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THE REAL COST OF CHINA'S RARE EARTH EXPORT QUOTAS ON AMERICAN JOB SECURITY

by Katherine Weatherford*

The populist appeal for job creation currently dominating U.S. politics has spurred copious discussion about whether regulatory policy is responsible for the present economic condition.¹ Although this debate centers primarily on domestic regulations, recent congressional action² confirms reports that China's economic policies, particularly its export restraints and currency manipulation, have not only increased the already significant trade deficit between the U.S. and China, but have cost approximately 2.8 million U.S. jobs.³ Of specific concern are China's export quotas on Rare Earth Minerals ("REMs").

REMs are used in the production of virtually all technological goods—from cell phones to wind turbines.⁴ Thus, it is no surprise that the demand for REMs has increased exponentially over the last decade.⁵ Even though the U.S. has sufficient REM reserves to satisfy demand, importing REMs from China costs less than producing them domestically.⁶ And because many other nations also rely on China's low-cost REMs, China has dominated the global REM market, and currently produces 97% of the world's supply.⁷ Consequently, when China set export quotas on REMs, it resulted in uncertainty about future availability accompanied by a drastic price increase.⁸

The implications of export quotas on rare earths, especially in light of the current economic downturn, make it evident that the U.S. must begin to consider feasible solutions to the REM access conflict.⁹ One option is to continue accepting REMs from China subject to its export quotas. Yet, choosing this option will undoubtedly force U.S. taxpayers to continue financing China's REM stockpiles at the expense of American jobs.¹⁰ This is because product manufacturers located in China can purchase REMs without the added costs associated with export quotas. This incents foreign manufacturers, including U.S.-based companies, to relocate to China in pursuit of these cheaper REMs, and ultimately, to take U.S. manufacturing jobs overseas as well.¹¹

A second option is for the United States to file a complaint with the World Trade Organization ("WTO"), as it did in 2009 in collaboration with the European Union and Mexico.¹² This 2009 complaint asserted that China's export quotas on raw minerals violated Article XI:1 of the General Agreement on Tariffs and Trade ("GATT"),¹³ and various provisions of China's Accession Protocol and China's Working Party Report.¹⁴ China invoked GATT Article XX exceptions, framing its export restraints as a means to "protect the environment and [its] limited resources" and arguing that its actions advance "the sustainable development of the global economy."¹⁵ Nevertheless, the WTO panel rejected China's defense,¹⁶ prompting China to file an appeal, which is currently pending.¹⁷

In both the 2009 complaint and the current conflict over REMs, China disguises its economic motives by implying that export

quotas will result in reduced production, which will help protect natural resources. But this is not the case if China merely supplements exports with domestic production. If China actually intended to protect its environment, it should have regulated its mining operations rather than its exports.¹⁸ Regardless of China's intention, it seems futile for the United States to pursue a resolution through the WTO process given the failure of the 2009 consultations to produce an effective outcome thus far.

A third option is for the U.S. to produce REMs domestically.¹⁹ While this is technically feasible, the U.S. closed its only remaining rare earth mining operation in 2002 as a result of environmental damage and intense global competition.²⁰ Plans are in motion to reopen the Molycorp, Inc. facility in Mountain Pass, California by 2012;²¹ however, building new facilities will require a large investment.²² Even with domestic production, the U.S. will still need to send the REMs to China for alloying and manufacturing, at least until the technology needed to safely and economically perform these processes is developed.²³ Although domestic production is likely the most sustainable mechanism to stimulate longterm job growth, the United States must take other steps in the interim to respond to China's REM export quotas.²⁴

One intermediate step is to enact legislation modeled after the Conflict Minerals provision in § 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.²⁵ That provision instructs the Securities and Exchange Commission to promulgate a rule requiring any producer who uses conflict minerals "to disclose in . . . its annual report whether its conflict minerals originated in the Democratic Republic of the Congo or an adjoining country."²⁶ Just as the § 1502 reporting requirement will help to prevent human rights abuses in the Congo, a similar rule requiring disclosure of REMs originating in China would assist in combating China's protectionist policies and lax environmental regulations.²⁷

Ultimately, the United States must begin evaluating legitimate solutions to the REM access conflict. In doing so, the U.S. must not act hastily, as an illconsidered solution will likely fail to focus on longterm sustainable development. Most importantly, in choosing whether and how to pursue domestic REM production the U.S. must be especially attentive not to neglect environmental protection in favor of economic stability.²⁸ Only by considering both domestic action and international diplomacy can the United States resolve the REM access conflict.



