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

(WT/DS431)

Answers of the United States of America
to Questions from the Panel Received April 11, 2013

April 25, 2013

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China – Raw Materials (Panel)	Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, 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
China – Raw Materials (AB)	Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012
U.S. – COOL (AB)	Appellate Body Report, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/AB/R, adopted 23 July 2012
U.S. – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
U.S. – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998

61. **To all parties**: As noted by Turkey in its third party submission, paragraphs 22 and 23 (and Japan's response to question No. 58), the precursor to Article XX(g) contained in the draft ITO charter referred to measures "…relating to the conservation of exhaustible natural resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption". (E/PC/T/33, cited by Turkey in its third party submission) The Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment (E/PC/T/34) contains specific comments by delegates relating to this precursor provision. With respect to those comments, which are contained at page 32 of E/PC/T/34 under the heading "Sub-paragraph (j)", please answer the following questions:

> (a) What is the relevance of the fact that a proposal to delete the words following "natural resources" (so as to read "relating to conservation of exhaustible natural resources") was not reflected in the final version of Article XX(g) of the General Agreement on Tariffs and Trade?

1. **Answer**: The significance of the rejection of the proposal is that the negotiating history confirms the interpretation of Article XX(g) put forward by the complaining parties. The negotiating history, which may serve as a supplementary means of interpretation to confirm the meaning of text resulting from application of the customary rules of interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties, clearly demonstrates that negotiators intended Article XX(g) to require both that measures "relate to" conservation and be "made effective in conjunction with restrictions on domestic production or consumption."

2. According to the sponsor of the proposal, the proposal to remove the requirement that conservation measures be made effective in conjunction with restrictions on domestic production or consumption from Article XX(g) was motivated by the desire to accommodate situations where a Member may find that resources are "ample" for "present and prospective" domestic consumption, but that domestic consumers have trouble procuring such resources in light of competing foreign demand.[1] Under this rejected modification to the conservation exception, Members would have been able to take actions that limit supplies to foreign consumers (e.g., export quotas), while at the same time ensuring "ample" domestic supplies, all in the name of conservation. By rejecting this proposal, negotiators established that, in order to qualify as a conservation measure excepted under the GATT, a challenged trade measure must ensure that any "austerity" burdens are borne by domestic economic actors as well as foreign ones – what the Appellate Body described as the requirement of "even-handedness" in *U.S. – Gasoline*.[2] Viewed another way, what the negotiators established was that, for a measure to be credibly considered a legitimate conservation measure such that it can be excused under the GATT, it

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[1] E/PC/T/C.II/QR/PV/1, p. 15.

[2] As the Appellate Body stated: "Put in a slightly different manner, we believe that the clause 'if such measures are made effective in conjunction with restrictions on domestic product or consumption' is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources." *U.S. – Gasoline (AB),* pp. 20-21.

must show that its primary purpose is the conservation of an exhaustible resource and not the creation of preferential conditions for the domestic market. Under the formulation of Article XX(g) that was adopted, the way to ensure this is by requiring that trade measures in question be "made effective in conjunction with restrictions on domestic production or consumption."

3. In the context of the instant dispute, the relevance of the rejection of this proposal is that it underscores that under Article XX(g), any efforts made by China to conserve exhaustible natural resources can not be undertaken through measures that ensure ample supplies to its domestic consumers at the expense of the access of foreign consumers.

4. It also means that China's argument that a measure that operates as an "export safeguard" can be justified as a conservation measure by Article XX(g) is untenable. According to China, the Article XX(g) exception, under the theory that a measure need only relate to the "use and management" of natural resources, can be used to shield domestic consumers of rare earths from the impact of market forces through, for example, an export safeguard. The fact that this proposal was rejected, and that Members chose to keep the requirement that the challenged measure must be made effective in conjunction with restrictions on domestic production or consumption as a proviso of Article XX(g), shows that, among other things, Members did not intend for the concept of an export safeguard to be included within the scope of the Article XX(g) exception. In other words, an export safeguard is not a form of conservation, and efforts to isolate domestic consumers from foreign demand for raw materials are not shielded under Article XX(g) of the GATT 1994. Accordingly, China's argument that an export safeguard falls within the ambit of GATT Article XX(g) should be rejected.

