes	20%
Finished stainless steel products	No	No

272. As this chart shows, China subjects molybdenum ores and concentrates to export quotas allegedly for conservation purposes and a 15 percent duty allegedly for environmental purposes. However, if the molybdenum concentrates are chemically processed into molybdenum oxide, China’s environmental concerns diminish, as it imposes a lesser, 5 percent duty on the intermediate product – molybdenum oxide. If the molybdenum oxide is smelted into ferro-molybdenum, China imposes a 20 percent duty and a quota. And, if that ferro-molybdenum is used to make finished stainless steel, China would not impose an export quota or duty on the final product.

273. China’s failure to provide any explanation for how the scope and coverage of the export quota and purported production restrictions on “molybdenum” relate to each other; how, in combination, they relate to “conservation”; and what “exhaustible natural resource” they are seeking to conserve, is fatal to China’s attempts to characterize its export quota as a defensible “conservation” measure.

3. China’s export quota on molybdenum is not made effective in conjunction with restrictions on domestic production

³²⁸ Exhibit JE-154.

³²⁹ Molybdenum Report, pp. 1-3, 14 (Exhibit JE-131).

³³⁰ Exhibit JE-3.

³³¹ Exhibit JE-6.

274. China has also failed to demonstrate that the export quota on molybdenum is “made effective in conjunction with restrictions on domestic production or consumption.” China asserts that it has a “comprehensive set of domestic restrictions” consisting of a number of measures that restrict the production of molybdenum in China.³³² As discussed below, these measures do not constitute “restrictions on domestic production” under Article XX(g) of the GATT 1994. Moreover, the export quota on molybdenum is not “made effective in conjunction with” such restrictions on molybdenum and therefore is not imposed “even-handedly” as the Appellate Body has interpreted is required by Article XX(g).

a. The measures China proffers are not “restrictions” on domestic production

275. China lists four types of measures that it contends act as domestic restrictions on the production of molybdenum – *i.e.*, access conditions, volume controls, taxes and environmental requirements.³³³ For the reasons shown below, none of these measures actually restrict the production of molybdenum in China.

i. “Access conditions” are not restrictions on domestic production or consumption

276. China claims that it restricts access to mining and further processing of molybdenum through the application of minimum production requirements, minimum recovery rates and other environmental and labor regulations.³³⁴ As with rare earths and tungsten, China has provided no support for its assertion that these requirements actually limit domestic production.

277. According to China, the *Opinions of the Ministry of Land and Resources and Other Authorities on the Integration of Exploitation of Mineral Resources* recognizes China’s goal of integrating China’s molybdenum mines by closing less efficient operations.³³⁵ Similarly, the *Conditions for Admission to the Molybdenum Industry* specify conditions of operation for all molybdenum mining, metallurgy and processing entities.³³⁶ None of these measures, however, “restricts” the production of molybdenum in the sense of deliberately confining or binding the production of molybdenum. Assuming that the mining, metallurgical or processing enterprises comply with the various standards, these measures do not directly limit the amounts of molybdenum that mining enterprises may produce or the amount of molybdenum products that metallurgy and processing entities may manufacture.

³³² China’s First Written Submission, paras. 358-359.

³³³ China’s First Written Submission, para. 360.

³³⁴ China’s First Written Submission, paras. 315-316.

³³⁵ China’s First Written Submission, para. 362; Exhibit CHN-17.

³³⁶ China’s First Written Submission, para. 363; Exhibit CHN-108.

ii. Purported “volume restrictions” are not restrictions on domestic production or consumption

278. China asserts that it has established a volume restriction on molybdenum in the form of an extraction target.³³⁷ In contrast to rare earths and tungsten, China has not claimed that the extraction target actually restricted the production of molybdenum in 2012; rather, China has merely noted that the extraction target exists.³³⁸ This is clearly deficient to establish that the production target constitutes a restriction under GATT Article XX(g).

279. Similar to rare earths and tungsten, actual molybdenum extraction has exceeded the extraction target for the two years in which China provided data:

	2010	2011	2012
Actual level of extraction	214,664	229,600	n.a.
Extraction target	185,000	200,000	194,520
Amount of overproduction as a percent of the extraction target	16.03%	14.80%	n.a.

