China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum
(WT/DS431, WT/DS432, WT/DS433)

Third Party Written Submission of Australia

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I. INTRODUCTION

1. These proceedings initiated by the European Union, Japan and the United States under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) raise significant systemic issues concerning legal interpretation of exceptions to Members’ substantive obligations under the General Agreement on Tariffs and Trade 1994 (GATT or GATT 1994), and the operation of the DSU.

2. In its third party submission, Australia addresses a number of issues relating to the interpretation of the provisions of the GATT 1994, with a particular focus on Article XX(g), including:
   
   (a) the meaning of “relating to the conservation of exhaustible natural resources”;
   
   (b) the meaning of “made effective in conjunction with restrictions on domestic production or consumption”; and
   
   (c) the application of the chapeau of Article XX in justifying a measure that is otherwise inconsistent with Article XI.

3. Australia also addresses in its third party submission China’s request to the Panel to make a preliminary ruling on the applicability of Article XX of GATT to China’s export duties on rare earths, tungsten and molybdenum.

4. Australia reserves the right to raise other issues in the third party hearing with the Panel.

II. THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

A. THE MEANING OF “RELATING TO THE CONSERVATION OF EXHAUSTIBLE NATURAL RESOURCES”

5. A material issue in this matter is whether China’s export restrictions on various forms of rare earths, tungsten and molybdenum are inconsistent with China’s obligations under Article XI of the GATT 1994. The complainants have also submitted that China’s export restrictions on rare earths, tungsten and molybdenum are inconsistent with China’s obligations under its Accession Protocol and the Working Party
Report\(^3\). In response, China submitted that the individual 2012 export quota systems for rare earths, tungsten, and molybdenum meet the exception under Article XX(g) of the GATT.\(^4\) China further submitted that the export quota systems form “an integral part of its conservation policies for each of these resources”\(^5\) and, thus, China did not explicitly dispute the complainants’ submission that these export quotas were inconsistent with Article XI:1 of the GATT. Australia’s submission will focus primarily on China’s invocation of Article XX(g) of the GATT to justify its measures.

6. The first part of Article XX(g) requires a Member justifying its otherwise GATT-inconsistent measure to establish that the measure is “relat[ed] to the conservation of exhaustible natural resources”. China submitted that Members may adopt policies to protect a broad range of “exhaustible natural resources”\(^6\) so long as the structure and design of the measure showed a “close and genuine relationship” to the conservation objective\(^7\), and that the measure was aimed both at “preserving exhaustible natural resources in their current state, as well as regulating their use for economic development today”\(^8\).

7. Australia agrees with China that the product scope of “exhaustible natural resources” covered by Article XX(g) is broad. With reference to the panel’s findings in China – Raw Materials\(^9\), Australia submits that mineral resources, such as rare earths, tungsten and molybdenum, would fall within the scope of Article XX(g).

8. Australia also agrees with China that a measure relates to the conservation of an exhaustible natural resource when there is a “close and genuine relationship” of ends and means between the goal of conservation and the measure employed to achieve that goal, and that such a relationship can be determined on the basis of an examination of the “general structure and design” of the measure at stake\(^10\). As explained by the Appellate Body in US – Shrimp, the measure employed must be “reasonably” related to the conservation of the exhaustible natural resources, and may not be “disproportionally wide in its scope and reach” in relation to the policy objective pursued.\(^11\)

9. Australia likewise agrees with China that the term “conservation” encompasses measures aimed both at “preserving exhaustible natural resources in their current

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\(^4\) See China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, WT/DS432, First Submission of China, 20 December 2012 (China’s first written submission), para. 4.

\(^5\) Ibid.

\(^6\) China’s first written submission, para. 43.

\(^7\) China’s first written submission, para. 46.

\(^8\) China’s first written submission, para. 48.