> (b) What is the relevance of the fact a proposal to add the words "or other" before "resources" into this same phrase (so as to read "… relating to conservation of exhaustible natural or other resources if such measures are taken pursuant to international agreements or are made effective in conjunction with restrictions on domestic production or consumption") was not incorporated into the final version of Article XX(g) of the General Agreement on Tariffs and Trade?

5. **Answer**: The failure to incorporate the term "or other" demonstrates the GATT negotiators' intention that Article XX(g) provide an exception for measures related to conserving only "exhaustible natural resources" – and not other types of resources. The "other" types of resources whose conservation is not covered might include, for example, resources that are not exhaustible and/or natural.

6. This provides further support to the U.S. argument that China has not met its burden to show that its export quotas relate to the conservation of "exhaustible natural resources." China's export quotas cover products that span raw material in its ores and concentrates form, to further processed products such as metals and ferro-alloys for rare earths, APT and tungsten carbide for tungsten and ferro-molybdenum and molybdenum oxide for molybdenum. China has not

explained what precisely the "exhaustible natural resources" are that these export quotas are seeking to conserve – for instance, whether the exhaustible natural resources are the various rare earth elements, tungsten and molybdenum in their raw form (i.e., ores) or whether the exhaustible natural resources being conserved extend to the further downstream products that are themselves products of industrial processing and not, in and of themselves, "exhaustible" except by virtue of the exhaustibility of their inputs.

7. Members meant to limit the GATT Article XX(g) exception to the conservation of exhaustible natural resources, and not "other resources." China has failed to provide any real explanation as to why it limits the export of intermediate products, but allows the unrestrained or promotes the export of high value-added finished products that use rare earths, tungsten and molybdenum as inputs. Ultimately, this means that China has failed to explain what "exhaustible natural resources" its quotas are seeking to conserve and how the scope and coverage of these export quotas relate to the conservation of those exhaustible natural resources. Accordingly, and as supported by the rejection of the proposal to include the conservation of "other" resources within the purview of Article XX(g), China has not met its burden to demonstrate that the export quotas "relate to the conservation of exhaustible natural resources" pursuant to GATT Article XX(g).

62. **To the complainants**: In part III.2 of their panel requests, the complainants state that China administers its export quotas on various forms of rare earths, tungsten and molybdenum "in a manner that is not uniform, impartial, or reasonable, such as by the use of criteria in the application and allocation process that lack definition or do not contain sufficient guidelines or standards in how they should be applied", and that this is inconsistent with Article X:3(a) of the GATT 1994 and Paragraph 2(A)(2) of Part I of China's Accession Protocol. Is the Panel correct in its understanding that the complainants are not pursuing these claims?

8. **Answer**: The Panel is correct in understanding that the United States is not pursuing these claims.

63. **To all parties**: With respect to the concept of "even handedness" in Article XX(g) of the GATT 1994:

> (a) Are the principles set forth in Article XIII of the GATT 1994 ("Non-discriminatory Administration of Quantitative Restrictions") relevant to the Panel's assessment of whether China's export restrictions are "even handed" under Article XX(g)? In particular, Article XIII:2 provides that import quotas should be allocated in shares or proportions approaching as closely as possible those shares that Members might be expected to obtain in the absence of such quotas/restrictions. Does this principle related to the non-discriminatory allocation of import quotas provide guidance on the interpretation and/or

> application of the "even handedness" test in Article XX(g) in the context of export quotas? More specifically, if the challenged export quotas (acting in conjunction with production quotas) operate to allocate shares or proportions of the products at issue in a way that approaches as closely as possible those shares that domestic and foreign consumers might be expected to obtain in the absence of the measures, would this demonstrate that those measures are "even-handed" for the purpose of Article XX(g)?

9. **Answer:** In light of the discussions regarding the requirement under Article XX(g) that a challenged measure be "made effective in conjunction with restrictions on domestic production or consumption" in the U.S. second written submission and in response to Question 61(a) above, the United States does not consider that the principles set forth in Article XIII of the GATT 1994 are relevant to the "even-handedness" analysis under Article XX(g).

