EUROPEAN UNION
Permanent Mission
to the World Trade Organization

Geneva, 21 January 2013
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Dear Mr Chairman,

Please find enclosed the comments by the European Union on China's request for a Preliminary Ruling in the Dispute "*China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* (DS432).

A copy is being provided to China, the United States, Japan and the Third Parties.

Yours sincerely,

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Minister Counsellor

Mr. Nacer Benjelloun-Touimi
Chairperson
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In the World Trade Organization

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

(DS432)

Reply to China's request for a preliminary ruling by the European Union

Geneva, 21 January 2013

TABLE OF CASES CITED

Short Title	Full Case Title and Citation
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, 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
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749
Thailand – Cigarettes (Philippines)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, 1291
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513

1. INTRODUCTION

1. In its first written submission China made a request to the Panel to issue a preliminary ruling on the availability, to China, of general exceptions enshrined in the GATT 1994, more specifically the general exceptions enshrined in Article XX of the GATT 1994, to excuse a potential violation of Paragraph 11.3 of China's *Accession Protocol.*[1] In accordance with the Panel's instructions dated 7 January, 2013, the European Union submits its response to said preliminary ruling request.

2. In order to permit the Panel to deal with this matter in an expeditious way, the European Union stands ready to assist the Panel in whatever way the Panel considers appropriate.

3. In this submission the European Union firstly addresses the issue of admissibility of China's request for a preliminary ruling and the relevance of previous panel and Appellate Body reports. It concludes in that respect that the Panel should issue a preliminary ruling in response to China's request. In doing so the Panel should follow the panel and Appellate Body's report in *China – Raw Materials* and consequently find that Article XX of the GATT 1994 cannot be invoked by China to justify a violation of Paragraph 11.3 of its *Accession Protocol.*

2. ADMISSIBILITY OF CHINA'S REQUEST FOR A PRELIMINARY RULING AND RELEVANCE OF PREVIOUS PANEL AND APPELLATE BODY REPORTS

4. The European Union firstly notes that the preliminary ruling procedure is not regulated in the standard Working Procedures contained in Appendix 3 to the *Understanding on rules and procedures governing the settlement of disputes* (*DSU*). It is, however, already established practice in WTO litigation that parties can raise certain objections and panels can decide early in panel proceedings if panels had detailed, working procedures that allowed, inter alia, for preliminary

[1] China's first written submission, paras 409 et seq.

rulings.[2] The Working Procedures adopted for this case explicitly foresee for the possibility of requesting a preliminary ruling.[3]

5. While the Working Procedures for the Panel do not delimit the scope of what can be subject to a preliminary ruling, it seems clear that not every issue subject to a WTO dispute can be adequately dealt with in the context of a preliminary ruling procedure without causing prejudice or unfairness to any party or third party. This is confirmed by the jurisprudence of panels in prior dispute settlement proceedings, in which panels agreed with WTO Members that matters of substance are not appropriately addressed through a preliminary ruling, without the benefit of argumentation by the parties and third parties through submissions and substantive meetings of the panel.[4]

6. Due process rights of other parties to the dispute delimit what can and what cannot be dealt with in the context of a preliminary ruling. As the Appellate Body explained:

> [...] a Member's right to raise a claim or objection, as well as a panel's exercise of discretion, are ***circumscribed by the due process rights of other parties to a dispute***. Those due process rights similarly serve to limit a responding party's right to set out its defence at any point during the panel proceedings.[5]

7. The Appellate Body further explained that "due process may also require a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek redress in a timely manner".[6] WTO Members explicitly reflected the objective of prompt settlement of disputes in the text of the DSU (notably in Article 3.3 and 12.2 DSU).

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2 Appellate Body report, *EC — Bananas III*, para. 144. Panels are most frequently asked to issue preliminary rulings in response to complaints concerning the compliance of the panel request with the requirements of Article 6.2 DSU. In certain cases requests concerned panel composition and issues of admissibility of evidence.

3 See point 6.

4 E.g. panel report in *EC – Footwear (China)*, para. 7.23; panel report, *Korea – Ships (EC)*, para. 7.2.

5 Appellate Body report, *Unites States – Gambling*, para. 270 (footnotes omitted, emphasis added).

6 Appellate Body report, *Thailand – Cigarettes*, para. 150.

8. The European Union notes that China's preliminary ruling request in this case is not made on the basis of a procedural challenge to the panel request and jurisdiction under the DSU, but rather on a *purely substantive matter of law*, which would normally be decided in the course of the proceeding along with all other substantive matters raised in the dispute. As such, China's preliminary ruling request and more importantly its decision not to put forward an affirmative defence in its first written submission[7], could have a detrimental effect on the complaining parties' ability to respond to China's defence and potentially prolong the process.