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⁸⁴ See Michael Ross, *The Natural Resource Curse: How Wealth Can Make You Poor*, in NATURAL RESOURCES AND VIOLENT CONFLICTS: OPTIONS AND ACTIONS 17, 24-32, 233-34, 243 (Ian Bannon & Paul Collier eds., 2003).

⁸⁵ *Id.*

⁸⁶ See, e.g., S.C. Res. 1643, ¶ 9, U.N. Doc. S/RES/1643 (Dec. 15, 2005).

⁸⁷ U.N. S.C. Rep. of the Secretary-General on inter-mission cooperation and possible cross-border operations between the United Nations Mission in Sierra Leone, the United Nations Mission in Liberia and the United Nations Operation in Côte d'Ivoire, ¶ 11, U.N. Doc. S/2005/135 (Mar. 2, 2005).

⁸⁸ JEREMY M. WEINSTEIN, INSIDE REBELLION: THE POLITICS OF INSURGENT VIOLENCE 347 (2007).

⁸⁹ *Id.*

⁹⁰ This was the case, for example, in Sierra Leone, where the RUF maintained control of the Kono diamond mines. Resources are not the only consideration, however. In Angola, UNITA units moved from diamond-rich areas to the homeland of its leader—a choice that was criticized from within the movement. WEINSTEIN, *supra* note 87 at 9.

⁹¹ *Id.* at 347.

⁹² See generally Macartan Humphreys, Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms, 49 J. OF CONFLICT RESOL., No.4 508 (2005), http://www.columbia.edu/~mh2245/papers1/MH8JCR05_paper.pdf.

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¹ See, e.g., *Regulatory Impediments to Job Creation: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (2011).

² Currency Exchange Rate Oversight Reform Act of 2011, S. 1619, 112th Cong. (2011) (proposing to identify and correct misaligned currency).

³ ROBERT E. SCOTT, ECON. POLICY INST., BRIEFING PAPER No. 323, GROWING U.S. TRADE DEFICIT WITH CHINA COST 2.8 MILLION JOBS BETWEEN 2001 AND 2010, at 1 (2011).

⁴ E.g., EMILY COPPEL, AM. SEC. PROJECT, RARE EARTH METALS AND U.S. NATIONAL SECURITY 2 (2011), available at <http://americansecurityproject.org/wp-content/uploads/2011/02/Rare-Earth-Metals-and-US-Security-FINAL.pdf>.

⁵ See MARC HUMPHRIES, CONG. RESEARCH SERV., R41347, RARE EARTH ELEMENTS: THE GLOBAL SUPPLY CHAIN 3 (2011) (explaining how the demand for rare earths is "derived" from the demand for the final products in which the minerals are used).

⁶ See *id.* at 2; COPPEL, *supra* note 4, at 2 (stating that cheap labor and lax environmental regulations are two factors that "make it much more economical to mine and produce rare earth metals in China").

⁷ E.g., HUMPHRIES, *supra* note 5, at 13.

⁸ Stormy-Annika Mildner & Gitta Lauster, *Settling Trade Disputes over Natural Resources: Limitations of International Trade Law to Tackle Export Restrictions*, 3 GOETTINGEN J. INT'L L. 251, 254 (2011).

⁹ See Joanna Bonarriva, Michelle Koscielski, & Edward Wilson, *Export Controls: An Overview of Their Use, Economic Effects, and Treatment in the Global Trading System* 6-7 (U.S. Int'l Trade Comm'n, Working Paper No. ID-23, 2009).

¹⁰ See CINDY HURST, INST. FOR THE ANALYSIS OF GLOBAL SEC. [IAGS], CHINA'S RARE EARTH ELEMENTS INDUSTRY: WHAT CAN THE WEST LEARN? 24-25 (2010) (discussing China's plan to stockpile rare earth minerals ("REMs")).

¹¹ *China's Monopoly on Rare Earths: Implications for U.S. Foreign and Security Policy: Hearing Before the Subcomm. on Asia & the Pacific of the H. Comm. on Foreign Affairs*, 112th Cong. 1 (2011) [hereinafter *Hearing*] (statement of Rep. Donald A. Manzullo, Chairman, Subcomm. on Asia & the Pacific) (explaining how "the pricing uncertainty created by [China's] action threatens tens of thousands of American jobs"); see also Gao Changxin, *Rare Earth's Surging Price*, CHINA DAILY (Nov. 17, 2010, 15:13), http://www.chinadaily.com.cn/bizchina/2010-11/17/content_11564412.htm (discussing how foreign companies that open processing plants in Baotou will help "transform it from a resource base into a hightechnology center").

