

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

(DS431)

**Appellant Submission
of the United States of America**

April 8, 2014

SERVICE LIST

PARTIES TO THE DISPUTE

H.E. Mr. Yu Jianhua, Permanent Mission of China

THIRD PARTIES

H.E. Mr. Angelos Pangratis, Permanent Mission of the European Union

H.E. Mr. Yoichi Otabe, Permanent Mission of Japan

H.E. Mr. Alberto Pedro D'Alotto, Permanent Mission of Argentina

H.E. Mr. Hamish McCormick, Permanent Mission of Australia

H.E. Mr. M. Marcos Galvão, Permanent Mission of Brazil

H.E. Mr. Jonathan Fried, Permanent Mission of Canada

H.E. Mr. Gabriel Duque, Permanent Mission of Colombia

H.E. Mr. Jayant Dasgupta, Permanent Mission of India

H.E. Mr. Syafri Adnan Bahruddin, Permanent Mission of Indonesia

H.E. Mr. Choi Seokyoung, Permanent Mission of Korea

H.E. Mr. Harald Neple, Permanent Mission of Norway

H.E. Mr. Abdulla Nasser Musallam Al Rahbi, Permanent Mission of Oman

H.E. Mr. Luis Enrique Chávez Basagoitia, Permanent Mission of Peru

H.E. Mr. Alexey Borodavkin, Permanent Mission of the Russian Federation

H.E. Dr. Abdolazeez S. Al-Otaibi, Permanent Mission of Saudi Arabia

Dr. Shin-Yuan Lai, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu,
Kinmen and Matsu

H.E. Mr. Mehmet Haluk Ilicak, Permanent Mission of Turkey

H.E. Mr. Nguyen Trung Thanh, Permanent Mission of Viet Nam

TABLE OF REPORTS CITED

Short Form	Full Citation
Panel Report	Panel Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum</i> , WT/DS431/R, WT/DS432/R, WT/DS433/R, circulated 26 March 2014
<i>Thailand – Cigarettes (AB)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011

Argument and Executive Summary

1. At issue in this appeal is the Panel's determination to reject evidence submitted by the complainants with their comments on China's responses to the Panel's questions after the second meeting (on 17 July 2013). In rejecting this evidence, the Panel erroneously concluded: that acceptance of such evidence would have presented "due process" concerns for China;¹ that "the submission of new expert reports" would have interfered with the prompt settlement of the dispute;² and that to be accepted as rebuttal evidence an exhibit must "rise to the required level of necessity."³ In reaching these conclusions, the Panel erroneously applied Article 3.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and failed to provide sufficient time to the United States to prepare its submissions pursuant to DSU Article 12.4.

2. Simply put, to the extent that the Panel was concerned with due process relating to China's ability to respond to the evidence submitted on 17 July 2013, the United States observes that the Panel afforded China an opportunity to respond to the evidence at issue. This opportunity alleviated any alleged due process concerns.⁴ Accordingly, acceptance of the evidence on 17 July 2013 would have been consistent with Article 11 of the DSU.

3. To the extent that the Panel considered that it had not provided sufficient time for China to respond to the evidence presented by the co-complainants, the Panel should have adjusted the time period for China to respond. That is, the Panel should not itself have created the "due process" concerns through insistence on a particular time period.

4. The Panel erred in considering that Article 3.3, which provides that the prompt settlement of disputes is essential to the functioning of the dispute settlement system, supported its approach that additional time could not be provided. A limited extension of time would not undermine the value of "prompt settlement" in the context of the overall length of a panel proceeding. Nor would Article 3.3 compel a conclusion that evidence that otherwise comports with DSU requirements need be rejected. There is no support for the Panel's conclusion that acceptance of the 17 July 2013 evidence would have interfered with the prompt settlement of the dispute under Article 3.3 of the DSU. In particular, there is no evidence that acceptance of the expert reports pursuant to a filing specifically called for in the Working Procedures would have caused a never-ending cascade of competing expert reports and filings not called for in the Working Procedures.