\(^10\) China’s first written submission, para. 44 (citations omitted).

state, as well as regulating their use for economic development today.\(^\text{12}\) Members’ autonomy to determine their own objectives related to the conservation of natural resources and the protection of the environment has been reaffirmed on a number of occasions.\(^\text{13}\)

10. Australia notes China’s submission that “pursuant to the principle of sovereignty over natural resources, States that possess natural resources may develop policies to husband the use of the resources to promote the production of more sophisticated processed products”\(^\text{14}\). Whilst Australia agrees that States have sovereign rights over their natural resources, Members have also exercised their sovereign rights in becoming party to the WTO Agreements. Members have thus agreed to exercise their sovereign rights in a manner that is consistent with their obligations under the WTO Agreements.\(^\text{15}\)

11. In making this submission, Australia agrees with China that the term “conservation” could also encompass measures aimed at managing the supply of exhaustible natural resources over time, with a view to ensuring sustainable use and development of the resource-endowed country.\(^\text{16}\) Nevertheless, Australia also agrees with the panel in China – Raw Materials that the immediate context of Article XX(g) includes Article XX(i) of the GATT 1994, which provides that any export restrictions on domestic materials to assist an affected downstream processing industry cannot operate to increase the protection afforded to the domestic industry.\(^\text{17}\) Australia agrees that Article XX(g) should not be interpreted in such a way as to contradict the provisions of Article XX(i), and therefore submits that Members “cannot rely on Article XX(g) to excuse export restrictions adopted in aid of economic development.”\(^\text{18}\).

12. Australia notes that the parties to China – Raw Materials did not appeal the panel’s application of the first part of Article XX(g). Australia recalls the panel’s view that “…a policy of extraction would be more in line with a policy to achieve conservation than one confined to restricting exports. For the purpose of conservation of a resource, it is not relevant whether the resource is consumed domestically or abroad; what matters is its pace of extraction.”\(^\text{19}\). Australia finds merit in the panel’s view that

\(^{12}\) China’s first written submission, para. 48.

\(^{13}\) See eg., Brazil – Retreaded Tyres; US – Gasoline; US – Shrimp.

\(^{14}\) China’s first written submission, para. 58.


\(^{16}\) China’s first written submission, para. 60.


\(^{18}\) Panel Report, China – Raw Materials, para. 7.386.

\(^{19}\) Panel Report, China – Raw Materials, para. 7.428.
it would be the limit on production, not the export restriction, which conserves the resource.

13. Australia accordingly submits that it is for the Panel to analyse the facts of this matter to determine whether China has demonstrated a close and genuine relationship between its export restriction and the goal of conservation. In doing so, the Panel needs to consider whether China has established a clear link between the way the export restriction is set and any conservation objective. In Australia’s view, even where a Member imposing restraints on the export of an exhaustible natural resource also imposes limitations on the domestic production of the resource, it may be difficult for that Member to justify its export restraints by reference to the goal of conservation in circumstances where only a relatively modest fraction of the capped domestic production is permitted to be exported.

B. THE MEANING OF “MADE EFFECTIVE IN CONJUNCTION WITH RESTRICTIONS ON DOMESTIC PRODUCTION OR CONSUMPTION”

14. The second part of Article XX(g) of the GATT requires a Member justifying its otherwise GATT-inconsistent measure to establish that the measure is “made effective in conjunction with restrictions on domestic production or consumption”.

15. China submitted that “a conservation-related export restriction will only comply with Article XX(g) of the GATT 1994 if it "works together with" restrictions on domestic production or consumption”\(^{20}\). China recalled that the jurisprudence has established that there is a requirement of “even-handedness” in the imposition of the restrictions on exports and the imposition of the restrictions on domestic production or consumption.\(^{21}\) China also claimed that the requirement of even-handedness does not oblige a Member to ensure that foreign consumers and domestic consumers “benefit identically from the exploitation of the natural resource by the resource-endowed country”\(^{22}\). In making this claim, China relied on the principle of permanent sovereignty over natural resources in its interpretation of the even-handedness requirement in Article XX(g).\(^{23}\)

16. Australia agrees with China that Article XX(g) does not necessarily require that domestic and foreign consumers of resources be treated in an identical manner by the resource-endowed Member.\(^{24}\) Australia also notes the Appellate Body’s finding in \textit{US – Gasoline} that Article XX(g) does not establish an “empirical effects test”\(^{25}\).

