

**World Trade Organisation
Panel Proceedings**

**China – Measures Related to the Exportation of Rare Earths,
Tungsten and Molybdenum**

(WT/DS432)

**First Written Submission
by the European Union**

Geneva, 30 October 2012

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Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R / WT/DS340/R / WT/DS342/R / and Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>China – Raw Materials</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R / WT/DS395/R / WT/DS398/R / and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, 1799
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
<i>Japan – Semi-Conductors</i>	GATT Panel Report, <i>Japan – Trade in Semi-Conductors</i> , L/6309, adopted 4 May 1988, BISD 35S/116

TABLE OF ABBREVIATIONS

ABBREVIATION	FULL FORM
<i>2012 Export Licensing Management Commodities List</i>	Notice on Issuing the "2012 Export Licensing Management Commodities List," (Ministry of Commerce and General Administration of Customs, No. 98, issued 30 December 2011, effective 1 January 2012)
<i>2012 Export Quantity for Agricultural and Industrial Products</i>	2012 Notice on the Total Export Quota Quantity for Agricultural and Industrial Products in 2012, (Ministry of Commerce, No. 71, issued 31 October 2011, effective 1 January 2012)
<i>2012 First Batch Rare Earth Export Quota Supplement</i>	Announcement on the Supplement Issued for 2012 the First Batch of Rare Earth Export Quota Notification (Ministry of Commerce No. 618, 16 May 2012)
<i>2012 First Batch Tungsten and Molybdenum Export Quota</i>	2012 Notice on List of Export (Supply) Enterprises and First batch Export Quota of Tungsten, Antimony and Other Nonferrous Metals, (Ministry of Commerce, shangmaohan, No. 1131, 26 December 2011)
<i>2012 First-Batch Rare Earth Export Quota</i>	2012 Notice on List of Rare Earth Export Enterprises and First-batch Rare Earth Export Quota (Ministry of Commerce, shangmaohan, No. 1133, 26 December 2011)
<i>2012 Molybdenum Export Quota Application Procedures</i>	Announcement on Application Conditions and Procedures for 2012 Indium, Molybdenum and Tin Export Quotas (Ministry of Commerce No. 79, 11 November 2011)
<i>2012 Rare Earth Export Quota Application Procedures</i>	Announcement on 2012 Application Conditions and Procedures for Qualification for Rare Earth Export Quota (Ministry of Commerce, No. 77, 11 November 2011)
<i>2012 Second Batch Rare Earth Export Quota</i>	Notice Concerning the 2012 Second Batch of Rare Earth Export Quotas (Ministry of Commerce, No. 627, 16 August 2012)
<i>2012 Second Batch Tungsten and Molybdenum Export Quota</i>	Notice of the Ministry of Commerce concerning the 2012 second batch export quotas for tungsten, antimony, silver, tin, indium, and molybdenum, (Ministry of Commerce, No. 513, 19 July 2012)
<i>2012 Tariff Implementation Program</i>	Notice Regarding the 2002 Tariff Implementation Program (State Council Customs Tariff Commission, shuiweihui (2001) No. 14, 1 January 2002)
<i>2012 Tariff Implementation Program (Customs)</i>	Announcement No. 79 Regarding the "2012 Tariff Implementation Program," (General Administration of Customs, No. 79, issued 22 December 2011, effective 1 January 2012)

ABBREVIATION	FULL FORM
<i>2012 Tungsten Export Quota Application Procedures</i>	Announcement Regarding the Qualification Standards of State Owned Tungsten, Antimony and Silver Trade and Enterprises, Tungsten and Antimony Export and Supply Enterprises and Declaration Procedures in 2012 (Ministry of Commerce, No. 80, 11 November 2011)
<i>Accession Protocol</i>	Protocol of Accession of the People's Republic of China, WT/L/432 (23 November 2001)
APT	Ammonium Paratungstate
CCCMC	China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters
CTIA	China Tungsten Industry Association
CNMIA	China Nonferrous Metals Industry Association
Customs	China's General Administration of Customs
<i>Customs Law</i>	Customs Law of the People's Republic of China (adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on January 22, 1987, amended July 8, 2000)
DSB	World Trade Organization, Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
<i>Export Quota Measures</i>	Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, issued December 20, 2001, effective January 1, 2002)
<i>Foreign Trade Law</i>	<i>Foreign Trade Law of the People's Republic of China</i>
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized Commodity Description and Coding System
<i>Import and Export Regulations</i>	Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (Order of the State Council No. 332, adopted at the 46th executive meeting of the State Council on 31 October 2001, effective 1 January 2002)
MOFCOM	Ministry of Commerce of the People's Republic of China
MOFTEC	Ministry of Foreign Trade and Commerce
REM	Rare Earth Metals
REO	Rare Earth Oxide

ABBREVIATION	FULL FORM
RMB	renminbi
USGS	United States Geological Survey
<i>Working Party Report</i>	Report of the Working Party on China's Accession to the WTO, WT/ACC/CHN/49 (1 October 2001)
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

LIST OF EXHIBITS

JE-1	World Trade Organization, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, circulated 1 October 2001 (excerpts)
JE-2	World Trade Organization, Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432, circulated 23 November 2001 (excerpts)
JE-3	Chart of Raw Material Names
JE-4	Notice on Addition of Rare Earth Alloy into Rare Earth Export Quota License (Ministry of Commerce, General Administration of Customs, 2011)
JE-5	2009-2011 Chinese Rare Earth Industry Export Quota Situation (China Rare Earth website http://www.cre.net/show.php?contentid=97130)
JE-6	Chart of Raw Materials Subject to Export Duties
JE-7	Chart of Raw Materials Subject to Quotas
JE-8	World Bank Data
JE-9	Blueprint for the Adjustment and Revitalization of the Steel Industry (State Council, 20 March 2009)
JE-10	Outline of the Eleventh Five-Year Plan for the National Economic and Social Development of the People's Republic of China (2006)
JE-11	National Mineral Resources Plan (Ministry of Land and Resources, 11 April 2001)
JE-12	Guidance for Enhancing the Management of Raw Materials Industries (Ministry of Industry and Information Technology (2009) No. 294)
JE-13	Development Policies for the Iron and Steel Industry (National Development and Reform Commission, 8 July 2005)
JE-14	Adjustment and Revitalization Plan for the Non-Ferrous Industry (State Council 2009)
JE-15	Outline of the Twelfth Five-Year Plan for the National Economic and Social Development of the People's Republic of China (2011)
JE-16	Catalogue for the Guidance of Foreign Investment Industries (the State Development and Reform Commission, the Ministry of Commerce, 31 October 2007)
JE-17	Yajun Zhang, "China Dangles Rare-Earth Resources to Lure Investment", <i>Wall Street Journal</i> , 16 August 2010

JE-18	Guiding Opinions of Jiangxi Province on the Development of the Rare Earths Industry (2007)
JE-19	Marianne Lavelle, “Higher Prices? Thank China: China's insatiable hunger for raw goods is starting to sting U.S. consumers” <i>U.S. News and World Report</i> , 4 April 2004
JE-20	Peter S. Goodman, “Booming China Devouring Raw Materials: Producers and Suppliers Struggle to Feed a Voracious Appetite” <i>Washington Post</i> , 21 May 2004
JE-21	Assif Shameen, <i>Material Impact</i> , The Edge Singapore, 28 September 2009
JE-22	Yao Ying, “Chinese investment: a new form of colonialism?” <i>EastAsiaForum</i> , 24 July 2012
JE-23	U.S. Geological Survey Mineral Commodity Summaries (2012): Rare Earths
JE-24	“Chinese rare earth major plans hiatus,” <i>UPI Energy</i> (19 October 2011).
JE-25	Rebecca Coons, “Molycorp Buys Rare Earth Processor for \$1.3 Billion” <i>Chemical Week</i> (12 March 2012)
JE-26	Yaron Vorona, "The State of the Union? It depends." <i>The Hill</i> (10 February 2011)
JE-27	China's Policy on Mineral Resources (State Council, 2003)
JE-28	Twelfth Five-Year Development Plan for New Materials Industry (Ministry of Industry and Information Technology, 4 January 2012)
JE-29	Inner Mongolia Autonomous Region "Twelfth Five-Year" High-Tech Industries Development Plan (13 December 2011).
JE-30	Jane Spooner, “Rare earths: China dominates”, <i>The Mining Journal</i> , 7 October 2005
JE-31	Molycorp, The Many Uses of Rare Earths
JE-32	International Tungsten Industry Association: Tungsten Properties
JE-33	International Tungsten Industry Association: Tungsten Mining & Beneficiation
JE-34	International Tungsten Industry Association: Tungsten Processing
JE-35	International Tungsten Industry Association: Intermediates
JE-36	International Tungsten Industry Association: Primary Uses of Tungsten

JE-37	U.S. Geological Survey Mineral Commodity Summaries (2012): Tungsten
JE-38	International Molybdenum Association: Molybdenum Properties
JE-39	International Molybdenum Association: Mining
JE-40	International Molybdenum Association: Processing
JE-41	International Molybdenum Association: Meltstock Mo Products
JE-42	International Molybdenum Association: Chemical Mo Products
JE-43	Roskill Consulting Group, Ltd., " <i>Study of the market for molybdenum</i> " November 2011
JE-44	Notice Regarding the 2002 Tariff Implementation Program (State Council Customs Tariff Commission, shuiweihui (2001) No. 14, 1 January 2002)
JE-45	Announcement No. 27 Issuing the "2012 Tariff Implementation Program," (State Council Customs Tariff Commission, shuiweihui, No. 27, issued 9 December 2011, effective 1 January 2012)
JE-46	Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council No. 392, adopted at the 26th executive meeting of the State Council on 29 October 2003, effective 1 January 2004)
JE-47	Announcement No. 79 Regarding the "2012 Tariff Implementation Program," (General Administration of Customs, No. 79, issued 22 December 2011, effective 1 January 2012)
JE-48	Notice on Issuing the "2012 Export Licensing Management Commodities List," (Ministry of Commerce and General Administration of Customs, No. 98, issued 30 December 2011, effective 1 January 2012)
JE-49	Foreign Trade Law of the People's Republic of China (adopted as amended at the 8th Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004, effective 1 July 2004)
JE-50	Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (Order of the State Council No. 332, adopted at the 46th executive meeting of the State Council on 31 October 2001, effective 1 January 2002)

JE-51	Measures for the Administration of Licenses for the Export of Goods (Order of the Ministry of Commerce No. 11, adopted 7 May 2008, effective 1 July 2008)
JE-52	Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, issued 20 December 2001, effective 1 January 2002)
JE-53	Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeiguanhanzi, No. 68, 21 September 1999, amended 12 September 2010)
JE-54	Customs Law of the People's Republic of China (adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, amended 8 July 2000)
JE-55	Circular on the 2012 List of Rare Earth Export Enterprises and First Batch of Rare Earth Export Quotas, (Ministry of Commerce, shangmaohan, No. 1133, 26 December 2011)
JE-56	Notice Regarding the Supplement Issued for the 2012 First Batch of Rare Earth Export Quota (Ministry of Commerce No. 618, 16 May 2012)
JE-57	Notice Concerning the 2012 Second Batch of Rare Earth Export Quotas (Ministry of Commerce, No. 627, 16 August 2012)
JE-58	2012 Notice on the Total Export Quota Quantity for Agricultural and Industrial Products in 2012, (Ministry of Commerce, No. 71, issued 31 October 2011, effective 1 January 2012)
JE-59	2012 Notice on the List of Export (or Supplier) Enterprises and First Batch Export Quotas of Tungsten, Antimony and Other Nonferrous Metals, (Ministry of Commerce, shangmaohan, No. 1131, 26 December 2011)
JE-60	Notice of the Ministry of Commerce Concerning the 2012 Second Batch Export Quotas for Tungsten, Antimony, Silver, Tin, Indium, and Molybdenum, (Ministry of Commerce, No. 513, 19 July 2012)
JE-61	Announcement on 2012 Application Conditions and Procedures for Qualification for 2012 Rare Earth Export Quota, (Ministry of Commerce, No. 77, 11 November 2011)

JE-62	Announcement Regarding the Qualification Standards of State Owned Tungsten, Antimony and Silver Trade and Export Enterprises, Tungsten and Antimony Export and Supply Enterprises and Declaration Procedures in 2012, (Ministry of Commerce, No. 80, 11 November 2011)
JE-63	Announcement on Application Conditions and Procedures for 2012 Indium, Molybdenum and Tin Export Quotas, (Ministry of Commerce, No. 79, 11 November 2011)
JE-64	Announcement Issuing the "2012 Graded License-Issuing List of Commodities Subject to Export License Administration," (Ministry of Commerce, No. 103, 31 December 2011, effective 1 January 2012)
JE-65	Notice Publishing the List of the State Trading Export Enterprises of Tungsten, Antimony and Silver, the Enterprises Exporting and Supplying Tungsten and Antimony, and the Enterprises of Applying for the Export Quotas for Indium and Molybdenum in 2012, (Ministry of Commerce, 14 December 2011)
JE-66	Notice Publishing the List of Enterprise Applying for the Export Quota for Rare Earths and Coke in 2012 (Ministry of Commerce, 14 December 2011)
JE-67	The State Council's Notification on the Issuance of Industrial Transformation and Upgrading Plan(2011-2015) (State Council, guofa, No. 47, 30 December 2011)
JE-68	Overall Plan for Mineral Resources of Jiangxi Province (2008-2015)
JE-69	Inner Mongolia Autonomous Region's Eleventh Five-Year Plan on the Rare Earth Industry (2006-2010)
JE-70	Announcement of MOFTEC issuing Export Quota Tendering to 13 Type of Commodities in 1999 (Ministry of Foreign Trade and Economic Cooperation, 1999)
JE-71	Notice of MOFTEC on Suspension of Tender for Rare Earth Export Quotas (Ministry of Foreign Trade and Economic Cooperation, 14 February 1999)
JE-72	Notice of the State Council on Listing Tungsten, Tin, Antimony and Ionic Rare Earth Minerals as National Specified Minerals under Protective Mining (State Council, 15 January 1991)
JE-73	1999 Notice Concerning the Rare Earth Products Export Quota (Ministry of Foreign Trade and Economic Cooperation, 14 February 1999)
JE-74	Statement on Relevant Matters Regarding the Issuance of Export License (Ministry of Commerce Quota and License Administrative Bureau, 20 July 2010)

