

E-ALERT | International Public Policy

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CHINA'S EXPORT RESTRICTIONS ON RARE EARTHS, TUNGSTEN, AND ANTIMONY
AND THE WORLD TRADE ORGANIZATION

Last Friday (February 18, 2011) the World Trade Organization (WTO) issued an interim panel report concluding that China acted improperly in imposing restrictions on the exportation of certain raw materials.¹ Although the report will remain confidential until late spring or early summer,² its reasoning will have direct implications for how the WTO might view similar Chinese measures—including export tariffs, export licenses, and export quotas—to restrict exports of products containing rare earths, tungsten, and antimony. These measures appear to constitute a *prima facie* violation of China's commitments as a member of the WTO. If challenged in a formal trade dispute, China would likely attempt to defend its policies under WTO exceptions for environmental or conservation measures, as it did in the raw materials case. The outcome would depend heavily upon the specific evidence presented by China and whether the facts suggest a protectionist or discriminatory intent or effect, but today's interim panel report in the raw materials case indicates that China may find it difficult to defend its export restrictions on rare earths, tungsten, and antimony as justified under WTO rules. This client alert provides a brief introduction to China's measures, its relevant WTO obligations, and the likely defenses.

CHINA'S EXPORT RESTRICTIONS

China is by far the world's leading producer and exporter of rare earths, tungsten, and antimony. Rare earths are a group of 17 metallic elements that are essential inputs in a variety of manufactured goods, from automobiles to wind turbines to precision-guided missile systems. Tungsten is a steel-gray metal whose alloys are used in various military, chemical, and electrical applications, while antimony is a metallic element utilized in fire retardants, solders and ball bearings, and microelectronics. In recent years, China has imposed a number of measures that have restrained the exportation of these products.

- **1. Export Duties.** China has three types of export duty rates: "regular" (the generally applicable rates); "temporary" (established for a defined period of time); and "special" (established under special circumstances). For tungsten and antimony products, China currently imposes regular and temporary export duties that range from 5 to 20 percent. It also imposes temporary export duties ranging from 15 to 25 percent on various rare earth products.
- **2. Export Licensing.** China has identified a broad array of rare earth, tungsten, and antimony products as controlled goods. Entities seeking to export these controlled goods must apply for and receive permission to do so in the form of an export license. Failure to abide by China's licensing regulations can prompt an investigation that may lead to civil or criminal penalties.

¹ John W. Miller and James T. Areddy, "Trade Judges See Flaw in China Policies: Preliminary WTO Report Finds No Case For Some of Beijing's Export Restrictions," *Wall Street Journal* (18 Feb. 2011), at A8.

² WTO rules require panels to give the parties an interim report and to address in the final panel report any comments received from the parties at the interim review stage.

- **3. Export Quotas.** China imposes quantitative limits on the annual volume of rare earth, tungsten, and antimony exports. China's export quota allocations for tungsten and antimony products have declined slightly since 2005, while export quotas for rare earth products have fallen steeply, with the total allocation for 2010 far below the 2007 level.

CHINA'S WTO COMMITMENTS

When China acceded to the WTO, it undertook various obligations regarding exports. Some apply to all WTO members; others derive from specific undertakings in China's Accession Protocol, which are enforceable in WTO dispute settlement proceedings.

With regard to export duties, China agreed to impose duties only on products listed in Annex 6 of the Accession Protocol, and only up to the rates listed there. Because rare earths are not listed in Annex 6, China's temporary duties on rare earth exports appear to violate the commitment it made in its Accession Protocol to "eliminate all taxes and charges applied to exports."

With regard to export licensing requirements and export quotas, China must abide by GATT Article XI, which prohibits "restrictions other than duties, taxes or other charges, whether made effective through *quotas*, . . . *export licences* or other measures, on the exportation . . . of any product destined for the territory of any other contracting party." As part of its accession agreement, China pledged that "upon accession, remaining . . . restrictions on exports would be notified to the WTO annually and would be eliminated unless they could be justified under the WTO Agreement or the Protocol."³ China also committed to provide full trading rights regarding rare earth exports. China has not eliminated licensing restrictions or quotas for a broad array of rare earth, tungsten, and antimony exports.

EXCEPTIONS UNDER GATT ARTICLE XX

In our view, a *prima facie* case can thus be made that these measures are inconsistent with China's WTO obligations. China nonetheless would have an opportunity to defend its export restrictions as falling within GATT Article XX exceptions that permit measures (i) necessary to protect human, animal or plant life or health, or (ii) relating to the conservation of exhaustible natural resources if made effective in conjunction with restrictions on domestic production or consumption. To prevail, China must show not only that its measures fall within the scope of an exception, but also that the measures have been applied in a manner that is neither unjustifiably discriminatory nor protectionist.

WTO members' success in offering GATT Article XX defenses tends to be highly dependent on the facts and circumstances surrounding the imposition and application of the challenged measures. China's ability to defend its export restrictions under GATT Article XX will turn on its ability to show, *inter alia*, that these restrictions do not favor companies operating in China over companies operating abroad. The WTO panel's decision in the raw materials case, where China relied heavily on GATT Article XX, may inform China's ability to justify its similar restrictions on the exportation of rare earth, tungsten, and antimony products.

³ "Report of the Working Party on the Accession of China," WTO Document WT/MIN(01)/3 (10 Nov. 2001), at paragraphs 162, 165.

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