5. Moreover, the Panel's rejection of the data in question because they are not "necessary" is inherently flawed. According to the Panel, evidence that is more necessary and, consequently, more likely to create due process concerns for the opposing party, would be accepted by the

¹ Panel Report, paras. 7.23-7.24.

² *Id.*, para. 7.24.

³ *Id.*, para. 7.25.

⁴ *Thailand – Cigarettes (AB)*, para. 153.

Panel, while confirmatory data, which present less of a due process concern, are more likely to be rejected. Such logic is flawed.

6. In sum, the Panel’s conclusion is wholly speculative and contradicts the time-table set forth by the Panel in the Working Procedures. By rejecting the evidence submitted by the co-complainants on 17 July 2013, the Panel effectively required that evidence to be submitted earlier and afforded a period for the co-complainants to make submissions that was inadequate, inconsistently with Article 12.4 of the DSU.

7. In addition, the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts by excluding exhibits submitted by the complainants with their comments on China’s responses to the Panel’s questions after the second meeting: by finding that “the evidence [in question] could and should have been submitted at an earlier date;”⁵ and by finding that the evidence in question does not rebut arguments made by China at the second meeting of the Panel.⁶

8. The Working Procedures in this dispute specifically provided that parties may submit evidence for purposes of rebuttal or comments on answers provided by other parties. As the United States will explain in detail below, the exhibits to which the Panel rejected all fall within this kind of rebuttal evidence. As such, the Panel had no basis to ignore the exhibits submitted by the co-complainants.

9. Paragraph 7 of the Working Procedures for this dispute states:

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

10. It is clear that the exhibits in question fall within the first category of evidence (*i.e.*, necessary for purposes of rebuttal) and that the co-complainants submitted them for the purposes of rebuttal in commenting on China’s answers to the Panel’s questions following the second substantive meeting. Indeed, China conceded that the evidence submitted by the co-complainants was necessary for the purposes of rebuttal.

11. Furthermore, although not relevant under the Working Procedures, it is not correct as a

⁵ Panel Report, para. 7.21.

⁶ *Id.*, para. 7.22.

factual matter, as the Panel found, that the evidence submitted by the co-complainants as Exhibits JE-188 through JE-197 could have been submitted much earlier in the process:

- Ministry of Commerce, Department of Foreign Trade Web-Published Notice on the 2013 Initial Approval List of Enterprises Qualified to Export Rare Earths in the Annual Review (17 December 2012) (Exhibit JE-188) was submitted by the co-complainants in support of arguments made in direct rebuttal to China’s answer to Panel Question 144.⁷ In particular, China asserted in its answer that the investigation by China Customs of Jiangxi South Rare Earth Hi-Tech Inc found that the company had engaged in the illegal sale of its rare earths export quota. The co-complainants relied on Exhibit JE-188 to demonstrate that this assertion is incorrect, and that the investigation by China Customs actually related to Jiangxi South Rare Earth Hi-Tech Inc’s evasion of export duties. The co-complainants thus submitted Exhibit JE-188 at the first possible occasion, following their review of China’s answer to Panel Question 144, in order to rebut China’s inaccurate assertion.
- Sina.com.cn, Rare Earth Mining Controls Said to “Might As Well Not Exist”, Real Production Remains Over-Quota Every Year (1 April 2011) (Exhibit JE-189) and Xinhuanet.com, China Minmetals Proposes Production Freeze, Revealing Unspoken Rules inside RE Industry (2 August 2011) (Exhibit JE-191) were submitted by the co-complainants directly in rebuttal to China’s answer to Panel Question 72. China made several new claims, in its answer to Panel Question 72, at para. 16, regarding the alleged relationship between China’s extraction quota and the actual level of extraction. These new arguments were premised on Exhibit CHN-191, which was first provided at the Second Panel Meeting. Moreover, Paragraphs 13-15 of Japan’s comments on China’s answers, which cite to Exhibits JE-189 and JE-191, directly rebut China’s claims by describing the illegal, over-quota production of rare earths in China. Exhibits JE-189 and JE-191 were thus timely submitted to the Panel in response to China’s newest arguments with respect to this evidence.
- Yangcheng Evening News, Rare Earth Industry Reorganizing, Guandong Staking an Early Claim (28 February 2012) (Exhibit JE-190) was submitted by the co-complainants in support of arguments made in rebuttal to China’s answers to Panel Questions 95 and 110. Both Panel Questions 95 and 110 were directed solely to China, and so it was only in their comments on China’s answers that co-complainants first had the opportunity to respond to both the Panel’s questions and to China’s answers.