9. What distinguishes this preliminary ruling request from other preliminary ruling requests and what in the view of the European Union enables this Panel to decide on it expeditiously without compromising the parties' due process rights is that it concerns a materially identical question to a question which has already been answered in prior panel and Appellate Body reports. As China seems to acknowledge[8], the adopted reports of the panel and Appellate Body in *China – Raw Materials* addressed this same question concerning the applicability of GATT Article XX defences to justify violations of China's export duty commitments[9] in Paragraph 11.3 of its Accession Protocol in the context of substantively identical claims against the same measure.

10. In view of these particular circumstances the European Union considers that it is possible for the Panel to issue a preliminary ruling on the availability, to China, of Article XX of the GATT 1994, without causing prejudice or unfairness to any party or third party. Indeed, in accordance with the report of the Appellate Body in *US – Continued Zeroing,* confirming the Appellate Body's findings and recommendations from *China – Raw Materials* would not only seem appropriate,

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7 See China's first written submission, para. 410.

8 Ibid.

9 The European Union notes that the products subject to the dispute, while both covered by China's *Tariff Implementation Program*, are not the same in both disputes. This distinction is irrelevant, however, since in both disputes the products subject to the claim under paragraph 11.3 of China's *Accession Protocol*, were not covered by Annex 6 of China's *Accession Protocol*.

but it is what would be expected from panels, especially where the issues are the same.[10]

11. The Appellate Body exists to clarify the meaning of the covered agreements.[11] In *China – Raw Materials* it has issued a clear and definitive ruling on the question of applicability of Article XX GATT 1994 defences to justify violations of Paragraph 11.3 of China's *Accession Protocol*. In accordance with Article 17.14 DSU, its decision has been adopted by the Dispute Settlement Body (DSB)[12] and unconditionally accepted by all the parties to the dispute, including China. The membership of the WTO is consequently entitled to rely upon these outcomes. Otherwise, the security and predictability enshrined in Article 3.2 of the *DSU* would be put in serious danger.

12. The European Union notes in that regard that the Appellate Body report in *US-Stainless Steel (Mexico)* addresses in general terms the relevance of previous panel and Appellate Body reports.[13] In particular, the Appellate Body clarified the role of its previous reports and indicated how panels should act in cases where the same legal issues arise:

> [T]he legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, **absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case**.

10 Appellate Body report, *US – Continued Zeroing*, para. 362.

11 Ibid., paras 312-313.

12 See, WT/DS394/16, WT/DS395/15, WT/DS398/14, dated 24 February 2012.

13 Appellate Body Report, *US – Stainless Steel (Mexico)*, paras 157 – 162.

> [...] The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU. Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.
>
> We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above. [14]

13. The Appellate Body confirmed its reasoning from *US – Stainless Steel (Mexico)* on the relevance of prior Appellate Body reports in *US – Continued Zeroing*:

14 Appellate Body Report, *US - Stainless Steel from Mexico*, paras 160 – 162 (emphasis added).

> Appellate Body reports adopted by the DSB are binding and must be unconditionally accepted by the parties to the particular dispute. The Appellate Body has also said that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute. Following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same. This is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral trading system. The Appellate Body has further explained that adopted panel and Appellate Body reports become part and parcel of the *acquis* of the WTO dispute settlement system and that "ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." Moreover, referring to the hierarchical structure contemplated in the DSU, the Appellate Body reasoned in *US – Stainless Steel (Mexico)* that the "creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements." The Appellate Body found that failure by the panel in that case to follow previously adopted Appellate Body reports addressing the same issues undermined the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.[15]

14. In sum, according to the Appellate Body, which we fully support, WTO panels are obliged to correctly apply the law; in the context of this dispute this also means that the Panel should follow the rulings of the Appellate Body where the Appellate Body has previously interpreted the same legal questions.