280. As noted by the panel in *China – Raw Materials*, in order for a restriction to meet the requirements set forth in Article XX(g) of the GATT 1994, such restrictions must “actually restrict or limit domestic production or consumption.”³³⁹ Here, China has not claimed that the restriction on molybdenum actually restricts production. Moreover, the amount of extraction above the target shows that China’s does not have “actual” restrictions or limitations on domestic production. And, China has provided no justification as to why this Panel should consider the extraction target to be a restriction in light of the above-target extraction of molybdenum.

iii. Resource taxes are not restrictions on domestic production or consumption

281. In its first written submission, China contends that the resource taxes on molybdenum of between RMB 12 per ton and RMB 8 per ton, which are less than US\$2 per ton, constitute a restriction under Article XX(g) of the GATT 1994.³⁴⁰ The lone evidence that China has provided that the resource taxes on molybdenum have an actual restrictive effect is that the amount of

³³⁷ China’s First Written Submission, paras. 366-370.

³³⁸ China’s First Written Submission, paras. 366-370.

³³⁹ *China – Raw Materials (Panel)*, para 7.437 (emphasis added).

³⁴⁰ China’s First Written Submission, paras. 371-373.

resource taxes paid by a single molybdenum producer – the Jinmu Group – is expected to increase substantially in 2012.³⁴¹

282. China’s argument lacks merit because while the resource tax increased between 50 and 66 percent (from RMB 6 per ton to RMB 10 per ton, and from RMB 8 per ton to RMB 12 per ton), depending on the ore grade, the amount of resource tax actually expected to be paid by the Jinmu Group increased by 400 percent. Accordingly, the fact that the company is expected to pay more in resource taxes in 2012 is not explained by the increase in the resource tax, but rather grossly increased production. In sum, the increase in the resource tax is not expected to prevent the Jinmu Group from drastically increasing its production of molybdenum from 2011 to 2012. Therefore, China has failed to show that the resource taxes on molybdenum served as an actual restriction on domestic production for purposes of GATT Article XX(g).

iv. “Environmental requirements” are not restrictions on domestic production or consumption

283. China also contends that the *Deposit for Ecological Recovery* is a domestic restriction under GATT Article XX(g).³⁴² The United States notes that its arguments related to environmental requirements on rare earths and tungsten are applicable in the context of molybdenum and hereby incorporates those arguments by reference.

284. For these reasons discussed above, China has not demonstrated that it maintains any restrictions on the production of molybdenum as required to invoke GATT Article XX(g).

b. The export quota on molybdenum is not “made effective in conjunction with”: the absence of even-handedness

285. Based on the requirements of Article XX(g) set out above, China’s export quota on molybdenum is not “made effective in conjunction with” restrictions on domestic production or consumption. To the contrary, China’s export quota presents the situation the Appellate Body alluded to in *U.S. – Gasoline*, where “no restrictions on domestic[] [interests] are imposed at all, and all limitations are placed upon [foreign interests] *alone*.”³⁴³ As the Appellate Body concluded, in such a scenario, “the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination”³⁴⁴

286. Even if one or some of the measures China has put forward could be considered as limiting the amount of molybdenum produced (as China has not claimed that there are any

³⁴¹ China’s First Written Submission, paras. 372-373.

³⁴² China’s First Written Submission, paras. 330.

³⁴³ *U.S. – Gasoline (AB)*, p. 21.

³⁴⁴ *U.S. – Gasoline (AB)*, p. 21.

domestic consumption controls on molybdenum), China would still not have demonstrated that the export quota on molybdenum was “made effective in conjunction with” such restrictions because the relative impact on domestic and foreign users of molybdenum would still not be “even-handed.”

287. To the extent any measure China has proffered as evidence of restrictions on domestic production is relevant at all to the production of molybdenum it would be relevant only to the mining or “production” of molybdenum. If such a measure were considered to “restrict” molybdenum production, a restriction on production would affect both domestic and foreign users of molybdenum. As China observes in its own description of the domestic restrictions, such restrictions impose costs on both domestic and foreign consumers.³⁴⁵ However, foreign users of molybdenum are also subjected to the export quotas (and the export duties) on molybdenum, while domestic users are not. In order for its measure to be even-handed, China would need to counter-balance the impact of the export quota on foreign users with some measure that similarly affects domestic users of molybdenum, but it has not done so.

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

289. This discrimination in the effect of the export quota, when conjoined with production restrictions, is exacerbated by the trends in changes to the export quotas as compared to the changes in domestic production targets for molybdenum. China reports a domestic production target on extraction starting in 2010.³⁴⁶ Since that time, China’s domestic extraction target has increased from 185,000 MTs in 2010 to 194,520 MTs in 2012. Since then, the export quota has shrunk from 25,500 MTs to 25,000 MTs. These changes further show the lack of even-handedness in the export quota on molybdenum.