\(^{20}\) China’s first written submission, para. 64.
\(^{21}\) China’s first written submission, para. 66.
\(^{22}\) China’s first written submission, para. 67.
\(^{23}\) Ibid.
\(^{24}\) Idem.
17. Australia recalls the Appellate Body’s statement in *China – Raw Materials* that “Article XX(g) permits trade measures relating to the conservation of exhaustible natural resources if such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource”\(^{26}\). In making this finding, the Appellate Body concluded that the phrase “made effective in conjunction with” in Article XX(g) does not require a “separate showing that the purpose of the challenged measure must be to make effective restrictions on domestic production or consumption”\(^{27}\).

18. Australia, however, remains of the opinion that the mere existence of a restriction on domestic production or consumption is not enough to establish even-handedness between the export restriction and the domestic restriction.

19. Rather, Australia submits that Article XX(g)’s even-handedness requirement would require a careful consideration of the design, structure and application of the domestic restrictions, and how those restrictions relate to the export restrictions. Such an approach was taken with respect to import restrictions in *US – Shrimp*, where the Appellate Body analysed the import restrictions and compared them with the restrictions on domestic producers in determining whether the import restriction was an even-handed measure\(^ {28}\).

20. In a matter concerning export restrictions, Australia further submits that the consideration of the even-handedness requirement would require a comparison between the export restrictions and the restrictions on domestic consumption. That is, a Member’s export restriction in the name of conservation cannot be justified merely because of the existence of restrictions on domestic production.

21. Australia recalls the panel’s analysis in *China – Raw Materials* as follows:

> … in order to understand whether a production restriction effectively limits domestic consumption, we need to compare domestic demand with the available quantity of the product in the domestic economy. The availability of the raw material in the domestic economy depends on whether the export quota is fully used. The amount not used by the export quota will go to domestic consumption.\(^ {29}\)

Australia notes that the parties to *China – Raw Materials* did not appeal this analysis by the panel. In Australia’s views, the panel’s application of the even-handedness requirement in *China – Raw Materials*, as quoted above, is relevant to this matter.

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22. Accordingly, Australia considers pertinent the view expressed by the panel in *China – Raw Materials* that a Member would need “to show that the impact of the export duty or export quota on foreign users is somehow balanced with some measure imposing restrictions on domestic users and consumers”\(^{30}\) in order to satisfy the even-handedness requirement in Article XX(g).

23. Australia, therefore, remains of the view that whilst Article XX(g) does not necessitate equivalence in treatment between foreign consumers and domestic consumers, a Member would need to demonstrate that there is a *balance* between its restrictions on foreign consumers and its restrictions on domestic consumers. Otherwise, it would be difficult for the Member to assert that it had applied export restrictions in an even-handed manner. \(^{31}\)

**C. THE APPLICATION OF THE CHAPEAU OF ARTICLE XX**

24. Australia recalls the statement by the Appellate Body in *US – Gasoline* that even if a Member has provided “provisional justification by reason of characterization of the measure under XX(g), [the Member must then] provide evidence to sustain a further appraisal of the same measure under the introductory clauses of Article XX [of the GATT]”\(^{32}\).

25. Australia notes China’s submission that “a measure would only violate [the first requirement of the chapeau of Article XX] if the alleged discriminatory application concerns *countries where the same conditions prevail.* If indeed the same conditions prevail, the differential treatment may *still be explained by its rational connection to the objective pursued by the measure*”\(^{33}\). China’s submission suggests that the chapeau only obliges an exporting Member to demonstrate that the export restriction is not applied in a manner that discriminates between the different importing Members concerned.

