

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

(DS431)

**CLOSING STATEMENT OF THE UNITED STATES
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL
WITH THE PARTIES**

February 28, 2013

1. On behalf of the United States, I would like to thank you, Mr. Chairman, the members of the Panel, and the members of the Secretariat, for your efforts and kind attention during this first meeting. We hope that our interventions will be helpful as you continue your work in this important dispute.

I. INTRODUCTION

2. As we have noted many times, China has used export quotas and export duties for raw materials as a reliable industrial policy tool to advance its economic development goals for many years. As reflected in its Working Party Report (see paragraphs 160 and 161), China's reliance on these export restrictions was a source of concern and consternation from the time of the negotiations over its accession to the WTO. As a result, in acceding to the WTO, China committed to disciplining its use of export quotas by eliminating them or maintaining them in conformity with the GATT 1994. China also committed to disciplining its use of export duties through elimination – except on a finite set of products, below maximum duty levels.

3. Nevertheless, China's reliance on these tools continued and grew, as did the concern of other Members of the WTO. In 2009, the United States, the European Union (EU) and Mexico initiated the first dispute against China regarding its use of various export restrictions including export quotas and export duties on nine categories of industrial raw materials. Then, as now, China has been engaged in an attempt to retrofit its export restrictions to the WTO's rules. China was not successful in its attempt in the first case. We are now in the midst of the second dispute against China regarding its use of the same tools – export quotas and export duties – on three different categories of industrial raw materials. As before, China's attempts in this dispute are again focused on the difficult and awkward task of retrofitting these export restrictions to WTO rules.

4. This time, China has taken a somewhat different approach from the one it took before and these differences underscore the dubiousness of China's asserted justifications in this dispute.

5. In the previous dispute, China attempted to justify export quotas on certain products as environmental measures under Article XX(b) of the GATT 1994 and export quotas on other products as conservation measures excepted under Article XX(g). China also attempted to justify export duties on some products as environmental measures excepted under Article XX(b) and export duties on other products as conservation measures under Article XX(g).

6. In this case, however, China has chosen a different tactic: now, with as little explanation as it provided in the previous dispute, China has chosen to portray that all of its export quotas are conservation measures under Article XX(g) while all of its export duties are environmental protection measures under Article XX(b).

7. In the previous dispute, China chose to assert an Article XX(g) exhaustible natural resource conservation exception only for materials in their most primary form (bauxite and fluorspar) and asserted an Article XX(b) environmental protection justification only for materials that had been produced through some stage of processing (*e.g.*, coke, manganese, silicon carbide).

8. In the present dispute, China has decided to try its luck at defending its export restrictions on large sets of materials ranging from materials in their most primary form to more processed forms under the same justification.

9. In the previous dispute, China attempted to justify an export quota and export duty simultaneously applied to one raw material (coke) under the same Article XX exception.

10. By contrast, in the present dispute, China is, with no explanation, asserting that the export quotas on a certain products are justified as a conservation measure by Article XX(g) and export duties applied simultaneously to the same product are justified as an environmental measure under Article XX(b).

11. One particular dynamic that is unique to the present dispute, but that also demonstrates the weakness of China's arguments, is that the quotas and duties on rare earths, tungsten, and molybdenum are all imposed on such large groups of materials at various stages of processing but seemingly start and stop in an arbitrary way. This is particularly true in regards to the rare earths

export restrictions, which cover nearly 75 tariff lines spanning ores and concentrates all the way to rare earth alloys.

12. Specifically, it is difficult to understand why China would subject neodymium ores to export quota for conservation purposes and an export duty of 20 percent for environmental protection; while, if that neodymium ore is processed into neodymium magnetic film, China no longer imposes an export duty for conservation purposes, but still applies an export duty of 20 percent for environmental reasons. And, if that neodymium is processed even further into a neodymium magnet, China would not impose any export restriction, either quota or duty. China's conservation and environmental concerns seem to melt away as one goes up the value chain.

13. The United States observes that China's use of export restrictions has been and continues to be systemic and that China's "see what sticks" experimentation with the GATT's justifications has been methodical. Even so, not all of the raw materials that China subjects to export restriction are created equal in strategic significance to China. By virtue of China's generous endowment in rare earth deposits, China's successful cornering of the international rare earth market, the unique nature of rare earths, and the development of new and exciting technologies requiring rare earth inputs, the rare earths export restrictions are the darling of China's export restrictions.

This is evident in the relative lack of attention, argumentation, and evidence that China has provided to justify its export restrictions on tungsten and molybdenum. This is evident not just in China's first written submission and in China's February 15 presentation of its export duties defense, but also in China's presentation of its case at this first meeting of the Panel with the parties.