290. Accordingly, even if China had demonstrated the existence of restrictions on domestic production, China would still not have demonstrated the requisite even-handedness to justify its export quota, as applied to molybdenum, under Article XX(g).

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

³⁴⁵ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, paras. 130-131 (“There are great financial incentives for foreign buyers to violate Chinese law by smuggling China’s rare earth products. The most important is the low costs. Not only do the illegal foreign buyers avoid the export duty, their purchases of illegally mined and produced rare earths in China do not reflect any of the much higher regulatory-imposed costs of legally produced rare earth products in China.”).

³⁴⁶ Exhibit CHN-139.

291. As discussed above, an otherwise GATT-inconsistent measure for which a Member seeks an exception under Article XX must satisfy both the requirements of subparagraph of Article XX that the Member invokes and the separate requirements of the chapeau of Article XX. In other words, in addition to meeting the paragraph-specific criteria of Article XX(g), the measure must also “not be applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.”³⁴⁷

292. With respect to the export quotas that China maintains on rare earths, tungsten and molybdenum that are inconsistent with Article XI:1 of the GATT 1994, China contends that the breaches of Article XI:1 by the quotas are justified pursuant to GATT Article XX(g). However, China has failed to establish that these export quotas meet the paragraph-specific requirements of Article XX(g) – and the Panel’s analysis need go no further. However, even in the highly unlikely event that China were able to demonstrate successfully that its export quotas “relate to conservation” and were “made effective in conjunction with restrictions on domestic production or consumption,” China would still fail to satisfy the requirements of the Article XX chapeau.

293. In China’s first written submission and oral statement, China made no serious attempt to satisfy its burden of establishing that the export quotas satisfy the chapeau.³⁴⁸ Instead, in its first written submission, China cursorily argues that the export quotas are not applied in a manner that constitutes arbitrary or unjustifiable discrimination because they “make no distinction in respect of the destination of the products that are exported.”³⁴⁹ However, as later acknowledged by China, this reflects a misstatement of the applicable standard as articulated by the Appellate Body.

294. Specifically, the requirement that a measure not be “applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail” is a requirement that the measure not discriminate between other Members or between other Members and the Member maintaining the measure. The Appellate Body’s statements in *U.S. – Gasoline* confirm this interpretation.³⁵⁰ Moreover, in China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, China notes that

³⁴⁷ *U.S. – Gasoline (AB)*, p. 22 (“In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under [the subparagraph] second, further appraisal of the same measure under the introductory clauses of Article XX.”). Moreover, the burden of establishing conformity with the chapeau lies with the party invoking the defense. And, the burden under the chapeau represents “a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.” *U.S. – Gasoline (AB)*, pp. 22-23.

³⁴⁸ China’s First Written Submission, paras. 231-250, 335-337, 376-380.

³⁴⁹ China’s First Written Submission, paras. 231, 336, 377.

³⁵⁰ *U.S. – Gasoline (AB)*, pp. 23-24.

“the requirement not to apply an export quota system in a manner that would constitute ‘arbitrary discrimination’ also covers arbitrary discrimination between domestic and foreign consumers.”³⁵¹

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

296. In its Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, China finally makes an argument that the export quotas on one group of products (rare earths) do not constitute “arbitrary discrimination” under the chapeau.³⁵² According to China, the fact that the export quotas on rare earths were not filled in 2012 and the fact that Chinese domestic prices for rare earths have recently increased show that the export quotas on rare earths do not constitute discrimination under the chapeau.³⁵³ As shown below, China’s argument is based on a flawed understanding of the Article XX chapeau’s requirements.

297. The fact that the export quotas on rare earths were not filled in 2012 does not support China’s assertion that the export quotas do not result in arbitrary or unjustifiable discrimination between domestic and foreign users. First, some foreign companies were reducing inventories in 2012, and thus not filling the quota, following panic-induced buying and uncertainty in the market that began in the middle of 2010, following China’s decision to cut the rare earth export quota nearly in half.³⁵⁴ Another factor that appears to have affected rare earth sales to foreign companies in 2012 in various ways is disincentives provided by the export duties on rare earths, which for some rare earth products were and continue to be as high as 25 percent ad valorem.³⁵⁵ Finally, according to a report in the China Daily, smuggling was considered one of the “main cause[s]” for the quota not being filled.³⁵⁶

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

³⁵¹ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, para. 208.

³⁵² China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, paras. 208-211.

³⁵³ China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting with the Parties, paras. 208-211.

³⁵⁴ Lynas Corporation Ltd., Quarterly Report for the Period Ending 31 December 2012, p. 9 (Exhibit JE-108); China Daily, Rare earth exports to be below quota (Exhibit JE-109).