15. The European Union notes that while China asks the Panel not to follow[16] the Appellate Body's interpretation of paragraph 11.3 of China's *Accession Protocol* from *China – Raw Materials,* which it describes as incorrect[17], China entirely disregards the Appellate Body jurisprudence on the role of adopted panel and Appellate Body reports and does not invoke *cogent reasons* which could justify a decision different from the one reached by both the panel and the Appellate Body

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15 Appellate Body report, *US – Continued Zeroing*, para. 362 (footnotes omitted).

16 China's first written submission, para. 460.

17 China's first written submission, para. 413.

in *China – Raw Materials*. China merely alleges that the arguments it presents in its preliminary ruling request are new or have not been addressed fully by the panel and Appellate Body in *China - Raw Materials*.[18] As will be shown in the second part of this submission, China's arguments are substantially similar to those it advanced before the panel and Appellate Body in *China - Raw Materials.*

16. To conclude, the European Union considers that, to the extent that the Panel wants to make an independent finding about the interpretation of the relevant law and its application to the facts, the Panel should follow adopted Appellate Body and panel reports on the same legal issue, and consequently find that Article XX of the GATT 1994 cannot be invoked by China to justify a violation of Paragraph 11.3 of its *Accession Protocol.*

3. ARTICLE XX OF THE GATT 1994 AGREEMENT IS NOT APPLICABLE TO PARAGRAPH 11.3 OF CHINA`S ACCESSION PROTOCOL

17. The European Union would now like to address the points made by China in support of its view that Article XX of the GATT 1994 Agreement is applicable to its commitment not to impose export duties, which is contained in paragraph 11.3 of its *Accession Protocol.*

18. China claims that it is asking this Panel to decide again on this issue, and to depart from previous decisions of both the panel and the Appellate Body in *China-Raw Materials,* as it is presenting *"either new arguments that have not been asserted previously, or arguments which were neither argued or addressed fully by the panel and the Appellate Body in China-Raw Materials."*[19] Moreover, China considers that it is "*prudent*"[20] for it to ask the Panel to decide on this issue in a preliminary ruling, before it engages in a "*substantive defence of the export duties under Article XX."*[21]

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18 China's first written submission, para. 416.

19 China's first written submission, para. 416.

20 Ibid. para. 410.

21 Ibid.

19. China accepts that there is no "*explicit textual link*"[22] which would make the exceptions of Article XX GATT 1994 "*available for excusing a potential violation of Paragraph 11.3*" [23]of its Accession Protocol. However, it then proceeds to criticize the Appellate Body of an "*overly textualist approach to treaty interpretation*",[24] and then claims further that the "*only correct interpretative result*"[25] that the Appellate Body could have reached was that the general exceptions of Article XX of the GATT 1994, were applicable to China's commitment not to impose export duties due to the *"absence of explicit treaty language to the contrary."*[26]

20. The European Union does not agree with China's position and agrees with the conclusion reached by the panel and Appellate Body in *China-Raw Materials*. In the opinion of the European Union the reasoning of both the panel and the Appellate Body was correct and done according to the rules of interpretation contained in the *Vienna Convention on the Law of Treaties*. In fact, in its appellant submission before the Appellate Body in *China-Raw Materials*, it was China itself which had based most of its arguments on specific textual links in other paragraphs of its *Accession Protocol* and *Working Party Report* (such as paragraph 11.1 and 11.2 of its *Accession Protocol* and paragraph 170 of its *Working Party Report*), in order to try to justify its export duties by the general exceptions of Article XX of the GATT 1994.

21. The Appellate Body had rejected all these arguments made by China, and in its reasoning correctly drew the distinction between the language in found in paragraph 5.1 of China's *Accession Protocol* and that found in paragraph 11.3 of the same *Protocol*. The European Union recalls that in *China - Publications and Audio-visual Products*, the Appellate Body had found that China could invoke Article XX(a) of the GATT 1994 when defending a claim brought under paragraph 5.1 of the *Accession Protocol*, which deals with its "trading rights"

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22 Ibid. para. 411.