JE-75	Notice of the Ministry of Finance, National Development and Reform Commission, Ministry of Commerce, General Administration of Customs, State Administration of Taxation on Adjusting the Tax Refund Rates of Certain Commodities and Supplementing the Catalogue of Prohibited Commodities in Processing Trade (2006) No.139
JE-76	World Trade Organization, Trade Policy Review, WT/TPR/S/230, circulated 26 April 2010 (excerpts)
JE-77	Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa No. 398, 9 October 2008)
JE-78	Rules on the Administration of Import and Export License Certificates (Ministry of Commerce, shangwubuling, No. 1, issued 4 February 2012, effective 5 March 2012)
JE-79	U.S. Geological Survey Minerals Yearbook (2010): Rare Earths
JE-80	U.S. Geological Survey Minerals Yearbook (2010): Tungsten
JE-81	U.S. Geological Survey Minerals Yearbook (2012): Molybdenum
JE-82	U.S. Geological Survey, Global Rare Earth Oxide Production Trends (2010)
JE-83	Notice by the Department of Finance and the State Administration of Taxation on Adjusting the VAT Rebates of Certain Products (29 April 2005)
JE-84	International Tungsten Association, About Tungsten, Resources, Minerals & Deposits
JE-85	International Tungsten Industry Association, Tungsten Products, Tungsten Oxides & Acid
JE-86	International Tungsten Industry Association, Applications, Cemented Carbides
JE-87	International Tungsten Industry Association, Applications, Cemented Carbides, Tungsten Carbide and Cobalt
JE-88	International Tungsten Industry Association, Applications, Cemented Carbides, Machining
JE-89	International Tungsten Industry Association, Applications, Cemented Carbides, Mining & Construction
JE-90	International Tungsten Industry Association, Applications, Tungsten in Steel

JE-91	International Tungsten Industry Association, Applications, Tungsten in Steel, Heating Resistant Steel & Cast Steel
JE-92	International Tungsten Industry Association, Applications, Tungsten in Steel, Tool Steel
JE-93	International Tungsten Industry Association, Applications, Tungsten in Steel, High Speed Steel
JE-94	International Molybdenum Association, Molybdenum Uses, Molybdenum Chemistry & Uses
JE-95	International Molybdenum Association, Molybdenum Uses, Molybdenum Metal & Alloys
JE-96	International Molybdenum Association, Molybdenum Uses, Molybdenum Chemistry & Uses, Molybdenum Compound Uses
JE-97	International Molybdenum Association, Molybdenum, Molybdenum Market Information, Molybdenum Global Production & Use

I. INTRODUCTION

1. The European Union is challenging the People's Republic of China's ("China") export restrictions on various forms of rare earths, tungsten and molybdenum, which are imposed through WTO-inconsistent export duties and export quotas, as well as through additional restrictions in China's system for the administration and allocation of export quotas.
2. While the raw materials at issue are considered to be essential inputs for major industries of other WTO Members like the European Union, China enjoys a unique position in this regard: China has access to some of the world's largest known reserves of these raw materials and is the leading global producer of all of them.
3. Due to this unique position, the export restrictions imposed by China on the raw materials at issue have fundamentally distorted the level playing field on which WTO Members compete. While these export restrictions disadvantage manufacturers located outside China by limiting access to these raw material inputs and by driving up their prices, they also serve to promote access to these materials for producers located in China. This gives Chinese producers a significant competitive advantage in the manufacturing of downstream products when competing against downstream products from other WTO Members, both in the Chinese domestic market as well as in export markets. As a consequence, these export restrictions have put pressure on foreign producers to move their operations and technologies to China.
4. These restrictions and the economic hardship they cause for companies not producing in China are the result of a deliberate strategy that China employs to foster its economic development and industrial ambitions. China's production of industrial raw materials and processed goods has increased significantly as well as China's exports of processed, value-added goods. At the same time, China's exports of industrial raw materials have decreased.
5. These raw materials are used in the manufacture of cars, electronic and electrical devices, engineering goods, steel and various alloys. Independently of the share of the cost of these raw materials in the finished products, their use is often

- indispensable; i.e. not substitutable and alternatives are not easily found. The Chinese restrictions at issue in this dispute negatively affect international trade in these products and create an uncertainty of supply to the detriment of other WTO Members' industries relying on these raw materials.
6. Several EU industries directly use and import rare earths and refine them further into specific intermediate products (e.g. from powders or alloys, which then go into e.g. catalysts or magnets). Other European companies use the latter products further downstream in the production chain, for example, in catalysts in car exhausts, energy-efficient light bulbs, screen displays, industrial ceramics, medical equipment, and wind power turbines.
 7. Tungsten is also used widely by European industries, and some of its end-use applications include the manufacture of light bulbs, fluorescent tubes, cell phones, television sets, magnetrons for microwave ovens and other electronic products. Tungsten is a raw material which is in high demand by various European industrial manufacturers, and as European tungsten resources are not sufficient to meet demand, the industry is dependant on tungsten imports, most of which come from China.
 8. Molybdenum is another raw material which is much used by European industries, principally as an alloying agent in steel, cast iron and super-alloys, as it increases the strength and resistance to corrosion of these materials. On a global level, European industry is the second largest user of molybdenum, coming second to China. Moreover, European industries are fully reliant on molybdenum imports, as there are no molybdenum deposits in Europe.
 9. China's measures which are being challenged in this dispute are inconsistent with China's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and with the commitments that China undertook when it joined the WTO in 2001, as set out in China's Protocol of Accession to the WTO ("*Protocol*" or

- "Accession Protocol")¹ and the Report of the Working Party on China's Accession to the WTO ("*Working Party Report*")².
10. During China's accession negotiations to the WTO, China was still maintaining various restrictions on exportation, including on some of the products that are the subject of this dispute. In fact in 2001, in its *Working Party Report*, China stated that it had reduced its export restrictions since 1992 and that by 1999 the export restrictions had been reduced to only 58 categories covering a total of 73 items.³ However, even then, WTO Members "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."⁴ WTO Members also expressed concern "over taxes and charges applied exclusively to exports".⁵
 11. Consequently, China committed in paragraph 11.3 of its *Accession Protocol* to eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of the *Accession Protocol*, or applied in conformity with the provisions of Article VIII of the GATT 1994.
 12. Despite these clear WTO commitments China has been increasing its export duties, their scope and amount, while gradually decreasing the quotas allowed for exports. Since 2001, China has gradually increased the number of tariff lines subject to export duties, covering a wide range of goods. While the *2002 Tariff Implementation Program*⁶ announced the imposition of export duties on 36 tariff lines, the *2012 Tariff Implementation Program*⁷ announces the imposition of export duties on 363 tariff lines. The majority of those tariff lines are either not listed in Annex 6 of the

¹ World Trade Organization, Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432, circulated 23 November 2001, (Exhibit JE-2).

² World Trade Organization, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, circulated 1 October 2001, (Exhibit JE-1).

³ *Working Party Report*, para. 158, (Exhibit JE-1).

⁴ *Working Party Report*, para. 161, (Exhibit JE-1).

⁵ *Working Party Report*, para. 155, (Exhibit JE-1).

⁶ Notice Regarding the 2002 Tariff Implementation Program (State Council Customs Tariff Commission, shuiweihui (2001) No. 14, 1 January 2002, (Exhibit JE-44).

⁷ Announcement No. 27 Issuing the "2012 Tariff Implementation Program," (State Council Customs Tariff Commission, shuiweihui, No. 27, issued 9 December 2011, effective 1 January 2012), (Exhibit JE-45).

Accession Protocol or the levels of export duty exceed the levels committed to in Annex 6 of the *Accession Protocol*.

13. Furthermore, China subjects the export of raw materials, such as various forms of rare earths, tungsten and molybdenum to an annually updated export quota and export licensing regime and to other export restrictions through a number of laws, regulations and annual measures. Presently, China subjects over 360 items to export duties,⁸ 26 categories of products to export quotas⁹ and over 670 items to non automatic licensing.¹⁰
14. The European Union (and a number of other WTO members) has repeatedly raised China's continued and growing use of export restrictions in bilateral and multilateral contexts, including by reminding China of its explicit commitments under the *Accession Protocol*, the *Working Party Report* as well as the GATT 1994. More specifically, the EU has consistently raised the issue at technical and political level in its bilateral discussions with China, as well as in the context of the WTO Trade Policy Review of China¹¹, the Transitional Review Mechanism for China¹² and other relevant WTO groups and committees. Unfortunately, all these efforts were to no avail.
15. The European Union has already brought its concerns regarding China's restrictive export policies on a different set of raw materials to the WTO dispute settlement system for resolution in the context of the *China –Raw Materials* dispute. The panel and the Appellate Body in *China – Raw Materials* ruled that the export restrictions imposed by China on the raw materials subject to said dispute are inconsistent with the rules of the WTO and cannot be justified by GATT exceptions. Despite this ruling and the similarity of the measures at issue in said dispute with the ones subject

⁸ Ibid.

⁹ 2012 Notice on the Total Export Quota for Agricultural and Industrial Products in 2012 (Ministry of Commerce, No.71, issued 31 October 2011, effective 1 January 2012) ("*2012 Export quantity for Agricultural and Industrial Products*"), (Exhibit JE-58).

¹⁰ Notice on Issuing the "2012 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, No.98, issued 30 December 2011, effective January 1, 2012) ("*2012 Export Licensing Management Commodities List*"), (Exhibit JE-48).

¹¹ World Trade Organization, Trade Policy Review, WT/TPR/M/264, circulated on 17 July 2012, para. 246.

¹² World Trade Organization, Report of the Council for Trade in Goods on China's Ninth and Final Transitional Review, G/L/977, circulated on 16 November 2011, para 14.29.

to this dispute, China has regrettably displayed no willingness to revisit its broader export restriction regime in order to bring it in line with its WTO obligations. Consequently, the European Union has been left with no choice but to seek recourse to WTO dispute settlement again.

16. The European Union begins this submission by outlining the procedural history (Section I) and factual background (Section III) of this dispute. The European Union then demonstrates (in Section IV) that China's export duties, export quotas, as well as the administration and allocation of export quotas on rare earths, tungsten and molybdenum violate China's WTO obligations. The European Union presents its claims in the following order:

Export Duties

17. China imposes and maintains export duties on rare earths, tungsten and molybdenum contrary to its commitment under paragraph 11.3 of its *WTO Accession Protocol* to eliminate all taxes and charges applied to exports.

Export Quotas

18. China imposes quotas on the exportation of rare earths, tungsten and molybdenum. These export quotas are inconsistent with Article XI:1 of the GATT 1994 and they also constitute a violation of paragraph 1.2 of China's *Accession Protocol*, which incorporates China's commitments contained in paragraphs 162 and 165 of its *Working Party Report*.

Export Quota Administration

19. In addition, China imposes prior experience, export performance and minimum capital conditions on enterprises in order to allow them to participate in the export quota application and allocation procedures. These conditions imposed by China are inconsistent with paragraph 5.1 of China's *Accession Protocol*, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the *Accession Protocol*, which incorporates commitments in paragraphs 83(a), 83(b), 83(d), 84(a) and 84(b) of the *Working Party Report* because they limit the right to trade.

II. PROCEDURAL HISTORY

20. The European Union requested consultations with China on 13 March 2012, pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to China's restrictions on the export of various forms of rare earths, tungsten and molybdenum. On the same day, the United States of America and Japan requested consultations with China with respect to the same restrictions. The requests were circulated to WTO Members on 15 March 2012 (WT/DS431/1, WT/DS432/1, WT/DS433/1).
21. On 22 March 2012, the European Union, Japan and the United States requested to join each other's consultations. On 26 March 2012, Canada requested to join all three consultations. Subsequently, China informed the Dispute Settlement Body (DSB) that it had accepted all requests to join the consultations. The Parties held joint consultations on 25 and 26 April 2012. These consultations provided helpful clarification, but failed to resolve the dispute.
22. On 27 June 2012, the European Union, the United States and Japan each requested the establishment of a panel pursuant to Article 6 of the DSU (WT/DS431/6, WT/DS432/6, WT/DS433/6, respectively). The DSB considered this request at its meeting on 10 July 2012, at which time China objected to the establishment of a panel.
23. The European Union, the United States and Japan each renewed its request for the establishment of a panel and the DSB established a single panel with standard terms of reference to examine the complaints by the European Union, the United States and Japan at the DSB meeting of 23 July 2012.
24. On 12 September 2012 the European Union, the United States and Japan requested the Director-General of the WTO to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 24 September 2012, the Director-General of the WTO composed the Panel as follows:¹³

¹³ Doc. WTO/DS432/7.

Chairman: Mr Nacer Benjelloun-Touimi

Members: Mr Hugo Cayrús

Mr Darlington Mwape.

III. FACTUAL BACKGROUND

A. The Raw Materials

25. The group of elements referred to as rare earths, tungsten and molybdenum are either naturally occurring minerals, or materials that have undergone a degree of processing. China is the leading global producer of all of these raw materials, which thus renders the export restrictions it imposes upon them particularly distortive for the consumers of these raw materials who are not located within China.

1. Rare Earths

26. Rare-earth elements, also commonly referred to as "rare earths" are a group of 15 lanthanide elements in the periodic table given the atomic numbers of 57 to 71. Scandium (Atomic number 21) and yttrium (Atomic number 39) are also commonly referred to as "rare earths" due to their occurrence together with the lanthanides.¹⁴

27. The 15 lanthanide elements are the following: lanthanum (Atomic No. 57), cerium (Atomic No. 58), praseodymium (Atomic No. 59), neodymium (Atomic No. 60), promethium (Atomic No. 61)¹⁵, samarium (Atomic No. 62), europium (Atomic No. 63), gadolinium (Atomic No. 64), terbium (Atomic No. 65), dysprosium (Atomic No. 66), holmium (Atomic No. 67), erbium (Atomic No. 68), thulium (Atomic No. 69) ytterbium (Atomic No. 70), and lutetium (Atomic No 71).¹⁶ The rare earths from lanthanum to europium (Atomic Numbers 57 to 63) are often referred to "light rare

¹⁴ J. Spooner, "Rare Earths: China Dominates", *The Mining Journal*, 7 October 2005, (Exhibit JE-30).
¹⁵ Promethium does not exist naturally in the earth's crust. Spooner notes that: "Promethium has never been discovered on earth but has been identified in spectral analysis of a star in the Andromeda galaxy." (J. Spooner, "Rare Earths: China Dominates", *The Mining Journal*, 7 October 2005, (Exhibit JE-30)).

¹⁶ J. Spooner, "Rare Earths: China Dominates", *The Mining Journal*, 7 October 2005, (Exhibit JE-30).