³⁵⁵ Exhibit JE-109.

³⁵⁶ Exhibit JE-109.

of quota-fill in 2012 is not evidence of non-discrimination; rather, it is a significant example of the discriminatory application of the rare earth export quotas.

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

300. China also asserts that the export quotas do not constitute a disguised restriction on international trade because they are “not applied in a manner that would constitute a *concealed* or *unannounced* restriction.”³⁵⁷ It should be noted up-front that, as the Appellate Body stated in *U.S. – Gasoline*, “[i]t is . . . clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of ‘disguised restriction.’”³⁵⁸ Thus, the mere assertion that a measure does not constitute a “concealed or unannounced restriction” falls short of the showing required under this element of the chapeau.

301. For rare earths and molybdenum, China argues that the export quotas are not disguised restrictions on international trade because the export quotas were not filled³⁵⁹ and because the allocation of the export quotas creates incentives for Chinese companies to supply foreign consumers through prior export performance requirements.³⁶⁰ China further contends that the export quotas on rare earths are not disguised restrictions on international trade because foreign consumers can use the export quota for different rare earths, depending on demand.³⁶¹ For tungsten, China asserts that the export quota does not constitute a disguised restriction because, oddly, China imports significant quantities of tungsten.³⁶²

302. For rare earths, the United States has already addressed China’s claims relating to quota fill and incorporates those arguments by reference. For molybdenum, the United States notes that, like rare earths, molybdenum exports are subject to duties between 5 and 20 percent.³⁶³ And regarding the use of prior export performance requirements, for the reasons set forth in Section IV, such requirements are inconsistent with China’s obligations under the Accession

³⁵⁷ See e.g. China’s First Written Submission, para. 232 (emphasis original).

³⁵⁸ *U.S. – Gasoline (AB)*, p. 25.

³⁵⁹ China’s First Written Submission, paras. 233-235, 378.

³⁶⁰ China’s First Written Submission, paras. 236-246, 379.

³⁶¹ China’s First Written Submission, para. 249.

³⁶² China’s First Written Submission, para. 337.

³⁶³ Exhibit JE-6.

Protocol. China should not be allowed to use such WTO-inconsistent allocation measures to establish that its export quotas are, in fact, WTO-consistent.

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

within each of the two categories of 2012 [rare earth export] quotas, the manner in which the quota is filled is not pre-determined. For example, if a number of foreign consumers in 2012 needed one specific medium/heavy rare earth element (e.g. Samarium) more than another medium/heavy rare earth element (e.g. Terbium), the quota could be used mainly, or even solely, for the rare earth element (Samarium) that is in the greatest demand.³⁶⁴

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

304. Regarding tungsten, China’s argument that the tungsten export quota is not a disguised restriction on international trade because China imported tungsten in 2012 is illogical on its face. China’s ability to import tungsten, consistent with its “two resources, two markets” philosophy, is wholly irrelevant to the Panel’s disguised restriction analysis. Rather, China’s successful importation of important raw materials such as tungsten shows that China has a policy of taking advantage of the commitments by other Members not to engage in WTO-inconsistent conduct by using export restrictions on raw materials for purposes of industrial policy.³⁶⁵

305. While China has failed to meet its burden under the chapeau, evidence provided by the complainants shows that China’s export quotas are applied in a manner that is arbitrary, unjustified and a disguised restriction on trade. In particular, the denomination of the export quotas on rare earths is inconsistent with the chapeau. China denominates the export quotas on rare earths in gross weight, while it designates the production targets in rare earth oxide

³⁶⁴ China’s First Written Submission, para. 249.

³⁶⁵ *See generally* Tungsten Report, p. 48 (Exhibit JE-130) (noting that “China holds a significant market share of the imports of ores & concentrates. The opposite is the case with respect to intermediate and downstream tungsten products, where China holds a significant market share of the exports to the global market.”)

equivalents (REO) tons, which captures the amount of rare earths in a given product.³⁶⁶

According to China, “rare earth elements are most frequently separated and sold in their oxide form. Therefore, it is customary to present rare earth data in terms of rare earth oxide (REO) equivalents.”³⁶⁷

306. Beyond just deviating from customary market practice, and China’s practice before 2005,³⁶⁸ China’s use of gross weight distorts the application of the rare earth export quotas. Because the export quota is in gross weight, a 100 MT ferroalloy that contains 10 MT of rare earths (i.e., ferroalloy containing at least 10 percent rare earths under HS 7102.9991)³⁶⁹ would count just as much against the quota as a 100 MT of lanthanum oxide of 99.99 percent purity that contains 99.99 MT of rare earths – both would count 100 MT against the quota. In contrast, China denominates the export quotas on tungsten and molybdenum based on metal content, thereby avoiding this problem.

