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

**NOTIFICATION OF AN OTHER APPEAL BY CHINA  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 17 April 2014, from the Delegation of the People's Republic of China, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and 23 of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010) ("*Working Procedures*"), the People's Republic of China ("China") hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (WT/DS431) ("Panel Report").

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**I. APPEAL OF THE PANEL'S INTERPRETATION OF ARTICLE XII:1 OF THE *MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION*, READ IN CONJUNCTION WITH PARAGRAPH 1.2, SECOND SENTENCE, OF CHINA'S *ACCESSION PROTOCOL***

2. China seeks review by the Appellate Body of the Panel's interpretation of Article XII:1 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*Marrakesh Agreement*"), read in conjunction with the second sentence of Paragraph 1.2 of China's *Accession Protocol*.<sup>1</sup>

3. The Panel's interpretation is in error, *inter alia*, because:

- the Panel failed to give effective meaning to the second sentence of Article XII:1 which does not merely prescribe that newly acceding Members may not pick and choose among the various covered agreements but have to accept the WTO legal framework as a single undertaking;
- the Panel failed properly to read Article XII:1 of the *Marrakesh Agreement* together with the second sentence of Paragraph 1.2 of China's *Accession Protocol*;
- the Panel erred in interpreting the terms contained in the second sentence of Paragraph 1.2 of China's *Accession Protocol*;
- the Panel unduly found that the words "shall be an integral part of the WTO Agreement" in the second sentence of Paragraph 1.2 of China's *Accession Protocol* leads to the conclusion that China's *Accession Protocol* is thereby made an integral

<sup>1</sup> The relevant analysis by the Panel is contained in paras. 7.73-7.93 of the Panel Report.

part of the *Marrakesh Agreement* excluding the multilateral trade agreements annexed thereto.

4. Accordingly, China requests that the Appellate Body reverse the Panel's findings in paragraphs 7.80, 7.89 and 7.93 of the Panel Report in this regard.

**II. APPEAL OF THE PANEL'S FINDINGS THAT CHINA'S EXPORT QUOTAS ON RARE EARTHS AND TUNGSTEN DO NOT "RELAT[E] TO" CONSERVATION UNDER ARTICLE XX(G) OF THE GATT 1994**

5. China seeks review by the Appellate Body of the Panel's findings and conclusions that export quotas for rare earths and tungsten do not "relat[e]" to conservation within the meaning of subparagraph (g) to Article XX of the GATT 1994 because they send a perverse signal to domestic users.<sup>2</sup>

6. The Panel's findings are based on errors in the interpretation and application of the "relating to" element of subparagraph(g) of Article XX, *inter alia*, because the Panel:

- focused on the design structure and architecture of China's export quotas to the exclusion of evidence regarding the operation of the export quotas together with other elements of China's comprehensive conservation policy, in circumstances where China submitted substantial evidence on the operation of the conservation programme in the marketplace; and
- required China to show that there is no risk that perverse signals to domestic users might offset the positive effect of conservation signals to foreign users.

7. In addition, China submits that the Panel acted inconsistently with Article 11 of the DSU in relation to these issues by failing to make an objective assessment of the matter, including an objective assessment of the facts relating to the existence of "perverse signals" and through providing incoherent reasoning.

8. Accordingly, China requests the Appellate Body to reverse the Panel's interpretation in paragraphs 7.279-7.293 to the extent that this interpretation required the Panel to examine solely the structure and design of China's export quotas, as well as the Panel's failure to apply the proper legal standard and make an objective assessment in paragraphs 7.444, 7.446-7.448, 7.541-7.542, 7.604, 7.725 and 7.731 of the Panel Report.

9. To the extent that these errors taint the Panel's conclusions, in paragraphs 7.600-7.614, 7.810-7.820, 8.2(c), 8.7(c) and 8.12(c) of the Panel Report, that China's export quotas on rare earths and tungsten cannot be provisionally justified under subparagraph (g) of Article XX of the GATT 1994, China requests the Appellate Body also to reverse these findings of the Panel.