- earths". The elements from gadolinium to lutetium (Atomic Numbers 64 to 71), along with yttrium (Atomic Number 39) are often referred to as "heavy rare earths".
28. While the differentiation explained above is the most common in practice, other classifications do exist and it should be noted that China classifies lanthanum (Atomic No. 57) through promethium (Atomic No. 61) as "light rare earths" and it classifies samarium (Atomic No. 62) through lutetium (Atomic No. 71) as "medium" and "heavy rare earths" for purposes of the export quota (discussed below). China also classifies scandium (Atomic No. 21) and yttrium (Atomic No. 39) as "medium" and "heavy rare earths".
29. Ores containing rare earths are extracted and then concentrated, usually at the mine, to increase the content of rare earths. The processing of rare earths concentrates generally involves an "initial cracking or leaching step to bring the elements into solution".¹⁷
30. Rare earth concentrates are then separated into individual compounds, including rare earth oxides (REO), and can be further converted into rare earth metals (REM). The term "smelting" is often used to describe the process of separating and reducing rare earth elements into rare earths metals. As metals, the rare earths can be alloyed or mixed with other raw materials or elements (such as iron), depending on the intended end-use of the particular alloy.
31. Rare earths have specific magnetic, chemical and spectroscopic properties that have led to their application in a wide range of end-uses. However, due to the fact that there are differences in the physical and chemical properties of "light" and "heavy" rare earths, this results in them being used differently in diverse products.¹⁸
32. Rare-earths are used as "process-enablers" in specific production processes, as well as "key components" which are needed to manufacture other products. Examples of the use of rare earths as "process-enablers" are fluid-cracking catalysts used in petroleum refining, catalytic converters used in cars, as well as polishing powders for

¹⁷ Ibid.

¹⁸ Ibid.

- glass, mirrors and other products. As "process-enablers" the rare earths used are consumed in the production process and do not remain in the final product.¹⁹
33. Examples of the use of rare earths as "key components" in final products include: in magnets in motors, generators, computer disk drives, battery alloys for energy storage in electric vehicles, phosphors in fluorescent lighting, and glass additives.²⁰
34. According to statistics in the United States Geological Survey (USGS) China has been the world's leading producer of rare earths since the 1990s. In fact China accounts for approximately 97% of the total world production of rare-earths, producing an estimated 130,000 metric tonnes of REO in 2011.²¹
35. Table 1 below provides a description of the different rare earths by the different product names, the product name short form, the Chinese HS (8-digit) and Customs Commodity Codes (10-digit), and a column indicating whether the product in question is classified by China as a "light" or "heavy" rare earth.

¹⁹ Molycorp, The Many Uses of Rare Earths, (Exhibit JE-31).

²⁰ Ibid.

²¹ U.S. Geological Survey Mineral Commodity Summaries (2012): Rare Earths, (Exhibit JE-23).

Table 1 – Rare Earths

<i>Product Name</i>	<i>Product Name Short Form</i>	<i>Chinese HS code</i>	<i>Heavy or Light²²</i>	<i>Chinese Customs Commodity Code²³</i>
Ores of rare earth metals	Rare earth ores	2530.9020	Heavy	2530902010
			Light	2530902090
Thorium ores and concentrates ²⁴	Thorium	2612.2000	Heavy	2612200000
Neodymium	Neodymium	2805.3011	Light	2805301100
Dysprosium	Dysprosium	2805.3012	Heavy	2805301200
Terbium	Terbium	2805.3013	Heavy	2805301300
Lanthanum	Lanthanum	2805.3014	Light	2805301400
Cerium	Cerium	2805.3015	Light	2805301510
			Light	2805301590
Praseodymium	Praseodymium	2805.3016	Light	2805301600
Yttrium	Yttrium	2805.3017	Heavy	2805301700
Other rare-earth metals, scandium and yttrium, not intermixed or interalloyed	Other rare earths	2805.3019	Heavy	2805301913
			Heavy	2805301914
			Heavy	2805301915
			Light	2805301990
Battery quality rare-earth metals, scandium and yttrium, intermixed or interalloyed	Battery quality rare earths	2805.3021	Heavy	2805302110
			Light	2805302190
Other rare-earth metals, scandium and yttrium, intermixed or interalloyed	Other mixed rare earths	2805.3029	Heavy	2805302910
			Light	2805302990
Cerium oxide	Cerium oxide	2846.1010	Light	2846101000
Cerium hydroxide	Cerium hydroxide	2846.1020	Light	2846102000
Cerium carbonate	Cerium carbonate	2846.1030	Light	2846103000
Other cerium compounds	Other cerium compounds	2846.1090	Light	2846109010
				2846109090
Yttrium oxide	Yttrium oxide	2846.9011	Heavy	2846901100
Lanthanum oxide	Lanthanum oxide	2846.9012	Light	2846901200

²² Denotes whether the 2012 Export Licensing Management Commodities List (Exhibit JE-48) classifies the product as a heavy or light rare earth.

²³ As indicated in Annex 1 to 2012 Export Licensing Management Commodities List (Exhibit JE-48). Note that "N/A" is indicated where the particular Chinese Commodity Code is not listed in the 2012 Export Licensing Management Commodities List.

²⁴ The 2012 Export Licensing Management Commodities List (Exhibit JE-48) classifies thorium as a heavy rare earth even though the scientific community does not consider thorium to be a rare earth.

Neodymium oxide	Neodymium oxide	2846.9013	Light	2846901300
Europium oxide	Europium oxide	2846.9014	Heavy	2846901400
Dysprosium oxide	Dysprosium oxide	2846.9015	Heavy	2846901500
Terbium oxide	Terbium oxide	2846.9016	Heavy	2846901600
Praseodymium oxide	Praseodymium oxide	2846.9017	Light	2846901700
Other rare earth oxides (except for luminescent red phosphors)	Other rare earth oxides	2846.9019	Heavy	2846901920
			Heavy	2846901930
			Heavy	2846901940
			Heavy	2846901970
			Heavy	2846901980
			Heavy	2846901991
			Heavy	2846901992
			Light	2846901999
Terbium chloride	Terbium chloride	2846.9021	Heavy	2846902100
Dysprosium chloride	Dysprosium chloride	2846.9022	Heavy	2846902200
Lanthanum chloride	Lanthanum chloride	2846.9023	Light	2846902300
Neodymium chloride	Neodymium chloride	2846.9024	Light	2846902400
Praseodymium chloride	Praseodymium chloride	2846.9025	Light	2846902500
Yttrium chloride	Yttrium chloride	2846.9026	Heavy	2846902600
Mixed rare earth chlorinates	Mixed rare earth chlorinates	2846.9028	Heavy	2846902810
			Light	2846902890
Unmixed rare earth chlorinates	Unmixed rare earth chlorinates	2846.9029	Heavy	2846902900
Terbium fluoride	Terbium fluoride	2846.9031	Heavy	2846903100
Dysprosium fluoride	Dysprosium fluoride	2846.9032	Heavy	2846903200
Lanthanum fluoride	Lanthanum fluoride	2846.9033	Light	2846903300
Neodymium fluoride	Neodymium fluoride	2846.9034	Light	2846903400
Praseodymium fluoride	Praseodymium fluoride	2846.9035	Light	2846903500
Yttrium fluoride	Yttrium fluoride	2846.9036	Heavy	2846903600

Other rare earth fluorides	Other rare earth fluorides	2846.9039	Light	2846903900
Lanthanum carbonate	Lanthanum carbonate	2846.9041	Light	2846904100
Terbium carbonate	Terbium carbonate	2846.9042	Heavy	2846904200
Dysprosium carbonate	Dysprosium carbonate	2846.9043	Heavy	2846904300
Neodymium carbonate	Neodymium carbonate	2846.9044	Light	2846904400
Praseodymium carbonate	Praseodymium carbonate	2846.9045	Light	2846904500
Yttrium carbonate	Yttrium carbonate	2846.9046	Heavy	2846904600
Mixed rare earth carbonate	Mixed rare earth carbonate	2846.9048	Heavy	2846904810
			Light	2846904890
Unmixed rare earth carbonate	Unmixed rare earth carbonate	2846.9049	Heavy	2846904900
Other lanthanum compounds	Other lanthanum compounds	2846.9091	Light	2846909100
Other neodymium compounds	Other neodymium compounds	2846.9092	Light	2846909200
Other terbium compounds	Other terbium compounds	2846.9093	Heavy	2846909300
Other dysprosium compounds	Other dysprosium compounds	2846.9094	Heavy	2846909400
Other praseodymium compounds	Other praseodymium compounds	2846.9095	Light	2846909500
Other yttrium compounds	Other yttrium compounds	2846.9096	Heavy	2846909600
Other rare earth compounds, yttrium and scandium	Other rare earth compounds	2846.9099	Heavy	2846909910
			Light	2846909990
Rapid setting neodymium-iron-boron (NdFeB) magnet film	NdFeB magnet film	7202.9911	N/A	N/A
Other NdFeB alloys	Other NdFeB alloys	7202.9919	N/A	N/A
Ferroalloy containing rare earths with weight of more than 10%	Ferroalloy containing rare earths	7202.9991	Heavy	7202999110
			Light	7202999191
			Light	7202999199
Other ferroalloy	Other ferroalloy	7202.9999	N/A	N/A

2. Tungsten

36. Tungsten is the name given to the element with the Atomic Number 74 in the Periodic Table of chemical elements. Its value as a raw material is due to its particular properties, as it has the highest melting point of all metals, with a boiling point of 5700 Degrees Celsius, which is equivalent to the surface of the sun, and with its high density, tungsten is also one of the heaviest metals on earth. Its electrical conductivity at 0 Degrees Celsius is about 28% of that of silver (which itself has the highest conductivity), and moreover its co-efficient of thermal expansion is the lowest of all metals.²⁵
37. Tungsten is primarily found in two ores: wolframite and scheelite. The ore is mined, pre-treated and then concentrated at the mine to increase the tungsten content of the material.²⁶ Modern processing methods dissolve wolframite and scheelite concentrates, which then produce a sodium tungstate solution. This is then further processed into an ammonium tungstate solution. From this solution "ammonium paratungstate" (APT) is obtained after further processing (by crystallization).²⁷ APT can be further processed into a number of other immediate products, such as tungsten oxide.²⁸ In turn, tungsten oxide can be reduced to form tungsten powder and tungsten carbide.²⁹
38. Wolframite concentrates can also be smelted directly with charcoal or coke in an electric arc furnace to produce "ferrotungsten" which is used as alloying material in steel production. Pure scheelite concentrates may also be added directly to molten steel.³⁰
39. Tungsten is primarily used to make "cemented carbides", also known as "hardmetals" which are used to produce metal cutting tools, drilling and mining tools, as well as tools used for the shaping of other materials, like other metals, alloys, wood, composites, plastics and ceramics. The main constituent of "cemented carbide" is

²⁵ International Tungsten Industry Association: Tungsten Properties, (Exhibit JE-32).

²⁶ International Tungsten Industry Association: Tungsten Mining & Beneficiation, (Exhibit JE-33).

²⁷ International Tungsten Industry Association: Tungsten Processing, (Exhibit JE-34).

²⁸ International Tungsten Industry Association: Intermediates, (Exhibit JE-35)

²⁹ Ibid.

³⁰ International Tungsten Industry Association Tungsten Processing, (Exhibit JE-34)

"tungsten monocarbide", which has a hardness close to a diamond.³¹ Tungsten is also used as an alloying agent in the production of steel and super-alloys, as well as in filaments or electrodes used in various types of lamps. It is also used as a catalyst in the production of a number of chemicals.³² According to the USGS, China is the world's leading producer of tungsten, in fact China produced 60,000 metric tonnes of tungsten in 2011, which constitutes approximately 83% of global production.³³ Table 2 below provides a description of the different product names for tungsten products, the product name short form, listing also the Chinese HS Codes and the Chinese Commodity Codes.

Table 2 – Tungsten products

<i>Product Name</i>	<i>Product Name Short Form</i>	<i>Chinese HS Code³⁴</i>	<i>Chinese Customs Commodity Code³⁵</i>
Tungsten ore	Tungsten ore	N/A	2611000000
Ash and residues containing mainly tungsten	Tungsten ash	2620.9910	2620991000
Tungsten acid	Tungsten acid	2825.9011	2825901100
Tungsten trioxide	Tungsten trioxide	2825.9012	2825901200
Other tungsten oxides and hydroxides	Other tungsten oxides and hydroxides	2825.9019	2825901910
Ammonium paratungstate	APT	2841.8010	2841801000
Sodium tungstate	Sodium tungstate	2841.8020	2841802000
Calcium tungstate	Calcium tungstate	2841.8030	2841803000
Ammonium metatungstate	Ammonium metatungstate	2841.8040	2841804000
Other tungstates	Other tungstates	2841.8090	N/A
Tungsten carbide	Tungsten carbide	2849.9020	2849902000
Ferro-tungsten	Ferro-tungsten	7202.8010	N/A
Ferro-silico-tungsten	Ferro-silico-tungsten	7202.8020	N/A
Tungsten powder	Tungsten powder	8101.1000	8101100010
			8101100090

³¹ International Tungsten Industry Association: Primary Uses of Tungsten, (Exhibit JE-36).

³² Ibid.

³³ U.S. Geological Survey Mineral Commodity Summaries (2012): Tungsten, (Exhibit JE-37).

³⁴ As indicated in Table 6 to *2012 Tariff Implementation Program*, (Exhibit JE-45). Note that "N/A" is indicated for tungsten ore because that item is listed in Annex 6 of China's *Accession Protocol*, and the export duty rate does not appear to exceed the maximum level listed in the Annex.

³⁵ As indicated in Annex 1 to *2012 Export Licensing Management Commodities List*, (Exhibit JE-48). Note that "N/A" is indicated where the particular Chinese Commodity Code is not subject to the quota on tungsten.

Unwrought tungsten	Unwrought tungsten	8101.9400	8101940000
Tungsten waste and scrap	Tungsten waste	8101.9700	8101970000

3. Molybdenum

40. Molybdenum which is a silvery metallic element, with the Atomic Number 42 in the Periodic Table, has one of the highest melting points of all the elements (2623 Degrees Celsius). However compared to other elements with a high melting point, it is relatively less dense.³⁶
41. Molybdenum is mined from ore containing molybdenite, which is often recovered as a by-product of copper mining.³⁷ The molybdenite is concentrated and roasted to form "roasted molybdenite concentrate" which is also known as "tech oxide". "Tech oxide" can be smelted into ferro-molybdenum or further processed into molybdates and molybdenum powders.³⁸
42. When added to steel and cast irons, molybdenum enhances their strength, hardenability, weldability, toughness, elevated temperature strength and corrosion resistance.³⁹ In many cases, ferro-molybdenum is added directly into the furnace or after the steel is melted.⁴⁰ In addition, molybdenum-based chemicals are used in de-sulphurisation, pigmentation, flame and smoke suppression, and as a corrosion inhibitor.⁴¹
43. China is the world's largest producer of molybdenum. In 2010, it produced 80,000 metric tonnes of molybdenum, which represents 36% of the world's supply of this material.⁴² Table 3 below provides a description of the different product names for molybdenum products, the product name short form, listing also the Chinese HS Codes and the Chinese Customs Commodity Codes.