307. The requirements of the Article XX chapeau are important in avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX, as the Appellate Body has recognized.³⁷⁰

292. The United States notes once again that, an analysis pursuant to the Article XX chapeau’s requirements would only take place if China were able to satisfy all of the requirements of sub-paragraph (g). In the present dispute, the United States has shown that China has not met the burden of making the required showings under Article XX(g) and, consequently, the Panel need not reach the chapeau analysis. If the Panel were to address the chapeau on an *arguendo* basis, however, the United States considers that, for the facts and reasons set out above, China’s measures nevertheless frustrate and defeat the balance of rights and obligations between China and its trading partners under the GATT.

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

IV. CHINA’S PRIOR EXPORT PERFORMANCE AND MINIMUM CAPITAL REQUIREMENTS ON RARE EARTHS AND MOLYBDENUM ARE INCONSISTENT WITH CHINA’S TRADING RIGHTS COMMITMENTS AND NOT JUSTIFIED UNDER ARTICLE XX(G) OF THE GATT 1994

309. As the United States explained in its first written submission, in addition to subjecting exports of rare earths and molybdenum to export duties and quotas, China further restricts the

³⁶⁶ China’s First Written Submission, para. 128.

³⁶⁷ China’s First Written Submission, fn. 266.

³⁶⁸ Exhibits JE-128; CHN-5, Table 1, p. 4.

³⁶⁹ Exhibit JE-6.

³⁷⁰ *U.S. – Gasoline (AB)*, p. 23.

ability of companies to export those products by requiring companies to satisfy certain criteria in order to be able to export under the quota. In particular, China requires companies to satisfy certain prior export performance and minimum capital requirements.³⁷¹

310. As shown in the U.S. first written submission, Paragraphs 83 and 84 of the Working Party Report impose a clear requirement on China not to impose prior export performance and minimum capital requirements.³⁷² Similarly, Paragraph 5.1 requires China not to limit the right to trade rare earths and molybdenum to a subset of enterprises based on such requirements.³⁷³ As also shown in the U.S. first written submission, China's restrictions on the right to trade rare earths and molybdenum to those enterprises that meet prior export performance and prior minimum capital requirements is inconsistent with the obligations set forth in Paragraph 5.1 and in Paragraphs 83 and 84.³⁷⁴

311. In response, China first asserts that it has amended the *Foreign Trade Law* to eliminate requirements that a foreign trade operator meet certain conditions in order to import or export.³⁷⁵ As the United States noted in its opening oral statement, however, these cited amendments to the *Foreign Trade Law* are irrelevant to the issue before the Panel, in light of the fact that China does not dispute that it imposes prior export performance and minimum capital requirements on rare earths and molybdenum.³⁷⁶

312. China also insists that it is entitled to impose prior export performance and minimum capital requirements on rare earths and molybdenum because it imposes a quota on those products that, in China's view, is justified under Article XX(g) of the GATT 1994. China maintains that those prior export performance and minimum capital requirements are justified under Article XX(g) but that it is not required to make any showing that those requirements meet the conditions of Article XX(g).³⁷⁷

313. As explained below, China's invocation of Article XX(g) with respect to the prior export performance and minimum capital requirements that it imposes on rare earths and molybdenum should be rejected. First, Article XX of the GATT 1994 is not available to justify the imposition of such requirements, which are plainly inconsistent with Paragraphs 83 and 84 of the Working Party Report. Second, even if Article XX(g) were available as a defense, China would have to

³⁷¹ U.S. First Written Submission, paras. 106-112 (rare earths), 114-126 (molybdenum).

³⁷² U.S. First Written Submission, paras. 142-146.

³⁷³ U.S. First Written Submission, paras. 133-141.

³⁷⁴ U.S. First Written Submission, paras. 149-151.

³⁷⁵ China's First Written Submission, paras. 264-267.

³⁷⁶ U.S. Oral Statement at the First Substantive Meeting with the Panel, para. 86; *see also* U.S. Answers to the Panel's Questions Following the First Substantive Meeting with the Parties, para. 20; Canada's Third Party Submission, para. 32.

³⁷⁷ China's Comments on the Complainants' Answers to the Panel's Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, paras. 22-24.

show that the prior export performance and minimum capital requirements meet the conditions of Article XX(g). China has not done so.