II. ARTICLE XX(G) DEFENSE FOR RARE EARTH EXPORT QUOTA

14. As China has focused its energies thus far on its Article XX(g) defense for the rare earths export quota, we would like to offer the following comments and observations on China's arguments.

15. On the burden of proof, we will not elaborate further on the points articulated by our Japanese colleagues. We would just note that the burden of proof is on China to establish a defense under Article XX(g), and the Panel should not allow China to shift the burden to the complainants.

16. Second, China has completely failed to explain how, in light of the fact that a domestic restriction on production affects both domestic and foreign users of the resources, the impact of the export quota on foreign users is somehow balanced with some measure imposing restrictions on domestic users and consumers.

17. China has also presented wholly incorrect or partial data to the Panel. China said that it cannot denominate the rare earth quota in rare earth oxide equivalents (REOs), but it requires its exporters to declare the REO content. China has also failed to explain to this Panel the fact that it denominated the export quota in REOs before 2005.

18. While we believe that the price data provided by China to the Panel is a distraction, and that China's exclusive focus on such data is at odds with the instructions by the Appellate Body for panels to take into account qualitative data, which show that export restrictions lead to increased domestic consumption, China has provided price data for only two types of rare earths, out of 17. China has also only provided data for four products, out of 75 subject to the quota. And even that showed troubling price differences, such as in the case of neodymium oxide in the beginning of 2012.

III. EXPORT DUTIES

19. China appears to recognize that it faces a particularly steep uphill battle in attempting to defend its use of export duties under Article XX(b).

20. The United States has explained in previous written submissions that the customary rules of treaty interpretation lead to the conclusion that Article XX of the GATT 1994 is not applicable to breaches of the export duty commitment in Paragraph 11.3 of China's Accession Protocol. Both the panel and the Appellate Body reports in the first *Raw Materials* dispute confirm this conclusion.

21. China considers this an overly textualist approach. The United States does not agree. An interpretation of Paragraph 11.3 of China's Accession Protocol that applies the customary rules of treaty interpretation does not reflect an overly textualist approach, nor one that threatens sustainable development.

22. The conclusion that China may not use Article XX of the GATT 1994 to justify using export duties does not jeopardize the ability of China – or any other WTO Member – to achieve the ends recognized in the Article XX exceptions. The United States pointed out, in this dispute and in the last, that WTO Members have and use a range of tools other than export duties to address conservation and health concerns. China has never explained why it must use export duties to address these issues. In fact, in the last dispute, China claimed that its export quotas were necessary to protect human, plant or animal life or health under Article XX(b).

23. It should be noted that China's commitment to eliminate export duties was negotiated as part of a much larger accession package. On the one hand, China gained the multiple and undeniable benefits of WTO membership. On the other hand, China made certain commitments to the WTO Membership. The Report of the Working Party on China's accession makes clear that WTO Members had specific concerns about China's use of export duties. It is fair for Members to rely upon the specific commitment China made to eliminate them.

24. China's insistence that the Article XX exceptions must apply to violations of Paragraph 11.3 in order for it to promote non-trade objectives is also surprising, given that China has provided only an anemic attempt to substantiate the export duties at issue in this dispute. China has failed to meet its burden of proof with respect to any element of an Article XX(b) defense. Instead, China continues to overlook the fact that its export duties increase export prices to disadvantage downstream users in other WTO Members, and protect the health of China's downstream domestic industries.

IV. TRADING RIGHTS

25. Finally, with respect to the U.S. trading rights claims, China's defense is simply that because, in China's view, its export quotas are justified, China is permitted to violate the trading rights commitments in its accession documents in administering those quotas. In so doing, China again ignores the fact that where a measure violates a particular obligation, the question is what exceptions attach to that obligation. "Quota administration" is not an exception to violations of China's trading rights commitments.

V. CONCLUSION

26. In closing at this first meeting of the Panel with the parties, we would like to emphasize that we consider WTO dispute settlement to be an undertaking of utmost seriousness.

27. We have been studying China's export restriction for a long time. Our stakeholders' concerns have also grown and heightened over that time. Even so, we brought this dispute only after a careful and painstaking examination of China's measures – their text as well as their design, operation and structure. We examined the changes that China has made to its regulation in recent years, as well as the changes that China has not made. We concluded that China's export quotas and export duties on rare earths, tungsten and molybdenum are still today unjustifiable and WTO-inconsistent. And that is why we are all here before you.

28. We thank the Panel and the Secretariat for your time and attention. We look forward to cooperating with the delegation of China, and the delegations of the EU and Japan, in assisting you in the next phases of this important proceeding.