³⁶ International Molybdenum Association: Molybdenum Properties, (Exhibit JE-38).

³⁷ International Molybdenum Association: Mining, (Exhibit JE-39).

³⁸ International Molybdenum Association: Processing, (Exhibit JE-40).

³⁹ International Molybdenum Association: Molybdenum Properties, (Exhibit JE-38).

⁴⁰ International Molybdenum Association: Meltstock Mo products, (Exhibit JE-41).

⁴¹ International Molybdenum Association: Chemical Mo Products, (Exhibit JE-42).

⁴² Roskill Consulting Group Ltd.: *Study of the Market for Molybdenum*, November 2011, (Exhibit JE-43).

Table 3 – Molybdenum products

<i>Product Name</i>	<i>Product Name Short Form</i>	<i>Chinese HS Code⁴³</i>	<i>Chinese Customs Commodity Code⁴⁴</i>
Roasted molybdenum ores & concentrates	Roasted molybdenum ores & concentrates	2613.1000	2613100000
Other molybdenum ores & concentrates	Other molybdenum ores & concentrates	2613.9000	2613900000
Molybdenum oxides and hydroxides	Molybdenum oxides and hydroxides	2825.7000	2825700000
Ammonium molybdate	Ammonium molybdate	2841.7010	2841701000
Other molybdates	Other molybdates	2841.7090	2841709000
Ferro-molybdenum	Ferro-molybdenum	7202.7000	7202700000
Molybdenum powder	Molybdenum powder	8102.1000	8102100000
Unwrought molybdenum	Unwrought molybdenum	8102.9400	8102940000
Molybdenum waste and scrap	Molybdenum scrap	8102.9700	8102970000

B. Export Duties

1. China's Obligations under its WTO Accession Protocol

44. In 2001, when China joined the WTO, it imposed export duties on only 36 products.⁴⁵ Since its accession, China has continually increased its imposition of export duties on various products, which now in 2012, have reached a total of 363.⁴⁶ During China's accession negotiations to the WTO, concerns were raised by other WTO Members about taxes and charges applied to Chinese exports. In fact the text of the *Working Party Report* itself reflects this concern, as specifically it provides that:

Some members of the Working Party raised concerns over taxes and charges applied exclusively to exports. In their view, such taxes and

⁴³ As indicated in Table 6 to *2012 Tariff Implementation Program*, (Exhibit JE-45).

⁴⁴ As indicated in Annex 1 to *2012 Export Licensing Management Commodities List*, (Exhibit JE-48).

⁴⁵ "The representative of China noted that the majority of products were free of export duty, although 84 items, including tungsten ore, ferrosilicon and some aluminium products, were subject to export duty." (*Working Party Report*, para 156, (Exhibit JE-1). However, according to the *2002 Tariff Implementation Program*, (Exhibit JE-44) China imposed export duties on only 36 products.

⁴⁶ *2012 Tariff Implementation Program*, Table 6, (Exhibit JE-45).

charges should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Draft Protocol.⁴⁷

45. Accordingly, China has committed in paragraph 11.3 of 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 1994.⁴⁸

46. Annex 6 of China's *Accession Protocol* entitled "Products Subject to Export Duty" lists 84 different products (on an 8-digit Harmonised System Code level), each specifying an export duty rate indicated as an *ad valorem* percentage. The products which are listed in Annex 6 are therefore those products on which China retained the right to impose export duties. Moreover, the export duty rates listed in Annex 6 indicate the maximum percentage rate which China retained the right to impose on the products listed in the said Annex.

47. In fact, as the Note at the end of Annex 6 of China's *Accession Protocol* 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.⁴⁹

48. China restricts the exportation of various forms of rare earths, tungsten and molybdenum by imposing export duties as indicated in Table 4 below.⁵⁰ With the exception of tungsten ores, the various forms of rare earths, tungsten and molybdenum do not appear in Annex 6 of China's *Accession Protocol*.

⁴⁷ *Working Party Report*, para. 155, (Exhibit JE-1).

⁴⁸ *Accession Protocol*, para 11.3, (Exhibit JE-2).

⁴⁹ *Accession Protocol*, Annex 6, (Exhibit JE-2).

⁵⁰ For purposes of the discussion of China's export duties, the terms "rare earths", "tungsten" and "molybdenum" cover the forms of each of these Raw Materials listed in the "Chart of Raw Materials Subject to Export Duties", (Exhibit JE-6) and in Table 4 below.

2. China's Export Duties Framework

49. The *Regulations of the People's Republic of China on Import and Export Duties*, ("*Regulations on Import and Export Duties*"),⁵¹ which are formulated in accordance with the relevant provisions of the Customs Law of People's Law of the People's Republic of China ("*Customs Law*")⁵² provide that the Customs authorities of China shall "collect import or export duties on all goods permitted by the People's Republic of China to be imported into or exported out of the Customs territory [...]".⁵³
50. The Tariff Commission of China, which is established by the State Council, has various responsibilities referred to specifically in the *Regulations on Import and Export Duties*. According to Article 4 of these Regulations, the Tariff Commission is responsible for adjusting and interpreting tariff items and duty rates, as well as "determining the goods subject to temporary duty rates", and "determining the application of duty rates under special circumstances".
51. Article 9 of the *Regulations on Import and Export Duties*, states that "[d]uty rates on export goods are designed to collect export duty. Temporary duty rates may apply to export goods within a specific time limit". Article 11 of the same measure states further that: "[w]here there are temporary duty rates on export goods to which the export duty rates are applicable, such temporary duty rates shall apply". Thus, there are at least three types of export duty rates operative in China: "regular" export duty rates that are established to be generally applicable, "temporary" export duty rates established for a limited period of time,⁵⁴ as well as "special" export duty rates established under special circumstances.⁵⁵

⁵¹ *Regulations of the People's Republic of China on Import and Export Duties* (Order of the State Council No. 392, adopted at the 26th Executive Meeting of the State Council on 29 October, 2003, effective 1 January 2004), (Exhibit JE-46).

⁵² Exhibit JE-54.

⁵³ *Regulations on Import and Export Duties*, Article 2.

⁵⁴ Ibid. Articles 4, 9 and 11.

⁵⁵ Ibid. Article 4.

3. "Temporary" Export Duties

52. On 9 December 2011, the Tariff Commission issued the *2012 Tariff Implementation Programme*,⁵⁶ which came into effect on the 1 January 2012. Section E of the *2012 Tariff Implementation Programme* outlines adjustments to export duties, providing that in 2012 the "regular" export duty rates which were in effect in 2011 will remain unchanged,⁵⁷ and that certain goods will be subject to "temporary" duty rates,⁵⁸ as set out in detail in Table 4 below. The *2012 Tariff Implementation Programme* does not specify a time limit for the duration of the application of the "temporary" export duty rates.
53. On 23 December 2011, the Customs Administration issued *Announcement No.79 regarding the "2012 Tariff Implementation Programme ("2012 Tariff Implementation Program (Customs))"*⁵⁹, which came into effect on the 1 January 2012 and implemented the afore-mentioned *2012 Tariff Implementation Programme* issued by the Tariff Commission.⁶⁰ The export duties imposed on rare earths, tungsten and molybdenum are the same in the two measures.
54. The *Table of Duty Rates for Exported Commodities* in Annex 6 of the *2012 Tariff Implementation Programme* identifies with their HS Code, 363 goods subject to export duties in 2012.⁶¹ The said table indicates the duty rates applicable to those goods as "regular" export duty rates, "temporary/interim" export duty rates, and/or "special" export duty rates.
55. With respect to the products at issue in this dispute, the *Table of Duty Rates for Exported Commodities* sets out the "temporary/interim" duty rates shown in Table 4 below. None of the products listed in Table 4 are included in Annex 6 of China's *Accession Protocol*.⁶²

⁵⁶ *2012 Tariff Implementation Programme*, (Exhibit JE-45).

⁵⁷ Ibid. Section E.

⁵⁸ Ibid. Table 6.

⁵⁹ *2012 Tariff Implementation Program (Customs)*, (Exhibit JE-47).

⁶⁰ *2012 Tariff Implementation Programme*, (Exhibit JE-45).

⁶¹ Ibid. Table 6, (Exhibit JE-45).

⁶² China maintains an export duty on tungsten ore (HS No. 2611.0000) that is listed in Annex 6 of China's *Accession Protocol*. Accordingly, the European Union does not contest in this dispute the export duty on tungsten ore.

Table 4 – "Temporary" duty rates

<i>Raw Material</i>	<i>Duty List Item No.</i>	<i>Product Name (Short Form)</i>	<i>HS Code</i>	<i>Temporary/Interim Export Duty Rates</i>
<i>Rare Earths</i>	29	Rare earth ores	2530.9020	15%
	47	Thorium	2612.2000	10%
	87	Neodymium	2805.3011	25%
	88	Dysprosium	2805.3012	25%
	89	Terbium	2805.3013	25%
	90	Lanthanum	2805.3014	25%
	91	Cerium	2805.3015	25%
	92	Praseodymium	2805.3016	25%
	93	Yttrium	2805.3017	25%
	94	Other rare earths	2805.3019	25%
	95	Battery quality rare earths	2805.3021	25%
	96	Other mixed rare earths	2805.3029	25%
	123	Cerium oxide	2846.1010	15%
	124	Cerium hydroxide	2846.1020	15%
	125	Cerium carbonate	2846.1030	15%
	126	Other cerium compounds	2846.1090	15%
	127	Yttrium oxide	2846.9011	25%
	128	Lanthanum oxide	2846.9012	15%
	129	Neodymium oxide	2846.9013	15%
	130	Europium oxide	2846.9014	25%
	131	Dysprosium oxide	2846.9015	25%
	132	Terbium oxide	2846.9016	25%
	133	Praseodymium oxide	2846.9017	25%
	134	Other rare earth oxides	2846.9019	15%
	135	Terbium chloride	2846.9021	25%
	136	Dysprosium chloride	2846.9022	25%
	137	Lanthanum chloride	2846.9023	25%
	138	Neodymium chloride	2846.9024	15%
	139	Praseodymium chloride	2846.9025	15%
	140	Yttrium chloride	2846.9026	15%
141	Mixed rare earth chlorinates	2846.9028	15%	
142	Unmixed rare earth chlorinates	2846.9029	15%	
143	Terbium fluoride	2846.9031	15%	
144	Dysprosium fluoride	2846.9032	15%	
145	Lanthanum fluoride	2846.9033	15%	
146	Neodymium fluoride	2846.9034	15%	
147	Praseodymium fluoride	2846.9035	15%	
148	Yttrium fluoride	2846.9036	15%	
149	Other rare earth fluorides	2846.9039	15%	
150	Lanthanum carbonate	2846.9041	15%	

	151	Terbium carbonate	2846.9042	25%
	152	Dysprosium carbonate	2846.9043	25%
	153	Neodymium carbonate	2846.9044	15%
	154	Praseodymium carbonate	2846.9045	15%
	155	Yttrium carbonate	2846.9046	15%
	156	Mixed rare earth carbonate	2846.9048	15%
	157	Unmixed rare earth carbonate	2846.9049	15%
	158	Other lanthanum compounds	2846.9091	25%
	159	Other neodymium compounds	2846.9092	25%
	160	Other terbium compounds	2846.9093	25%
	161	Other dysprosium compounds	2846.9094	25%
	162	Other praseodymium compounds	2846.9095	25%
	163	Other yttrium compounds	2846.9096	25%
	164	Other rare earth compounds	2846.9099	25%
	232	NdFeB magnet film	7202.9911	20%
	233	Other NdFeB alloys	7202.9919	20%
	234	Ferroalloy containing rare earths	7202.9991	25%
	235	Other ferroalloys	7202.9999	20%
Tungsten	70	Tungsten ash	2620.9910	10%
	105	Tungsten acid	2825.9011	5%
	106	Tungsten trioxides	2825.9012	5%
	107	Other tungsten oxides and hydroxides	2825.9019	5%
	118	APT	2841.8010	5%
	119	Sodium tungstate	2841.8020	5%
	120	Calcium tungstate	2841.8030	5%
	121	Ammonium metatungstate	2841.8040	5%
	122	Other tungstates	2841.8090	5%
	165	Tungsten carbide	2849.9020	5%
	227	Ferro-tungsten	7202.8010	20%
	228	Ferro-silico-tungsten	7202.8020	20%
	347	Tungsten powder	8101.1000	5%
	348	Unwrought tungsten	8101.9400	5%

	349	Tungsten waste	8101.9700	15%
Molybdenum	48	Roasted molybdenum ores & concentrates	2613.1000	15%
	49	Other molybdenum ores & concentrates	2613.9000	15%
	104	Molybdenum oxides and hydroxides	2825.7000	5%
	116	Ammonium molybdate	2841.7010	5%
	117	Other molybdates	2841.7090	5%
	226	Ferro-molybdenum	7202.7000	20%
	350	Molybdenum powder	8102.1000	5%
	351	Unwrought molybdenum	8102.9400	5%
	352	Molybdenum scrap	8102.9700	15%

C. Export Quotas (including administration and allocation)

1. General Overview

56. China restricts the exportation of various forms of rare earths, tungsten and molybdenum by subjecting the exportation of these materials to export quotas. China allocates quota amounts to applicants subject to certain requirements.⁶³
57. China's *Foreign Trade Law* confers the authority on the Chinese government to restrict or prohibit the exportation of goods through export quotas.⁶⁴ The *Foreign Trade Law* provides for administrative and even criminal sanctions for anyone that "exports any goods that are banned from export, or unlawfully exports any goods that are restricted from export without approval."⁶⁵
58. The general provisions of China's *Foreign Trade Law* are further developed in Regulation of the People's Republic of China on the Administration of the Import

⁶³ *Regulation of the People's Republic of China on the Administration of the Import and Export of Goods* (Order of the State Council No. 332, adopted at the 46th executive meeting of the State Council on October 31, 2001, effective January 1, 2002), Article 39, (Exhibit JE-50).

⁶⁴ *Foreign Trade Law*, Articles 16-19, (Exhibit JE-49).

⁶⁵ *Ibid.* Article 61.

and Export of Goods ("Import and Export Regulations"),⁶⁶ which has been adopted in order to implement the relevant provisions of China's Foreign Trade Law. The Import and Export Regulations have in turn been implemented through the Measures for Administration of Export Commodities Quotas ("Export Quota Measures")⁶⁷ and the 2012 Tungsten Export Quota Application Procedures⁶⁸ and 2012 Molybdenum Export Quota Application Procedures⁶⁹ with respect to tungsten and molybdenum export quota administration, and the 2012 Rare Earth Export Quota Application Procedures⁷⁰ with respect to rare earths.