A. Article XX of the GATT 1994 Is Not Available to Justify the Imposition of Prior Export Performance and Minimum Capital Requirements That Are Inconsistent with Paragraphs 83 and 84

314. As the United States explained in its first written submission, in Paragraphs 83 and 84 of the Working Party Report, China specifically agreed not to use prior export performance and minimum capital requirements. China now contends that it may use such requirements as long as they are used to allocate a quota that is justified by the exceptions of Article XX.³⁷⁸

315. However, it is not at all clear that Article XX of the GATT 1994 applies to the commitments to eliminate prior export performance and minimum capital requirements set forth in Paragraphs 83 and 84. Citing the panel and Appellate Body reports in *China – Audiovisual Products*, China asserts that Paragraphs 83 and 84 are “elaborations” of the commitments in Paragraph 5.1 and must be “read together.”³⁷⁹ China’s reliance on the *China – Audiovisual Products* reports is misplaced. Contrary to China’s suggestion, reading Paragraphs 83 and 84 of the Working Party Report and Paragraph 5.1 of the Accession Protocol together does not mandate the conclusion that the imposition of such requirements may be justified under Article XX – much less the conclusion that the imposition of such requirements is automatically permissible in the quota context.

1. The language of China’s trading rights commitments establishes a specific obligation to eliminate prior export performance and minimum capital requirements, and the “qualifying” language of Paragraph 5.1 does not extend to those commitments

316. As the United States explained in its response to China’s request for a “preliminary ruling,” in *China – Audiovisual Products*, the Appellate Body’s conclusion that Article XX of the GATT 1994 is available to justify breaches of Paragraph 5.1 was grounded in the language of Paragraph 5.1 stating, “[w]ithout prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement . . .”³⁸⁰ This “qualifying” language does not appear in Paragraphs 83 and 84.

³⁷⁸ China similarly argued in the *China – Raw Materials* dispute that it was entitled to impose prior export performance and minimum capital requirements on the raw materials at issue in that dispute in connection with the administration of quotas that China argued were justified under Article XX of the GATT 1994. The panel rejected China’s arguments. See *China – Raw Materials (Panel)*, paras. 7.662-7.667. While this part of the panel report was not ultimately adopted by the DSB, the Panel may still take it into account. *EU – Footwear (Panel)*, para. 7.83.

³⁷⁹ China’s First Written Submission, paras. 274-275.

³⁸⁰ U.S. Response to China’s Request for a “Preliminary Ruling,” para. 22 (citing *China – Audiovisual Products (AB)*, paras. 218-230).

317. Instead, Paragraph 84 uses the disjunctive “but” to distinguish between prior export performance and minimum capital requirements and those types of regulatory activity that might, by virtue of the qualifying language in Paragraph 5.1, be permitted. In particular, the last sentence of Paragraph 84 provides, “[t]he 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.*”³⁸¹ China relies on the first part of the phrase in arguing that it is permitted to impose prior export performance and minimum capital requirements, but ignores the disjunctive “but”.³⁸² Neither the panel nor the Appellate Body in *China – Audiovisual Products* examined the specific commitment that “requirements relating to minimum capital and prior experience would not apply.”

318. The distinction between the types of regulatory activity that might be permitted under Paragraphs 83 and 84 by virtue of the qualifying language in Paragraph 5.1, and the specific commitments to eliminate prior export performance and minimum capital requirements, suggests that the latter may not be justified by Article XX of the GATT 1994. This interpretation of the obligations to eliminate prior export performance and minimum capital requirements set forth in Paragraphs 83 and 84 is “consistent with those of paragraph 5.1”³⁸³ and with a coherent reading of Paragraphs 83 and 84 and Paragraph 5.1.

319. To be clear, Paragraph 5.1 does prohibit China from limiting the right to trade in rare earths and molybdenum to a subset of enterprises, including based on prior export performance and minimum capital requirements.³⁸⁴ Paragraphs 83 and 84 include a specific commitment to eliminate such requirements.³⁸⁵ In light of this clear commitment in Paragraphs 83 and 84 to eliminate prior export performance and minimum capital requirements, China’s repeated statements that Paragraphs 83 and 84 simply elaborate or confirm the obligations of Paragraph 5.1 is of no avail.³⁸⁶ As the panel noted in *China – Raw Materials* (in findings mooted on other grounds), “Paragraphs 83(a) and 83(b) of China’s Working Party Report provide additional specific restrictions on China’s right to regulate trade.”³⁸⁷ In other words, China expressly agreed not to use prior export performance and minimum capital requirements, even though such

³⁸¹ Emphasis added.