¹² Panel Report, *China – Measures Related to the Exportation of Various Raw Minerals*, WT/DS394/R (July 5, 2011).

¹³ The General Elimination of Quantitative Restrictions provides: "No prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by any contracting party on the . . . exportation or sale for export of any product destined for the territory of any other contracting party." General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XI ¶ 1, 61 Stat. A-11, 55 U.N.T.S. 194.

¹⁴ Panel Report, *China – Measures Related to the Exportation of Various Raw Minerals*, WT/DS394/R (July 5, 2011).

¹⁵ Mildner & Lauster, *supra* note 8, at 272-73 (quoting *China Defends Export Restrictions*, BBC NEWS (Nov. 5, 2009), <http://news.bbc.co.uk/2/hi/business/8344053.stm>).

¹⁶ See Panel Report, *China – Measures Related to the Exportation of Various Raw Minerals*, WT/DS394/R, ¶ 7.148 (July 5, 2011) (stating that even had the exceptions applied, China did not meet the requirements necessary to claim the exceptions as a defense).

¹⁷ As speculated, China filed an appeal on August 31, 2011. E.g., Mary Swire, *China Appeals WTO Ruling on Raw Material Exports*, TAX-NEWS.COM (Sept. 5, 2011), http://www.tax-news.com/news/China_Appeals_WTO_Ruling_On_Raw_Material_Exports_51268.html.

¹⁸ See Richard Jones, *Exclusive: Inside China's Secret Toxic Unobtainium Mine*, DAILY MAIL ONLINE (Jan. 10, 2010, 11:19 AM), <http://www.dailymail.co.uk/news/article-1241872/EXCLUSIVE-Inside-Chinas-secret-toxic-unobtainium-mine.html> (describing the lack of labor and environmental regulation at Baiyun Obo mine and reporting that China is "restricting supply to force manufacturers to bring their factories and technological secrets to China").

¹⁹ See generally JUSTIN PAUL & GWENETTE CAMPBELL, U.S. ENVTL. PROT. AGENCY, DOC. No. 908R11003, INVESTIGATING RARE EARTH ELEMENT MINE DEVELOPMENT IN EPA REGION 8 AND POTENTIAL ENVIRONMENTAL IMPACTS (2011) (providing background on REMs and exploring mining potential in the United States).

²⁰ See Ariel Schwartz, *Can the U.S. Break China's Stranglehold on Rare Earth Metals?*, FAST COMPANY.COM (Aug. 16, 2011), <http://www.fastcompany.com/1773009/how-the-us-could-end-up-with-a-plentiful-cheap-supply-of-rare-earth-metals>; HUMPHRIES, *supra* note 5, at 14.

²¹ E.g., HUMPHRIES, *supra* note 5, at 14-16.

²² See, e.g., *Hearing*, *supra* note 11, at 50 (statement of Mark A. Smith, President & CEO, Molycorp, Inc.) (explaining that Molycorp's plan to expand facilities at Mountain Pass, which is often called "Project Phoenix," will cost \$781 million).

²³ See HUMPHRIES, *supra* note 5, at 13-15. Of the five stages in the REM supply chain—"mining, separation, refining, alloying, and manufacturing (devices and component parts)"—the U.S. is currently only capable of mining and separation. *Id.* at 13.

²⁴ See Brooke Infusino, *Molycorp Minerals LLC*, EXPLORATION PROCESSING, http://www.exploration-processing.com/cms2/index.php?option=com_content&view=article&id=962:molycorp-minerals-llc&catid=130&Itemid=84 (last visited Nov. 12, 2011) (reporting that Molycorp Minerals LLC's General Manager, Rocky Smith, has stated that "[r]estarting rare earth mineral mining at Molycorp could generate thousands of new jobs for all of the support businesses and as many as 900 new jobs at Molycorp Minerals").

²⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213-18 (2010) (to be codified at 15 U.S.C. § 78m).

²⁶ Conflict Minerals, 75 Fed. Reg. 80,948 (Dec. 23, 2010) (to be codified at 17 C.F.R. pts. 229, 249).

²⁷ *Id.*

²⁸ See S.E. Smith, *Dirty, Dangerous and Destructive—The Elements of a Technology Boom*, GUARDIAN (Sept. 26, 2011, 9:00 EDT), <http://www.guardian.co.uk/commentisfree/2011/sep/26/rare-earth-metals-technology-boom> (explaining that the environmental damage caused by rare earth minerals occurs at two levels: (i) during the extracting, processing, and refining stages, and (ii) after consumers have discarded, rather than recycled, the products).