59. The *Import and Export Regulations* provide that the foreign trade department of the State Council (in collaboration with other relevant departments of the State Council) shall "formulate, adjust and promulgate" the "list of goods limited in exportation".⁷¹ They also provide that "where there are quantitative limits on the goods limited in exportation, the goods shall be subject to the administration of quotas".⁷² Such export quotas are "subject to the administration of the foreign trade department of the State Council and the relevant economic administration departments of the State Council [...]".⁷³ Following the merger and renaming of the relevant Chinese departments in 2003 and the creation of China's Ministry of Commerce, the references to the foreign trade department in the Regulation are to be understood as references to China's Ministry of Commerce ("MOFCOM"). It is MOFCOM, in collaboration with Customs that is responsible for formulating, adjusting and publishing a catalogue listing all the goods that are subject to an export quota.⁷⁴

⁶⁶ See *Import and Export Regulations*, (Exhibit JE-50).

⁶⁷ *Measures for the Administration of Export Commodities Quotas* (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, issued on 20 December 2001, effective as of 1 January 2002), (Exhibit JE-52).

⁶⁸ *Announcement Regarding the Qualification Standards of State Owned Tungsten, Antimony and Silver Trade and Export Enterprises, Tungsten and Antimony Export and Supply Enterprises and Declaration Procedures in 2012*, (Ministry of Commerce, No. 80, November 11, 2011), (Exhibit JE-62).

⁶⁹ *Announcement on Application Conditions and Procedures for 2012 Indium, Molybdenum and Tin Export Quotas*, (Ministry of Commerce, No. 79, November 11, 2011), (Exhibit JE-63).

⁷⁰ *Announcement on 2012 Application Conditions and Procedures for Qualification for 2012 Rare Earth Export Quota*, (Ministry of Commerce, No. 77, November 11, 2011), (Exhibit JE-61)

⁷¹ *Import and Export Regulations*. Article 35, (Exhibit JE-50).

⁷² *Ibid.* Article 36.

⁷³ *Ibid.* Article 37.

⁷⁴ *Foreign Trade Law*, Article 1, (Exhibit JE-49); *Import and Export Regulations*, Articles 37-39, (Exhibit JE-50).

60. The *Import and Export Regulations* provide that the total amount of export quota imposed on a particular good for one particular year, must be determined by 15 October of the previous year, and that applications for the allocation of an export quota must be submitted between 1 and 15 November of the previous year.⁷⁵ A decision on the allocation must be issued within 30 days from the submission of the application and no later than 15 December of the year preceding the year for which the quota is allocated.⁷⁶ MOFCOM may allocate the export quotas in two instalments (no less than 70% by 15 December of the previous year and the rest no later than 30 June of the year for which the export quotas have been issued), where this is justified by "precarious factors in the international markets".⁷⁷
61. MOFCOM is directed to administer an application process for export quotas.⁷⁸ MOFCOM distributes the quotas to enterprises under central administration directly and distributes quotas to local administrative authorities, which further distribute those quotas to the enterprises within their respective areas.
62. When the holder of an export quota obtains a relevant export quota certificate, it must present it to Customs in order to export the goods.⁷⁹ It must also present it to the authorities that are responsible for the issuance of an export license, where the relevant good is also subject to the export licence regime.⁸⁰
63. The holder of an export quota must return the unused quotas by 31 October of the year for which the export quotas have been issued. Failure to return the unused quotas on time (and failure to use them by the end of the year for which the export quotas have been issued) may result in administrative sanctions, such as the deduction of the corresponding quantities from the quotas to be allocated to the same holder the following year.⁸¹ There are administrative sanctions (including the "revocation of the business licence for foreign trade" and the "taking back of the allocated quotas") and even criminal sanctions for violations of the export

⁷⁵ *Import and Export Regulations*, Article 38, (Exhibit JE-50).

⁷⁶ *Ibid.* Article 40.

⁷⁷ *Export Quota Measures*, Article 18, (Exhibit JE-52).

⁷⁸ *Import and Export Regulations*, Article 38, (Exhibit JE-50).

⁷⁹ *Ibid.* Article 41.

⁸⁰ *Ibid.* Article 43.

⁸¹ *Ibid.* Article 42.

restrictions. The *Import and Export Regulations* provides a list of such violations, including exporting without permission, exceeding the quantitative limitations, and buying or selling quotas certificates or other "approval documents".⁸²

2. Goods Subject to Export Quotas

64. MOFCOM, in collaboration with other relevant departments of the State Council and Customs, is required to publish the catalogue of goods subject to restricted exportation, including export quotas, 21 days ahead of the catalogue taking effect.⁸³
65. The catalogue which is effective for the year 2012 includes the raw materials listed in the following table as subject to export quotas:⁸⁴

Table 5 – Export Quotas

<i>Raw Material</i>	<i>Product Name Short Form</i>	<i>Chinese Commodity Code No.</i>	<i>2012 Export Licensing Management Commodities List Item No.</i>
<i>Rare Earths</i>	Rare earth ores	2530902010	21
		2530902090	
	Thorium	2612200000	21
	Neodymium	2805301100	21
	Dysprosium	2805301200	21
	Terbium	2805301300	21
	Lanthanum	2805301400	21
		Cerium	2805301510
			2805301590
	Praseodymium	2805301600	21
	Yttrium	2805301700	21
	Other rare earths	2805301913	21
		2805301914	21
		2805301915	21
		2805301990	21
Battery quality rare earths	2805302110	21	
	2805302190	21	

⁸² Ibid. Articles 64-67 and 70.

⁸³ Ibid. Article 35.

⁸⁴ *2012 Export Licensing Management Commodities List*, (Exhibit JE-48).

Other mixed rare earths	2805302910	21
	2805302990	21
Cerium oxide	2846101000	21
Cerium hydroxide	2846102000	21
Cerium carbonate	2846103000	21
Other cerium compounds	2846109010	21
	2846109090	21
Yttrium oxide	2846901100	21
Lanthanum oxide	2846901200	21
Neodymium oxide	2846901300	21
Europium oxide	2846901400	21
Dysprosium oxide	2846901500	21
Terbium oxide	2846901600	21
Praseodymium oxide	2846901700	21
Other rare earth oxides	2846901920	21
	2846901930	21
	2846901940	21
	2846901970	21
	2846901980	21
	2846901991	21
	2846901992	21
	2846901999	21
Terbium chlorinate	2846902100	21
Dysprosium chlorinate	2846902200	21
Lanthanum chloride	2846902300	21
Neodymium chloride	2846902400	21
Praseodymium chloride	2846902500	21
Yttrium chloride	2846902600	21
Mixed rare earth chlorinates	2846902810	21
	2846902890	21
Unmixed rare earth chlorinates	2846902900	21
Terbium fluoride	2846903100	21
Dysprosium fluoride	2846903200	21

	Lanthanum fluoride	2846903300	21
	Neodymium fluoride	2846903400	21
	Praseodymium fluoride	2846903500	21
	Yttrium fluoride	2846903600	21
	Other rare earth fluorides	2846903900	21
	Lanthanum carbonate	2846904100	21
	Terbium carbonate	2846904200	21
	Dysprosium carbonate	2846904300	21
	Neodymium carbonate	2846904400	21
	Praseodymium carbonate	2846904500	21
	Yttrium carbonate	2846904600	21
	Mixed rare earth carbonate	2846904810	21
		2846904890	21
	Unmixed rare earth carbonate	2846904900	21
	Other lanthanum compounds	2846909100	21
	Other neodymium compounds	2846909200	21
	Other terbium compounds	2846909300	21
	Other dysprosium compounds	2846909400	21
	Other praseodymium compounds	2846909500	21
	Other yttrium compounds	2846909600	21
	Other rare earth compounds	2846909910	21
		2846909990	21
	Ferroalloy containing rare earths	7202999110	21
		7202999191	21
		7202999199	21
<i>Tungsten</i>	Tungsten ore	2611000000	30
	Tungsten ash	2620991000	30
	Tungsten acid	2825901100	30
	Tungsten trioxides	2825901200	30
	Other tungsten oxides and hydroxides	2825901910	30

	APT	2841801000	30
	Sodium tungstate	2841802000	30
	Calcium tungstate	2841803000	30
	Ammonium metatungstate	2841804000	30
	Tungsten carbide	2849902000	30
	Tungsten powder	8101100010	30
		8101100090	30
	Unwrought tungsten	8101940000	30
	Tungsten waste	8101970000	30
<i>Molybdenum</i>	Roasted molybdenum ores & concentrates	2613100000	39
	Other molybdenum ores & concentrates	2613900000	39
	Molybdenum oxides and hydroxides	2825700000	39
	Ammonium molybdate	2841701000	39
	Other molybdates	2841709000	39
	Ferro-molybdenum	7202700000	39
	Molybdenum powder	8102100000	39
	Unwrought molybdenum	8102940000	39
	Molybdenum scrap	8102970000	39

3. Application and Allocation Process for Export Quotas

(a) Rare Earths Quota Application and Allocation Process

66. Rare earth export quota administration is governed by the *Import and Export Regulations*, as well as MOFCOM's yearly notices on application procedures and qualification standards. MOFCOM issued procedures governing the rare earth quota application process for the year 2012 on 11 November 2011 in Announcement 2011, No. 77 of the Ministry of Commerce of the Conditions and Procedures for

Application for Rare Earth Export Quotas 2012 ("*2012 Rare Earth Export Quota Application Procedures*").⁸⁵

67. In accordance with the *2012 Rare Earth Export Quota Application Procedures*, China requires enterprises to apply to receive an allocation of the rare earths export quota for a given year in November of the preceding year. Enterprises under local administration are required to submit their applications for export quotas to the relevant local authorities, which review such applications and establish a list of applicant companies that fulfil the conditions and send the applications, the lists and their opinion to MOFCOM, with a copy to the China Chamber of Commerce of Metals, Minerals and Chemical Importers and Exporters ("CCCMC"),⁸⁶ by the end of November. Enterprises under central administration submit their applications for export quota directly to MOFCOM with a copy to the CCCMC. The CCCMC examines whether the companies applying to export rare earths under the quota have satisfied the requisite eligibility criteria. The CCCMC must formulate and send its opinion regarding the applications to MOFCOM.
68. Subsequently, MOFCOM examines both the applications filed by enterprises under central administration and the applications that have been preliminarily reviewed and submitted by the local administrative authorities, as well as the suggestions of the CCCMC, and on that basis establishes the allocation of the export quotas for the qualifying companies.⁸⁷
69. 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. MOFCOM distinguishes between manufacturing enterprises and trading enterprises.

⁸⁵ Exhibit JE-61.

⁸⁶ The CCCMC is a membership organization whose members must be legally listed and registered entities engaged in the import and export, or other trade-related activities, of metals, minerals, and chemicals in China. According to the most recent data, the CCCMC has more than 4000 members, consisting of foreign trade companies, trade and manufacturing companies, joint venture companies, private enterprises and research institutes operating businesses in ferrous metals, non-ferrous metals, non-metallic minerals and products, construction materials, coal and coal products, oil and oil products, chemicals, plastics, fine chemicals, agro-chemicals, rubber products, etc.

⁸⁷ See *2012 Rare Earth Export Quota Application Procedures*, Section II, (Exhibit JE-61).

i) Eligibility criteria for manufacturing enterprises

70. The *2012 Rare Earth Export Quota Application Procedures* provide the requirements that manufacturing enterprises must satisfy in order to be eligible to receive an allocation under the quota. These are:

- be qualified for import and export operations, or proceeding with the registration as a foreign trade operator, and have the credentials of an independent legal person;
- observe relevant provisions of rare earth industrial plans, industrial policies and industrial management;
- meet prescribed export performance requirements;
- obtain rare earth raw materials from an eligible mining enterprise announced by the Ministry of Land and Resources;
- meet certain environmental protection requirements;
- observe relevant policies and provisions of the national land administration and comply with China's relevant national and local governments' regulations;
- lawfully participate in a social insurance scheme and produce certificates of timely and full payment of all associated fees;
- have no record of infringement of relevant national laws and regulations.⁸⁸

ii) Eligibility criteria for trading enterprises

71. With respect to trading enterprises, China imposes the following eligibility criteria:

- be qualified for import and export operations, or proceeding with the registration as a foreign trade operator and have the credentials of an independent legal person;
- have a minimum registered capital of at least RMB 50 million;

⁸⁸ *2012 Rare Earth Export Quota Application Procedures*, Section I(i), (Exhibit JE-61).

- meet minimum export performance requirements;
- obtain rare earths export products from manufacturing enterprises which comply with the eligibility requirements set out in the *2012 Rare Earth Export Quota Application Procedures* for manufacturing enterprises;
- comply with China's relevant national and local governments' regulations, lawfully participate in a social insurance scheme and produce certificates of timely and full payment of all associated fees
- be ISO 9000 certified;
- have no record of infringement of relevant national laws and regulations.⁸⁹

iii) Rare Earths Export Quota Allocation

72. Rather than allocating the rare earths quota amount available for a given year in advance, MOFCOM issues notices during the year announcing that certain "batches" of the rare earth export quota are being allocated to specific enterprises. Quotas are allocated to qualifying enterprises based on an allocation formula published in the notice announcing the allocation.⁹⁰
73. MOFCOM determines a global quota for rare earths, i.e. not broken down by product groups or tariff lines. The only distinction MOFCOM makes is between heavy and light rare earths. This distinction was introduced for the first time in the context of the 2012 export quota announcement for rare earths.⁹¹

(b) Tungsten Quota Application and Allocation Process

74. Tungsten export quota administration is governed by the *Import and Export Regulations*,⁹² the *Export Quota Measures*,⁹³ as well as MOFCOM's yearly notices

⁸⁹ Ibid. Section I(ii).

⁹⁰ 2012 Notice on List of Rare Earth Export Enterprises and First batch Rare Earth Export Quota, (Ministry of Commerce, shangmaohan, No. 1133, December 26, 2011) ("*2012 First Batch Rare Earth Export Quota*"), (Exhibit JE-55).

⁹¹ Ibid.

