In the World Trade Organization

China – Measures related to the exportation of rare earths, tungsten and molybdenum

(WT/DS431, WT/DS432, WT/DS433)

The European Union's Responses to Additional Questions from the Panel to the Parties

Geneva, 25 April 2013

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As requested by the Panel in its communication of 11 April 2013, the European Union provides its responses to the Panel's questions in its second written submission in the paragraphs indicated below and in this document for Question 62.

QUESTION 60

To the European Union and China: Please comment on paragraphs 24 and 25 of the United Sates' opening oral statement at the first substantive meeting and paragraphs 36 and 37 of Japan's opening oral statement at the first substantive meeting. Please include in your answer your view whether rare earth concentrates (mixed rare earth oxides), individual rare earth oxides, rare earth metals and rare earth alloys are "natural resources" within the meaning of GATT Article XX(g).

1. Please see the European Union's second written submission, para. 99.

QUESTION 61

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

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

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

2. Please see the European Union's second written submission, paras 49-52.

QUESTION 62

To the complainants: In part III.2 of their panel requests, the complainants state that China administers its export quotas on various forms of rare earths, tungsten and molybdenum "in a manner that is not uniform, impartial, or reasonable, such as by the use of criteria in the application and allocation process that lack definition or do not contain sufficient guidelines or

standards in how they should be applied", and that this is inconsistent with Article X:3(a) of the GATT 1994 and Paragraph 2(A)(2) of Part I of China's Accession Protocol. Is the Panel correct in its understanding that the complainants are not pursuing these claims?

3. The Panel's understanding is correct. The European Union is not pursuing these claims.

QUESTION 63

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

(a) Are the principles set forth in Article XIII of the GATT 1994 ("Non-discriminatory Administration of Quantitative Restrictions") relevant to the Panel's assessment of whether China's export restrictions are "even handed" under Article XX(g)? In particular, Article XIII:2 provides that import quotas should be allocated in shares or proportions approaching as closely as possible those shares that Members might be expected to obtain in the absence of such quotas/restrictions. Does this principle related to the non-discriminatory allocation of import quotas provide guidance on the interpretation and/or application of the "even handedness" test in Article XX(g) in the context of export quotas? More specifically, if the challenged export quotas (acting in conjunction with production quotas) operate to allocate shares or proportions of the products at issue in a way that approaches as closely as possible those shares that domestic and foreign consumers might be expected to obtain in the absence of the measures, would this demonstrate that those measures are "even-handed" for the purpose of Article XX(g)?

(b) With reference to Article XX(g), the Appellate Body in US – Gasoline explained that "'if such measures are made effective in conjunction with restrictions on domestic product or consumption' is a requirement that the measures impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources"(pp. 20-21, emphasis added).

With respect to the chapeau test of Article XX, the Appellate Body in US – Gasoline also explained that "[t]he chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied" (p.22, emphasis added; footnote omitted).

To what extent are these two legal tests different? In particular, what factual matters are relevant in determining whether a measure is "even handed" in the context of Article XX(g)? What factual matters are relevant in determining whether the same measure is not applied in a manner that constitutes "arbitrary or unjustifiable discrimination" within the meaning of the chapeau of Article XX? Is there an overlap in the application of these two tests of Article XX?

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

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

4. Please see the European Union's second written submission, paras 64-79.

QUESTION 64

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

(a) the GATT 1994;

(b) the Marrakesh Agreement, narrowly defined, under Article XII;

(c) the Marrakesh agreement, broadly defined to include the Multilateral Trade Agreements annexed thereto;

(d) somewhere else within the WTO Agreement, like another covered agreement, parallel to the GATS, TRIPS and other multilateral trade agreements?

In Article 7(7) of the Implementing Regulation, what are the criteria for customs or competent authorities in the Member States to use in determining if there are "doubts relating to the authenticity or correctness of an attesting document"?

5. Please see the European Union's second written submission, paras 329-333.

QUESTION 65

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

6. Please see the European Union's second written submission, paras 334-336.