23 Ibid.

24 Ibid. para. 412.

25 Ibid. para. 413.

26 Ibid.

commitments. Unlike paragraph 11.3 of China's *Accession Protocol*, paragraph 5.1 contains the following introductory language: *"Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement...."* In fact, the Appellate Body stated as follows:

> "As noted by the Panel, such language is not found in Paragraph 11.3 of China's Accession Protocol. We therefore do not agree with China to the extent that it suggests that the Appellate Body's findings in *China-Publications and Audio-visual Products* indicate that China may have recourse to Article XX of the GATT 1994 to justify export duties that are inconsistent with Paragraph 11.3."[27]

22. In Section V.C of its first written submission[28]. China makes the claim that Paragraph 11.3 of its *Accession Protocol* has to be treated as an integral part of the GATT 1994. It fundamentally disagrees with the reasoning of the Appellate Body in *China-Raw Materials* which stated as follows[29]:

> "[A]s China's obligation to eliminate export duties arises exclusively from China's Accession Protocol, not from the GATT 1994; we consider it reasonable to assume that, had there been a common intention to provide access to GATT Article XX in this respect, language to that effect would have been included in Paragraph 11.3 or elsewhere in China's Accession Protocol."

23. China bases its claim (i.e. the assertion that paragraph 11.3 of its *Accession Protocol* is an "integral part" of the GATT 1994) on the following premises: (a): its commitment on export duties contained in paragraph 11.3 of its *Accession Protocol* has an "intrinsic relationship" or a "clear conceptual nexus"[30] with the GATT 1994, and (b) in the absence of an "explicit statement in the Accession Protocol to the contrary". [31] Thus, according to China, Article XX of the GATT 1994 Agreement would become applicable to paragraph 11.3 of its *Accession Protocol.*

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27 Appellate Body report, *China – Raw Materials,* para. 304.

28 China's first written submission, paras 422-435.

29 Appellate Body report, *China - Raw Materials*, para. 293.

30 China's first written submission, paras 422 and 429.

31 China's first written submission, para. 422.

24. The European Union fundamentally disagrees with China's reasoning. While it is correct to say that restrictions on export duties are related to the liberalisation of trade in goods, and that they may have similar restrictive effects to export quotas (from an economic perspective), it is simply not correct to assume that for these reasons, China's "WTO-Plus" commitment in paragraph 11.3 of its *Accession Protocol*, suddenly becomes part of the GATT 1994 formulation. The fact is that the GATT 1994 Agreement does not restrict and does not regulate export duties.

25. The European Union also disagrees with China in its assertion that paragraph 11.3 of its *Accession Protocol* becomes an "integral part" of the GATT 1994 Agreement in the absence of language to the contrary. This is a fallacy, based on flawed reasoning. It is a common feature of China's *Accession Protocol*, that in situations where the negotiators or drafters of the *Accession Protocol* intended a particular article of a particular WTO Agreement to apply, then it was stated specifically. China's *Accession Protocol* reflects rights and obligations that were "tailor-made" for China. That is precisely why they are commonly referred to as "WTO-Plus" obligations. China's *Accession Protocol* and *Working Party Report* were carefully negotiated and crafted, the result of some 15 years of negotiations. There was nothing left out, or left in, by chance, or by implication.

26. In Section V.D of its first written submission,[32] China argues that the terms "nothing in this Agreement" in the *chapeau* of Article XX of the GATT 1994 do not exclude the availability of Article XX to defend a violation of paragraph 11.3 of China's *Accession Protocol*.

27. In an argument based on what is essentially flawed logic, China asserts that the phrase, "nothing in this Agreement" contained in the Article XX *chapeau*, does not exclude, but rather confirms the availability of the general exceptions contained in Article XX of the GATT 1994.

28. China's premise is that this language was originally contained in the GATT 1947 Agreement, (which legally ceased to exist on the 31 December 1995). All provisions of the GATT 1947 then became part of the GATT 1994 Agreement

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32 China's first written submission, paras 436-444.

which entered into force on the 1 January 1995, when the WTO was created. With all the other Agreements negotiated in the Uruguay Round, the GATT 1994 Agreement then became part of the WTO Agreement. So far, the European Union agrees with China. This is in fact part of the established legal history of the coming into being of the WTO.

29. The European Union, however, strongly disagrees with China's argumentation when it states that the phrase "nothing in this Agreement" contained in Article XX of the GATT 1994, has a meaning which was greatly expanded from the same phrase in the same article, contained in the GATT 1947. Simply put, the phrase "nothing in this Agreement" in the GATT 1994, refers to the GATT 1994. It does not refer to the WTO Agreement (which includes all other WTO "covered" Agreements). These other Agreements, which (like China's *Accession Protocol*) form an integral part of the WTO Agreement, are of course, separate and distinct from the GATT 1994 Agreement.