⁹² Exhibit JE-50.

on application procedures and qualification standards. MOFCOM issued procedures governing the tungsten quota application process for the year 2012 on 11 November 2011 in Announcement 2011, No. 80 of the Ministry of Commerce on Qualification Standards and Application Procedures for State-Owned Trade Export Enterprises of Tungsten, Antimony and Silver and Export Supply Enterprises of Tungsten and Antimony in 2012 ("*2012 Tungsten Export Quota Application Procedures*").⁹⁴

75. Pursuant to the *Import and Export Regulations* and the *Export Quota Measures*, MOFCOM is directed to administer an application process for export quotas.⁹⁵ MOFCOM distributes the quotas to enterprises under central administration directly and distributes quotas to local administrative authorities, which further distribute those quotas to the enterprises within their respective areas.⁹⁶

76. The *Export Quota Measures* require MOFCOM to base its assessment for the export quota allocation on, *inter alia*, the following criteria:

- the export performance;
- the utilization rate of quotas;
- the operating capacity;
- the production scale and resources status;

of the applicant enterprises or regions during the previous 3 years.⁹⁷

77. In accordance with the *2012 Tungsten Export Quota Application Procedures*, China requires enterprises to apply to receive an allocation of tungsten under the export quota for a given year in November of the previous year. Companies under central administration are required to submit their applications to MOFCOM and to submit a copy to the CCCMC, China Tungsten Industry Association (CTIA)⁹⁸ and China

⁹³ Exhibit JE-52.

⁹⁴ *2012 Tungsten Export Quota Application Procedures*, (Exhibit JE-62)

⁹⁵ See *Import and Export Regulations*, Article 38, (Exhibit JE-50); *Export Quota Measures*, Article 16, (Exhibit JE-52).

⁹⁶ See *Export Quota Measures*, Article 17, (Exhibit JE-52).

⁹⁷ *Ibid.* Article 19.

⁹⁸ The CTIA is a membership organization whose members are involved in tungsten production, trade or development of the tungsten industry.

Nonferrous Metals Industry Association (CNMIA)^{99,100} Enterprises under local administration are required to submit their applications to the relevant local trade authority. These local authorities examine the applications, conduct a preliminary examination of whether the applicants satisfy the requisite conditions, and submit to MOFCOM and the CCCMC, CTIA and CNMIA a list of companies that fulfil the necessary requirements.

78. The *2012 Tungsten Export Quota Application Procedures* assigns the CCCMC, CTIA and CNMIA an important role in the application process for the tungsten export quota, including reviewing and evaluating the applications of enterprises seeking to export under the quota. The CCCMC, the CTIA and the CNMIA examine whether the companies applying to export tungsten under the quota have satisfied the requisite eligibility criteria. These organizations must formulate and send an "industry opinion" regarding the applications to MOFCOM. Subsequently, MOFCOM publishes the list of all companies having applied for tungsten exports quotas, as well as the list of those complying with the criteria based on the review by the CCCMC, the CTIA and the CNMIA.
79. 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. MOFCOM administers different application processes for export supply enterprises and trade export enterprises.

i) Eligibility criteria for export supply enterprises

80. The *2012 Tungsten Export Quota Application Procedures* provide the requirements that smelting or processing enterprises of tungsten must satisfy in order to supply trade export enterprises with material that can be exported. These are:
- obtain production approval from the relevant national departments;
 - meet minimum production capacity requirements;

⁹⁹ The CNMIA is also a membership organization composed of non-ferrous metal industry enterprises, public institutions, mass organizations and related units.

¹⁰⁰ *2012 Tungsten Export Quota Application Procedures*, Section IV, (Exhibit JE-62).

- obtain export supply qualifications and meet minimum export requirements;
- meet the prevailing national or industrial standards for product quality and obtain ISO 9000 and ISO 14000 certification;
- comply with China's relevant national and local governments regulations, lawfully participate in a social insurance scheme and produce certificates of timely and full payment of all associated fees;
- meet threshold rates for resource recovery and energy consumption;
- meet certain environmental protection requirements;
- use equipment manufactured after 1995;
- purchase primary products from enterprises with exploitation licenses and smelting enterprises with export supply qualifications.¹⁰¹

ii) Eligibility criteria for trade export enterprises

81. With respect to trade export enterprises, China imposes the following eligibility criteria:

- be qualified for import and export operations, or proceeding with the registration as a foreign trade operator and have the credentials of an independent legal person;
- be ISO 9000 certified;
- comply with China's relevant national and local governments regulations, lawfully participate in a social insurance scheme and produce certificates of timely and full payment of all associated fees;
- obtain tungsten export products from manufacturing enterprises which comply with the eligibility requirements set out in the *2012 Tungsten Export Quota Application Procedures* for export supply enterprises;

¹⁰¹ Ibid. Section III.

- meet minimum export performance requirements for tungsten;
- have no record of infringement of relevant national laws and regulations for the period from 2008 to 2010;
- *For manufacturers:* have approval for production by relevant national departments; obtain ISO 14000 certification and provide current environmental certificates from provincial departments of environmental protection.¹⁰²

iii) Tungsten Export Quota Allocation

82. MOFCOM does not allocate the available tungsten quota amount for a given year to qualifying enterprises in advance, but issues notices during the year announcing that certain "batches" of the tungsten export quota are being allocated to specific enterprises. Quotas are allocated to qualifying enterprises based on an allocation formula published in the notice announcing the list.¹⁰³

(c) Molybdenum Quota Application and Allocation Process

83. Molybdenum export quota administration is governed by the *Import and Export Regulations*,¹⁰⁴ the *Export Quota Measures*,¹⁰⁵ as well as MOFCOM's yearly notices on application procedures and qualification standards. MOFCOM issued procedures governing the molybdenum quota application process for the year 2012 on 11 November 2011 by Announcement 2011, No. 79 of the Ministry of Commerce on the Conditions and Procedures for Applying for Export Quotas of Indium, Molybdenum and Tin in 2012 ("*2012 Molybdenum Export Quota Application Procedures*").¹⁰⁶

¹⁰² Ibid. Section I(ii).

¹⁰³ 2012 Notice on List of Export (Supply) Enterprises and First batch Export Quota of Tungsten, Antimony and Other Nonferrous Metals, (Ministry of Commerce, shangmaohan, No. 1131, December 26, 2011) ("*2012 First Batch Tungsten and Molybdenum Export Quota*"), (Exhibit JE-59).

¹⁰⁴ See Exhibit JE-50.

¹⁰⁵ See Exhibit JE-52.

¹⁰⁶ *2012 Molybdenum Export Quota Application Procedures*, (Exhibit JE-63)

84. Pursuant to the *Import and Export Regulations* and the *Export Quota Measures*, MOFCOM is directed to administer an application process for export quotas.¹⁰⁷ MOFCOM distributes the quotas to enterprises under central administration directly and distributes quotas to local administrative authorities, which further distribute those quotas to the enterprises within their respective areas.¹⁰⁸

85. The *Export Quota Measures* require MOFCOM to base its assessment for the export quota allocation on, *inter alia*, the following criteria:

- the export performance;
- the utilization rate of quotas;
- the operating capacity;
- the production scale and resources status;

of the applicant enterprises or regions during the previous 3 years.¹⁰⁹

86. In accordance with the *2012 Molybdenum Export Quota Application Procedures*, 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. Companies under central administration are required to submit their applications to MOFCOM and to submit a copy to the CCCMC.¹¹⁰ Enterprises under local administration are required to submit their applications to the relevant local trade authority. These local authorities examine the applications, conduct a preliminary examination of whether the applicants satisfy the requisite conditions, and submit to MOFCOM and the CCCMC a list of companies that fulfil the necessary requirements. The CCCMC and CNMIA examine whether the companies applying to export molybdenum under the quota have satisfied the requisite eligibility criteria. The CCCMC and CNMIA must formulate and send their opinion regarding the applications to MOFCOM. Subsequently, MOFCOM publishes the list of all companies having applied for

¹⁰⁷ See *Import and Export Regulations*, Article 38, (Exhibit JE-50); *Export Quota Measures*, Article 16, (Exhibit JE-52).

¹⁰⁸ See *Export Quota Measures*, Article 17, (Exhibit JE-52).

¹⁰⁹ Ibid. Article 19.

¹¹⁰ *2012 Molybdenum Export Quota Application Procedures*, Section III, (Exhibit JE-63).

molybdenum exports quotas as well as the list of those complying with the criteria "according to the suggestions" of the CCCMC and CNMIA.

87. As part of that application process, MOFCOM requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation under the quota. MOFCOM administers different application processes for manufacturing enterprises and trading enterprises.

i) Eligibility criteria for manufacturing enterprises

88. The *2012 Molybdenum Export Quota Application Procedures* provide the eligibility requirements for manufacturing enterprises. The applicants are required to:

- have approved production that is in compliance with current industry policies;
- be qualified for import and export operations, or proceeding with the registration as a foreign trade operator and have the credentials of an independent legal person;
- meet minimum production performance requirements;
- be ISO 9000 certified;
- meet listed production standards, including recycling rates, energy consumption, possession of specialized laboratory and equipment, and procedures for processing ammonium, and sulphur dioxide gas;
- take listed environmental protection measures and put in place safety and emergency measures; obtain pollution emission license from the environmental protection department and a environmental monitoring report from the provincial authority for the current year;
- comply with China's relevant national and local governments' regulations, lawfully participate in a social insurance scheme and produce certificates of timely and full payment of all associated fees;

- have no record of infringement of relevant national laws and regulations for the period from 2008 to 2010.

ii) Eligibility criteria for trading enterprises

89. China requires trading companies applying for a molybdenum quota to satisfy the following conditions:

- be qualified for import and export operations, or proceeding with the registration as a foreign trade operator and have the credentials of an independent legal person;
- have a registered capital of more than RMB 30 million;
- meet applicable export performance requirements;
- obtain molybdenum export products from manufacturing enterprises which comply with the eligibility requirements set out in the *2012 Molybdenum Export Quota Application Procedures* for manufacturing enterprises;
- be ISO 9001 certified;
- comply with China's relevant national and local governments' regulations, lawfully participate in a social insurance scheme and produce certificates of timely and full payment of all associated fees;
- have no record of infringement of relevant national laws and regulations during the last 3 years.¹¹¹

iii) Molybdenum Export Quota Allocation

90. MOFCOM does not allocate the available molybdenum quota amount for a given year to qualifying enterprises in advance, but issues notices during the year announcing that certain "batches" of the export quota are being allocated to specific

¹¹¹ *2012 Molybdenum Export Quota Application Procedures*, Section II(ii), (Exhibit JE-63).

enterprises. Quotas are allocated to qualifying enterprises based on an allocation formula published in the notice announcing the list.¹¹²

4. Export Quota Amounts

(a) Export Quota for rare earths

91. China's measures direct MOFCOM to determine the total amount of the annual export quota for each good subject to export quotas and to announce the total amount of the annual export quota for each product by 31 October of the previous year.¹¹³ Subsequently, towards the end of 2011, China published a notice on 26 December 2011¹¹⁴ announcing that the first-batch of the export quota for rare earths for 2012 would be issued to enterprises that meet the application conditions of export quotas for rare earths in 2012. The Notice also listed a number of enterprises which had been allocated a quota for 2012. According to the Notice, the first-batch allocation represents approximately 80% of the total amount of the 2012 export quota for rare earths.
92. Specifically, China allocated 9,095 metric tonnes of light rare earths and 1,451 metric tonnes of medium and heavy rare earths in the first-batch. In addition, MOFCOM allocated an additional 12,605 metric tonnes of light rare earths and 1,753 metric tonnes of medium and heavy rare earths to "pending enterprises". These "pending enterprises" were to receive quota licenses if they passed environmental reviews conducted by the Ministry of Environmental Protection by end of July 2012.¹¹⁵
93. On 16 May 2012, China published another notice supplementing the first-batch of rare earths export quotas for 2012.¹¹⁶ This Notice allocated 9490 metric tonnes of

¹¹² See *2012 First Batch Tungsten and Molybdenum Export Quota*, (Exhibit JE-59).

¹¹³ *Import and Export Regulations* Article 38, (Exhibit JE-50). *Export Quota Measures*, Articles 9-11, (Exhibit JE-52).

¹¹⁴ *2012 First Batch Rare Earth Export Quota*, (Exhibit JE-55).

¹¹⁵ *Ibid.* Article III.

¹¹⁶ *Notice No. 618 Regarding the Supplement issued for 2012 First Batch of Rare Earth Export Quota Notification* (Ministry of Commerce, No. 618, May 16, 2012) ("*2012 First Batch Rare Earth Export Quota Supplement*"), (Exhibit JE-56).

light rare earths, and 1190 metric tonnes of heavy rare earths to various enterprises which have previously been listed as "pending".

94. On 22 August 2012, China published a Notice allocating the second-batch of rare earths export quotas for 2012.¹¹⁷ This Notice allocated export quotas of 8537 metric tonnes of light rare earths, and 1233 metric tonnes of heavy rare earths to various enterprises listed in its Annex.

Table 6 – 2012 Export quota amounts for rare earths

<i>Raw Material</i>	<i>1st batch 2012 quota amounts (metric tonnes)</i>	<i>Supplement to 1st batch 2012 quota amounts (metric tonnes)</i>	<i>2nd batch 2012 quota amounts (metric tonnes)</i>	<i>Total 2012 quota amounts (metric tonnes)</i>
<i>Medium/Heavy Rare Earths</i>	1451	1190	1233	3874
<i>Light Rare Earths</i>	9095	9490	8537	27122
				30996

(b) Exports Quotas for tungsten and molybdenum

95. On 31 October 2011, MOFCOM published the 2012 export quota amounts for agricultural and industrial products, which included tungsten and molybdenum.¹¹⁸ The 2012 export quota amounts for these products are shown in Table 7 and Table 8 below.
96. At the end of 2011, China announced the release of the first batch of export quotas for tungsten and molybdenum products through the "2012 Notice on List of Export (Supply) Enterprises and First-Batch Export Quota of Tungsten, Antimony and Other Nonferrous Metals".¹¹⁹ According to this Notice, "the released quantity of the first batch of export quotas for nonferrous metals in 2012 shall be 60% of the annual

¹¹⁷ Notice Concerning the 2012 Second Batch of Rare Earth Export Quotas (Ministry of Commerce, No. 627, August 16, 2012), ("2012 Second Batch Rare Earth Export Quota"), (Exhibit JE-57).

¹¹⁸ 2012 Export Quantity for Agricultural and Industrial Products, (Exhibit JE-58).

¹¹⁹ 2012 First Batch Tungsten and Molybdenum Export Quota, (Exhibit JE-59).