10. As the Appellate Body stated in *U.S. – Gasoline*:

> [W]e believe that the clause "if such measures are made effective in conjunction with restrictions on domestic product or consumption" is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.[3]

The "even-handedness" requirement of Article XX(g) is part of the analysis to determine whether a measure can be rightfully excused as a conservation measure because the burdens relating to conservation are borne by both foreign and domestic interests. This requires examining measures that affect or restrict foreign interests and measures that affect or restrict domestic interests. As the Appellate Body has made clear in its approach to the even-handedness analysis, it does not involve an "effects" test.[4]

11. Accordingly, the Appellate Body's approach to examining whether a respondent has been even-handed in imposing restrictions, in the name of conservation, not only on foreign economic interests but also domestic ones, has focused on a qualitative assessment of whether both foreign and domestic interests are affected by the measures in question. For example, in *U.S. – Gasoline*, the Appellate Body found that the measures in question – *i.e.*, the baseline

[3] *U.S. – Gasoline (AB)*, pp. 20-21.

[4] As the Appellate Body stated, "We do not believe, finally, that the clause 'if made effective in conjunction with restrictions on domestic production or consumption' was intended to establish an empirical "effects test" for the availability of the Article XX(g) exception." *U.S. – Gasoline (AB)*, p. 21.

establishment rules – affected both domestic and imported gasoline.[5] Likewise, in *U.S. – Shrimp*, the Appellate Body observed that the United States had a set of measures that impacted the harvesting of domestic shrimp and a separate set of measures that impacted the harvesting of imported shrimp.[6] In both of these disputes, the Appellate Body found that the measures at issue were in fact even-handed.

12. Similarly, in *China – Raw Materials*, the panel examined China's export restrictions (including export quotas) on raw materials and China's purported domestic production restrictions from a qualitative standpoint. In that dispute, the panel found that domestic production restrictions affected both domestic and foreign consumers, while the export quotas impacted only foreign consumers. Thus, unlike the measures at issue in *U.S. – Gasoline* and *U.S. – Shrimp*, the measures at issue in *China – Raw Materials* impacted foreign consumption, without any corresponding restriction on domestic consumption. Accordingly, the panel concluded that the export quotas were not "made effective in conjunction with restrictions on domestic production or consumption" – *i.e.*, that China's measures were not "even-handed" for purposes of Article XX(g) of the GATT 1994.

13. As in *China – Raw Materials*, domestic restrictions (some of which China claims to have adopted) on the production of rare earths, tungsten and molybdenum – such as taxes and production targets – would affect both domestic and foreign consumers of the materials equally.[7] This point has been acknowledged by China.[8] In contrast, the measures at issue in this dispute – namely, export quotas on these products – adversely affect only foreign consumption. And because China has not shown here that the "impact of the … export quota on foreign users is somehow balanced with some measure imposing restrictions on domestic users and consumers,"[9] the export quotas at issue in this dispute are not even-handed. (*See also* U.S. second written submission, section III.B.2.)

14. Article XIII:2, on the other hand, relates to distributing shares of a quantitative restriction to different trading partners in a manner that reflects the flow of unrestricted trade. By nature, the principles of Article XIII:2 implicate quantitative rather than qualitative considerations; consider effects of allocations and whether they would reflect the outcome or effects of unrestricted trade; and relate to the narrow question of how a quota (presumably one that is permitted under the GATT 1994) can be apportioned rather than the fundamental question of whether a quota for example can be considered a conservation measure and permitted as such.

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[5] *U.S. – Gasoline (AB)*, p. 21.

[6] *U.S. – Shrimp (AB)*, para. 144.

[7] *China – Raw Materials (Panel)*, paras. 7.460, 7.465; China's First Written Submission, para. 149.

[8] China's First Written Submission, para. 149.

[9] *China – Raw Materials (Panel)*, paras. 7.460, 7.465.

15. Finally, we note that, as a theoretical matter, even if the Article XIII:2 principle were relevant to the Article XX analysis, in light of the facts in the instant dispute, it would be extraordinarily difficult for the Panel to determine the hypothetical level of exports that Members might have been expected to obtain in the absence of export quotas. First, there are a number of distortive, WTO-inconsistent measures applied to the products at issue – e.g., export duties, export quotas, prior export performance and minimal capital requirements – that would make it difficult to answer the question of what China might have exported in the absence of the export quotas. Second, the export quotas in this case have, in some cases, forced companies to relocate to China, thereby distorting demand. China's export quotas must be viewed in the context of their imposition over time and the recent and current "market" for these materials should be considered to be highly distorted.

