

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

(DS431, DS432, DS433)

**FIRST INTEGRATED EXECUTIVE SUMMARY
OF THE UNITED STATES OF AMERICA**

April 9, 2013

I. INTRODUCTION

1. During the negotiations between Members and China on its WTO accession, there was no dispute that China maintained various restrictions on exportation, including on some of the products at issue in this dispute. Likewise, there was no misunderstanding that Members sought to have China lift these restrictions as part of its accession commitments, and that China committed to do so. Yet China, in pursuit of industrial policy goals, has decided to maintain or even strengthen these restrictions.

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

3. Members of the Working Party also expressed concerns regarding taxes and additional charges that China applied exclusively to exports. With respect to export duties, China committed in its Protocol of Accession to the WTO that it would "eliminate all taxes and charges applied to exports unless ... specifically provided for in Annex 6 of this Protocol," which lists the products on which China retained the right to impose export duties, "or applied in conformity with the provisions of Article VIII" of the GATT 1994.

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

5. The DSB also rejected China's attempts to invoke various exceptions set forth in, for example, GATT Article XX to justify China's use of export quotas to meet alleged environmental and conservation goals. These are the same justifications that China has cited for its export restrictions covering the products at issue here. In rejecting China's use of export quotas, the DSB found that "[f]or the purpose of conservation of a resource, it is not relevant whether the resource is consumed domestically or abroad; what matters is its pace of extraction." The DSB also found that "export restrictions are not an efficient policy to address environmental externalities when these derive from domestic production rather than exports or imports."

6. The products subject to the export restrictions at issue in this dispute are various forms of rare earths, tungsten and molybdenum ("Raw Materials"). China is the leading producer of each

of the Raw Materials, which 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.

7. China's export restrictions have distorted the playing field on which Members compete. These export restrictions not only distort domestic and world markets in these critical Raw Materials, but they also impact entire manufacturing chains and have broad implications for competition and trade in a wide variety of products. For example, because China is the world's leading producer of the Raw Materials, the distortions created by the export restrictions can drive up the prices that U.S. and other non-Chinese producers must pay for these inputs on the world market. Concurrently, the export restrictions can increase supplies in China's domestic market, driving down the prices that Chinese producers would otherwise pay for these same inputs.

8. Over time, China has tightened its export restrictions on rare earths, tungsten and molybdenum; export quota amounts have decreased steadily while export duty rates have increased steadily since 2001. Indeed, in the case of rare earths, during the pendency of *China – Raw Materials I*, China not only expanded the scope of products covered by the export quota by adding rare earth alloys to the oxides, concentrates, metals and compounds already subject to the export quota, but China also drastically reduced the volume of the export quota from approximately 50,000 metric tons ("MTs") in 2009 to around 30,000 MTs in 2010.

9. This dispute focuses on two types of restrictions that China imposes on the exportation of the Raw Materials: export duties and export quotas (including certain quota administration measures). It is important to note that the United States does not disagree with policies aimed at addressing environmental externalities stemming from the domestic production of raw materials.

10. China's export duties are inconsistent with China's obligations under its Accession Protocol. China's export quotas, in themselves and in the manner they are administered, are inconsistent with China's obligations under the GATT and China's Accession Protocol, which incorporates commitments made by China in the Report of the Working Party. To summarize:

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

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

13. **Export Quotas – Administration and Allocation of the Export Quotas:** China’s commitments under paragraph 5.1 of Part I of the Accession Protocol, as well as paragraph 1.2 of the Accession Protocol to the extent it incorporates paragraphs 83 and 84 of the Working Party Report (commonly referred to as China’s “trading rights” commitments), require China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export products except for goods listed in Annex 2A of the Accession Protocol. China explicitly committed to eliminate certain eligibility criteria for obtaining the right to export. In its administration of the quotas for rare earths and molybdenum, China breaches these commitments by impermissibly requiring exporters to satisfy certain criteria – *i.e.*, (i) prior export experience and export performance and (ii) minimum capital requirements – to be eligible to participate in the process required to receive an allocation of the quotas (and in turn be able to export).

II. EXPORT DUTIES

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

A. China’s Obligations under the Accession Protocol

15. China committed in its Accession Protocol to “eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.” Annex 6 of the Accession Protocol, titled “Products Subject to Export Duty,” sets forth a list of 84 discrete products by individual harmonized system (HS) numbers accompanied by a short description of each product.

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

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

17. With one exception, the various forms of the Raw Materials do not appear in Annex 6. Accordingly, China must not impose export duties on the Raw Materials. Nevertheless, China restrains the exportation of various forms of rare earths, tungsten and molybdenum through the imposition of export duties.