³⁸² China’s Comments on the Complainants’ Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 20.

³⁸³ *China – Audiovisual Products (Panel)*, para. 7.310

³⁸⁴ U.S. First Written Submission, paras. 135-137.

³⁸⁵ U.S. First Written Submission, paras. 143-145.

³⁸⁶ China’s First Written Submission, para. 275; China’s Comments on the Complainants’ Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 18.

³⁸⁷ *China – Raw Materials (Panel)*, para. 7.655; see China’s First Written Submission, para. 274; China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 57.

requirements might otherwise be WTO-consistent (whether justified under Article XX or on some other basis).

320. China further asserts that because, in light of the “qualifying” language in Paragraph 5.1, its trading rights commitments do not prevent China from using quotas, its trading rights commitments likewise do not prevent it from using prior export performance and minimum capital requirements to administer quotas.³⁸⁸ This argument is without merit. As detailed below, and in the U.S. response to Question 11 from the Panel,³⁸⁹ China’s trading rights commitments are separate obligations from the obligations in Article XI of the GATT 1994 with respect to quantitative restrictions. As such, to the extent that China’s trading rights commitments do not prevent China from imposing quotas that satisfy the conditions of Article XX of the GATT 1994, it does not follow that China may by extension impose prior export performance and minimum capital requirements in allocating such quotas.

B. Even if Article XX of the GATT 1994 Were Applicable, China Has Failed to Demonstrate That Prior Export Performance and Minimum Capital Requirements Imposed on Rare Earths and Molybdenum Satisfy the Conditions of Article XX(g)

321. China’s breaches of Article XI:1 of the GATT 1994 resulting from its export quotas on rare earths, tungsten and molybdenum are not justified by Article XX(g) of the GATT 1994, as the United States has explained above. But even if those quotas satisfied the conditions of Article XX(g), that would not automatically also excuse breaches of China’s trading rights commitments with respect to rare earths and molybdenum. China must show that the prior export performance and minimum capital requirements imposed for exporting rare earths and molybdenum meet the conditions of Article XX(g). It has not done so, and instead insists that it need not do so.³⁹⁰

1. To excuse prior export performance and minimum capital requirements for rare earths and molybdenum under Article XX(g), China must show that those requirements satisfy the conditions of Article XX(g)

322. China’s assertion that it is not required to demonstrate that its prior export performance and minimum capital requirements satisfy the conditions of Article XX(g) cannot withstand scrutiny. At issue are distinct breaches of distinct commitments – on the one hand, the imposition of quotas in breach of the commitment set forth in Article XI:1 of the GATT 1994 not

³⁸⁸ China’s Comments on the Complainants’ Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 16.

³⁸⁹ U.S. Answers to the Panel’s Questions Following the First Substantive Meeting with the Parties, para. 22.

³⁹⁰ China’s Comments on the Complainants’ Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 15.

to impose quantitative restrictions, and on the other hand the imposition of prior export performance and minimum capital requirements in breach of the commitment set forth in Paragraphs 5.1 and 83 and 84 not to impose prior export performance and minimum capital requirements. These breaches must be examined individually to determine if they meet the conditions of the exceptions asserted.

323. China’s citation of Articles X and XIII of the GATT 1994 appears to recognize this fact. China states that it must comply with the obligations set forth in those provisions in allocating its export quotas.³⁹¹ China admonishes: “[I]f Complainants wanted to *separately* challenge China’s quota allocation criteria, they should have challenged these measures under the specific WTO obligations applicable to quota allocation rules, including the following: *First*, Article X:1 of the GATT 1994 *Second*, Article X:3(a) *Third*, Article XIII”³⁹²

324. China appears to understand that breaches of the commitments set forth in Articles X and XIII of the GATT 1994 in the context of quota administration would not automatically be justified by Article XX if the quota were so justified. It is not clear why China seems to think that it has an obligation to comply with its commitments under those provisions, but not with its commitments under Paragraphs 83 and 84 and Paragraph 5.1. As the panel in *China – Raw Materials* recognized (in findings mooted on other grounds):

The obligations relating to allocation and administration of quotas (Articles X and XIII) are distinct from and additional to those relation to Article XI and GATT possible justifications. Even in situations where a quota must comply with Articles X and XIII Paragraphs 83 and 84 of China’s Working Party Report includes further commitments granted by China. . . .Therefore, the Panel is unable to agree with China that the ‘prior export performance’ requirement and ‘minimum registered capital’ requirements, challenged by the complainants, are automatically WTO-consistent in the case of China’s allocation of export quotas, because China’s exports allegedly respect the provisions of GATT Articles X:3(a), XIII of the GATT 1994, or any provision of the Import Licensing Agreement. Such a conclusion would run contrary to the particular requirements set forth at the time of China’s accession.³⁹³

2. China has failed to show that prior export performance and minimum capital requirements on rare earths and molybdenum satisfy the conditions of Article XX(g)

³⁹¹ China’s Comments on the Complainants’ Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 16; China’s First Written Submission, para. 281.