> (b) With reference to Article XX(g), the Appellate Body in *U.S. – Gasoline* explained that "'if such measures are made effective in conjunction with restrictions on domestic product or consumption' is a requirement that the measures impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources" (pp. 20-21, emphasis added).
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> With respect to the chapeau test of Article XX, the Appellate Body in *U.S. – Gasoline* also explained that "[t]he chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied" (p.22, emphasis added; footnote omitted).
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> To what extent are these two legal tests different? In particular, what factual matters are relevant in determining whether a measure is "even handed" in the context of Article XX(g)? What factual matters are relevant in determining whether the same measure is not applied in a manner that constitutes "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX? Is there an overlap in the application of these two tests of Article XX?

16. **Answer:** As discussed above and in the U.S. second written submission, the "even-handedness" assessment relates to an examination of whether a challenged measure that a responding party argues is related to "conservation" can be permitted under the GATT 1994. The particular inquiry scrutinizes whether the measure at issue is truly undertaken for purposes of conservation, and whether, as a result, the burdens resulting from serving the purpose of conservation are borne by both domestic and foreign interests.

17. On the other hand, there is no examination of the chapeau or its requirements unless and until a challenged measure first satisfies the requirements and is justified under one of the sub-paragraphs of Article XX. The inquiry at the point of the chapeau becomes whether a measure that has successfully been demonstrated to be legitimate, *e.g.*, a conservation measure under sub-paragraph (g), nonetheless should still be considered GATT-inconsistent because it is applied between Members in a way that constitutes "arbitrary or unjustifiable discrimination" or a "disguised restriction on trade." The Appellate Body further explained in *U.S. – Gasoline* that in understanding the Article XX chapeau, such requirements are important in avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.[10]

18. As a result of the different roles and purposes of the Article XX(g) "even-handedness" requirement (to determine whether a measure has as its primary purpose "conservation") and the Article XX chapeau requirement (to prevent the abuse or illegitimate use of the Article XX exceptions), the factors that might be relevant to each "test" are likely to be highly case-specific and fact-specific.

19. In the present dispute, for example, the Article XX(g) even-handedness inquiry will need to take into account what "restrictions" China imposes on its domestic consumers. The crux of the examination will be to consider whether there are facts that can, in light of the hard consumption restrictions imposed on foreign consumers through the export quotas, demonstrate that the export quotas are primarily aimed at serving a conservation objective, rather than some other objective that might include, e.g., providing preferences to domestic consumers, spurring the development of domestic processing industries and increasing the exportation of higher value-added products. These facts would need to show that China has made the hard choice to subject its own consumers of these raw materials to the kinds of burdens that it has imposed on foreign consumers of these raw materials for a very long time. As discussed in the U.S. first oral statement, second written submission, and above, the facts do not show that China has made this hard choice.

20. With respect to the Article XX chapeau's requirements, once again, the analysis would only take place if China were able to satisfy all of the requirements of sub-paragraph (g). In this dispute, the facts relevant to this inquiry would be ones that could confirm or contradict the sense that nevertheless, China's measures frustrate or defeat the balance of rights and obligations between China and its trading partners under the GATT. In the present dispute, the United States does not believe that China has met the burden of making the required showings under Article XX(g) and, consequently, the chapeau analysis should not become relevant. Nevertheless, for the sake of argument, the United States considers that facts that could be relevant for the Article XX(g) even-handedness inquiry could also be relevant to the analysis under the chapeau and vice versa, including, for example, the design and structure of China's

[10] *U.S. – Gasoline (AB)*, p. 23.

measures, the relative burdens borne by foreign and domestic consumers, differences between domestic and foreign prices, the manner in which the export quotas are administered, etc.

> (c) In the context of interpreting Article 2.1 of the TBT Agreement, the Appellate Body has stated that a measure would not be "even handed" where it is "designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination". (Appellate Body Report, *U.S. – COOL*, paras. 293, 340, 341, and 349) Does this test provide guidance on the interpretation and/or application of the "even handedness" test in the context of Article XX(g) of the GATT 1994?