- total quantity",¹²⁰ and that it shall be "calculated mainly by reference to the output, export quantity and export amount of all enterprises from 2009 to October 2011".¹²¹
97. In addition, MOFCOM only allocated the export quota for tungsten to certain tungsten-containing products, specifically: "ammonium metatungstate and paratungstate" (3036 metric tonnes), "tungstic acid and its salts" (377 metric tonnes), "tungsten trioxide and blue tungsten oxide" (5380 metric tonnes) and "tungsten powder and its products" (2587 metric tonnes). MOFCOM did not allocate a portion of the quota for the export of tungsten ores, tungsten ash and scrap.¹²² For molybdenum the quota was allocated as follows: "primary raw molybdenum" (19,914 metric tonnes), "chemical Molybdenum products" (2,353 metric tonnes) and "molybdenum products" (2,250 metric tonnes).
98. On 19 July 2012, MOFCOM issued a Notice concerning the second-batch of the export quota for 2012, for tungsten and molybdenum products, as well as for other products.¹²³ This Notice indicates that it accounts for 40% of the annual volume for the 2012 export quota.¹²⁴ It allocates different amounts (indicated in metric tonnes) of the export quotas to different export companies located in various provinces in China as follows: "ammonium paratungstate" (2024 metric tonnes), "tungsten acid and its salts" (251 metric tonnes), "tungsten trioxide and blue tungsten oxide" (3587 metric tonnes), "tungsten powder and its products" (1725 metric tonnes), "primary raw molybdenum" (13726 metric tonnes), "chemical Molybdenum products" (1569 metric tonnes) and "molybdenum products" (1500 metric tonnes).

¹²⁰ Ibid. Article I.

¹²¹ Ibid. Article II.

¹²² Ibid.

¹²³ *Notice of the Ministry of Commerce concerning the 2012 second batch export quotas for tungsten, antimony, silver, tin, indium, and molybdenum*, (Ministry of Commerce, No. 513, July 19, 2012) ("*2012 Second Batch Tungsten and Molybdenum Export Quota*"), (Exhibit JE-60).

¹²⁴ Ibid. Article 1.

Table 7 –2012 export quota amounts for tungsten

<i>Product group</i>	<i>Customs Code</i>	<i>Material description</i>	<i>First batch 2012</i>	<i>Second batch 2012</i>	<i>Total 2012</i>
Annual Quota					15,400
Tungsten ores	2611000000	Tungsten ore			
	2620991000	Tungsten ash			
Ammonium paratungstate + metatungstate	2841801000	APT	3,036	2,024	5,060
	2841804000	Ammonim metatungstate			
Tungsten trioxides and Blue TO	2825901200	Tungsten trioxides	5,380	3,587	8,967
	2825901910	Other tungsten oxides and hydroxides			
Tungstic acid and salts	2825901100	Tungstic acid	377	251	628
	2841802000	Sodium tungstate			
	2841803000	Calcium tungstate			
Tungsten powder and its products	2849902000	Tungsten carbide	2,587	1,725	4,312
	8101100010	Tungsten powder			
	8101100090				
	8101940000	Unwrought tungsten			
	8101970000	Tungsten waste			

Table 8 - 2012 export quota amounts for molybdenum

<i>Product group</i>	<i>Chinese Commodity Code No.</i>	<i>Product Name Short Form</i>	<i>First batch 2012</i>	<i>Second batch 2012</i>	<i>Total 2012</i>
Annual Quota					25,000
Primary raw molybdenum	2613100000	Roasted molybdenum ores and concentrates	19,914	13,276	33,190
	2613900000	Other molybdenum ores and concentrates			
	7202700000	Ferro-molybdenum			
Chemical Molybdenum Products	2825700000	Molybdenum oxides and hydroxides	2,353	1,569	3,922
	2841701000	Ammonium molybdate			
	2841709000	Other molybdates			
Molybdenum products	8102100000	Molybdenum powder	2,250	1,500	3,750
	8102940000	Unwrought molybdenum			
	8102970000	Molybdenum scrap			

IV. CLAIMS

A. Export Duties

1. **China's Temporary Export Duties are inconsistent with its obligations under its *Accession Protocol***

99. The second sentence of Paragraph 1.2 of China's *WTO Accession Protocol* states as follows:

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.

100. Thus, as an integral part of the WTO Agreement, the provisions of the Accession Protocol are enforceable in WTO dispute settlement proceedings pursuant to Article 1.1 of the DSU.¹²⁵

101. In fact, as the panel held in *China-Auto Parts*:¹²⁶

The Accession Protocol is an integral part of the WTO Agreement pursuant to Part I, Article 1.2 of the Accession Protocol.

102. This was later confirmed by the Appellate Body in the same dispute. Moreover, in *China- Raw Materials*,¹²⁷ the panel held that:

The second sentence of Paragraph 1.2 of China's Accession Protocol states that provisions of the Protocol are "an integral part of the WTO Agreement". Thus, the provisions of the Accession Protocol are enforceable in WTO dispute settlement proceedings pursuant to Article 1.1 of the DSU. This is consistent with the approach taken by panels and the Appellate Body.

103. China's *Accession Protocol*,¹²⁸ provides in paragraph 11.3 that:

¹²⁵ It is understood that the provisions of the *Accession Protocol* and the commitments in paragraph 342 of the *Working Party Report* are subject to WTO dispute settlement. Panel report, *China-Raw Materials*, para. 7.64 Article 1.1 of the DSU provides that the rules and procedures of the DSU shall apply to the "consultations and settlement of disputes between Members concerning their rights and obligations" under the provisions of the WTO Agreement and of the DSU "taken in isolation or in combination with any other covered agreement." The WTO Agreement is a covered agreement as specified in Appendix 1 of the DSU.

¹²⁶ Panel report, *China-Auto Parts*, para 7.740.

¹²⁷ Panel report, *China-Raw Materials*, para. 7.64.

¹²⁸ *Accession Protocol*, (Exhibit JE-2).

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.

104. Annex 6 of China's *Accession Protocol*,¹²⁹ entitled "*Products Subject to Export Duty*" lists 84 different products, each identified by an 8-digit HS number, and by a product description. Moreover, at the end of the list of the different 84 products there is the following Note:

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.

105. Article VIII of the GATT 1994 applies to "[a]ll fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with...exportation [...]."
106. The export duties imposed by China on the exportation of the rare earths, tungsten and molybdenum, (as set out in Table 4 above) cannot be justified by either of these exceptions. Firstly, the relevant raw materials are not included in the list of products contained in Annex 6 of China's *Accession Protocol*. Secondly, these export duties are duties and are not other "fees and charges" within the meaning of Article VIII of the GATT Agreement. As a result, they do not fall within the scope of Article VIII of the GATT.
107. In *China-Raw Materials*¹³⁰, the panel commented as follows about the reference to Article VIII of the GATT in paragraph 11.3 of China's *Accession Protocol*:

¹²⁹ Ibid. p. 93.

¹³⁰ Panel report, *China-Raw Materials*, para. 7.129.

The Panel recalls that Article VIII allows WTO Members to impose, at the border, a variety of fees or charges provided that they are limited in amount to the approximate costs of services rendered and that they are imposed on or in connection with importation or exportation. As such, Article VIII is clearly intended to govern fees and charges imposed in particular circumstances. The Panel can find no general exception in the language of Paragraph 11.3 that would authorize China to maintain export duties other than in circumstances described in Annex 6 or in Article VIII of the GATT 1994.

108. This part of the panel's report was not appealed by China before the Appellate Body.
109. Accordingly, China's imposition and maintenance of temporary export duties applied to the exportation of rare earths, tungsten and molybdenum, as set out in Table 4 above, is inconsistent with China's commitment under paragraph 11.3 of its WTO *Accession Protocol* to eliminate all taxes and charges applied to exports.

B. Export Quotas

1. China's Export Quotas are inconsistent with Article XI:1 of the GATT 1994.

110. According to Article XI:1 of the GATT 1994:

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 of any product destined for the territory of any other contracting party.

111. It is generally accepted that a measure falls within the prohibition of Article XI:1 of the GATT 1994 when the following two conditions are satisfied: firstly it is a *governmental measure*,¹³¹ which means that it has been introduced by the government of a WTO member, or that there is *sufficient governmental involvement with it*.¹³² Secondly, it is a *quantitative restriction*, i.e. it "prohibits or restricts the exportation or sale for export of products".¹³³

¹³¹ See panel report, *Argentina – Hides and Leather*, para. 11.18.

¹³² Ibid. citing the panel report in *Japan- Film*, para. 10.56.

¹³³ See panel report, *India-Quantitative Restrictions*, para. 5.128 (upheld by the Appellate Body). See also the GATT panel report, *Japan – Semiconductors*, para. 104.

112. China's export quotas on rare earths, tungsten and molybdenum satisfy both these conditions, as they are undoubtedly governmental measures, introduced through various Chinese laws, regulations and notices (as explained in detail in Section III.C above).
113. The Chinese export quota regime is established through various legal measures. China's *Foreign Trade Law*¹³⁴ provides in its Article 19 that the "State applies quota and licensing system to the management of goods subject to import or export restrictions" and also that the goods that are subject to export quotas can only be "exported with approval from the foreign trade department of the State Council independently or jointly with other departments of the State Council in accordance with the State Council's rules". Moreover, according to Article 36 of *China's Import and Export Regulations*, "goods restricted from exportation that are subject to quantitative restrictions by the state are subject to the administration of quotas".¹³⁵ This is also reflected in Article 3 of the *Export Quota Measures* which provides that MOFCOM applies export quota administration on goods or commodities which are "restricted from export by the State".¹³⁶
114. On an annual basis MOFCOM, in collaboration with Chinese Customs, identifies the goods which are to be subject to an export quota and then proceeds to publish this list.¹³⁷
115. The amounts for China's export quotas on rare earths, tungsten and molybdenum, which were to be effective from the 1 January 2012 were published by various Notices issued by MOFCOM, as already explained in Section III.C.4 above.
116. Thus, China's export quotas on rare earths, tungsten and molybdenum are definitely *quantitative restrictions*, as they are measures that *prohibit or restrict* the exportation of goods, within the meaning of Article XI:1 of the GATT 1994, by expressly limiting the export of rare earths, tungsten and molybdenum to a certain maximum volume.

¹³⁴ *Foreign Trade Law*, Article 19, (Exhibit JE-49).

¹³⁵ *Import and Export Regulations*, (Exhibit JE-50).

¹³⁶ *Export Quota Measures*, (Exhibit JE-52).

117. Consequently China's export quotas on rare earths, tungsten and molybdenum are inconsistent with Article XI:1 of the GATT 1994.

2. China's Export Quotas are inconsistent with its obligations under the Accession Protocol

118. China's *Accession Protocol* provides in its paragraph 1.2 that:

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.

119. Paragraph 342 of China's *Working Party Report* includes a reference to both paragraphs 162 and 165 of the same Working Party Report.

120. Paragraph 162 of China's *Working Party Report* states the following:

The representative of China confirmed that China would abide by WTO rules in respect on non-automatic export licensing and export restrictions. The Foreign Trade Law would also be brought into conformity with GATT requirements. Moreover, export restrictions and licensing would only be applied, after the date of accession, to those cases where this was justified by GATT provisions. The Working Party took note of these commitments.

121. Paragraph 165 of China's *Working Party Report* states the following:

The representative of China confirmed that upon accession, remaining non-automatic restrictions on exports would be notified to the WTO annually and would be eliminated unless they could be justified under the WTO Agreement or Draft Protocol. The Working Party took note of this commitment.

122. Consequently, China's export quotas on rare earths, tungsten and molybdenum are inconsistent with its commitments set forth in paragraphs 162 and 165 of its *Working Party Report*. China has not eliminated its export restrictions upon its accession to the WTO and, moreover, they continue to be in place till today.

123. China's export quotas on rare earths, tungsten and molybdenum constitute a violation of Article XI:1 of the GATT 1994, and they are also inconsistent with paragraph 1.2

¹³⁷

As reflected in *Foreign Trade Law*, Article 18 (Exhibit JE-49) *Import and Export Regulations*, Article 35, (Exhibit JE-50) and *Export Quota Measures*, Article 7, (Exhibit JE-52).

of China's *Accession Protocol*, which incorporates China's commitments contained in paragraphs 162 and 165 of its *Working Party Report*.

C. *Export Quota Administration and Allocation*

1. **China imposes restrictions on the trading rights of enterprises seeking to export various forms of rare earths and molybdenum contrary to its commitments under the *Accession Protocol* and *Working Party Report***

(a) Legal standard

124. Paragraph 5.1 of China's *Accession Protocol* provides as follows:

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. All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users. 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.

125. Paragraph 1.2 of the *Accession Protocol* provides:

The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. 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.

126. Paragraph 342 of the *Working Party Report* provides (underlining added):

The Working Party took note of the explanations and statements of China concerning its foreign trade regime, as reflected in this Report. The Working Party took note of the commitments given by China in relation to certain specific matters which are reproduced in paragraphs 18-19, 22-23, 35-36, 40, 42, 46-47, 49, 60, 62, 64, 68, 70, 73, 75, 78-79, 83-84, 86, 91-93, 96, 100-103, 107, 111, 115-117, 119-120, 122-123, 126-132, 136, 138, 140, 143, 145, 146, 148, 152, 154, 157, 162, 165, 167-168, 170-174, 177-178, 180, 182, 184-185, 187, 190-197, 199-200, 203-207, 210, 212-213, 215, 217, 222-223, 225, 227-228, 231-235, 238, 240-242, 252, 256, 259, 263, 265, 270, 275, 284, 286, 288, 291, 292, 296, 299, 302, 304-305, 307-310, 312-318, 320, 322, 331-334, 336, 339 and 341 of this Report and noted that these commitments are incorporated in paragraph 1.2 of the Draft Protocol.

127. Consequently, the commitments set out in, *inter alia*, paragraphs 83 and 84 of the *Working Party Report* are commitments that are incorporated into paragraph 1.2 of the Accession Protocol.

128. Paragraph 83 of the *Working Party Report* provides:

The representative of China confirmed that during the three years of transition, China would progressively liberalize the scope and availability of trading rights.

(a) [...] upon accession, China would eliminate for both Chinese and foreign-invested enterprises any export performance [...] and prior experience requirements such as in [...] exporting, as criteria for obtaining or maintaining the right to [...] export.

(b) 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.

129. Paragraph 84 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. [...]

(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.

130. Paragraph 5.1, first sentence, imposes on China the obligation to ensure that, within three years after accession, "all enterprises in China [...] have the right to trade in all goods throughout the customs territory of China", except for those goods listed in Annex 2A to the *Accession Protocol*. Paragraph 5.1, second sentence, defines the "right to trade" as including the "right to export [...] goods". China acceded to the WTO on 11 December 2001.¹³⁸ Thus, the three-year transition period referred to in paragraph 5.1 expired on 11 December 2004.
131. As explained above, paragraphs 83 and 84 of China's *Working Party Report* include further relevant commitments undertaken by China, which were incorporated into paragraph 1.2 of China's *Accession Protocol* by virtue of paragraph 342 of the *Working Party Report*. As the Appellate Body in *China – Publications and Audiovisual Products* clarified, paragraphs 83(d) and 84(a) of China's *Working Party Report* confirm China's obligation to grant the right to trade.¹³⁹ Paragraphs 83 and 84 also provide additional specific restrictions on China's right to regulate trade.¹⁴⁰

¹³⁸ WT/INF/43/Rev.8.