30. The European Union is of the opinion that China is wrong when it argues[33] that according to the rules of the *Vienna Convention on the Law of Treaties* the phrase "nothing in this Agreement" contained in Article XX of the GATT 1994 should be "read broadly to incorporate provisions in post - 1994 accession protocols for which an intrinsic relationship to the GATT 1994 can be shown."[34] The argument put forward by China (i.e. that this is due to the fact that the drafters of the WTO Agreement decided to keep the original provisions of GATT 1947 and incorporate them into the new GATT 1994), is not convincing. If the drafters of other WTO Agreements intended the exceptions of the GATT 1994 to apply to that other Agreement, they would have stated this specifically. A case in point is in fact Article 3 of the *Agreement on Trade-Related Investment Measures (TRIMS)*, which states that "All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." The same language is not found anywhere in China's *Accession Protocol*.

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33 China's first written submission, para. 442.

34 Ibid.

31. In Section V.E of its first written submission[35], China argues that "an appropriate holistic interpretation of the silence in paragraph 11.3 of China's *Accession Protocol*, taking into account the object and purpose of the WTO Agreement, confirms that China may attempt to justify its use of export duties on rare earths, tungsten and molybdenum through recourse to the general exceptions of Article XX of the GATT 1994."[36]

32. First of all, China starts by criticizing the Appellate Body Report in *China-Raw Materials,* claiming that it "failed to apply the customary rules of interpretation of public international law as codified in the Vienna Convention in a *holistic* manner".[37] China goes on to accuse the Appellate Body of the "summary dismissal of the interpretive value of the WTO's fundamental objectives".[38]

33. The first point that the European Union would like to make is that this is not a new argument put forward by China at this stage. China made this argument already before the Panel, and also before the Appellate Body in *China-Raw Materials*. However, in said dispute, the argument was dismissed by both the panel and by the Appellate Body.

34. In the current dispute, China is now attempting to convince this Panel to depart from the reasoning of the Appellate Body on this issue. In fact, in its first written submission submitted in the current dispute, when trying to bolster its argument about the Appellate Body's supposed "summary dismissal" of this issue, China quotes parts of the reasoning of the Appellate Body.[39] In doing so, it also manages to misconstrue the reasoning of the Appellate Body.

35. The Appellate Body had actually stated the following in paragraph 306:

> " The preamble of the *WTO Agreement* lists various objectives, including "raising standards of living," "seeking both to protect and preserve the

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35 China's first written submission, paras 445-458.

36 Ibid. para. 445.

37 Ibid. para. 446.

38 Ibid. para 448.

39 China's first written submission, para 447. China refers its Footnotes 585 and 586 to paragraph 306 of the Appellate Body report in *China-Raw Materials.*

> environment" and "expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development." The preamble concludes with the resolution to "develop an integrated, more viable and durable multilateral trading system". Based on this language we understand *the WTO Agreement, as a whole*, to reflect the balance struck by WTO Members between trade and non-trade related concerns. However, none of the objectives listed above, nor the balance struck between them, provides specific guidance on the question of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol. In the light of China's explicit commitment contained in Paragraph 11.3 to eliminate export duties and the lack of any textual reference to Article XX of the GATT 1994 in that provision, we see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3."

36. The European Union fully agrees with the conclusions reached by both the panel and the Appellate Body in *China-Raw Materials.* Contrary to what China claims, the Appellate Body does not dismiss in any way the objectives listed in the Preamble to the *WTO Agreement.* Rather it acknowledges them and mentions them specifically. What the Appellate Body had actually said (in paragraph 306) was that it is the "*WTO Agreement, as a whole"* (and not merely the Preamble to the WTO Agreement), which reflects the balance struck between WTO Members on trade and non-trade related concerns.

37. Thus, the European Union disagrees with China's assertion that the conclusions of the Appellate Body in *China – Raw Materials* suggest a "silent" abrogation of China's fundamental sovereign rights.[40] China had exercised its sovereign rights when it negotiated its entry into the WTO, as it had agreed not to impose export duties, or - to quote the precise text in paragraph 11.3 - to "eliminate all taxes and charges applied to exports" (excluding 84 listed and defined products). It has gone back on that commitment, and is continuously trying to justify it by any means.

38. For the reasons stated above, the European Union asks the Panel to confirm, in line with previous reports of the panel and Appellate Body in *China – Raw Materials,* that the provisions of Article XX of the GATT 1994 Agreement are not applicable to paragraph 11.3 of China's Accession Protocol.

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40 China's first written submission, para. 457.