21. **Answer:** The standard that a Member must meet to fulfill its obligations under Article 2.1 of the TBT Agreement is distinct from the requirements needed to successfully invoke the exception under GATT Article XX(g). Accordingly, the interpretation of Article 2.1 of the TBT Agreement does not particularly inform the interpretation of Article XX(g) of the GATT 1994.

22. The even-handed analysis under Article XX(g) is a function of the requirement that the measure in question be "made effective in conjunction with restrictions on domestic production or consumption." According to the Appellate Body in *U.S. – Gasoline,* "[t]he clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."[11] In applying this provision, the Appellate Body has looked to see if there are measures like the non-conforming measure that restrict domestic production or consumption of exhaustible natural resources.[12]

23. In contrast, Article 2.1 of the TBT Agreement concerns national treatment in regard to technical regulations. In *U.S. – COOL*, the Appellate Body only reached the question of even-handedness after first determining that the technical regulation had a detrimental impact on the conditions of competition for imported products.[13] After making that determination, the Appellate Body then examined whether the detrimental impact stemmed from a legitimate regulatory distinction made by the technical regulation or whether the technical regulation lacked, as an illustration, even-handedness, and thus, somehow reflected discrimination. In other words, the even-handed analysis was used in *U.S. – COOL* in an entirely different context, and it is not particularly applicable to the interpretation of Article XX(g) of the GATT or an assessment of whether China's measures can be justified by this exception.

24. Also of note, application of the even-handed standard from *U.S. – COOL* to the instant dispute, where China's ability to invoke Article XX(g) is in question, risks rendering the GATT Article XX chapeau a nullity. Specifically, treating the test of even-handedness as a

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[11] *U.S. – Gasoline (AB)*, p. 21.

[12] *U.S. – Gasoline (AB)*, p. 20.

[13] *U.S. – COOL (AB)*, para. 293

determination if the non-conforming measure is "designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination" would make the even-handedness test mirror the requirements of the chapeau of Article XX, thereby rendering the latter a nullity. This is inconsistent with the customary rules of treaty interpretation.

> (d) The Appellate Body has confirmed that "discrimination" may result not only when countries where the same conditions prevail are differently treated, but also when countries where different conditions prevail are treated the same. (Appellate Body Report, *U.S. – Shrimp*, para. 165) Does this principle related to the existence of "discrimination" provide guidance on the interpretation and/or application of the "even handedness" test in Article XX(g)?

25. **Answer:** As noted above, the Article XX(g) "even-handedness" requirement is focused on ensuring that otherwise non-conforming measures that are excepted under the GATT 1994 are primarily aimed at serving a conservation purpose – because unless burdens resulting from conservation efforts are shared by both domestic and foreign interests – a measure cannot be considered to have conservation as its primary objective.[14] As a result, the analysis for purposes of Article XX(g) "even-handedness" has less to do with determining whether treatment of a trading partner takes into account whether the same or different conditions prevail there and more to do with the credibility of the challenged measure as truly serving a conservation purpose.

64. **To all parties**: Where exactly are the "WTO-plus provisions" of an Accession Protocol located within the WTO Agreement? For example, are the export duty prohibitions of Paragraph 11.3 (an integral) part of:

> (a) the GATT 1994;
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> (b) the Marrakesh Agreement, narrowly defined, under Article XII;
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> (c) the Marrakesh Agreement, broadly defined to include the Multilateral Trade Agreements annexed thereto;
> (d) somewhere else within the WTO Agreement, like another covered agreement, parallel to the GATS, TRIPS and other multilateral trade agreements?

26. **Answer**: The text of an accession protocol establishes the relationship between the provisions of the protocol (whether WTO-plus or otherwise) and the WTO Agreement. As the United States has explained, Paragraph 1.2 of China's Accession Protocol provides: "This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." The first recital of the Preamble

[14] *See U.S. – Gasoline (AB)*, pp. 21-22.

defines the "WTO Agreement" to be "the Marrakesh Agreement Establishing the World Trade Organization." This is consistent with the fact that the Decision of the Ministerial Conference of 10 November 2001 (WT/L/432) was as follows: "The People's Republic of China may accede to the Marrakesh Agreement Establishing the World Trade Organization on the terms and conditions set out in the Protocol annexed to this decision." It is also consistent with the fact that Paragraph 1.3 of the Protocol refers explicitly to "the Multilateral Trade Agreements annexed to the WTO Agreement."