¹³⁹ Appellate Body report, *China – Publications and Audiovisual Products*, para. 167. See also panel report, *China – Raw Materials*, para. 7.666.

¹⁴⁰ Panel report, *China – Raw materials*, para. 7.655.

132. The European Union notes that commitments pursuant to paragraph 83 constitute a response to concerns raised by WTO Members about known and flagrant restrictions to the right to export, with respect to which specific action was requested already during the "transition" period.¹⁴¹
133. Notably, paragraph 83(a) requires China to eliminate upon accession any prior export performance and prior experience requirements for both Chinese and foreign-invested companies. Paragraph 83(b) directs China to eliminate any "examination and approval system" within three years of accession, including specifically the elimination of minimum registered capital requirements.¹⁴²
134. The more general commitments undertaken pursuant to paragraph 84 represent a response to concerns by WTO Members about the risk of discrimination against foreign companies and individuals in the course of the process for obtaining the right to import and export,¹⁴³ as well as concerns that after the transition period "any linkage between an enterprise's scope of business or business licence and the right to trade would constitute a restriction on the right to import and export".¹⁴⁴
135. Paragraph 84(a) requires China to eliminate its system of examination and approval of trading rights within three years after accession and permit "all enterprises in China and foreign enterprises and individuals [...] to export [...] all goods" except those listed in Annex 2A to the *Accession Protocol*.¹⁴⁵ Paragraph 84(b) further obliges China to grant trading rights in a non-discriminatory and non-discretionary way. It also provides that any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade. Finally, it reaffirms that no minimum capital or prior experience related requirements would be imposed on foreign companies for obtaining trading rights (only WTO-consistent requirements would be applied).
136. As confirmed by the panel in *China – Publications and Audiovisual Products*, foreign enterprises within the meaning of paragraphs 84(a) and 84(b) includes

¹⁴¹ See *Working Party Report*, para. 80.

¹⁴² Panel report, *China – Raw materials*, para. 7.655.

¹⁴³ See *Working Party Report*, para. 81.

¹⁴⁴ *Ibid.* para. 82.

¹⁴⁵ See panel report, *China – Publications and Audiovisual Products*, para. 7.313.

foreign enterprises invested and registered in China, as well as enterprises not invested and registered in China; the latter including both foreign enterprises with and those without a commercial presence in China.¹⁴⁶

(b) Factual background

137. Despite the commitments described above,¹⁴⁷ China subjects enterprises to an examination and approval system before they may export molybdenum and rare earths products. As part of this process, China imposes, *inter alia*, prior export performance and prior experience requirements and requires applicants for export quotas for rare earths and molybdenum to have a minimum registered capital.

i) *Requirements concerning export quotas for rare earths*

Export performance requirement

138. While the *2012 Rare Earth Export Quota Application Procedures* do not provide export performance requirements as an explicit condition for application for a quota,¹⁴⁸ the *Procedures* indicate that applying enterprises must have had prior export performance.¹⁴⁹ Furthermore, MOFCOM relies on a company's export performance in calculating the actual quota allocation for rare earth products.¹⁵⁰

Minimum registered capital requirement

139. In addition to having to comply with the export performance criterion rare earths trading enterprises are also required to have a registered capital of at least RMB 50 million, in order to be eligible for an export quota.¹⁵¹

ii) *Requirements concerning export quotas for molybdenum products*

¹⁴⁶ Ibid. paras 7.381 and 7.286-7.299

¹⁴⁷ See above, Section IV.C.1(a).

¹⁴⁸ *2012 Rare Earths Export Quota Application Procedures*, (Exhibit JE-61).

¹⁴⁹ See Attachment to *2012 Rare Earths Export Quota Application Procedures*, (Exhibit JE-61).

¹⁵⁰ The quota allocation formula relied upon by MOFCOM is the following:

Quota = quota amount of such rare earth × (A1 + A2)

A1 = (the enterprises' total exports in recent three years ÷ China's total exports) × 0.5 weight

A2 = (the enterprises' total amount of exports in recent three years ÷ China's total amount of exports) × 0.5 weight

(See *2012 First Batch Rare Earth Export Quota*, Annex 1, (Exhibit JE-55))

¹⁵¹ *2012 Rare Earth Export Quota Application Procedures*, Section 2.2, (Exhibit JE-61).

Export performance and prior experience requirements

140. Firstly, pursuant to the *Export Quota Measures*, which apply to the administration and allocation of export quotas for *inter alia* molybdenum products, MOFCOM and local authorities charged with the distribution of quotas are required to take into account the export performance of applicants:

Article 19 When distributing quotas, [MOFCOM] and the local authorities in charge of foreign trade and economic cooperation shall take into full account the export performance of the commodities concerned, the utilization rate of quotas, operating capacity, production scale and resources status, etc. of the applying enterprises or regions in the last three years. (emphasis added)¹⁵²

141. Under the *2012 Molybdenum Export Quota Application procedures* China requires manufacturing enterprises that wish to apply for an export quota for molybdenum products to comply with the following requirements:

Enterprises that have acquired export quotas should have reached actual export performance of Molybdenum during the 2008-2010 period (the actual performance will not be examined temporarily for the enterprises that acquired the export quotas in 2011); the newly applying enterprises will be evaluated based on the three year average output of 2008-2010: comprehensive output of ferromolybdenum and molybdenum oxide (equivalent of roasted molybdenum concentrates) is more than 6000 tons; the molybdenum grade of the roasted molybdenum concentrates is higher than 51%, and the molybdenum grade of the ferromolybdenum is higher than 55%; the output of molybdate is more than 1600 tons; the output of molybdenum powder and molybdenum metal products is more than 600 tons. The actual export performance is subject to customs statistics, and the output will be determined on the basis of the sales volume verified by industrial organizations; (emphasis added)¹⁵³

142. Similarly, trading enterprises that wish to apply for an export quota for molybdenum products are subject to the following requirements under the *2012 Molybdenum Export Quota Application procedures*:

¹⁵² See *Export Quota Measures*, (Exhibit JE-52).

¹⁵³ *2012 Molybdenum Export Quota Application Procedures*, Part II.i.2, (Exhibit JE-63).

Having acquired export quotas and have actual export performance of Molybdenum for 2008-2010 (the actual performance will not be examined temporarily for the enterprises that acquired its export quotas in 2011) the actual export performance shall be according to customs statistics. (emphasis added)¹⁵⁴

143. Trading enterprises are also required to purchase products from the manufacturing enterprises eligible for export of molybdenum, i.e. complying with the already described conditions for manufacturing enterprises.¹⁵⁵
144. Furthermore, MOFCOM relies on a company's export performance in calculating the actual quota allocation pursuant to the quota allocation formulas for molybdenum.¹⁵⁶

Minimum registered capital requirement

145. Secondly, in addition to having to comply with the export performance criterion trading enterprises in molybdenum are also required to have a registered capital of a least RMB 30 million, in order to participate in export quota application procedures for molybdenum.¹⁵⁷

(c) Legal argument

146. Through these application requirements and/or quota allocation formulas, China imposes prior export performance, prior experience and minimum registered capital requirements on enterprises that wish to export molybdenum and rare earth products.
147. The European Union submits that by imposing prior export performance and prior experience requirements China violates its obligations under paragraph 5.1 of its *Accession Protocol*, as well as paragraphs 83(b), 83(d), 84(a) and 84(b) of the

¹⁵⁴ Ibid. Part II.ii.3.

¹⁵⁵ Ibid. Part II.ii.4.

¹⁵⁶ The quota allocation formula relied upon by MOFCOM is the following:
Manufacturing enterprises: Quota = quota amount of the manufacturing company x [0.5 x (A1 + A2) + 0.5 x A3]; Trade enterprises: Quota = quota amount of trade enterprises x (A1 + A2)
(Note: manufacturing enterprises' total exports account for a weight of 0.5, with a weight of 0.5 attributed to production)
A1 = (enterprise's export volume / total exports) x 0.3 weight
A2 = (enterprise's export volume / total exports) x 0.7 weight
A3 = Enterprise's output for the most recent 3 year period / Total domestic industry's output over the most recent 3 year period
(2012 *First Batch Tungsten and Molybdenum Export Quota*, Annex 2, p. 8, (Exhibit JE-59)
¹⁵⁷ 2012 *Molybdenum Export Quota Application Procedures*, (Exhibit JE-63).

Working Party Report and as a result paragraph 1.2 of the *Accession Protocol*. Furthermore, by imposing minimum registered capital requirements China violates its obligations under paragraph 5.1 of its *Accession Protocol*, as well as paragraphs 83(a), 83(d), 84(a) and 84(b) of the *Working Party Report* and as a consequence paragraph 1.2 of the *Accession Protocol*.

i) China is breaching its obligation to grant trading rights to all enterprises with respect to all goods by imposing export performance, prior experience and minimum capital requirements with respect to exports of molybdenum and rare earths products

148. As part of its administration and allocation of the rare earth and molybdenum export quotas, China restricts enterprises' right to export both (i) by requiring enterprises to satisfy export performance, prior experience and minimum registered capital requirements in order to be eligible to export under the quota, and (ii) by using prior export performance as a criterion in assigning quota rights to applying enterprises.
149. As already explained above in Section IV.C.1(a), China undertook an obligation upon its accession to the WTO to ensure that, within three years of its accession, "all enterprises in China [...] have the right to trade in all goods", except those listed in Annex 2A of the *Accession Protocol*. Products subject to this claim, namely molybdenum and rare earth products are not listed in Annex 2A to the *Accession Protocol* and are therefore covered by China's obligation pursuant to Paragraph 5.1 of the *Accession Protocol*. Paragraphs 83(d) and 84(a) of China's *Working Party Report* confirm China's obligation to grant the right to trade.
150. It is clear from the relevant provisions in the *Accession Protocol* and the *Working Party Report* that the right to trade should be extended to all enterprises and that it covers the right to export. However, as a result of the afore described requirements imposed by China, an enterprise which cannot comply with prior export performance, prior experience and/or minimum registered capital requirements, is not eligible for an export quota and is consequently barred from exporting altogether.
151. MOFCOM's measures promulgating the first and second batches of rare earth and molybdenum export quotas further demonstrate that MOFCOM relies on prior

export performance both as an eligibility requirement and a criterion for calculating the amount of quota rights for enterprises wanting to export molybdenum and rare earths products. Indeed, as a result of these formulas, prior export performance/prior experience is mandatory for enterprises to actually receive any rare earth export quota and for enterprises to receive any molybdenum export quota, since in the absence of prior exports the formulas result in a "zero" quota.

152. As a consequence – contrary to China's commitments under paragraph 5.1 of its *Accession Protocol* and paragraphs 83(d) and 84(a) of China's *Working Party Report*¹⁵⁸ – not all enterprises in China have the right to export rare earth and molybdenum products.
153. Furthermore, conditioning the enterprise's right to obtain an export quota on its having achieved a certain export performance or output, is precisely the "export performance" and "prior experience" requirement that China explicitly committed to eliminate in paragraph 83(a) of the *Working Party Report*.
154. Similarly, the above noted minimum registered capital requirements imposed by China constitute the type of requirement that China committed, pursuant to paragraph 83(b) of the *Working Party Report*, to abolish completely by 11 December 2004.
155. The European Union also notes that China reconfirmed its commitment not to impose both type of requirements, namely "requirements relating to minimum capital and prior experience" in the third sentence of paragraph 84(b) of the *Working Party Report*.
156. For the foregoing reasons, China's administration of the export quotas on rare earths and molybdenum is inconsistent with its obligations under paragraph 5.1 of China's WTO Accession Protocol, as well as paragraphs 83(b), 83(d), 84(a) and 84(b) of the *Working Party Report* and as a result paragraph 1.2 of the *Accession Protocol*.

¹⁵⁸ Appellate Body report, *China – Publications and Audiovisual Products*, para. 167. See also panel report, *China – Raw Materials*, para. 7.666.

ii) *China is breaching its obligation to grant trading rights to foreign enterprises in a nondiscretionary way with respect to enterprises wanting to export molybdenum products*

157. The European Union further submits that the prior export performance conditions that China imposes on applicants for export quotas for molybdenum also violate China's commitments pursuant to paragraph 84(b) of China's *Working Party Report* and thus paragraph 1.2 of its *Accession Protocol*.
158. The prior export performance requirement applies to all enterprises that have previously acquired export quotas, including foreign enterprises. The *2012 Molybdenum Export Quota Application procedures* do not quantify the export performance required to qualify for a quota; thus allowing China freedom to choose¹⁵⁹, based essentially on its own preference and considerations, how much a company has to have exported in order to meet the export performance criterion and qualify for a quota. As a result China does not grant trading rights to foreign enterprises in a non-discretionary way and for this reason breaches its obligation under paragraph 84(b) of the *Working Party Report* and thus paragraph 1.2 of the *Accession Protocol*.¹⁶⁰

(d) Conclusion

159. In conclusion, the Panel should find the measures challenged by the European Union as inconsistent with paragraph 5.1 of China's *Accession Protocol*, as well as paragraphs 83(a), 83(b), 83(d), 84(a) and 84(b) of the *Working Party Report* and thus paragraph 1.2 of China's *Accession Protocol*.

V CONCLUSIONS AND REQUEST FOR FINDINGS

160. For the reasons set out in this submission, the European Union requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations contained in:

¹⁵⁹ See Panel report, *China – Publications and Audiovisual Products*, para. 7.324.

¹⁶⁰ See panel report, *China – Publications and Audiovisual Products*, para. 7.657.

- i. paragraph 11.3 of China's *WTO Accession Protocol*, because China imposes and maintains temporary export duties on rare earths, tungsten and molybdenum;
 - ii. Article XI:1 of the GATT 1994 and paragraph 1.2 of China's *Accession Protocol*, which incorporates China's commitments contained in paragraphs 162 and 165 of its *Working Party Report*, because China imposes quotas on the exportation of rare earths, tungsten and molybdenum;
 - iii. paragraph 5.1 of China's *Accession Protocol*, as well as paragraphs 83(a), 83(b), 83(d), 84(a) and 84(b) of the *Working Party Report* and thus paragraph 1.2 of China's *Accession Protocol*, because China imposes prior export performance, prior experience and minimum registered capital requirements on enterprises that wish to export molybdenum and rare earth products and thereby limits their right to trade.
161. The European Union respectfully requests the Panel to recommend that the Dispute Settlement Body request China to bring the contested measures into conformity with its obligations under the GATT 1994 and the *Accession Protocol*.