**III. APPEAL OF THE PANEL'S FINDINGS THAT THE CHINA'S EXPORT QUOTAS ON RARE EARTHS, TUNGSTEN AND MOLYBDENUM ARE NOT "MADE EFFECTIVE IN CONJUNCTION WITH" DOMESTIC RESTRICTIONS UNDER ARTICLE XX(G) OF THE GATT 1994**

10. China seeks review by the Appellate Body of the Panel's findings and conclusions that China's export quotas on rare earths, tungsten and molybdenum are not "made effective in conjunction with" domestic restrictions within the meaning of subparagraph (g) of Article XX of the GATT 1994.<sup>3</sup>

11. The Panel's findings are based on errors in the interpretation and application of the "made effective in conjunction with" domestic restrictions element of subparagraph (g) of Article XX

<sup>2</sup> The relevant Panel findings are contained, *inter alia*, in paras. 7.279-7.293, 7.444, 7.446-7.448, 7.541-7.542, 7.604, 7.725, 7.731. The relevant Panel conclusions are contained, *inter alia*, in Panel Report, paras. 7.600-7.614, 7.810-7.820, 8.2(c), 8.7(c) and 8.12(c).

<sup>3</sup> The relevant Panel findings are contained, *inter alia*, in Panel Report, paras. 7.301, 7.314-7.337, 7.568-7.599, 7.792-7.809, and 7.919-7.935. The relevant Panel conclusions are contained in Panel Report, paras. 7.600-7.614, 7.810-7.820, 7.936-7.944, 8.2(c), 8.7(c) and 8.12(c).

because the Panel erroneously interpreted and applied the term "made effective in conjunction with" domestic restrictions to mean that the Panel was:

- required to engage in a separate and distinct enquiry to determine whether, and find that, China "distributes the burden of conservation-related measures between domestic and foreign consumers in a balanced way";<sup>4</sup> "counterbalance[ed]"<sup>5</sup> the restrictions on domestic and foreign users; or achieved "substantive complementarity"<sup>6</sup> between foreign and domestic restrictions; and
- confined to assessing the "objective structure, design and architecture"<sup>7</sup> of China's regulatory system of conservation measures and it was precluded from having regard to "the actual effects which a regulatory system has in the market place",<sup>8</sup> in circumstances where China submitted substantial evidence on the operation of the conservation programme in the marketplace.

12. In addition, China submits that the Panel acted inconsistently with Article 11 of the DSU in relation to these issues by failing to make an objective assessment of the matter, including an objective assessment of the facts, through its lack of objectivity in the treatment of evidence it considered relevant; through its inconsistent reasoning in finding that none of the domestic measures advanced by China amounts to a "domestic restriction"; and by relying on inconsistent reasoning as well as a double standard of proof in comparing the relative burden of China's restrictions on foreign and domestic users.

13. Accordingly, China requests that the Appellate Body reverse the Panel's interpretation in paragraphs 7.301 and 7.314-7.337 with respect to the Panel's additional enquiry regarding the relative burdens borne by domestic and foreign interests under relevant conservation measures, as well as the Panel's failure to apply the proper legal standard and make an objective assessment in paragraphs 7.568-7.599, 7.792-7.809, and 7.919-7.935 of the Panel Report.

14. To the extent that these errors taint the Panel's conclusions, in paragraphs 7.600-7.614, 7.810-7.820, 7.936-7.944, 8.2(c), 8.7(c) and 8.12(c) of the Panel Report, that China's export quotas on rare earths, tungsten and molybdenum cannot be provisionally justified under subparagraph (g) of Article XX of the GATT 1994, China requests the Appellate Body also to reverse these findings of the Panel.

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<sup>4</sup> Panel Report, para. 7.332.

<sup>5</sup> See, e.g., Panel Report, para. 7.595.

<sup>6</sup> Panel Report, para. 7.301.

<sup>7</sup> Panel Report, para. 7.332.

<sup>8</sup> Panel Report, para. 7.332.