B. “Temporary” Export Duties

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

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

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

21. Annex 6 of China’s Protocol does not include any of the products listed in Exhibit JE-6.

C. China’s Export Duties on Raw Materials Are Inconsistent with China’s Obligations under Part I, Paragraph 11.3, of the Accession Protocol

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

1. Paragraph 11.3 of the Accession Protocol

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

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

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

25. Annex 6 of the Protocol lists 84 products sequentially by HS number and accompanied by a description of the product and an export duty rate listed as an *ad valorem* percentage.

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

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

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

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

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

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

30. Accordingly, China’s maintenance of the temporary export duties applied to the exportation of rare earths, tungsten and molybdenum is inconsistent with China’s commitment under paragraph 11.3 of the Protocol to eliminate all taxes and charges applied to exports. Indeed, the panel in *Raw Materials I* found that the very same series of measures, consisting of, *inter alia*, the *Customs Law, Regulations on Import and Export Duties* and the *Tariff Implementation Program* in force at that time, resulted in the imposition of export duties inconsistent with paragraph 11.3 of the Protocol.

III. EXPORT QUOTAS

31. China imposes export quotas on various forms of rare earths, tungsten and molybdenum. These export quotas are inconsistent with China’s obligations under GATT Article XI:1, which explicitly prohibits restrictions made effective through a quota on the exportation of any product.

Likewise, these export quotas are also inconsistent with China’s obligations in paragraphs 162 and 165 of the Working Party Report, as incorporated by paragraph 1.2 of the Protocol.

A. Overview of Export Quotas

32. China restricts the exportation of various forms of rare earths, tungsten and molybdenum by subjecting the exportation of these materials to export quotas.

33. China’s *Foreign Trade Law* subjects goods whose exportation is subject to export quotas to an export quota administration. Under the *Foreign Trade Law*, MOFCOM is the government agency responsible for the centralized administration of all quotas. Specifically, MOFCOM is responsible for setting the total amount of export quotas for the following year no later than October 31 of each year, distributing export quotas, evaluating applications for export quotas, and determining whether to grant quotas.

34. MOFCOM must approve the exportation of the goods listed in the catalog as subject to quota before they can be exported. Entities that are approved to export under the quotas are issued a certificate of quota after meeting certain standards, which are discussed below.

B. Goods Subject to Export Quotas

35. MOFCOM, in collaboration with other relevant departments of the State Council, is required to publish the catalog of goods subject to restricted exportation, including export quotas, within 21 days of the catalog taking effect. The catalog effective for the year 2012, the *2012 Export Licensing Management Commodities List*, includes the Raw Materials listed in Exhibit JE-7 as subject to export quotas.

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

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

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

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

38. China subjects the exportation of various forms of rare earths, tungsten and molybdenum to quotas. These quotas prohibit exportation of these materials above certain quantities and, accordingly, restrict the exportation of these materials.

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

40. As the government agency responsible for administering the export quotas, MOFCOM, in collaboration with Customs, identifies the goods subject to export quotas on a list published annually. For the export quotas taking effect on January 1, 2012, MOFCOM and Customs published the *2012 Export Licensing List Notice*, which identifies rare earths, tungsten and molybdenum as products subject to export quotas.

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

42. The *China – Raw Materials I* panel found that China imposed export quotas on a number of raw materials through a series of measures, including the *Foreign Trade Law* and *Import and Export Regulations* and that this series of measures resulted in WTO-inconsistent export quotas.

IV. QUOTA ADMINISTRATION

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

A. Rare Earths

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

1. Manufacturing Enterprises

45. MOFCOM issued procedures governing the rare earth quota application process in 2012 for manufacturing enterprises. That measure – the *2012 Rare Earth Export Quota Application Procedures* – provides the requirements that manufacturing enterprises must satisfy in order to be eligible to receive an allocation under the quota. With respect to manufacturing enterprises, the applicants are required to, *inter alia*:

(iii) meet prior export experience and export performance from 2008-2010 (for enterprises whose export quotas were acquired after 2008, the export performance is based on all years from the year in which the quota was acquired up to 2010).

2. Trading Enterprises

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

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

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

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

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

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

B. Molybdenum

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

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

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

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

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

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

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

1. Manufacturing Enterprises

56. MOFCOM issued the *2012 Molybdenum Quota Application Procedures* that govern the molybdenum quota application process in 2012 for manufacturing enterprises. That measure

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

(ii) have actual export performance from 2008 to 2010 if the enterprise had previously acquired export quota or, if a new applicant, successfully met the production requirements from 2008-2010, which were:

(a) a combined production of 6,000 MTs of ferromolybdenum and molybdenum oxide; and

(b) production capacity of molybdenum powder and molybdenum metal of 600 MTs; and

(c) production of molybdate of more than 1,600 MTs; although these requirements can be lowered if the applicant produces certain high-tech products.