³⁹² China’s Comments on the Complainants’ Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 24; *see also* China’s First Written Submission, para. 281.

³⁹³ *China – Raw Materials (Panel)*, paras. 7.664-7.665, 7.667.

325. China has not and cannot show that the prior export performance and minimum capital requirements on rare earths and molybdenum satisfy the conditions of Article XX(g).³⁹⁴ These requirements do not relate to conservation. As China has explained (for rare earths), the export performance requirement:

enables the Chinese quota administration authorities to ensure that the exporter has the commercial expertise necessary to participate in complex international transactions, such as export contracts for the products at issue, to manage the flow of goods to meet international demands, arranging for financing and customs clearance, and to maintain a high quality standards.³⁹⁵

According to China, minimum capital requirements “ensure the exporter’s financial soundness, the absence of which might hamper its ability to source the materials and comply with international contracts.”³⁹⁶

326. With respect to molybdenum, China asserts that “[t]he use of these criteria, which are an integral part of China’s 2012 quota system for molybdenum, is not prevented by China’s trading rights commitments”³⁹⁷

327. The stated purpose of these requirements – to limit the ability to export to those companies that China deems suitable to engage in international transactions and capable of complying with international contracts – does not relate to conservation of an exhaustible natural resource. Indeed, China does not even contend as much.

328. China also attempts to distract attention by questioning U.S. motives in challenging the prior export performance and minimum capital requirements.³⁹⁸ But China’s speculation is not relevant to the issue of whether the requirements are consistent with China’s trading rights requirements – they are not – or whether they are justified under Article XX(g) – they are not.

329. However, the United States notes that it does not agree that the prior export performance and minimum capital requirements in some way guarantee that foreign consumers have access to rare earths and molybdenum. The requirements limit and control who can export, supposedly based on China’s determination of who is fit to engage in export transactions. China claims that 30 of 42 “major producers” of rare earths that satisfy access conditions to the rare earths industry have access to export quotas and that China’s quota system, including the prior export

³⁹⁴ See Section III.B above.

³⁹⁵ China’s First Written Submission, para. 239.

³⁹⁶ China’s First Written Submission, para. 240.

³⁹⁷ China’s First Written Submission, para. 388.

³⁹⁸ China’s Opening Statement at the First Substantive Meeting of the Panel with the Parties, para. 54; China’s Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 53.

performance and minimum capital requirements, thereby “ensures that the same, efficient and reliable suppliers are selected to supply the export market.”³⁹⁹ This may reflect China’s efforts to consolidate the rare earths industry.⁴⁰⁰ But the limitation of the ability to export rare earths and molybdenum to companies that satisfy minimum capital and prior export performance requirements does not guarantee supply to the export market and may serve to limit competition by new entrants for export opportunities. These prior export performance and minimum capital requirements are an additional restriction on exports, on top of the quotas, and on top of the duties.

330. Accordingly, for the reasons set forth in the U.S. first written submission and other submissions, and as further explained above, China’s imposition of prior export performance and minimum capital requirements on rare earths and molybdenum is inconsistent with China’s trading rights commitments set forth in Paragraphs 83 and 84 of the Working Party Report and Paragraph 5.1 of the Accession Protocol, and is not justified under Article XX(g).

V. CONCLUSION

331. For the reasons set forth in this submission and as supplemented by the reasons set forth in the U.S. answers to the Panel’s questions of April 11, 2013, the United States respectfully requests the Panel to find that China’s measures, as set out above, are inconsistent with China’s obligations under the GATT 1994 and the Accession Protocol. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.

³⁹⁹ China’s Comments on the Complainants’ Answers to the Panel’s Written Questions Subsequent to the First Substantive Meeting of the Panel with the Parties, para. 20; China’s Opening Oral Statement at the First Panel Meeting, paras. 47-48.

⁴⁰⁰ China’s First Written Submission, para. 103 (citing Exhibit CHN-13: Several Opinions, Paragraph I(2)); *see also* Exhibit JE-123 (English.news.cn, China Minmetals takes steps to help rare earth industry consolidate (June 16, 2011)).