26. Australia, however, considers that the reference in the chapeau of Article XX to *discrimination* extends to measures which discriminate between the exporting Member and its importing partners. Australia recalls that the Appellate Body in *US – Shrimp* elaborated that:

> [i]n United States – Gasoline, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Members concerned. \(^{34}\)

\(^{30}\) Ibid (emphasis added).


\(^{34}\) China’s first written submission, para. 73 (emphasis in the original).
27. As noted in China’s submission, the chapeau embodies a guarantee against *abus de droit* by a Member invoking the exception. The chapeau, which addresses arbitrary or unjustifiable discrimination and disguised restrictions on international trade, plays an important role in maintaining the delicate balance between the right of a Member to invoke the general exceptions, and the rights of all other Members under the substantive obligations of the GATT 1994.

28. Australia finds relevant in this matter the statement of the panel in *Brazil – Retreaded Tyres* that the “unjustifiable discrimination” element in the chapeau requires the Member “to ‘defend’ or convincingly explain the rationale for any discrimination in the application of the [trade-restrictive] measure”\(^ {36}\). In considering matters involving export restrictions on natural resources, the chapeau of Article XX requires the Member pursuing conservation goals to restrict foreign consumption in parallel with comparable restrictions on domestic consumption. Where there is a substantial disparity between a domestic production quota and an export quota, it would be difficult for a Member to justify its discriminatory treatment between foreign consumption and domestic consumption.

### III. CHINA’S REQUEST TO THE PANEL TO MAKE A PRELIMINARY RULING

29. China has sought a preliminary ruling on the availability of a defence under Article XX of the GATT for a violation of Paragraph 11.3 of its Accession Protocol.\(^ {37}\) China noted that the Appellate Body has previously ruled that China has no right to invoke Article XX of the GATT to justify the use of export duties, and in light of this ruling, China considered it prudent, before engaging in the substantive defence of the export duties under Article XX, to ask the Panel to render a preliminary ruling on China’s arguments that it should be able to invoke Article XX to defend the use of export duties.\(^ {38}\)

30. Australia notes that the Appellate Body in *China – Raw Materials* found that “nothing in the Note to Annex 6 suggests that China could invoke Article XX of the GATT 1994 to justify the imposition of export duties that China had committed to eliminate under Paragraph 11.3 of China’s Accession Protocol”\(^ {39}\). The Appellate Body also found that:

…there is no language in Paragraph 11.3 similar to that found in Paragraph 5.1 of China’s Accession Protocol – ”[w]ithout prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement” – which was

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37 China’s first written submission, para. 409.
38 China’s first written submission, para. 410.
interpreted by the Appellate Body in *China – Publications and Audiovisual Products*. In our view, this suggests that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3 of China’s Accession Protocol.

31. Australia recalls the Appellate Body in *US – Stainless Steel (Mexico)* found that:

It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio deciden
di* contained in previous Appellate Body reports that have been adopted by the DSB.  

... 

Thus, the legal interpretation embodied in adopted panel and Appellate Body reports become 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.

32. Australia agrees with the Appellate Body’s explanation of the status of adopted panel and Appellate Body reports in subsequent disputes as set out in *US – Stainless Steel (Mexico)*. Accordingly, Australia submits that the panel should decide on China’s request for a preliminary ruling.

IV. CONCLUSION

33. Central to this dispute are important systemic issues concerning the interpretation of exceptions to Members’ substantive obligations under the GATT. A Member’s invocation of an exception under Article XX should be considered against the background of the delicate balance between the competing rights of the Members. The product scope of “exhaustible natural resources” covered by Article XX(g) is broad, and Article XX(g) does not require that domestic and foreign consumers of resources be treated in an identical manner by the resource-endowed Member. Australia, however, remains of the view that to satisfy the even-handedness requirement in Article XX(g), a Member would need to demonstrate that there is a *balance* between its restrictions on foreign and domestic consumers. With regards to China’s request for a preliminary ruling, Australia agrees with the Appellate Body’s statement in *US – Stainless Steel (Mexico)*.

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