2. Trading Enterprises

57. With respect to trading companies, China requires such enterprises to satisfy the requirements set out above for production enterprises as well as additional criteria. In particular, trading enterprises are required to have a minimum registered capital of RMB 30 million.

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

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

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

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

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

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

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

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

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

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

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

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

62. In addition to restricting the exportation of rare earths and molybdenum through export quotas, China restricts the right of enterprises to export rare earths and molybdenum by requiring enterprises to satisfy certain criteria – *i.e.*, the prior export experience and export performance and minimum registered capital requirements discussed above – to be eligible to receive a quota allocation. The measures establishing China's current trading rights regime for the forms of rare earths and molybdenum subject to export quotas are inconsistent with China's obligations contained in Part I, paragraphs 5.1 and paragraphs 83 and 84 of the Working Party Report, as incorporated by 1.2 of the Accession Protocol.

1. China's Trading Rights Commitments

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

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

legislative procedures to implement these provisions during the transition period.

64. Paragraph 1.2 of Part I of the Protocol also states in pertinent part that “[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.”

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

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

(b) With respect to wholly Chinese-invested enterprises, the representative of China stated that although foreign-invested enterprises obtained limited trading rights based on their approved scope of business, wholly Chinese-invested enterprises were now required to apply for such rights and the relevant authorities applied a threshold in approving such applications. In order to accelerate this approval process and increase the availability of trading rights, the representative of China confirmed that China would reduce the minimum registered capital requirement (which applied only to wholly Chinese-invested enterprises) to obtain trading rights to RMB 5,000,000 for year one, RMB 3,000,000 for year two, RMB 1,000,000 for year three and would eliminate the examination and approval system at the end of the phase-in period for trading rights.

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

66. Paragraph 84, which is referred to in paragraph 342 of the Working Party Report, states:

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

distribution services would be done in accordance with China’s Schedule of Specific Commitments under the GATS.

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

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

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

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

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

71. Annex 2B identifies a list of six product headings (natural rubber, timber, plywood, wool, acrylic and steel) that are divided into 245 products according to their eight-digit HS number. Trading rights for all of these products were to be “liberalized within three years” following China’s WTO accession – *i.e.*, by December 11, 2004. Annex 2B is not relevant to these

proceedings because none of the Raw Materials are covered by Annex 2B and this limitation is no longer applicable to China's trading rights commitments, since it expired in 2004.

72. Thus, all enterprises in China should now have the right to export from China all goods, except those listed in Annex 2A2 of the Accession Protocol. Annex 2A2 does not include rare earths or molybdenum.

73. The third element established that within three years after accession China was required to complete all necessary legislative procedures to implement its obligations with respect to the right to trade. This three-year period expired on December 11, 2004

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

75. Paragraph 84(a) of the Working Party Report likewise confirms China's obligations with respect to trading rights, as set forth in paragraph 5.1 of the Protocol. Paragraph 84(a) provides that China's trading rights obligations apply to all enterprises in China, as of December 11, 2004, with regard to all products outside Annex 2A. Paragraph 84(a) also confirms China's commitment to eliminate its "examination and approval" system of trading rights within three years after accession at which time "China would permit all enterprises in China and foreign enterprises and individuals ... to export and import all goods."

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

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

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

78. The *Import and Export Regulations* provides that MOFCOM is responsible for the administration of export quotas, that enterprises seeking to export under the quota must apply to do so, and that the relevant administrative authorities must decide whether to grant those applications. The *2012 Rare Earth Export Quota Application Procedures* and *2012 Molybdenum Export Quota Application Procedures*, issued by MOFCOM, govern the application process for the allocation of the rare earths and molybdenum export quotas. These measures prescribe several criteria that applicants must satisfy in order to be eligible to export under the quotas. One of those criteria is that the enterprise have exported the requisite amount

of rare earths or molybdenum in the previous three-year period, or have supplied for export the requisite amount of rare earths or molybdenum in the previous three-year period. In addition, trading companies are also required to have a registered capital of at least RMB 50 million to export rare earths and RMB 30 million to export molybdenum.

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

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

81. In fact, the *China – Raw Materials I* panel found that China's prior export experience and export performance and minimum registered capital requirements were inconsistent with China's trading rights commitments.

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

V. CONCLUSION

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