27. In this respect, the relationship between China's Accession Protocol and the WTO Agreement is akin to the relation between the annexed multilateral agreements and the WTO Agreement. Article II:2 of the Marrakesh Agreement provides that the annexed multilateral agreements are integral parts of the WTO Agreement. However, they are not all integral parts of one another. Nor are individual provisions of one agreement integral parts of another. The drafters of these agreements could have chosen to place all of the provisions of the covered agreements into a single agreement if that had been the intended effect. They did not do so. Where there are linkages, the text identifies those linkages in the text of the relevant agreement, *e.g.*, Articles 2 and 3 of the *Agreement on Trade-Related Investment Measures*, or Articles 1 and 2 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*. It would make no sense for the Accession Protocol – which, like the multilateral agreements, touches on a range of subjects – to be an "integral part" of the WTO Agreement itself and the individual agreements in its annexes.

28. It appears that China considers it can avoid this problem by suggesting that, at least at this time, only Paragraph 11.3 should be treated as an integral part of the GATT 1994, while presumably other obligations in its Accession Protocol that do not relate to trade in goods should be treated as an integral part of one or more of the other multilateral agreements. But this suggestion also lacks any basis in the customary rules of treaty interpretation and is completely untenable. In effect, under China's proposed approach, the various provisions of its Accession Protocol are apparently muddled together with all of the provisions of the multilateral agreements to create a single pool from which obligations and exceptions can be mixed and matched on a case-by-case basis. This *à la carte* approach is completely inconsistent with the WTO framework.

29. Moreover, as both the panel and the Appellate Body in the *China – Raw Materials* dispute recognized, Paragraph 11.3 establishes an obligation to eliminate export duties that is not found in the GATT 1994. The Working Party Report (paragraphs 155 and 156) makes clear that Members sought this "WTO-plus" obligation to address specific concerns they had about China's use of export duties. The conclusion that China may not rely upon Article XX of the GATT 1994 in order to continue or even expand its use of export duties and thus circumvent the clear intent of Members negotiating China's accession is, under the customary rules of treaty interpretation, a straightforward one. China's convoluted approach to allow it to evade its obligation to eliminate export duties should be rejected.

65. **To all parties**: Paragraph 1(b)(ii) of the General Agreement on Tariffs and Trade 1994, as specified in Annex 1A ("GATT 1994"), states that the protocols of accession that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement, are part of the GATT 1994. Paragraph 1.2 of China's Accession Protocol states that the protocol of accession is an integral part of the WTO Agreement. China argues that GATT-related "WTO-plus" provisions in China's Accession Protocol, such as its Paragraph 11.3, have become an integral part of the GATT 1994. Could you comment please on China's argument in light of paragraph 1(b)(ii) of the GATT 1994 and Paragraph 1.2 of China's Accession Protocol?

30. **Answer**: The text of Paragraph 1(b)(ii) of the GATT 1994 and Paragraph 1.2 of China's Accession Protocol undermines China's argument that certain provisions in its Accession Protocol are an integral part of the GATT 1994. First, this is not what Paragraph 1.2 says. Paragraph 1.2 states that China's Accession Protocol is an integral part of the WTO Agreement. Second, Paragraph 1(b)(ii) of the GATT 1994 demonstrates that Members used explicit language to make a protocol of accession an integral part of the GATT 1994 when they intended to do so.

31. Paragraph 1(b)(ii) is consistent with the fact that, prior to the entry into force of the WTO Agreement, protocols of accession resulted in a country or customs territory becoming a contracting party to a single agreement, namely the *General Agreement on Tariffs and Trade* [1947]. The WTO Agreement, among other things, established the WTO. Article XI of the WTO Agreement provided for those contracting parties to the GATT 1947 who accepted the WTO Agreement and the multilateral trade agreements and for which schedules were attached to the GATT 1994 and the GATS to be original Members of the WTO, while Article XII provides that any state or separate customs territory may accede to the WTO Agreement "on terms to be agreed between it and the WTO." The language of China's Accession Protocol reflects the terms agreed between China and the WTO, and makes clear that the Accession Protocol is an integral part of the WTO Agreement, not the GATT 1994.