⁷ The Panel Questions noted in the bullets refer to Panel Questions following the second substantive meeting of the Panel.

- Quotes from China’s Export Quotas and Measures Promoting Downstream Industries (Exhibit JE-192) were submitted by the co-complainants in support of arguments made in rebuttal to China’s answer to Panel Question 95.
- Professor L Alan Winters: Comments on China’s replies to Panel Questions 76 and 87 (Exhibit JE-193) was submitted by the co-complainants in support of arguments made in direct rebuttal to China’s answers to Panel Questions 76 and 87. The co-complainants note that Panel Questions 76 and 87 were addressed to China alone and sought China’s reaction to Exhibit JE-141. The arguments made by China therein could not have been rebutted earlier than in the context of the comments on the answers. Since China relied on Exhibit CHN-195, an expert report which set out a critique of Exhibit JE-141, in support of the arguments made in its answer to Panel Questions 76 and 78, it is perfectly reasonable that co-complainants also exhibited with their comments a paper by the author of Exhibit JE-141 thereby providing him an opportunity to respond to the critique.
- Similarly, Professor L Alan Winters: Comments on China’s replies to Panel Questions 78 and 86 (Exhibit JE-194) was submitted by the co-complainants in support of arguments made in rebuttal to China’s answers to Panel Questions 78 and 86. The United States notes that while Panel Question 78 was addressed to all Parties, Panel Question 86 was only addressed to China. For its answers to both Questions, China heavily relied on Exhibit CHN-186, an expert report submitted in the context of China’s opening oral statement at the second substantive meeting.
- Professor L Alan Winters: Response to Professor De Melo, Exhibit CHN-206 and certain points in China’s Answers of 8th July 2013 (Exhibit JE-195) was submitted in support of rebuttal arguments made by the co-complainants to Exhibit CHN-206. The latter, an expert report by Professor De Melo, was only submitted by China in the context of its answers to the Panel’s Questions. It would have therefore been impossible for the co-complainants to rebut it at any earlier occasion.
- Dudley Kingsnorth, “Rare Earths: An Industry Undergoing Rejuvenation,” June 2013 (Exhibit JE-196) was submitted by the co-complainants to rebut Chinese extraction and production data that were cited in China’s answers to the Panel’s Questions. In China’s answers, China referred to Dudley Kingsnorth as “the world’s leading rare earth market expert.” Thus, the importance of the Kingsnorth’s data to rebutting China’s claims did not become apparent until China’s answers to the Panel’s Questions. The United States further notes that it reserved the right to comment on China’s 2012 extraction and production data in its opening oral statement at the second Panel meeting because China had not submitted the source of such data to the Panel (and never did so).

- Professor Gene Grossman: Response to Professor Jaime de Melo (Exhibit JE-197) was submitted by the co-complainants to rebut Exhibit CHN-206, which was submitted by China in its answers to the Panel’s Questions. Accordingly, it would have been impossible for the co-complainants to rebut Exhibit CHN-206 at an earlier date.
12. For the reasons set forth in this submission, the United States respectfully requests that the Appellate Body find that the Panel’s rejection of the evidence submitted by the co-complainant on 17 July 2013 was inconsistent with Articles 11 and 12.4 of the DSU.